IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2004
No. 2792

MONTGOMERY COUNTY, MARYLAND,

Appellant

v.

HARRY W. RIDGE, III,

Appellee

On Appeal from the Circuit Court for Montgomery County, Maryland
(Joseph A. Dugan, Jr., Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves an application for a variance to construct a two-car garage submitted by Harry W. Ridge, III. (E. 1) The Board of Appeals for Montgomery County conducted two hearings and voted to deny the request based on a failure of the application to establish that the property was unique or that the 8-foot variance was the minimum reasonably necessary to overcome a practical difficulty. (E. 49-50) Mr. Ridge filed a petition for judicial review challenging the sufficiency of the board's findings of fact as well as the accuracy of the board's interpretation of the zoning ordinance.

Based upon its review, the circuit court concluded that the evidence in the record did not support the board's findings, but rather, supported findings in favor of the applicant. The court proceeded to make specific findings that each element of the variance had been established by the applicant, reversed the board's decision, and ordered that the variance be granted. (E. 112-113) The County filed an appeal from that decision to this Court.[1]

QUESTION PRESENTED

> Did the board of appeals properly construe the zoning ordinance to require it in reviewing an application for a variance to make findings based on the unique characteristics of the property without considering the location of existing structures on the site?

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[1]The board of appeals has original jurisdiction to hear and decide applications for variances. Montg. Co. Code § 59-A-4.11(b) (2004). Judicial review by the circuit court and further appeal to this Court are provided by Montg. Co. Code § 59-A-4.64.

STATUTES, ORDINANCES, AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances, and constitutional provisions appears in the appendix to this brief.

STATEMENT OF FACTS

Mr. Ridge owns property improved by a two-story single-family home at 10711 Seven Locks Road in Potomac, Maryland. (E. 4) The property is zoned RT 12.5, permitting townhouse development as well as single-family homes. (E. 1) The lot contains about 9,147 square feet of land and measures 100 feet across the front, 117 feet across the rear, 130 feet along one side, and 60 feet along the other side. The variation between the two side lot lines creates an angled rear lot line. (E. 4) The house measures 26.5 feet wide by 20 feet deep, and a detached wood shed sits directly behind the house. (E. 4) A concrete driveway extends from the road to the south side of the house, where it widens into a parking pad. (E. 4) The driveway slopes up about 15 feet from the street to the front of the house where the property levels off, then the lot slopes up another 15 feet from the rear of the house to the rear of the lot. (E. 12, 17)

The application requested an 8-foot variance to permit construction of a one-story garage measuring 20 feet by 20 feet, which Mr. Ridge explained was the smallest size to accommodate two cars. (E. 1-3) The garage would connect to the house and extend 12 feet from the rear lot line, instead of the 20 feet required by the zoning ordinance. (E. 4-8) *See* Montg. Co. Code § 59-C-1.732(c)(2). Mr. Ridge relied on the shape and topography of the property to show peculiar or unusual practical difficulties in complying with the setback

restriction, because the angle of the rear lot line causes the rear property line setback to protrude unusually into the side yard. (E. 2, 26, 44) According to Mr. Ridge, the steep topography of the property "does not allow for an attached garage on the opposite side of the house or for a detached garage in the rear." (E. 2) He wants the garage to address a perceived safety concern that his future in-laws or children might slip and fall down the steep driveway after exiting a vehicle parked on the parking pad. (E. 1, 26) Alternatives to the two-car garage include extending the parking pad four or five feet back, which would require installation of a retaining wall, or a one-car garage, which would not fully alleviate his safety concern and would still need a variance of 1 or 2 feet. (E. 43-44)

Several townhouse developments surround Mr. Ridge's lot and also bear RT 12.5 zoning classifications. (E. 13, 28) Although the townhouse lots are significantly smaller than Mr. Ridge's property, the same 20-foot rear setback restriction applies. (E. 13) The general topography in the area is hilly, with elevations ranging from 275 feet to 339.8 feet. (E. 12)

ARGUMENT

This appeal involves review of the board's denial of a request for a variance. Judicial review of an administrative decision requires the court to determine "whether there was substantial evidence on the record as a whole to support the agency's findings of fact and whether the agency's conclusions of law were correct." *Motor Vehicle Administration v. Atterbeary*, 368 Md. 480, 490-491, 796 A.2d 75, 81 (2002) (citations omitted). The reviewing court will not substitute its judgment for the expertise of the agency or make its

own findings of fact when the record contains substantial evidence to support the administrative decision. *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450-451, 800 A.2d 768, 774-775 (2002). When the issue is fairly debatable, and reasonable persons could reach different conclusions based on the evidence, the court will not second-guess the agency's decision. *Stansbury v. Jones*, 372 Md. 172, 183, 812 A.2d 312, 318 (2002). In fact, when the inference made by the board could reasonably be drawn from the evidence, the reviewing court must not substitute its judgment—the standard is "reasonableness, not rightness." *Alviani v. Dixon*, 365 Md. 95, 108, 775 A.2d 1234, 1242 (2001) (citations omitted). Moreover, the agency decides how to resolve any conflicting evidence and determines what inferences to draw from the evidence. *Gigeous v. Eastern Correctional Institution*, 363 Md. 481, 497, 769 A.2d 912, 922 (2001).

The court may substitute its judgment only as to an error made on an issue of law. *Relay Improvement Association v. Sycamore Realty Company*, 105 Md. App. 701, 713-714, 661 A.2d 182, 188 (1995), *aff'd*, 344 Md. 57, 684 A.2d 1331 (1996). Even for issues of law, the court extends a degree of deference to the agency and often gives considerable weight to the agency's interpretation and application of the statute that the agency administers. *Annapolis Market Place, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1037 (2002).

When reviewing administrative decisions, this Court's role is precisely the same as that of the circuit court—to apply the substantial evidence test to the agency's decision and to determine whether the agency's decision is legally correct. *Gigeous*, 363 Md. at 495-496, 769 A.2d at 921; *Capital Commercial Properties, Inc. v. Montgomery County Planning*

Board, 158 Md. App. 88, 95, 854 A.2d 283, 287-288 (2004). The agency's order will be upheld on judicial review "if it is not based upon an erroneous determination of law, and if the agency's conclusions reasonably may be based upon the facts proven." *Montgomery County v. Buckman*, 333 Md. 516, 519 n.1, 636 A.2d 448, 450 n.1 (1994) (citations omitted).

> **The board of appeals properly construed the zoning ordinance to require consideration of the unique characteristics of the property as a basis for determining whether practical difficulties exist to support the grant of a variance, and properly did not consider the location of existing improvements on the property.**

The present appeal requires this Court to determine whether the board properly interpreted the provisions in the zoning ordinance regarding the elements of proof to obtain a variance. The board is entitled to a degree of deference based on its zoning expertise. As long as the board's findings are based on substantial evidence in the record, those findings will not be disturbed, even if this Court disagrees with the inferences made by the board.

Variances must be granted sparingly.

A variance permits a use or a structure that otherwise would not be permitted by the zoning ordinance, which has led this Court to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). The applicant for a variance bears the burdens of production and persuasion as to each of the variance standards. *Angelini v. Harford County*, 144 Md. App. 369, 376-377, 798 A.2d 26, 30-31, *cert. denied*, 370 Md. 269, 805 A.2d 265 (2002). In effect, the nature of a variance places

on the applicant "the burden of overcoming the presumption that the proposed use is unsuitable." *North v. St. Mary's County*, 99 Md. App. 502, 510, 638 A.2d 1175, 1179, *cert. denied*, 336 Md. 224, 647 A.2d 444 (1994).

Maryland recognizes two types of variances. An area variance involves relief from area, height, density, setback, or sideline restrictions, and includes situations that affect the distance required between buildings. A use variance permits a use other than that permitted in the particular district by the ordinance, much like a special exception. *Anderson v. Board of Appeals*, 22 Md. App. 28, 37-38, 322 A.2d 220, 225-26 (1974). Montgomery County permits only area variances and prohibits the board from granting a variance "to authorize a use of land not otherwise permitted." Montg. Co. Code § 59-G-3.1(d). To obtain an area variance, an applicant must establish four criteria:

> (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;
>
> (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;
>
> (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and
>
> (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties . . . .

Montg. Co. Code § 59-G-3.1. The applicant's failure to prove even one of these four elements prevents the board of appeals from granting the application.

A unique quality of the property must create a practical difficulty.

Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the site and then to determine whether a practical difficulty results from the uniqueness of the property:

> The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is — in and of itself — unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

Cromwell, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient for or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. *See Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

The inherent nature of a variance from setback restrictions tends to disrupt and destroy the uniformity of the spatial relationships between structures in derogation of the zoning

plan. For this reason, they are to be granted sparingly and only under exceptional circumstances, for "to do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations." *Marino v. Mayor and City Council of Baltimore*, 215 Md. 206, 216, 137 A.2d 198, 202 (1957); *see also Cromwell*, 102 Md. App. at 722, 651 A.2d at 439-440. The uniqueness requirement guards against the proliferation of variances within a uniformly developed community and thereby preserves the land-use patterns established by the community's zoning classification:

> If the hardship is one which is common to the area the remedy is to seek a change of the zoning for the neighborhood rather than to seek a change through a variance for an individual owner. Thus some exceptional and undue hardship to the individual landowner, unique to that parcel of property and not shared by property owners in the area, is an essential prerequisite to the granting of such a variance.

A. Rathkopf, 3 *The Law of Zoning and Planning* § 58:11 (2004) (citation omitted). The land itself must be unique or unusual in relation to other parcels in the area—improvements to the land do not satisfy this requirement:

> "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

Cromwell, 102 Md. App. at 710, 651 A.2d at 434 (quoting *North v. St. Mary's County*, 99 Md. App. at 514, 638 A.2d at 1181). Although this Court did not delineate the architectural aspects that satisfy uniqueness, it acknowledged that a zoning ordinance may explicitly set

out the basis for uniqueness. *North*, 99 Md. App. at 514, 638 A.2d at 1181. The decision in *North* quoted the Queen Anne's County ordinance—a provision that is virtually identical to the language in the Montgomery County zoning ordinance—as an example of the general meaning of uniqueness. *Id.*

Only if a unique or peculiar characteristic exists on the property does it become necessary to consider whether the exceptional condition "result[s] in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property." Montg. Co. Code § 59-G-3.1(a). Because the zoning ordinance uses the two terms in the disjunctive, the more lenient standard applies:

> When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive ("or"), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements.

Belvoir Farms Homeowners Association v. North, 355 Md. 259, 276, 734 A.2d 227, 237 (1999) (citations omitted); *see also Stansbury v. Jones*, 372 Md. at 177, 812 A.2d at 315. The logic of applying the lesser standard to area variances derives from the view that an area variance does not change the essential character of the neighborhood. *Belvoir Farms*, 355 Md. at 276 n.10, 734 A.2d at 237 n.10; *Loyola Federal Savings & Loan Association v. Buschman*, 227 Md. 243, 249, 176 A.2d 355, 358 (1961). But the applicant must show that he is unreasonably burdened by the zoning restriction. *Anderson v. Board of Appeals*, 22 Md. App. at 39, 322 A.2d at 226-227.

The totality of the circumstances approach recognized in *Lewis v. Department of Natural Resources*, 377 Md. 382, 833 A.2d 563 (2003), does not apply nor affect the practical difficulties standard required by the Montgomery County Code. First, the zoning ordinance considered in *Lewis* applied the unwarranted hardship standard, rather than the practical difficulties standard articulated in the Montgomery County Zoning Ordinance. 377 Md. at 409-410, 833 A.2d at 580. In addition, the Wicomico County ordinance listed the variance criteria as factors or guides to be considered in their totality in assessing whether a variance is warranted. *Compare Lewis*, 377 Md. at 413-414, 833 A.2d at 582, *with* Montg. Co. Code § 59-G-3.1. Finally, *Lewis* addressed a variance located within a buffer area established under the Chesapeake Bay Critical Area Protection Program, which has no bearing on Mr. Ridge's application.[2]

When Mr. Ridge applied for a variance from the 20-foot rear setback requirement, he sought an area variance. The Montgomery County Zoning Ordinance specifically requires a variance application to show exceptional conditions that "result in peculiar or unusual practical difficulties to, *or* exceptional or undue hardship upon, the owner of such property." Montg. Co. Code § 59-G-3.1(a) (emphasis added). Under Maryland law, the plain

[2]The differences between the critical area program and a variance are significant. The Critical Area Protection Program is designed to minimize damage to water quality and natural habitats along the shoreline and adjacent lands of the Bay and its tributaries. Md. Code Ann., Nat. Res. § 8-1801 (2004). On the other hand, zoning area restrictions are designed to provide light, air, and privacy, and to preserve spatial patterns between structures in a community. A. Rathkopf, 3 *The Law of Zoning and Planning* § 53:2 (2004).

disjunctive standard in the zoning ordinance makes the practical difficulty standard applicable, because it is the least restrictive of those mentioned.

Even under the less stringent standard, Mr. Ridge had to establish the uniqueness of the property and show that the requested variance was the minimum reasonably necessary to overcome the practical difficulty. Mr. Ridge's property shares its topography with the area and has the same rear setback as the adjoining townhouses. (E. 12) The lot is noticeably larger than the townhouse lots surrounding his property and exceeds the minimum area for the R-60 zone, which applies to single-family development in the RT-12.5 zone. Montg. Co. Code § 59-C-1.71(a) n.1. Although the rear lot line is angled, the evidence reasonably supports the board's finding that the lot is no more shallow than the other lots in the area. (E. 4, 12, 13) To the extent that the angled rear lot line might be considered uncommon, it does not result in a practical difficulty, because the remaining building envelope has enough room to accommodate a garage elsewhere on the lot without a variance. (E. 4)

The record reflects that the surrounding area is hilly, supporting an inference that Mr. Ridge's lot is not unique in that respect. (E. 2) Based on the evidence in the record, the board properly found that no unique characteristic of the property caused a practical difficulty. In addition, Mr. Ridge failed to show that the property was disproportionately impacted by the zoning restriction. *Cromwell*, 102 Md. App. at 695, 651 A.2d at 426. It does not suffice that an applicant cannot use his property in a particular way due to the setback restriction, but rather, an applicant must show that the setback restriction unreasonably prevents him from using the property for a permitted purpose. Without this

standard, a variance could be granted for virtually anything an applicant wants, contrary to the notion that a variance is to be granted sparingly.

The variance must be the minimum reasonably necessary to overcome the practical difficulty.

Even if Mr. Ridge had shown a unique characteristic that resulted in a practical difficulty based on the shape or topography of the lot, he still had to prove that the 8-foot variance was "the minimum reasonably necessary to overcome the aforesaid exceptional conditions." Montg. Co. Code § 59-G-3.1(b). Having failed to show either that the requested two-car garage could not reasonably be built elsewhere within the building envelope, or that a two-car garage was a reasonable use in the zone, the application failed to meet this criterion as well.

The record did not reflect whether a two-car garage was a typical and reasonable use in the area. In fact, Mr. Ridge conceded that a one-car garage could reduce the extent of the encroachment into the setback and reduce the amount of the variance he needed, but he chose not to revise his request and pursued the two-car garage. (E. 43-44) If a one-car garage reasonably could be located so as to eliminate the need for a variance or to require a smaller variance, then the proposal was not the minimum reasonably necessary to overcome the practical difficulty. The Board could not substitute a one-car garage for Mr. Ridge's request for a two-car garage and reasonably found that the application did not satisfy the required element of proof.

CONCLUSION

The board properly interpreted the zoning ordinance to require an applicant for a variance to establish four criteria, each of which are specified in the ordinance. As *Angelini* teaches, an applicant bears the burden of proof and of persuasion. The board properly found that the applicant's proof did not show the property to have a unique characteristic that caused a practical difficulty, nor did the applicant satisfy the board that the requested variance was the minimum reasonably necessary to overcome the difficulties the applicant felt he might have were he to construct his garage elsewhere on the lot, or were he to reduce the size of his proposed garage. Inasmuch as the applicant's failure to establish even one of the four criteria requires the board to deny a variance request, this Court should affirm the board's decision in this case.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

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Excerpts from Maryland Annotated Code

Nat. Res. § 8-1801 (2004)

(a) *Findings.* The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake and the Atlantic Coastal Bays, and their tributaries;

(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;

(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes; and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake and

the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

(b) *Purpose.* It is the purpose of the General Assembly in enacting this subtitle:

(1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.

Excerpts from Montgomery County Code (1994), as amended

§ 59-A-4.11. Authority.

The County Board of Appeals may hear and decide the following matters as provided in Section 2-112:

* * *

(b) Petitions for variances from the strict application of this chapter, as provided in article 59-G-3.

* * *

§ 59-A-4.64. Appeal.

Any party aggrieved by a decision of the Council or Board of Appeals may appeal to the circuit court for the county and thereafter to the Court of Special Appeals within the time and manner prescribed within the Maryland Rules of Procedure relating to administrative appeals. The time for appeal runs from the date of the order of approval or denial or from the date the application was denied for lack of the necessary affirmative votes.

* * *

§ 59-C-1.71. Land uses.

No use is allowed except as indicated in the following table.

Permitted Uses. Uses designated by the letter "P" are permitted on any lot in the zones indicated, subject to all applicable regulations.

Special Exception Uses. Uses designated by the letters "SE" may be authorized as special exceptions, in accordance with the provisions of Article 59-G.

	R-T 6.0	R-T 8.0	R-T 10.0	R-T 12.5	R-T 15.0
(a) Residential.					
Dwelling unit, one-family detached.	P1	P1	P1	P1	P1
* * *					
Townhouse.	P	P	P	P	P
* * *					

1 Subject to the requirements of the R-60 zone.

* * *

§ 59-C-1.73. Development standards.

In addition to the following, the regulations concerning row design in section 59-C-1.722 apply.

	R-T 6.0	R-T 8.0	R-T 10.0	R-T 12.5	R-T 15.0

§ 59-C-1.732. Building Setbacks (Minimum, in Feet).

* * *					
(c) From an adjoining lot;					
(1) Side (end unit)	10	10	10	10	8
(2) Rear.	20	20	20	20	20
* * *					

§ 59-G-3.1. Authority-Board of Appeals.

The board of appeals may grant petitions for variances as authorized in section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

(a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of

property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

(b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;

(c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and

(d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted.

(e) Any allegation of error or any appeal from any action, inaction, order or decisions pertaining to calculation of building height or approved floor area ratio (FAR) standard shall be considered according to the provisions governing appeals for a variance (section 59-G-3.1), rather than as an administrative appeal (section 59-A-4.11(c)).

An appellant seeking a variance will be subject to the requirements for filing and notice in section 59-A-4.2 and section 59-A-4.46. The Board may request technical advice from the Planning Board or technical staff. Upon request, the Planning Board or its technical staff must respond by submitting a written report making a recommendation. If there is an issue of public interest, the Planning Board or its technical staff may, on its own initiative, submit a written report making a recommendation on a variance under this section. Any response will be submitted at least 5 working days before the date set for public hearing, with a copy sent to the parties of record.