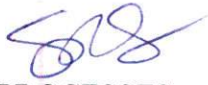

MEMORANDUM

TO: CRAIG RAYMOND, PLANNING AND COMMUNITY DEVELOPMENT DIRECTOR
FROM: SARA SEXE, CITY ATTORNEY 
RE: DESIGN WAIVER AND VARIANCE PROCESSES
DATE: APRIL 4, 2016



You have requested an opinion regarding the processes involved in design waiver and variance requests for presentation to the Board of Adjustment/Appeals.

Design Waiver Requests

A design waiver is separate and distinct from a variance request, in terms of the requirements and the entity vested with the authority to grant the respective requests.

A design waiver is considered, and either granted or denied, by the Director of the Planning and Community Development Department. Under the Great Falls municipal code:

1. There may be instances where certain design requirements of this Title that if enforced may cause unintended and unwanted results, as opposed to a hardship where a variance may be the appropriate remedy.
2. Minor deviations from this Title may help to promote a better development and protect environmental and cultural resources.
3. A mechanism is needed to allow an administrative deviation from this Title when it can be shown that the grant of relief will avoid unintended and unwanted results and result in a better development.
4. Such a mechanism should be simple, handled at the administrative level, and be consistently and fairly applied.
5. Issuance of a design waiver does not imply or guarantee subsequent approval or conditional approval of any review process required by this Title.

OCCGF 17.16.20.010. There are various findings that must be met by a design waiver request, which must be based on substantial competent evidence. Each finding must evaluate:

1. The requirement would cause an unintended or undesirable result if applied to the particular circumstance and if relaxed would result in a better overall development design and/or protect environmental or cultural resources.
2. The exceptional and unique circumstances do not result from the actions of the applicant.
3. The applicant has no other option to improve the development's design or avoid negative impacts on environmental and/or cultural resources.

4. The request is not based exclusively upon a desire to reduce the cost of developing the site or to maximize the developer's profit.
5. The granting of the design waiver will not be detrimental to the public health, safety, or general welfare or injurious to other adjoining properties.
6. The effect of the proposed design waiver is in harmony with the general intent of this Title and the specific intent of the relevant subject area(s).
7. The design waiver requested is the minimum necessary to accomplish the intent of this part.

OCCGF 17.16.20.030.

Under OCCGF 17.16.20.020(C), the Planning and Community Development Director is vested by the City Commission with the authority to review and then, approve, approve with conditions, or deny design waiver requests. Afterward, the appropriate board shall ratify or revoke the waiver issuance. *Id.* at (E).

However, a design waiver is limited. It cannot be granted to modify lot size or cause other increases in density or intensity, and must not be used for issues that should be evaluated under variance processes. OCCGF 17.16.20.040.

Under OCCGF 17.16.20.070, design waivers expire eighteen months after date of approval or as identified by the Planning and Community Development Director, unless construction has commenced and continued in good faith.

Variance Requests

Variances (other than subdivision variances which are considered by the City Commission), are reviewed and approved, approved with conditions, or denied, by the Board of Adjustment/Appeals, after public hearing. There must be a concurring vote of four members (OCCGF 17.16.32.060) and the Board may impose necessary conditions and restrictions (OCCGF 17.16.32.080). Applicants apply for variances at the Planning and Community Development Department. OCCGF 17.16.32.020(A). The Department is required to provide a report regarding the request which contains a summary of comments from the review, findings, conditions for approval and recommendation as to the disposition of the application. OCCGF 17.16.32.110. Variances are subject to judicial review by a court of competent jurisdiction as identified by Mont. Code Ann. §76-5-327 (i.e. State District Court). OCCGF 17.16.32.140.

The City Commission has provided guidance to the Board of Adjustment/Appeals regarding the consideration of variances:

1. There may be instances where certain requirements of this Title that if enforced would cause unnecessary hardship to individual landowners.
2. Minor deviations from this Title may help to alleviate those unnecessary hardships without circumventing or undermining the intent of this Title.

OCCGF 17.16.32.010.

Variances, as well, are limited. Under OCCGF 17.16.32.040, dimensional variances can only be made upon findings that:

1. The variance is not contrary to the public interest.
2. A literal enforcement would result in unnecessary hardship, owing to conditions unique to the property.
3. The spirit of this Title would be observed and substantial justice done by granting the variance.

Also, variances cannot be granted in such a manner as will violate the Great Falls municipal code; they shall not be allowed to create:

1. Expansion of a nonconforming use.
2. Modification to lot or other requirements so as to increase the permitted density or intensity of use.
3. Any project within a floodway that increases flood velocities or elevations.
4. Continuation of an amortized sign.
5. Establishment of a use not permitted based upon the zoning classification assigned to subject property.

OCCGF 17.16.32.070.

Approved variances expire after one year unless substantial work has commenced and continued in good faith. OCCGF 17.16.32.130.

This is a summary of the requirements under the Official Code of the City of Great Falls (OCCGF). For further detail, reference to the specifically cited code sections is suggested.

Please let me know if you require anything further, or if you have other questions.

Thank you.