

Board of Zoning Appeals

April 28, 2020 – 7 pm

REGULAR MEETING AGENDA

This meeting will be held via Webex in accordance with the local emergency declaration made by the City under Minn. Stat. § 12.37. The public may monitor this meeting by calling 1-415-655-0001 and entering the meeting code 806 533 109. If you incur costs to call into the meeting, you may submit the costs to the City for reimbursement consideration. For technical assistance, please contact the City at 763-593-8007 or webexsupport@goldenvalleymn.gov.

1. **Call to Order**
2. **Approval of Agenda**
3. **Approval of Minutes**
December 16, 2019, Regular Meeting
4. **Annual Board of Zoning Appeals Orientation**
5. **Variance Training for Board Members**
6. **Presentation of 2019 Board of Zoning Appeals Annual Report**
7. **Officer Elections**
8. **Adjournment**



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Board of Zoning Appeals

December 16, 2019 – 7 pm
Council Chambers
Golden Valley City Hall
7800 Golden Valley Road

REGULAR MEETING MINUTES

Call To Order

The meeting was called to order at 7 pm by Chair Nelson.

Roll Call

Members present: Nancy Nelson, Richard Orenstein, Andy Snope, and Planning Commissioner Andrew Johnson

Board Members absent: David Perich, Kade Arms-Regenold

Staff present: Planning Manager Jason Zimmerman and Planner Myles Campbell

Approval of Agenda

MOTION made by Snope, seconded by Orenstein to approve the agenda of December 16, 2019, as submitted and the motion carried unanimously.

Approval of Minutes

MOTION made by Snope, seconded by Orenstein to approve the November 26, 2019, meeting minutes as submitted and the motion carried unanimously.

510 Parkview Terrace

Joann Birk, Applicant

Request: Waiver from Section 113-88, Single-family Residential (R-1) Zoning District, Subd. (f)(1)(c)(1) side yard setback requirements.

- 1.7 feet decrease in the required 15 feet setback for the lot.

Purpose: To allow for the construction of a larger deck.

Myles Campbell, City Planner, presented a map and pointed out 510 Parkview Terrace. He gave a brief history of the parcel; in 1992 the house was a complete teardown and remodel. At that time, the back deck was allowed to have a deck stair and landing 1.7 feet short of the required 15 feet setback due to accessibility.

Campbell went on to explain that the existing stair and landing provides access to the rear yard from the main floor; the door for this landing is located on the southern building façade facing the neighboring property. The applicant's plans would convert this landing into a raised deck, which could be used for recreational purposes in addition to the rear yard access.



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Campbell provided blueprints of an initial design by the home owners, it required a variance because it was only 8.8 from the property line. The initial design was shown to the board members while staff explained that the applicant modified the design to decrease the side yard encroachment. When showing the current deck design, **Campbell** explained that due to door location, the deck requires a wraparound feature for greater deck access. 5 feet is the applicant's preferred width of the wrap around walkway, however a width of 3.7 feet would not be an encroachment and thus not require a variance. ADA regulations were checked and building inspection staff confirmed the reduction in width would not trigger state building code issues.

Recommendations

Based on the above information and staff analysis of Minnesota State Statute 462.357, requiring that a property exhibit "practical difficulties" in order for a variance to be granted, staff recommends denial of the variance request.

Member Orenstein asked for clarification between the initial and adapted designs.

Member Snope requested clarification on the design compared to the Google satellite images.

Chair Nelson asked for clarification on the location of the door that requires a deck wraparound feature.

Myles Campbell, City Planner, addressed all three questions with current photos of the property and design information. Both questions are related to building architecture, not the proposed deck.

Planning Commissioner Johnson asked for clarification on the current deck stairs and landing as it relates to its own square footage and the setback. **Jason Zimmerman, Planning Manager**, stated that the deck itself can't extend in to that same footage area because the code only refers to stairs and landing.

Chair Nelson requested that the applicant come forward.

510 Parkview Terrace applicant, **Joann Birk**, presented to the Board. **Birk** stated that they have family members in wheel chairs and while the wraparound doesn't have an ADA requirement, decreasing the walkway width space limits maneuverability. **Birk** also stated that closing the current door and creating a new access point, to eliminate the wraparound, is cost prohibitive and the existing interior would suffer. Showing blueprints and photos, **Birk** described an existing stucco wall built on the side of the current deck landing that dictates the width of the wrap around walkway. Removing the permanent wall to accommodate a smaller or no walkway impacts the exterior structure of the house.

Chair Nelson opened the floor for public comment.

R. Jacobson, the neighbor south of 510 Parkview Terrace, requests a denial of the variance request.

Jacobson stated concern for his sight lines while using his backyard. He has concern that the deck encroachment would negatively impact the architectural integrity of homes in the neighborhood as well as reduce the value of his property. **Jacobson** stated the ability to create a usable yard-space without encroaching on their neighbors and stated 510 Parkview Terrace could exercise similar options. **Jacobson** stated that the previous owners of 510 Parkview Terrace asked them if they would approve a variance

for a similar encroachment. They said no and the previous owners honored that and opted out of requesting a variance.

Seeing no further comments, **Chair Nelson** closed the public comment.

Commissioner Johnson stated that Jacobson's statement about denying a variance for the previous owners of 510 Parkview Terrace may be true, however, it is important to note that the BZA authorizes appeals, not residents. The resident may not agree with the variance but the public does not have the authority to deny a variance. **Johnson** went on to state that he understands the applicant's desire to create an accessible walkway, especially when keeping in mind the City's 2040 plan and how to adjust for an aging population. However, he stated he wished the applicant would have brought more alternatives for the walkway because as it stands, with the one design plan, he's inclined to deny the variance request.

Member Orenstein commented on keeping the larger landing area to not disrupt the stucco wall but to decrease the width of the walkway as it extends. The applicant stated they can accept that solution; **Orenstein** asked the neighbor if they could accept a partial encroachment. The neighbor stated that any encroachment would negatively impact their sightlines and property value. The applicant stated that the walkway would not extend further than the current stairwell and that there are areas in the yard to expand the deck that don't require a variance.

Chair Nelson mentioned that the Board could table the variance, allowing for the applicant to create some design alternatives, and return to request a variance.

MOTION made by **Chair Nelson**, seconded by **Orenstein** to postpone the variance request for 1.7 feet decrease in the required 15 feet setback for the lot and the motion carried 4 to 0. The variance is postponed until the January 28, 2020, BZA meeting.

Adjournment

MOTION made by **Chair Nelson**, seconded by **Snope** and the motion carried unanimously to adjourn the meeting at 7:50 pm.

Nancy Nelson, Chair

Amie Kolesar, Planning Assistant



MEMORANDUM

City Attorney

763-593-8096

Date: December 13, 2019
To: Jason Zimmerman, Planning Manager
From: Maria Cisneros, City Attorney
Subject: Land Use Variances

INTRODUCTION

This memorandum provides an introduction to variances. A variance is a request to deviate from the City's zoning ordinance and allows a property owner to use their property in a manner normally prohibited by an ordinance. Variance requests are considered and decided by the Board of Zoning Appeals (the "BZA").

The decision to grant or deny a variance is a quasi-judicial decision and is made by comparing the facts against the criteria set forth in Minnesota Statutes, section 462.357, subdivision 6(2) and City Code section 113-27(c).

If the BZA denies a variance request, the applicant may appeal the decision to the City Council. Non-applicants whose property interests are directly affected by a BZA decision may also appeal the decision, but their appeal must be brought in District Court and not to the City Council.

ANALYSIS

A. What is a variance?

A variance is a request to deviate from the City's zoning ordinance.¹ A variance allows a landowner to use their property in a manner forbidden by an ordinance.² Variances may generally only be granted for deviation from a dimensional standard, such as a setback or a height limitation. Use variances, or variances allowing landowners to use a property for a purpose not allowed in the

¹ Minn. Stat. § 462.357, subd. 6(2).

² *Holasek v. Village of Medina*, 226 N.W.2d 900 (Minn. 1975).

zoning district where the property is located, are not allowed under Minnesota law.³ Once a variance is granted, it runs with the land to the benefit of all subsequent owners.

B. Who grants a variance?

Under Golden Valley City Code, the BZA decides zoning variances.⁴ When deciding variance requests, the BZA acts in a quasi-judicial capacity. That means the BZA acts like a judge and must apply the facts of the particular variance request against an established legal standard. The legal standard for variances is set forth in state statute and city code.⁵ As discussed below, if the BZA denies a variance, the applicant may appeal the decision to the City Council.⁶

C. What is the legal standard for variances?

The BZA may only grant a variance if the following requirements are met:

1. *The variance must be in harmony with the general purposes and intent of the City's zoning ordinance.*

The purpose of Golden Valley's zoning ordinance is "to regulate land use within the City, including the location, size, use, and height of buildings, the arrangement of buildings on lots, and the density of population within the City for the purpose of promoting the health, safety, order, convenience, and general welfare of all citizens of the City."⁷ Developing a record with respect to this factor requires the BZA to compare the proposal against the City's stated zoning ordinance purpose and determine whether the two are in harmony.

2. *The variance must be consistent with the City's comprehensive plan.*

The City's 2040 Comprehensive Plan is available on the City's website ([here](#)).⁸ Developing a record with respect to this factor requires the BZA to compare the proposal against the City's comprehensive plan and determine whether the requested variance is consistent with the plan.

Courts have upheld denials of variances based on this factor. For example, in *VanLandschoot v. City of Mendota Heights*,⁹ the Minnesota Supreme Court upheld the City's denial of an application for three variances. In that case, the owner applied for a subdivision and three variances: one from

³ *Id.*

⁴ City Code, section 113-27(b)(2).

⁵ Minn. Stat. § 462.357, subd. 6(2); Golden Valley City Code § 113-27(c). *See also Sagsetter v. City of St. Paul*, 529 N.W.2d 488 (Minn. Ct. App. 1995)(holding that the City's authority to grant a variance cannot exceed the powers granted by state statute).

⁶ City Code, § 113-27(d).

⁷ City Code § 113-2.

⁸ This memo assumes the 2040 Comprehensive Plan will be formally adopted in February 2020.

⁹ *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503 (Minn. 1983).

the city's wetland ordinance, one from the front yard setback requirements, and one from the frontage requirements. In its proposed plan, the applicant asked the City to allow a public access road to double as a private driveway serving part of the subdivided property.

The city denied all three variance requests. The court upheld the city's denial based on the city's finding that the plan would violate the city's comprehensive plan. Particularly, the court found that allowing a public road to double as a driveway conflicted with the section of the comprehensive plan requiring subdivisions to be planned so as to provide access within and between neighborhoods for public safety and service vehicles. This conflict was a sufficient rational basis for the city's finding that granting the requested variances would adversely affect the health and welfare of the neighborhood and community.

3. *The applicant must establish that there are practical difficulties in complying with the zoning ordinance.*

This requirement is known as the practical difficulties test.¹⁰ To pass the practical difficulties test, the applicant must satisfy all of the following requirements:

- a. The property owner proposes to use the property in a reasonable manner not permitted in the zoning ordinance;
- b. The relevant circumstances are due to circumstances unique to the property and not created by the landowner; and
- c. The variance will not alter the essential character of the locality.

Each prong of the practical difficulties test is addressed in turn below.

a. *Reasonableness*

Under the first prong of the practical difficulties test, reasonableness means that the owner's proposed use, though not allowed under the ordinance, is reasonable.¹¹ It does not mean that the land cannot be put to any reasonable use whatsoever without the variance.¹²

¹⁰ Minn. Stat. § 462.357, subd. 6(2).

¹¹ See, e.g., *Continental Property Grp., LLC v. City of Wayzata*, 2016 WL 1551693 (Minn. Ct. App., April 18, 2016) (upholding the City's determination that the proposed use was not reasonable because the height far exceeded what was allowed under the ordinance).

¹² *Mohler v. City of St. Louis Park*, 642 N.W.2d 623, 631 (Minn. Ct. App. 2002). See also *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010). Compare Minn. Stat. § 462.357, subd. (6) (2009) ("To hear requests for variances from the literal provisions of the ordinance in instances where their strict enforcement would cause *undue hardship*") (emphasis added) and Minn. Stat. § 462.357, subd. 6 (2011) ("Variances may be granted when the applicant for the variance establishes that there are *practical difficulties*" in complying with the ordinance)(emphasis added).

b. Uniqueness

With respect to the second prong, uniqueness generally refers to the physical characteristics of the property, not the personal preferences of the owner. For example, in *Nolan v. City of Eden Prairie*,¹³ the Minnesota Court of Appeals upheld the city's finding of unique circumstances justifying a variance where the property was located at the end of a cul-de-sac, there was a significant grade change, and there was a stand of trees.

However, the Minnesota Supreme Court has recognized that "unique circumstances are not limited to the purely physical condition of the land" because "such a limitation would make granting of a variance 'practically impossible except where the topographic conditions of a specific parcel of land would render the tract of land in question otherwise valueless.'"¹⁴

c. Essential Character

Under the third prong, essential character, the BZA must consider whether the resulting structure or other physical characteristic allowed by the variance will be out of scale, out of place, or otherwise inconsistent with the surrounding area. Developing a record with respect to this factor requires the BZA to determine whether the proposal is consistent or inconsistent with the surrounding area and to explain how that consistency or inconsistency relates to the essential character of the locality.

For example, in *Mohler v. City of St. Louis Park*,¹⁵ the Minnesota Court of Appeals overturned the City's decision to grant a variance for a garage that was 4 feet higher than the maximum height allowed by code. The Court concluded that there was no evidence to support the City's decision to grant the variance when it had previously decided that a garage that was 1' 7" higher would alter the neighborhood's essential character, and there was no evidence in the record explaining how the 1' 7" difference resolved the previous concerns regarding to the essential character factor. This case illustrates the importance of providing fact-based rationale for all findings and ensuring the rationale explains how the facts relate to the relevant factor.

Prior to 2011, variance decisions were made under the "undue hardship test." The Minnesota legislature amended the statute and replaced the undue hardship test with the practical difficulties test in 2011. This amendment was made shortly after the Minnesota Supreme Court's decision in *Krummenacher v. City of Minnetonka*,¹⁶ which interpreted the statute to require the applicant to

¹³ 610 N.W.2d 697, 702 (Minn. Ct. App. 2000).

¹⁴ *State ex rel Neighbors for East Bank Liveability v. City of Minneapolis*, 915 N.W.2d 505, 517–18 (Minn. Ct. App. 2018) citing *Merriam Park Cmty. Council, Inc. v. McDonough*, 210 N.W.2d 416, 419–20 (Minn. 1973), overruled on other grounds by *City of Arden Hills*, 281 N.W.2d at 868.

¹⁵ *Mohler v. City of St. Louis Park*, 642 N.W.2d 623 (Minn. Ct. App. 2002).

¹⁶ 783 N.W.2d 721 (Minn. 2010).

show that the property could not be put to reasonable use absent the variance. For this reason, it is essential to pay careful attention when deciding variances to ensure they are made under the new standard and not the old one. Similarly, when analyzing variance decisions, it is important to carefully parse case law interpreting the variance statute to be sure that the precedent relied upon applies to the practical difficulties test and not the undue hardship test.

D. Other Considerations

State statute and City Code provide the following additional rules applicable to variances:

1. Economic considerations alone do not constitute practical difficulties.

State statute and City Code specifically state that economic factors alone are not sufficient to justify a variance. This is true regardless of whether the economic factors are based on perceived economic barriers to development, future economic benefit, or expenses already incurred in furtherance of a particular plan.¹⁷

2. Neighborhood opinion alone is not a sufficient basis to grant or deny a variance.

While neighborhood comments should be considered as part of the BZA's consideration of a variance application, neighborhood opinion alone is not a sufficient basis to deny or grant a variance. Instead, neighborhoods "play an advisory part" in variance decisions.¹⁸ "Although neighborhood sentiment may be taken into consideration in any zoning decision, it may not constitute the sole basis for granting or denying a given permit."¹⁹ Furthermore, "[a] city may consider neighborhood opposition only if based on concrete information."²⁰ Thus, when considering neighborhood opinion, the BZA must weigh the credibility and factual merit of the facts offered, and should consider the opinions as advisory.²¹

3. Use variances are not allowed under Minnesota law.

The City may not grant a variance that would allow any *use* that is not allowed in the zoning area where the affected property is located.²²

¹⁷ Minn. Stat. § 462.357, subd. 6(2); Golden Valley City Code § 113-27(c).

¹⁸ *Id.*

¹⁹ *Nw. Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979).

²⁰ *Yang v. County of Carver*, 660 N.W.2d 828, 833 (Minn. App. 2003).

²¹ *State ex rel Neighbors for East Bank Liveability v. City of Minneapolis*, 915 N.W.2d 505, 512 (Minn. Ct. App. 2018) (*review denied*) ("This advisory role neighborhoods play in city planning is consistent with the current statutory framework delegating power to cities, not neighborhoods.").

²² *Id.* See also City Code § 113-1 (defining "use" as "[t]he purpose or activity for which the land, structure, or building thereon is designated, arranged, or intended, or for which it is occupied, utilized, or maintained, and shall include the performance of such activity as defined by the performance standards of [the zoning chapter]").

4. Conditions must be related and proportionate to the impact of the variance.

The City may impose conditions in the granting of variances, but the conditions must be directly related and bear a rough proportionality to the impact created by the variance.²³ The City may not impose conditions based on other, unrelated sections of code. It is particularly important to keep this distinction in mind when dealing with properties that have existing nonconformities. There may be a temptation to impose conditions related to the existing nonconformities, rather than the impact created by the variance; however, such unrelated conditions are prohibited under state law.

E. Who can appeal a variance decision and how?

As previously discussed, the BZA has the authority to “hear requests for variances from the requirements of [the City’s zoning ordinances].”²⁴ A party seeking a zoning variance, referred to as a “petitioner” in the ordinance, must file a petition requesting a hearing before the BZA.²⁵ If the petitioner disagrees with the BZA’s decision, the petitioner may appeal the decision to the City Council.²⁶ The Council then has 30 days to hear the appeal and issue a written decision.²⁷ If the petitioner does not appeal the BZA decision, the decision is considered final.²⁸ Only the petitioner may appeal the BZA decision to the City Council under this ordinance.

In contrast, under Minnesota Statutes, section 462.361 “Any person aggrieved by an ordinance, rule, regulation, decision or order of a governing body or board of adjustments and appeals. . . may have such ordinance, rule, regulation, decision or order, reviewed by an appropriate remedy in the district court. . . .”²⁹ Minnesota courts have found that this statute allows parties other than the petitioner to appeal BZA decisions to the district court, as long as the BZA decision “operates on [the appellants] rights of property or bears directly upon his personal interests.”³⁰

²³ Minn. Stat. § 462.357, subd. 6(2).

²⁴ City Code § 113-27(b)(2).

²⁵ *Id.* § (d)(1).

²⁶ *Id.* § (d)(4)(“Within 30 days of the final order of the Board of Zoning Appeals, any petitioner feeling aggrieved by the decision of the Board of Zoning Appeals may file a written appeal with the designated staff liaison, thereby appealing the decision of the Board of Zoning Appeals to the City Council. The City Council shall, within 30 days from the date of such appeal, make its findings and determination with respect to the appeal and serve a written report thereof upon the appellant by United States mail. If no appeal is taken by the petitioner from the decision of the Board of Zoning Appeals in the manner provided above, then the decision of the Board of Zoning Appeals shall be final.”).

²⁷ *Id.*

²⁸ *Id.* (“If no appeal is taken by the petitioner from the decision of the Board of Zoning Appeals in the manner provided above, then the decision of the Board of Zoning Appeals shall be final.”).

²⁹ Minn. Stat. § 462.361, subd. 1.

³⁰ *Stansell v. City of Northfield*, 612 N.W.2d 814, 818–819 (Minn. Ct. App., 2000)(“We therefore interpret the term ‘person aggrieved’ in Minn. Stat. § 462.361 to grant standing to a person when an action by the municipality adversely ‘operates on his rights of property or bears directly upon his personal interest.’”)(finding that a group of

Though City Code does not provide a precise procedure governing variance appeals to the City Council, I recommend the council follow the following procedures based on past practice:

1. Staff presents the appeal. Staff's presentation includes the facts contained in the application, staff's analysis and recommendation, and a summary of the BZA analysis and decision.
2. The appellant is afforded an opportunity to present its case. The appellant may present relevant evidence and call witnesses. A variance appeal is a quasi-judicial proceeding, not a public hearing; therefore, members of the public have not historically been afforded an opportunity to speak during the appeal.
3. The Council discusses the facts as presented by staff and the appellant and decides the appeal.

citizens objecting to a large retail development did not have standing to challenge the City's decision because the group failed to allege specific injuries as a result of the Council's actions).



INFORMATION MEMO

Land Use Variances

Learn about variances as a way cities may allow an exception to part of their zoning ordinance. Review who may grant a variance and how to follow and document the required legal standard of “practical difficulties” (before 2011 called “undue hardship”). Links to a model ordinance and forms for use with this law.

RELEVANT LINKS:

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

I. What is a variance

A variance is a way that a city may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply.

Sometimes a landowner will seek a variance to allow a particular use of their property that would otherwise not be permissible under the zoning ordinance. Such variances are often termed “use variances” as opposed to “area variances” from dimensional standards. Use variances are not generally allowed in Minnesota—state law prohibits a city from permitting by variance any use that is not permitted under the ordinance for the zoning district where the property is located.

II. Granting a variance

Minnesota law provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission or even the city council may serve that function. A variance decision is generally appealable to the city council.

A variance may be granted if enforcement of a zoning ordinance provision as applied to a particular piece of property would cause the landowner “practical difficulties.” For the variance to be granted, the applicant must satisfy the statutory three-factor test for practical difficulties. If the applicant does not meet all three factors of the statutory test, then a variance should not be granted. Also, variances are only permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

III. Legal standards

When considering a variance application, a city exercises so-called “quasi-judicial” authority. This means that the city’s role is limited to applying the legal standard of practical difficulties to the facts presented by the application. The city acts like a judge in evaluating the facts against the legal standard. If the applicant meets the standard, then the variance may be granted. In contrast, when the city writes the rules in zoning ordinance, the city is exercising “legislative” authority and has much broader discretion.

A. Practical difficulties

“Practical difficulties” is a legal standard set forth in law that cities must apply when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied.

1. Reasonableness

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

2. Uniqueness

The second factor is that the landowner’s problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

RELEVANT LINKS:

[2011 Minn. Laws, ch. 19, amending Minn. Stat. § 462.357, subd. 6.](#)

[Krummenacher v. City of Minnetonka](#), 783 N.W.2d 721 (Minn. June 24, 2010).

[Minn. Stat. § 462.357 subd. 6.](#)
[Minn. Stat. § 394.27, subd. 7.](#)

See Section I, *What is a variance.*

See Section IV-A, *Harmony with other land use controls.*

3. Essential character

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor, consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

B. Undue hardship

“Undue hardship” was the name of the three-factor test prior to a May 2011 change of law. After a long and contentious session working to restore city variance authority, the final version of HF 52 supported by the League and allies was passed unanimously by the Legislature. On May 5, Gov. Dayton signed the new law. It was effective on May 6, the day following the governor’s approval. Presumably it applies to pending applications, as the general rule is that cities are to apply the law at the time of the decision, rather than at the time of application.

The 2011 law restores municipal variance authority in response to a Minnesota Supreme Court case, *Krummenacher v. City of Minnetonka*. It also provides consistent statutory language between city land use planning statutes and county variance authority, and clarifies that conditions may be imposed on granting of variances if those conditions are directly related to, and bear a rough proportionality to, the impact created by the variance.

In *Krummenacher*, the Minnesota Supreme Court narrowly interpreted the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance. The new law changes that factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling.

The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retained the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. Also included is a sentence new to city variance authority that was already in the county statutes.

RELEVANT LINKS:

[Issuance of Variances](#), LMC model ordinance.

[Variance Application](#), LMC model form.
[Adopting Findings of Fact](#), LMC model resolution.

[Minn. Stat. § 462.357, subd. 6.](#)

See LMC information memo, [Taking the Mystery out of Findings of Fact.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

C. City ordinances

Some cities may have ordinance provisions that codified the old statutory language, or that have their own set of standards. For those cities, the question may be whether you have to first amend your zoning code before processing variances under the new standard. A credible argument can be made that the statutory language pre-empts inconsistent local ordinance provisions. Under a pre-emption theory, cities could apply the new law immediately without necessarily amending their ordinance first. In any regard, it would be best practice for cities to revisit their ordinance provisions and consider adopting language that mirrors the new statute.

The models linked at the left reflect the 2011 variance legislation. While they may contain provisions that could serve as models in drafting your own documents, your city attorney would need to review prior to council action to tailor to your city's needs. Your city may have different ordinance requirements that need to be accommodated.

IV. Other considerations

A. Harmony with other land use controls

The 2011 law also provides that: “Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.” This is in addition to the three-factor practical difficulties test. So a city evaluating a variance application should make findings as to:

- Is the variance in *harmony with* the purposes and intent of the ordinance?
- Is the variance *consistent with the comprehensive plan*?
- Does the proposal put property to use in a *reasonable manner*?
- Are there *unique circumstances* to the property not created by the landowner?
- Will the variance, if granted, alter the *essential character* of the locality?

B. Economic factors

Sometimes landowners insist that they deserve a variance because they have already incurred substantial costs or argue they will not receive expected revenue without the variance. State statute specifically notes that economic considerations alone cannot create practical difficulties. Rather, practical difficulties exist only when the three statutory factors are met.

RELEVANT LINKS:

[Minn. Stat. § 462.357, subd. 6.](#)

C. Neighborhood opinion

Neighborhood opinion alone is not a valid basis for granting or denying a variance request. While city officials may feel their decision should reflect the overall will of the residents, the task in considering a variance request is limited to evaluating how the variance application meets the statutory practical difficulties factors. Residents can often provide important facts that may help the city in addressing these factors, but unsubstantiated opinions and reactions to a request do not form a legitimate basis for a variance decision. If neighborhood opinion is a significant basis for the variance decision, the decision could be overturned by a court.

D. Conditions

A city may impose a condition when it grants a variance so long as the condition is directly related and bears a rough proportionality to the impact created by the variance. For instance, if a variance is granted to exceed an otherwise applicable height limit, any conditions attached should presumably relate to mitigating the effect of excess height.

V. Variance procedural issues

A. Public hearings

Minnesota statute does not clearly require a public hearing before a variance is granted or denied, but many practitioners and attorneys agree that the best practice is to hold public hearings on all variance requests. A public hearing allows the city to establish a record and elicit facts to help determine if the application meets the practical difficulties factors.

B. Past practices

While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors for each and every variance request. In evaluating a variance request, cities are not generally bound by decisions made for prior variance requests. If a city finds that it is issuing many variances to a particular zoning standard, the city should consider the possibility of amending the ordinance to change the standard.

RELEVANT LINKS:

[Minn. Stat. § 15.99.](#)

[Minn. Stat. § 15.99, subd. 2.](#)

See LMC information memo,
*Taking the Mystery out of
Findings of Fact.*

[Minn. Stat. § 15.99, subd. 2.](#)

Jed Burkett
LMCIT Land Use Attorney
jburkett@lmc.org
651.281.1247

C. Time limit

A written request for a variance is subject to Minnesota's 60-day rule and must be approved or denied within 60 days of the time it is submitted to the city. A city may extend the time period for an additional 60 days, but only if it does so in writing before expiration of the initial 60-day period. Under the 60-day rule, failure to approve or deny a request within the statutory time period is deemed an approval.

D. Documentation

Whatever the decision, a city should create a record that will support it. In the case of a variance denial, the 60-day rule requires that the reasons for the denial be put in writing. Even when the variance is approved, the city should consider a written statement explaining the decision. The written statement should explain the variance decision, address each of the three practical difficulties factors and list the relevant facts and conclusions as to each factor.

If a variance is denied, the 60-day rule requires a written statement of the reasons for denial be provided to the applicant within the statutory time period. While meeting minutes may document the reasons for denial, usually a separate written statement will need to be provided to the applicant in order to meet the statutory deadline. A separate written statement is advisable even for a variance approval, although meeting minutes could serve as adequate documentation, provided they include detail about the decision factors and not just a record indicating an approval motion passed.

VI. Variances once granted

A variance once issued is a property right that "runs with the land" so it attaches to and benefits the land and is not limited to a particular landowner. A variance is typically filed with the county recorder. Even if the property is sold to another person, the variance applies.

VII. Further assistance

If you have questions about how your city should approach variances under this statute, you should discuss it with your city attorney. You may also contact League staff.



BOARD OF ZONING APPEALS 2019 ANNUAL REPORT

2019 Board of Zoning Appeals

Commissioners

Nancy Nelson, Chair (2020)

Richard Orenstein, Vice Chair (2020)

David Perich (2020)

Andy Snope (2020)

Rotating Planning Commission Representative

Kade Arms-Regenold (Youth Representative, 2020)

Note: Terms run May 1-April 30

Council Liaison

Larry Fonnest

City Staff

Marc Nevinski, Physical Development Director

Jason Zimmerman, Planning Manager

Emily Goellner, Associate Planner/Grant Writer

Myles Campbell, Planner

Emily Anderson, Planning Intern

Lisa Wittman, Administrative Assistant

Amie Kolesar, Administrative Assistant

Purpose, Mission, And Prescribed Duties

The Board of Zoning Appeals (BZA) hears requests for variances from the requirements of the Zoning Code, which is Chapter 113 of the Golden Valley City Code. The BZA consists of five members that meet once a month if there are any petitions pending for action. A Planning Commissioner serves as the fifth member of the BZA.

Criteria For Analysis

A variance may be granted when the petitioner for the variance establishes that there are practical difficulties in complying with this Chapter. "Practical difficulties," as used in connection with the granting of a variance, means:

- the property owner proposes to use the property in a reasonable manner not permitted by this Chapter
- the plight of the property owner is due to circumstances unique to the property not created by the property owner
- the variance, if granted, will not alter the essential character of the locality

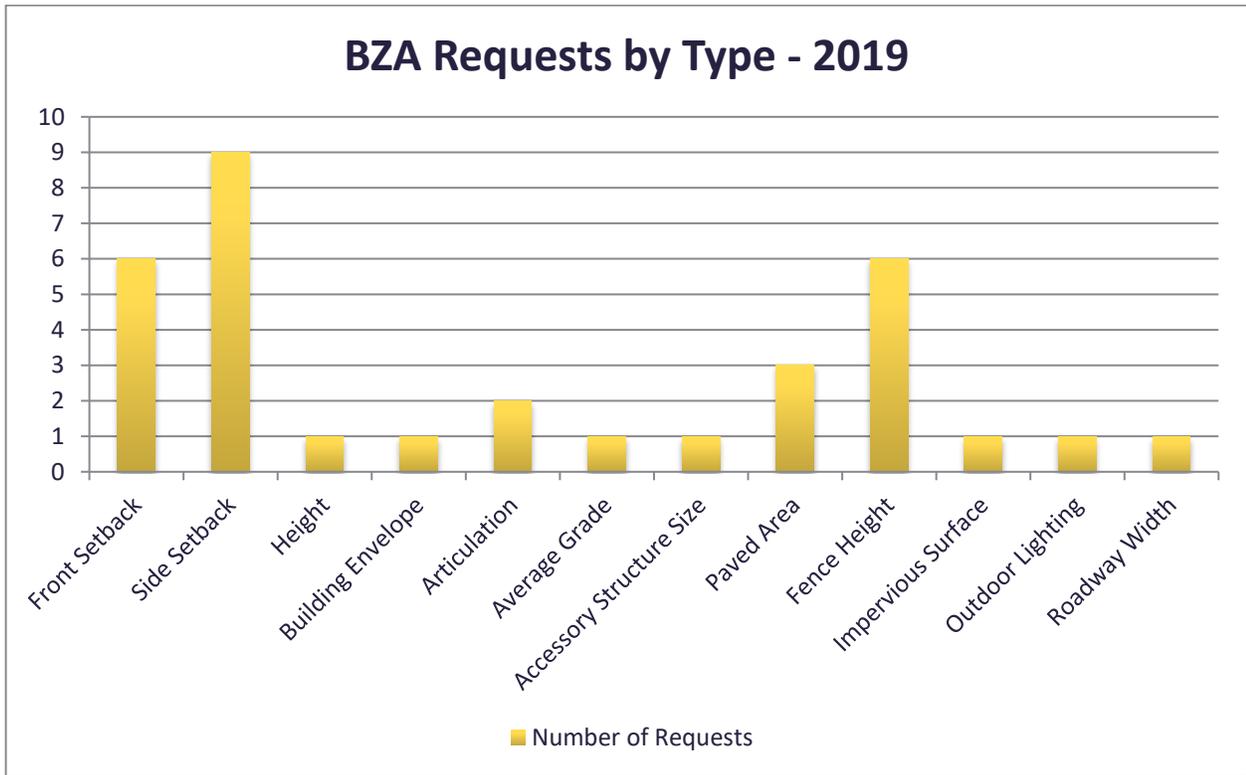
Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems.

Table Of Contents

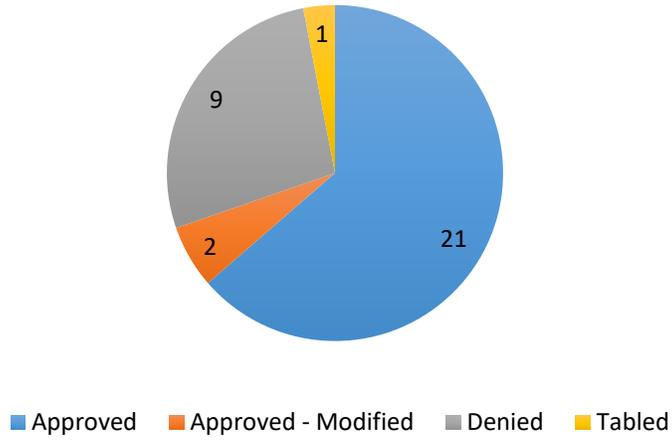
2019 Overview	page 3
Five-Year Summary: 2015-2019	page 5

2019 Overview

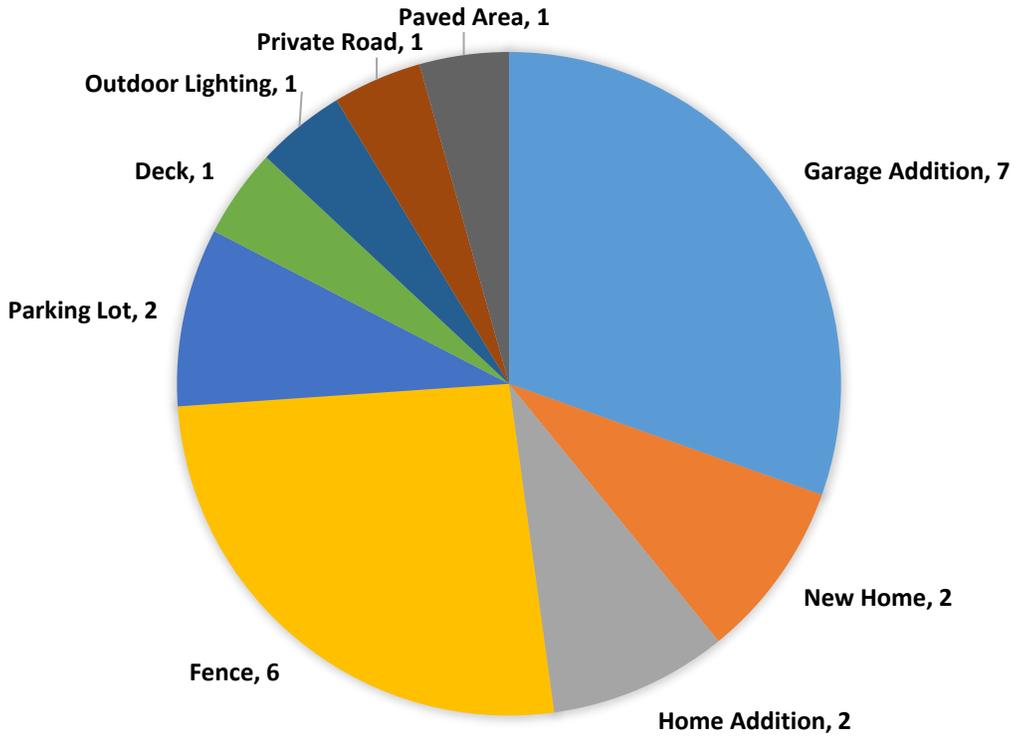
Variances Considered
33
In R-1 Residential Zoning District
30



BZA Decisions, 2019



TOTAL NUMBER OF PROPOSED PROJECTS REQUESTING VARIANCES, BY TYPE OF PROJECT - 2019



Five-Year Summary: 2015-2019

Variances Considered
127

In R-1 Residential Zoning District
113

In R-2 Residential Zoning District
2

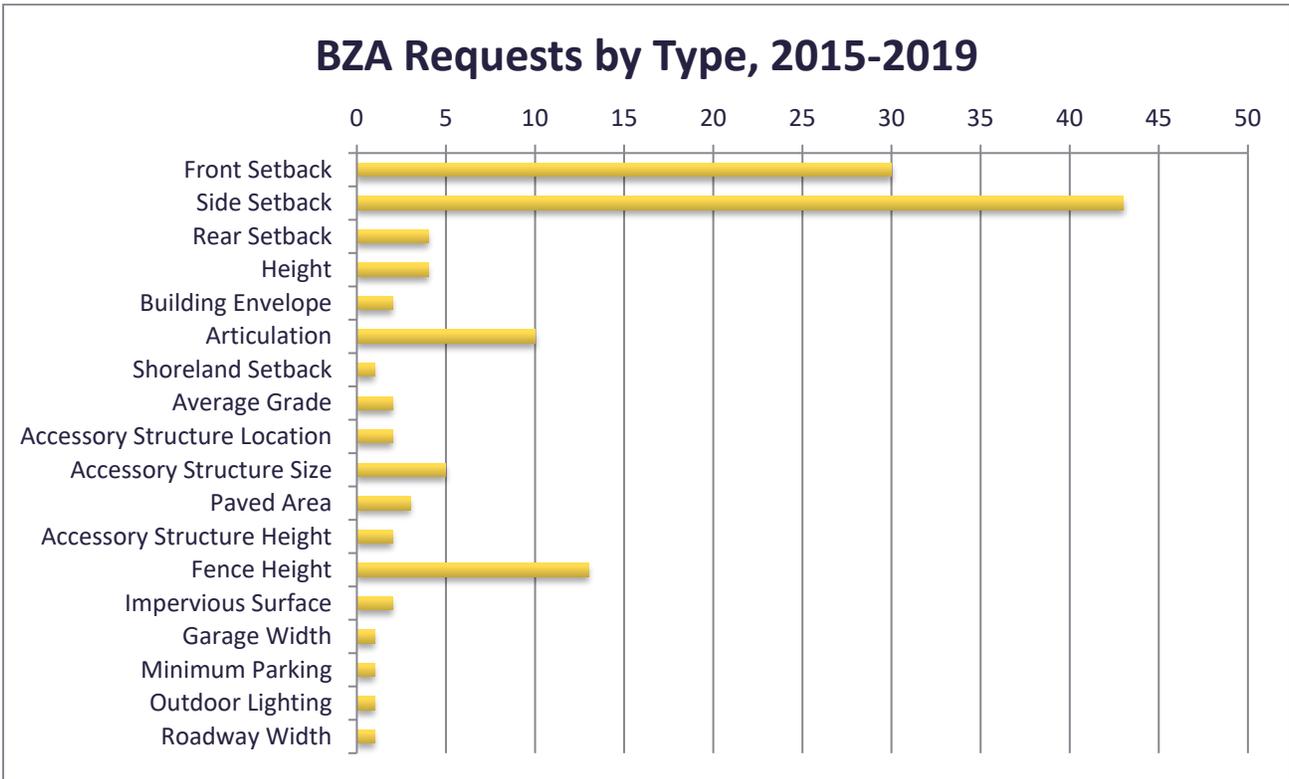
In Commercial Zoning District
2

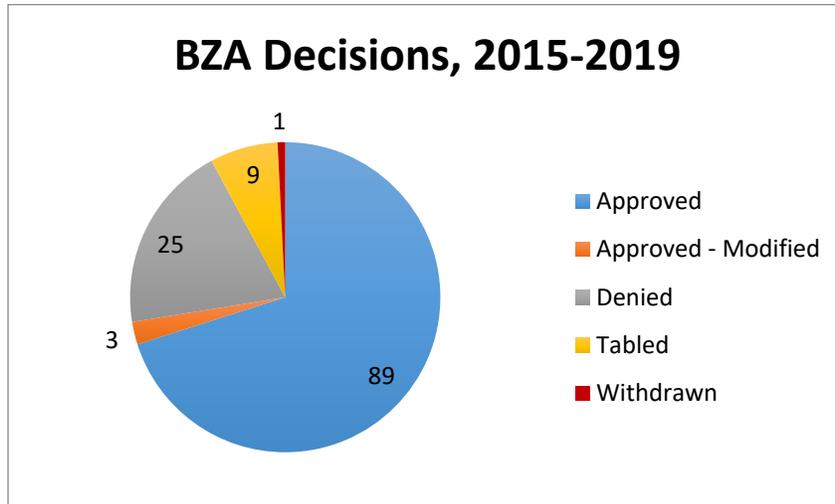
Mixed Use
2

In Institutional Zoning District
6

In Industrial Zoning District
1

In Light Industrial Zoning District
1

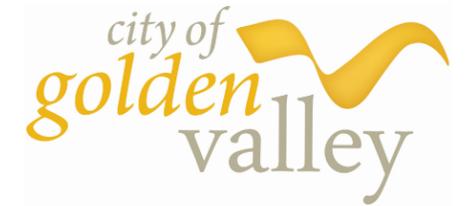




Types Of Variances Considered

Variance Type	Description
Front Yard Setback	Requests to build structures within 35 feet of the front yard property line in R-1, R-2, and Institutional Districts. Institutional Districts also require that at least 25 feet be landscaped and maintained as a buffer zone.
Side Yard Setback	Requests to build structures within the side yard setback area, which ranges from 5 feet to 50 feet depending on the type of structure and the Zoning District.
Rear Yard Setback	Requests to build structures within the rear yard setback area, which ranges from 5 feet to 50 feet depending on the type of structure and the Zoning District.
Articulation	Requests to waive articulation requirement, which requires inward or outward articulation of 2 feet in depth and 8 feet in length for every 32 feet of side wall on homes in the R-1 and R-2 Zoning Districts.
Height	Requests to build principal structures over the maximum height requirement, which ranges from 25 to 28 feet depending on the type of roof and the Zoning District.
Fence Height	Requests to build fences over the maximum height requirements, which ranges from 4 to 12 feet depending on the location on the property (front yard or side/rear yard) and the Zoning District.
Building Envelope	Requests to build a structure beyond the maximum building envelope, which is defined for properties within the R-1 and R-2 Zoning Districts. This includes the 2:1 or 4:1 slope requirement when the structure is taller than 15 feet at the side yard setback line.
Accessory Structure Location	Requests to build a garage, shed, or other accessory structure in a location that is not completely to the rear of the principal structure or in a location that is not at least 10 feet from the principal structure.
Accessory Structure Size	Requests to build a garage, shed, or other accessory structures above the allowable limit of 1,000 square feet in R-1, R-2, and Institutional Zoning Districts.

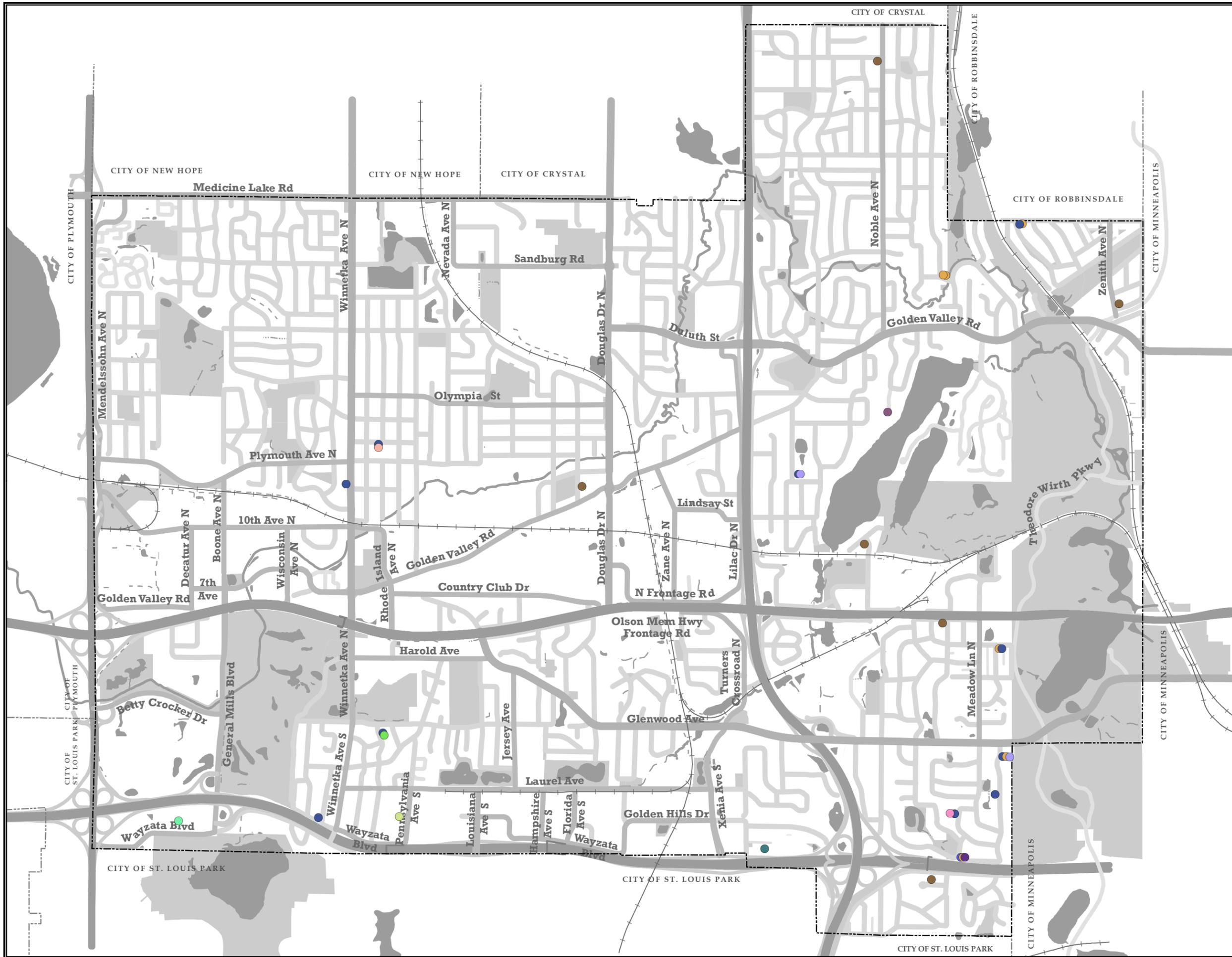
Accessory Structure Height	Requests to build a garage, shed, or other accessory structures above the maximum height requirements, which is 10 feet in the R-1, R-2, and Institutional Zoning Districts.
Garage Width	Request to build a garage in the R-2 District that is wider than 65 percent of the width of the front façade.
Average Grade	Requests to change the average grade of a property by more than 1 foot.
Shoreland Setback	Requests to build a structure within the minimum shoreland setbacks, which are larger than standard front, side, and rear setbacks.
Impervious Surface	Requests to construct additional impervious surface beyond the maximum allowable, which is 50 percent of the lot in R-1 and R-2 and 60 percent in R-3 and R-4 Zoning Districts.
Minimum Parking	Request to build or use an existing parking lot or garage with a number of parking spaces that is less than the minimum required based on the use of the property.
Outdoor Lighting	Request regarding the total amount of foot candles of light produced by lighting systems, the amount of allowed light trespass, or other issues relating to lighting systems.
Roadway Width	Requests to build a private roadway above or below the maximum and minimum required widths respectively.



Variance Requests

Requests by Type, 2019

- Accessory Structure Location
- Articulation
- Grading/Average Grade
- Building Envelope
- Fence Height
- Front Setback
- Height
- Impervious Surface
- Outdoor Lighting
- Parking
- Parking Setbacks
- Roadway Width
- Side Setback



Print Date: 4/22/2020
 Sources:
 -Hennepin County Surveyors Office for Property Lines (2018).
 -City of Golden Valley for all other layers.

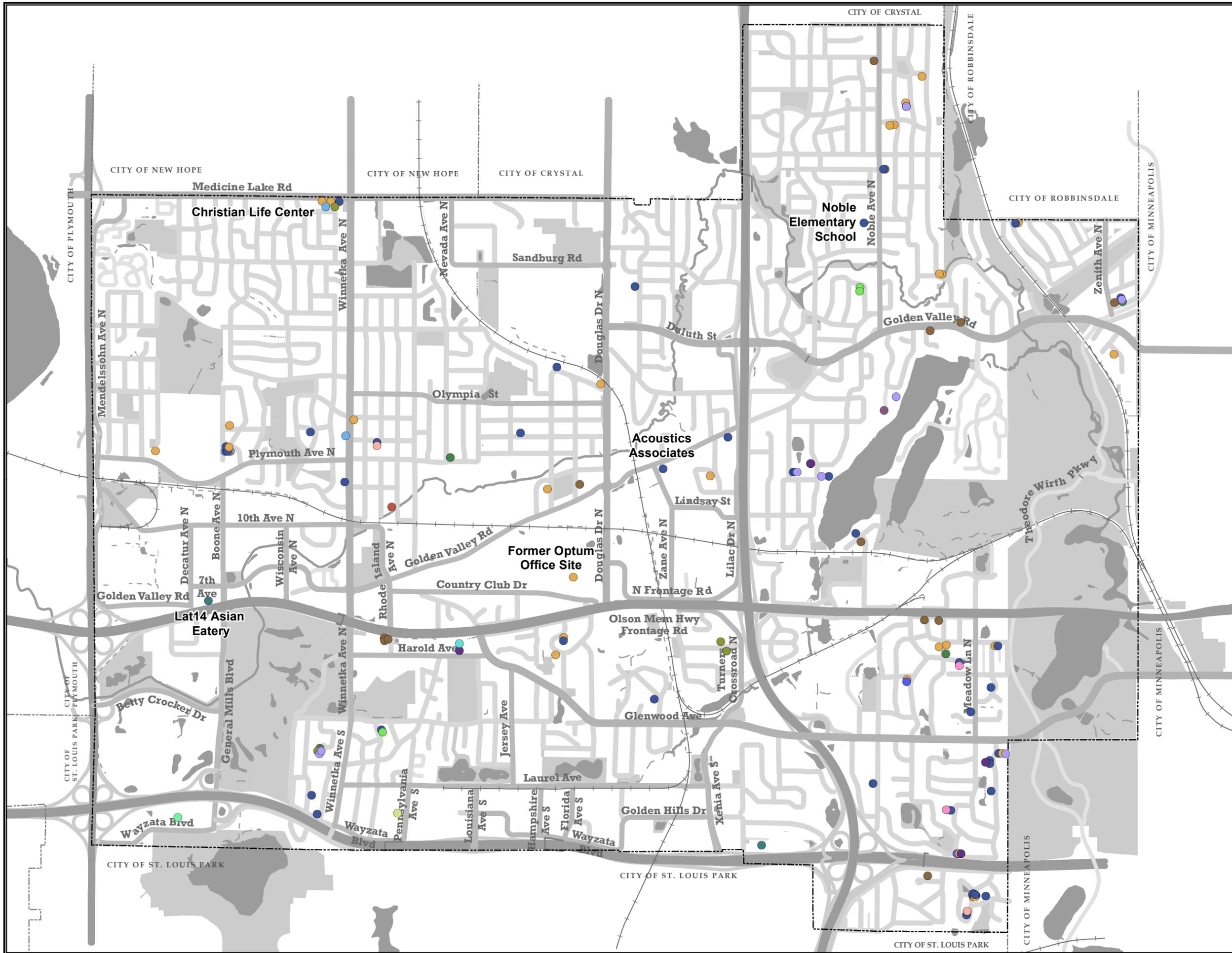


Variance Requests

Requests by Type, 2015-2019

- Accessory Structure Height
- Accessory Structure Location
- Accessory Structure Size
- Articulation
- Grading/Average Grade
- Building Envelope
- Fence Height
- Front Setback
- Garage Width
- Height
- Impervious Surface
- Outdoor Lighting
- Parking
- Parking Setbacks
- Rear Setback
- Roadway Width
- Shoreland Setback
- Side Setback

Print Date: 4/22/2020
 Sources:
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 -City of Golden Valley for all other layers.

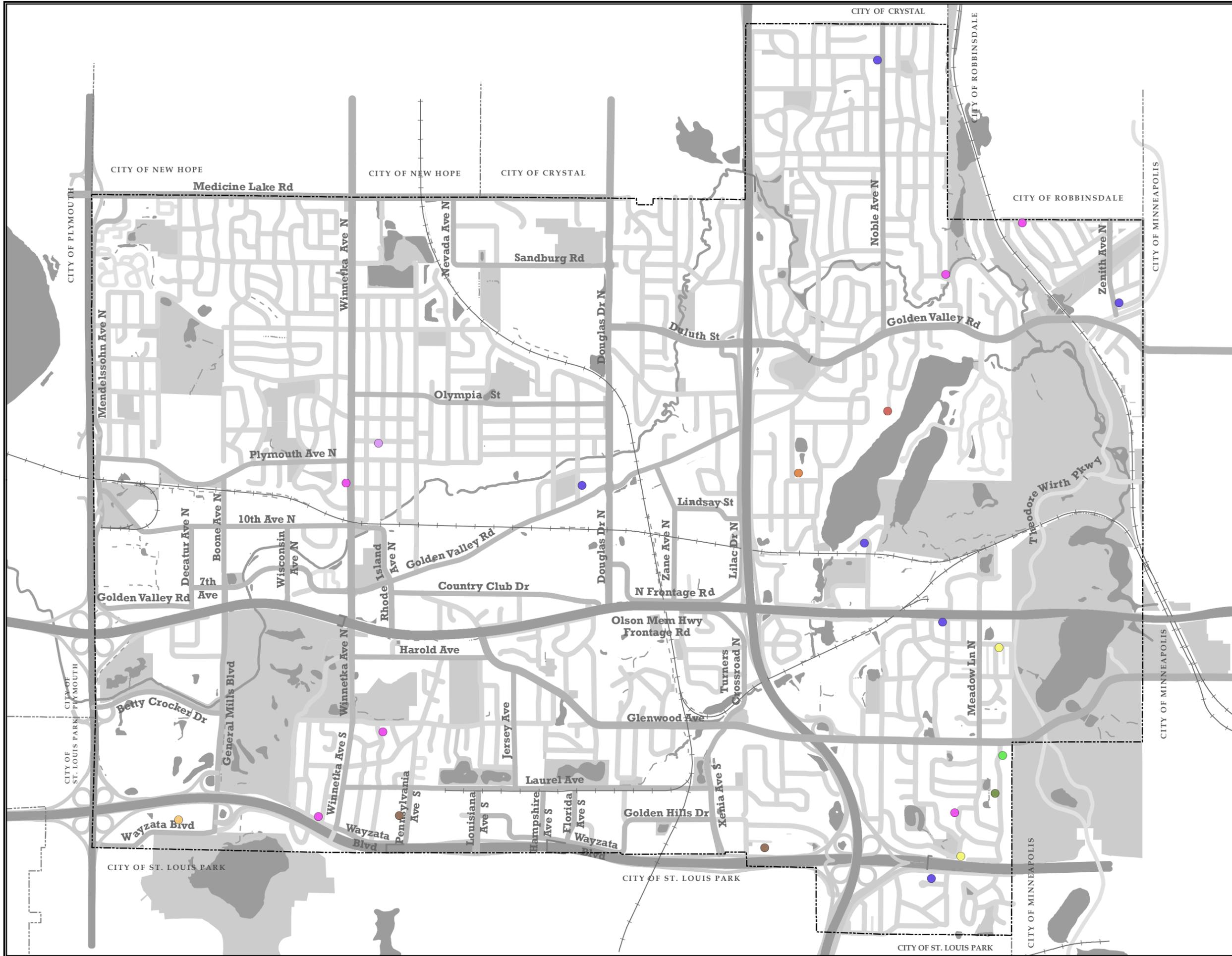




Variance Requests

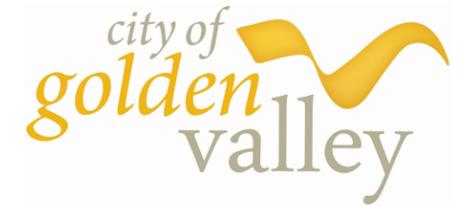
Requests by Project, 2019

- Building Addition
- Deck
- Fence
- Garage/Garage Addition
- Home Addition
- New Home
- Outdoor Lighting
- Parking
- Paved Area
- Private Road



Print Date: 4/22/2020
Sources:
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-City of Golden Valley for all other layers.

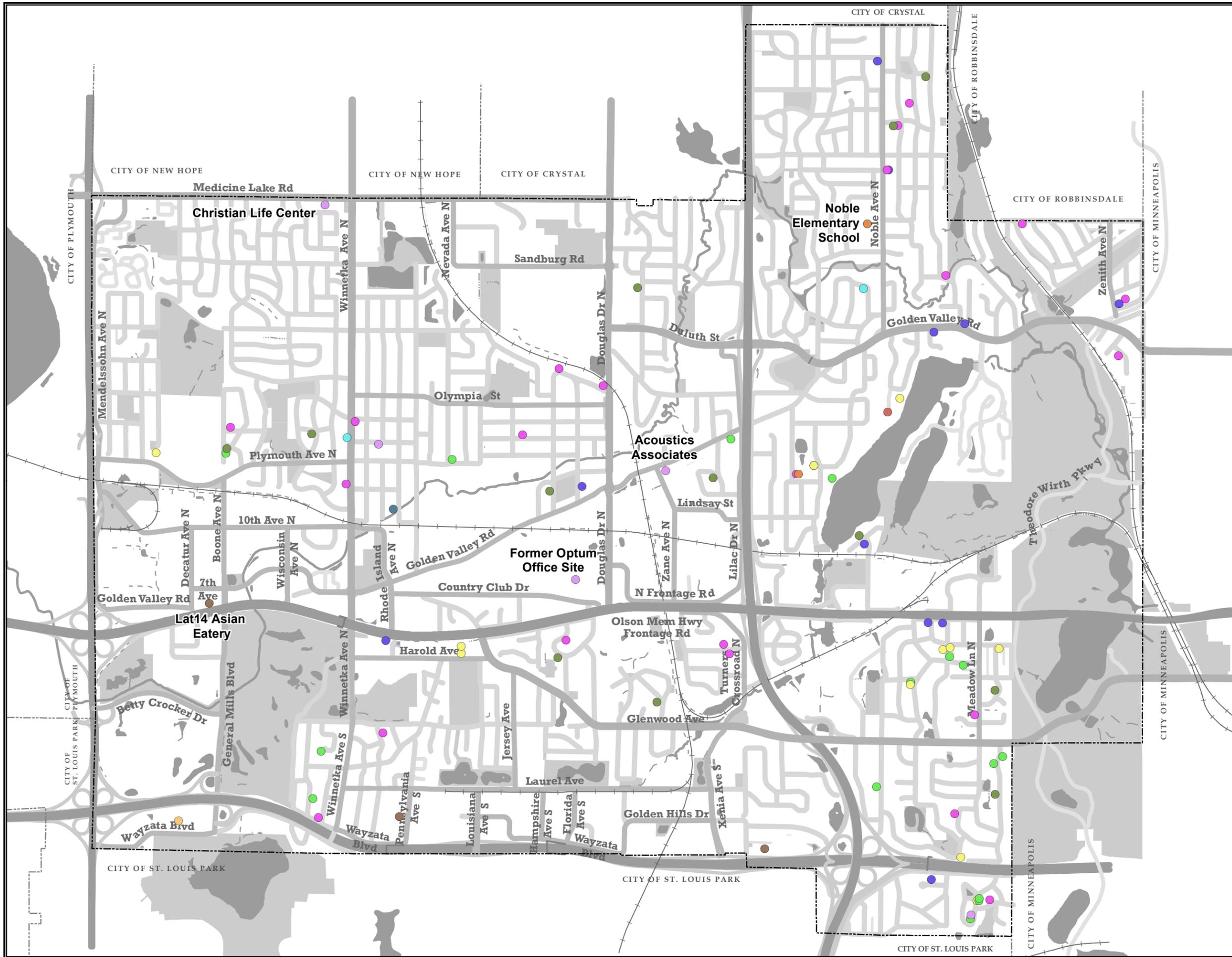




Variance Requests

Requests by Project, 2015-2019

- Building Addition
- Deck
- Fence
- Front Porch
- Garage/Garage Addition
- Home Addition
- New Home
- Outdoor Lighting
- Parking
- Paved Area
- Private Road
- Shed



Print Date: 4/22/2020
 Sources:
 -Hennepin County Surveyors Office for Property Lines (2018).
 -City of Golden Valley for all other layers.

