



California
Air Resources
Board

● Advisory ●

Variance Orders

Number 20

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Legal Requirements for Variance Orders
Health and Safety Code Section 42352

Attached is a copy of a recent legal opinion issued by the General Counsel of the Air Resources Board regarding variance orders. The issue counsel addressed was whether it is sufficient to cite Health and Safety Code Section 42352 in the variance order or whether a hearing board must address explicitly each of the three findings required by that Section. The conclusion the legal opinion reaches is that "the mere citation of Health and Safety Code Section 42352 in a decision on a petition for a variance is not legally sufficient."

The opinion also indicates that the mere recitation of the statutory findings is insufficient and that the order must provide the reasons the findings were made. Also, a suggested format for variance orders is discussed.

We recommend that you review this opinion carefully with your staff and fellow hearing board members. If you have any questions about this opinion or need additional information, please contact Mary Boyer at (916) 322-6037.

State of California

MEMORANDUM

To : James J. Morgester, Chief
Compliance Division

Date : November 10, 1987

Through: David Navi 
General Counsel

Subject : Health and Safety
Code Section 42352

From : Margery Knapp 
Staff Counsel
Air Resources Board

This memorandum is in response to your request for a legal opinion clarifying Section 42352 of the Health and Safety Code, which relates to the findings that must be made in a written decision when a district hearing board grants a variance. You have asked whether a citation of Health and Safety Code Section 42352 without specifically addressing the findings required in that section is legally sufficient.

CONCLUSION

The mere citation of Health and Safety Code Section 42352 in a decision on a petition for a variance is not legally sufficient. Applicable statutes and case law require that the hearing board's written decision must include a statement of facts, application of the facts to the findings required by Health and Safety Code Section 42352, and a conclusion granting or denying the petition.

ANALYSIS

Section 42352 of the Health and Safety Code reads as follows

42352. No variance shall be granted unless the hearing board makes all of the following findings:

(a) That the petitioner for a variance is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district.

(b) That, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property, or (2) the practical closing and elimination of a lawful business.

(c) That such closing or taking would be without a corresponding benefit in reducing air contaminants.

Other statutory provisions which are relevant to this question include Health and Safety Code Sections 40860 and 40862, which provide, respectively, that a hearing board's decision must be in writing and that the written decision must include the reasons for the decision. A considerable volume of case law, beginning with the landmark case, Topanga Association for a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506 (hereinafter referred to as "Topanga"), also governs this issue

The Topanga case involved a petition for review of a planning commission's decision to grant a variance from a county zoning ordinance. The granting of variances from zoning ordinances is governed by Government Code Section 65906, which sets forth specific circumstances in which variances may be granted. In spite of the fact that the Government Code does not require a planning commission's decision to be written, and that no specific findings are required under the terms of the statute, the California Supreme Court ruled that administrative bodies whose decisions are subject to judicial review under Code of Civil Procedure Section 1094.5 must render findings sufficient for the parties involved to determine whether and on what basis to seek review, and to inform a reviewing court of the basis for the agency's action. According to the Court, "...the agency which renders the challenged decision must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." Topanga, at 514-515.

The Topanga decision applies to the district hearing boards, because the boards' decisions are specifically subject to judicial review under Section 1094.5 of the Code of Civil Procedure. Health and Safety Code Section 40864(a). The provisions of the Health and Safety Code that govern the nature of the findings concerning the variances which must be made are completely in harmony with the Topanga case: where Topanga requires "findings to bridge the analytical gap," the Health and Safety Code requires "findings" and "reasons." Compliance with either standard would clearly satisfy the demands of the other. The comments in the following paragraphs are intended to provide some specific guidance as to how the statutory material and the case law should be applied to the hearing boards' circumstances.

1. Since Section 40860 of the Health and Safety Code specifies that the boards' decisions must be in writing, each of the findings required by Section 42352 of the Health and Safety Code must be set forth in a written decision. The necessary findings will not be implied by a court, when the statute requires written findings. Conti v. Board of Civil Service Commissioners, (1969) 1 Cal.3d 351, 365.

2. The mere recitation of the statutory findings will not be sufficient, because the recitation of the findings does not provide the reason the findings were made. The record must show

that an adequate analysis of the circumstances involved in each petition for a variance occurred. Topanga, at 517 fn. 16, City of Carmel-by-the-Sea v. Board of Supervisors, (1977) 71 Cal.App.3d 84, 92.

3. The cases and statutes relating to the findings that must be made by administrative agencies do not set forth any specific format in which the findings must be presented. It is clear, however, that some statement concerning the facts of the case, some application of the facts to the statutorily required findings, and a final decision granting or denying the petition for the variance must be provided. The format for decisions outlined below is used by many agencies which are subject to the Administrative Procedure Act (Government Code Sections 11500 et seq.). This format is suggested, because under Section 40807 of the Health and Safety Code, the hearing boards are advised to have their procedures conform so far as practicable with the Administrative Procedure Act.

- A. An introductory paragraph should set forth various procedural details, including a statement that a petition for a variance was filed, the date of filing, information whether an interim variance was granted, a statement to the effect that a hearing on the petition was held in accordance with Health and Safety Code Section 40808 and stating the date of the hearing.
- B. A section labeled "Findings of Fact" should set forth the evidence relied on by the board in reaching its conclusions concerning the petition. When contrary evidence concerning the circumstances of a case is presented, the evidence which the board believes is correct should be specified. The decision may incorporate findings of fact by reference to the administrative record, as long as the reference to the administrative record informs the parties and the courts of the factual basis for the agency's decision. See McMillan v. American General Financial Corporation, (1976) 60 Cal.App.3d 175, 182-184.
- C. A section labeled "Determination of Issues" should apply the facts given above to each of the three findings required by Health and Safety Code Section 42352. For instance, if the district's regulations allow no more than one pound per day of a certain air contaminant to be emitted by a certain facility, and the facility is currently emitting two pounds per day, specify that the petitioner is in violation of the district's regulation (citing the number of the regulation) because his facility is emitting two pounds per day. The second and third findings are more difficult. See Manaster, Administrative Adjudication.

of Air Pollution Disputes: The Work of Air Pollution Control District Hearing Boards in California, (1984) 17 U.C. Davis Law Review 1117, at 1124-1129, for a very helpful discussion concerning the issues involved in making these findings. Ordinarily the third finding, "[t]hat such closing or taking would be without a corresponding benefit in reducing air contaminants," will involve a weighing of the excess emissions which would result from the grant of a variance, i.e. the benefit in reducing air contaminants, against the burden on the source of compliance with the rule.

- D. Finally, a section labeled "Conclusions" should specify whether the variance is denied or granted, and if granted set forth all conditions to which the grant is subject. The decision should be dated and signed by the board's chairperson. As provided by Health and Safety Code Section 42360, a copy of any order affecting a variance must be provided to the Air Resources Board within thirty days.

As noted above, there are no formal requirements for the the presentation of the hearing boards' written decisions. The courts are, however, very familiar with the format we have suggested. If specific questions arise about the application of these suggestions, please feel free to contact me. We hope this information has been helpful.