

## WHAT IS A D(1) VARIANCE AND WHY YOU SHOULD KNOW ABOUT IT

A municipal Board of Adjustment (or Zoning Board) has the power to grant variances. A variance is a deviation from the zoning law. In granting variances, the Board is obligated to follow New Jersey's Municipal Land Use Law.

There are major and minor variances. Minor ones are called C and can be as simple as asking to reduce the required setback from your property line by one foot. Even C variances must be justified, but the criteria to justify a minor C variance present a much lower bar to the applicant.

D variances are a bigger deal. There are six kinds of D variances, but the first D(1) is of particular interest. D(1) is often called the "use" variance because if granted, it allows a land use that is not permitted for the zone.

For example, 54 W. Englewood Avenue, Block 4905, Lots 2 and 3, are currently zoned R-S, for Residential Single-family houses. A developer has applied to the Board of Adjustment for a D(1) variance in order to erect a 4-story multi-family building with 24 rental units above a parking lot.

### **What does the applicant need to prove to the Board of Adjustment in order for it to grant a D(1) variance of this sort?**

Courts have made it clear that a D variance should not be granted readily. In fact, granting a D variance should always be an exception, not a rule or a new trend. D variances are supposed to be very difficult to obtain. The criteria for granting them are rigorous. There are both positive and negative criteria.

There must be special reasons (the positive criteria) for a D variance from the zoning law. The property must be peculiarly suited to the proposed purpose, and it should be *inherently beneficial* to the general welfare of the community. A variance to permit building a school or hospital, for example, would fulfill that criterion.

Other uses that may benefit the community - potentially providing jobs or products, for example - are not normally considered to be *inherently beneficial*.

The negative criteria are equally important and must also be met for the zoning board to grant a D(1) variance. So, even when granting a variance that would benefit the community in some ways, it must also be shown that it would not be a detriment to the public good in other ways. Part of that proof is showing that any negative impacts on the neighboring properties will not also be a substantial detriment to the general good.

And it must also be shown that it will not substantially impair the intent and the purpose of the existing Master Plan and its zoning ordinance, because these documents reflect the common vision for the Town, carefully built with public participation.

One of the legal responsibilities of the Board of Adjustment is to review its own decisions on variances at least once every year and provide a written report to the Council and Planning Board.

For further reading See: <https://www.hnwlaw.com/real-estate-law/nj-zoning-laws/introduction-to-the-d-variance-and-nj-zoning-law/>