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## Indiana Variance Proceedings and the Application of Res Judicata

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## INDIANA VARIANCE PROCEEDINGS AND THE APPLICATION OF RES JUDICATA

In *Broughton v. Metropolitan Board of Zoning Appeals*,<sup>1</sup> the Appellate Court of Indiana stated that boards of zoning appeals “. . . should not indiscriminately or repeatedly reconsider a determination denying a variance absent a change of circumstances.”<sup>2</sup> As a consequence, the court adopted a significant new rule of law governing administrative proceedings in Indiana; the doctrine of res judicata<sup>3</sup> will apply to board determinations if remonstrators show a lack of changed circumstances.<sup>4</sup> While the remonstrators in *Broughton* pleaded the prior Board determination denying the variance in question, the court held that they had failed to carry their burden of showing a lack of changed circumstances.<sup>5</sup> As a result, the court affirmed the Board’s action in reversing its prior determination which denied the variance sought by the petitioners.

Variances of use<sup>6</sup> have been described as “safety valves” incorporated into zoning ordinances in order to provide the flexibility in instances where strict enforcement of the zoning ordinance would work unnecessary hardship.<sup>7</sup> In contrast to jurisdictions which permit variances of use are those which provide that any deviation from ordinances must be achieved through amendment.<sup>8</sup> In the former case boards of zoning appeals are given limited discretionary power to provide exemptions from the terms of the existing zoning ordinance whereas in the

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1. —Ind. App.—, 257 N.E.2d 839 (1970), *rehearing denied*, —Ind. App.—, 258 N.E.2d 866 (1970) [Hereinafter cited as *Broughton*].

2. *See Broughton v. Metropolitan Bd. of Zoning Appeals*, —Ind. App.—, 257 N.E.2d at 842. *See also* F. JAMES, *CIVIL PROCEDURE* § 11.9 (1965) and C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 343-49 (2d ed. 1970) for a general survey of res judicata.

3. *Id.*

4. *Id.* The facts in *Broughton* are typical of much zoning litigation. The appellees originally sought a variance of use to construct a gasoline service station in a residential area. The Board denied the petition for variance. Later the appellees redocketed the case with the Board; the Board reversed its prior determination and granted the variance to appellees. The Board’s determination was appealed to the Superior Court of Marion County which affirmed the Board’s determination. Appellants thereupon took an appeal to the Appellate Court of Indiana.

5. —Ind. App.—, 257 N.E.2d at 843.

6. A grant of a variance of use, it has been said

“. . . is not personal to the owner at the time of the grant but is available to any subsequent owner until it expires according to its terms or is effectively revoked. . . .” A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 46-1 (3d ed. 1964). As such, the grant of a variance runs with the realty in question and applies to those who hold title to the land and to those who may be affected by the utilization of the variance of use.

7. J. CRIBBETT, *PRINCIPLES OF THE LAW OF PROPERTY* 327 (1962).

8. A. RATHKOPF, *supra* note 6, at § 46-1.

latter case only the legislative authority which established the ordinance is empowered to change its effects upon those who wish to use the zoned premises in a manner not permitted by the existing ordinance.<sup>9</sup>

Because of the statutory review procedures afforded parties<sup>10</sup> who are disappointed by determinations of boards of zoning appeals, the issue of whether a board's determination is *res judicata* as to subsequent variance petitions becomes important only in situations, as represented in *Braughton*, where repeated access to the administrative agency is permitted.<sup>11</sup> It has been asserted that in matters of sufficient zoning importance aggrieved parties will generally take immediate appeal rather than waiting the required period to redocket their petition on the zoning board calendar.<sup>12</sup> However, it may often be advantageous to wait the required period and seek reversal by a board of its prior determination because courts are reluctant to overrule agency determinations.<sup>13</sup> The existing procedure, therefore, affords ample opportunity to parties seeking variances to return repeatedly to the appropriate administrative board. Thus, dangers of harassment and the wearing down of resistance of remonstrators by persistent seekers are constantly present.<sup>14</sup> Through

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9. J. CRIBBETT, *supra* note 7, at 326-29. In Indiana boards of zoning appeals are empowered to grant variances:

. . . from the terms of the [zoning] ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. IND. ANN. STAT. § 53-778 (Burns Repl. 1964).

10. IND. ANN. STAT. § 53-969 (Burns Supp. 1970) and §§ 539-74, -978 (Burns Supp. 1970) and §§ 53-975 to -977 and 53-979 to -980 (Burns Repl. 1964). These statutes provide that immediate appeal may be taken from an adverse board determination either to the Metropolitan Plan Commission sitting as a board of zoning appeals if the Executive Director of the Commission desires or by writ of certiorari to the circuit or superior court of the county in which the premises are located. An appeal can be taken from any final circuit or superior court judgment to the Appellate Court of Indiana.

11. 2 Am. Jur.2d, *Admin. Law* §§ 496 and 502 (1962).

12. K. DAVIS, *HANDBOOK ON ADMINISTRATIVE LAW* §§ 171-72 and 178 (1951). See Department of Metropolitan Development, Metropolitan Board of Zoning Appeals of Marion County, Indiana—Rules of Procedure (January 6, 1970), art. IV, § 4 which provides that in cases which have been decided adversely against petitioners no redocketing of the case shall be made for a period of six months beginning from the date of the decision denying the variance. The only exception to this provision is that upon a motion to permit redocketing within the six month period, permission to redocket may be given if unanimous approval of the Board is given the motion.

13. 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 520-21 (1965). Such a feeling on the part of petitioners may be well founded in that reviewing courts are hesitant to overrule agency determinations because records are often incomplete, rules of evidence are generally relaxed in most agency proceedings and courts recognize that agencies often deal with rapidly changing circumstances in zoning matters.

14. Parker, *Administrative Res Judicata*, 40 ILL. L. REV. 56, 59 (1945). Since originally disappointed seekers can return almost at will to secure variances (*see* note 12 *supra*), remonstrators who were originally successful can be worn down by persistent seekers. As a practical matter in many cases, parties are forced to hire legal

the application of the doctrine of res judicata the court in *Broughton* attempted to promote the finality of boards of zoning appeals' determinations in order that originally successful remonstrators would not be subjected to continued efforts by petitioners to secure variances.<sup>15</sup>

A majority of jurisdictions<sup>16</sup> currently recognize that the doctrine of res judicata, in many respects and to significant degrees, is applicable to administrative adjudication.<sup>17</sup> Traditionally, the rule was to the contrary; res judicata did not apply to questions of law or fact determined in other than final court judgments. Factors given in support of this rule were that administrative determinations are not of judicial quality and that agencies are quasi-legislative and thus should be free to change previous determinations. The reasoning upon which the older rule was founded<sup>18</sup> should be considered in applying the doctrine of res judicata

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counsel to represent them in resisting seekers' efforts. The continuous difficulty of keeping residential property owners organized and the expense of effective resistance present obstacles to continued resistance by remonstrators.

15. —Ind. App.—, 257 N.E.2d at 842. In applying res judicata to multiple hearings the court in *Broughton* cited *Whittle v. Bd. of Zoning Appeals*, 211 Md. 36, 125 A.2d 41 (1956) and *St. Patricks Church Corp. v. Daniels*, 113 Conn. 132, 154 A. 343 (1931). The *Whittle* case involved premises in a residential district for which a special permit of variance was sought to establish a funeral home. The seekers of the permit finally lost after a lengthy appeal taken into the Maryland *judicial system* where a final judgment was entered against them. Five years later the appellees in *Whittle*, who had gained title to the premises subsequent to the final judgment, sought the same permit of variance their predecessors had sought. The Zoning Commissioner refused the permit, the Board of Zoning Appeals reversed the Commissioner, the circuit court upheld the Board's determination whereupon the remonstrators appealed to the Maryland Court of Appeals. This court, in dicta, said that a zoning appeals board can reconsider a denied petition for variance but can only grant such a petition if there has been a substantial change in circumstances; the court grounded its decision not strictly on the doctrine of res judicata but on the proposition that it would be arbitrary for a board to arrive at opposite conclusions unless there were a change in circumstances or law. The *Whittle* court expressly held that res judicata was involved only because there had been a prior court determination. This case is of doubtful authority for the *Broughton* holding.

In the *St. Patricks Church* case the granting of a variance for a parking lot was challenged because of a board of zoning appeals prior denial. The court held, however, that as a matter of law it could not be said that a lack of changed circumstances made the Board's decision arbitrary and that, therefore, the Board's later determination would stand. This court based its holding on the theory that administrative agencies must be free to execute the law in order to be able to respond to a changing society.

16. L. JAFFEE, *ADMINISTRATIVE LAW, CASES AND MATERIALS* 626-31 (3d ed. 1968). See also 2 F. COOPER, *supra* note 13, at 503-30 and 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 18.12, at 625-28 (1958). The traditional viewpoint, now the minority position, was that res judicata did not apply to questions of law or fact determined in other than final court judgments. When reasoning for the rule was provided in the case law, which seldom it was, given as compelling factors in support of the rule were that administrative determinations are not of judicial quality and that agencies are often quasi-legislative and should be free to change courses.

17. 2 K. DAVIS, *supra* note 16, § 18.02, at 548-68.

18. *Id.* 548-57. Cited as a reason for non-applicability of the doctrine is that administrative determinations are summary in nature. In addition, since witnesses cannot be compelled to attend hearings, germane evidence is often not received. Another reason

because state administrative hearings are invariably informal: rules of evidence are normally relaxed and witnesses cannot be compelled to attend hearings.<sup>19</sup>

In the broadest sense the question is not simply whether *res judicata*, as developed in the judicial context, is applicable to administrative determinations; rather the question is to what *extent* will the principles of *res judicata* be applicable. Most jurisdictions focus upon this latter question when deciding the degree of applicability of *res judicata*; this is called the "qualification or relaxation" of the doctrine of *res judicata*.<sup>20</sup> The court in *Broughton* apparently favored this view, as evidenced by its citing of one of the leading cases advocating relaxation, *St. Patricks Church Corp. v. Daniels*,<sup>21</sup> and by the use of the word "generally"<sup>22</sup> in describing the degree of applicability of *res judicata* to board determinations. If the court in *Broughton* did in fact adopt this approach then it can be expected that a strong argument for relaxation of the general doctrine of applicability, buttressed by the compelling circumstances of a particular case, may well prove to be persuasive with Indiana courts in the future.

The trend in jurisdictions outside Indiana indicates that the test for deciding whether an administrative agency should be permitted to reverse or modify a prior determination depends upon a balancing of public and private interests within a particular fact situation.<sup>23</sup> In any dispute there will usually be circumstances that favor allowing agencies latitude to reverse or modify prior determinations. Whenever an agency does reverse or modify a prior determination, it evidences a belief that the public welfare will not be adversely effected. However, in each case where there was a prior determination reliance interests exist in at least

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for non-applicability is that rules of evidence are normally relaxed in such hearings and parties should not be bound by such informal proceedings.

19. 2 F. COOPER, *supra* note 13, at 503-04.

20. 2 K. DAVIS, *supra* note 16, § 18.03, at 557-68.

21. *See* note 15 *supra*. The court in the *St. Patricks Church* case paid deference to the repose interests of the parties which arose out of the original board determination and at the same time took cognizance of the fact that agencies, as tools of government, must be free to change direction as circumstances require. The test, the court said, . . . is whether new or additional facts appear showing a change in conditions or other considerations materially affecting the merits, intervening since the former decision . . . . When the facts and circumstances which actuated . . . a decision are alleged and shown to have so changed as to vitiate or materially affect the reasons which produced . . . it, and no vested rights have intervened, it is reasonable . . . that the subject matter be reexamined in the light of the altered circumstances.

113 Conn. at 138, 154 A. at 345.

22. —Ind. App.—, 257 N.E.2d at 842.

23. 2 F. COOPER, *supra* note 13, at 506.

one of the parties to that determination which deserve careful consideration. Exactly what weight courts give to these competing interests often varies and no clear pattern emerges from the cases.<sup>24</sup>

Seldom will a simple "yes" or "no" answer suffice in response to the question of whether *res judicata* applies to administrative agency determinations.<sup>25</sup> For example, it would be unwise to suggest that one who was denied a variance of use for a particular premise would forever be barred from seeking a variance. Otherwise, the entire geographical area in which the premises were located could change,<sup>26</sup> yet a variance would be denied even though the area in question might be greatly benefited by the granting of the variance. However, in a situation where a variance to erect a building has been granted in an original proceeding, *res judicata* should attach to that determination in order that the agency would be precluded from reversing itself and forcing the originally successful party to tear the building down.<sup>27</sup> Otherwise, even if such a party were compensated for his property economic waste would result.

24. *Id.*

25. Most authorities discuss the application of *res judicata* to administrative board determinations in terms of categories of administrative law. Those most frequently discussed are: (1) zoning, (2) tax, (3) licensing, (4) workmens compensation, and (5) categories involving continuing jurisdiction by agencies. *Id.* 510-34 2 K. DAVIS, *supra* note 16, § 18.03, at 557-68; L. JAFFEE, *supra* note 16, at 226-36.

26. If substantial change in the form of added businesses occurs in an area zoned residential, a rezoning would be appropriate.

27. 2 F. COOPER, *supra* note 13, at 509. See also K. DAVIS, *supra* note 12, § 172, at 565-71 (1951); 2 K. DAVIS, *supra* note 16, § 18.03, at 557-68; Comment, *Res Judicata in Administrative Law*, 49 YALE L.J. 1250-89 (1940). These authorities suggest the balancing decisions can only be made by a weighing of competing interests in light of all the specific factors of a case. Thus, distinctions have been made where the agency in question has granted or denied a right or privilege. There have been distinctions made in cases where agencies decide disputes involving non-recurring factual situations, *i.e.*, the theory here is that upon final determination it would be unfair for an agency to revoke or modify its determination in an after-the-fact fashion and return to confront the party relying on that final determination. The nature of the particular grant or privilege and the particular modification or reversal of the prior determination the agency or parties may be seeking can have a strong bearing on the issue of *res judicata* being applicable or not, *e.g.*, a tax statute construed by the responsible agency as not being applicable to X businessman; the nature of the modification sought by the agency in later tax years, such as a determination that X will have to pay the tax in the future is much more palatable than a new ruling by the agency that X will have to pay the tax for the year(s) that X relied on the original determination.

It has been stated with respect to the applicability of *res judicata* :

It is in the context of administrative decisions that are applicable to a continuing course of conduct [as most administrative orders are] that the problem as to the proper application of doctrines of *res judicata* becomes acutely difficult. The variables involved . . . are so great as to preclude the formation of any neat rules capable of ready or uniform application . . . . Sometimes, the balance preponderates in favor of the same result as that reached by application of court-made doctrines of *res judicata*. Sometimes, the scales point in the opposite direction.

2 F. COOPER, *supra* note 13, at 510.

*Res Judicata and Zoning Agency Determinations*

The field of zoning is one of the most difficult areas of administrative law regarding the application of the doctrine of res judicata.<sup>28</sup> The difficulty stems from the fact that the interests of the parties and the public are at their strongest. Successful parties want to rely on the agency determination denying the variance, whereas unsuccessful parties desire modification or reversal of the agency's determination. Simultaneously, the board is responsible for the public interest, the promotion of which would demand affirmation or reversal of a previous board determination depending upon the circumstances confronting the board. Boards need the power to adapt to change in neighborhood conditions which can rapidly occur. Yet, boards also have an interest in upholding prior denials so that existing zoning plans are not continuously ignored. In summary, if prior denials of variances of use were deemed to preclude further petition by the seeker, and those in privity with the seeker, after change had occurred, hardship would result and the public's interests in growth and adaption to change would be stymied.<sup>29</sup>

Boards of zoning appeals are generally recognized as possessing broad discretionary powers to grant variances after a prior denial when there has been an intervening and substantial change of circumstances.<sup>30</sup>

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28. See generally the case law of the jurisdictions of New Jersey and Connecticut which have a good deal of litigation concerning res judicata as applied to administrative zoning law. See also *Pieretti v. Mayor & Council of Town of Bloomfield*, 35 N.J. 382, 173 A.2d 296 (1961); *Mason v. Bd. of Zoning Appeals*, 143 Conn. 634, 124 A.2d 920 (1956); *Spencer v. Bd. of Zoning Appeals*, 141 Conn. 155, 104 A.2d 373 (1954).

29. Groner and Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300, 303 (1954). See also *Commissioner v. Sunnen*, 333 U.S. 591 (1948) for an example of federal case law. See generally Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5 and *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

30. 2 F. COOPER, *supra* note 13, at 504-06. See also IND. ANN. STAT. § 53-969 (Burns Supp. 1970). This section provides boards may grant variances of use upon determination in writing that:

1. The grant will not be injurious to the public health, safety, morals and general welfare of the community.
2. The use or value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner.
3. The need for the variance arises from some condition peculiar to the property involved and such condition is not due to the general conditions of the neighborhood.
4. The strict application of the terms of the ordinance will constitute an unusual and unnecessary hardship if applied to the property for which the variance is sought.
5. The grant of the variance does not interfere substantially with the metropolitan comprehensive plan adopted pursuant . . . [to] this act.

At the time the variance was granted in Braughton the statutory prerequisites were different than listed above. See IND. ACTS 1955, ch. 283, § 69; Ind. Acts 1965, ch. 434, §

*Broughton* ignores this rule because it permitted reversal of the original agency determination *without* a showing of changed circumstances.<sup>31</sup> Before discussing this aspect of the case, it is appropriate to examine the issue of what constitutes a change in circumstances.

*What Constitutes Changed Circumstances*

Presently there is a lack of satisfactory criteria providing guidelines as to what will be deemed a change in circumstances. Therefore, what might be valuable as a predictive aid is a general survey of what has been deemed to constitute "changed circumstances" in Connecticut, a jurisdiction cited as authority by the court in *Broughton*. In *Sipperley v. Board of Appeals of Zoning*,<sup>32</sup> the defendants in 1950, sought a variance of use for realty which was denied by the Board. No appeal was taken from that determination. In 1951 the defendants again sought the variance, admitting there was no change in external circumstances, but reasoned that intervening growth of their business greatly increased their need of the variance and constituted a change in circumstances. The Board agreed and thus granted the variance. Upon appeal the Supreme Court of Errors held that the increased need of the defendants was merely a matter existing at the time of the original determination and therefore finally settled:

To fall within the principle [of changed circumstances] the consideration must relate to something that was not and could not have been advanced as a reason for seeking a variance upon the prior application. It must relate to some material new factor which was nonexistent when the prior application was denied.<sup>34</sup>

In *Mason v. Board of Zoning Appeals*,<sup>35</sup> the court held that once a

17. See also *Broughton v. Metropolitan Bd. of Zoning Appeals*, —Ind. App.—, 257 N.E.2d at 840.

31. —Ind. App.—, 257 N.E.2d at 843. See note 10 *supra*. See also IND. ANN. STAT. §§ 53-700 to -900 (Burns Repl. 1964) which provides the correct variance procedure to use in Indiana cities of all classes.

32. The Court in *Broughton* cited cases of the Connecticut jurisdiction but also cited the Maryland jurisdiction. See —Ind. App.—, 257 N.E.2d at 842.

In recent years the Connecticut jurisdiction has often considered the doctrine of res judicata and has tended to apply a "rather strict (*though not unrelenting*) application of the principle of res judicata to preclude revisions of earlier determinations." 2 F. COOPER, *supra* note 13, at 519. The Supreme Court of Errors of Connecticut holds that after an administrative agency has made a final determination relating to the use of real property it cannot reverse itself unless there are intervening changed circumstances upon which to base such a reversal.

33. 140 Conn. 164, 98 A.2d 907 (1953).

34. *Id.* at 168, 98 A.2d at 908.

35. 143 Conn. 634, 124 A.2d 920 (1956).



board has given its *approval* for a variance, it cannot refuse to grant annual renewal of the variance absent a change in circumstances. The variance permitted the establishment of a garage repair business. The Board refused the certificate of renewal when the remonstrators appeared and complained about its operation. The court stated that the operation of the business was not in issue. Rather, the issue under consideration was the suitability of the premises as a garage repair business sight, and absent a showing of changed circumstances, the Board could not reverse its determination granting the variance.<sup>36</sup>

In a third Connecticut case, *Mills v. Town Plan & Zoning Commission*,<sup>37</sup> the Board unanimously refused an application for a variance to establish a "shopping center" upon premises zoned for agricultural use. Reasons for the refusal were that a major portion of the land was subject to periodic flooding and that the land zoned for business in the area was adequate.<sup>38</sup> Two months later the seekers applied for a "regional shopping center" variance. This application was approved by a three-two vote after the Board had met privately with the seekers. The *Mills* court held that changing the terms of the variance from a "shopping center" to a "regional shopping center" did not constitute a change in circumstances which would allow a board to overrule its prior determination. In addition, the court found the record of the subsequent hearing "barren of any evidence that the area was not . . . prone to flooding. . ."<sup>39</sup> and that there was also a lack of evidence to indicate that the area zoned for business was now inadequate.

In *Dubiel v. Zoning Board of Appeals of the Town of East Hartford*,<sup>40</sup> there had been a denial of a petition for variance in 1954 that sought permission to erect a gasoline service station. The basis of the denial by the Board was that the granting of the variance would "imperil the safety of the public."<sup>41</sup>

In 1958 the Board granted the variance. On appeal the court reversed, finding that no evidence existed in the record to support the

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36. Here the reliance interest of the party possessing the variance in the original determination was viewed as paramount in importance to the interests of the remonstrators or the agency.

37. 145 Conn. 237, 140 A.2d 871 (1958).

38. *Id.* at 239, 140 A.2d at 873.

39. *Id.* at 242, 140 A.2d at 874.

40. 150 Conn. 75, 186 A.2d 74 (1962).

41. The safety issue arose because the Board felt the location was unsuitable for a station due to the narrow width of the highway abutting the premises which would have made it difficult to handle the increased traffic requirements which the service station's operation would have created. Moreover, the Board found that certain trees obstructed vision of drivers and this also contributed to the lack of safety.

Board's conclusion that there had been "[c]hange[s] in conditions which have eliminated [the] hazard."<sup>42</sup> In 1960 another variance was sought and granted by the Board. This time the Board made specific findings of fact detailing the elimination of the hazard.<sup>43</sup> The court, however, reversed the Board's determination, holding that the record was insufficient to support the Board's conclusion that the changes in conditions were substantial enough to permit reversal. The *Dubiel* holding is too strict in applying the principles of *res judicata* in light of the Board's written findings of change and the amount of evidence in the record upon which such findings could logically be grounded.<sup>44</sup>

The case of *Fiorilla v. Zoning Board of Appeals of the City of Norwalk*<sup>45</sup> represents a situation where the court found a change in circumstances. In *Fiorilla* the purpose of the later variance application was for the construction of a building which was desperately needed by the seeker in order to continue the profitable operation of his business. The originally denied variance was for a "substantially" larger building, and upon this basis of difference "in scope"<sup>46</sup> the court allowed the Board to modify its original determination.<sup>47</sup>

The Connecticut jurisdiction, as the cases indicate, has followed the broad rule of general applicability of the doctrine of *res judicata* to administrative zoning board determinations. The court has, however, not failed to respond to particular circumstances of individual cases which argue for relaxation and qualification of the rule.<sup>48</sup> If the courts in Indiana continue to look to Connecticut for authority and reasoning, many of the above factual situations constituting or failing to constitute

42. 150 Conn. at 76, 186 A.2d at 74.

43. *Id.*

44. Serious questions concerning the scope of judicial review of administrative agency findings of fact are raised by the *Dubiel* holding. For a discussion of these questions see Note, *Judicial Review of Administrative Agency Actions in Indiana*, 37 IND. L.J. 259 (1962); Tepper and Toor, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform*, 12 UCLA L. REV. 937 (1965). See also Forkosch, *Credibility Gap in Judicial Review of Administrative Determinations*, 18 CLEVE. ST. L. REV. 257 (1969).

45. 144 Conn. 275, 129 A.2d 619 (1957).

46. *Id.* at 279, 129 A.2d at 621.

47. The *Fiorilla* court did not distinguish the facts of *Fiorilla* from *Sipperley*, but simply said anything in *Sipperley* "which seems to run counter . . . is overruled." 144 Conn. at 279, 129 A.2d at 621-22. The court relied heavily upon statutory authority that, in the court's opinion, vested the Board with greater discretionary powers than would otherwise have been the case. *Id.* at 280-81, 129 A.2d at 622-23. Exactly what may "run counter" in *Fiorilla* to the holding in *Sipperley* is not clear. *Sipperley* involved the issue of a greatly increased need for the variance because of internal changes, while in *Fiorilla* the lessened scope of the variance sought was deemed to be substantially different than the originally sought variance and, therefore, not subject to the effects of *res judicata*.

48. See note 20 *supra* and the accompanying text.

“changed circumstances” may be applicable to Indiana zoning disputes.<sup>49</sup>

*Burden of Proof*

It is difficult to accept the Indiana court's determination that the burden of proof indicating a lack of changed circumstances lies with the party alleging the defense of *res judicata*<sup>50</sup> since this negates most of the benefits conferred by the doctrine. As authority for placing the burden of proof on the remonstrators the court cited *Brown v. Street*,<sup>51</sup> a case involving an action upon a promissory note allegedly the subject of a prior justice of the peace judgment. The court cited a second case, *Guyer v. Union Trust Co.*,<sup>52</sup> as authority for such allocation of the burden. This case involved an action on a promissory note issued to secure a mortgage which had been the subject of a prior superior court judgment. Thus, former adjudication was raised as an issue in *Brown* and *Guyer*, but the *res judicata* effects attached to judicial determinations rather than to an administrative determination as was the situation in *Broughton*.

These cases, therefore, provide no insight into why the court failed to draw the distinction recognized in other jurisdictions in the area of administrative law between *res judicata* and changed circumstances: *res judicata* attaches to a previous board determination unless the petitioner for the variance shows a change in circumstances. Furthermore, the court has implicitly rejected the Connecticut authority it relied upon when stating that “a zoning board should not indiscriminately or repeatedly reconsider a [prior] determination,”<sup>53</sup> since it placed on the remonstrators the burden of showing a lack of changed circumstances.

The only other insight provided by the court as to why it placed the burden of proof upon remonstrators is the following:

The informal nature of the variance process makes an exact determination of circumstances attendant to a prior denial very difficult. Th[is] inability . . . makes it very difficult to show that the circumstances have or have not changed. Therefore, the consideration of changed circumstances should be limited

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49. IND. ANN. STAT. §§ 53-700 to 985 (Burns Repl. 1964). Chapters 7, 8 & 9 of Title 53 cover planning, zoning appeals of all classifications of governmental units in Indiana. The similarity of the provisions and the *Broughton* court's general language probably indicates that the holding in *Broughton* is applicable throughout the state rather than just to cities of the first class out of which the dispute in *Broughton* arose.

50. —Ind. App.—, 257 N.E.2d at 842-43.

51. 60 Ind. 8 (1877), cited in—Ind. App.—, 257 N.E.2d at 843.

52. 55 Ind. App. 472, 104 N.E. 82 (1914), cited in —Ind. App.—, 257 N.E.2d at 843.

53. —Ind. App.—, 257 N.E.2d at 842.

to situations in which the issue is raised by remonstrators who introduce evidence indicating . . . a lack of changed circumstances.<sup>54</sup>

The court has recognized the difficulty of determining in an agency proceeding not only what were the circumstances attendant to a prior denial, but also whether the circumstances had changed during the intervening period. However, the court failed to state why this demands that the remonstrators should be the party bearing the burden of proof.<sup>55</sup>

There are compelling reasons within the area of administrative zoning law for placing the burden of showing a change of circumstances upon the party seeking a variance for the second time rather than upon the remonstrators. Since the disappointed seekers of a variance may re-petition with little constraint,<sup>56</sup> the remonstrators are open to harassment. Seekers could be motivated to repeatedly reappear in hope that there would be a change in outlook by the board members, a change in composition of the board<sup>57</sup> or a collapse of the remonstrators' will to resist.

Remonstrators are often groups of residential property owners who are too loosely organized and ill-financed to successfully resist repeated efforts of seekers. In contrast, those seeking variances are frequently business organizations or parties supported by business organizations, comparatively well financed and organized, and at times in a position to absorb the costs of repeated efforts by passing the costs on to consumers.

Another reason why the burden of showing changed circumstances should be upon seekers is that they normally have easier access to evidence which would indicate changed circumstances.<sup>58</sup> Therefore,

54. —Ind. App.—, 257 N.E.2d at 842-43.

55. It should be noted, however, that the court may view the doctrine of changed circumstances as being part of the doctrine of *res judicata*. If so, then the court's allocation of the burden of proof would operate, in effect, to give agencies more latitude to reverse and modify prior determinations.

56. The rules promulgated (under authority of IND. ANN. STAT. § 53-920 (Burns Repl. 1964)) by the Marion County Board in *Broughton* provide:

—No case which has been decided adversely against the petitioner shall again be placed on the docket for consideration by the BOARD within a period of six (6) months from the date of the decision previously rendered, except upon motion to permit redocketing . . ., adopted by a unanimous vote of all members present. . . .

Department of Metropolitan Development, Metropolitan Board of Zoning Appeals of Marion County, Indiana—Rules of Procedure, art. IV, § 4 (Jan. 6, 1970). When the *Broughton* case was heard originally by the Board there was a 4th Division of the Board which since has been eliminated. *Id.* art. I, § 1.

57. 2 F. COOPER, *supra* note 13, at 518. See also IND. ANN. STAT. § 53-959 (Burns Supp. 1970) which provides for one year terms of office for all members of the Board of Zoning Appeals.

58. See IND. ANN. STAT. §§ 53-967 to -980 (Burns Repl. 1964). If originally

economy of party resources would be furthered by forcing seekers to carry the burden rather than requiring remonstrators to duplicate evidence gathering efforts. Consequently, if seekers reappear without evidence indicating that changed circumstances do exist upon which to base a request for reversal, they should be denied the variance.

### *Conclusion*

Boards of zoning appeals must be free to reverse or modify previous determinations in light of changed circumstances. If they were not, zoning would remain static and progress would be hampered. However, in cases where no appeal is taken from adverse determinations denying a petition for a variance, the party seeking the variance for a second time should show cause why the board should reverse itself after the originally successful remonstrators plead *res judicata*. Otherwise, the presumption is in favor of the seeker and remonstrators can be too easily vexed by one who has had his day "in court."

PAUL C. RÄVER

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unsuccessful seekers decide to try again for the same variance, it would appear they would have knowledge of a change in circumstances. Otherwise, such an attempt would be frivolous unless the seekers were relying on non-legal grounds (*see* note 57 *supra* and accompanying text) to secure a reversal or modification. Furthermore, in the Braughton court's holding is the implicit requirement of the remonstrators to be constantly gathering evidence of a lack of changed circumstances in order that they might be constantly prepared to defend against repeated efforts of seekers. The natural order of the variance procedure requires that the seekers should have the burden to gather evidence for successive attempts.