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USE VARIANCE COMES TO MISSOURI

*Matthew v. Smith*¹

Jim and Susan Brandt owned a tract of land in the Kansas City area zoned for single family use. Two houses were located on the land. The Board of Zoning Adjustment of Kansas City granted the Brandts a variance allowing them to rent both of the houses with a single family in each house. Matthew, a neighboring landowner, challenged the grant of variance in circuit court.² The circuit court affirmed the Board's decision and Matthew appealed. The court of appeals held that the Board of Zoning Adjustment was without authority to grant the variance.³ The case was then transferred to the Missouri Supreme Court, which, sitting en banc, reversed the appellate court's decision and remanded the case back to the Board of Adjustment.⁴

In reaching its unanimous decision, the Missouri Supreme Court made two determinations. First, the court determined that the Brandts were requesting a use variance rather than an area variance.⁵ Second, the court determined that the Board of Adjustment was empowered to grant such a use variance.⁶ The significance of these holdings is that while Missouri courts

1. 707 S.W.2d 411 (Mo. 1986) (en banc).

2. *Matthew*, 707 S.W.2d at 411.

3. *Matthew*, 707 S.W.2d at 412. The court of appeals' decision was apparently soundly based on existing Missouri case law. The case was decided in accordance with 56 years of Missouri Court of Appeals decisions beginning with *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 27 S.W.2d 1030 (1930) (en banc). See *Bartholomew v. Board of Zoning Adjustment*, 307 S.W.2d 730 (Mo. Ct. App. 1957); *Brown v. Beuc*, 384 S.W.2d 845 (Mo. Ct. App. 1964); *State ex rel. Sheridan v. Hudson*, 400 S.W.2d 425 (Mo. Ct. App. 1966); *State ex rel. Meyer v. Kinealy*, 402 S.W.2d 1 (Mo. Ct. App. 1966); *Rosedale-Skinker Improvement Ass'n v. Board of Adjustment*, 425 S.W.2d 929 (Mo. 1968) (en banc); Note, *The Zoning Variance: A New Look in Missouri?*, 34 Mo. L. REV. 631 (1969). But see *Beckmeyer v. Beuc*, 367 S.W.2d 9 (Mo. Ct. App. 1963) (St. Louis Court of Appeals affirmed issuance of variance to permit use of former dormitory as a hotel in zoning district restricted to two-family dwellings). See generally 3 A. RATHKOFF, *THE LAW OF ZONING AND PLANNING* § 38 (1987); 5 N. WILLIAMS, *AMERICAN PLANNING LAW* § 129.05 (1985).

4. The case was remanded to the Board of Adjustment with directions that the Brandts be permitted to present evidence warranting the grant of either a use variance or an area variance and to amend their application to claim a nonconforming use of the premises. *Matthew*, 707 S.W.2d at 418-19.

5. *Matthew*, 707 S.W.2d at 414.

6. *Id.*

have consistently held that boards of adjustment have the power to grant "area" variances, courts have not allowed boards of adjustment to grant "use" variances.⁷ After the *Matthew* decision, Missouri boards of adjustment may now grant both kinds of variances.⁸

A variance is the grant of a right to develop land for a purpose or in a manner which is otherwise expressly prohibited by law.⁹ It allows a landowner to use his property in a way which is contrary to the provisions of the zoning ordinance. It is frequently stated that the purpose of a variance is to "afford a [safety valve] against individual hardships, to provide relief against unnecessary and unjust invasions of the right of private property, to provide a flexibility of procedure necessary to the protection of constitutional rights, and to keep the law 'running on an even keel.'"¹⁰ A variance is granted only when practical difficulties or unnecessary hardship would result from the literal application of the zoning ordinance.¹¹

The majority of jurisdictions, including Missouri, recognize two types of variances: an area variance¹² and a use variance.¹³ An area variance permits deviations from zoning restrictions involving the dimensions of the property. Dimensional deviations include deviations in height, area, density, setback, or side line restrictions.¹⁴ A variance permitting erection of a house on a 95 foot lot in a zone requiring 100 foot lots is therefore an area variance. A use variance, on the other hand, permits a different *use* of the property than prescribed by the zoning ordinance. Thus, a variance permitting the operation of a service station or a retail store in a residential district is a use variance.¹⁵

Determining whether a particular variance is an area variance or a use variance is not always simple.¹⁶ The variance involved in *Matthew v. Smith*

7. See cases cited *supra* note 3.

8. *Matthew*, 707 S.W.2d at 414.

9. *Matthew*, 707 S.W.2d at 413; A. RATHKOPF, *supra* note 3, § 38.01, at 2.

10. 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.160 (rev. 3d ed. 1983).

11. R. ANDERSON, AMERICAN LAW OF ZONING § 18.02 (2d ed. 1977).

12. *Matthew*, 707 S.W.2d at 413. Area variances may also be termed "non-use" variances. *Id.*

13. *Matthew*, 707 S.W.2d at 413; A. RATHKOPF, *supra* note 3, § 38.01, at 1.

14. *Matthew*, 707 S.W.2d at 413; A. RATHKOPF, *supra* note 3, § 38.01, at 1.

15. See, e.g., *State ex rel. Meyer v. Kinealy*, 402 S.W.2d 1 (Mo. Ct. App. 1966) (use variance requested for a service station); *Simone v. Board of Appeals*, 6 Mass. App. Ct. 601, 380 N.E.2d 718 (1978) (use variance requested for a retail store).

16. A. RATHKOPF, *supra* note 3, § 38.01, at 6-12, discusses the difficulties of distinguishing area and use variances; an example of the difficulty being an ordinance which permits both single and multiple family dwellings in a district but requires larger lots for the multiple family dwellings. *Id.* It is unclear whether the granting of a variance permitting a multiple family dwelling on a single family sized lot is an area or a use variance. *Id.* It appears to be an area variance in that only the restriction on lot size may be said to have been varied. *Id.* at 7. It appears to be a use variance in that a different use is being permitted on the smaller lot than was specified in the

illustrates the difficulty of this determination. The variance could be viewed as an area variance in that only the minimum lot size for each house was to be varied. The variance could be viewed as a use variance in that two houses were to be permitted on a single lot. The majority in *Matthew* held that a use variance was involved although Judge Robertson, in his concurring opinion, made a compelling argument that an area variance was in fact involved.¹⁷ Judge Robertson reasoned that the Brandts' variance request was for relief from the zoning ordinance's lot size restrictions and therefore constituted an area, not a use, variance.¹⁸ He did not, however, deny the authority of adjustment boards to issue use variances.¹⁹

Prior to *Matthew*, making the distinction between the two types of variances was crucial, as Missouri courts had allowed area variances but not use variances.²⁰ Relying on the landmark case of *State ex rel. Nigro v. Kansas City*,²¹ the granting of a use variance had been viewed by the courts as an invalid attempt by a board of adjustment to amend the zoning ordinance itself.²² In the past, Missouri courts had ruled that such a grant constituted an usurpation of legislative zoning powers,²³ and as such was a nullity.²⁴

ordinance. *Id.* at 7. One New York court took the view that these circumstances constitute a combination area and use variance. *Markovich v. Feriola*, 41 Misc. 1051, 247 N.Y.S.2d 29 (1963), *aff'd*, 22 A.D.2d 691, 253 N.Y.S.2d 417 (1964); *see also* R. ANDERSON, *supra* note 12, § 18.46, at 265-66.

17. *Matthew*, 707 S.W.2d at 420-21 (Robertson, J., concurring).

18. *Matthew*, 707 S.W.2d at 419-21 (Robertson, J., concurring). *See* discussion, *supra* note 16, on the difficulties of distinguishing use and area variances.

19. Judge Robertson stated: "This Court has never held that 'use' variances are prohibited . . . although two Court of Appeals cases have arguably so held." *Matthew*, 707 S.W.2d at 421 (Robertson, J., concurring).

20. *See* cases cited *supra* note 3 and accompanying text.

21. 325 Mo. 95, 27 S.W.2d 1030 (1930) (en banc). In *Nigro*, the respondent had applied for a variance to permit construction of a building for business purposes on land zoned for residential use only. Holding that the adjustment board had no power to issue the variance, the Missouri Supreme Court stated:

What [respondent] in fact asked the board of zoning appeals to do was to "rezone" the corner on which his property is located, that is, change the boundaries between the residential district in which it is situated and the adjoining business district so that his lot would fall within the latter district. This, as already pointed out, the board was powerless to do; the common council only is authorized to change the boundaries. Section 5, Enabling Act. If the board has heretofore attempted such rezoning, as the record suggests, its acts in that respect were nullities.

State ex rel. Nigro v. Kansas City, 325 Mo. at 101, 27 S.W.2d at 1032-33 (1930) (en banc).

22. *See, e.g.*, *State ex rel. Meyer v. Kinealy*, 402 S.W.2d 1 (Mo. Ct. App. 1966) (board of adjustment had no power to issue a variance permit for construction of filling station on residentially zoned land); *State ex rel. Sheridan v. Hudson*, 400 S.W.2d 425 (Mo. Ct. App. 1966) (board of adjustment had no authority to issue variance permit for construction of apartment buildings on residentially zoned land).

23. *E.g.*, *State ex rel. Meyer v. Kinealy*, 402 S.W.2d at 6 (Mo. Ct. App.

Although the Missouri Supreme Court in *Matthew* has now rejected these arguments and boards of adjustment may now grant both types of variances, the distinction between area and use variances remains important. The court has set out separate tests for the granting of variances—the requirements for obtaining an area variance being “slightly less rigorous”²⁵ than those required for a use variance.

The Missouri Enabling Statute delegates to the Board of Adjustment the power to grant a variance when the applicant establishes “practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.”²⁶ *Matthew* holds that an applicant may fulfill the requirements of the Enabling Statute and obtain either type of variance by proving:

- 1) relief is necessary because of the unique character of the property rather than for personal considerations; and
- 2) applying the strict letter of the ordinance would result in unnecessary hardship; and the
- 3) imposition of such a hardship is not necessary for the preservation of the plan; and
- 4) granting the variance will result in substantial justice to all.²⁷

Of these four requirements for a variance to issue, the second element of “unnecessary hardship” is *not* applied equally to area and use variances. The Missouri Supreme Court in *Matthew* held that to obtain a use variance an applicant must demonstrate “unnecessary hardship,”²⁸ while to obtain an

1966); State *ex rel.* Sheridan v. Hudson, 400 S.W.2d at 430-31 (Mo. Ct. App. 1966); Brown v. Beuc, 384 S.W.2d 845, 854 (Mo. Ct. App. 1964); State *ex rel.* Nigro v. Kansas City, 325 Mo. at 100-01, 27 S.W.2d at 1032 (1930) (en banc). In frequently quoted language, the *Nigro* court stated that:

[T]he Zoning Ordinance must be read and construed in connection with the Enabling Act; the former, if in any respect inconsistent with the latter, is to that extent a nullity. The Board of Zoning Appeals . . . is an administrative body—without a vestige of legislative power. It cannot therefore modify, amend or repeal what the ordinance itself designates as its “general rules and regulations. . . .” [T]he Board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they cannot merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance.

State *ex rel.* Nigro v. Kansas City, 325 Mo. at 100-01, 27 S.W.2d at 1032.

24. See *Nigro v. Kansas City*, 325 Mo. at 101, 27 S.W.2d at 1032 (1930) (en banc); State *ex rel.* Meyer v. Kinealy, 402 S.W.2d at 6 (Mo. Ct. App. 1966); Sheridan v. Hudson, 400 S.W.2d at 430 (Mo. Ct. App. 1966).

25. *Matthew*, 707 S.W.2d at 416.

26. Mo. REV. STAT. § 89.090.1(3) (1978).

27. *Matthew*, 707 S.W.2d at 415-16; see A. RATHKOPF, *supra* note 3, § 38.02, at 17; N. WILLIAMS, *supra* note 3, § 129.06, at 15.

28. *Matthew*, 707 S.W.2d at 416.

area variance an applicant must establish, “the existence of conditions *slightly* less rigorous than unnecessary hardship.”²⁹ The less rigorous standard for area variances is termed “practical difficulties”³⁰ by the court and is found in the language of the Missouri Enabling Statute.³¹ The court noted that prior case law focusing on the granting of area variances remains in force and continues to establish the guidelines for when an area variance may be granted due to practical difficulties.³² This holds true regardless of the wording in the holdings.³³ With respect to use variances, the court provided additional clarification.

Recognizing that the granting of use variances is a field “not yet developed by case law in our own jurisdiction,”³⁴ the court in *Matthew* provided guidance as to what constitutes a showing of unnecessary hardship by citing with approval pertinent cases from other jurisdictions.³⁵ One such case is the

29. *Matthew*, 707 S.W.2d at 416 (emphasis in original).

30. *Matthew*, 707 S.W.2d at 416 n.6.

31. Mo. REV. STAT. § 89.090.1(3) (1978); *see supra* text accompanying note 26.

32. *Matthew*, 707 S.W.2d at 416 n.6. Two Missouri cases setting area variance standards are *Rosedale-Skinker Improvement Ass'n v. Board of Adjustment*, 425 S.W.2d 929 (Mo. 1968) (en banc), and *Brown v. Beuc*, 384 S.W.2d 845 (Mo. Ct. App. 1964). In *Rosedale-Skinker*, the Missouri Supreme Court affirmed the granting of a variance to permit construction of a telephone exchange building higher than allowed by the local zoning ordinance. The court stated that the “physical characteristics of the land itself giving rise to difficulties and undue hardships is one, but not the sole, ground upon which variances in the application of zoning regulations may be granted.” *Rosedale-Skinker*, 425 S.W.2d at 934. The court placed great emphasis on the disruption of telephone service and the cost and inconvenience to the public should the area variance not be granted. In *Brown v. Beuc*, the court of appeals held that “the practical difficulty or unnecessary hardship relied on as a ground for [an area] variance must be unusual or peculiar to the property involved and must be different from that suffered throughout the zone or neighborhood.” *Brown v. Beuc*, 384 S.W.2d at 852. For a discussion of area variance law prior to *Matthew*, *see Note, The Zoning Variance: A New Look in Missouri?*, 34 Mo. L. REV. 631 (1969).

33. *Matthew*, 707 S.W.2d at 416 n.6.

34. *Matthew*, 707 S.W.2d at 416.

35. The court in *Matthew* cited the following cases as helpful in defining unnecessary hardship: *Grillo v. Zoning Bd. of Appeals*, 4 Conn. App. 205, 493 A.2d 275 (1985); *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984); *Kensington South v. Zoning Bd. of Adjustment*, 80 Pa. Commw. 546, ___, 471 A.2d 1317, 1319 (1984); *Greenawalt v. Zoning Bd. of Adjustment of Davenport*, 345 N.W.2d 537 (Iowa 1984); *Van Landschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983); *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. 550, ___, 462 A.2d 637, 640 (1983); *Ivancovich v. City of Tucson Bd. of Adjustment*, 22 Ariz. App. 530, 529 P.2d 242, 250 (1974); *Williams v. Town of Oyster Bay*, 32 N.Y.2d 78, ___, 343 N.Y.S.2d 118, ___, 295 N.E.2d 788, 790-91 (1973); *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939).

New York case of *Otto v. Steinhilber*.³⁶ The *Otto* case was cited as containing the classic definition of unnecessary hardship:

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.³⁷

Each of the three elements listed in *Otto* must be met in order for a use variance to be issued. Failure to meet any single element requires the adjustment board to deny the application.³⁸

The first element an applicant must meet to obtain a use variance is to show that his or her land, as zoned, cannot yield a reasonable return.³⁹ What constitutes a reasonable return is an issue which continually recurs in variance cases.⁴⁰ Generally, a simple showing that the property would yield a greater return if the use variance was issued is not sufficient to justify the issuance of the variance.⁴¹ Nor is a showing of mere economic loss alone sufficient. As the Supreme Court of Utah stated in *Xanthos v. Board of Adjustment of Salt Lake City*,⁴² "Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program."⁴³ In fact, the courts look very conservatively at the ability of land to yield a reasonable return. In many jurisdictions unnecessary hardship may be shown only if the landowner will be deprived of "all beneficial use of the property under any of the permitted uses."⁴⁴

36. 282 N.Y. 71, 24 N.E.2d 851 (1939).

37. *Matthew*, 707 S.W.2d at 416-17 (quoting *Otto v. Steinhilber*, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939)).

38. *Greenawalt v. Zoning Bd. of Adjustment of Davenport*, 345 N.W.2d at 542 (Iowa 1984); *Otto*, 282 N.Y. at 76, 24 N.E.2d at 853.

39. *Otto*, 282 N.Y. at 76, 24 N.E.2d at 853 (1939).

40. *See, e.g., Matthew*, 707 S.W.2d at 417-18; *Kensington South v. Zoning Bd. of Adjustment*, 80 Pa. Commw. 546, 471 A.2d 1317, 1319 (1984); *Otto v. Steinhilber*, 282 N.Y. 71, 76-77, 24 N.E.2d 851, 853 (1939). *See generally* R. ANDERSON, AMERICAN LAW OF ZONING § 18.17 (2d ed. 1977).

41. *Matthew*, 707 S.W.2d at 417; *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. at 550, —, 462 A.2d 637, 640 (1983); *Williams v. Town of Oyster Bay*, 32 N.Y.2d at 81-82, 295 N.E.2d at 790-91 (1973); A. RATHKOPF, *supra* note 3, § 38.02, at 19; 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.44, at 112 (rev. 3d ed. 1983).

42. 685 P.2d 1032 (Utah 1984).

43. *Id.* at 1037.

44. *Matthew*, 707 S.W.2d at 417 (emphasis added); *see* A. RATHKOPF, *supra* note 3, § 38.01 at 17; R. ANDERSON, AMERICAN LAW OF ZONING 2D § 18.17 (2d ed. Cum. Supp. 1985).

This is apparently the approach taken by the Missouri Supreme Court in *Matthew*.⁴⁵ The court stated that before a use variance may issue, the landowner must demonstrate that "the land is not suitable for any use permitted by the zoning ordinance."⁴⁶ In addition, mere conclusory or lay opinions concerning the lack of any reasonable return is usually not enough; there must be a "dollars and cents" showing of substantial economic loss.⁴⁷ Judge Blackmar, in his concurring opinion, suggested that because the Brandts owned two homes on land zoned for only a single residence, they should have little difficulty in establishing lack of a reasonable return on their property as zoned. Judge Blackmar noted that substantial waste would occur if habitable structures were required to be torn down.⁴⁸

The second element an applicant must meet to obtain a use variance is the unique circumstances element. Unique circumstances may, in some instances, be established when the property is topographically or geometrically unusual.⁴⁹ Such unique circumstances have been established where the land was traversed by a deep ravine,⁵⁰ covered with brush and stagnant water,⁵¹ or of an irregular shape.⁵² The fact that each piece of real property is deemed unique,⁵³ however, places a heavy burden on the variance applicant to show that the property in question is sufficiently different from surrounding property as to make the zoning restrictions particularly burdensome.⁵⁴

Where the burdens of the topography are shared by the entire neighborhood, a variance is not appropriate. An application for a variance cannot

45. *Matthew*, 707 S.W.2d at 417-18. The court remanded the case to the Board of Adjustment with instructions to permit the Brandts to present "dollars and cents proof . . . that they would be deprived of *all* beneficial use of their property." *Id.* at 418 (emphasis added).

46. *Matthew*, 707 S.W.2d at 417 (quoting *Greenawalt v. Zoning Board of Adjustment of Davenport*, 345 N.W.2d 537, 542-43 (Iowa 1984) (quoting R. ANDERSON, *AMERICAN LAW OF ZONING* § 18.17 (1968))).

47. *Matthew*, 707 S.W.2d at 417-18.

48. *Matthew*, 707 S.W.2d at 422 (Blackmar, J., concurring). *But cf.* *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984), where a pre-existing single family dwelling in violation of the zoning ordinance was ordered torn down.

49. R. ANDERSON, *supra* note 12, § 18.34, at 230; *see also* *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1036 (Utah 1984).

50. *Ferry v. Kownacki*, 396 Pa. 283, 152 A.2d 456 (1959).

51. *Baltimore v. Cohn*, 204 Md. 523, 105 A.2d 482 (1954).

52. *See, e.g., City of Baltimore v. Sapero*, 230 Md. 291, 186 A.2d 884 (1962) (commercial use variance permitted for lot 241 feet, by 192 feet, by 146 feet, with the side lot lines diminishing towards the rear of the lot); *see also* 82 Am. Jur. 2d *Zoning and Planning* § 274 (1976).

53. R. ANDERSON, *supra* note 12, § 18.34, at 231.

54. *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1036 (Utah 1984); *see also* *Otto v. Steinhilber*, 282 N.Y. 71, —, 24 N.E.2d 851, 852 (1939); R. ANDERSON, *supra* note 12, § 18.34, at 231.

be based on a disadvantage common to all surrounding property owners in the zone.⁵⁵ The unnecessary hardship must be due to the unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself.⁵⁶ If the entire neighborhood is unreasonably burdened, then the remedy is not the issuance of a variance but the actual amending of the zoning ordinance.⁵⁷

In addition to unique topographic or geometric features of the land, the unique circumstances necessary for a showing of unnecessary hardship may sometimes be shown where there are existing improvements to the land which do not comply with the zoning ordinance.⁵⁸ In *Sheedy v. Zoning Board of Adjustment of Philadelphia*,⁵⁹ for example, the Supreme Court of Pennsylvania reversed the Philadelphia Adjustment Board's denial of a variance which would have permitted the continued operation of a five unit multi-family dwelling in an area zoned only for single family dwellings.⁶⁰ The court noted that the dwelling had been occupied and used as a multi-family dwelling for at least 27 years and the cost of converting the home to a conforming use would have been exceedingly high.⁶¹ The Pennsylvania Supreme Court held that under these facts "unnecessary and unique hardship undoubtedly exists."⁶²

If the landowner is unable to show unique circumstances, then a use variance is inappropriate even when the resulting economic loss is high.⁶³ Neither will a showing of a prior variance on the land substitute for failure to establish unique circumstances.⁶⁴ A prior variance does not create a non-conforming use which can later be expanded to satisfy the unnecessary hardship test.⁶⁵

55. 82 Am. Jur. 2d *Zoning and Planning* § 274 at 817.

56. *Id.*; see *supra* text accompanying note 37.

57. *Id.*

58. R. ANDERSON, *supra* note 12, § 18.35.

59. 409 Pa. 655, 187 A.2d 907 (1963).

60. *Id.*

61. *Sheedy*, 409 Pa. at ____, 187 A.2d at 909.

62. *Sheedy*, 409 Pa. at ____, 187 A.2d at 909. Compare *Hasage v. Philadelphia Zoning Board of Adjustment*, 415 Pa. 31, 202 A.2d 61 (1964), where, one year later, the Pennsylvania Supreme Court upheld the denial of a variance to permit a five-family dwelling to operate in a single family zone. In *Hasage*, the court noted that the dwelling had been in conformance with the zoning up until six years prior when the present owners had converted the single family home into a five-family dwelling. *Id.* at 63. The court stated that the variance applicants' own negligence to ascertain the existing zoning restrictions at the time they bought and converted the property was not grounds to support the grant of a variance. *Id.* at 64.

63. See, e.g., *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984) (single family dwelling in violation of ordinance ordered torn down or used only for storage).

64. *Kensington South v. Zoning Bd. of Adjustment*, 80 Pa. Commw. 546, ____, 471 A.2d 1317, 1320 (1984).

65. *Id.*

Whether the Brandt property met the unique circumstances element of unnecessary hardship was unanswered by the court in *Matthew*. This issue was left to the Board of Zoning Adjustment of Kansas City on remand. Judge Blackmar did, however, provide the Board with some guidance. According to Judge Blackmar, the Brandts had successfully laid the foundation for the grant of a variance by their showing that the two separate houses were both located on the single lot well before the zoning ordinance was adopted.⁶⁶ Combining this fact with the fact that substantial waste would occur if the second habitable structure on the Brandt property were required to be torn down, Judge Blackmar stated that the Board of Adjustment should be able to find that the tests for unnecessary hardship had been met.⁶⁷

The third element an applicant must meet for a showing of unnecessary hardship is that the use to be authorized by the variance would not "alter the essential character of the locality."⁶⁸ Other jurisdictions have held that a variance may not issue if the comprehensive zoning plan will be substantially affected⁶⁹ or if the property rights of other land owners in the area will be damaged.⁷⁰ The starting point in evaluating this element of unnecessary hardship, therefore, is to ascertain the use being made of adjacent and surrounding land.⁷¹ A use variance will probably not be appropriate where the surrounding property is in substantial compliance with the zoning ordinance. Alternatively, a use variance may be proper where the surrounding property has changed in character since the passing of the ordinance,⁷² where a significant amount of the surrounding property has nonconforming use status,⁷³ or where the variance will have only a *de minimis* affect on the neighborhood.⁷⁴

66. *Matthew*, 707 S.W.2d at 422 (Blackmar, J., concurring).

67. *Id.*

68. *Otto v. Steinhilber*, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939). For a comprehensive analysis of the factors involved in deciding whether the essential character of the neighborhood will be affected, see R. ANDERSON, *supra* note 12, § 18.41.

69. See *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1036 (Utah 1984); *Williams v. Town of Oyster Bay*, 32 N.Y.2d 78, 82-83, 295 N.E.2d 788, 791 (1973).

70. *Xanthos*, 685 P.2d at 1036; see also *Williams*, 32 N.Y.2d at ____, 295 N.E.2d at 791.

71. See *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. 550, ____, 462 A.2d 637, 640 (1983); *Williams*, 32 N.Y.2d at ____, 295 N.E.2d at 791.

72. See *Stevens v. Town of Huntington*, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967); 82 Am. Jur. 2d *Zoning and Planning* § 277 at 821 (1976).

73. See *Valley View*, 501 Pa. at ____, 462 A.2d at 641-42; *Williams*, 295 N.E.2d at 791; *Mary Chess, Inc. v. City of Glen Cove*, 18 N.Y.2d 205, 219 N.E.2d 406, 273 N.Y.S.2d 46 (1966).

74. See *Kensington South v. Zoning Bd. of Adjustment*, 80 Pa. Commw. 546, ____, 471 A.2d 1317, 1319-20 (1984); *King v. Zoning Hearing Bd. of Borough of Nazareth*, 76 Pa. Commw. 318, 463 A.2d 505.

It is unclear in *Matthew v. Smith* whether granting the variance would “alter the essential character of the surrounding neighborhood.” Once again, the Missouri Supreme Court apparently left this issue to the Board of Zoning Adjustment on remand.⁷⁵ The court stated that there were insufficient facts in the record to make a decision.⁷⁶ Therefore, the court directed that the Brandts be permitted to present additional evidence before the Board of Adjustment to support their request for a variance.⁷⁷

Meeting the three elements of the unnecessary hardship test is a difficult task. The arguments for obtaining a use variance based on unnecessary hardship must be “substantial, serious and compelling.”⁷⁸ As the court itself stated in *Matthew*, “[I]f the law of variances is to have any viability, only in the exceptional case will a use variance be justified.”⁷⁹

The holding in *Matthew* brings Missouri into conformity with the majority of jurisdictions which permit the granting of use variances. Such a holding has probably long been overdue and should result in a more equitable resolution of unfair zoning burdens. Practicing attorneys should not expect easy acquisitions of use variances after *Matthew*, however. Given the rigorous nature of the test, the granting of a use variance will still occur only in the exceptional case.

GREGORY J. SCOTT

75. *Matthew*, 707 S.W.2d at 419.

76. *Matthew*, 707 S.W.2d at 418.

77. *Matthew*, 707 S.W.2d at 419.

78. *Valley View*, 501 Pa. at —, 462 A.2d at 640.

79. *Matthew*, 707 S.W.2d at 417.