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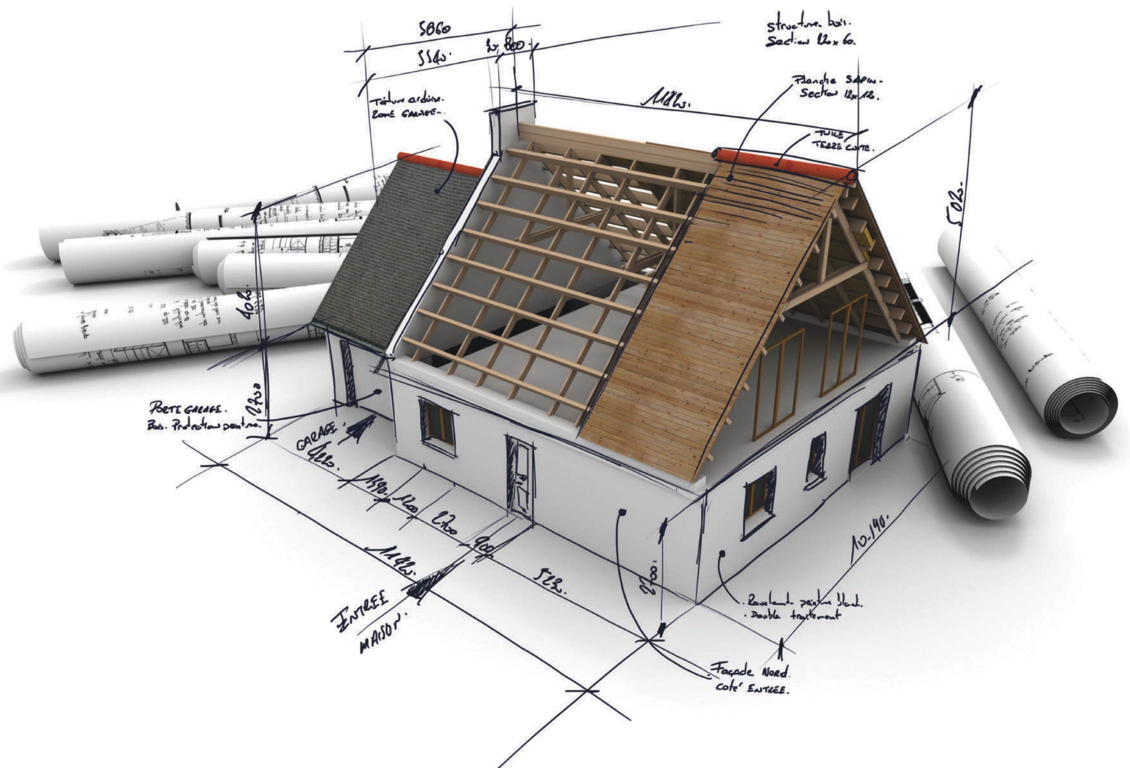
LOCAL GOVERNMENT
MANAGEMENT ASSOCIATION
OF BRITISH COLUMBIA

Board of Variance Guide



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Board of Variance Guide

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TABLE OF CONTENTS

PREFACE .... **III**

A NOTE ON TERMINOLOGY .... **III**

PART 1: BOARD OF VARIANCE AT A GLANCE **1**

PART 2: COMPOSITION AND APPOINTMENT OF THE BOARD **2**

- Composition of the Board 2
- Appointments 2
- Eligibility for Appointment 3
- Compensation and Indemnity of Members 3
- Role of Local Government Staff 4

PART 3: JURISDICTION OF THE BOARD **5**

- Development Variance Permits 5
- Timing of Applications to the BOV 6
- Siting, Size and Dimensions of Buildings and Structures 6
  - *Siting of buildings and structures* *7*
  - *Size and dimensions of buildings and structures* *10*
  - *Height* *10*
  - *Other dimensions* *12*
- Siting of a Manufactured Home in a Manufactured Home Park 13
- Servicing Standards in Industrial and Agricultural Zones 14
- Tree Cutting Bylaws 15
- Land Use Contract Termination Bylaws 16
- Lawful Non-Conforming Uses: Structural Alterations and Additions 17
- Lawful Non-Conforming Uses: Extent of Damage 17

PART 4: LIMITS ON THE BOARD'S JURISDICTION **19**

- Subjective Limits on the Board's Jurisdiction 20
  - *Inappropriate development of the site* *20*
  - *Adverse effect on the natural environment* *21*
  - *Substantial effect on use and enjoyment of adjacent land* *21*
  - *Vary permitted uses or densities under the applicable bylaw* *21*
  - *Defeat of the intent of the bylaw* *24*
- Objective Limits on the Board's Jurisdiction 24
  - *Conflict with a covenant* *24*
  - *Deal with a matter covered in a land use permit or land use contract* *25*
  - *Deal with a flood plain specification* *26*
  - *Apply to a heritage property* *27*

PART 5: UNDUE HARDSHIP **28**

- Physical Site Characteristics 29
- Physical Characteristics of Abutting Sites 29
- Personal Characteristics of Applicants 29
- Financial Hardship 30

PART 6: MINOR VARIANCE **32**

- How Minor is "Minor"? 32
- When "Minor" is Addressed 33
- "Minor" in the Context of Different Types of Bylaws 34

PART 7: BOARD PROCEDURES 36
BOARD OF VARIANCE BYLAW 36
APPLICANTS 36
APPLICATIONS AND APPLICATION FEES 36
NOTIFICATION OF HEARING 37
SITE VISITS 39
HEARINGS 40
Information about the application *40*
Open hearings *41*
Conflicts of interest *41*
Management of the hearing *41*
Adjournments *42*
Making the decision *42*
Reasons for decision *43*
Reconsideration of decisions *43*
VARIANCE AND EXEMPTION ORDERS 43
RECORD OF DECISIONS 45
PART 8: JUDICIAL REVIEW AND APPEAL OF BOARD DECISIONS 46
JUDICIAL REVIEW FOR JURISDICTIONAL ERROR 47
Basic aspects of BOV jurisdiction *48*
Minor variance and undue hardship *49*
Statutory limits on BOV jurisdiction – s. 542(2) of the Local Government Act *50*
JUDICIAL REVIEW FOR BREACH OF PROCEDURAL FAIRNESS 51
JUDICIAL REVIEW FOR UNREASONABLENESS 52
JUDICIAL REVIEW PROCEDURE 52
Parties *52*
Timing *53*
Costs *53*
PART 9: EXAMPLES AND PRACTICAL SUGGESTIONS 55
HARDSHIP CONSIDERATIONS 55
Building already constructed or under construction *55*
Fuller use of parcel *55*
Circumstances of the site *56*
Circumstances of the applicant *57*
IRRELEVANT CONSIDERATIONS 57
EXTENT OF DAMAGE APPLICATIONS 58
TREE CUTTING BYLAW APPLICATIONS 58
LAND USE CONTRACT EXTENSION APPLICATIONS 59
CONDITIONS ON BOARD ORDERS 59
TIME LIMITS ON BOARD ORDERS 60
APPENDIX A: GLOSSARY OF KEY TERMS 63
APPENDIX B: BOARD OF VARIANCE CASES 65

PREFACE

This Guide has been prepared by the Local Government Management Association for the assistance of local governments and persons appointed to serve on local boards of variance. The manuscript was prepared by Bill Buholzer of Young Anderson Barristers and Solicitors, and reviewed in draft form by members of the Saanich Board of Variance, whose assistance with the project is gratefully acknowledged.

Extracts from particular local government bylaws in **blue font** are included in the Guide for illustrative purposes only and should not be relied on as accurately indicating the regulations that are applicable from time to time in any jurisdiction. Bylaw extracts have been edited where necessary to eliminate obvious typographical and spelling errors.

References to the *Local Government Act* are references to R.S.B.C. 2015 c. 1, the re-numbered statute; extracts from the statute are in **green font**. References to case law include citations to the free online database of the Canadian Legal Information Institute (CanLII), except in a few instances where the case has not been uploaded. These unreported cases may be available through the British Columbia courts website http://www.courts.gov.bc.ca. All of the cases are listed alphabetically in Appendix B to the Guide. The law on which the Guide is based is current to September 30, 2016.

The information in the Guide is intended for general familiarization and reference purposes only, and should not be relied upon as legal advice. Local governments, boards of variance, and variance applicants requiring legal advice are advised to consult their own legal counsel.

A NOTE ON TERMINOLOGY

Boards of variance have jurisdiction to order "minor variances" in circumstances where an applicant has shown that compliance with the relevant bylaw would cause "undue hardship". The unmodified terms "variance" and "hardship" that are commonly used by board of variance members and local government staff are used in this Guide, except where the significance of the words "minor" or "undue" is being specifically addressed.

Boards of variance have jurisdiction to order both bylaw variances and "exemptions" from statutory limits on the alteration of buildings containing lawful non-conforming uses. Generally, a reference to a "variance" in this Guide is intended to include an exemption from such a limit. In circumstances where the BOV has different powers or is subject to different limitations for variances and exemptions, this is addressed in the text.

A glossary of key terms is provided as Appendix A to the Guide.

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PART 1: BOARD OF VARIANCE AT A GLANCE

The board of variance is an integral part of the local government land use management system established by Part 14 of the *Local Government Act*. Within the policy context created by an official community plan, each local government has enacted a zoning bylaw, in some cases called a land use bylaw. The provincial legislation requires that each local government also appoint a board of variance to deal with applications to vary that bylaw on the grounds of hardship. The zoning tool is by its original nature insensitive to the peculiarities of individual properties, and the legislation assumes that the board of variance will deal on a case-by-case basis with any hardship created by that insensitivity. The availability of variances in cases of hardship is thus an important component of the land use management system. The local government is responsible for the costs of operating the board of variance, providing administrative support, and covering any necessary legal costs.

Boards of variance consist of either three or five members, appointed by the local municipal council or regional board and serving without remuneration. Their principal jurisdiction is in relation to regulations controlling the siting, size or dimensions of buildings or structures permitted by the zoning bylaw. Variances of permitted land uses or permitted density of development are not allowed. The great majority of applications deal with permitted building height or the required distance between a building or portion of a building and an adjacent property boundary. In these cases, the requirement for a board of variance application will usually have been identified in the local government's review of a building permit application. In addition, boards have jurisdiction over several other matters, which together comprise only a minor portion of a typical board's agenda:

- water, drainage and sewer servicing standards for industrial and agricultural zones
- tree cutting bylaws that unduly restrict the development of a site
- land use contract termination bylaws
- structural alterations and additions to buildings containing lawful non-conforming uses
- extent of damage to buildings containing lawful non-conforming uses

Applications to the board of variance are considered at public meetings of the board, of which certain written notifications must be given. The board hears from the applicant, owners and occupiers of adjacent properties, and (in some cases) staff members of the local government whose bylaw is the subject of the variance application and then makes its decision, usually at the same meeting. In cases where individual hardship is a requirement for a board of variance order, the applicant is invited to indicate the nature of the hardship that the zoning bylaw causes them. Variance orders are, if approved, generally subject to time limits within which building construction must be started and, with some exceptions, variance orders run with the land (that is, benefit future occupiers of the property as well as the person who made the application).

Board of variance decisions are final. However, unsuccessful applicants may in certain cases be able to apply to the municipal council or regional board for a local government permit that varies the regulation in question; individual hardship is not a required element of such applications. Board of variance decisions may also be reviewed by the B.C. Supreme Court, on procedural fairness grounds, on the grounds that the board exceeded its jurisdiction in making the order, or on the grounds that the decision is unreasonable.

The Vancouver Board of Variance is subject to different enabling legislation in the *Vancouver Charter*. The information in this Guide is generally not relevant to the operation of the Vancouver board.

PART 2: COMPOSITION AND APPOINTMENT OF THE BOARD

Municipal councils and regional boards that have enacted zoning regulations under s. 479 of the *Local Government Act* are required to establish boards of variance. The establishment of a board of variance (BOV) is not optional. The fact that some kinds of variance applications are also within the development variance permit jurisdiction of the municipal council or regional board does not make the appointment of a board of variance redundant. There are other matters in which a BOV has jurisdiction and the council or board does not. Applicants are entitled, where jurisdiction actually overlaps, to make an application to an independent board of variance rather than to the council or board that enacted the regulation that the applicant wants varied.

Composition of the Board

Municipal boards of variance are comprised of either three or five members, depending on population; the threshold for a five-member board is 25,000 residents. In regional districts, the board consists of three members, and different boards may be established for different areas. Local governments may establish joint boards of variance; for example, two adjacent municipalities could share a BOV, or a regional district and a member municipality could establish a joint BOV for the municipality and the adjacent electoral area. Such a joint board would have three members, or five if a participating municipality has a population of more than 25,000.

Appointments

Appointments to the board of variance are made by council or board resolution, or in the case of a joint BOV, in accordance with the bylaw that establishes it.[1] Thus, for the example in which two adjacent municipalities with populations under 25,000 share a BOV, the establishing bylaw might provide that one member is appointed by resolution of each of the councils and the councils take turns appointing the third member. BOV appointments are for a three-year period, which unfortunately does not correspond with the four-year term of office of local elected officials that began with the 2014 local elections. If a replacement member is not appointed at the end of the three-year term, the member whose term is expiring continues to be a member until their successor is appointed.

A local government can rescind the appointment of a BOV appointee at any time,[2] and members may resign. In those circumstances, the local government that made the appointment must make a new appointment to fill the vacancy. All persons who are subject to zoning regulations are entitled to have a full board of variance in office at all times, to consider hardship applications and other types of applications that are within the jurisdiction of the BOV.

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[1] Prior to 2003, the Province also appointed members to each board.

[2] The council may also terminate the appointments of all of the members and appoint a new BOV: *Martin v. Vancouver (City)*, 2008 BCCA 197 (CanLII). In that case, the Court of Appeal decided that BOV members are not entitled to notice or an opportunity to be heard in relation to the local government's decision to rescind their appointment. The Court observed that the BOV is not intended to operate with more than a "minimal degree of independence" from Council, given its limited role within the overall scheme of planning and land use management that the local government has established in its zoning regulations, and that BOV members are therefore not entitled to the security of tenure that the members of other types of tribunals enjoy.

BOV members are required to elect a chair; typically this will occur at the inaugural meeting of the board following its appointment. The statutory function of the chair is to preside at hearings convened by the board, but the chair will likely perform additional functions such as liaising with local government officials regarding logistical matters like the preparation of application forms, hearing agendas, notices of hearing and records of board decisions, and arrangements for meeting space and the viewing of sites that are the subject of applications to the board. The chair may appoint another member as acting chair to preside at hearings in their absence. This would most effectively be done on an *ad hoc* basis when the chair knows they will not be able to preside at a hearing and can appoint another member who they know will be in attendance. As a member of the board, the chair has a vote on each variance application.

Eligibility for Appointment

There are no eligibility requirements for service on a board of variance. The *Local Government Act* makes ineligible for appointment both local elected officials and staff members, and members of any advisory planning commission, though all such persons would be eligible to serve on the BOV of a different local government. For example, a planner who works for the City of Prince George but lives in an adjacent electoral area of the Fraser-Fort George Regional District would be eligible to serve on the BOV for that electoral area. Local governments generally attempt to appoint individuals who have some knowledge or experience related to land development, since that is the activity that is regulated by the bylaws for which variance applications are made. Retired building contractors, land surveyors, realtors, architects and civil engineers are typical candidates for appointment. Many local governments post or publish notices inviting applications for appointment to the board when the term of office of a sitting member is coming to an end or a member has resigned.

Because board of variance hearings are subject to common law rules of procedural fairness, and members should therefore not be participating in hearings on matters in which they have a personal interest, local governments should generally avoid appointing members with close personal connections to parties such as architects and contractors who will be making frequent applications to the board on behalf of their clients. When the board is reduced to two members on account of a conflict of interest on the part of the third member, a tie vote will result in denial of the variance. The statutory requirement for an odd number of BOV members is intended to avoid this result, and appointing a member who will frequently have conflicts of interest will tend to defeat this intention.

Compensation and Indemnity of Members

BOV members are not entitled to receive compensation for their work as members; this is a volunteer position. The local government is obliged to identify funds in its annual budget that are required for the operations of the board, but this cannot include salaries or honoraria.

Local governments may, however, indemnify BOV members for the following:

- expenses incurred in the performance of their duties, such as travel to board hearings
- amounts required to defend an action brought against them in connection with the performance of their duties.

It’s important to note that BOV members are designated as “local public officers” for the purposes of s. 738 of the *Local Government Act*, which bars claims for damages made against local public officers in their personal capacity for anything they have done or neglected to do in the exercise of their powers.

(A plaintiff could still sue the local government, which is vicariously liable for the actions of its local public officers.) However, s. 738 would not necessarily prevent a plaintiff from naming a BOV member personally in their claim, and the member might incur costs in having the claim dismissed on the basis of s. 738. The local government can indemnify the member for those costs, either under the terms of a general indemnification bylaw that applies to all local public officers who might be named as defendants in such claims, or by resolution passed after a particular claim has been made. Local governments will likely find it easier to attract volunteers for BOV positions if a general indemnification bylaw is in place.

Role of Local Government Staff

Municipal and regional district staff members, including staff from a legislative or corporate services department or members of the planning department, or both, are usually assigned to provide administrative support to the board of variance. These tasks include managing applications and notifications, meeting logistics, and the board's record of decisions. The board's status as an independent tribunal requires that these staff members respect the board's independence from the local government, including its right to determine whether any particular application is within its jurisdiction. This problem seems particularly to arise at the application stage, where in some jurisdictions applicants have been told, improperly, that their BOV application cannot be accepted because a proposed variance is not "minor", or that the hardship they are alleging is not sufficient to warrant a variance. Planning staff members who are providing factual information about applications, or expressing opinions on the merits of individual applications at the request of the board, should be particularly careful to avoid any perception that they are instructing the board members or coaching them towards a certain decision.

PART 3: JURISDICTION OF THE BOARD

British Columbia boards of variance have long had jurisdiction in relation to particular kinds of regulations enacted as part of a local zoning or land use bylaw, and more recently have been given jurisdiction in relation to other types of land use management bylaws that can cause site-specific hardship. They also have jurisdiction to grant relief from the operation of certain statutory restrictions on the continuation or expansion of lawful non-conforming uses of buildings. The Vancouver Board of Variance has broader powers, closely related to the use of discretionary zoning powers conferred only on the City of Vancouver via the *Vancouver Charter*; these broader powers are beyond the scope of this Guide.[3] The board's principal source of jurisdiction is s. 540 of the *Local Government Act*:

Application for variance or exemption to relieve hardship

540 A person may apply to a board of variance for an order under section 542 [*board powers on application*] if the person alleges that compliance with any of the following would cause the person hardship:

(a) a bylaw respecting

(i) the siting, size or dimensions of a building or other structure, or

(ii) the siting of a manufactured home in a manufactured home park;

(b) a subdivision servicing requirement under section 506 (1) (c) [*provision of water, sewer and other systems*] in an area zoned for agricultural or industrial use;

(c) the prohibition of a structural alteration or addition under section 531 (1) [*restrictions on alteration or addition while non-conforming use continued*];

(d) 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.

Development Variance Permits

Since 1985, some local governments and boards of variance have been uncertain as to whether the BOV has jurisdiction to deal with a variance application in circumstances where the municipal council or regional board has denied a development variance permit (DVP) application seeking the same variance. Similarly, there has been uncertainty as to whether an applicant can "appeal" a BOV decision denying a variance, by making an identical DVP application to the municipal council or regional board. The creation of the DVP option in 1985 did not change the jurisdiction of the board of variance. The BOV may, on hardship grounds, allow a variance that could have been authorized by DVP, even if such an application has been

[3] Briefly stated, in addition to the types of matters over which all boards of variance have jurisdiction, the Vancouver BOV can hear appeals "by any person aggrieved by a decision on a question of zoning by any official charged with the enforcement of a zoning bylaw", and "by any person aggrieved by a decision by any board or tribunal to whom Council has delegated power to relax the provisions of a zoning bylaw": *Vancouver Charter*, s. 573. The board also has jurisdiction in relation to the City's off-street parking bylaw.

denied. Likewise, the municipal council or regional board may authorize a DVP for a variance that the BOV has denied, despite the fact that a BOV decision is “final”. This isn’t an appeal of the BOV’s decision, but a different application to a different decision-maker made under different provisions of the *Local Government Act*.[4]

Timing of Applications to the BOV

The question of when an application can be made to the board of variance sometimes arises. In some communities, the practice is that a building permit application must have been rejected before the applicant can “appeal” to the board of variance, while in others a BOV application is accepted before a building permit application has been made. The differences in approach might arise from the fact that, when variance boards were first established under the 1925 *Town Planning Act*, the legislation provided a right of “appeal” by any person who was “dissatisfied with the decision of any official charged with the enforcement of a zoning bylaw”. A building official rejecting a permit application for non-compliance with zoning regulations would be such an official. (This aspect of BOV jurisdiction has since been repealed except in relation to the Vancouver Board of Variance.) However, even in 1925 the BOV had separate authority to deal with applications based on “unnecessary hardship”, which could be addressed in advance of any local government decision.

Allowing an application to the BOV before the applicant has made a building permit application will obviously allow them to avoid the cost of making the building permit application, should their variance application be refused, or to tailor their building permit application to comply with BOV approval conditions, and to that end the legislation can be interpreted as allowing that sequence of applications. A *pro forma* rejection of the building permit application based on non-compliance with the zoning regulations is not required. Elsewhere in this Guide the point is made that the BOV may nonetheless need to refer to fairly detailed application drawings in order to evaluate the impact of a requested variance, and to properly frame a variance order. Even so, such drawings would usually be considerably less detailed and less costly to prepare than the drawings that would be required to obtain a building permit. If the variance is allowed, the applicant can then proceed to have their designer continue to develop the drawings for the building permit application, incorporating any changes that the BOV has required as conditions of the variance.

Siting, Size and Dimensions of Buildings and Structures – s. 540(a)(i) of the *Local Government Act*

The vast majority of BOV applications deal with regulations enacted by the municipal council or regional board under s. 479(1)(c)(iii)(A) of the *Local Government Act* – the authority to regulate within a zone “the siting, size and dimensions of … buildings and other structures”. (Zoning bylaws can also regulate the siting, size and dimensions of “uses that are permitted on the land”, but the BOV has no jurisdiction to vary the permitted use of either buildings or land.)

[4] The B.C. Legislature attempted to reduce the confusion by enacting a requirement that the applicant first make a DVP application. That application was deemed to have been refused, thereby entitling the applicant to make a BOV application based on hardship, if the DVP had not been authorized within 45 days. These provisions have never been brought into force.

Siting of buildings and structures

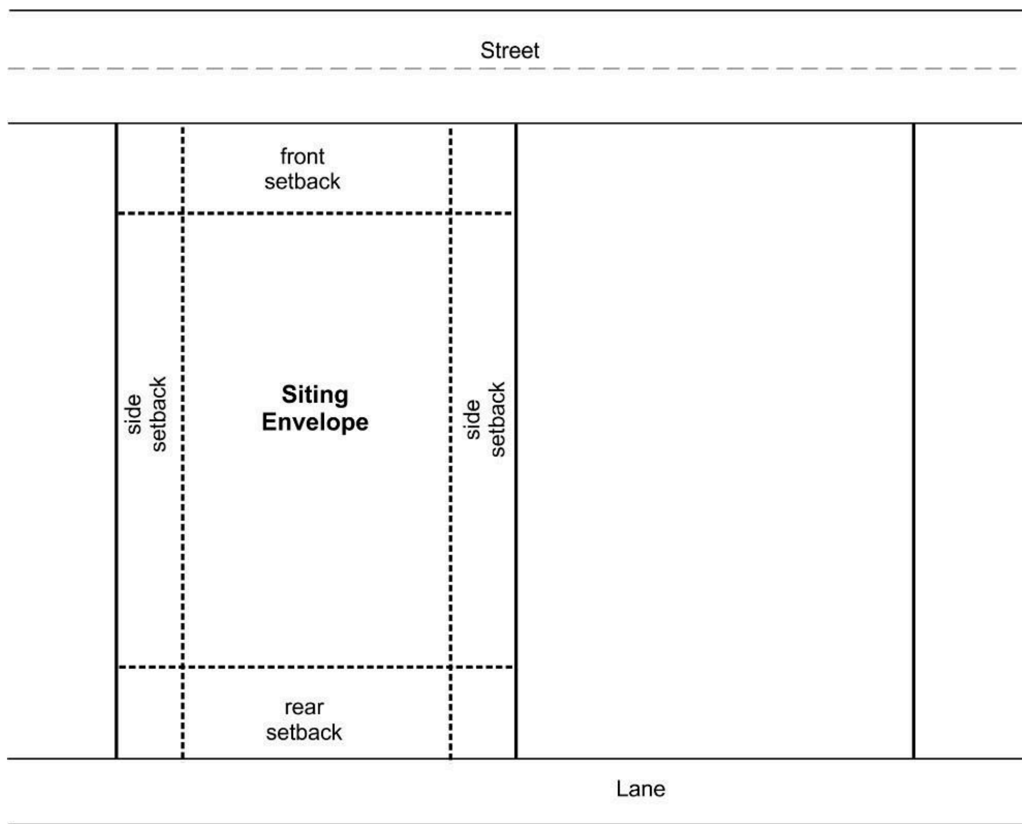
Siting regulations generally take the form of "setback" rules, or rules prescribing the minimum size of "yards", and are typically enacted in relation to lot boundaries – front lot lines, rear lot lines, and interior and exterior side lot lines – though they may also be enacted in relation to other features such as watercourses, railway rights of way, and other buildings.

Siting

The location of a building, structure or use on a lot, usually indicated by horizontal distance from

Setback

A horizontal distance, prescribed in zoning regulations, between a building or structure and a lot boundary, another building, or a geographical feature like a stream or bluff.



The portion of a lot on which buildings and structures are permitted to be constructed is sometimes called the "siting envelope". In addition to the basic siting rule for buildings and structures, local governments often specify certain building features that may extend beyond the siting envelope, usually by a maximum permitted distance and, sometimes, subject to a maximum dimension of the encroaching feature (such as the width of a projecting bay window or balcony).

For example, the Pitt Meadows Zoning Bylaw has these siting rules for the A-3 zone:

Siting—Agricultural Buildings and Manure Storage

Agricultural buildings and structures shall be sited not less than:

a) For livestock barns, poultry brooder houses, confined livestock areas, fur farming sheds, milking facilities, stables, and hatcheries:

- **i. 30 m from front, rear, and exterior lot lines;**
- **ii. 15 m from interior lot lines;**
- **iii. 15 m from watercourses, key ditches and constructed ditches.**
- **iv. 30 m from residential buildings on adjacent lots.**

b) For the growing of mushrooms:

- **i. 15 m from front, rear, and exterior lot lines;**
- **ii. 7.5 m from interior lot lines;**
- **iii. 15 m from watercourses, key ditches and constructed ditches.**

c) For the keeping of more than six swine and associated manure storage:

- **i. 60 m from front, rear, and exterior lot lines;**
- **ii. 30 m from interior lot lines;**
- **iii. 30 m from watercourses, key ditches and constructed ditches.**
- **iv. 90 m from residential buildings on adjacent lots.**

d) For kennels:

- **i. 30 m from all lot lines and watercourses, key ditches and constructed ditches.**

e) For all other agricultural buildings and structures:

- **i. 9 m from front, rear, and exterior lot lines;**
- **ii. 4.5 m from interior lot lines;**
- **iii. 15 m from watercourses and key ditches;**
- **iv. 6 m from constructed ditches.**

f) Unless otherwise noted, manure storage and mushroom solid waste storage shall be located 30 m from all lot lines and 15 m from watercourses, key ditches and constructed ditches.

g) Unenclosed storage shall be sited not less than 6.0 m from all lot lines.

The Pitt Meadows bylaw has these siting exceptions for one of the residential zones:

Projections into Yards in Townhouse Zones

The following projections shall be permitted in the residential zones and in site-specific zones that permit townhouses:

a) **Fireplaces and chimneys, whether enclosed or unenclosed, may project up to 0.6 m into side and rear yards.**

b) **Bay windows and hutches may project up to 1.0 m into the front yard and 0.6 m into side and rear yards.**

c) **Entry stairs may project into any yard but shall be no closer than 3.0 m to a front lot line and 1.5 m to a side lot line or rear lot line.**

d) **Balconies and porches may project up to 1.5 m into the front yard, exterior side yard, and rear yard but not into the interior side yard.**

e) **Gateways, pergolas, and similar landscape structures that do not form part of the principal building may be located within a yard, but no closer to a lot line or right-of-way granted for public passage than 0.6 m.**

Note the mixture of siting rules in the Pitt Meadows bylaw for buildings and structures such as barns and kennels, and siting rules for land uses like manure storage that are not contained within buildings. The BOV has jurisdiction with respect to the former, but not the latter.

Siting rules for buildings and structures can have various land use management objectives, including the prevention of noise and odour nuisances and the protection of sunlight access and privacy. In areas with heavy snow loads, generous setback areas can allow for the shedding of snow from adjacent roofs over the winter season. Siting rules in zoning bylaws should not be confused with minimum building separations prescribed in the Building Code to address the spread of fire. In some cases, the minimum separation of a building from another building or a property line will be determined by the Building Code, notwithstanding that a lesser separation is possible under the applicable land use regulations. The BOV has no jurisdiction over siting requirements imposed by the Building Code, and it would therefore be helpful to board members for staff reports on applications to the board to identify any conflicts between proposed variances and the Building Code. In some cases, a siting variance will be useless to the owner because the Building Code imposes a requirement for a greater setback.

Building Code

The provincial standard for building construction established by the Government of B.C. under the *Building Act*.

A BOV application in relation to a siting rule can arise in circumstances where the footprint of an existing building is not actually changing. Under s. 529 of the *Local Government Act*, a building that is lawfully non-conforming as to siting can be maintained, extended or altered to the extent that no further contravention of the bylaw is involved. An increase in height of a portion of a building that is within a “yard” or “setback area” that was prescribed by a zoning bylaw after the building was constructed and is therefore lawfully non-conforming as to siting, is usually a “further contravention” that the BOV has jurisdic-

tion to permit, based on hardship. Similarly, the extension of a non-conforming portion of a building in a horizontal plane, within a required setback area is usually a "further contravention" even though no portion of the building is being brought nearer to the property boundary. The prescribed setback area can be regarded as a volumetric space extending above the surface of the lot, that is to remain free of building volume except as permitted by variance of the bylaw.

Size and dimensions of buildings and structures

Because of the overlap between the "dimensions" of buildings and structures and their "size", it seems reasonable to address them together. A "dimension" is, by *Oxford Dictionary* definition, a "measureable extent of any kind, as length, breadth, thickness, area, volume", while "size" is defined as "relative bigness, dimensions or magnitude".

> **Floor Area**
>
> A measurement of the horizontal area contained within the floors of a building, usually measured to the outer surfaces of

> **Floor Area Ratio**
>
> The ratio of the total floor area on a lot to the area of the lot. A 150 square metre building on a 600 square metre lot has a floor area ration of 0.25. Also called "floor space ratio".

Zoning bylaws address size and dimensions of buildings and structures in myriad ways: maximum height, maximum width, maximum depth, maximum floor area, maximum site coverage, maximum proportion of building area to lot area (floor area or floor area ratio). Whether any such regulations are "density" regulations that cannot be varied is addressed in the following Part of the Guide.

> **Density**
>
> A measurement of the intensity of use of land, which may be expressed as building floor ratio, dwelling units per lot or per building, subdivision lots per hectare of land, or by some other measure.

> **Site Coverage**
>
> The proportion of a lot that is covered by buildings and structures, including in some cases other impermeable surfaces such as paving.

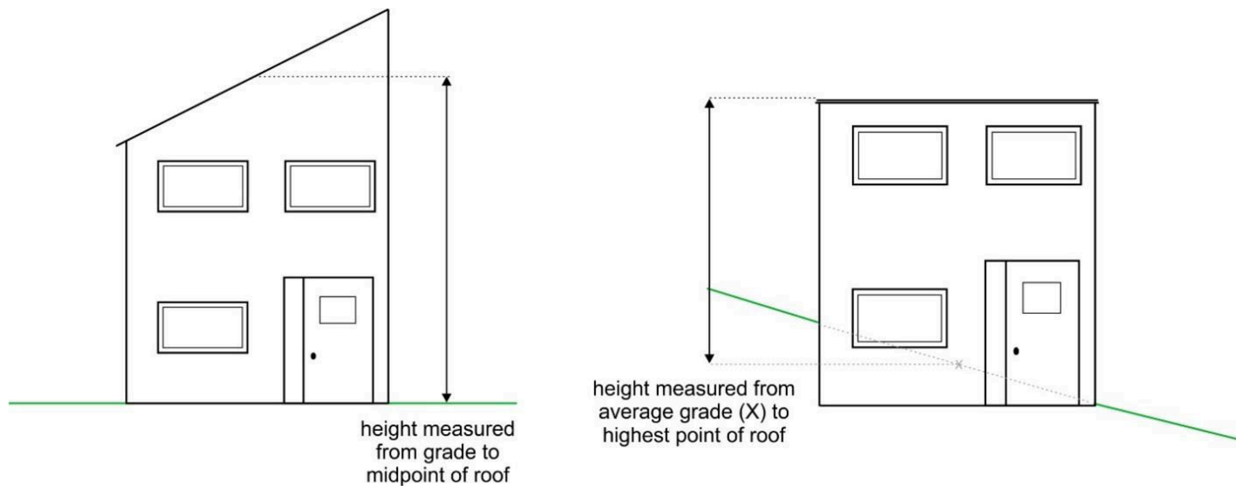
Height

Height dimensions are very commonly the subject of BOV applications. Zoning bylaw height regulations usually involve relatively complex descriptions of the base line for measuring height – usually defined by reference to average grade of the site adjacent to the building – and the upper end of the measurement, often described in a way that distinguishes between different roof shapes. As with siting regulations, the bylaw will typically identify building elements such as chimneys and other architectural features that are excluded from the height limit.

Applications to vary permitted building height are often driven by peculiarities of the site that affect the bottom end of the height measurement, or particulars of roof design that affect the upper end of the measurement.

Height

The vertical dimension of a building or structure, generally measured between grade level adjacent to the building and either the highest part of the building or some lower point selected to achieve the regulator's height management objectives, such as the midpoint of a sloped roof.



The District of Squamish zoning bylaw specifies maximum building heights for principal and accessory buildings in residential zones (9 m and 4.58 m respectively), and includes this additional regulation (with a diagram):

Height of buildings and structures

a) **The following structures are exempt from the height requirements of this Bylaw: church spires, chimneys, flagpoles, masts, silos, satellite dishes, antennae, water tanks, spires, steeples, belfries, domes, cupolas, monuments, transmission towers, elevator penthouses, screened ventilation machinery, and structures required for a public service use.**

b) **Where the front height datum point is below the average street curb elevation so that a line joining the two average elevations inclines at a slope of 25% or greater below the horizontal, then the allowable height of the principal building shall be increased by 0.6m for a slope of 25% to 29% or 1.2m for a slope of 30% or greater.**

A definition of “height datum point” supports the second regulation, which allows a somewhat higher building on a site that is below the elevation of the street from which the site takes its civic address. The regulation suggests that one of the objectives of the bylaw is to manage the height of the residential building as perceived from the street.

The discussion below on variance of regulations establishing minimum building dimensions applies equally to any regulations setting a minimum building height.

Other dimensions

Consideration of the extent of BOV jurisdiction in relation to other regulations addressing the dimensions of buildings and structures inevitably engages the limitations on varying permitted densities under the zoning bylaw and defeating the intent of the bylaw (see Part 4 of the Guide). Note that these limitations are expressed in such a way as to make their application a matter that is subject to the board’s opinion. Subject to those limitations, the BOV may order minor variances in building width and depth regulations and those dealing with floor areas and site coverage. Historically such regulations have specified maximum values for these building elements, though some zoning bylaws prescribe a minimum building width for residential zones, usually a remnant of rules designed to exclude mobile homes from the zones. For example, Vernon’s zoning bylaw has this regulation:

Minimum Building Width

The minimum horizontal width of any detached primary building shall be 7.0m in all residential zones, except in the R7 Mobile Home Residential zone and RST1 Residential Single and Two Family Zone which may have a minimum building unit width of 5.0m on single family lots up to 9.4m wide and two family lots up to 16.4 m wide.

Planners interested in “neo-traditional” neighbourhood design and the more efficient use of municipal infrastructure have begun to recommend minimum values such as minimum floor area ratio or building height. The BOV would have jurisdiction to vary a minimum building dimension rule, on grounds of hardship, to allow a building with a lesser dimension, as long as it did not consider that doing so would defeat the intent of the bylaw.

As is the case with building siting and height rules, building dimension rules are usually accompanied by a list of building elements or features that are excluded from calculations. West Vancouver's zoning bylaw has the following rules for the calculation of floor area ratio:

1. **Floor area ratio calculations shall include:**
   a) **the total floor area of all storeys, measured to the exterior faces of the building or buildings, including hallways, elevator shafts and stairwells at each floor level; and**
   b) **accessory buildings.**
2. **Floor area ratio shall not include:**
   a) **boiler room, mechanical room, electrical room, transformer vault, garbage room and building maintenance room, all intended to service the entire building, when located in a basement and/or sub-basement.**
   a) **open balconies, open terraces or exterior steps.**
   b) **enclosed balconies as long as the all-weather glass doors and/or windows remain in place.**
   c) **hallways, elevator shafts and stairwells at basement and at sub-basement floor levels.**
   d) **interior swimming pools.**
   e) **laundry and workshop areas when located in a basement.**
   f) **locker and storage space when located in a basement.**
   g) **one residential use only entrance lobby.**
   h) **parking and loading area.**
   i) **recreation rooms serving the entire building.**

Note that local zoning bylaws can also regulate the size and dimensions of uses that are permitted on land. BOV jurisdiction extends only to the size and dimensions of buildings and structures. Thus, for example, the board would have no jurisdiction with respect to a regulation setting a maximum floor area for a home occupation or secondary residential use that is permitted within a principal residential dwelling.

Siting of a Manufactured Home in a Manufactured Home Park – s. 540(a)(ii) of the *Local Government Act*

Separate BOV jurisdiction with respect to the siting of this type of building is a result of the fact that, historically, local governments were given separate regulatory powers with regard to mobile home parks, originally in an era when mobile homes were more in the nature of vehicles than buildings, and mobile home parks provided common facilities such as laundry rooms, washrooms and outdoor recreation space. The *Community Charter* still confers, under the heading "protection of persons and property", the authority to regulate, prohibit and impose requirements in relation to "trailer courts, manufactured home parks and camping grounds", and some local governments (particularly regional districts) still have "mobile home park bylaws" that address the siting of these homes within the "park". (The siting of a mobile or manufactured home within a mobile or manufactured home subdivision is more likely to be governed by a zoning regulation.)

The Manufactured Home Parks Bylaw of the Regional District of Central Kootenay has these provisions:

Setbacks and Height

1. **No manufactured home or addition to a manufactured home shall be located within 4.5 metres (14 ft. 6 in.) of an adjacent manufactured home or addition.**
2. **No part of a manufactured home, or an addition to it, or accessory structure shall be located:**
   a) **within 2 metres (6 ft. 6 in.) of an internal access road right of way or a common parking area; and**
   b) **within 1.5 metres (5 ft.) of the rear or side lines of a manufactured home site.**
3. **No buildings or structure in a manufactured home park shall exceed 7.5 metres (25 ft.) in height.**
4. **Notwithstanding Section 9.5(1), the minimum setback of a carport on a manufactured home site shall be 3 metres (10 ft.) to an adjacent manufactured home or addition.**

Note that this bylaw imposes siting rules for manufactured homes, for additions to manufactured homes, for accessory structures generally and for carports. The bylaw imposes siting rules in relation to adjacent manufactured homes and additions, access roads, parking areas, and the rear and side boundaries of the manufactured home site. The BOV has jurisdiction only in relation to "the siting of a manufactured home" itself, and not the siting of additions or accessory structures of any kind. Note also that the BOV has no jurisdiction with respect to the 7.5 m height limit for buildings and structures in the manufactured home park, including the manufactured homes themselves, because the height limit is not within the scope of the board's jurisdiction with regard to "siting" under s. 540(a)(ii).

Servicing Standards in Industrial and Agricultural Zones – s. 540(b) of the *Local Government Act*

Boards of variance have jurisdiction to order, on grounds of hardship, variances in certain subdivision servicing requirements in areas zoned for agricultural or industrial use. This head of jurisdiction refers to bylaws enacted by the local government under s. 506(1)(c) of the *Local Government Act*, which authorizes bylaws requiring 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 established in the bylaw". Other subsections of s. 506(1) deal with standards for roads including sidewalks, street lighting and so forth. It is only the infrastructure systems mentioned in s. 506(1)(c) that the BOV can vary.

The standards in s. 506(1) bylaws are applied in the context of both subdivision applications and building permit applications, so the reference in s. 540(b) to a "subdivision servicing requirement under section 506(1)(c)" should probably be interpreted to include a requirement that is imposed on a building permit applicant. Hardship grounds that could plausibly be advanced in this type of application could include the more limited need that agricultural and industrial users have for this type of infrastructure, or perhaps the cost of the services where it is disproportionate to the revenue that the developer can earn from agricultural or industrial uses.

BOV applications of this type are rare. Increasingly, local government development servicing standards are enacted on the basis of thoroughly-considered civil engineering principles including the need to design and install infrastructure systems on the basis of the most intensive use of land, buildings and structures that is contemplated by the local government's official community plan, rather than the immediate intentions of the developer who installs the services. Varying the bylaw standards to relieve financial hardship on a particular developer seems, in this context, a questionable course of action, particularly in relation to fire suppression infrastructure, sanitary sewers and drainage works where the lack of proper services can have serious consequences for the community at large.

Tree Cutting Bylaws – s. 540(d) of the *Local Government Act*

BOV jurisdiction with respect to tree cutting bylaws does not exist in regional districts, which have not been given jurisdiction to enact the type of tree cutting bylaws that municipal councils can enact under s. 8(3)(c) of the *Community Charter*, and in municipalities the BOV jurisdiction exists only in very particular circumstances. Urban tree cutting bylaws can prohibit the cutting of certain species of trees or tree specimens, trees of a certain size, or both, with the potential result that a siting envelope of the size and at the location permitted by the applicable zoning regulations cannot be achieved on a particular lot. In such circumstances, the *Community Charter* entitles the owner to claim compensation from the municipality for diminished market value, unless the municipal council issues a development variance permit or development permit that enables the owner to achieve the permitted density on the lot without removing the protected trees. The municipality can issue such a permit without the owner applying for it. The BOV has jurisdiction to vary the tree cutting bylaw, on hardship grounds, only if the bylaw prevents the development of the lot and the municipal council has not itself initiated a variance.

> **Siting Envelope**
>
> The portion of a lot on which local zoning regulations permit the location of a building. A building envelope is a volumetric, three-dimensional space when, as is usually the case, the regulations include a height limit.

> **Development Variance Permit**
>
> A permit issued by a municipal council or regional board to vary a bylaw enacted under Part 14 of the *Local Government Act*, including a zoning bylaw.

> **Development Permit**
>
> A permit issued by a municipal council or regional board under Part 14 of the *Local Government Act* to authorize subdivision or development in an area designated in its official community plan. Development permits may include variances that are consistent with applicable development permit guidelines.

Some of the statutory limitations on BOV jurisdiction discussed elsewhere (see Part 4 of the Guide) seem particularly troublesome in relation to such variances. The BOV cannot order a variance if it is of the opinion that it will "adversely affect the natural environment" or "defeat the intent of the bylaw". Many of the trees that are protected by municipal tree cutting bylaws are native trees that are an element of the natural environment, and the intent of tree cutting bylaws is generally to protect trees from being cut, though many of these bylaws make it reasonably clear that the council's intent does not extend to limiting development permitted by the zoning bylaw.

A variance ordered under this head of BOV jurisdiction would, presumably, identify particular trees that the applicant wishes to remove in order to achieve their desired siting envelope, and would vary the tree cutting prohibition in the bylaw to the extent required to enable the owner to remove those trees. In most cases some type of drawing overlaying the proposed siting envelope on a tree survey of the property would seem required in support of the application. It would not seem necessary for the board order to dispense with any bylaw requirement for a tree cutting permit to be obtained, since the permit requirement is usually used to monitor and enforce compliance with other bylaw requirements as well, such as those dealing with tree cutting practices and the planting of replacement trees.

Land Use Contract Termination Bylaws – s. 543(5) of the *Local Government Act*

In 2014 the Legislature enacted amendments to the *Local Government Act* that enable local governments to unilaterally replace land use contracts (LUC) pertaining to land in their jurisdiction, with zoning regulations. All land use contracts in the province will terminate by operation of law on June 30, 2024. Before that date, the local government may enact a bylaw unilaterally terminating a land use contract as of a date specified in the bylaw, which must be at least one year after the date the bylaw is adopted. In many cases, development that was authorized by land use contract has become functionally obsolete, and both the affected owners and the local government having jurisdiction would consider that the development regulations included in the land use contract are also obsolete. Thus, owners may agree that the time to terminate their land use contract has come.

> **Land Use Contract**
>
> A form of contract zoning used in the 1970s that applies in place of zoning bylaws. Land use contracts will be terminated by operation of provincial law in 2024 and in the meantime may be terminated by local government bylaw.

Despite the fact that all land use contracts have been in force for 35 years at a minimum, the Legislature considered that the termination of particular contracts might cause undue hardship to owners whose use of land is regulated in this way, and provided for an application to the board of variance for an order that the land use contract continues to apply to the applicant's land for a further period of time specified in the BOV order, which cannot be later than June 30, 2024. Presumably the grounds for any such application will be that the application of the local government's zoning regulations on the effective date of the termination bylaw will cause undue hardship in that the applicant will not be able to continue to use or develop their land in accordance with the land use contract. Unlike the termination bylaw itself, a BOV order under s. 543(5) is not registered in the Land Title Office. Thus, the affected local government will, in administering development approvals, need to flag its database of LUC properties to ensure that the extended term of the land use contract is reflected in the administration of approvals.

There are special rules regarding applications and orders under s. 543(5). The limitations on the board's jurisdiction that are set out in s. 542 don't apply to applications made under s. 543; for example, the board does not have to consider whether extending its effective date would "defeat the intent" of the land use contract termination bylaw. The BOV must make a decision on each application within six months of receiving it. Orders made under s. 543(5) don't run with the land; they are of benefit only to the owner who makes the application. This suggests that the Legislature considered that the hardship grounds that motivate the BOV to make an order within this aspect of its jurisdiction will be personal to the owner, rather than a type of hardship that relates to the land that is the subject of the contract.

Lawful Non-Conforming Uses: Structural Alterations and Additions – s. 540(c) of the *Local Government Act*

Generally speaking, while lawful non-conforming uses of buildings and structures are allowed to continue (s. 528 of the *Local Government Act*), structural alterations and additions to such buildings and structures are prohibited while the non-conforming use continues (s. 531). This rule recognizes that, in the long run, uses that don't conform to generally applicable land use regulations are expected to come to an end. Additions and structural alterations would tend to perpetuate such uses indefinitely.

> **Lawful Non-Conforming Use**
>
> A use of land that was lawful when zoning regulations were adopted, that is prohibited by the regulations, and that is permitted by s. 528 of the *Local Government Act* to continue, subject to a six-month discontinuance rule.

There is an exception to the rule in s. 531 for structural alterations and additions that are either required by an enactment or permitted by the board of variance. An example of a structural alteration that is "required by an enactment" would be a structural repair that is ordered by the municipal council using the remedial action powers in the *Community Charter*. The BOV has jurisdiction to allow an exemption, on hardship grounds, from the statutory prohibition on structural alterations and additions in s. 531. There is no "minor" element to such exemptions, as there is to other BOV orders made under s. 541(1); the board has jurisdiction to permit whatever alterations or additions the owner has requested.

A threshold jurisdictional issue is whether the work in question actually constitutes a "structural alteration or addition". Generally speaking, this is a question on which a BOV would usually take advice from local building officials. If a building permit application is made for a building that accommodates a lawful non-conforming use, the building official should advise the applicant that board of variance approval is required if the permit application indicates a structural alteration or building addition. Alterations to exterior walls, foundations and roof trusses or rafters are almost always "structural" in nature. Removal or addition of internal walls also constitutes a structural alteration if the walls are load-bearing. The replacement of wall sheathing, whether external or internal, can even be a structural alteration in relation to the capacity of the wall to bear wind load.

Lawful Non-Conforming Uses: Extent of Damage – s. 544 of the *Local Government Act*

Another limitation on the continuation of lawful non-conforming uses of buildings and structures is imposed by s. 532(1) of the *Local Government Act*. If the building or structure is damaged to the extent of 75% or more of its value above its foundations, as determined by the building inspector having jurisdiction, it may be reconstructed or repaired only for a use that complies with the zoning regulations then in effect.

The BOV has jurisdiction under s. 544 to hear and decide an appeal by a person alleging that the building inspector's determination is in error. Such an appeal might be filed where the continued use of the building for the non-conforming use is more advantageous or profitable than a conversion to a conforming use. This is a true appeal, in the sense that the BOV will be considering evidence on the extent of damage and either upholding the building inspector's determination or overruling it. Persons filing appeals under this head of BOV jurisdiction will generally produce a report by a qualified person supporting an opinion that the extent of damage is less than 75%. (In the only reported case dealing with an appeal of this type, the appellant's consultant produced a report indicating that the extent of damage was 73.94% rather than the 85% determined by the building inspector.[5]) Balanced against this evidence would be the building inspector's calculations, which could be supported by a third party opinion. In these appeals, the BOV will be dealing largely with the credibility of evidence that is being tendered on behalf of the appellant on the one hand, and the local government on the other.

BOV decisions made under this head of jurisdiction may, unlike other decisions, be appealed to the B.C. Supreme Court (see Part 8 of the Guide). The limited case law indicates that the Supreme Court would likely defer to the judgment of the BOV as to the extent of damage, unless the board's decision is unreasonable in view of the evidence that it had before it, or involved a procedural error of some kind.

[5] *Sidhu v. Surrey (City) Board of Variance* (1995).

PART 4: LIMITS ON THE BOARD'S JURISDICTION

In addition to the general limitation of the jurisdiction of the BOV to ordering "minor" variances, discussed elsewhere in the Guide, the *Local Government Act* in ss. 542(1)(c) and 542(2) sets out two categories of particular limits on the jurisdiction of the board. The more straightforward of these categories, addressed in s. 542(2), is dealt with below under the heading "objective limits". The other category is worded in s. 542(1)(c) as a limit on the board's core authority to order variances and exemptions: an order may be made only if the BOV "is of the opinion" that the variance or exemption does not have any of five particular consequences described in the section.

Board powers on application

542 (1) On an application under section 540, the board of variance may order that a minor variance be permitted from the requirements of the applicable bylaw, or that the applicant be exempted from section 531 (1) [*alteration or addition while non-conforming use continued*], if the board of variance

(a) has heard the applicant and any person notified under section 541,

(b) finds that undue hardship would be caused to the applicant if the bylaw or section 531 (1) is complied with, and

(c) is of the opinion that the variance or exemption does not do any of the following:

(i) result in inappropriate development of the site;

(ii) adversely affect the natural environment;

(iii) substantially affect the use and enjoyment of adjacent land;

(iv) vary permitted uses and densities under the applicable bylaw;

(v) defeat the intent of the bylaw.

(2) The board of variance must not make an order under subsection (1) 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 land use permit or covered in a land use contract;

(c) deal with a matter that is covered by a phased development agreement under Division 12 [*Phased Development Agreements*];

(d) deal with a flood plain specification under section 524 (3);

(e) apply to a property

(i) for which an authorization for alterations is required under Part 15 [*Heritage Conservation*],

(ii) for which a heritage revitalization agreement under section 610 is in effect, or

(iii) that is scheduled under section 614 (3) (b) [*protected heritage property*] or contains a feature or characteristic identified under section 614 (3) (c) [*heritage value or character*].

Courts considering the extent of their own jurisdiction to review BOV decisions have attached considerable significance to the distinction between these two types of limitations, related to the fact that a reviewing court can (subject to finding no procedural error) quash a BOV order if it was made outside the board's jurisdiction, but not if it is made within jurisdiction. Though the matters listed in s. 542(1)(c) appear as a matter of form to set limits on the board's jurisdiction, the fact that they involve an opinion

formed by the board itself has generally resulted in judicial deference to the board's judgment, such that a jurisdictional error will not be found to have occurred (and the order of the board will not be quashed) even if the court would not have formed the same opinion as the board with regard to these particular matters. In administrative law terms, the BOV need not be "correct" in the opinion that it forms regarding matters listed in s. 542(1)(c). A neighbour or a local government would be unlikely to succeed in quashing a board decision on the grounds, for example, that the variance had, indeed, "defeated the intent of the bylaw". The single exception to this general comment has to do with s. 542(1)(c)(iv), varying permitted uses and densities, which seems more similar in nature to the matters mentioned in s. 542(2) and will be considered in detail below.

By contrast, whether a board order would "conflict with", "deal with", or "apply to" something listed in s. 542(2) lends itself to more objective analysis, and generally speaking the BOV will have to be correct in its assessment of whether any of those limitations applies, to survive judicial review of its order.

Subjective Limits on the Board's Jurisdiction

The wording of s. 542(1)(c) of the *Local Government Act* suggests that the BOV cannot order a variance or allow an exemption from s. 531(1) unless it has formed an opinion on the matters set out in that section, and this would of course require that the BOV turn its mind, collectively, to these matters during its consideration of each particular application. Reviewing courts are likely to infer, from the fact that the BOV has made the order or allowed the exemption, that the BOV took each of these matters under consideration, even though there may be no direct evidence of that in the board's minutes. There is, however, a significant possibility that in a case where there is persuasive evidence that BOV members were either unaware of the existence s. 542(1)(c) or any part of it, or failed to turn their minds to any of these matters when there was a real possibility that, having done so, the decision would have been different, the variance or exemption would be quashed. Thus it's good practice for BOV members to have a copy of s. 542 in front of them during their hearings, and in the case of larger municipalities where the BOV has staff support, that reports on applications contain at least a brief narrative addressing each of the matters identified in s. 542(1)(c). As well, local governments should consider itemizing these topics on their BOV application forms, to prompt applicants to address the issues that the board is statutorily obliged to consider when dealing with variance and exemption applications.

With the exception of the limitation on varying permitted uses or densities, this part of the *Local Government Act* can be seen as simply reminding the BOV of some of the basic purposes of zoning bylaws, which includes ensuring compatibility of neighbouring land uses, avoiding harm to the environment and ensuring that sites are developed appropriately. As a component of the local government's land use management system, the BOV would ordinarily be striving, in its decisions, to accommodate individual hardship without undermining the basic purposes of the bylaws whose provisions are being varied. In relation to each of these matters, a court being asked to review a BOV decision is highly unlikely to second-guess the opinion of the board.

Inappropriate development of the site

The lack of jurisdiction to order variances or exemptions that would result in inappropriate development of a site has to be considered in the context of the local government having already determined in a general way, by prescribing development regulations in the zoning bylaw, what would be appropriate development of the land in which the site is located. The focus of the BOV's analysis should be on the site itself. Development regulations that apply to an entire zone may be insensitive to circumstances

that exist on particular sites in the zone, which can, perhaps, reasonably accommodate different development standards (such as building height or siting) from those contained in the generally applicable regulations. The BOV's task is to recognize and accommodate individual hardship, without ordering any variances and exemptions that are simply outside the range of appropriate development standards for the site.

Adverse effect on the natural environment

This limitation on BOV jurisdiction was added to the *Municipal Act* in 1997 in connection with other amendments enhancing local government jurisdiction in relation to environmental matters, enacted during the same session of the Legislature as the *Fish Protection Act* (since re-named the *Riparian Areas Protection Act*). With the same legislation came local government powers to impose impact assessment requirements on development applicants, authority for riparian area property tax exemptions, and authority for additional types of development permit conditions addressing environmental impacts. It is difficult to see how board members can address this limitation properly in situations where environmental impact is a concern, without having the applicant prepare some sort of impact assessment of their project with a particular assessment of the impact of the variance (over and above the impact that would occur in any event if the site was developed in strict accordance with the bylaw).

Given the origin of this reference to the natural environment, it's interesting to note that the *Riparian Areas Protection Act* restrictions on the approval of development in riparian areas does not apply to board of variance decisions, though it does apply to local government decisions potentially impacting riparian areas, including decisions to issue development variance permits that in some cases have the same effect as BOV orders. This might have the effect of diverting certain kinds of variance applications to the BOV rather than the municipal council or regional board. However, this reference to the natural environment would enable (but would not oblige) a board of variance to require an applicant to submit the same type of riparian area impact assessment as the applicant would have to submit to the local government in order to obtain a DVP, or otherwise address any concern that the BOV might have that the requested variance would have an adverse effect on a riparian area.

Substantial effect on use and enjoyment of adjacent land

In most zones, development of any kind will have an effect on the use and enjoyment of adjacent land, especially where the development site has previously been vacant. BOV members should be careful about distinguishing between the overall effect of a development and the particular effect of the variance that is being sought, which will generally be more limited, though potentially significant in its effect on a particular neighbour. A height variance, for example, may be relatively inconsequential in its contribution to the overall effect of a development, but may properly be considered to have a substantial effect on adjacent land if it deprives a garden on that land of direct sunlight for a significant portion of the growing season.

Vary permitted uses or densities under the applicable bylaw

In relation to applications for exemptions from the prohibition on structural alterations and additions to buildings containing lawfully non-conforming uses, this limitation on BOV jurisdiction seems difficult to apply. It would seem that every exemption that allows a structural alteration to such a building would be perpetuating the operation of a use that the bylaw no longer allows at the location in question, and because a non-conforming use can be extended into every part of the building in which it's occurring,

every exemption that allows an addition would be expanding the scale and impact of a use that the by-law no longer allows. It could easily be asserted that in each case the intent of the bylaw is being defeated, yet such variances are clearly within the board's jurisdiction. Applications to the BOV to vary a bylaw are not likely to engage this limitation, because s. 540 confers jurisdiction only in relation to a by-law respecting the siting, size or dimensions of a building or structure.

One type of regulation that potentially does engage this limitation is the increasingly popular "spacing" rule that is finding its way into zoning regulations pertaining to "adult" uses, liquor stores, marijuana dispensaries, and so forth. Typically such regulations establish a minimum distance for such uses from one another, and from uses such as schools and parks that are perceived to require special protection from them. Assuming that such regulations are not so inherently uncertain as to be invalid, the question arises whether varying the stated distance on grounds of hardship would be varying a rule regarding the siting of a building or structure, which is within BOV jurisdiction, or varying the siting of a use, which is not. Clearly these uses occur in buildings or structures, but it is only the particular use of the building or structure that triggers the application of the siting rule. The area within, for example, 200 m of a liquor store can be seen as an area within the zone in question in which another liquor store use is not permitted, and varying that distance can therefore be seen as a variance of permitted uses under the bylaw.

As regards densities, there is no generally applicable definition of "density" that assists with an understanding of this limit on the BOV's jurisdiction. The case law suggests that in relation to both BOV applications and permit applications seeking bylaw variances (both development permits and development variance permits) that the important question is – what, if any, are the "density" regulations in the applicable bylaw? Some zoning bylaws contain regulations dealing with maximum floor area ratio that most planners would consider density regulations, but there are zones in which other types of regulations impact permitted densities quite directly – for example a commercial or industrial zone in which the size of buildings is limited only by the minimum building setbacks and maximum height. The only case that has inquired into this kind of limitation in any detail involved the issuance of

Zoning bylaws

479 (1) A local government may, by bylaw, do one or more of the following:

(a) divide the whole or part of the municipality or regional district into zones, name each zone and establish the boundaries of the zones;

(b) limit the vertical extent of a zone and provide other zones above or below it;

(c) regulate the following within a zone:

(i) the use of land, buildings and other structures;

(ii) the density of the use of land, buildings and other structures;

(iii) the siting, size and dimensions of

(A) buildings and other structures, and

(B) uses that are permitted on the land;

(iv) the location of uses on the land and within buildings and other structures;

(d) regulate the shape, dimensions and area, including the establishment of minimum and maximum sizes, of all parcels of land that may be created by subdivision.

a heritage alteration permit by the municipal council in Fort Langley.[6] Such permits can vary zoning regulations other than those dealing with permitted use and density, and the council varied both the maximum site coverage and the maximum building height (to permit an additional floor of commercial development), in a mixed-use zone that lacked an overall floor area control. To determine whether the variance exceeded the council's jurisdiction, the B.C. Court of Appeal first considered the manner in which the zoning power was itself conferred on the council in s. 479(1) of the *Local Government Act*:

The organization of these powers suggested to the Court that the heritage alteration permit could vary any regulation other than one that had been enacted under clauses (i) and (ii) of subsection (c). Turning to the zoning bylaw in question, the Court found that the council had enacted regulations dealing with residential density, with which the proposed building complied fully, but no regulations controlling commercial density, and that building height and site coverage regulations had been enacted under clause (iii) of subsection (c) (in particular, "size and dimensions" of buildings) and could therefore be varied.

This approach, assuming that it would apply equally to the interpretation of the equivalent limit on BOV jurisdiction, requires that the regulation that would be varied be considered in the context of the entire body of regulations that apply to the land under the zoning bylaw, to determine whether it is a regulation of "density", and without assuming that the local government actually exercised its authority to regulate density in the zone in question. In the Fort Langley case, the presence of some clear regulations controlling residential density enabled the Court to infer that the Council had intended no such limit on commercial density, and that the site coverage and building height rules addressed the "size and dimensions" of buildings.

A further question is whether the BOV has to be correct in its opinion that a particular variance will not vary permitted densities, or whether it is sufficient that its decision is not unreasonable, in the legal sense. (Unreasonableness as a ground for attacking a BOV decision is addressed in Part 8 of this Guide.) Unlike the other limitations mentioned in s. 542(1)(c), this one seems to lend itself to an objective analysis of the effect of the variance, rather than the forming of a subjective opinion. One can easily see a reviewing court deferring to the BOV and upholding a variance that has been ordered despite a local government staff submission that the variance would "defeat the intent of the bylaw" or "adversely affect the natural environment", but not so easily where a variance has been ordered despite a staff argument that it would vary the permitted density of development under the bylaw. In applications where this particular limitation is potentially engaged, it may be prudent for the BOV to obtain an independent legal opinion on whether it applies.

Density of development on a site should not be confused with the massing of buildings. Massing refers to the general shape and form of a building, or the arrangement of the permitted building volume on the building site. In many cases, applications to vary the permitted siting or height of a building are driven by design considerations associated with massing, such as the desire to create a better transition between adjacent buildings or

> **Massing**
>
> The general shape and form of a building.

[6] *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2013 BCCA 2273 (CanLII). The permit authorized the construction of a new mixed-use building in a heritage conservation area.

to reduce the impact of the building when viewed from a particular vantage point. Such matters are, generally, within the board's jurisdiction if the massing dictated by the applicable siting and height regulations can be demonstrated to constitute an undue hardship.

Defeat of the intent of the bylaw

Since the "intent" of a zoning bylaw is usually a matter of opinion, very little can be said about the scope of this limitation on the jurisdiction of the BOV. Indeed it may be impossible to discern any overall intent at all, in a patchwork of bylaw provisions enacted by many councils or regional boards over a period of many years. Some zoning bylaws include general "intent" statements for individual zones, which could play a part in any analysis as to whether a variance or exemption defeats the intent of the bylaw, though these statements are usually so vague and general as to provide little substantive guidance. Literally speaking, it seems unlikely that any particular variance or exemption that a BOV could order would be capable, all on its own, of defeating the intent of set of zone regulations, let alone an entire bylaw. It could even be argued that, given the mandatory establishment of an independent BOV, no zoning bylaw can seriously have been intended to achieve 100% compliance with all of its requirements on every site within the jurisdiction. Considering how a particular variance would fit with the express or presumed intent of zoning regulations, however, will often assist BOV members to decide whether ordering the variance would be an appropriate decision, particularly if they hear from a representative of the local planning department on what land use management objective the particular regulation that would be varied was intended to achieve.

Objective Limits on the Board's Jurisdiction

The overall rationale for the existence of the BOV is that zoning regulations are, by their nature, insensitive to site particularities, and a mechanism is needed to adjust the regulations in circumstances where they restrict the use of land to an extent that creates particular hardship. As Part 14 of the *Local Government Act* has evolved, municipal councils and regional boards have been given jurisdiction to manage land use with site-specific tools in addition to the general zoning tool, and the Legislature has adjusted BOV jurisdiction to take account of the fact that elected officials may have already turned their minds to site particularities in managing land use on specific sites. Generally speaking, the BOV has no jurisdiction to vary bylaws in respect of properties for which the municipal council or regional board has already issued a site-specific development approval, the assumption being that any hardship that the generally applicable zoning bylaw creates with respect to a particular site has already been addressed.

Conflict with a covenant

Land use covenants registered against title to land under s. 219 of the *Land Title Act* and predecessor legislation are, essentially, contracts between the owner of the land and the local government that bind successors in title to the owner who originally signed the covenant as well as any occupier of the land. Covenants have for many years been used to supplement zoning regulations, usually because the matter addressed in the covenant is outside the scope of the zoning power (for example, a covenant that restricts occupancy of dwelling units to persons 65 years of age and older, or that prescribes

> **Restrictive Covenant**
>
> A document registered in the Land Title Office that restricts the use of the land. It may be a common law covenant granted by one owner to another, or a statutory covenant granted by an owner to the local government under s. 219 of the *Land Title Act*.

in detail the design requirements for a building) or to avoid the procedural steps involved in amending the zoning bylaw to provide site-specific regulations. This limitation on BOV variance necessitates that the titles to properties that are subject to BOV applications be searched to identify any such covenants, and that any covenants then be reviewed to determine whether the BOV order or exemption that is being sought would conflict with the covenant. A straightforward example of a conflict would be an application to vary a height limit from 9 to 12 m, where a covenant has been granted to the local government that limits building height on the property to 10 m. Another would be an application for an exemption from s. 531(1) to permit an addition to a non-conforming commercial building in a residential zone, where a covenant has been granted to the local government that restricts the floor area of a commercial use to that existing when the covenant was granted. Occasionally, it might be necessary to obtain a legal opinion on whether the order or exemption would conflict with a particular covenant that is vaguely worded.

Building Scheme

A restrictive covenant that is registered against all of the lots in a subdivision and that may be enforced by any lot owner against another lot owner. Building schemes are usually administered by the developer of the subdivision.

Land that is the subject of a variance application may instead be subject to a restrictive covenant granted to a neighbour, or a building scheme, or the area in which the owner wishes to build may lie within a registered easement granted to a neighbour. In all of these cases the BOV is obliged to deal with the application without regard to any building restriction contained in the registered document. The most that the board should do is draw the applicant's attention to the existence of the restriction, which might render their variance useless.

Easement

A registered interest in land that allows a party other than the owner to enter on or use the owner's land for purposes specified in the easement, such as a driveway. An easement granted to a local government or utility is called a statutory

Deal with a matter covered in a land use permit or land use contract

To the extent that land use contracts are somewhat similar in nature to land use covenants, the limit on BOV jurisdiction seems to be based on the same logic: the local council or regional board has negotiated a contract with the owner, to which the owner wouldn't have agreed if its terms constituted an undue hardship. Land use contracts are, like covenants, registered in the Land Title Office. It should be noted that zoning regulations do not apply to lands that are subject to land use contracts, except to the extent that the LUC specifically incorporates such regulations. However other types of bylaws that the BOV has jurisdiction to vary might apply to land use contract lands, and the question that will have to be addressed is whether the variance or exemption would "deal with" a matter that is "covered" in the contract. Again, straightforward examples can be imagined, such as a variance to a siting requirement in a manufactured home park bylaw where the land use contract contains a drawing showing the permitted siting envelope for each manufactured home. There is a procedure available in Part 14 of the *Local Government Act* for modifying a land use contract that requires the approval of the municipal council or regional board.

Land use contracts are registered, in their entirety, in the Land Title Office. These instruments date from the late 1970s and are, in many cases, much less detailed than they would be if drafted today, so it may be difficult to determine whether a matter is "covered" in a land use contract, particularly where the contract incorporates the generally applicable zoning regulations by reference. Legislation passed in 2014 terminates all land use contracts by operation of law in 2024, and enables local governments to unilaterally terminate these contracts at an earlier date. For separate BOV jurisdiction regarding the early termination of land use contracts, see Part 3 of the Guide.

A "land use permit" is a development permit, development variance permit or temporary use permit issued by the municipal council or regional board. In each case, the permit represents a site-specific determination by elected officials as to a proper land use management regime for the site in question, and in the case of a development or development variance permit the property owner has an opportunity in making their permit application to ensure that any undue hardship caused by the application of the zoning bylaw is addressed. Each of these types of permit can be used to vary or supplement the zoning bylaw. Temporary use permits "deal with" permitted uses, but such a permit might specify more onerous development standards (building siting or height) for the use that is being permitted, thereby taking those matters out of BOV jurisdiction.

> **Land Use Permit**
>
> A term used in the *Local Government Act* to refer to a development permit, development variance permit or temporary use permit.

> **Temporary Use Permit**
>
> A permit issued by a municipal council or regional board under Part 14 of the *Local Government Act* to authorize a land use that is not permitted by the applicable zoning regulations. Temporary use permits have a term, with renewals, of up to 6 years.

The *Local Government Act* requires Land Title Office notices for all land use permits, so the existence of these permits can be determined with a title search. The permits themselves are not registered on title so a search of local government records will be necessary.

Deal with a flood plain specification

Flood plain specifications are enacted by local governments under s. 524 of the *Local Government Act*, and include designated flood construction levels (FCLs) and minimum setbacks from water bodies for structures or fill used to elevate buildings to the specified FCL. The board of variance has no jurisdiction to vary such regulations. There is an exemption process in s. 524 for persons who don't wish to comply with these specifications, which in most cases requires the applicant to obtain an engineer's certification that the land can be safely used even if the local government flood plain specifications are not followed. Each type of specification can be characterized as a "siting" rule, which the BOV could vary were it not for the prohibition in s. 542(2)(d).

In cases where there is a flood hazard that has not been addressed by local government flood plain specifications, and a person is seeking a variance that would expose their building or structure to greater risk of flood damage (for example, reducing the minimum setback from the water body), a BOV might choose to use an application review process similar to that which a council or regional board would use

if regulations were in place. This could include requiring the applicant to produce an engineer's certification that the land can be safely used if built on in accordance with the requested variance.

Apply to a heritage property

The BOV cannot make a variance order that would "apply to" a protected heritage property. This is most broadly worded of the limitations in s. 542(2) since it permits no analysis as to the precise relationship between the proposed variance or exemption and the site-specific land use management mechanism that is already in place; the mere fact that the variance order would apply to a property described in this subsection is sufficient to remove BOV jurisdiction. The types of property that are covered include:

- Properties for which Part 15 of the *Local Government Act* requires a heritage alteration permit. This includes properties in heritage conservation areas, individually designated heritage properties, and properties that are subject to temporary heritage protections such as a heritage control period.
- Properties that are subject to heritage revitalization agreements. These are properties for which the local government has negotiated some measure of heritage protection in exchange for variances to generally applicable bylaws, including in some cases permitted uses but often building siting and dimensions as well. If compliance with bylaws is causing undue hardship, the owner can attempt to arrange variances as part of the agreement negotiations.
- Particular properties in heritage conservation areas that are listed in a schedule to the official community plan, or that "contain a feature or characteristic" that is identified in the plan for the purpose of limiting the discretion of persons to whom responsibility for issuing heritage alteration permits has been delegated.

Only heritage designation bylaws and heritage revitalization agreements require notice on title, so more than a title search may be required to determine if the heritage limitation applies. Heritage conservation areas are designated in official community plans, but the heritage alteration permit requirement (and resulting limitation on BOV jurisdiction) commences when the bylaw containing the designation is given first reading. Temporary heritage protection orders that trigger a heritage alteration permit requirement (and a limitation on BOV jurisdiction) are made by council or board resolution.

PART 5: UNDUE HARDSHIP

> **Application for variance or exemption to relieve hardship**
>
> **540 A person may apply to a board of variance for an order under section 542 if the person alleges that compliance with any of the following would cause the person hardship ….**
>
> **Board powers on application**
>
> **542 (1) On an application under section 540, the board of variance may order that a minor variance be permitted from the requirements of the applicable bylaw, or that the applicant be exempted from section 531 (1), if the board of variance … finds that undue hardship would be caused to the applicant if the bylaw or section 531 (1) is complied with ….**

As has been noted on the first pages of this Guide, the *raison d'être* for boards of variance is the assumption that typical zoning regulations are likely, when applied to particular properties within the area to which the regulations apply, to cause particular hardship in the use of land. It has to be kept in mind when hardship matters are under consideration that all zoning regulations impose some measure of hardship on all those who must obey the regulations; their core purpose is to limit and restrict what owners and occupiers would do with their properties in the absence of regulation. The rationale for the establishment of boards of variance was the notion that there might be particular hardship in relation to particular properties, which the legislative body would likely have addressed if the enactment of zoning regulations was a more fine-grained process, and that the board of variance can address on the basis of an individual application.

In this sense the BOV, acting on the grounds of hardship, can be seen as completing the legislative body's task as regards the application of the bylaw to particular properties following a site-specific analysis of the impact of the regulations on the owner's or occupier's use of the land.

> ### Hardship
>
> The impact of generally applicable regulations on a particular lot, which the owner alleges is severe enough that it justifies a variance in the application of the regulations.

The first difficult question is: what types of hardship are eligible for consideration in a BOV application? It may be best to begin with the more obvious types that were likely in the minds of the drafters of the earliest legislation establishing variance tribunals, and proceed from that perspective to consider other types that applicants may allege. The next difficult question is: when does a particular type of hardship become "undue" hardship? A finding of "undue" hardship enables the BOV to make a variance order. The use of this term implies that a certain amount of hardship is everybody's fate, in a jurisdiction that enacts zoning regulations. Presumably, hardship becomes "undue" at the point that it is not necessary that the owner or occupier in question endure the hardship to achieve the intent of the bylaw, both generally and in the locale in which the hardship is being experienced. If that is correct, "undue" hardship is that which is disproportionate to the public good or benefit that is being achieved by the administration and enforcement of the bylaw in question. It is only the "undue" hardship that a board of variance order should be designed to relieve.

Physical Site Characteristics

Probably the easiest hardship allegations for boards of variance to consider favourably are those connected with the physical peculiarities of a site. In relation to residential building siting rules, for example, which are generally drafted on the assumption that building lots are more or less rectangular in shape with the narrower end of the rectangle forming the street frontage, a parcel of land that is triangular or otherwise irregular shape presents a "building envelope" (that portion of the parcel on which one is permitted to construct a building) that may not be able to accommodate a residential building of typical shape or dimensions. The owner or occupier may propose to locate the building nearer to one or more parcel boundaries than the bylaw permits to create a building envelope similar to that on neighbouring lots. Certain site features such as mature trees and rock outcrops can create similar building envelope difficulties. While in these cases the problematic site characteristics can usually be altered (assuming that tree removal and this type of land alteration is allowed in the jurisdiction), the owner or occupier may prefer to seek a variance of the siting rules, and the BOV may determine that the intent of the bylaw does not require the removal of these types of physical features in order to achieve a perfectly consistent siting pattern for residential dwellings.

Consideration of applications of this type should include a review of the physical characteristics of adjacent lots to ensure that the hardship that is being alleged is, in fact, particular to the applicant's lot. Planners are generally aware of the consequences of unconventional parcel shapes as regards building sites, and may have tailored the regulations on a neighbourhood basis to match the siting rules to the parcel shapes – for example on a cul de sac where many of the parcels have a somewhat triangular shape. In such cases, an allegation of individual hardship may be unfounded.

Physical Characteristics of Abutting Sites

Compliance with zoning rules that address the siting, size or dimensions of buildings and structures can equally cause hardship in relation to the characteristics of neighbouring parcels, especially if they have been developed with buildings and structures. Take the example of an "infill" lot in the middle of a residential block face, where all of the dwellings were constructed at a 7 m setback line under a previous bylaw and the setback line is now at 10 m. In this case, it might be alleged that building to that line will result in hardship as regards sunlight access to windows, views to the street, and so forth, as well as a reduced rear yard area as compared with other dwellings on the block. The owner or occupier may prefer to build at the 7 m setback line, pursuant to a variance order.

Personal Characteristics of Applicants

Applicants to the board of variance may claim that compliance with bylaws or s. 531(1) will cause them hardship in relation to a personal characteristic that has nothing to do with the land. In some North American jurisdictions, this type of hardship is eliminated, by legislation, from consideration in a variance application, but not in ours. A typical example is a variance application precipitated by a building permit application for a ramp or elevator structure that would be installed to permit a resident with a new personal disability to continue to use their home, where the structure would encroach into a required setback area or extend beyond a height limit. These applications are particularly difficult to assess because, while the legislation is silent on this point, BOV orders are generally considered to be permanent, at least for the life of the building or structure for which they were made, and not to be personal to the person whose disability may have constituted the undue hardship. Because there is nothing in the legislation that rules out such variances, BOV members are usually sympathetic to persons who

find themselves in these situations and neighbours rarely speak up in opposition, this type of BOV order is not unusual. Some boards of variance would likely prefer to have authority to make these types of variances temporary, in the case of structures like ramps that can be removed with relative ease. However desirable this may be, the *Local Government Act* does not allow it.

Other personal characteristics might elicit less sympathy, from both neighbours and BOV members. A building height rule has been alleged in one case[7] to cause undue hardship to homeowners with a desire to have a larger family, giving rise to a need for additional bedrooms and thus a need for a variance of the height rule. The variance was ordered. In another case,[8] an owner who required a workshop for her hobby sought a variance of a zoning rule that was preventing the construction of the workshop at her preferred location.

Financial Hardship

A significant proportion of BOV applications are, in effect, applications for forgiveness rather than applications for permission: a building or structure has either inadvertently or intentionally been constructed in contravention of a regulation dealing with building siting, size or dimensions, and the owner or occupier is seeking a variance to legalize the contravention. In such cases, one solution would be for the applicant to alter the building to bring it into compliance. Depending on the extent of the construction, this could be costly, and the only type of hardship that the applicant can allege in an application to the BOV is the financial hardship associated with the cost of those alterations. In some of these situations, the applicant's financial hardship could equally be alleviated via a successful claim against their designer or contractor, who has either not complied with approved building plans or has undertaken construction without obtaining building plan approvals. There may be other cases, though, where the owner has specifically instructed that the building be placed in the non-complying location, or having been informed of a designer or contractor error, has given instructions for the construction to proceed on the assumption that the non-compliance will not be detected, or that a variance will be ordered if it is detected. In these types of cases the record of the BOV in previous applications can have significance to applicants. Following a consistent pattern of rejecting such applications may, in the long run, demonstrate to applicants and the construction sector that there may be only a remote chance of obtaining a variance order. Regularly approving such applications may, over time, lead applicants to expect approval and endorse a lower level of attention to detail as approved building plans are being implemented on building sites.

In relation to financial hardship, there is one case[9] in which the B.C. Supreme Court found as a matter of law that 'cost alone, when a building is already erected, is not undue hardship" within the meaning of what is now s. 540 of the *Local Government Act*. This was a case in which the proceedings before the BOV, resulting in the denial of a height variance for an accessory building, disclosed no evidence of hardship beyond the cost to the applicants of remedying the bylaw violation. In many, if not most, cases involving buildings that have already been constructed in contravention of the bylaw, it may be difficult for the applicant to identify *bona fide* hardship that could support a variance. Avoiding the cost of correcting the contravention will generally be the reason for the variance application, though there may be situations where a BOV application based on hardship could have been made prior to work being done, but was not.

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[7] *Bailey v. Corp. of Delta*, 1994 CanLII 478 (BCSC).

[8] *Surrey (City of) v. City of Surrey Board of Variance*, 1996 CanLII 2409 (BCSC).

[9] *Coulter v. Esquimalt (Township)*, 1989.

There are certain circumstances that most planners would agree constitute actual hardship, such as the presence of rock outcrops that the owner or occupier could simply remove in order to use the standard building envelope that have a dominant financial aspect, so it would probably be incorrect to say that a more costly building project can never constitute a hardship within the meaning of s. 540. However, in relation to buildings already constructed, the *Coulter* case suggests that one takes one's chances in proceeding without a building permit or constructing a building in contravention of the permit, in the expectation of sympathy from the BOV in the event that the contravention is detected.

PART 6: MINOR VARIANCE

Apart from the question of hardship, the requirement that a variance be "minor" is probably the most vexing aspect of the *Local Government Act*'s board of variance provisions for board members, applicants, and local government staff members who advise and support the BOV. It's an important question, because the effect of the wording of s. 542(1) is that the BOV has no jurisdiction to order a variance that is not "minor".

How Minor is "Minor"?

Board powers on application

542 (1) On an application under section 540, the board of variance may order that a minor variance be permitted from the requirements of the applicable bylaw, or that the applicant be exempted from section 531 (1) [*alteration or addition while non-conforming use continued*] …

The statutory history of s. 542 suggests that the adjective "minor" was added following the Supreme Court of Canada's decision in *Min-En Laboratories Ltd. v. North Vancouver (District) Board of Variance*,[10] in which the Court held that the BOV had jurisdiction to vary 20-foot side yard requirements on each side of a 50-foot industrial lot to enable the owner to construct a building that was 50 feet wide – apparently the second such variance that the BOV had ordered in the immediate neighbourhood. If it was the Legislature's intention to constrain boards of variance as regards the magnitude of variances that they were willing to order, by changing "variance" to "minor variance" in the enabling legislation, that intention has been frustrated by boards of variance themselves and by the superior courts that have consistently refused to set aside variance orders on the grounds that the variances ordered are not "minor".

Some case examples are useful to illustrate the point. In *Smithers (Town) v. Olsen*, [11] the issue was whether a minimum front yard setback variance from 7.5 m to 5.77 m, permitting the replacement and enlargement of a front porch on a residential dwelling, was within the jurisdiction of the BOV as "minor". The BOV had approved the application to allow Ms. Olsen to replace a deteriorated porch, which at 6.6 m from the front lot line pre-dated the adoption of the zoning regulation. The B.C. County Court quashed the variance order in the Town's application for judicial review of its own board's decision, holding that a variance of that magnitude (about 20% of the applicable setback requirement) was not "minor". The Court of Appeal disagreed, referring to Ontario jurisprudence on that province's longstanding "minor variance" regime. Citing in particular a 1977 Ontario Divisional Court decision, the B.C. Court of Appeal concluded that "whether a variance is in fact minor is a matter to be judged by the board in relation to all the surrounding circumstances and is not subject to any specific limit, even if it amounted to a complete elimination of a requirement of the by-law". The Smithers BOV order was reinstated. In a later case, a British Columbia court noted that what constituted a "minor" variance within the jurisdiction of the BOV had to take into account all of the regulations that apply to the development in question (for example, all of the property line setbacks that apply and not only the particular one that is being varied) and that the degree of variance that the board could order was the degree of variance that was

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[10] *Min-En Laboratories Ltd. v. Board of Variance of City of North Vancouver et al*., 1977 CanLII 172 (SCC)

[11] *Smithers v. Olsen*, 1985 CanLII 371 (BCCA).

required to relieve the hardship that had been demonstrated, and no more. These decisions leave the BOV with very broad discretion to determine, in any particular application, whether the variance that is being sought qualifies as "minor".

In this regard, it's instructive to consider the overall thrust of the jurisprudence from Ontario, where the "committee of adjustment" has jurisdiction to allow minor variances from zoning regulations including variances with respect to permitted uses and permitted density (but subject to further appeal to the Ontario Municipal Board).[12] The Ontario Municipal Board decisions largely equate the concept of "minor variance" to "any variance that does not create adverse impacts". This suggests that, in our jurisdiction, the question of whether a variance is "minor" may safely be conflated with the BOV's determination as to whether the variance would "defeat the intent of the bylaw", "result in appropriate development of the site", or "substantially affect the use and enjoyment of adjacent land". A proposed variance that doesn't pass those three tests would not, under the Ontario jurisprudence, be a minor variance. Thus, for example, while a 100% variance in the minimum side yard setbacks of two adjacent properties in B.C. to allow a dwelling to be constructed upon the property line, might affect no land other than the applicant's and thus might qualify as "minor", the same 100% variance in the minimum rear yard setback might reasonably be considered to affect the use and enjoyment of the land directly across the lane, such that it is not "minor". To continue the example, the percentage of rear yard variance that would not be "minor" is the percentage that begins to have a "substantial effect" on the use and enjoyment of the land across the lane.

When "Minor" is Addressed

There are two preliminary stages at which the question of whether proposed variances are "minor" can arise. In some municipalities and regional districts, there is an administrative or even a council or board policy that variances exceeding a certain percentage must be dealt with by development variance permit (DVP) because they are, by definition, not "minor". Sometimes this determination is made on an *ad hoc* basis depending on the judgment of the civic official who is dealing with the application. In other communities, the BOV has itself established a criterion that results in prospective applicants being told, on the basis of the magnitude of the variance they are seeking, that the board has no jurisdiction to deal with the application because the variance isn't "minor", and that they must therefore make an application for a DVP. Each approach is inappropriate. Where applications are being screened out by local government staff, whether pursuant to a council or board policy or case by case, the BOV is being deprived of an opportunity to make a decision as to whether the applicant's variance is minor – a decision that the courts have clearly indicated is the board's to make. In principle, there is no conceivable variance that a BOV could not properly determine to be "minor". Where the board is itself screening out applications from consideration on account of the magnitude of variance that is being sought, it is failing to exercise a discretion that the law requires it to exercise on a case-by-case basis. While the BOV may use

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[12] "The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained": Ontario *Planning Act*, s. 45(1). Ontario municipalities have recently been given authority to constrain this very broad power by establishing, by bylaw, criteria for minor variances, but few have done so.

certain "yardsticks" during its consideration of the question of "minor", the board must exhibit flexibility by applying its yardstick in the context of each particular case after actually hearing the applicant's hardship submissions.

"Minor" in the Context of Different Types of Bylaws

Section 540 permits the BOV to order a minor variance from the provisions of any of the following types of bylaws:

- *a bylaw respecting the siting, size or dimensions of a building or other structure, or the siting of a manufactured home in a manufactured home park;*
- *a subdivision servicing requirement under section 506 (1) (c) in an area zoned for agricultural or industrial use;*
- *a tree cutting bylaw under section 8 (3) (c) of the Community Charter, other than a bylaw that has an effect referred to in section 50 (2) 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.*

Determining whether a proposed variance is a "minor" variance appears on the surface to be a simpler task in the case of building siting, size and dimension regulations to the extent that the degree of variance can be quantified numerically. A 3 m variance to a 6 m setback rule, for example, is a 50% variance, and a 1 m variance to an 8 m height limit is a 12.5% variance. These types of variances have dominated board of variance agendas over the years. As just noted, however, the percentage of variance is not the end of the analysis; the magnitude of a variance is also related to the question of impact, and each type of bylaw that is within the jurisdiction of the BOV calls for a different type of analysis as to the impact of a requested variance. How does one determine, for example, whether an application to vary a water servicing requirement under s. 506(1)(c) in an area zoned for agricultural use is "minor"? The applicant might be applying to vary the bylaw by eliminating the water supply servicing requirement entirely (perhaps on the basis that their agricultural land has an adequate on-site supply of water for both domestic purposes and irrigation). Addressing the question of "minor" within the broader questions of whether the variance defeats the intent of the bylaw or results in inappropriate development of the site seems to make the analysis more manageable, to the extent that the relationship between servicing requirements and the intent of the bylaw can be readily grasped. Similarly, whether development of the site without connection to a community water system would be "inappropriate" can be addressed by the applicant and, if it wishes, the local government, at the BOV hearing.

As regards tree cutting bylaws under s. 8(3)(c) of the *Community Charter*, generally the effect of these bylaws is to prohibit the cutting of specific trees of historical or arboricultural significance; to restrict the cutting of specific classes of trees defined by species, size or both; and to restrict the cutting of trees of all types where the removal of the tree is not required for the development of land under the applicable zoning bylaw. In each scenario, what would constitute a "minor" variance of the bylaw is not entirely clear, and we have no case law to assist. Approaching these variances on the basis of the degree of variance that is required to alleviate the hardship that has been shown appears to have some potential, if the hardship is associated with the inability of the applicant to remove certain trees (such as those that would block sunlight access to a solar device that the applicant wishes to install on their roof). Note that in this particular context the authority to remove, say, five large trees might be considered an acceptable minor variance, whereas in relation to four trees in the municipality that have been designated as having historical or arboricultural significance, a variance order allowing even one of them to be re-

moved, regardless of the reason, might not be so easily characterized as “minor” given the requirement to adhere to the “intent of the bylaw”. It seems unlikely that these types of questions were deeply considered when boards of variance were given variance powers in relation to these types of bylaws, when municipalities were given jurisdiction to adopt them in the 1990s.

PART 7: BOARD PROCEDURES

Board of variance procedure is governed by the local government bylaw that establishes the board, and by some general administrative law principles that apply to all tribunals that perform a function of the type that the BOV performs. The contents of the board of variance bylaw are outside of the board's direct control, though the board can certainly make recommendations to the local government regarding amendments to the board of variance bylaw. The board can also establish its own procedures in matters that are not addressed in either the board of variance bylaw or the *Local Government Act*, but should ensure that those procedures accord with administrative law principles of procedural fairness.

Board of Variance Bylaw

The *Local Government Act* stipulates in s. 539 that the bylaw establishing a board of variance must "set out the procedures to be followed by the board of variance, including the manner in which appeals are to be brought and notices under section 541 or 543(2) are to be given". The term "appeals" in this provision can be interpreted as including applications based on hardship, as well as the appeals of building inspector determinations of damage that are provided for in s. 544. Some suggestions for what the bylaw should require in regard to application procedures and notices are indicated below.

Applicants

The *Local Government Act* authorizes "persons" to make applications to the board on the basis of hardship; in the case of land use contract termination bylaws the "owner" may make an application. Section 541 requires the BOV to notify all owners and tenants in occupation of the land that is the subject of the application, as well as adjacent land. This suggests that occupiers of land (tenants or lessees) are entitled to make applications to the BOV with or without the knowledge or consent of the owner of the land; there would be no need for the board to notify the owner if their consent to the application was required and obtained in the first place. This contrasts with the requirements for development variance permits, for which, according to s. 498 of the Act, only the landowner may apply.

Applications and Application Fees

Application procedures would typically include details as to the application form to be used, the information that must be provided on the form, and the person to whom the application should be submitted to initiate the application process. The information requirements that are identified in a board of variance bylaw should reflect the considerations that the board is required to address in dealing with the application, most notably the requirement (where this is applicable) that the applicant identify undue hardship. The application form should require a description of the applicant's hardship. The board is implicitly required, by s. 542(1)(c) of the Act, to form an opinion as to whether the requested variance would result in in appropriate development of the site, adversely affect the natural environment, substantially affect the use and enjoyment of adjacent land, vary permitted uses and densities under the inapplicable bylaw, or defeat the intent of the bylaw. With the exception of permitted uses and density, it would be good practice for a local government to invite the applicant, by means of appropriate spaces on the application form, to comment on each of these topics. This can assist the board in making sure that all applicable criteria have been addressed. Whether a variance would vary permitted uses and densities under the applicable bylaw is not a topic on which the opinions of the applicant would usually be helpful.

Variance applications cannot properly be evaluated, in relation to such criteria as appropriate development of the site and effect on the use and enjoyment of adjacent land, in the absence of plans of the proposed development for which the variance is required. Thus, an application for a bylaw variance or exemption from the prohibition on alterations to a building with a lawful non-conforming use should include plans of proposed building or building alterations in sufficient detail to allow the board to evaluate the impact of the variance or exemption. Applicants should be made aware that the board's approval, if it is given, may refer specifically to the plans that have been included in the application. For particular types of applications, applicants can be encouraged or even required to provide third-party reports such as geotechnical engineering or environmental impact studies to assist the board in addressing these approval criteria.

In relation to information elicited by an application form that is "personal information" under the *Freedom of Information and Protection of Privacy Act*, that Act requires the local government to include on the application form a notice stating the purpose for which and the legal authority under which the information is being collected and identify a local government staff member from whom information about the collection of the information can be obtained. This requirement does not have to be addressed in the board of variance bylaw, but should be shown on any application form that is prescribed by such a bylaw or by a local government official who is authorized to create a form for board of variance applications. In this context, personal information would include the contact information of the applicant and the residential address of the applicant, if it is not the address to which the application pertains.

The authority for application fees for board of variance matters is contained in the general planning and development fees power in s. 462 of the *Local Government Act*. These fees are usually set out in the same bylaw that establishes fees for rezoning and permit applications, though they could be in the board of variance bylaw instead. There is a general rule in s. 462 that a fee cannot exceed the estimated average costs of processing, inspection, advertising and administration usually related to the type of application to which the fee relates. The purpose of this kind of rule is to prevent the local government from using the fee as a source of general revenue, and not to limit the local government to the recovery of actual costs on each particular application. In other words, the legislation accepts that some applications are more complex than others, and allows some cross-subsidization of applicants.

It was noted in Part 1 of the Guide that local government staff handing BOV applications should not be screening them on the basis that the requested variance is not "minor" or that the applicant is not alleging an eligible type of undue hardship, these being matters for the board itself to decide. There may be circumstances, such as those involving an alteration to a building that contains a lawful non-conforming use, where there is a *bona fide* issue of jurisdiction – in this example, whether the alteration is "structural" in nature. In those circumstances, local government staff would be acting appropriately if they simply brought this aspect of the matter to the board's attention at the hearing, or discussed with the chair before the hearing whether the board ought to obtain legal or other advice to assist with its decision on whether it has jurisdiction to consider the application.

Notification of Hearing

The board of variance bylaw must set out "the manner in which … notices … are to be given". The persons to whom notices are to be given in relation to applications under s. 540 and 543 are identified in the *Local Government Act*. These are "all owners and tenants in occupation of the land that is the sub-

ject of the application, and the land that is adjacent to" that land. The "manner" in which notices are to be given refers to the method of notice: personal service, registered mail, ordinary mail, delivery of a handbill or flyer by the local government, or some other method. Notices are not required in relation to appeals of building inspector determinations of damage made under s. 544.

The contents of the notice are prescribed in ss. 541(2) and 543(3): it must state the subject matter of the application and the time and place where the application will be heard. It's prudent for a board of variance to establish a standard form of notice that has been reviewed by the local government's legal counsel, and to use the standard form consistently. The subject matter of the application would include the civic address or other identifier of the property to which the variance would apply, and either the regulation that the applicant is seeking to vary or a description of the building addition or alteration that the applicant wishes to make in the case of an application under s. 531. Including copies of drawings illustrating the proposed development and the requested variance is a good practice. A notice in relation to a land use contract termination bylaw should identify the property that is the subject of the land use contract, the bylaw that is terminating the contract, and period of time beyond the time specified in the bylaw during which the applicant is requesting that the contract continue in force.

The main difficulties that can arise under the statutory notice provisions are how to properly identify the persons (owners and tenants) who are entitled to be notified, and what land is "adjacent to" the land that is the subject of the application. The term "owner" is defined in the Schedule to the *Community Charter*, which applies to the interpretation of terms in the *Local Government Act* ,as well to include the registered owner of an estate in fee simple, the tenant for life under a registered life estate, the registered holder of the last registered agreement for sale, or the holder or occupier of Crown or municipal land. All of these persons can usually be identified by consulting the assessment roll, or a title search. Tenants in occupation of premises that are the subject of or adjacent to the subject of an application are more difficult to identify by name, but they can be given notice by means of an unaddressed document delivered to the premises, or a mailed document addressed to "occupier".

The meaning of the term "adjacent" is somewhat elusive. It has a broader meaning than the term "adjoining", so while it certainly includes any land that shares a boundary with the parcel that is the subject of the application, it probably includes land that is separated from that parcel by a street, lane, minor watercourse, utility right of way, or similar intervening feature. It might also include land that is separated from that parcel by one or more vacant parcels, perhaps depending on the size of the intervening parcels. An important element that would be addressed in any dispute as to whether land is "adjacent" for the purposes of this notification requirement would be whether the variance could reasonably be expected to have an effect on the use or enjoyment of the property in question. Erring on the side of caution by providing an additional notice in doubtful cases will usually involve only minor cost, which is worth incurring to avoid a legal challenge based on lack of notice.

In an attempt to shield BOV decisions from legal challenges based on technical flaws in the notification process, the Legislature has provided in ss. 541 and 543 that the notice requirements are satisfied if the BOV made a "reasonable effort" to mail or otherwise deliver the notice. What constitutes a "reasonable effort" is not specified, so it will depend entirely on the circumstances of the case. There is an indirectly relevant 1997 decision of the Supreme Court[13] dealing with a similar provision related to notification for

[13] *Armstrong v. Langley (Township)*, [1997] CanLII 1758.

a public hearing on a zoning amendment bylaw, which indicates that the circumstances of the case will include whether the person who is complaining about not receiving a notice was actually aware of the hearing. In that case they had attended the hearing, and their complaint was therefore rather artificial. The case also establishes that:

- the fact that particular individuals did not actually receive a notice that was mailed is not determinative of whether a reasonable effort was made to mail it, and
- the fact that a notice was not mailed at all does not necessarily mean that a reasonable effort was not made to do so.

The latter conclusion was reached on the basis of the local government's evidence of a standard procedure for identifying the recipients of notices, which had been followed in the application in question.[14]

Site Visits

Most boards of variance make it a practice to arrange a visit to sites that are the subject of upcoming applications, to allow members to get a sense of the potential impacts of the variance or exemption that is being sought. In that regard, the board may require the applicant to mark the site to indicate the proposed location of buildings and other features of the proposed development. Site visits are not addressed in the *Local Government Act* but courts have in several cases acknowledged that such visits occur, without adverse comment despite the procedural complications that such visits can produce. Judges are familiar with the practice of "taking a view" of a location that is the subject of litigation, where the physical arrangement of buildings, geographical features and so forth is relevant to the dispute that is being resolved, but they never take a view in the absence of representatives of the parties, who must be in attendance so that they will be able to address, in argument, anything that the judge has seen on the site.

The principal problem with site visits is the personal contact that might occur on such occasions between BOV members and the applicant, or between board members and neighbours who might be opposed to the application. Any such contact is, on its face, a potential violation of the common law rule that a tribunal should not hear from one of the parties about whose interests it will be adjudicating in the absence of the other party. Judicial comment on these situations suggests that BOV members should be careful not to allow themselves to be lobbied on these occasions, though there is no harm in allowing the applicant to show them around the site. It's preferable for BOV members to conduct these visits together rather than separately, so that all of the members are operating on the same information base, though members should refrain from discussing the merits of applications either at the site or *en route*.

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[14] The procedure was described as follows: "Pursuant to the Procedures Bylaw, the Planning Technician … identified which of the neighbouring parcels of land ought to receive notice by placing a check mark against such properties on a map of the area. [The Planning Technician] then gave that map to a clerk … who used it to compile the list of persons to be notified and their respective addresses and who attended to the mailing of the notices. … Using a computer program which contains a map of the Township, [the clerk] selected, on the computer, those properties which [the Planning Technician] had made a check mark against. After each selection, she placed a second check mark on the map to indicate that the property was going to have an address label generated. The computer program automatically generated the corresponding list of addresses and names of owners or occupiers on that property along with mailing labels."

BOV members making individual site visits are more likely to be the subject of lobbying by the applicant or other interested parties.

Hearings

A board of variance has jurisdiction to order variances or exemptions from s. 531(1) of the *Local Government Act* only if the board "has heard the applicant and any person notified under section 541". This statutory requirement for a hearing is not accompanied by any detail as to where and when the hearing is to occur or how it must be conducted, leaving all of these matters to be addressed either in the local government's board of variance bylaw or by the BOV itself. The absence of detail on the conduct of the hearing has allowed boards to develop relatively informal procedures, which have generally been supported by the courts when procedure has been called into question. For example, evidence on such matters as hardship is not taken under oath, and verbatim transcripts of proceedings are not generally prepared. However, courts are very much alive to the potentially prejudicial effect of procedural errors on the outcome of hearings, and will require a BOV to repeat a hearing if there has been a breach of procedural fairness principles. These include the right of the applicant to be heard by an impartial tribunal, and their right to examine and make representations on information provided to the tribunal by parties who are adverse in interest to the applicant, at a hearing in which all parties are given a full opportunity to be heard.

Information about the application

In addition to the information provided by the applicant, boards of variance may be given information regarding the application by local government staff. This could include information on the matters mentioned in s. 542(1)(c) and 542(2) of the *Local Government Act* (limitations on the board's jurisdiction that would require the board to reject the application) or general information about the regulation that the applicant seeks to vary or the area in which the applicant's site is located. Local government staff may provide information on whether construction has already occurred in violation of the bylaw and whether a stop-work order has been issued. In some jurisdictions, planning staff may provide comments on whether the local government would have any objection to a variance being ordered, either as requested by the applicant or with some modification that would more clearly meet the intent of the bylaw. All such information should be made available to the applicant as well prior to the hearing.

In the pre-hearing period, some boards of variance make it a practice to permit notified persons to examine building plans that are submitted with an application made under s. 540, which are often the same plans that the applicant is using to obtain a building permit. These are "records" of the board of variance under the *Freedom of Information and Protection of Privacy Act*, to which members of the public are entitled to access under that Act, and it is likely that the right of notified persons to be heard by the BOV includes, according to procedural fairness principles, a right to examine (before the hearing) building plans related to the application in respect of which they have a right to be heard, as well as the application itself and relevant material provided to the BOV by local government staff. By the same token, the applicant is entitled to examine any written submissions that the board has received from third parties such as neighbours prior to the hearing, so that they can address these submissions at the hearing if they wish to do so. Third parties should therefore be made aware that the applicant as well as other interested parties will have access to any such submissions.

Open hearings

The board of variance is, according to s. 93(d) of the *Community Charter*, subject to the "open meeting" rule in s. 90. There is no authority for the BOV members to deal with any aspect of an application in the absence of the applicant and other persons who have been notified. It would also be a breach of procedural fairness principles for BOV members to engage with local government staff in any conversation or debate about the merits of an individual application, other than at the hearing itself. The board is entitled to hold a closed meeting to receive legal advice, which might include advice on whether the board has jurisdiction to deal with an application or whether there has been a procedural error in the handling of an application.

Conflicts of interest

At common law, a right to a hearing includes a right to be heard by an impartial decision-maker. This means that BOV members should withdraw from participation in the hearing of any application in which they have a personal interest. That would include any financial interest such as owning a nearby property whose value could be affected by the construction of the building that is the subject of the application, or a non-financial interest such as a family or other close social relationship with the applicant or a neighbour who has been notified. It is preferable for the board member to leave the room in which the hearing is occurring, rather than merely abstaining from the vote, since their mere presence in the room could arguably affect the votes of other members of the board. While there is no statutory rule (as there is in the case of municipal councilors and regional board directors) requiring board members to state the nature of their conflict of interest before withdrawing, it seems reasonable that they would do so, at least in general terms (for example, "I have a business relationship with the applicant").

Management of the hearing

A logical sequence for the conduct of a hearing on an application under s. 540 is for the board to hear first from the applicant, then from notified persons and other members of the public, and finally from the local government's representative if the local government is taking a position on the application. In calling on the applicant to make their representations in relation to an application under s. 540, it is a good practice for the chair to remind the applicant that they must address the question of undue hardship. In addition to calling on persons who have been notified to make their submissions, the chair should allow other interested persons in attendance at the hearing to address the board. Finally, it may be that the local government wishes to take a position either for or against an application. The local government is not necessarily adverse in interest to the applicant on every variance application; this Guide points out that the BOV is a part of the land use management machinery in Part 14 of the *Local Government Act* and the local government is entitled to rely on BOV decisions to avoid the creation of undue hardship by general zoning regulations that cannot possibly anticipate their effect on every parcel of land. Thus the local government may be wholly supportive of some applications, and is entitled to make any such views known to the board. Equally the local government may consider that a variance ought not to be approved, however, and it is similarly entitled to put its position forward, including any position it has as to whether the variance would "defeat the intent of the bylaw".

Board of variance members should take care to treat all persons making submissions in an even-handed way, despite any tendency there might be to show greater familiarity with people like staff planners from whom the board hears quite regularly, than with applicants who are making a once-in-a-lifetime appearance before the board. Board members are entitled to question all parties with respect to mat-

ters arising from their submissions or those of other interested parties, and should do so politely even though they may be unconvinced by the answers they are getting.

A board of variance hearing, like a meeting of a municipal council or regional board, is an occasion of qualified privilege for the purposes of the law of defamation. Qualified privilege permits the making of statements that might be defamatory (libelous or slanderous) in other settings, but only if they are made without malice. Thus, for example, an applicant might be entitled to state to the board that a neighbour who speaks against the application is a chronic and habitual complainer regarding change in the neighbourhood, without fear of being sued for defamation (assuming for the sake of the example that such a statement is actually defamatory). Board chairs should therefore be cautious about ruling these kinds of statements to be out of order, as long as they are otherwise relevant to the board's consideration of an application and are made in a civil manner.

Adjournments

Applicants or notified persons will occasionally request an adjournment of a hearing because of an event that has interfered with their preparation for the hearing or to address an unanticipated question that has arisen at the hearing. In administrative tribunal practice, there is a general assumption that an applicant is entitled to an adjournment if they have a good reason for requesting it, while other parties (such as persons notified of a BOV application) are given less consideration in that regard and an applicant is not entitled to multiple adjournments. BOV members should be aware that particular parties may have an interest in delaying a board decision on an application and be alive to the possibility of tactical or strategic adjournment requests. The board should remain in control of its own hearing agenda, and strive to render decisions in a timely way for the benefit of both applicants and notified persons.

A brief adjournment can be useful to enable an applicant to consider whether to modify their application in light of submissions that the board has received, so as to have a better chance of approval. For example, if there is neighbour opposition to a siting variance based on privacy issues and board members have indicated in debate that the variance might be approvable with minor building redesign such as the removal or relocation of a window, the chair might ask the applicant (during the hearing) whether they wish to have a brief adjournment to confer with their building designer or their client. The Board might then approve a revised proposal and the building officials would ensure that the plans referenced in the building permit, when it is issued, include the change to which the applicant has agreed. This procedure should not be used if the revised proposal involves new variances for which new notifications would be required.

Making the decision

According to s. 18 of the *Interpretation Act*, a majority vote of the BOV is required to order a variance or exemption or approve another type of application: at least two members in the case of a BOV comprised of three members, and at least three if the BOV has five members. A vacancy on the board does not affect the number of votes that is required. Except for a member of the board who has withdrawn from hearing an application on account of a conflict of interest, an applicant is entitled to have each member vote on their application. Board members (including the chair) cannot "abstain" from voting. A typical practice is for the chair to call on each member of the board to state their position in favour of or against each application after the applicant and persons notified have all been heard and any board debate on the application has concluded, and to then add their own statement before declaring the application to have been either approved or not approved. The composition of the BOV (three or five mem-

bers) is designed to avoid tie votes. If a member is absent, a tie vote becomes possible, and a tie vote on a motion to approve an application defeats the motion, with the result that the application is denied.

Reasons for decision

Administrative tribunals are, increasingly, expected to give reasons for their decision as part of their duty to provide procedural fairness. In the context of applications to a BOV to vary regulations such as those dealing with building height or siting, or for an exemption from s. 531, this expectation can seem odd and difficult to meet in that the reason will usually be the same: the applicant's failure to show sufficient hardship to warrant the variance that they are seeking. The onus is on the applicant in a BOV application to give a reason that they should not have to comply with the bylaw or the statute, and not on the board of variance to give a reason that they should.

There is the further complication that individual members of the BOV may have different reasons for rejecting an application, and the BOV as a body therefore cannot articulate a reason for its decision. For example, one member may consider that the variance would defeat the intent of the bylaw even though the applicant has demonstrated undue hardship, while another may not have been convinced by the applicant's hardship argument. Under the current state of the law, the best practice is likely to have the minutes of the board meeting record briefly the statements that each board member makes as they indicate whether they are in favour of or against the application. The applicant can then be referred to the minutes if they request that they be given reasons for the board's decision.

Reconsideration of decisions

Once it has decided an application, the BOV is, in administrative law terms, *functus officio* in relation to the application; it cannot reconsider its decision or re-hear the application. This rule relieves the board and affected neighbours from having to deal with repetitive applications. It also discourages the practice of re-submitting an application after new members of the tribunal have been appointed, in hopes of a better result. The *functus officio* rule also means that applicants cannot be allowed to make additional applications to the board of variance, as the design for their project evolves, once the board has approved a variance.[15]

The rule against repetitive applications is, it seems, relatively easy to get around by making minor changes in the application. For example, a rejected application for a side yard setback variance can be re-submitted with the removal of windows in the building elevation facing the varied side yard, if privacy concerns have motivated board members to vote against the variance. This would constitute a new application, rather than a reconsideration of the same application. In some jurisdictions, the board allows this process to be avoided through the alteration of the variance application in the course of the hearing, as described earlier under "Adjournments".

Variance and Exemption Orders

Because board of variance orders and s. 531 exemptions are not recorded in the Land Title Office, the board's own record of decisions is the main source of information on the development regulations that apply to properties for which variances or exemptions have been approved. Section 539(4) of the *Local*

[15] *Bailey v. Corp. of Delta*, 1994 CanLII 478 (BCSC)

Government Act requires a board of variance to "maintain a record of all its decisions" and "ensure that the record is available for public inspection during regular office hours". Obviously the record should include, in the case of a bylaw variance and in addition to the basic property information (legal description and civic address), a specific reference to the bylaw provision that is being varied and the description of the development that is being authorized despite its non-compliance with the bylaw. The description of the development should also be included in any order for an exemption from s. 531. The scope of any variances of subdivision servicing bylaws and tree cutting bylaws, and any orders respecting the effective date of land use contract termination bylaws, should similarly be described very clearly in the public record.

Section 542(3) of the *Local Government Act* contemplates that the BOV may do either or both of the following:

- *Set a time within which construction must be completed;*
- *Set a time period that is either longer than or shorter than the 2-year period mentioned in the Act, by which construction must substantially start.*

The Act goes on to say that the BOV's permission or exemption terminates and the bylaw or s. 531 applies if time limits set by the BOV are not complied with, and if the BOV has not set a time period by which construction must start, the permission or exemption terminates if the construction does not start within 2 years of the date of the board's order.[16] Setting a time limit for construction to be completed, with the result that the board's permission or the s. 531 exemption "terminates" if construction is not so competed, seems pointless in relation to projects that are underway when the time runs out. Certainly the legal status of any construction that has occurred by that point and that does not comply with the bylaw or s. 531 would be unclear, as would the board's jurisdiction to consider a further variance application to enable the applicant to complete the project. For these reasons, conditions related to the completion of construction seem unwise.

Conditions related to the "substantial start" of construction are desirable (except in relation to projects that have already been completed) for at least two reasons. Applicants may have no genuine intention of constructing a building but may merely wish to enhance the selling price of their property by securing a variance that increases its development potential; a time limit for starting construction, failing which the variance terminates, discourages that practice. Further, BOV notifications and hearings are carried out in relation to a particular set of neighbours who are given an opportunity to be heard regarding the variance, and the perceived validity of these procedures will diminish once a variance is authorized if the composition of the neighbourhood has significantly changed by the time the construction is actually undertaken. It is relatively easy for the local government to police a "start of construction" deadline in a BOV order or the default 2-year rule in s. 542 by simply refusing to issue a building permit for a non-compliant building after the relevant time has elapsed. More difficulty is involved in determining, after the building permit has been issued, whether construction has "substantially started". This term is not defined in the legislation, though it is used in s. 504 in relation to development permits as well. In either context, a "substantial start" likely requires more than trivial site alterations preliminary to construction,

[16] In most jurisdictions, a building permit issued promptly after the BOV orders a variance would also expire within this same time period; this is governed by the local building bylaw.

such as the construction of footings for a building rather than mere site clearing and minor excavation or the letting of a contract for the construction of the building. The enforcement of the time limit for the start of construction is the responsibility of the local government, whose bylaw again fully applies once the board's permission terminates, and not that of the BOV.

The Act in s. 542 speaks of the board's order setting a time limit. This suggests that a variance that includes a time limit be expressed as a single order, for example, "that section AA of City of BB Zoning Bylaw No. CC be varied to permit a minimum 3.6 m front yard setback for the building depicted in the plans prepared by DD and dated EE, and that construction be substantially started within one year of the date of this order".

The authority of the BOV to impose other types of conditions, such as a period during which a variance is valid and after which the building will have to be brought into compliance with the bylaw is doubtful, however useful such authority might seem in cases such as those dealing with ramps and similar alterations related to physical disabilities.

Record of Decisions

The BOV must "maintain a record of all its decisions and must ensure that the record is available for public inspection during normal business hours". The importance of this record is highlighted by the fact that there is no record of variances ordered by the BOV in the Land Title Office, while variances granted by development variance permit, development permit or heritage alteration permit are the subject of Land Title Office notices registered on title to the benefiting property. The form this record takes is not prescribed by the Province so it may be prescribed locally. Some boards have developed a standard "record of decision" that sets out the relevant information about the application, indicates the variance that has been ordered and bears the signature of the chair of the BOV or, in some cases, all members or all members who voted in favour of the variance. Another way of recording the board's decisions is the keeping of minutes of the hearing. This type of record has the potential to satisfy any requirement that might arise after the hearing, that the BOV give reasons for its decision, if the minutes contain information on the undue hardship that the applicant alleges and indicate whether the board was persuaded that the hardship exists.

It's a good administrative practice for local governments to note BOV decisions in their property data base, which is usually organized by civic address or legal description. This alerts staff processing permit applications to the fact that a variance has been ordered, and assists staff who respond to inquiries from the public about the development standards that apply to particular parcels of land.

PART 8: JUDICIAL REVIEW AND APPEAL OF BOARD DECISIONS

It was noted in Part 2 of this Guide that boards of variance are independent tribunals established under Part 14 of the *Local Government Act* as part of the land use management machinery of local governments. The activities of independent statutory tribunals are supervised by the superior courts, in this province via the procedures set out in the *Judicial Review Procedure Act*. When a local government or its citizens is dissatisfied with a board of variance decision, they have a right to apply to the B.C. Supreme Court for judicial review of the decision. The obligations of the local government to "provide in its annual budget for the necessary funds to pay for the costs of the board of variance" would include the costs involved in defending board of variance decisions in judicial reviews and appeals, including judicial reviews and appeals initiated by the local government itself.

The Supreme Court's jurisdiction on such a review is, however, very limited. The most important limitations are those contained in ss. 542(4) and 543(8) of the *Local Government Act*, which state that a BOV decision is "final".

Board powers on application

542 (4) A decision of the board of variance under subsection (1) is final.

Exemption to relieve hardship from early termination of land use contract

543 (8) A decision of the board of variance under subsection (5) is final.

These are, in administrative law terms, "privative clauses", and their effect is to bar the Supreme Court from reviewing BOV decisions on their merits. Simply put, the Supreme Court has no jurisdiction to overrule a BOV decision because it is alleged to be "wrong". Privative clauses are included in legislation establishing administrative tribunals to establish that the tribunal is being given jurisdiction over the matters that are within its purview on the basis of some type of expertise or specialized knowledge that a typical superior court judge is not likely to possess. Accordingly, such judges will not be allowed to substitute their own view of how a particular application ought to have been decided by the board of variance, for the board's own view. This requires the party seeking judicial review of the decision to focus their court application on matters other than whether the BOV made a "correct" decision in the matter: whether the BOV had jurisdiction to make the order it did, or whether the BOV followed a proper procedure in dealing with the application as it did. A further aspect of judicial review, the question of "reasonableness" of BOV decisions, will be addressed at the end of this part.

The single aspect of BOV jurisdiction that is not shielded from substantive judicial review by a privative clause is in s. 544: the jurisdiction to set aside a building inspector's determination of the extent of damage to a building with a lawful non-conforming use, and substitute the board's own determination. In these cases, the applicant to the board or the local government may "appeal" the BOV decision to the B.C. Supreme Court on the grounds that the board's decision is simply incorrect, and the court may substitute its own determination for the board's determination.

Such an appeal is an "appeal on the record", and not a fresh hearing of the application that was made to the board of variance. What this means, in practice, is that the court will examine the evidence that was placed before the board of variance on the extent of damage, decide whether the board's decision was supported by the evidence, and if not, make its own determination of the extent of damage based on that same evidence. The court will not admit fresh evidence on the extent of damage that was not available to the building inspector in the first instance. This type of appeal to the BOV is relatively rare, and further appeals to the B.C. Supreme Court even more rare. One reported case of this type from 1995 is referenced at the end of the Guide (Case #17).

Extent of damage to non-conforming use property

544 (3) The applicant or the local government may appeal a decision of the board of variance under subsection (2) to the Supreme Court.

Judicial Review for Jurisdictional Error

A key purpose of judicial review of administrative tribunal decisions is to ensure that the tribunal stays within the jurisdiction it has been given by the relevant statute, in this case the BOV provisions of the *Local Government Act*. These tribunals perform important governmental functions but, like governments themselves, will sometimes stray into making decisions that are not theirs to make. In that regard, the following observations of the B.C. Court of Appeal in a BOV case[17] merit direct quotation:

> *… the Board of Variance is a statutory tribunal created for the purposes of the Municipal Act, and as an inferior tribunal, its jurisdiction to do anything must be found in the statute which gives it the right to hear appeals from the officers of the Municipality. Nothing is to be presumed to be within the jurisdiction of an inferior tribunal. The jurisdiction must be found on a fair interpretation of the statute, either expressly or impliedly given for the purpose of performing functions bestowed upon it by the legislature.*

Deciding whether an application falls within the jurisdiction of the BOV can be a difficult legal question, on which the board or its legal counsel may conceivably err, and our system of government does not allow such an error to go uncorrected. Correction is accomplished by way of judicial review. Because the effect of BOV decisions is, generally, to permit building construction that, without a BOV order, would contravene the local zoning bylaw, it is frequently the local government itself that will analyze carefully whether a particular variance order or exemption falls within the jurisdiction of the BOV, and accordingly whether it can apply for judicial review of the BOV decision on jurisdictional grounds. Affected neighbours will also sometimes initiate applications for judicial review.

The standard of review that applies where a decision is alleged to be outside the jurisdiction of the board of variance is a "correctness" standard, not the "unreasonableness" standard discussed at the end of this Part of the Guide. The interpretation of the legislation that confers jurisdiction on the BOV is not a matter on which a reviewing court will defer to the judgment of the BOV; the interpretation must be legally correct.

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[17] *Burnaby (Municipality) v. Burnaby Board of Variance,* 1980 CanLII 378 (BCCA) at paragraph 22.

Basic aspects of BOV jurisdiction

The substantive core of BOV jurisdiction is set out in s. 540(a) through (d) of the *Local Government Act*, which for convenience is set out again:

> **a) a bylaw respecting**
> **i. the siting, size or dimensions of a building or other structure, or**
> **ii. the siting of a manufactured home in a manufactured home park;**
> **b) a subdivision servicing requirement under section 506 (1) (c) [*provision of water, sewer and other systems*] in an area zoned for agricultural or industrial use;**
> **c) the prohibition of a structural alteration or addition under section 531 (1) [*restrictions on alteration or addition while non-conforming use continued*];**
> **d) 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.**

Many if not most of the words used in these sections of the *Local Government Act* can give rise to a jurisdictional issue, as follows:

a) Is the rule that the applicant wants to vary in a bylaw? Is it a siting, size or dimensions rule? Is the thing that they want to construct a building or structure? Is the thing they want to site a manufactured home, and if so would it be sited in a manufactured home park?

b) Is the requirement that is said to create undue hardship a subdivision servicing requirement under s. 506(1)(c)? Is it in an area zoned for agricultural or industrial use?

c) Is the subject of the application for exemption from s. 531(1) a structural alteration or an addition? Is the building in use for a lawful non-conforming use?

d) Is the bylaw that is said to create undue hardship a bylaw under s. 8(3)(c) of the *Community Charter*? Does the bylaw prevent permitted uses and densities on the applicant's land, and if so has the council taken action to compensate or mitigate the hardship?

A "no" answer to any of these questions except the last one would indicate that the BOV has no jurisdiction to hear the application or make the variance order requested. Probably the clearest example of a jurisdictional error in British Columbia BOV cases[18] was decided when what is now s. 540(c) of the *Local Government Act* permitted the BOV to exempt structural alterations to buildings containing lawful non-conforming uses, but not building additions, and the Burnaby board had exempted a 222 square meter addition to an industrial building. The Court of Appeal ultimately held that what the BOV had approved was not an "alteration" of the building under the legislation then in place, but an addition to it, and that the board had therefore exceeded its jurisdiction in allowing the exemption. (The legislation was subsequently amended to give the BOV jurisdiction with respect to building additions as well as structural al-

[18] *Burnaby (Municipality) v. Burnaby Board of Variance,* 1980 CanLII 378 (BCCA).

terations, for buildings containing non-conforming uses.) Another interesting Burnaby decision also dealt with an issue of jurisdiction: whether the BOV could authorize a "further contravention of the by-law" as now described in s. 529(2)(a) of the *Local Government Act*.[19] This is the part of the legislation that deals with alterations to buildings that are lawfully non-conforming as to siting. The BOV had ordered a variance in the setback regulations for an existing dwelling to permit an increase in the height of the building within the setback area, and a neighbour challenged the validity of the order on the grounds that the *Local Government Act* did not give the BOV jurisdiction in such matters, as it did with respect to alterations to buildings containing non-conforming uses (the precise situation that the earlier Burnaby case had dealt with). The B.C. Supreme Court disagreed and upheld the variance order, holding that the basic conferral of jurisdiction to vary siting rules covered situations of non-conforming siting, and no express grant of jurisdiction was necessary in relation to this class of buildings.

The question of when and how to address jurisdictional issues at the stage when an application to the BOV is being made is a difficult one to address, because the individuals who are typically assigned responsibility to accept BOV applications are usually local government employees in a planning or development services group that administers and enforces the very bylaw that is the subject of the application. Such individuals may have strong views as to what types of applications the BOV should and should not approve, giving them a potential conflict of interest if they are responsible for determining whether applications are within the board's jurisdiction. Having said that, it should be noted that such staff members often suggest BOV applications, in their attempts to assist applicants (property owners, occupiers and developers) on whom the strict application of the bylaw that the staff are administering is causing particular hardship. Staff members performing this role should be carefully trained and supervised to ensure that matters of jurisdiction are being objectively addressed, and the BOV should always have access to independent legal advice as to whether particular applications are within their jurisdiction.

Minor variance and undue hardship

The jurisdiction of the board of variance is to order minor variances on the basis of undue hardship. These key aspects of jurisdiction have each been addressed in their own parts of the Guide; there is no jurisdiction to order a variance that is not "minor", or to order a variance in the absence of a finding of undue hardship.

As regards the extent of variance that may be ordered, since the "minor" criterion was added to the enabling legislation in 1977, attempts to quash BOV orders on the grounds that the variances ordered are not minor have consistently failed. The first of these involved the variance of a 7.5 m minimum front lot line setback to 5.77 m to permit the construction of a front porch.[20] The B.C. Court of Appeal referred to Ontario jurisprudence dealing with the interpretation of "minor variance" in that province, in which one court had observed that the full elimination of a side or rear yard setback would not necessarily mean that the variance is not minor and therefore beyond the jurisdiction of the committee of adjustment (the Ontario equivalent of the BOV). Our Court of Appeal concluded that the question of whether a variance is minor "is one which must be decided in relation to all the surrounding circumstances. There is no basis in law for the conclusion of [the judge who had initially set aside the variance order] that a setback variance of over 20% 'is not a minor variance'. In some sets of circumstances, a variance in excess of that

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[19] *O'Connell v. Burnaby (Corporation of the District),* 1990 CanLII 876 (BCSC).

[20] *Smithers v. Olsen,* 1985 CanLII 371 (BCCA).

will be minor and, in others, a variance of a smaller percentage will not be minor." In a subsequent case,[21] the Court of Appeal observed that the purpose of applications to the BOV is to relieve undue hardship, and a minor variance "should be no more than what is required for this purpose", essentially reading the term "minor" out of the legislation.

As regards hardship, in 1990 the B.C. Supreme Court set aside a variance order allowing a 15-foot building height variance on the grounds that the BOV had not made a finding of undue hardship before making its order.[22] Such a finding of fact was "fundamental to the exercise of its jurisdiction", but the minutes of the hearing did not disclose any evidence of undue hardship being brought forward by the applicants, and the Court was not willing to allow the chair of the board to file an affidavit to supplement the information contained in the minutes, as he attempted to do in the judicial review application.[23] Five years later, a local government similarly attacked the BOV decision on the grounds that there was, in the board's minutes, no evidence of a finding of undue hardship and that its order was therefore made without jurisdiction. This time the attack failed, the B.C. Supreme Court holding that there was "ample evidence of undue hardship before the Board" and that "the absence of an express statement to that effect in the minutes of the Board meeting is not fatal to its decision". Nonetheless, it's a good practice for the BOV to indicate in its order the nature of the undue hardship on which the order is based.

Statutory limits on BOV jurisdiction – s. 542(2) of the Local Government Act

Section 542(2) of the *Local Government Act* describes five types of situations in which the BOV may not make an order that would otherwise be within its jurisdiction; these situations are addressed in detail in Part 4 of the Guide. Generally speaking, they are situations in which the municipal council or regional board has already identified site-specific development parameters for a site. They include the following:

- the BOV order would be in conflict with a covenant granted to the local government under s. 219 of the *Land Title Act*;
- the BOV order would deal with a matter that is covered in a development permit, development variance permit, temporary use permit or land use contract;
- the BOV order would deal with a matter that is covered by a phased development agreement;
- the BOV order would deal with a flood construction level or setback enacted by the local government in a floodproofing bylaw; or
- the BOV order would apply to a property that is subject to certain heritage protection measures under Part 15 of the *Local Government Act.*

Note the variability of the wording in these references – "deal with a matter that is covered" by something is more specific than "apply to a property that is subject to" something, in that the former requires an examination of the permit, contract or agreement while the latter requires only an identification of any heritage status of the property that is the subject of the application. Identifying a "conflict" between a proposed variance and a covenant could be a difficult exercise requiring legal analysis, including the

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[21] *Metchosin (District of) v. Metchosin Board of Variance,* 1993 CanLII 2882 (BCCA).

[22] *Moore v. Lions Bay (Village)* (1990).

[23] *Surrey (City of) v. City of Surrey Board of Variance,* 1996 CanLII 2409 (BCSC).

interpretation of the covenant, many of which (especially older ones) are not well-drafted or easy to understand. As noted elsewhere in the Guide, the administration of BOV applications should involve a checklist that ensures that each of these potential barriers to jurisdiction is considered. Failure to subject applications to such a filter could lead to jurisdictional error on the part of the board.

Judicial Review for Breach of Procedural Fairness

Probably the most promising basis for seeking judicial review of a BOV decision, from the point of view of applicants and affected neighbours, is the requirement that the board's decision-making procedures be fair. Courts attach a great deal of importance to procedural fairness in the operation of administrative tribunals of all kinds, and are particularly diligent in enforcing the rules about procedural fairness in matters affecting owners' rights to use their land. The *Local Government Act* contains only brief rules regarding BOV procedure, leaving the details up to the local government's board of variance bylaw and the common law.

> **Procedural Fairness**
>
> A group of principles intended to ensure that citizens who are subject to the jurisdiction of an administrative tribunal such as a board of variance receive fair treatment in the handling of an application.

The statutorily prescribed procedures for the BOV to follow are these:

- Section 541 requires that the BOV notify all owners and tenants in occupation of the land that is the subject of an application or adjacent to that land.
- Section 542 requires the BOV to hear the applicant and any person notified under s. 541 before ordering a variance or allowing an exemption.

Other common law procedural fairness requirements have been dealt with in Part 8 of the Guide. These include the right to an impartial decision-maker and the right to disclosure, prior to or at the hearing, of information tendered to the board by parties adverse in interest. The question of a duty to provide reasons for the board's decision has also been addressed.

Generally speaking, any failure of the BOV to comply with the statutory requirements will automatically render its decision invalid regardless of whether anyone has been prejudiced by such failure; the court has no discretion to overlook such non-compliance, perhaps on the theory that the board has no jurisdiction in the matter at all unless it has complied with these requirements. In relation to notification of owners and tenants in occupation, s. 541 includes a "reasonable effort" clause; the statutory notice requirement is satisfied if the board made a reasonable effort to mail or otherwise deliver the notice. There is some case law arising from similar notice provisions in s. 466 in respect of public hearings on official community plan (OCP) and zoning bylaws, that indicates when a court might consider that reasonable effort has been made. In regard to owners, s. 466 requires notice to the owners "as shown on the assessment roll as at the date of first reading of the bylaw". This description of the relevant owners does not appear in s. 541 but a board of variance that uses the same source of ownership information, as at the date of the BOV application, will likely have made a reasonable effort to identify the relevant owners. As for tenants, a common practice for notice under s. 466 is to deliver notices to residential premises door-to-door without identifying the occupants by name, and without attempting to eliminate duplication with notices mailed to owners.

Compliance with procedures prescribed in the local government's board of variance bylaw is another matter. The local government cannot, by imposing procedural requirements via the board of variance bylaw, indirectly limit the jurisdiction of the board, so any such procedural requirements will not be applied on judicial review as strictly as the statutory requirements. The court may require the applicant for judicial review to show not only that the BOV bylaw requirements were not followed, but that as a result, some specific prejudice was suffered by a party who had a right to notice and a right to be heard.

A successful attack of a BOV decision on procedural grounds will, in most cases, simply result in the board having to repeat its notice and hearing procedures in relation to the application in question; in other words, it will be given an opportunity to correct its procedural error.

Judicial Review for Unreasonableness

In the administrative law world in which boards of variance are located, the Supreme Court of Canada's 2008 decision in a case from New Brunswick involving an employment matter[24] set a fresh standard for judicial review of administrative tribunal decisions. From that point forward, decisions made within the jurisdiction of an administrative tribunal will, generally speaking, be set aside only if the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[25] This standard incorporates a relatively high degree of deference to the judgment of the tribunal, whose members (in the case of a board of variance) would be assumed to have been appointed on the basis of their particular insight into matters of land use management and development in their own community. In particular, on such questions as whether an applicant has demonstrated sufficient undue hardship, whether a particular variance is minor, and whether a variance would have any of the effects identified in s. 542(1)(c) of the *Local Government Act* (the BOV is of the opinion that the variance or exemption does not result in inappropriate development of the site, adversely affect the natural environment, substantially affect the use and enjoyment of adjacent land, vary permitted uses and densities under the applicable bylaw, or defeat the intent of the bylaw), it will be very difficult for an applicant for judicial review of a BOV decision to establish that the decision is, in law, unreasonable.

> **Reasonableness**
>
> The quality of being within an acceptable range of possible outcomes of a transparent and intelligible administrative decision-making process.

Judicial Review Procedure

Applications for judicial review are filed in the B.C. Supreme Court registry by means of a petition to the Court, and are governed by the *Judicial Review Procedure Act*.

Parties

The proper party for the applicant to name as respondent, where the validity of a BOV decision is being attacked, is the board of variance itself (not the members of the board in their personal capacity) rather

[24] *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII).

[25] *Dunsmuir*, at para. 47.

than the municipality or regional district.[26] In cases where an order has been made or an exemption allowed, the applicant for judicial review should also be giving notice to the party who made the successful application to the board and to the local government, since those parties will have a right to be heard in the judicial review proceedings if they file a response to the petition. Notice to the variance applicant also allows them to make a decision, in cases where a building permit has been issued on the basis of the BOV order or exemption, on whether to proceed with construction while a decision on the application for judicial review is pending. If the application succeeds, the court will likely quash the permit and the construction will be unlawful.

Boards of variance cannot, in these cases, stand back from the proceedings with a view to letting the applicant defend their order or exemption; the court expects the tribunal to speak up in defence of its interpretation of its jurisdiction, the fairness of its procedure, or the reasonableness of its decision, as the case may be. However, legal counsel for the board of variance and the property owner who obtained the variance order or exemption will likely co-ordinate their approach to the litigation.

Timing

There is no statutory limitation period for challenging board of variance decisions. However, parties wishing to seek judicial review of BOV decisions allowing variances or exemptions must do so promptly, considering that building permits are likely to be issued shortly after the board makes its decision and that the applicant will likely be undertaking construction in reliance on the permit. According to s. 11 of the *Judicial Review Procedure Act*, an application for judicial review is not barred by passage of time "unless the court considers that substantial prejudice or hardship will result to any person affected by reason of delay". The passage of time can significantly reduce the likelihood that a court will quash a board of variance decision on procedural grounds, and may even immunize a board of variance decision made without jurisdiction. A recent case involved a Vancouver Board of Variance order made on October 3, 2012 and a building permit issued in reliance on the BOV order in February of 2013.[27] The application for judicial review by an affected neighbour was not filed until May of 2013, by which time the building in question, a garage, was about 60% complete. The judicial review application was denied on grounds of unreasonable delay prejudicial to the permit holder, despite the petitioner's evidence that she had been involved in a motor vehicle accident that incapacitated her for a substantial portion of the time during which she should allegedly have been pursuing her legal remedy.

Costs

Ordinarily, the successful party in judicial review proceedings is entitled to a costs order. Under the Rules of Court, such an order only partially indemnifies the successful party; as a rule of thumb, the costs award covers not more than one-third of actual legal costs. The Rules of Court allow a costs award that more fully indemnifies the successful party, in exceptional cases. In a 1992 case[28] the B.C. Supreme Court addressed the situation that can arise when a local government attacks the validity of a decision of its own board of variance and forces the board to incur legal costs that the municipality might be un-

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[26] In *Eng v. Vancouver (City),* 2014 BCSC 1001 (CanLII), the B.C. Supreme Court observed (at para. 15) that the "City of Vancouver and the [Vancouver] Board [of Variance] are distinct legal entities".

[27] *Eng v. Vancouver (City) and Vancouver Board of Variance*.

[28] *Metchosin (District) v. Metchosin Board of Variance,* 1992 CanLII 1572 (BCSC).

enthusiastic about covering without being compelled to do so. The BOV was able to obtain an order of "special costs", which the Court justified in the following passage (referring to the members of the BOV as "volunteers"):

> *It seems to me there are but two choices. Should the Municipality be called upon to pay special costs or are community volunteers to be placed in a position where, in order to discharge their duties, they might be called upon to pay substantial sums of money in legal costs? Of the two competing policy choices I have no difficulty in concluding that it is important to encourage and not discourage the spirit of voluntarism in our communities. Where volunteers, in the proper pursuit of their duties and exercising reasonable skill and judgment, are brought into court because of their positions as volunteers, I am of the opinion that it is proper for the court to exercise its discretion and make an award of special costs.*

Since the municipality was under s. 536(8) under a duty to "provide in its annual budget for the necessary funds to pay for the costs of the board of variance", the Court's comment about board members being called upon to pay substantial sums in legal costs seems speculative. The court's comments do, however, confirm the soundness of the principle that where the Legislature has called for the establishment of a volunteer body to perform a role in local land use management, it is appropriate that the local government cover its costs, particularly any legal costs that the local government itself obliges the volunteer body to incur.

PART 9: EXAMPLES AND PRACTICAL SUGGESTIONS

The *Local Government Act* provides very little guidance on the criteria that boards of variance should use in deciding whether to order variances, allow appeals of building inspector "extent of damage" determinations, or approve other types of applications that are within their jurisdiction. Case law also provides little guidance, except to suggest whether particular variances qualify as "minor" and whether particular types of hardship might make applicants eligible to obtain a favourable board of variance decision. This part of the Guide can therefore provide only very general information. Because BOV decisions are not binding as precedents, this case law is of limited use to board members in deciding how to deal with particular applications. Board members consulting this part of the Guide should keep in mind that they have very broad discretion as to how to deal with applications that are within their jurisdiction, and that their decisions on hardship applications are very unlikely to be second-guessed should the applicant or an affected neighbour seek judicial review of the decision.

Hardship Considerations

Building already constructed or under construction

Probably the most common dilemma that faces BOV members is whether to give favourable consideration to an application that is made after the applicant has been caught constructing a building without a building permit, or constructing a building in a location or to a plan that is not authorized by the building permit. In some jurisdictions, virtually all BOV applications have one of these features, and much of the BOV case law deals with situations of this type. The fact that an applicant is effectively "asking for forgiveness rather than permission" does not make them ineligible for a variance, but it complicates the analysis about whether compliance with the zoning regulations would cause undue hardship, to the extent that the hardship might be considered to be largely self-imposed.

In a 1989 Supreme Court decision upholding a BOV decision to refuse a height variance for a garage already under construction in a residential area,[29] there was no evidence that the applicant had asserted any hardship other than that associated with remedying the bylaw violation by altering the building. The Court agreed with the submissions made on behalf of the Township, that "cost alone, when a building is already erected, is not undue hardship" within the meaning of the *Local Government Act*. This decision suggests that in these types of circumstances, the BOV should be approaching the question of hardship in precisely the same manner as they would be if the applicant was seeking permission rather than forgiveness: in other words, requiring the applicant to produce evidence of some type of individual hardship other than the cost of compliance, that would arise from having to comply with the zoning regulations in question. Potentially, the same factors that led to the building being constructed without a permit, or contrary to the approved permit plans, would constitute some type of hardship that the BOV could properly consider.

Fuller use of parcel

Generally speaking, the effect of zoning regulations and the statutory prohibition on structural alterations and additions to buildings housing lawful non-conforming uses is to constrain the use of land in the greater public interest as compared with the use that the owner or occupier would make of the land in

[29] *Coulter v. Esquimalt (Township)*, 1989.

the absence of zoning regulations. In that sense, every applicant to the BOV will be seeking to make fuller use of their land than the regulations allow. As noted in Part 5 of this Guide, having to comply with the generally applicable limits on the use of land, while it may be a hardship, is not an "undue" hardship; it is simply the hardship that results from being subject to the regulatory powers that the Legislature has conferred on the local municipal council or regional district board. An applicant to the BOV must, where undue hardship is required to be proven, show a type or degree of hardship that is peculiar to their property, or a reasonably narrow range of properties that may share a common characteristic, such as location on a difficult slope.

The *Vancouver Charter*, but not the *Local Government Act*, addresses this issue by stipulating in s. 573(2) that the Board of Variance "shall not allow any appeal solely on the ground that if allowed the land or buildings in question can be put to a more profitable use". It is suggested that this is the case under the *Local Government Act* as well, despite the absence of any such provision in the governing legislation, and that a variance that is granted solely on the grounds that the applicant can make fuller use of their land with a variance would therefore be highly vulnerable to a legal challenge.

Circumstances of the site

As regards eligible hardship, physical peculiarities of a site are probably the factors that led to the mandatory requirement for a variance board in the first place, given that zoning regulations are usually prescribed for relatively large districts or zones without a site-by-site regulatory impact analysis. The application of building siting and height restrictions to parcels of land with non-typical topography or shape probably produces the great majority of cases of genuine "undue hardship". For example, in the Court of Appeal's 1993 decision upholding a Supreme Court dismissal of a municipal appeal against a decision of its BOV,[30] the Court described the subject parcel, created by subdivision plan 36 years before the enactment of the zoning bylaw, as trapezoidal in shape such that "the setback requirements of the Bylaw when measured from the lot lines so defined would result in an odd building envelope – so odd that no one suggests it be built". Later the Court observed that the applicable zoning "protects a rural character but in its application to this subdivision would effectively deprive [the owner] of any reasonable use of his land", and agreed with the Supreme Court that "in this case appropriate factors to consider would include the strange shape of Lot 10, the fact that some relief in setbacks would be required to construct any residence, the size of the residence proposed [which was smaller than it could have been], other options available, and the impact of the development on surrounding properties". Topographical circumstances of a site can make the application of building height limits particularly onerous, when height is measured from an artificially low elevation reflecting the location of natural grade.

Hardship might also arise from the siting of an existing building to which the owner or occupier wishes to make an addition of reasonable size. This was the situation in a 1985 case from Smithers, in which the BOV had approved a variance of the required front yard setback from 7.5 m to 5.77 m so that the owner could construct a new porch to replace one that was sited 6.6 m from the front lot line.[31] The Court of Appeal noted, in allowing the owner's appeal from a Supreme Court decision setting aside the BOV's approval of the variance, that the old porch was so designed that it "did not give adequate protection to the front door, particularly in keeping out cold in the winter". While every residential lot in Smithers is

[30] *Metchosin (District of) v. Metchosin Board of Variance,* 1993 CanLII 2882 (BCCA).

[31] *Smithers v. Olsen,* 1985 CanLII 371 (BCCA).

presumably subject to the same weather conditions, a residence that is too near the front lot line to permit the construction of an adequate porch could be a less common feature.

Circumstances of the applicant

More difficult to assess are hardships associated with the site's owner or occupier rather than the site itself. An applicant may have a physical disability that necessitates the retrofitting of an elevator that cannot be contained within the applicable building height limit, or a wheelchair ramp that cannot be contained within the permitted building envelope. These would seem, to many observers, to be text-book cases of undue hardship caused by the zoning regulations. Most of the difficulty with these applications arises not from the initial assertion of undue hardship, but from the fact that there's no mechanism to limit the benefit of the variance to the individual who is exposed to the undue hardship. Variance orders and exemptions from s. 531 are generally considered to run with the land, so presumably they continue to apply even if the person who successfully alleged undue hardship transfers the land before undertaking the construction that has been authorized. Once altered to accommodate the variance applicant, the property can also be sold to a purchaser who suffers no equivalent hardship. And there are situations where a disability that justified a variance turns out to be temporary.

Less straightforward are asserted hardships associated with individual choices such as a decision to accommodate family members in a larger residential building or to pursue a particular hobby or home occupation, rather than a random occurrence such as a physical disability. While these types of hardship have been mentioned in passing in some of the case law, they haven't been the focus of legal challenges to variances and we have no judicial guidance on whether they qualify. For example, in one case,[32] the owners wished to make an addition to a 1500-square foot bungalow to accommodate a 4-person family, and in another one of the owners of a dwelling wished to pursue a career in art in a garage/studio that had been partially constructed in contravention of building height and siting regulations, an arrangement that was said, as well, to provide easier access to the home for elderly parents of the owners.[33] (In each case the variance had been approved and was upheld in court.) One of the difficulties with these types of alleged hardship is that any resulting variance "runs with the land", and the family circumstances of subsequent owners won't necessarily justify the variance that the owners enjoy.

Irrelevant Considerations

It's possible from the case law to glean a few examples of factors in BOV applications that can safely be categorized as relevant, and others as irrelevant. In a 1985 decision, the B.C. Supreme Court ordered a board of variance to hold a full hearing on an application to vary siting regulations for a detached garage, after the board had rejected the application for no reason other than its policy not to hear applications in relation to building construction that had already occurred.[34] Thus, whether an application was made before or after building construction commenced is not a relevant consideration to the board, and a policy of this type is inconsistent with the board's duty to consider variance applications. Another

[32] *Bailey v. Corp. of Delta,* 1994 CanLII 478 (BCSC).

[33] *Surrey (City of) v. City of Surrey Board of Variance,* 1996 CanLII 2409 (BCSC).

[34] *Hale v. Corporation of the City of White Rock Board of Variance,* 1985 CanLII 705 (BCSC).

case[35] indicates that the fact that a building unlawfully encroaches on public property is not a relevant consideration in an application to vary the zoning regulations in relation to a different part of the building that does not encroach. In an earlier case[36] the court had held that the BOV has jurisdiction in an application for a height variance to take into consideration existing siting and lot coverage contraventions that are not within the scope of the application under consideration. This makes sense, since the overall acceptability of a height variance might well be affected by whether existing siting and site coverage non-compliance is going to be addressed.

Extent of Damage Applications

The only relevant consideration on applications made under s. 544 of the *Local Government Act* – the extent of damage to a building that houses a lawful non-conforming use – is the persuasiveness of the evidence that is presented by the appellant, on the one hand, and on the other hand by the building official who made the determination (75% or more of value above building foundations) from which the appellant is appealing. In the only judicial decision that appears to have been made in relation to such an appeal,[37] the building official was of the opinion that the extent of damage was 85%, with the result that the building could not lawfully be repaired, and the appellant presented a builder's evidence that the extent of damage was close to 73.94%. The BOV considered the reports of the building inspector and the builder, and apparently some photographs of the damaged building as well, which the Supreme Court, hearing the owner's unsuccessful statutory appeal from the BOV's decision, characterized as supporting the description of the burned building as "almost a total loss".

It's instructive that in this case the owner's lawyer alleged that the BOV had also taken into account information that was not relevant, being opinions from neighbours which obviously cannot have any relevance to an application of this type, and the Court noted that an appeal under s. 544 is "not the sort of test that is often laid upon a Board of Variance to decide whether a minor variance will or will not be permitted". It ultimately concluded that the board's decision to uphold the building inspector's determination of the extent of damage had been properly made. In regard to the relevant material and in particular the owner's builder's report, the Court commented that it was not apparent "how one could be all that precise [that is, to two decimal places] with regard to the nature of the damage". On these types of applications, it would be relevant for the BOV to consider the relative qualifications and experience of both the building inspector and any expert that the applicant had engaged to present an alternative opinion on the extent of damage, in quantifying extent of damage, as well as photographic evidence of the extent of damage, supplemented perhaps by a site visit.

Tree Cutting Bylaw Applications

The jurisdiction of the BOV in s. 540(d) of the *Local Government Act* to vary municipal tree cutting bylaws is rarely exercised, probably because most such bylaws allow as much tree cutting as is required to enable the owner or occupier to avoid having to apply to the board of variance. It applies only when the bylaw prevents the use of the land to the maximum extent in terms of uses and densities that is permit-

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[35] *White Rock (City of) v. Kaufmann,* 1999 CanLII 6453 (BCSC). This was a development variance permit application, but the principle would likely apply to a board of variance application as well.

[36] *Coulter v. Esquimalt (Township)*, 1989.

[37] *Sidhu v. Surrey (City) Board of Variance*, 1995.

ted by the applicable zoning regulations, and the municipal council has not taken the initiative to relieve that hardship. On such applications, the comments above regarding hardship applications apply, though with the proviso that the whole point of the board's jurisdiction regarding this type of bylaw is to permit maximum use of the land despite the effect of the tree cutting bylaw.

Land Use Contract Extension Applications

The jurisdiction of the board of variance in relation to bylaws terminating land use contracts is limited to varying the date on which the bylaw takes effect – that is, the date on which the land use contact is terminated and the general zoning regulations again apply to the land. The legislation authorizing these bylaws requires that there be at least one year between the date of adoption of the bylaw and the date the bylaw takes effect, and the notice to the land owner that the bylaw has been adopted must inform them of their right to apply to the board of variance to extend this time period, on hardship grounds.

Land use contracts were used in the late 1970s as a mechanism for tying land use approvals to developer obligations regarding the installation of basic infrastructure services and, more rarely, the provision of parks and other amenities. These contacts have, in 2016, been in force for in excess of 35 years, and for the most part the development that they authorize has been "built out". However, some unbuilt potential might remain within certain land use contract areas, and it is conceivable that a particular owner may claim, before the arrival of the statutory land use contract termination date (June 30, 2024) that an earlier termination date imposed by a local government bylaw causes undue hardship. For example, the owner may have only recently acquired the land with the intention of taking advantage of the unused development rights under the contract, and there may be a particular reason that they cannot exercise those rights (by means of a subdivision or building permit application) before the land use contact terminates in accordance with the bylaw. An assertion of undue hardship, in a BOV application to extend the date on which a LUC termination bylaw will take effect, would presumably relate to the reason for this delay. Perhaps the owner has been unable to make the required development applications due to a long-term illness, for example. Because each BOV application related to this type of bylaw must specify the date to which the owner wishes the termination bylaw's date to be extended, applicants should be required to provide a rationale for the amount of additional time they are requesting for the exercise of their development rights under their land use contract. The new termination date cannot be later than June 30, 2024.

Conditions on Board Orders

Apart from conditions related to the commencement or completion of construction, the *Local Government Act* is silent on the question of attaching conditions to BOV orders. While a broad jurisdiction to impose conditions probably should not be inferred, some types of conditions are likely permissible. The most obvious condition that is associated with a BOV order based on a hardship application is the condition that the property be developed in accordance with the plans that the applicant has submitted in support of their application. The board's conclusions on such matters as the appropriateness of development of the site and effect on the use and enjoyment of adjacent land will almost always be determined by the specific plans that the applicant submits. Thus it is the development depicted in those plans, and not any other form of development for the site, that ought to benefit from the board's order. To put it another way, on a particular application (illustrated with proposed plans) for, say, a reduction in the required rear yard from 12 metres to 8 metres, the BOV is not usually deciding simply to vary the minimum rear yard requirement to 8 metres for whatever the owner may choose to construct on the site; it is deciding to vary it to 8 metres for the purpose of allowing the applicant to construct the building illustrated in plans and elevations prepared by the applicant or their designer and submitted with

the application to the BOV. This information should be reflected in detail in the board order, which means that it should be included in any motion put by a board member to approve a variance. The plans and elevations will generally illustrate building features including building siting and height, roof configuration and elevation drawings will show the presence or absence of windows, doors, balconies and so forth, which may have been relevant to the board's decision to allow the siting variance. Thus it's important that these features be incorporated in some way into the board's order. It would be rare for a BOV to be convinced to order a siting or height variance for any form of development at all that the applicant might subsequently decide to undertake, and perhaps beyond its jurisdiction in that the board could not likely address some of its mandatory considerations without having a specific plan of development to consider.

Boards from time to time have considered whether they have jurisdiction to make their orders subject to a condition that the applicant grant a covenant to the local government dealing with some aspect of the applicant's development. In a 1996 case dealing with a height variance allowing an artist's studio in a detached garage,[38] the BOV addressed a concern that the studio would be converted into an illegal secondary suite by having the applicant grant a covenant to the municipality prohibiting such a use of the property, and no comment was made in the case on the validity of such a condition. It would be contrary to the current trend in the interpretation of the powers of local governments to interpret board of variance jurisdiction so narrowly as to preclude the use of such covenants to address matters that are relevant to the board's approval of variances. However, it should be noted that the enabling legislation for covenants of this type (s. 219 of the *Land Title Act*) has certain limitations, such that certain restrictions that might enable the BOV to better discharge its mandate (such as tying a particular variance to the occupancy of the building by a person with a particular type of disability) would not be registrable in the Land Title Office. There is also the question of whether a local government that is opposed to the approval of a particular variance would accept a covenant that its board of variance might consider stipulating as an approval condition. The board of variance could not hold such a covenant in its own name.

Time Limits on Board Orders

Section 542(3) of the *Local Government Act* deals with time limits on board orders. The BOV has jurisdiction to set time limits for both the substantial start of construction associated with the order, and its completion.

In relation to substantial start, there is a default requirement that construction start within two years from the date of the order, or such other period as the BOV may specify in its order, which may be shorter or longer. The statute doesn't specify what constitutes a "substantial start" of construction, though this phrase is also used in s. 504 of the *Local Government Act*, in relation to development permits and development variance permits. In this context, it makes sense to interpret "substantial start" to refer to construction that, if the variance was deemed to have terminated, could not proceed to completion without a fresh application being made to the BOV for the same variance. This default termination provision prevents BOV orders from continuing indefinitely despite the applicant's abandonment or deferral of a project, and discourages applicants from making sham applications for the purpose of enhancing the value of their property for resale. While the 2-year limit in the Act seems very generous in

[38] *Surrey (City of) v. City of Surrey Board of Variance,* 1996 CanLII 2409 (BCSC).

the context of most residential building construction projects, boards can consider setting even longer time frames for the start of construction, as well as shorter time frames.

The authority of the BOV to set a time within which the construction must be completed is more problematic. It's reasonably possible, and logical, to equate completion of construction for these purposes to that stage at which the local government issues an occupancy permit. However, the consequences of a BOV order terminating while the building in question is under construction but not yet completed, and accordingly the point of imposing such a limit in the first place, are far from clear. What happens, for example, if the BOV has been reconstituted in the meantime and the new board cannot be convinced, when another application is made, that compliance with the zoning regulations would cause undue hardship? Because a time frame for completion is optional, many boards focus their attention on the start of construction, and leave completion to be addressed via the building permit process.

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APPENDIX A: GLOSSARY OF KEY TERMS

Term	Definition
ACCESSORY BUILDING OR USE	A building or use that is functionally related to and subordinate in scale to a principal building or use, generally on the same lot.
BUILDING CODE	The provincial standard for building construction established by the Government of B.C. under the *Building Act*.
BUILDING FOOTPRINT	The area of a lot that is actually covered by a building, usually measured to the outer limits of the foundation walls.
BUILDING SCHEME	A restrictive covenant that is registered against all of the lots in a subdivision and that may be enforced by any lot owner against another lot owner. Building schemes are usually administered by the developer of the subdivision.
DENSITY	A measurement of the intensity of use of land, which may be expressed as building floor area ratio, dwelling units per lot or per building, subdivision lots per hectare of land, or by some other measure.
DEVELOPMENT PERMIT	A permit issued by a municipal council or regional board under Part 14 of the *Local Government Act* to authorize subdivision or development in an area designated in its official community plan. Development permits may include variances that are consistent with applicable development permit guidelines.
DEVELOPMENT VARIANCE PERMIT	A permit issued by a municipal council or regional board to vary a bylaw enacted under Part 14 of the *Local Government Act*, including a zoning bylaw.
EASEMENT	A registered interest in land that allows a party other than the owner to enter on and use the owner's land for purposes specified in the easement, such as a driveway. An easement granted to a local government or utility is called a statutory right of way.
FLOOR AREA	A measurement of the horizontal area contained within the floors of a building, usually measured to the outer surfaces of the exterior walls.
FLOOR AREA RATIO	The ratio of the total floor area on a lot to the area of the lot. A 150 square metre building on a 600 square metre lot has a floor area ratio of 0.25. Also called "floor space ratio".
HARDSHIP	The impact of generally applicable regulations on a particular lot, which the owner alleges is severe enough that it justifies a variance in the application of the regulations.
HEIGHT	The vertical dimension of a building or structure, generally measured between grade level adjacent to the building and either the highest part of the building or some lower point selected to achieve the regulator's height management objectives, such as the midpoint of a sloped roof.
LAND USE CONTRACT	A form of contract zoning used in the 1970s that applies in place of zoning bylaws. Land use contracts will be terminated by operation of provincial law in 2024 and in the meantime may be terminated by local government bylaw.
LAND USE PERMIT	A term used in the *Local Government Act* to refer to a development permit, development variance permit or temporary use permit.
LAWFUL NON-CONFORMING USE	A use of land that was lawful when zoning regulations were adopted, that is prohibited by the regulations, and that is permitted by s. 528 of the *Local Government Act* to continue, subject to a six-month discontinuance rule.

LAWFUL NON-CONFORMING SITING	Building siting that was lawful when zoning regulations were adopted, that is prohibited by the regulations, and that is permitted by s. 529 of the *Local Government Act* to continue.
MASSING	The general shape and form of a building.
PRINCIPAL BUILDING OR USE	The primary or main building or land use on a lot.
PROCEDURAL FAIRNESS	A group of principles intended to ensure that citizens who are subject to the jurisdiction of an administrative tribunal such as a board of variance receive fair treatment in the handling of an application.
REASONABLENESS	The quality of being within an acceptable range of possible outcomes of a transparent and intelligible administrative decision-making process.
RESTRICTIVE COVENANT	A document registered in the Land Title Office that restricts the use of the land. It may be a common law covenant granted by one owner to another, or a statutory covenant granted by an owner to the local government under s. 219 of the *Land Title Act*.
SETBACK	A horizontal distance, prescribed in zoning regulations, between a building or structure and a lot boundary, another building, or a geographical feature like a stream or bluff.
SITE COVERAGE	The proportion of a lot that is covered by buildings and structures, including in some cases other impermeable surfaces such as paving.
SITING	The location of a building, structure or use on a lot, usually indicated by horizontal distance from lot boundaries.
SITING ENVELOPE	The portion of a lot on which local zoning regulations permit the location of a building. A siting envelope is a volumetric, three-dimensional space when, as is usually the case, the regulations include a height limit. Also called a building envelope.
STATUTORY RIGHT OF WAY	See easement.
TEMPORARY USE PERMIT	A permit issued by a municipal council or regional board under Part 14 of the *Local Government Act* to authorize a land use that is not permitted by the applicable zoning regulations. Temporary use permits have a term, with renewals, of up to 6 years.

APPENDIX B: BOARD OF VARIANCE CASES

Links given below are to the Canadian Legal Information Institute's data base http://www.canlii.org. The remaining cases may be available at http://www.courts.gov.bc.ca.

1. *Thomas v. Surrey (District) Board of Variance* (1969)
2. *Min-En Laboratories Ltd. v. Board of Variance of City of North Vancouver et al.* <http://canlii.ca/t/1z743>
3. *Burnaby (Municipality) v. Burnaby Board of Variance* <http://canlii.ca/t/23ncl>
4. *Rosewood Estates Ltd. v. Williams Lake (Town)* <http://canlii.ca/t/23dq3>
5. *Legallais v. Esquimalt (Township)* (1982)
6. *Smithers v. Olsen* <http://canlii.ca/t/21695>
7. *Hale v. Corporation of the City of White Rock Board of Variance* <http://canlii.ca/t/22kxb>
8. *Whistler (Resort Municipality) v. Whistler (Resort Municipality, Board Of Variance)* (1986)
9. *Karpick v. Colwood (City)* (1988)
10. *Coulter v. Esquimalt (Township)* (1989)
11. *Moore v. Village of Lions Bay* (1990)
12. *O'connell v. Burnaby* <http://canlii.ca/t/1dtd2>
13. *Saanich (Corp. of the District of) v. Kalfon* <http://canlii.ca/t/1dg40>
14. *Metchosin (District) v. Metchosin Board of Variance* <http://canlii.ca/t/1dh26>
15. *Metchosin (District of) v. Metchosin Board of Variance* <http://canlii.ca/t/1dc5g>
16. *Bailey v. Delta (District)* http://canlii.ca/t/1dnps
17. *Sidhu v. Surrey (City) Board of Variance* (1995)
18. *Surrey (City of) v. City of Surrey Board of Variance* <http://canlii.ca/t/1f2jj>
19. *Maple Ridge (District of) v. Board of Variance of the District of Maple Ridge* <http://canlii.ca/t/1dz93>
20. *Shepp v. Board of Variance for the Corp. of the District of Saanich* <http://canlii.ca/t/1f72p>
21. *Martin v. Vancouver (City)* <http://canlii.ca/t/1wtr8>
22. *Lawrie (Guardian ad litem of) v. North Saanich* <http://canlii.ca/t/27hfn>
23. *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)* <http://canlii.ca/t/g2bl7>