



**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**FINAL REPORT**

Relating to

**LAND USE LAW**

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## **Land Use Variances**

The Commission's intent in this report is not to change the law defining when a land use variance may be granted but to clarify it. The grounds for a variance are explained in court decisions interpreting 40:55D-70. While the cases are clear, the statute is not. This proposal clarifies the language of the statute so that its meaning can be understood more easily. Clarity in statutory language is always a benefit. However, here clarity has an added importance. Land use statutes are enforced by local officials most of who are not lawyers. Frequently, counsel does not represent the applicants for variances. It is unreasonable to expect these people to read court cases to interpret the law. The language of these provisions must be straightforward enough to allow a landowner to know whether he has a claim for a variance and to allow a zoning official to enforce the law correctly and fairly. The Commission hopes that this recommendation is a step in that direction.

### **40:55D-70. Powers**

The board of adjustment shall have the power to:

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance;

b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act;

c. Grant a variance from the strict application of a zoning regulation that prescribes the size or configuration of a lot, the size of improvements, other bulk requirements, or the placement of improvements on the lot, provided relief can be granted without substantial impairment of the zone plan and zoning ordinance, except as otherwise provided by subsection d, and only in the following circumstances:

(1) if strict application would result in exceptional practical difficulties or undue burden for the applicant by reason of the exceptional narrowness, shallowness or shape of a specific piece of property; topographic conditions or physical features uniquely affecting a specific piece of property; or circumstances uniquely affecting a specific piece of property or the structures lawfully on it; or

(2) if the grant of the variance would promote any of the purposes of zoning as enumerated by N.J.S. 40:55D-2, or the purposes of the "Educational Facilities Construction and Financing Act" (N.J.S. 18A:7G-1), and the benefits of the variance would substantially outweigh any detriment to the purposes of the zoning regulation.

A variance under subsection (c) shall not be granted if the proposed development requires approval by the planning board of a development in conjunction with which the planning board has the power to review a request for a variance pursuant to N.J.S. 40:55D-47a.

An application for multiple variances, none of which is subject to subsection d, may be granted under this subsection.

d. Grant a variance provided it can be granted without substantial impairment of the zone plan and zoning ordinance, and the benefits of the variance would substantially outweigh any detriment to the purposes of the zoning regulation, and either the proposed use is inherently beneficial or would promote any of the purposes of zoning as enumerated by N.J.S. 40:55D-2, for the purpose of permitting:

(1) a use or principal structure in a district restricted against that use or principal structure;

(2) expansion of a nonconforming use;

(3) deviation from a standard prescribed for a conditional use;

(4) an increase in permitted floor area ratio as defined by N.J.S. 40:55D-4;

(5) an increase in permitted density as defined by N.J.S. 40:55D-4, except that a variance pursuant to subsection c may be granted to permit a detached one- or two-dwelling on either an isolated undersized lot or an undersized lot resulting from a minor subdivision; or

(6) the height of a principal structure which exceeds by ten feet or ten percent of the maximum height permitted in the district for a principal structure.

A variance under subsection (d) shall be granted only upon the affirmative vote of at least five members of a municipal board or two-thirds of the full authorized membership of a regional board.

e. In respect to any airport safety zones delineated under the "Air Safety and Zoning Act of 1983," 6:1-80 et seq., no variance or other relief may be granted under the terms of this section, permitting the creation or establishment of a nonconforming use which would be prohibited under standards promulgated pursuant to that act, except upon issuance of a permit by the Commissioner of Transportation. An application under this section may be referred to any appropriate person or agency for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act.

#### COMMENT

Subsections (c) and (d) have been completely rewritten. While the wording of these subsections is not identical to their sources, the changes are intended to clarify the meanings of the subsections, not to change them. Proposed subsections (e) and (f) are new only in form; they are substantially identical to the material currently at the end of the section after the definitions of the grounds for variances. This revision includes the 2007 amendment to the text of the statute.