

Floodplain Management Variances

*A variance is a grant of relief from the terms of a floodplain management regulation. This generally involves allowing development that is contrary to good floodplain management practices. Because the result can be an increased risk to life and property, **the granting of floodplain variances should be rare.***

Local Floodplain Development Permit

Responsibility for issuing or denying Floodplain Development Permits lies with the Local Floodplain Administrator (usually the Code Enforcement Officer). If a proposed project does not comply with the municipality's floodplain development standards, the Local Floodplain Administrator should deny the permit and provide a written summary of project deficiencies. The applicant may then revise and resubmit the application or request a hearing from the designated appeals board (usually the Zoning Board of Appeals).

Appeals

If the applicant alleges an error in the decision or determination made by the Local Floodplain Administrator, the appeal is heard and decided by the designated appeals board. If the applicant requests a variance from local floodplain development requirements, the variance request must be supported by a written justification. The request for variance should never be an after-the-fact request for a non-compliant project.

Local Variance Procedure

The appeals board considers a variance request at one or more public meetings at which they seek (1) testimony from the Local Floodplain Administrator about how the proposed activity fails to meet local floodplain development standards and (2) testimony from the applicant as to why it is infeasible or impossible to make the proposed development conform. Complete records should be kept of all deliberations and actions of the board. (Use of a *Floodplain Variance Findings & Decision* form is recommended.)

Although a municipal appeals board has the authority to decide whether or not a variance is granted, the Federal Emergency Management Agency (FEMA) may review the community's findings. If that review indicates a pattern inconsistent with the objectives of sound floodplain management, the community can be subjected to probation or suspension from the National Flood Insurance Program.

State Variance Procedure

Because floodplain management requirements are specified in the NYS Building and Residential Codes, it may be necessary to obtain a Variance to the Uniform Fire Prevention and Building Code from the NYS Department of State. This is in addition to a local variance from the municipality.

Considerations and Conditions

Each municipality's Flood Damage Prevention regulations specify factors that must be considered and conditions that must be met prior to granting a floodplain variance. Both the applicant and the appeals board should refer to these regulations to ensure that each issue is addressed in the applicant's written justification and carefully considered during the board's deliberations. Key issues are discussed below.

Good and Sufficient Cause

Because floodplain management regulations do not anticipate every imaginable situation, the variance process allows a developer to seek permission to vary from the letter of the rules because of a special situation. However, ***the variance must pertain to the land itself – not to the structure, its inhabitants, or the property owner.*** A variance should not be granted for a problem that can be resolved through other means, even if the alternative is more expensive, more complicated, requires that the parcel be put to a different use, or requires the applicant to build elsewhere.

Exceptional Hardship

Federal regulations state that a community can only issue a variance upon “a determination that failure to grant the variance would result in exceptional hardship to the applicant.” Additional guidance states: “***The applicant has the burden of proving unnecessary hardship.*** Reasons for granting the variance must be substantial; the proof must be compelling. The claimed hardship must be exceptional, unusual and peculiar to the property involved. Financial hardship, inconvenience, aesthetic considerations, physical handicaps, personal preferences or the disapproval of one’s neighbors do not qualify as exceptional hardships.”¹

Minimum Variation Necessary

The variance must be the minimum necessary, considering the flood hazard, to afford relief. A variance is a request to vary from the rules, not to ignore them. Any variance should allow only minimum deviation from the local requirements. The approved project should provide as much flood protection as is possible.

Regulatory Floodway

Variations shall not be issued within any regulatory floodway if any increase in flood levels during the base flood discharge would result. Because the community should not be exposed to higher flood risks, federal standards prohibit variances from the requirements concerning floodway encroachments.

When Might a Variance Be Warranted?

Special circumstances may justify granting a variance:

- **Deviation from Higher Standards:** When a municipality’s floodplain management standards exceed the minimum federal requirements, some situations may warrant deviation from those higher standards.
- **Small Lot:** Although variances are strongly discouraged, the technical justification required for a building that fails to meet elevation requirements is lower if it is erected on a lot of one-half acre or less and surrounded by lots with existing structures constructed below the base flood elevation.
- **Wet Floodproofing:** Variances that allow protection from flood damage using wet floodproofing techniques may be issued for structures that are: functionally dependent on close proximity to water (such as boat houses), historic buildings (if the historic character is preserved), accessory structures, and certain agricultural structures. The variance may be contingent on limited use of the structure (for storage, parking, or agricultural purposes). In all cases, the variance must be the minimum necessary.

Impact of Increased Risk on Flood Insurance Rates

A variance is for floodplain management purposes only. It does not alter flood insurance purchase requirements or the mechanism for determining insurance costs. The increased risk for a non-compliant structure will be reflected in higher annual flood insurance premiums, which can be as high as \$25 for \$100 of insurance coverage. This may create severe financial consequences for the property owner who applied for the variance and for any future owners. Although a variance may save money in the short term, over the long run the owner may pay much more in insurance premiums or, if uninsured, in flood losses. If a variance is issued for a building with the lowest floor below the base flood elevation, the municipality must notify the applicant of the potentially high flood insurance premiums and the increased risks to life and property.

Additional Resources

- *Appeals, Special Uses and Variances, in Unit 7: Ordinance Administration of FEMA 480: National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials* (2005), available at <http://www.floods.org/index.asp?menuid=388&firstlevelmenuid=180&siteid=1>.
- *Wet Floodproofing Requirements for Structures Located in Special Flood Hazard Areas*, Technical Bulletin 7-93, FEMA FIA-TB-7 (1993), available at <http://www.fema.gov/library/viewRecord.do?id=1720>, specifies variance conditions and provides technical guidance for wet floodproofed buildings.

¹ *National Flood Insurance Program (NFIP) Floodplain Management Requirements*, FEMA 480 (2005), page 7-46.