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Article 5 - Exceptions to Code Standards

Chapters:

5.1 Variances

5.2 Non-Conforming Uses and Development

5.3 Lots of Record; Legal Lot Determination

Chapter 5.1 - Variances

Sections:

- 5.1.010** Variances - Purpose
- 5.1.020** Variances - Applicability
- 5.1.030** Class A Variances
- 5.1.040** Class B Variances
- 5.1.050** Variance Application and Appeals

5.1.010 Variances - Purpose

Chapter 5.1 provides standards and procedures for variances, which are modifications to development standards that are not otherwise permitted elsewhere in this Code as exceptions to code standards. This Code cannot provide standards to fit every potential development situation. The City’s varied geography and the complexities of land development require flexibility. Chapter 5.1 provides that flexibility while maintaining the purpose and intent of the Code. The variance procedures provide relief from specific code provisions when they have the unintended effect of preventing reasonable development in conformance with all other codes. The variance procedures provide flexibility while ensuring that the resulting development is consistent with Code’s intent.

5.1.020 Variances - Applicability

- A. Exceptions and Adjustments versus Variances.** A code standard or approval criterion (“code section”) may be modified without approval of a variance if the applicable Code expressly allows exceptions or adjustments. If the Code does not expressly provide for an exception or modification, then a variance is required and the provisions of Chapter 5.1 apply.
- B. Combining Variances With Other Approvals; Permit Approvals by Other Agencies.** Variance requests may be combined with and reviewed concurrently by the City approval body with other land use and development applications (e.g., development review, site design review, subdivision, conditional use, etc.), however, some variances may be subject to approval by other permitting agencies, such as ODOT in the case of State Highway access. Variances to City of Dallas Engineering Design Standards are reviewed by the City Engineer and are not subject to this Code. Approvals under this Code that are contingent upon variance approvals by the City Engineer or other agencies may be conditioned accordingly.
- C. Types of Variances.** As provided in Section 5.1.030, there are two types of variances: Class A and Class B. Class A involve variances involve limited discretion and therefore are reviewed administratively by means of a Type II procedure (Section 4.1.030). Class B

variances require a public hearing under a Type III procedure (Section 4.1.040) because they involve more discretion. Where the Code contains built-in flexibility, for example, through provisions that allow lot size averaging in new subdivisions, density bonuses, building height bonuses, or flexible setbacks, under Articles 2 and 3, a variance is not required. Permissible uses shall not be modified through a variance but may be adjusted as part of a Master Planned Development under Chapter 4.5.

5.1.030 Class A Variances

A. **Applicability.** The following variances are reviewed using a Type II procedure, pursuant to Section 4.1.030 and based on the approval criteria in subsection B below:

1. Front yard setbacks. Up to a 10 percent change to the front yard setback standard in the land use district.
2. Interior setbacks. Up to a 10 percent reduction of the dimensional standards for the side and rear yard setbacks required in land use district.
3. Lot coverage. Up to 10 percent increase of the maximum lot coverage required in the land use district.
4. Landscape area. Up to 10 percent reduction in landscape area (e.g., overall area, required buffer areas, interior parking lot landscape area, quantity of trees or other vegetation, and similar landscape code provisions).

B. **Approval criteria.** A Class A Variance shall be granted if the applicant demonstrates compliance with all of the following criteria:

1. The variance requested is to provide for greater compatibility between proposed structures and the built or natural environment.
2. The variance will not result in violation(s) of any other adopted ordinance or code standard; each code standard to be modified shall require a separate variance request.
3. An application for a Class A variances is limited to one (1) lot per application.
4. No more than three (3) Class A variances may be approved for one lot or parcel in a continuous 12 month period.

5.1.040 Class B Variances

A. **Applicability.** Class B variances are allowed for requests that do not otherwise meet the criteria under subsection 5.1.030 (Class A Variance), pursuant to the limitations under subsections 1-3, below, and the approval criteria in Sections 5.1.040C through 5.1.040G.

Class B variances shall be reviewed using a Type III procedure under Chapter 4.1.040.

1. The Class B variance standards apply to individual platted and recorded lots; properties determined to be Legal Lots of Record under Chapter 5.3 are also eligible for Class B variances.
2. The Class B variance procedure shall not be used to modify a standard for lots yet to be created through a partition or subdivision process. Such requests may be approved under the Master Planned Development procedure of Chapter 4.5.
3. A variance shall not be approved that would vary the “permitted uses” or “prohibited uses” of a land use district (Article 2).

B. Approval Criteria. A Class B Variance may be approved only upon finding it meets all of the following criteria:

1. The variance is necessary because the subject Code provision does not account for special or unique physical circumstances of the subject site, existing development patterns, or adjacent land uses.
2. The variance is the minimum necessary to address the special or unique physical circumstances referenced in subsection 5.1.040B(1).
3. The variance conforms to the provisions of subsections 5.1.040C through 5.1.040G, as applicable.
4. The variance does not conflict with other applicable City policies or other applicable regulations.
5. The variance will result in no foreseeable harm to adjacent property owners or the public.

C. Variance to Vehicular Access and Circulation Standards (Chapter 3.1). Where vehicular access and circulation cannot reasonably be designed to conform to Code standards within a particular parcel, shared access with an adjoining property shall be considered. If shared access in conjunction with another parcel is not feasible, the City may grant a variance to the access requirements after finding all of the following:

1. There is not adequate physical space for shared access, or the owners of abutting properties do not agree to execute a joint access easement.
2. There are no other alternative access points on the street in question or from another street.
3. The access separation requirements cannot be met.
4. The request is the minimum variance required to provide adequate access.

5. The approved access or access approved with conditions will result in a safe access.
6. The vision clearance requirements of Chapter 3.1 will be met.
7. Variances for street access deviations shall be subject to review and approval by the roadway authority.
8. Variances for access deviations on a road right-of-way shall be subject to review and approval by applicable road authority.

D. Variance to Street Tree Requirements (Chapter 3.2). The City may approve, approve with conditions, or deny a request for a variance to the street tree requirements in Chapter 3.2 after finding the following:

1. Installation of the tree would interfere with existing utility lines, and no substitute tree with a lower canopy is appropriate for the site;
2. The standard tree planting requirement would cause a vision clearance problem; **or**
3. There is not adequate space in which to plant the standard street tree; the City may require the installation of additional or replacement landscaping elsewhere on the site (e.g., parking lot area trees) to compensate for the street tree variance.
4. Street tree approval or modification of standards within a right-of-way requires approval by the road authority.

E. Variance to Parking and Loading Standards (Chapter 3.3).

1. The City may approve variances to the parking standards (number of parking spaces, parking location, quantities and dimensions of parking spaces) in Chapter 3.3 upon finding all of the following:
 - a. The individual characteristics of the use at that location require more or less parking than is generally required for a use of this type and intensity, or modified parking dimensions, as demonstrated by a parking analysis or other facts provided by the applicant;
 - b. The need for additional parking cannot reasonably be met through provision of on-street parking or shared parking with adjacent or nearby uses; and
 - c. All other code standards are met, in conformance with Article 2 (Land Use Districts) and Article 3 (Design Standards).
2. The City may reduce the number of required bicycle parking spaces per Section 3.3.020, if the applicant can demonstrate that the proposed use by its nature would be reasonably

anticipated to generate a lesser need for bicycle parking.

3. The City may allow a reduction in the amount of vehicle stacking area required in for drive-through facilities if such a reduction is deemed appropriate after analysis of the size and location of the development, limited services available and other pertinent factors.
4. The City may modify the loading area standards if such a reduction is deemed appropriate after analysis of the use, anticipated shipping or delivery traffic generated by the use and alternatives for loading/unloading, such as use of on- or off-street parking areas during non-business hours provided that traffic is not impeded.

F. Variance to Maximum or Minimum Yard Setbacks to Avoid or Reduce Impacts in areas subject to Geological Hazards, Floodplains, Significant Trees, Wetlands, or Other Natural Features (Article 2 – Land Use Districts). The City may grant a variance to the applicable setback requirements of this Code for the purpose of avoiding or reducing impact to floodplains, significant trees, wetlands, or other natural features. Modification of the standard shall not be more than is necessary for the preservation of the nature feature to be protected.

G. Variances to Transportation Improvement Requirements (Section 3.4.010). The City may grant a variance to the standards of Section 3.4.010 when the variance is not in conflict with the Transportation System Plan and is determined to be in the public interest.

H. Other Variances. Variances to other standards, those not expressly provided for in subsections C-G, may be approved pursuant to the criteria for Class B variances.

5.1.050 Variance Application and Appeals

- A. Application.** The variance application shall conform to the requirements for Type II or II applications (Sections 4.1.030 or 4.1.040), as applicable. In addition, the applicant shall provide a narrative or letter explaining the reason for the variance request, alternatives considered, how the stated variance criteria are satisfied, and why the subject standard cannot be met without the variance.
- B. Appeals** to variance decisions shall be processed in accordance with the appeal provisions of Chapter 4.1.
- C. Expiration.** A variance approval shall expire if not acted upon by the property owner within one (1) year of the City approving the variance. Where the owner has applied for a building permit or final plat, or has made site improvements consistent with an approved development plan (e.g., site design review or preliminary subdivision plan), the Community Development Director may extend the variance approval accordingly.

Chapter 5.2 - Non-Conforming Uses and Developments

Sections:

- 5.2.010 Non-Conforming Uses and Developments - Purpose
- 5.2.020 Non-conforming Uses
- 5.2.030 Non-conforming Development

5.2.010 Non-Conforming Uses and Developments Purpose

This Chapter provides standards and procedures for non-conforming situations (i.e., existing uses or development that do not comply with the Code). The standards for non-conforming uses and development are intended to provide some relief from code requirements for uses and developments that were established prior to the effective date of this Code and do not comply with current standards.

5.2.020 Nonconforming Uses

Where at the time of adoption of this Code a use of land exists which would not be permitted by the regulations imposed by this Code and was lawful at the time it was established, the use may be continued as long as it remains otherwise lawful, provided:

- A. **Expansion Prohibited.** No such nonconforming use is enlarged, increased or extended to occupy a greater area of land or space than was occupied at the effective date of adoption or amendment of this Code. No additional structure, building or sign shall be constructed on the lot in connection with such nonconforming use of land;
- B. **Location.** No such nonconforming use shall be moved in whole or in part to any portion of the lot other than that occupied by such use at the effective date of adoption or amendment of this Code;
- C. **Discontinuation or Abandonment.** The nonconforming use of land is not discontinued for any reason for a period of more than twelve (12) months. For purposes of calculating the twelve (12) month period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:
 1. On the date when the use of land is physically vacated;
 2. On the date the use ceases to be actively involved in the sale of merchandise or the provision of services;
 3. On the date of termination of any lease or contract under which the nonconforming use

has occupied the land; or

4. On the date a request for final reading of water and power meters is made to the applicable utility districts.

D. Application of Code Criteria and Standards. If the use is discontinued or abandoned for any reason for a period of more than 12 months, any subsequent use of land shall conform to the applicable standards and criteria specified by this Code for the land use district in which such land is located.

5.2.030 Non-conforming Development

Where a development exists at the effective date of adoption or amendment of this Code that could not be built under the terms of this Code by reason of restrictions on lot area, lot coverage, height, yard, equipment, access, parking, landscaping, its location on the lot or other requirements concerning the development; and the development was lawful when constructed, the development may remain on the site so long as it remains otherwise lawful, subject to the following provisions:

- A. **Alterations.** No such nonconforming development may be enlarged or altered in a way that increases its nonconformity, but any development or portion thereof may be enlarged or altered in a way that satisfies the current requirements of this Code or will decrease its nonconformity;
- B. **Destruction.** Should such nonconforming development or nonconforming portion of development be destroyed by any means to an extent more than fifty (50) percent of its current value as assessed by the Polk County Assessor, it shall be reconstructed only in conformity with this Code;
- C. **Roadway Access.** The owner of a non-conforming access connection (i.e., street or highway access) may be required to bring the non-conforming access into conformance with this Code and other applicable standards as a condition of the City or other roadway authority approving a new access connection permit, or a change in land use.
- D. **Relocation or Removal.** Should such development be moved for any reason and by any distance, it shall thereafter conform to the regulations of this Code.

Chapter 5.3 - Lots of Record; Legal Lot Determination

Sections:

- 5.3.010 Lots of Record - Purpose
- 5.3.020 Lots of Record - Applicability
- 5.3.030 Lots of Record - Procedure

5.3.010 Lots of Record - Purpose

The purpose of Chapter 5.3 is to establish criteria and a process for determining when a lot of record exists.

5.3.020 Lots Record - Criteria

A lot of record is a plot of land that was not created through an approved subdivision or partition, was created and recorded before the effective date of City's first subdivision ordinance, and for which the deed, or other instrument dividing the land, is recorded with Polk County. A lot of record shall be entitled to development of no less than one (1) single family dwelling. Additional land use or development may be approved subject to applicable Code requirements.

5.3.030 Lots of Record; Legal Lot Determination - Procedure

- A. **Purpose.** A lot of record determination shall be made by the Community Development Director through a Type I or Type II procedure (Section 4.1.020 or Section 4.1.030), as determined by the Community Development Director. It shall be the property owner's responsibility to demonstrate that his or her plot of land is meets the lot of record criteria in Section 5.3.020.
- B. **Applicability.** An application for Legal Lot Determination shall be required when any of the following thresholds apply:
 - 1. The owner of a lot or parcel, or the owner's authorized representative or contract purchaser, has requested the Legal Lot Determination for one or more contiguous lots or parcels under the same ownership.
 - 2. The purchaser of a lot or parcel may requests a Legal Lot Determination to validate a unit of land alleged to be improperly created by sale. Under this threshold, fewer than all the owners of a unit of land may apply for a Legal Lot Determination, provided the applicant is the purchaser of an interest in the subject lot or parcel and the purchase occurred prior to January 1, 2007.

3. The Community Development Director requires a Legal Lot Determination be made as a prerequisite to, or concurrently with, the filing of a land use application.

C. **Approval Criteria.** In determining whether the subject lot or parcel is a Legal Lot, the decision making authority shall make findings based on evidence provided by the applicant demonstrating that the unit of land conforms to the lot area and dimensional standards of the applicable Land Use District; except where a unit of land was created by sale prior to January 1, 2007 and was not lawfully established, the approval body may deem the unit of land a Legal Lot upon finding:

1. The unit of land could have complied with the applicable criteria for creation of a lawful parcel or lot in effect when the unit of land was sold; or
2. If The City, or County prior to annexation, approved a permit as defined in ORS 215.402 or 227.402 for the construction or placement of a dwelling or other structure on the unit of land after the sale, and such dwelling has all of the features listed in ORS 215.755(1)(a)-(e).

D. **Evidence.** An application for a Legal Lot Determination shall be made by the owner of the subject property, the owner's authorized agent, or contract purchaser on a form provided by the Community Development Director and shall be filed with the Community Development Director; provided, however, fewer than all the owners of a unit of land created by sale prior to January 1, 2007, may apply for a Legal Lot Determination. The Legal Lot Determination application shall be accompanied by the all of following information:

1. The information required by the application form and by Section 50.25 (Application Completeness);
2. An application for Legal Lot Determination where the unit of land was created by sale prior to January 1, 2007 and was not lawfully established, shall include a sworn statement that the applicant is the purchaser of an interest in the subject lot or parcel and that their interest was represented at the time of their purchase to be that of a discrete lot or parcel but that it appears the discrete lot or parcel may have been improperly created;
3. Any other information identified through a Pre-Application Conference.

E. **Conditions of Approval.** The approval body may impose conditions on the Legal Lot Determination to ensure compliance with applicable Code requirements. For a unit of land created by sale for which the City has made a Legal Lot Determination pursuant to this Chapter, such unit of land shall not become a lawfully established parcel until the owner of the unit of land records a Final Plat with Polk County, subject to review by the County Surveyor, and within 90 days after the city makes the Legal Lot Determination. The Final Plat shall conform to the City's Legal Lot Determination and conditions thereof.

F. **Appeal of a Decision.** Any appeal of a Legal Lot Determination shall follow the applicable

procedures for appeals of Type II decisions under Chapter 4.1.