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VARIANCE GUIDELINES

Enclosure 1

INTRODUCTION

The Federal Emergency Management Agency (FEMA) does not set forth absolute criteria for granting variances from the floodplain management provisions of Title 44 CFR, §60.3, §60.4, and §60.5. However, general variance criteria have been established in the NFIP regulations under §60.6 (a). These criteria provide the basis for each community participating in the NFIP to determine if a structure qualifies for a variance from the local floodplain management regulations. The variance criteria are a compilation of standards most frequently found in State variance law, coupled with specific floodplain management standards.

In all cases, the responsibility to approve or disapprove a variance rests on the community, not FEMA. However, FEMA evaluates variances granted by a community to determine if they are consistent with the objectives of sound floodplain management. The variance criteria are intended to inform participating communities of the guidelines that FEMA will use in such an evaluation.

To ensure consistency with sound floodplain management, communities should issue variances only on a finding of good and sufficient cause, exceptional hardship, and a determination that variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances. In addition, a variance should be the minimum necessary, considering the flood hazard, to afford relief.

If the criteria at §60.6 (a) are closely adhered to, variances that completely waive the substantive NFIP requirements which provide protection to the 100-year standard should be quite rare. In most cases some lower level of protection or alternative methods to provide comparable protection will be available.

DESCRIPTION AND INTENT OF THE REGULATIONS COVERING VARIANCES

The NFIP variance criteria are based on the general principal of zoning law that variances pertain to a piece of property and are not personal in nature. Though standards vary among States, in general a properly issued variance is granted for a parcel of property with physical characteristics so unusual that complying with the ordinance would create an exceptional hardship to the applicant or the surrounding property owners. Those characteristics must be unique to that property and not be shared by adjacent parcels. The unique characteristics must pertain to the land itself, not to the structure, its inhabitants or the property owners. Therefore, financial hardship or the health condition of the property owner alone are never sufficient causes for granting a variance.

It is common practice for some administrative bodies to grant variances for zoning, property setback, and non-health and safety regulations based on personal criteria and the character of the owner rather than the nature of the property. However, granting a variance from NFIP floodplain management standards on these grounds would rarely be an appropriate action. Such action, would not be consistent with the community's need to ensure public safety.

Once the character of the owner changes (i.e., the property is sold, leased, etc.) the justification for a variance based on personal considerations no longer exists. Because the structure remains, future owner/occupants are exposed to the nonconforming nature of the property and whatever hazards and public safety problems are associated with it. This exposure to flood risk is unnecessary because the sole reason for granting the variance was the personal condition of the previous owner.

The variance criteria in §60.6(a) must be read as a whole and not piecemeal. Variances can be granted for new construction and substantial improvements only if all criteria in §60.6(a) and the local ordinance are met. If any one of the criteria is not met the variance should not be granted.

Floodways - §60.6 (a) (1)

The floodway is defined (§59.1) as:

> "the channel of a river or other water course and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height."

It is important to reserve the floodway as a water conveyance area because any encroachments or obstructions placed in the floodway will increase flood heights and consequently flood damages. Thus, at §60.6 (a) (1):

> "Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result."

The intent of this variance criterion is to prohibit non-conforming development that may increase flood levels which in turn would increase potential flood damages to other property owners.

In most cases there will be alternative locations for the proposed development outside the floodway, or other actions can be taken to compensate for increased flood stages or the floodway can be modified through flood control measures. If there is no feasible or practical alternative site to locate the development and it must meet all criteria under §60.6 (a) and, in accord with §60.6 (d) (3), demonstrate that no increase in flood stages will result. Section 60.3 (d) (3) states that:

> "the community shall prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway that would result in any increase in flood levels within the community during the occurrence of the base flood discharge."

The only exceptions to this provision, located in §§60.3 (c) (13) and (d) (4) of the NFIP regulations, allow for the increases in flood levels under certain conditions and upon approval by the administrator.

In cases where all variance criteria in §60.6 (a) are met and a "no-rise" analysis and certification has been approved, the community may find it appropriate to issue a variance. However, because of the potential hazards involved, many states and communities exceed minimum NFIP requirements by prohibiting the issuance of variances for floodway development altogether, regardless of whether all variance criteria are met and a "no-rise" certification was made. Therefore, a community may wish to prohibit all variance requests based on three potential flood hazards in the floodway:

1. The hazard to the development itself;

2. The increased hazard which the development may cause to other properties;

3. The risk to individuals stranded in isolated structures surrounded by what is in many cases rapidly flowing, debris laden flood waters, and the risk to the rescue workers.

For example, the granting of a variance which allows the placement of a manufactured home below the BFE in a floodway will place the lives of its inhabitants at risk because during a flood it is likely that the manufactured home will be totally demolished. Aside from this danger, experience has shown that a manufactured home can float into other manufactured or conventional homes and result in severe structural damage; or, become wedged in a bridge opening or culvert, which could in turn dramatically increase flood

heights upstream and endanger other citizens. Also, local emergency service personnel may be endangered attempting to rescue the occupants before the manufactured home is carried downstream.

Because of the hazards of granting variances for development in the regulatory floodway, community officials should carefully consider all of the possible dangers created by the variance issuance. In most cases, a review will indicate that the benefits of allowing the development are outweighed by the costs of increased future flood damage and increased hazards to life.

Lots of One-Half Acre or Less - §§60.6 (a) and (a) (2)

> "While the granting of variances generally is limited to a lot size less than one-half acre (as set forth in paragraph (a) (2) of this section), deviations from that limitation may occur. However, as the lot size increases beyond one-half acre, the technical justification required for issuing a variance increases."
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> "Variances may be issued by a community for new construction and substantial improvement to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, in conformance with the procedures of paragraphs (a) (3), (4), (5) and (6) of this section."

A common, but unjustifiable argument for variance requests on lots of less than ½ acre is one based on personal convenience or aesthetics; i.e., the height inconsistency that would result between adjacent structures if the middle one was elevated to or above the BFE. Aesthetics or other personal considerations should never be a consideration when making variance determinations on ½ acre lots. Section 60.6 (a) (2) only addresses the physical, not the aesthetic characteristics of a lot in relation to the adjacent lots. In balancing considerations for personal issues versus issues related to public health and safety such as minimum NFIP criteria, a community should always choose public safety and the protection of lives and property.

The intent of the above variance criteria has been misinterpreted to mean that variances can be systematically granted for all intermediate or "in-fill" subdivision lots of less than ½ acre. Variances on "in-fill" lots of less than ½ acre are not automatic. The intent of §60.6 (a) (2) is not to place a lesser (or no) burden on ½ acre lots, but a greater burden on lots larger than ½ acre. Note that §60.6 (a) specifically states that "as the lot size increases beyond ½ acre, the technical justification required for issuing a variance increases."

The ½ acre threshold pertaining to lot size is meant to be a general cutoff point and, as §60.6 (a) states, "deviations from that limitation may occur." However, experience shows that for intermediate lots greater than ½ acre, a structure can, in nearly all instances be elevated on fill to or above the BFE without causing measurable drainage impacts to the adjacent structures whose lowest floor elevations are at or below grade. Because of the additional storage and infiltration capacity provided by larger lots, and

because of the flexibility in being able to choose a least-impactive location on a large lot, the technical justification required for issuing a variance based on potential drainage problems increases as the lot size increases beyond ½ acre. However, conditions will vary based on the size of the structure relative to the size of the lot, as well as, the location of the structures relative to each other.

Many design and construction alternatives exist that will ease a hardship caused by potential drainage problems, while still allowing a structure in this situation to be built in full compliance with NFIP regulations. There are several acceptable elevation techniques that cause no more, and usually less disruption of drainage patterns than building a structure at ground level through a variance. Examples include: 1.) elevation of the structure on pilings, columns, or extended foundation walls; 2) grading or landscaping the elevated fill pad to drain away form the adjoining properties; and 3) creation of natural or artificial infiltration fields or systems located at the intersection of the fill slope and the natural ground. Many of these type alternatives can be cost effective as well as visually appealing in the community, while still not creating drainage problems for adjacent structures.

In summary, the granting of variances for small lots where elevation on fill will pose an exceptional hardship due to drainage problems should be rare. Variances for "in-fill" lots of ½ acre or less should be granted on the basis of potential drainage problems only 1) if, as §60.6 (a) (2) explicitly states, all other criteria [§§60.6 (a) (3), (4), (5), and (6)] are met, and 2) if a professional engineer or architect has prepared and certified data demonstrating that there are no technically feasible methods available to alleviate or mitigate the drainage problems.

Good and Sufficient Cause - §60.6 (a) (3) (i)

> "Variances shall only be issued by a community upon a showing of good and sufficient cause."

A variance request by an applicant that is based on good and sufficient cause is one that deals solely with the physical characteristics of the property, subdivision lot, or land parcel under question. A rendering of a good and sufficient cause should never be based on the character of the planned construction or substantial improvement, the personal characteristics of the owner or inhabitants, or local provisions that regulate non-health and public safety standards (e.g., aesthetic restrictions of subdivision homeowner associations).

"Good and sufficient" cause means that by granting a variance there is substantial and legitimate benefit to be achieved by numerous other citizens, or the community as a whole. It is not merely based on the convenience or financial relief that the variance would afford the applicant. Inconvenience, aesthetic considerations, physical handicaps, personal preferences, the disapproval of one's neighbors, or homeowners' association restrictions, likewise do not, as a rule, qualify as "good and sufficient" causes. "Good and sufficient" cause for a variance occurs when a parcel of property

possesses physical characteristics so unusual that complying with NFIP regulation in a local ordinance would create an exceptional hardship to the applicant, the surrounding property owners, or the community in general. In addition, the unusual physical characteristics must be unique to that property and not be shared by adjacent parcels or be typical of other lots in the community.

Physical conditions are inherent to the land or property and usually will not change or be significantly altered over time. Therefore, the justification for granting a variance based on physical characteristics will usually not be undermined over time. In contrast, personal characteristics and intended uses of buildings can change dramatically with changes in ownership. Likewise, local aesthetic and other non-health and safety restrictions are frequently altered over short periods of time. Thus, the justification for granting variances based on characteristics other than the physical conditions of the property can rapidly compromised.

Once the character of the owner changes (i.e., the property is sold, leased, etc. or the owner no longer suffers from financial hardship) the justification for the variance no longer exists, but the structure remains. Future owner/occupants are exposed to the nonconforming nature of the property and whatever hazards and public safety problems are associated with it. This exposure to property and personal risk from flood damage is unnecessary except for the personal condition of the previous owner.

A common misinterpretation of what constitutes "good and sufficient cause" for granting a variance is based on the financial status or other monetary circumstances of the owner. Financial hardship of the property owner is never a good and sufficient cause for granting a variance. Granting a variance for construction in a flood hazard area based on financial hardship only increases the probability that owners least able to afford it will suffer even greater monetary adversity (not to mention health and safety risks) when the structure is damaged during a flood.

Exceptional Hardship - §60.0 (a) (3) (ii)

> "Variances shall only be issued by a community upon a determination that failure to grant the variance would result on exceptional hardship to the applicant."

In determining whether or not an applicant has established an exceptional hardship sufficient to justify a variance, the variance or appeal board or other local governing body must weigh the applicant's hardship against community goals and the purpose of their floodplain management ordinance. In the case of variances form NFIP flood elevation or floodproofing requirements, this would mean asking which is more serious: the hardship that this individual applicant would face, or the community's need for strictly enforced regulations that protect its citizens form the dangers and damages of flooding? Only a truly exceptional, unique hardship relative to the physical character of a piece of property should persuade local officials to set aside provisions of an ordinance designed with the whole community's safety in mind.

The hardship might not have to be so severe if the applicant were seeking a variance to a setback ordinance, for instance, which was intended merely to simplify street repair and modifications. In the course of considering variances to flood protection ordinances, however, variance boards continually must face the more difficult task of frequently having to deny requests form applicants whose personal circumstances evoke compassion, but whose hardships are simply not sufficient to justify deviation form community-wide flood damage prevention requirements.

The hardship that would result from failure to grant a requested variance must be exceptional, unusual, and peculiar to the property involved. Inconvenience, aesthetic considerations, physical handicaps, personal preferences, the disapproval of one's neighbors, or homeowners association restrictions likewise cannot, as a rule, qualify as exceptional hardships. All of these problems can be resolved through other means, without granting a variance. This is so even if the alternative means are more expensive or complicated than building with a variance, or if they require the property owner to put the parcel to a different use than originally intended, or to build his or her home elsewhere.

For example, a situation in which it would cost a property owner several thousand dollars more to elevate a house to comply with the ordinance and an additional several thousand to build a wheelchair ramp or an elevator to provide access to that house for a handicapped member of the family might at first glance seem like the sort of problem that could be relieved by a variance. However, while financial considerations are always important to property owners and the needs of the handicapped person certainly must be accommodated, these difficulties do not put this situation in the category of "exceptional hardships" as they relate to variances. This is because the characteristics that result in the hardship are personal (the physical condition and financial situation of the people who propose to live on the property) rather than pertaining to the property itself. Also, the problem of the day-to-day access to the building can be alleviated in any one of a number of ways (going to the additional expenses of building a ramp or elevator), without granting a variance. In fact, one method which facilitates the use of a structure for handicapped persons (especially those in wheel chairs) is to elevate the structure by means of earthen fill.

Third, the situation of handicapped persons occupying flood-prone housing raises a critical public safety concern. If a variance is granted and the building is constructed at grade, it will be absolutely critical that the handicapped or infirm person evacuate when flood waters begin to rise, yet he or she may be helpless to do so alone. Not only does this pose an unnecessary danger to handicapped persons but also it places an extra demand on the community's emergency services personnel who may be called upon. If the building is properly elevated, the handicapped person can still be evacuated if there is sufficient warning and assistance available. If there is not, that person can, in all likelihood survive the flood simply by remaining at home safely above the level of the flood waters.

More simply, the property owner's difficulties would not really be relieved by the variance, but likely only postponed and perhaps ultimately increased. It would be more prudent over the long run for the property owner and the community, if the variance were denied and the home built at the proper elevation with handicapped access. This will ensure the safety of all family members when floodwaters rise and also protect individual and community investment in the property, as discussed in the paragraphs on public safety and nuisances.

Another common argument for variances from the elevation requirement is the unaesthetic height differential with adjacent structures that would result. To promote architectural and aesthetic consistency, homeowners associations or subdivision boards frequently place restrictions on landscaping and construction practices, such as the total height to which structures can be built. The owner, and usually the prospective neighbors and local homeowners association, protest that the structure, if elevated, will be architecturally out of sync with the rest of the structures on the block and that property values will be decreased as a result.

Variance requests that claim exceptional hardships due to architectural considerations or conflicts with local subdivision regulations governing aesthetics should never be granted to waive regulations designed to protect the health and safety of residences. For the following reasons a community would be remiss in its responsibilities to its citizens if it placed appearance before public protection:

1. The hardship would be based on personal preference, not the property per se;

2. Most structures can be elevated such that they are aesthetically pleasing and architecturally consistent, despite the height difference;

3. Elevated structures are much less prone to flood damage, and, therefore, actually increase in value relative to adjacent unprotected structures, especially after they are damaged in a flood;

4. The health and safety risks placed on occupants of the unprotected structure are unnecessary and avoidable.

Increased Flood Heights - §60.6 (a) (3) (iii)

> "Variances shall only be issued by a community upon a determination that the granting of a variance will not result in increased flood heights."

A development for which a variance is to be granted must not in any way cause an increase in water surface elevations during floods of any magnitude, not just the base flood. Therefore, for a community to grant a variance, all other variance criteria in Section 60.6 (a) must be met, and the applicant must demonstrate through technical justification that the proposed development will not increase flood heights.

The underlying principal is that an increase in flood heights has the potential to cause flood damage to structures in the community that otherwise would not be flood-prone. In addition, it has the potential to increase the depth of flooding, and thus the damage potential, of structures that are already flood-prone.

To allow increases in flood heights to occur unnecessarily is inconsistent with the objectives of sound floodplain management, and undermines the community's previous efforts to protect structures by requiring elevation or floodproofing to or above the BFE. Increases in flood heights subtract from the level of protection provided by these requirements.

Public Safety and Nuisances - §60.6 (a) (3) (iii)

"A variance will not cause additional threats to public safety or create nuisances."

Variances must not result in additional threats to public safety or create nuisances. Local flood damage prevention ordinances (including elevation and floodproofing requirements) are intended to help protect the health, safety, well-being, and property of the local citizens. This is a long range community effort usually made up of a combination of approaches such as adequate drainage systems, warning and evacuation plans, keeping new property (especially homes) above the flood levels, and participating in an insurance program. These long-term goals can be met if exceptions to the laws are kept to a bare minimum.

Variances to allow the construction of habitable structures below the BFE, especially in the higher hazard areas such as floodways, places residents of those structures at much greater personal risk. The potential for loss of life is much greater in structures where the first floor is below the BFE, and where flood depths are greater than three feet or velocity is present. A community which grants variances to waive elevation requirements in these situations is doing a disservice to its citizens. In addition, a community may be held liable for personal injuries or loss of life which occurs to occupants of structures for which a non-compliant variance has been granted.

It is often argued that variances to waive the elevation requirement should be granted for structures where handicapped or elderly persons will be occupants. The basis for this argument is that elevation of the structure will make wheelchair access difficult (i.e., long and expensive ramps) or that elderly people are not physically capable of climbing stairs. However, for the same exact reasons, handicapped and elderly people are much less able to quickly evacuate flood-prone structures. They are much more likely to become trapped inside structures if not aware of the imminent and worsening flood hazard or when flood waters rapidly rise. Therefore, it is difficult to imagine a case where a variance would be appropriate for a structure when there is to be handicapped and/or elderly occupancy.

Historic Structures - §60.6(a)

> "Variances may be issued for the repair or rehabilitation of historic structures upon a determination that (i) the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and (ii) the variance is the minimum necessary to preserve the historic character and design of the structure."

The original intent of providing special treatment to historic structures was to comply with the intent of the Historic Preservation Act of 1966 by 1) allowing historic structures to always maintain Pre-FIRM, subsidized insurance rates and, 2) minimizing the adverse impacts of NFIP requirements on the historic integrity of historic structures. However, it is stipulated under §60.6(a) that the variance be the minimum deviation necessary to preserve both the historic character of the structure and its designation as a historic building. It should be noted that communities that do not require historic structures to meet variance criteria may exempt historic structures through the substantial improvement requirement without requiring the minimum necessary to afford relief provision.

The granting of a variance should be based on a structure-by-structure review to determine whether elevation (or floodproofing if a non-residential structure is involved) to or above the BFE would destroy the historic character or design of the structure. If so, a variance for that structure may be granted. Variances should never be granted for portions of, or entire historic districts, but only for individual historic structures.

For example, if elevation of a historic structure would destroy its character and cause a loss of its Department of Interior (DOI) designation, a variance for the elevation requirement may be considered. However, the owner of the structure should still be required, in accordance with §60.6(a)(40, to do the following where feasible: 1) elevate all utilities and finished interior and exterior improvements wherever possible; and/or 3) raise the interior floors to or above the BFE or to the maximum extent possible (this is often technically feasible in older structures with high ceilings).

Physical alterations made to a "historic structure" which would otherwise constitute a substantial improvement must not result in the delisting of the structure from its DOI certified, state, or local inventory status. If such alterations cause the structure to lose its official listing or historic status, the structure would no longer be a "historic structure" for the purposes of the NFIP and would be considered a substantial improvement and therefore, comply with the NFIP requirements for new construction.

For further background on the pertinent regulations, procedures and adopted nomenclature of the DOI as the as they pertain to historic structures see **36 CFR 61.4, 61.5, 67.2, 67.4, 67.5,** and **67.10**.

Not only does a community's public safety commitment apply to residents of structures located in flood hazard areas, but also to local emergency services personnel. Variances from the elevation requirement increase the risk exposure for personnel required to rescue residents of structures flooded because of the variance. Simply, if structures are elevated to or above the BFE, residents can in all likelihood, survive the flood by remaining at home safely above the level of the waters. The necessity to rescue residents of elevated structures is not as great, and local emergency services personnel can concentrate their efforts to areas of greater need.

Public Expense – §60.6 (a)(3)(iii)

> "Variances shall only be issued by a community upon a determination that the granting of a variance will not result in extraordinary public expense.

The public expense is usually monetary (government funds), but can also be non-monetary. An example of extraordinary public expense is the repair or replacement of public facilities and infrastructure damaged by a flood because of a variance issuance. Another example is the construction of flood control projects or other public works to protect structures prone to flooding because of the issuance of variances. There are also public costs associated with emergency floodproofing measures such as sandbags and temporary floodwalls built (with public funds) to protect structures flooded because they were issued a variance from elevation requirement.

The time and equipment expended by emergency services personnel to rescue residents of flooded structures is significant public expense. This time and expense is unnecessary, and therefore "extraordinary", if it is spent rescuing residents of structures for which variances were granted. There is also a significant "missed opportunity" (non monetary) public expense if an otherwise avoidable injury or death occurs while rescue personnel are busy evacuating structures for which variances were issued.

National expenditures in the form of various Federal disaster assistance programs (e.g., FEMA, SBA, etc.), non-government assistance (e.g., Red Cross), and other charity donations are also public expenses. Residents of structures flooded because of the issuance of variances may be entitled to one or more of these many forms of assistance; an increased public expense that, without a variance issuance, could be avoided. Specifically, residents of flooded structures (for which variances have been granted) may qualify for personal grants and monies to provide temporary housing under the terms of FEMA's Disaster Assistance Program.

Another form of public expense occurs when owners of heavily damaged structures (for which variances were granted) can not afford repairs, and abandon them. When local government is held responsible for repair or demolition (which is usually the case)' the

additional expense incurred by the public should be considered "extraordinary" because it would not have occurred had a variance not been issued.

Fraud and Victimization - §60.6(a)(3)(iii)

> "Variances shall only be issued by a community upon a determination that the granting of a variance will not cause victimization of the public."

When considering a variance request, local variance boards should consider the fact that every newly constructed building adds to the local government responsibilities and remains a part of the community for fifty or more years. Buildings that are permitted to be constructed below the base flood elevation are subject during all those years to increased risk of damage from floods, while future owners of the property and the community as a whole are subject to all the costs, inconvenience, danger, and suffering that those increased flood damages bring.

One of the biggest potential problems involving variances is the change of ownership of a structure for which a variance has been granted. Future owners that purchase the property may be unaware that it is subject to potential flood damages and can be insured only at very high flood insurance rates. Frequently, resale happens after the structure has been flooded. The original owner repairs the structure and removes all evidence of previous flooding. The structure is then put up for sale in an attempt to "unload" it on prospective buyers that are new to the area or who are otherwise unfamiliar with extent and nature of the local flood hazard.

An example of public victimization is the case of a variance request to waive elevation requirements for mini-warehouse. The units or "bays" of the warehouse are rented to the public for various personal uses such as the storage of excess furniture. Granting a variance in this case would create the potential for victimization of citizens who, unknowing of the flood hazard and the risk to their property, rent units to store their possessions. When the warehouse is flooded and its contents (which are not covered by flood damage by a homeowner's policy) are damaged, the owners may have no recourse for financial compensation. In addition, many stored possessions that are damaged may be family heirlooms, have sentimental or historic value, or otherwise be irreplaceable. Variances that have the potential to cause this type of victimization or fraud on the public should never be granted.

Existing Local Laws or Ordinances – §60.6(a)(3)(iii)

> "Variances shall only be issued by a community upon a determination that the granting of a variance will not result in conflict with existing local laws or ordinances."

A community is authorized to grant variances from their local floodplain ordinances provided that the variance is not in conflict with other existing Federal or State laws and regulations that, by statute, the community is required to obey and enforce. Examples of local laws that may be brought into contention with variances to floodplain management ordinances include building codes (many of which contain some form of flood resistant language) health and safety regulations, and laws protecting environmental and other natural resources. In addition, variances granted by a community must comply with the provisions of State zoning and enabling legislation and case law.

Minimum Necessary to Afford Relief – §60.6 (a)(4)

The variance that is granted should be for the minimum deviation from the local requirements that will still alleviate the hardship. In the case of variances to an elevation requirement, this means the community need not grant permission for the applicant to build at grade or even to whatever elevation the applicant proposes, but only to that level that will both provide relief and preserve the integrity of the local ordinance.

For example, if the BFE is ten feet above natural grade, and only a three-foot waiver is necessary to avoid a legitimate hardship, then the community should require that the structure be elevated seven feet. Or, using this example, if the structure had to be built on grade to afford relief, the variance should still stipulate that all utilities and finished interior workings (and other damageable property) be elevated to or above the BFE (or to the maximum extent possible or practically feasible) in order to reduce the potential of flood damage.

The variance must be the absolute minimum necessary to relieve the hardship, which means the absolute maximum to prevent or reduce future flood damages. When a variance waiving the elevation/dry floodproofing requirements is granted, the "minimum necessary" includes the implementation of 1) "wet floodproofing" techniques and/or 2) provisions in §60.3(a)(3) which require the structure to:

> "(i) be designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy, (ii) be constructed with materials resistant to flood damage, (iii) be constructed by methods and practices that minimize flood damages, and (iv) be constructed with electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities that are designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding."

In summary, very rarely will there be justification to grant a "blanket variance" which waives all NFIP requirements. There will almost always be something that can feasibly done to the structure to reduce the potential for flood damages.

Disclosure - §60.6(a)(5), §60.22 (c)(3)(ii)

Community officials must notify the applicant that the issuance of a variance to construct a structure below BFE will result in increased premium rates for flood insurance and that such construction below BFE increases risks to life and property.

Specifically, it is stated in §60.0(a)(5) that:

> "a community shall notify the applicant in writing over the signature of the community official that (i) the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as $25 for $100 of insurance coverage and (ii) such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph (a)(6) of this section."

In addition, under §60.22 (c) (3)(ii), "Planning Considerations in Flood Prone Areas", it is recommended that a community consider implementing:

> "full disclosure to all prospective and interested parties (including but not limited to purchasers and renters) that variances have been granted for certain structures located within flood-prone areas."

Such a disclosure is important and necessary to inform subsequent buyers of structures for which a variance was granted to build below BFE.

From a public safety standpoint, the prospective buyer has a right to know that the structure will be susceptible to flooding and its occupants subject to risk. From a financial standpoint, the prospective buyer has the right to know that the structure and its contents will be susceptible to damage. All prospective owners of these structures who desire flood insurance should be made aware, before closing, that the premium rates applied to these structures can be extreme, and possibly prohibitively high.

Often the variance applicant does not wish, or is not forced under the mandatory purchase requirement, to purchase flood insurance at the time the variance is granted and high rates are not a problem. However, at some later date, especially after a structure has experienced flooding, there may be a desire by the owner to purchase flood insurance. In addition, prospective buyers of a structure for which a variance has been granted may desire or be required to purchase flood insurance and may be discouraged from acquiring the structure because of the high rates. This situation can

be compounded when an unsuspecting buyer purchases such a structure and discovers at a later date that insurance is required, but at a prohibitive cost. This can result in an economic hardship to an innocent party.

Functionally Dependent Uses – §60.6 (a) (7)

> "Variances may be issued by a community for new construction and substantial improvements and for other development necessary for the conduct of a functionally dependent use provided that (i) the criteria of paragraphs (a)(1) through (a)(4) of this [60.6] section are met, and (ii) the structure or other development is protected by methods that minimize flood damages during the base flood and create no additional threats to public safety."

As defined §59.1, a "functionally dependent use" means a use that cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities that are necessary for the loading and unloading of cargo and passengers, and shipbuilding and repair facilities, but does not include the long-term storage or related manufactured facilities.

Long-term storage or related manufactured facilities can be located outside of the floodplain or fully comply with all NFIP requirements. These uses are therefore excluded from the definition of "functionally dependent use". The intent of this is to limit variances only to the practical problems of building and repairing ships, of loading cargo and passengers from vessels, and moving the cargo onto other forms of transportation or to long-term storage facilities that fully comply with NFIP criteria.

In accordance with §60.6(a)(7), communities may grant variances for new construction or substantial improvement and for other development necessary for the conduct of functionally dependent uses. However, all variance criteria must be met and the structures or other development must be protected by methods which minimize flood damages during the base flood.

When applied to some functionally dependent uses such as port facilities, the seafood industry or shipbuilding, NFIP floodplain management criteria can usually be met, with the industry still being able to operate as intended. A 1983 FEMA study entitled *"Effect of Floodplain Regulations on Inland Port Facilities"* identified few instances where ports could not be built in compliance with the regulations while several examples were given of ports that have met all standards.

However, because functionally dependent uses must be located on or adjacent to water to operate, there can be serious practical and operational difficulties resulting in exceptional hardship due to the physical characteristics of the property if a variance is not granted. Typically of concern to the port industry are the elevation and watertight

floodproofing requirements in §60.3(c)(3) and the floodway requirements in §60.3(d). In addition, problems occasionally arise in dealing with various V-zone requirements in §60.3(e), especially those covering pile and column construction, breakaway walls, prohibition of fill for structural support, and location of new construction landward of mean high tide. Except for the floodway requirements, there are feasible alternative methods for creating no additional threats to public safety and achieving a comparable degree of protection from flood damages for the types of structures that normally accompany functionally dependent uses.

Therefore, in accordance with §60.6(a)(4), a variance can be used to address the unique problems of functionally dependent uses if it is for "the minimum necessary to afford relief considering the flood hazard" (§60.6(a)(4)).

When evaluating variances for functionally dependent uses, the primary concerns should be that flood damages will be minimized during the base flood and that no additional threats to public safety will be created. A community that varies individual standards for functionally dependent uses, but still uses methods to reduce flood damages to the maximum extent possible or practically feasible does not jeopardize its NFIP eligibility.

As with existing variance criteria under §60.3(a)(1), no variances for functionally dependent uses may be issued within any designated regulatory floodway if any increases in flood levels would increase potential flood damages to other property owners. In many situations there will be feasible locations outside of the floodway for a functionally dependent use. If a functionally dependent use has no option but to locate in a floodway, the applicant must either demonstrate that no increase in flood stages will result or must provide additional floodway carrying capacity such as through channel improvements to ensure that no increase in flood stage will result. Communities should be instructed to contact FEMA regional offices for technical assistance if they encounter situations where functionally dependent uses must locate in a floodway, but cannot meet the no-increase-in-flood-stage requirement.

Smorey, Greg

From: Smorey, Greg
Sent: Friday, August 24, 2012 1:52 PM
To: Chatham
Subject: Variance Guidelines
Attachments: Variance Guidlines.pdf

Storm Water Variance Board Members,

I just wanted to take this time to remind you of our Variance Board hearing next Wednesday, August 29, 8:15am. Room 805.

Along with the reminder, I have attached the Variance Guidelines set forth in CFR. The attachment is the guideline for what should or should not be "Varied". I believe that the upcoming variance request might be one that is a bit more complex and I just wanted to refresh myself and the board regarding the guidelines for granting a variance.

The Hamilton County Flood Damage Prevention Regulations states, regarding variances:

Any request for a variance from the requirements of these Regulations (which were based upon the standards of 44 CFR 60.3) shall be reviewed by the appropriate body identified in Section 6.1, above, using the guidance and procedures contained in 44 CFR 60.6(a).

Variances shall only be issued upon:

1. A showing of good and sufficient cause.
2. A determination that failure to grant the variance would result in exceptional hardship due to the physical characteristics of the property. **Increased cost or inconvenience of meeting the requirements of these regulations <u>does not</u> constitute an exceptional hardship to the applicant.**
3. A determination that the granting of a variance will not result in increased flood heights beyond that which is allowed in these regulations; additional threats to public safety; extraordinary public expense, nuisances, fraud on or victimization of the public, or conflict with existing local laws.
4. A determination that the structure or other development is protected by methods to minimize flood damages.
5. A determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

Upon consideration of the above factors and the purposes of these regulations, the Appeals Board may attach such conditions to the granting of variances, as it deems necessary to further the purposes of these regulations.

D. Other Conditions for Variances

1. Variances shall not be issued within any designated floodway if any increase in flood levels during the base flood discharge would result.
2. Generally, variances may be issued for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing

structures constructed below the base flood level, providing items in Section 5.4(C)(1) to (11) have been fully considered. As the lot size increases beyond one-half acre, the technical justification required for issuing the variance increases.

3. Any applicant to whom a variance is granted shall be given written notice that the structure will be permitted to be built with a lowest floor elevation below the base flood elevation and the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation.

If you have any questions, please feel free to contact me.

Sincerely,

Gregory J. Smorey, CFM
Project/Floodplain Manager - Plans Examiner
Hamilton County Department of Planning and Development Storm Water Division
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http://www.hamilton-co.org/pubworks/default.asp