

# Sign code variances: How to win your appeal

*The ability to get a variance can be a super sales tool*

By Dan Mika



In states where an “economic justification” is allowed, a strategy that is sometimes used is to ask for a “time limited” variance (say, six months to a year). This could be used, for example, to allow a business to “get started” or start leasing a new building. Signmaker unknown

**S**o your client needs more or bigger signs than the sign code allows. Or signs closer to the road. Or a different type than the code allows.

Should you advise them to apply for a variance (a waiver from the code)? It depends on the justifications used and the municipality in question. Even municipalities located right next to each other may differ wildly in their variance approval percentages.

If you’re not an expert on variance law, it’s essential that you know roughly what percentage of the sign variance requests in your targeted municipality are granted. That figure may range from close to zero to over 50%. Once you have that figure, you can factor it into your sales process. If the figure is high (and you have a good case), you can advise your customer that the ZBA is business-friendly—which increases the chances of a favorable outcome. Finding these percentages is explained in *What are the percentages?* below.

Becoming familiar with how sign code variances work can help your clients to get more advertising for their businesses and lets you

sell bigger sign projects. Most sign variance requests fall into the following areas:

- Increased face area
- Extra signs
- Additional height
- Reduced setback on freestanding signs
- Placing a sign where not allowed by the code
- Using a type of sign not allowed by the code

**Making your case** Aside from knowing the percentages of variances that municipalities grant, there are general principles that are helpful to know. With a bit of effort, you should be able to use research-based justifications to increase your winning percentages.

ZBA’s look for “unique factors” when deciding cases because they are reluctant to allow signs that create a precedent that will legally force them to grant the same variance to others. Therefore, when filling out the variance form and presenting your case to the ZBA, be aware of factors that make your case **unique**. This will allow the ZBA to feel that they can grant your variance and yet leave

## What are the percentages?

There are a couple of ways to determine what percentage and types of variances are granted in any municipality. Ask the municipality in question where the records of the ZBA are kept. You may be able to look at them right there or you can ask for copies of the records going back a couple of years. The records may even be accessible online. See how many sign-related cases were granted variances and look at the specifics of the cases. For example, you may find that lesser setbacks or larger sizes were frequently allowed. Take notes.

In some communities, the building department has someone who attends the variance board meetings who will be able to advise you on how your issue has been handled in the past. The most likely thing you’ll hear from the building department, though, is that “it could go either way” or “it’s up to the board.” But you may hear something like I heard recently from a building code official: “Our ZBA is a pushover.”

the integrity of the code in place. Unique justifications can be both physical and in some states, economic.

**Safety justifications** There are instances when unique physical factors (usually related to safety) make the sign code limitations overly harsh and dangerous. Ask yourself “if the sign(s) specified in the code are used will it cause any of the following problems? These will constitute your “safety talking points.”

- Drivers will be forced to make dangerous U-turns.
- Drivers will have to slow down to look for the business (“lack of ease of identification”).
- Drivers won’t have enough time to safely change lanes when they approach the location.

If applicable, mention the preceding safety concerns, which can be caused by such things as:

- Traffic speed too high for safe, on-time response to the sign
- The number of lanes on the street—making signs unreadable
- Buildings, trees, bridge abutments or railings that block vision
- A building fronts on two roads but has a sign allowance only sufficient for one street (This is sometimes neglected in sign codes.)
- Background clutter

The solutions are as mentioned earlier:

- Increased face area
- Extra signs
- Additional height
- Reduced setback on freestanding signs
- Placing a sign where not allowed by the code
- Using a type of sign not allowed by the code

continued...

## Help your clients by sharpening your understanding of variances

Regulations governing variance boards differ somewhat by state. Many states do not allow an economic justification argument to be used. Check your own state’s law, read the application—talk to the building department or ZBA to see whether an economic justification is allowable—it will dramatically change your presentation.

Some of the remaining principles are similar from state to state. New York State Town Law, for example, requires variance boards to apply a “balancing test” and weigh the “benefit to the applicant” against the detriment to the health, safety and welfare of the neighborhood or community.” If the variance request meets the standard of the balancing test, the municipality *must* by law, grant the variance.

The law further states (and these are questions you have to answer on the NYS ZBA application): In making this determination the board must also consider:

- (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to the nearby properties will be created by the granting of the area variance.
  - (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.
  - (3) whether the requested area variance is substantial (author’s note: i.e. significantly more than the code allows).
  - (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.
  - (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.”
- Most safety related problems are related to a deficient code—not a hardship, but you still must consider this.

Always differentiate in your own mind as to whether or not your requests are “self-imposed hardships” also known as “self created difficulties”. An example of a hardship that is clearly *NOT* self-created would be a road widening project that eliminates or relocates a main sign and causes a loss of revenue. Your case is much stronger in such an instance. Safety justifications, based upon deficient sign codes, are of course *NOT* self imposed but ZBA’s don’t look at it that way.

ZBA’s may contend that they are not there to rewrite the code. This is true of course but at the same time point out that the application they are now reviewing gives them sufficient evidence to grant the appeal based on objective safety evidence. THAT is their duty, to decide case by case whether appeals meet their state’s criteria.

In any case, be ready with a response as to what makes your situation unique and use objective safety justifications to make your case airtight.

Your basic guidance will be provided by the answer to the question “What’s the safest situation for the Driver, to direct that person to their destination?”

**Research is your best ally** The USSC (the United States Sign Council) has done over \$1,000,000 worth of independent and university-based research on sign visibility and traffic safety. The USSC has published lots of material that describes their research and some of the results are available in a form that will get the attention and respect of many ZBA’s. Their book *USSC Best Practices Guidelines: Standards for On-Premise Signs*, is an excellent resource, (available for \$25 from the USSC).

The APA (American Planning Association), whose members write many of the sign codes these days, has published a book *Street Graphics and the Law – 3<sup>rd</sup> edition* (about \$50 from the APA) which contains sign recommendations based on the research of the USSC.

It answers such questions as “Is a 25 square foot sign sufficient, and safe, for a four-lane highway where the speed limit is 45 mph?” These recommendations set a “safety standard” and take into account driver reaction time, traffic speed, sign size, illumination etc.

At a variance hearing, you might say something like, “According to *Street Graphics and the Law: 3<sup>rd</sup> edition*, published by the American Planning Association, the organization whose members write most new codes, the minimum safe size and height for a sign in this situation is ...” You might add that the stan-

dards are based upon independent and university-based research. The kinds of justifications in these publications take your argument out of the realm of subjective opinion. Using the APA book is like giving an unbiased opinion and the ZBA should respect that.

This book *Street Graphics and the Law* is available from the APA ([www.planning.org](http://www.planning.org)). This book is well worth the investment of about \$50 for the expert partner it will be when you present your case to the ZBA. I recommend this book above all other sources for you as an aid to facilitate your case.

If you establish your case on safety grounds or use figures from *Street Graphics*, you will eventually hear a member of the board say, “If what you say about sign visibility and safety are true, then our entire sign code is unsafe and needs rewritten...” You can answer with something like, “I agree, but that’s a matter for another legislative body to pursue. As I understand it, the decision of any ZBA is based on the merits of the case at hand, and in this case, I’ve made public safety the primary consideration.”

**Economic justifications** Less than half of states allow economic justifications to be used in presenting a case. To find out whether your state allows economic justifications, talk to the chief building official and get a reference to the ZBA and ask them—or read the application form.

But in every case, whether economic justifications are allowed or not, the board members will be interested to know the economic reason behind the application as it is often the motivation for the request. So the following economic justifications for signs can be used either as primary legal justifications, or in some states to give the board more background. These will be your economic “talking points.”

- Insufficient income to keep operating. A detailed, written “dollars and cents” proof may need to be presented.
- The fear of having to lay off employees or the inability to hire more employees.
- The business may be larger by comparison than neighboring businesses. Applying the normal sign limits to them would put an undue economic burden on the business, because the larger operation represents

## Lawyers and expert witnesses

There are times when it is better to advise your customer to hire a lawyer. Certain high value cases and certain jurisdictions (I’m told Philadelphia is one) almost require that an attorney be used. Using an attorney may cost anywhere from \$100 to \$200 per hour bringing average total attorney costs to from \$1000 to \$2500. An expert sign witness can cost perhaps \$500.

If the circumstances are right though, the cost will be easily justified by the increased sign exposure generated by the sign if the permit is granted. Attorneys don’t worry as much about the percentages in each town but rather on how good the legal justifications are. Occasionally, an employee of one of the larger sign companies in your area may serve as an expert sign witness or you can contact the United States Sign Council for information.

a larger investment.

- The shape of the building, as in the case of a narrow storefront on a deep lot, can make limitations based upon frontage seem unfair. “It’s a big site, two acres, but the frontage is only 120 feet.”
- The business may have little or no street visibility. This point, as many of the others, is technically a “self-imposed hardship” but some boards may buy into it.
- A lack of impulse buyers is causing economic distress. This might be considered a unique circumstance by some boards.
- An argument can also be made in some cases that “the taxable value of that parcel is directly related to the income that can be produced on that property and it’s not there yet.”
- Internet competition, economic downturns and struggling local economies all might also be used as “talking points.”

**Compromise strategies** During the ZBA meeting, if it seems like the board is listening but leaning against granting your variance in full, be ready with a compromise. If the ZBA sees that you are flexible in your request, they may decide to be flexible as well. Find out what your client is willing to settle for but don’t show your hand all at once. Give away a little at a time until the board agrees. You might want to bring an alternate design just in case.

In some cases, applicants ask for a little more than they want in the application so that they will have something to bargain down to—and still get close to what they originally wanted. But be careful, if you begin by asking for too much, you may just annoy the board.

Many boards look favorably on willingness to compromise. Before the meeting, make a list of things you could possibly offer to help the board meet your request:

- Offer to plant shrubbery or to professionally landscape the area around a free-standing or ground sign.
- Reduce the size somewhat.
- Reduce the height somewhat.
- Trade off some lesser important existing signs. “We’re willing to eliminate the sign on the side of the building if we could have a more effective size for the free-standing sign...”

- Change or eliminate the lighting.
- Change the location.
- Ask for a temporary use permit (see photo example).
- Reduce the number of colors on the sign. In a historic area, you can even offer to do the sign in black and white if that’s all that the board will accept.
- Perhaps be ready with an alternative design.

Remember that if you are basing your request on safety justifications, offering to reduce sizes or other “giveaways” may undercut your argument somewhat.

Also consider doing the following:

- Find out if a video presentation is possible and if advantageous, videotape the site to help bolster your presentation.
- Consider how the variance would affect the neighbor living closest to the sign. If applicable, mention that the sign will be in a purely business district and does not adjoin a residential district.
- Know if other signs in the municipality have received variances for the exact thing you are seeking.
- At the meeting, you may hear the question, “If we grant your variance what will we say when another business asks for the same thing?” Be ready with an explanation of the unique circumstances of your request.
- If useful, get the neighborhood businesses and residential neighbors to give their



Where economic justifications can be used, the case can be made that “One-size-fits-all” sign codes are unfair to larger businesses that are limited by sign size requirements that apply to very small and very large businesses alike. In many cases though, the “safety justification” should be used. A “safety justification” might go something like “This is a busy location and customers will be forced to make dangerous ‘U’ turns and slow down in traffic if the letters are not large enough to see” and if possible, lock up your contentions with objective data. In states that allow both economic and safety justifications you may want to use both.

Signs Unlimited, Inc. - Eden, NY

## From “Street Graphics and the Law”

This book is available from the APA at [www.planning.org](http://www.planning.org). Chapter two is of particular interest as it can help you make your case for a variance. Here’s an overview of that chapter, *United States Sign Council Best Practice Standards for Commercial On-Premise Signs*, by Andrew Bertucci, Executive Director, United States Sign Council:

Seeing and reading roadside on-premise signs • Determining sign size using driver reaction time • Factors affecting the way drivers see, understand and respond to signs while in movement • Sign factors affecting a driver’s perception of a sign • Putting it all together: calculating sign area • Sign height: minimum standards in areas of medium or high vehicular traffic

The material from this section, with additional information, is also available from the USSC as *USSC Standards* for \$25 at [www.ussc.org](http://www.ussc.org).

# Come prepared with unique justifications and reasonable compromises.

favorable opinions.

- Many times ZBA members visit the site of the proposed variance before the meeting. In certain cases a “mock up” version of the proposed sign can be displayed for their benefit. (For example, to prove that a proposed sign will not block sitelines).
- Bring in witnesses. [See *Lawyers and Expert Witnesses*]

## How review boards work (or don't work)

There are reasons that municipalities vary wildly from one to another in the granting of variances. It may be as simple as one municipality trying to attract and keep businesses, while another municipality has more than enough businesses and has turned their focus to aesthetics. In many cases, ZBA members may have been brought on board only after being interviewed to see that their philosophy agrees with that of the board chairman. Many boards are conscientious and do try to follow the rules of their state's variance law.

By law, ZBA's can only apply the standards from their state and cannot arbitrarily veer from them. There are certain cases where a variance must be granted but is denied. Depending on the circumstances, that is



This sign, in a residential neighborhood, was part of a variance procedure. It illustrates that where codes forbid ground signs due to the nature of the neighborhood (residential), the point could be made that this type of sign is perfectly compatible with the neighborhood. Additionally, the sign is needed to inform those looking for the building that they have arrived (safety justification). The variance board would then balance the benefit of the sign to the applicant and the negative impact of the sign against the safety and general welfare (including aesthetics) of the neighborhood or community. Signlanguage, Perry, NY

when it is time to consider an appeal and the involvement of a lawyer.

Some towns use the ZBA as a revenue-producing tool, granting the same variance over and over. Check their track record. Come prepared with unique justifications and compromises. If you've never attended a ZBA meeting, attend one and try it on for size to get a feeling for the board.

**Charge for your time** The cost of a variance hearing may range from \$100 to \$1000. A lot of time spent may be spent registering for the meeting, preparing the materials and attending the meeting. A packet of information for each of the board members (there may be as many as 12) will usually be required. It will probably be necessary to fill out an “Area” variance form. Providing photos, videotaped presentations if possible, digital renderings, surveys and elevations may be necessary to help them understand your case.

ZBA's usually meet at night once or twice a month. Summer meeting schedules may vary. The sign company rep, the business owner or a lawyer specializing in variance law, (or any combination) usually must be there to present the petition and answer questions.

Charge your client accordingly for all this work or politely offer to let them do it themselves. As with any professional, it is important to use business practices that will give you the financial return that will allow you to stay in business.

Remember that no matter who does the work, the time and expense will be far outweighed by the increased sign visibility that will be provided by the variance, if granted. Signs, after all, offer the BEST value by far in advertising of any existing media. •\$¢

Thanks to Rick Crawford, USSC Legislative Consultant for his help in reviewing this article; Rick is an attorney working in the sign industry and can be reached at [rick@ussc.org](mailto:rick@ussc.org).—D.M.



Sign analyst Dan Mika, Cheektowaga, New York, is always looking for ways signs can be more effective.