BOARD OF VARIANCE
General Information and Frequently Asked Questions

July 3, 2025

BOARD OF VARIANCE

Function

Where a Council has enacted a zoning bylaw, section 536 of the *Local Government Act* requires it to establish a Board of Variance. The Board of Variance is an avenue for appeal on the interpretation and the strict application of certain local government provisions and regulations in 6 specific circumstances defined in the legislation. It functions separately from the local government that established it and has its own authority under the *Act*.

The Board of Variance is not an appeal board for local government policy decisions, and it cannot replace decisions of elected officials. The Board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of a bylaw adopted by a municipal Council.

Variances can be granted respecting bylaw requirements for the siting, dimensions, or size of buildings that are designed to deal with the most common circumstances and to be applied universally to these situations. In special cases, regulations prohibiting structural changes in a non-conforming building, or requiring services upon subdivision, may result in an undue hardship if applied to a particular site. A person may appeal to the Board for a variance only if the application of these general regulations to his or her particular site would impose such a hardship. The Board may also decide on the correctness of a certain type of decision made by a building inspector.

Appointments

In North Cowichan, the Board of Variance consists of five members, each appointed by Council for a three-year term. The three-year term runs from March 16 of the commencement year to March 15 of the cessation year.

The members of the Board of Variance cannot be members of an advisory planning commission, elected officials or employees of the local government that appoints them. This is because their responsibilities include both assessing the correctness of an interpretation of the amount of damage given by the local government building inspector and modifying the strict application of local government regulations.

CATEGORIES OF APPEAL TO BOARD OF VARIANCE

The duties of the Board are specified in section 536 of the *Local Government Act*. There are five grounds for appeal, each of which involve different considerations and can be characterized generally as follows:

1. relaxation of zoning regulations;
2. extension of non-conforming uses;
3. relaxation of servicing requirements;
4. reconstruction of a non-conforming building; and
5. relaxation of tree protection requirements.

QUALIFIERS

In the *Local Government Act,* the five categories of appeal are all based on the demonstration of "undue hardship" and are limited by the following:

> 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 bylaw, or that the applicant be exempted from section 531(1), if the Board of Variance,
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> (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
> (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, or
> (vi) vary the application of an applicable bylaw in relation to residential rental tenure.

This section requires that a Board hear an applicant and the owners and occupiers of the subject and adjacent properties. The wording of the legislation makes it clear that the decision as to whether undue hardship is demonstrated is the Board's to make. It must be satisfied a variation is justified by the presence of undue hardship. The scope of the variation, however, is limited by the word "minor" and by paragraphs (a) to (c) of section 542 (1). The Board must be satisfied that all the criteria listed have been met. Each is explored below:

a. **"Hardship"** - The application of requirements of the bylaw must create a hardship. Increased cost or loss of an amenity is a hardship but is unlikely to be a sufficient reason on its own.

b. **"Undue"** - The hardship created must be undue. The intent of this term is to limit the concerns of the Board to types of hardship that result from aspects of the site as opposed to those that are personal to or generated by the owner. If a characteristic of a site is that bedrock protruding in the site's building area makes compliance with the siting provisions of a bylaw difficult and unreasonable, the hardship created, through no fault of the property owner themselves, is undue. If other properties in the zone do not have the protruding rock, they would not be subject to the same degree of hardship.

   The difficulty in determining what undue hardship is revolves around whether the hardship would have been a hardship for everyone. If compliance with the general setback regulations is difficult or expensive, but that is the case for all properties within that zone, then one could not argue that there is undue hardship. If a circumstance penalizes one or only a few owners, it would be unfair and unduly onerous.

There have been Court rulings that undue hardship does not consist of hardship brought on by oneself out of ignorance or by acting outside of the Bylaws.

c. **"Minor variance"** - This terminology limits the scope of the variances the Board may allow. Relaxation of a requirement of a bylaw cannot be a substantial variation.

Because the statute limits the Board's authority in this way, the Board must consider this point most carefully. While the decision of the Board is final, the courts may review an appeal on a procedural or jurisdictional issue, including the scope or degree of a variation permitted by the Board.

d. **"Inappropriate development"** - The legislation does not limit the interpretation of "inappropriate" solely to an opinion of the Board. It states that the variance must not be "inappropriate". A simple test would be to compare the proposed development with that existing on surrounding lots. The elected officials, to some measure, have defined what is appropriate by specifying general regulations in a bylaw. If these are "appropriate" for surrounding properties, the Board should determine why they would not be equally appropriate for the particular property which is the subject of appeal.

e. **"Substantially affect"** - The full wording in the legislation refers to affecting the use and enjoyment of adjacent land which includes a full range of considerations such as noise, dust, destruction of views as well as safety concerns. It is the Board's obligation to determine if the variance requested would cause significant impact on surrounding properties. A petition circulated by the applicant to adjoining owners indicating consent to the variance, although a helpful indication, does not satisfy this requirement. Ownership changes and what does not offend one neighbour may another. The Board must decide the issue.

f. **" Vary uses and densities"** - Variations allowed by the Board cannot change permitted use or density. Such changes are not minor. They may only be made by elected officials through a zoning bylaw amendment, which is subject to full public scrutiny.

The issue of density may add complexity. Variances affecting setbacks, the size and dimensions of a building, site coverage, or the floor space ratio could result in allowing change in the density of a use. However, as long as any increase in density is within the limits established in the zoning bylaw, it is within the permitted density.

One example would be where relaxation of a 20 metre setback for an apartment building may allow a larger building to be constructed on the site. It should be clear in the decision that such a relaxation does not give any special right to the developer to increase the number of units over that allowed by bylaw simply because a larger building is now possible. More units beyond the limits of the bylaw would be an increase in density.

g. **"Defeat the intent of the bylaw"** - The Board must try to determine, from reading the bylaw, what the local government intended to be the type of neighbourhood established by the zoning regulations. It must decide this by reading the bylaw because that is the only valid definition of the Council or regional district board's intent. Any variance granted by the Board should not disrupt the basic harmony with other developments within a zone.

PROCEDURES

- The *Local Government Act* requires that a Board of Variance follow certain procedures but allows other procedures to be prescribed by a bylaw of the local government establishing the Board.
- Members of the Board of Variance do not receive compensation for their work. However, their individual expenses and all the operating expenses of the Board are covered in the annual budget of the Municipality of North Cowichan.
- The legislation requires that the chairperson be selected by the members of the Board themselves and allows the chairperson to appoint a Board member to act as chairperson in situations where he or she must be absent.
- The *Act* requires that before hearing an application the Board must notify the owners and occupiers of the land subject to appeal and of all real property adjacent to the property subject to appeal. The notice must say what is being appealed, and the time and place the appeal will be heard.
- The responsibility of local government extends only to the establishment of the Board and payment of operating expenses. The Board operates separately and autonomously under the specific authority of the *Local Government Act*, and there are no requirements in the *Act* for the local government to be notified of every appeal. The local government may, by bylaw, set procedures not covered by the *Act* itself providing always that such procedures are generally fair.

HEARINGS

The Board of Variance is given authority to hold its own hearings on any matters before it and the legislation ensures that the applicant and occupiers of the subject property and adjacent properties have the right to be heard by the Board. This means then, that some measure of public scrutiny will be present at all hearings and that none can be closed to those people most directly affected.

The *Local Government Act* requires that all decisions of the Board be a matter of public record and that any interested person can have access to them. The results are made available for public review during normal business hours.

FREQUENTLY ASKED QUESTIONS

What is the Board of Variance?

The Board of Variance is an independent body that considers variances to North Cowichan's Zoning Bylaw. The Board has the authority to grant variances in situations where compliance with the zoning bylaw would cause a person undue hardship. Variances can be granted respecting bylaw requirements for the siting, dimensions, or size of buildings. In some cases regulations prohibiting structural changes in a non-conforming building, or requiring services upon subdivision, may result in an undue hardship if applied to a particular site. A person may appeal to the Board for a variance only if the application of these general regulations to his or her particular site would impose such a hardship.

What is not the function the Board of Variance?

The Board of Variance is not an appeal board for local government policy decisions, and it cannot replace decisions of elected officials. The board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of the bylaws adopted by Council.

When can the Board permit a variance?

A minor variance may only be permitted if the Board finds undue hardship; and if the variance does not:

- result in inappropriate development of the site or adversely affect the natural environment;
- substantially affects the use and enjoyment of adjacent land;
- vary permitted uses and densities under the applicable by-law; or
- defeat the intent of the applicable bylaw.

What is the jurisdiction and limitations of the Board of Variance?

Within Board jurisdiction:

- variance of zoning regulation relating to the size, dimensions on sighting of buildings or structures;
- structural addition of non-conforming buildings and structures;
- relaxation of certain limited subdivision servicing requirements;
- determination of the percentage of destruction of a non-conforming building or structure (a matter relevant to whether it can be rebuilt); and
- variance of certain tree protection requirements.

Outside Board jurisdiction:

- conflict with a registered covenant or section 219 of the *Land Title Act*
- deal with a matter that is covered in a permit or land use contract;
- deal with a flood plan specification;
- apply to a property where authorization for heritage conservation alterations are required;
- apply to a property where heritage conservation is scheduled or contains a feature or characteristic of heritage conservation;
- apply to a property where a heritage revitalization agreement is in effect.

Can a decision of the Board of Variance be appealed?

A decision of the Board of Variance is final. However, there may be an appeal to the Supreme Court of British Columbia in the specific case where a person alleges that there has been an error by the building inspector in the determination of the amount of damage to a non-conforming building above its foundation. Non-conforming buildings that have been damaged or destroyed by 75% or more of their value may only be reconstructed to conform with zoning.

As a board of variance operates as a tribunal, its decisions may be assessed by the courts under the *Judicial Review Procedure Act* if it is alleged that proper procedure was not followed.

- *Judicial Review Procedure Act*
- *Zoning Bylaw*

THE ROLE OF BOARD CHAIR, MEMBERS AND MUNICIPAL STAFF

Role of the Board Chair

The duties of the Board Chair include the following:

- Call additional hearings, as required;

- Meet with staff liaison as necessary;
- Encourage all Board Members to participate;
- Preserve order during hearings;
- Rule on points of order;
- Review and sign minutes of hearings.

Role of Board members

Members are urged to:

- Actively participate on the Board;
- Keep the Board's purposes in mind as they prepare and attend hearings;
- Review upcoming board agenda packages thoroughly;
- Arrive on time or let the Deputy Corporate Officer or the Legislative Coordinator know if they will be late or absent;
- Come prepared to actively contribute to collective decision-making;
- Consider all relevant facts and opinions before making decisions;
- Treat board members, staff and the public with patience, courtesy, and respect;
- Reserve debate with Board Members for the actual meeting so the public can observe Board's deliberations;
- Consider business in open hearings unless the subject matter permits otherwise;[2]
- Not speak on behalf of the Board unless authorized to do so;
- Support Board decisions, even if not in agreement with the Board's decision;
- Avoid conflicts of interest and recuse yourself in such cases;[3]
- Not use Board membership for personal benefit;
- Use a separate and private email account for all Board business;
- Keep confidential information confidential;

Be aware that all records relating to Board business are subject to disclosure under the Freedom of Information and Protection of Privacy Act.

Role of the Staff Liaison

A staff liaison is assigned to assist the Board in a non-voting advisory and resource capacity. The staff liaison:

- Provides information and professional advice;
- Supports the chair by developing agendas and supporting materials;
- Drafts some Board reports;
- Provides updates on business of the Board.

Role of the Deputy Corporate Officer, or their designate

The Legislative Services Department provides administrative support to the Board. This includes:

- Scheduling hearings;
- Preparing agendas, based on the tasks identified in approved work plans and reports submitted;
- Assembling agenda packages;
- Distributing agenda packages;
- Attending hearings and recording minutes;
- Assisting with process and procedural matters;
- Preparing, certifying and preserving minutes;

- Handling hearing logistics and providing other administrative support as necessary.

ATTENDANCE OF BOARD MEMBERS

Board Members are expected to attend all Board hearings. If a Board Member is unable to attend, the Deputy Corporate Officer and the Legislative Coordinator should be notified as soon as reasonably possible.

Subject to the provisions of section 7.1(2) of the Board of Variance Bylaw, Board Members may attend hearings electronically.

Board Members are reminded that attendance is vital. Without quorum, the Board is unable to hold a hearing.

TIME AND LOCATION OF BOARD HEARINGS

Board of Variance hearings are held in the Maple Bay Meeting Room (also known as the Large Committee Room), which is located next to the main lobby, at the Municipal Hall, (7030 Trans-Canada Highway, North Cowichan, BC.), or by electronic means – conducted by video conference using the Cisco Webex platform.

Hearings are held bi-monthly on the last Thursday of the month at 2:00pm, unless otherwise determined by the Board Chair, in consultation with North Cowichan staff.

Depending on the amount of business, the Board hearings may also be held at the call of the Chair or cancelled due to lack of business or absence of a quorum.

QUORUM

A quorum of Board Members for a hearing is the majority of all Members (i.e. quorum is achieved when 3 of 5 Members are present). Where a quorum is not present within 15 minutes of the scheduled start time for the hearing, the Recording Secretary will record the names of those Members present and those Members absent and adjourn the meeting until the next scheduled hearing. If quorum is lost during the meeting, the meeting/hearing should promptly adjourn. If the remaining Members continue to meet, they cannot transact business and no record of their discussion is kept. All unfinished business must be placed on the next hearing agenda.

RULES OF PROCEDURE

The rules of procedure are set out in North Cowichan's Board of Variance Bylaw. Appendix A to this Handbook also sets out Board Meeting Guidelines. Committees and Boards follow these guidelines provided the guidelines are not inconsistent with the *Community Charter*, *Local Government Act*, or Council Procedure Bylaw and Council and Committee Procedures Bylaw. The Board may also seek the advice from the Deputy Corporate Officer for procedural guidance.

VOTING

All Board Members, including the Chair, may vote on any question before it. No one else may vote. Proxy votes are not permitted, nor are Council members allowed to vote at Board hearings.

In the event of a tie vote, the motion is considered defeated. Any Member present who abstains from a vote is deemed to have voted in the affirmative. Negative votes will only be recorded in the minutes upon request of the Member who voted in the negative.

CONFLICT OF INTEREST

Board Members are urged to comply with the conflict-of-interest requirements set out in sections 100 to 104 of the *Community Charter*.

A Member who thinks they may have a conflict of interest with a topic being discussed, is urged to declare the nature of the conflict immediately and leave the room during any discussions and voting thereon.

The Recording Secretary must note in the minutes the Board Member's declaration of a conflict of interest and the time the Member exited from, and returned to, the hearing. Once excusing themselves because of a conflict of interest, members with a conflict must not seek to influence the outcome of the matter.

MEETINGS OPEN TO THE PUBLIC

All Board hearings are open to the public, unless closed where required or permitted under s. 90 of the *Community Charter*. Any member of the public may be asked to leave a meeting due to improper conduct as identified in section 133 [*expulsion from meetings*] of the *Community Charter*.

BOARD MEETING GUIDELINES
(APPENDIX A)

AGENDA DEADLINES

The deadline to receive agenda items and approved reports is one (1) week prior to the meeting. Agendas are posted online, at the municipal hall and distributed via email at least 48 hours before the meeting.

Recommended Timeline

Four (4) weeks before the hearing date:

- The board chair and staff liaison should discuss what applications are coming forward for the next meeting/hearing.

Three (3) weeks before the hearing date:

- The Deputy Corporate Officer or the Legislative Coordinator (under direction from the staff liaison) will email the Board Members to confirm whether applications have been received and a meeting/hearing will occur.

Two (2) weeks before the hearing date:

- Staff must submit all reports and supporting material (through eScribe) for management review and approval.

One (1) week before the hearing date:

- All approved reports and supporting material for agenda items must be received by Legislative Services;
- The Board Chair and staff liaison should review the draft agenda and reports and confirm the agenda.

ORDER OF THE AGENDA

The headings of the Board of Variance Agenda shall be set in the order listed below, unless otherwise reordered or deleted (if no business under the heading) by the Deputy Corporate Officer prior to publishing the Agenda Package:

1. Call to Order
2. Election of Chair or Appointment of Vice Chair
3. Adoption of Minutes
4. Application(s)
5. Adjournment

ELECTION OF CHAIR

The members of the Board of Variance must elect a Chair from its members. Note that any reference to the Deputy Corporate Officer in this section means the Deputy Corporate Officer, or their designate.

1. The call for nominations for the office of Board Chair shall be conducted by the Deputy Corporate Officer.
2. Nominations must be made by a third party. For greater clarity, a Board Member may not nominate themselves for the position of Board Chair.
3. Nominees must consent to be nominated and to stand for election as Board Chair. A nominee may be nominated in absentia by agreeing in writing to the nomination.
4. The Deputy Corporate Officer shall call first for nominations for Board Chair and shall then call for nominations for Board Chair a second and third time.
5. If only one nominee for Board Chair is nominated that person is declared elected by acclamation by the Deputy Corporate Officer
6. If more than one nominee is nominated for the office of Board Chair, then an election by voting must be held, and voting must be conducted by secret ballot.
7. Prior to the vote being conducted, those persons nominated shall be given the opportunity to address the Board of Variance for one (1) minute prior to the vote on the first ballot being taken.
8. In the case of an election by voting, the counting of ballots will be conducted by the Deputy Corporate Officer. The outcome of the ballot count will be announced to the Board by the Deputy Corporate Officer. For greater clarity, the person with the most votes will be declared by the Deputy Corporate Officer as Board Chair.
9. In the event of a tie vote between two or more persons with the most votes, the persons who are tied remain in the election for Board Chair, and the Deputy Corporate Officer must continue to conduct votes to break the tie until a person emerges with the most votes who shall then be declared to office by the Deputy Corporate Officer.
10. For elections that take place while a meeting is being held by electronic or other communication facilities, if voting by secret ballot is not practical, Board Members may place their vote by way of an individual, confidential phone call to the Deputy Corporate Officer.

HANDLING THE BUSINESS OF THE HEARING

Good decision making requires, at a minimum:

- Background information;
- Options and recommendations through discussion;
- Preparation before the hearing;
- Regular attendance;
- Full participation in the hearing;
- Cooperation by all present Board Members;
- Consideration of others' ideas and opinions.

BOARD OF VARIANCE HEARING PROCEDURE

The hearing is open to the public and follows a structured format. The Board Chair will preside over and facilitate all hearing discussions.

Hearing

(1) The Board Chair introduces the Board members and outlines the hearing process.

(2) Planning staff will introduce applicants/attendees to the Board.

(3) The Board Chair will call upon the Recording Secretary to read aloud any correspondence that was not provided to the Board in advance of the hearing.

Presentation by Applicant

(4) The Board Chair will call upon the applicant (or their representative) to present their case, including:

- Description of the property and proposed development
- Explanation of the hardship and why the variance is needed.
- Supporting documents (e.g., site plans, photos).

(5) The Board may ask questions of the applicant(s).

Staff Presentation / Comments

(6) The Board Chair will call upon Planning staff who may provide a presentation that includes background, clarifying zoning regulations, and offer technical input.

(7) The Board may ask questions of staff.

Public Input

(8) The Board Chair will invite neighbours and affected parties to speak. Comments can support or oppose the application, and speakers must state their name and address for the record.

Board Questions

(9) The Board Chair will invite members to ask questions to clarify facts or concerns.

Applicant Response

(10) The Board Chair will allow the applicant to respond to public or Board comments.

Deliberation and Decision

(11) The Board will now deliberate the proposal in public. The applicant(s) and notified adjacent owner(s)/occupant(s) are welcome to remain in the meeting room and listen to the Board's deliberations. However, they cannot participate in any discussion at this stage.

(12) The Board will first decide whether the application is eligible for a BOV decision (minor, undue hardship) and second, they will decide on whether to approve the application.

(13) Once the Board has completed its deliberations, a motion will be made and voted on by the Board Members. A motion requires a majority vote to be passed.

(14) In extenuating circumstances, the Board Chair may choose to adjourn a hearing to a later date.

(15) Once a motion is passed, the decision is final and cannot be appealed.

MINUTES

Minutes provide a general overview of the hearing's proceedings and record the Board's decisions. Minutes are not verbatim. Advice and recommendations made at the hearing are recorded in the minutes.

The Board of Variance adopts their own minutes at their next hearing.

FURTHER INFORMATION

Board Members can obtain further information from the Board Chair, the staff liaison, or through Legislative Services. For further information, please contact:

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or

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List of References:

Local Government Act, Sections 536, 542 and 540
Land Title Act, Section 219
Judicial Review Procedure Act
North Cowichan's Zoning Bylaws
Community Charter
North Cowichan's Board of Variance, Bylaw No. 3727
North Cowichan's Council and Committee Procedures Bylaw No. 3945
Freedom of Information and Protection of Privacy Act