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# Variance Administration in Indiana - Problems and Remedies

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# NOTES

## VARIANCE ADMINISTRATION IN INDIANA — PROBLEMS AND REMEDIES

The zoning variance is designed to provide relief in individual cases from the restraints on land use that are specified in the local zoning ordinance. Some writers<sup>1</sup> and cases<sup>2</sup> state that the primary value of variances is that they protect zoning ordinances from constitutional attack on the basis of the fifth and fourteenth amendments<sup>3</sup> and similar provisions in state constitutions.<sup>4</sup> Other sources emphasize that variances are desirable in order to avoid unnecessary interference with private property,<sup>5</sup> assure that land is used,<sup>6</sup> correct unequal burdens of zoning that the legislature would have corrected had it foreseen them,<sup>7</sup> and "alleviate the situations where the harm to a particular individual outweighs the value that would be derived by the community if strict adherence to the ordinance were maintained."<sup>8</sup>

The responsibility for general planning and for devising and amending zoning ordinances lies with local plan commissions and legislative bodies. Petitions for variances from these ordinances are heard and decided by boards of zoning appeals. These boards are administrative, not legislative, in nature. Therefore, they should not have the power to

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1. *E.g.*, Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 280 (1926).

2. *E.g.*, *Town of Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958); *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 34 P.2d 534 (1934).

3. The fifth and fourteenth amendments provide that no person shall be deprived of property without due process of law. Restrictions placed on property by zoning laws do not violate the due process clause if such restrictions are a valid exercise of the police power. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). To constitute a valid exercise of the police power, the restrictions must bear a reasonable relation to the protection of public health, safety or welfare. *Corthouts v. Town of Newington*, 140 Conn. 284, 99 A.2d 112 (1953); *Marquette National Bank v. County of Cook*, 24 Ill. 2d 497, 182 N.E.2d 147 (1962). It follows that where the restrictions of a zoning ordinance deprive a property owner of the use of his property without furthering the public health, safety or welfare, there is an unconstitutional taking of property without due process of law. By providing for variances in such cases, the application of unconstitutional restrictions is avoided, and the constitutionality of the ordinance is maintained.

4. *E.g.*, IND. CONST. art. 1, § 21, which provides that private property shall not be taken by law without just compensation. This provision is violated when application of a zoning ordinance makes it unfeasible to use property as zoned. *Metropolitan Bd. of Zoning Appeals v. Gateway Corp.*, — Ind. —, 268 N.E.2d 736 (1971).

5. *E.g.*, *Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment*, 8 N.J. 386, 86 A.2d 127 (1952).

6. Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961) [hereinafter cited as *Zoning Variances*].

7. 2 C. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 37-1 (3d ed. 1972).

8. Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 519 (1955).

perpetrate *de facto* amendments of the zoning ordinance. Since an excessive number of variances does effect a change in the zoning scheme and thus functions as an amendment of the ordinance, variances should be granted only sparingly<sup>9</sup> and under unusual circumstances peculiar to the property involved.<sup>10</sup>

Numerous problems have been attributed to an excessive number of variances. Their quantity, it is argued, contributes to the decreased utility of zoning as a positive planning tool, retards later sound development in undeveloped areas, and contributes to urban blight and neighborhood decay.<sup>11</sup> Since variances are not reflected on zoning maps, excessive variances may mislead prospective purchasers as to the character of an area,<sup>12</sup> thus undermining confidence in the zoning ordinance as descriptive of the nature of a neighborhood. Residents of an area also build up expectations in reliance on the zoning scheme; these expectations are not met when an excessive number of variances in effect alter that scheme.

Excessive variances are the result of a malfunctioning of the variance granting system. This note undertakes a brief survey of the present Indiana law on variances and of data indicating a malfunctioning, examines several causes of this malfunctioning, and proposes some remedies which may be implemented on both state and local levels, through legislative, administrative, and judicial reforms.<sup>13</sup>

#### PRESENT INDIANA LAW

Indiana law dictates various standards to be applied by the boards of zoning appeals in granting or denying a variance, depending upon the locale. These standards, as well as the procedure to be followed on appeal, are established by statute. Three sets of statutes apply to three types of jurisdictions: (1) counties containing first class cities,<sup>14</sup> (2) counties

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9. *Bd. of Zoning Appeals v. Moyer*, 108 Ind. App. 198, 27 N.E.2d 905 (1940); 2 E. YOKELY, *ZONING LAW AND PRACTICE* 194 (3d ed. 1965) [hereinafter cited as YOKELY].

10. Thus, if a land use problem is shared by neighboring property, a variance is not justified. In such cases, relief may be obtained only through legislative action or judicial review of the validity of the ordinance. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 286 (1955) [hereinafter cited as Reps].

11. Reps, *supra* note 10, at 282.

12. *Zoning Variances*, *supra* note 6, at 1406.

13. It has been argued that excessive variances are a symptom of an inadequate system of planning and zoning which needs to be completely reexamined and revamped. Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Ky. L.J. 273, 350 (1962) [hereinafter cited as Dukeminier]. This note does not deal with the revision of Indiana's planning system as a whole, but only suggests ways in which that system may be improved by revising the manner in which variances are administered.

14. For the statutory provisions on boards of zoning appeals in counties with

with area planning departments,<sup>15</sup> and (3) all other counties.<sup>16</sup>

In counties with first class cities, the boards are authorized to grant variances upon a finding 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. . . .<sup>17</sup>

The decision of the board is subject to either administrative or judicial review.<sup>18</sup>

first class cities, see IND. CODE §§ 18-7-2-59 to 18-7-2-62 (1971), IND. ANN. STAT. §§ 53-957 to 53-960 (Supp. 1972); IND. CODE §§ 18-7-2-63 to 18-7-2-68 (1971), IND. ANN. STAT. §§ 53-961 to 53-966 (1964); IND. CODE §§ 18-7-2-69, 18-7-2-70 (1971), IND. ANN. STAT. §§ 53-967, 53-968 (Supp. 1972); IND. ANN. STAT. § 53-969 (Supp. 1972); IND. CODE §§ 18-7-2-72, 18-7-2-73 (1971), IND. ANN. STAT. §§ 53-970, 53-971 (Supp. 1972); IND. CODE §§ 18-7-2-74, 18-7-2-75 (1971), IND. ANN. STAT. §§ 53-972, 53-973 (1964); IND. ANN. STAT. § 53-974 (Supp. 1972); IND. CODE §§ 18-7-2-77 to 18-7-2-79 (1971), IND. ANN. STAT. §§ 53-975 to 53-977 (1964); IND. CODE § 18-7-2-80 (1971), IND. ANN. STAT. § 53-978 (Supp. 1972); IND. CODE §§ 18-7-2-81, 18-7-2-82 (1971), IND. ANN. STAT. §§ 53-979, 53-980 (1964); IND. CODE §§ 18-7-2-83 to 18-7-2-85 (1971), IND. ANN. STAT. §§ 53-981 to 53-982(a) (Supp. 1972); IND. CODE §§ 18-7-2-86 to 18-7-2-88 (1971), IND. ANN. STAT. §§ 53-983 to 53-985 (1964). These provisions presently apply only to Marion County.

15. For the statutory provisions on boards of zoning appeals in counties with area planning departments, see IND. CODE §§ 18-7-4-65 to 18-7-4-75 (1971), IND. ANN. STAT. §§ 53-1064 to 53-1074 (1964); IND. CODE § 18-7-4-76 (1971), IND. ANN. STAT. § 53-1075 (Supp. 1972); IND. CODE §§ 18-7-4-77 to 18-7-4-82 (1971), IND. ANN. STAT. §§ 53-1076 to 53-1081 (1964); IND. CODE § 18-7-4-83 (1971), IND. ANN. STAT. § 53-1082 (Supp. 1972); IND. CODE §§ 18-7-4-84 to 18-7-4-91 (1971), IND. ANN. STAT. §§ 53-1083 to 53-1090 (1964).

16. For the statutory provisions on boards of zoning appeals in these counties, see IND. CODE §§ 18-7-5-69 to 18-7-5-79 (1971), IND. ANN. STAT. §§ 53-767 to 53-775 (1964); IND. CODE § 18-7-5-80 (1971), IND. ANN. STAT. § 53-776 (Supp. 1972); IND. CODE §§ 18-7-5-81 to 18-7-5-95 (1971), IND. ANN. STAT. §§ 53-777 to 53-791 (1964). See also IND. CODE § 18-7-3-11 (1971), IND. ANN. STAT. § 53-808a (1964), which controls membership of boards of zoning appeals in counties with populations of 90,000 to 175,000 and with consolidated planning operations. The boards in such counties are governed by the variance standards and review procedure which apply to counties without first class cities or area planning departments.

17. IND. CODE § 18-7-2-71 (1971), IND. ANN. STAT. § 53-969 (Supp. 1972).

18. The granting of a variance may be appealed to the metropolitan plan com-

In cities, towns, and counties which have established an area planning department that operates on a county-wide basis, the boards of zoning appeals are required to apply the same standards with the exception of number 5.<sup>19</sup> However, use variances, i.e., variances permitting property to be used for a purpose different than those purposes specified in the zoning ordinance, are prohibited.<sup>20</sup> Decisions of the board are subject to court review by certiorari.<sup>21</sup>

The statute governing boards of zoning appeals in all other cities, towns, and counties provides that the board shall grant a variance:

[such] 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.<sup>22</sup>

Here, too, the decision of the board is subject to court review by certiorari.<sup>23</sup>

Additional standards for the granting of variances have been established by case law. For example, monetary loss resulting from the application of a zoning ordinance which permits only economically unreasonable uses may constitute "unnecessary hardship" within the meaning of the statutes.<sup>24</sup> However, economic loss resulting from causes other than ap-

mission by the executive director of the metropolitan planning department if he finds that the grant raises a substantial question of zoning policy. IND. ANN. STAT. § 53-969 (Supp. 1972). This procedure is unique to Marion County. If no such appeal is taken, the decision of the board of zoning appeals is subject to judicial review by certiorari. If the executive director takes an appeal, a writ of certiorari may be sought only against the decision of the plan commission. IND. CODE § 18-7-2-76 (1971), IND. ANN. STAT. § 53-974 (Supp. 1972).

19. IND. CODE § 18-7-4-78 (1971), IND. ANN. STAT. § 53-1077 (1964).

20. *Id.* Non-use variances permit deviations from height, area, bulk and similar requirements.

21. IND. CODE § 18-7-4-83 (1971), IND. ANN. STAT. § 53-1082 (Supp. 1972).

22. IND. CODE § 18-7-5-82 (1971), IND. ANN. STAT. § 53-778 (1964). The "unnecessary hardship" language in this statute is generally construed in accordance with the holding in *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939), that for a board to grant a variance on the ground of unnecessary hardship there must be a showing that:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

*Id.* at 76, 24 N.E.2d at 853.

23. IND. CODE § 18-7-5-87 (1971), IND. ANN. STAT. § 53-783 (1964).

24. *Metropolitan Bd. of Zoning Appeals v. Gateway Corp.*, — Ind. —, 268 N.E.2d 736 (1971).

plication of the zoning ordinance does not produce the "unnecessary hardship" required for variance purposes.<sup>25</sup> In addition, it has been held that self-created hardship does not justify a variance.<sup>26</sup> Also, whether a variance shall be granted cannot be determined by polling the sentiments of neighboring property owners.<sup>27</sup>

Despite the presence of such standards, evidence from Marion County indicates that an excessive number of variances is granted.<sup>28</sup> Moreover, this situation is not unique. Numerous studies in other states have revealed a similar pattern, in that a very high proportion of all variance requests are granted.<sup>29</sup> Since variances are designed to provide relief from zoning ordinances in relatively rare cases,<sup>30</sup> such excessive variances indicate a malfunctioning of the variance granting system.

#### PROBLEMS IN VARIANCE ADMINISTRATION

The malfunction of the variance granting system in Indiana is at-

25. *Light Co. v. Houghton*, 141 Ind. App. 93, 226 N.E.2d 341 (1967). In *Houghton*, the petitioner requested a variance so that he could operate an appliance store on land in a residential neighborhood. He was already using the land for a golf course. The alleged hardship arose out of the petitioner's need to keep his personnel employed during the winter months and to earn enough money to make mortgage payments on the golf course. The court stated, "the loss of . . . employment, however regrettable to the employees, is not a hardship which arises out of the application of the Zoning ordinance." *Id.* at 96, 226 N.E.2d at 343.

26. *Bd. of Zoning Appeals v. Waskelo*, 240 Ind. 594, 168 N.E.2d 72 (1960). In *Waskelo*, a property owner purchased a house on a lot 100 feet wide in a district where the zoning ordinance required a minimum lot width of fifty feet. He sold the house and 56 feet of land, and then requested a variance to build a house on the remaining 44 feet. His request was denied by the board and the supreme court affirmed, stating

The rule applicable here is stated in 58 Am. Jur., Zoning, § 208, p. 1053, as follows:

"Ordinarily, a claim of unnecessary hardship cannot be based upon conditions created by the owner or applicant."

*Id.* at 597, 168 N.E.2d at 73.

27. *Town of Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958).

28. A study of 156 use variance petitions considered at nine meetings of the Metropolitan Board of Zoning Appeals during 1966 and 1967 revealed that while the Board at times does specifically request the petitioner to show that each of the criteria are satisfied, such strict adherence to the [statutory] prerequisites is the exception, not the rule.

Note, *The Effect of Statutory Prerequisites on Decisions of the Board of Zoning Appeals*, 1 IND. L.F. 398, 404-05 (1968) [hereinafter cited as *Statutory Prerequisites*]. Eighty-six per cent of these variance petitions were granted. *Id.* at 410.

29. Eighty-five per cent of all variance petitions decided in Cambridge, Massachusetts, in 1952 were granted, including 84 per cent of the use variance petitions and 86 per cent of the non-use variance petitions. C. HAAR, *LAND USE PLANNING* 296 (1959). Eighty-one per cent of all appeals in Boston were successful, and 99 per cent of these were for use variances. Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 673 (1969) [hereinafter cited as *Administrative Discretion*]. See also Dukeminier, *supra* note 13, at 321; Shapiro, *Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969) [hereinafter cited as Shapiro].

30. YOKELY, *supra* note 9.

tributable to two factors: (1) the lay nature of the boards of zoning appeals, and (2) the lack of effective control over the operations of the boards.

Expert training for board members is not required under any of the enabling statutes,<sup>31</sup> yet the board must deal with complex technical matters, particularly in use variance cases. Expertise is especially necessary for determination of such factors as the risk of smoke and noise nuisance, revenue generation, traffic patterns, and sewage disposal capacity. The board, which should consider these matters when determining the effect of a variance on the community, not only lacks expertise itself, but also lacks any institutionalized tie to the city or county planning staff.<sup>32</sup> Local planning experts may present evidence and make recommendations to the board, but the board is not required to adopt them.<sup>33</sup> Similarly, the board is required to deal with such legal questions as the difference between an unconstitutional taking and unnecessary hardship,<sup>34</sup> often without any formal legal advice.

Two additional problems concerning the composition of the boards have been raised. It has been suggested that those board members appointed as representatives of community business and political interests

31. This situation is not peculiar to Indiana. A study of 14 major cities found that requirements that board of zoning appeals members have training in city planning or architecture existed in only two of the cities; and in one of these two cities, the requirement was that only one member of a five-member board have such training. *Administrative Discretion*, *supra* note 29, at 675.

32. There is no statutory requirement that the board obtain an expert opinion before making its decision or that an expert attend board hearings.

33. In the Marion County study, see note 28 *supra*, it was found that the Board granted sixty per cent of the petitions to which the planning staff had objected. *Statutory Prerequisites*, *supra* note 28, at 409. The findings in Indiana are paralleled closely by those from other states. In Boston, during the years 1965-66 the Board approved variances in 72 per cent of the cases in which the Redevelopment Authority recommended denial. *Administrative Discretion*, *supra* note 29, at 674. See also Duke-minier, *supra* note 13, at 329; Shapiro, *supra* note 29, at 12.

34. In *Town of Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958), the court held that an ordinance precluding the use of property for all purposes for which it is reasonably well adapted is unconstitutional as applied to that property. It has also been held that the violation of a property owner's constitutional right entitles him to a variance even without proof of the statutory standards. *Bd. of Zoning Appeals v. Koehler*, 244 Ind. 504, 194 N.E.2d 49 (1963). These cases suggest that a petitioner is entitled to a variance upon a showing either that he meets the statutory requirements or that the application of the zoning ordinance to his property is unconstitutional because it cannot be put to any reasonable use. *But see* *Suess v. Vogelgesang*, — Ind. App. —, 281 N.E.2d 536 (1972), a Marion County case in which it was held that there is unnecessary hardship under the statute if the property "cannot reasonably be put to conforming use." *Id.* at 540. This case suggests that if the zoning ordinance deprives a property owner of any reasonable use of his property, he is entitled to a variance only if it is also shown that the other four statutory prerequisites are met. The inconsistency of these cases leaves boards without clear guidelines for determining when the statutory standards should be ignored in favor of a constitutional standard.

are likely to be oversensitive to these interests, and also that some board decisions are motivated by improper external or *ex parte* influence.<sup>35</sup>

The second problem of the variance granting system is the lack of control over the boards of zoning appeals. Effective control can theoretically be accomplished through constraints on powers by delegation, judicial review, and political control through political responsibility. None of these methods presently exert effective control in this state.

An administrative agency, such as the board, could be controlled by a delegating statute that sharply delineates the limits of its power. Specific limitations on the exercise of board powers dissuade improper action. They also provide clear standards for judicial review. In Indiana, the delegating statute is an ineffective control mechanism because the statutory language applicable to most jurisdictions<sup>36</sup> is extremely vague and, even with the judicial interpretations that have been provided,<sup>37</sup> leaves boards with no clear guidelines. The statutes applicable to Marion County<sup>38</sup> and those counties which have adopted unified planning<sup>39</sup> are more specific, but nevertheless require application of the vague standard of "unnecessary hardship."<sup>40</sup>

Another potential source of control is judicial review. While courts have the power to review the boards' decisions for illegality,<sup>41</sup> this method of control has proved ineffective for a variety of reasons. Initially, the statutory language gives broad discretion to the board. Therefore, many board actions which may be undesirable in practice are nevertheless legal within the statutes. Secondly, courts reviewing board decisions which grant variances use the substantial evidence of probative value standard.<sup>42</sup>

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35. See generally Shapiro, *supra* note 29. It is difficult to evaluate the relative importance of these factors, but it is also probably unnecessary to do so. The other causes of malfunctioning are certainly the primary ones. Moreover, the remedies to be proposed in this note would greatly decrease the possibility that the advancement of special interests and *ex parte* influence could disturb the proper functioning of the board.

36. See note 22 *supra* & text accompanying.

37. See notes 24-27 *supra* & text accompanying.

38. See note 17 *supra* & text accompanying.

39. See note 19 *supra* & text accompanying.

40. The Marion County study, see note 28 *supra*, found that none of the 156 variance requests studied were denied for failure to find "unnecessary hardship." *Statutory Prerequisites*, *supra* note 28, at 408. There is a problem with the "unnecessary hardship" standard in addition to its vagueness. Variances may be desirable where the community would benefit from the variance, but there is no unreasonable restriction on the use of property and therefore no hardship. Dukeminier, *supra* note 13, at 346. Such variances are theoretically impossible under the current variance standards. See Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 S. CAL. L. REV. 548 (1965).

41. *Light Co. v. Houghton*, 141 Ind. App. 93, 226 N.E.2d 341 (1967).

42. *Vogelgesang v. Shackelford*, 146 Ind. App. 248, 254 N.E.2d 205 (1970).



Even though a great deal of evidence may indicate that a variance should not have been granted, the court is powerless to review that evidence; it can only determine whether there was sufficient evidence to support the board's finding. Thus, the board has great latitude without effective control.<sup>43</sup> Finally, judicial review is necessarily ineffective since it is seldom exercised,<sup>44</sup> and because courts, like boards of zoning appeals, lack the technical expertise required to solve land use problems.

The third potential method of controlling board actions is holding board members politically responsible.<sup>45</sup> However, no effective political control over the variance authorization process presently exists.<sup>46</sup> There are several reasons why this method of control is not feasible. The public is even less likely to understand the complex technical and legal issues relating to variances than is a lay board, and the costs of dissemination and public assimilation of the necessary information would be prohibitive. In addition, the chance of partisan considerations and *ex parte* influence affecting board decisions might be increased by making board members politically responsible.

#### PROPOSED REMEDIES

To remedy the lack of expertise on the board, either the lay nature of the board must be changed or those matters requiring expertise must be removed from the jurisdiction of the board. The present lay membership could be replaced by a board of experts or by a single administrator.<sup>47</sup>

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43. If the board denies a variance, the court, in order to reverse, must find as a matter of law that the statutory standards were established. *Speedway Bd. of Zoning Appeals v. Standard Concrete Materials*, — Ind. App. —, 276 N.E.2d 589 (1971).

44. See Shapiro, *supra* note 29, at 16. The paucity of appeals can be attributed to the fact that most petitions are granted and those opposed to such petitions are unlikely to appeal because they are loosely organized and poorly financed. Note, *Indiana Variance Proceedings and The Application of Res Judicata*, 46 IND. L.J. 286 (1971). Moreover, the ill effects of the variance are likely to be spread over a number of parties, and the cost of the variance to each one may be less than the cost of an appeal. In addition, transaction costs, or the costs of organizing all opponents to bring an appeal, may be prohibitive.

45. It has been argued that political control is the most attractive means of remedying difficulties in variance administration. *Administrative Discretion*, *supra* note 29.

46. One cause of the present lack of political control is the low visibility of board decisions. This results from the lack of in-depth publicity of board decisions and the public's inability to understand the issues involved. A second cause is that board members are appointed rather than elected. Of course, pressure could be exerted on the political parties appointing undesirable board members. However, there are several appointing parties, and it is therefore difficult to fix responsibility for appointments.

47. Reys, *supra* note 10, at 296. It is now possible to have an expert board in Indiana; the local appointing officials need only choose experts. However, there is no indication that this is being done. For example, the Marion County Board in 1967 consisted of six real estate salesmen, three corporate executives, two attorneys, two

Where lay members are retained they should be provided with an institutional tie to a planning expert or the local planning department,<sup>48</sup> and consideration of expert opinion should be mandatory.<sup>49</sup> Alternatively, the expert input could be provided by including a municipal zoning administrator or zoning ombudsman in the variance granting system.<sup>50</sup> This official would appeal variance decisions that he thinks are contrary to law.<sup>51</sup> The ombudsman procedure is approximated in Marion County, where the Executive Director of the planning department is authorized to seek pre-judicial review of Board decisions by the plan commission.<sup>52</sup> In

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businessmen, two insurance salesmen, one teacher, one engineer, one accountant, one public servant, and one person in public relations. *Statutory Prerequisites*, *supra* note 28, at 403 n.44.

48. It has been argued that this scheme is especially desirable because it separates the function of expert evaluation from that of hearing public complaints. *Administrative Discretion*, *supra* note 29, at 680. This bifurcation of function should more clearly indicate the expert opinion on a petition than would a decision by an expert administrator sitting in place of a board. In the latter case, the decision might have elements of both expertise and political compromise, yet it would probably be treated solely as an expert opinion, and therefore might be given undue weight on review.

49. This change could be effected by state statute, by local zoning ordinance, or by the local boards themselves under their statutory power to promulgate procedural rules. IND. CODE § 18-7-2-69 (1971), IND. ANN. STAT. § 53-967 (Supp. 1972) (boards in counties with first class cities); IND. CODE § 18-7-4-77 (1971), IND. ANN. STAT. § 53-1076 (1964) (boards in counties with area planning departments); IND. CODE § 18-7-5-81 (1971), IND. ANN. STAT. § 53-777 (1964) (all other boards).

The expert opinion required should include factual information on technical matters and recommendations on whether the variance should be granted. The recommendations should be treated as rebuttable presumptions; if a decision contrary to the recommendation is made, the basis of the decision should be fully explained in the record.

50. Shapiro, *supra* note 29, at 21.

51. In bringing the appeal, the ombudsman would act as the representative of city or community interests. This would facilitate judicial review of board decisions granting variances, which are now rarely reviewed. *Supra* note 44 & text accompanying. Alternatively, the ombudsman could review board decisions, and parties could appeal his decision to the courts.

52. During 1966 and 1967, the Executive Director appealed only ten cases. *Statutory Prerequisites*, *supra* note 28, at 409. In 1966, about 353 use variances were granted. *Id.* at 410. If the number of use variance requests in 1967 was approximately the same as in 1966, the Executive Director appealed less than two per cent of all variance grants. Even more startling is the fact that the Executive Director appealed only 6.7 per cent of the use variances granted by the Board over objections by the planning staff. *Id.* It is obvious that appeal by the Executive Director does not result in effective review. Perhaps a zoning ombudsman without the other planning duties of the Executive Director would be able to provide closer expert supervision of board decisions.

Another method of providing expert advice on variance decisions is to have determinations of the local boards appealable to a state review agency composed of planning and zoning specialists, whose decision in turn would be subject to court review. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 539 (1958). However, this plan has several disadvantages. It adds another layer of bureaucracy, with its attendant costs, to the variance process, and causes delay in the input of expert opinion. *Administrative Discretion*, *supra* note 29. Furthermore, under the plan, final decisions in many cases would be made without any expert advice be-

addition to expert technical advice, board members should be provided with expert legal advice defining the role of the board, identifying what conditions warrant granting or denying a variance, and explaining the applicable rules of evidence and burden of proof.

Lack of expertise in the variance granting process is especially harmful when a petitioner seeks a use variance. These petitions require expert analysis since they are likely to raise the most technical questions and to have the most widespread effect on a community. Therefore, use variance jurisdiction should be removed from the board. The removal of use variances would not be particularly burdensome to property owners since most disabilities to use property can probably be cured by non-use variances<sup>53</sup> or by rezoning, alternatives which would still be available.<sup>54</sup> Use variances are already prohibited in jurisdictions with unified county planning.<sup>55</sup> Moreover, if the requirements for variances in other jurisdictions<sup>56</sup> were clearly understood and strictly applied, few use variances would be granted. These jurisdictions should require that the hardship on the petitioner result from some condition unique to his property, and that the variance will not substantially alter the character of the neighborhood.<sup>57</sup> These criteria are seldom met.<sup>58</sup>

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cause most decisions would not be appealed to the state review agency for the same reasons that most decisions are presently not appealed to the courts. See note 44 *supra*.

53. An examination of use variances in Baltimore and Boston revealed "no situation in which there was no person who could utilize the property under existing use limitations." Shapiro, *supra* note 29, at 22.

54. In the past, variances were preferred over rezoning because the latter encourages spot zoning. It must be realized, however, that use variances as now administered have the same practical effects as spot zoning.

Another supposed advantage of variances is that they can be made flexible by the authorization of conditional and temporary variances. *E.g.*, *Statutory Prerequisites*, *supra* note 28, at 411 n.86. However, conditional variances can be costly to administer, Reys, *supra* note 10, at 282, and the standards for temporary variances are the same as for permanent ones. *Light Co. v. Houghton*, 141 Ind. App. 93, 226 N.E.2d 341 (1967).

It has been suggested that some use variances which would be beneficial to the community are precluded by the "unnecessary hardship" test. Dukeminier, *supra* note 13, at 345. If standards are changed to allow such variances, they should also be handled by the plan commission or by an expert board of zoning appeals. These bodies are better equipped than the present board to determine the best interests of the community.

55. IND. CODE § 18-7-4-78 (1971), IND. ANN. STAT. § 53-1077 (1964).

56. IND. CODE § 18-7-2-71 (1971), IND. ANN. STAT. § 53-969 (Supp. 1972) (counties with first class cities); IND. CODE § 18-7-5-82 (1971), IND. ANN. STAT. § 53-778 (1964) (counties without first class cities or area planning departments).

57. See note 22 *supra*.

58. Reys, *supra* note 10, at 296. The authorization of a board of zoning appeals to grant use variances has been held invalid in some jurisdictions as an improper delegation of legislative authority. *E.g.*, *Nicolai v. Bd. of Adjustment*, 55 Ariz. 283, 101 P.2d 199 (1940); *Livingston v. Peterson*, 59 N.D. 104, 228 N.W. 816 (1930). These courts point out that the power to grant a use variance is similar to the power to amend a zoning ordinance, and is therefore an exclusively legislative power.

The second problem of variance administration, control of board decision making, could be partially remedied by a uniform statute clearly defining the powers of all boards of zoning appeals. At present, there are three different statutes defining such powers.<sup>59</sup> There is no logical reason why this differentiation should be made since the role of the board should be the same in all jurisdictions.<sup>60</sup> A uniform statute on board powers would facilitate the development of court restraints on board activity since the courts would be required to apply only one statute, and any decision reviewing board actions would apply to all boards throughout the state.<sup>61</sup>

Another control over variance authorization would be a greater reliance on "special exceptions" in the zoning ordinance.<sup>62</sup> Since the exceptions are specified in the ordinance, board discretion in granting them is more limited than in granting variances. In instances where the general ordinance provisions cause hardship, a wider use of exceptions would provide the relief now supplied by variances.<sup>63</sup>

The court also has a role in increased control over the board. It is the responsibility of the court to encourage and aid agencies in performing their functions. This responsibility can be met only if the courts insist that parties bring all relevant facts before the agency. In reviewing boards of zoning appeals, the courts have the power to hear evidence supplementary to that presented before the board,<sup>64</sup> but this power should be rarely

Other courts have held that the power to grant use variances is not legislative if the statute delineates standards to be used by the board, and the board need only determine whether the facts of a case meet such standards. For example, in *Nelson v. Donaldson*, 255 Ala. 76, 50 So. 2d 244 (1951), the court found sufficient the language of ALA. CODE tit. 37, § 781 (1940), which gave boards power to authorize such variances 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, so that the spirit of the ordinance shall be observed and substantial justice done.

The courts using the "standards" approach have looked only to the language of the delegating statute to determine whether the standards are set forth with sufficient specificity. However, the courts should look to whether a statute *in fact* restrains boards from making legislative decisions.

59. See notes 17, 19 & 22 *supra*.

60. A uniform statute on variances would not preclude retention of different statutes governing plan commissions and board membership.

61. For a suggested statute, see Delogu, *Suggested Revisions in Maine's Planning and Land Use Control Enabling Legislation*, 20 MAINE L. REV. 175, 203 (1968).

62. Special exceptions are uses listed in the zoning ordinance that are not permitted as a matter of right but are allowed if the board finds that certain requirements are met. If special exceptions are to be administered properly, the requirements must be set out in the ordinance with specificity.

63. Of course, provision for special exceptions should not be too liberal or the effect on planning and development will be the same as that under excessive granting of variances.

64. IND. CODE § 18-7-2-81 (1971), IND. ANN. STAT. § 53-979 (1964) (counties

exercised. Otherwise, a party requesting a variance need present only meager evidence before the board, since he knows that most petitions for variances are granted and that any defects in evidence can be cured on appeal.<sup>65</sup> If, however, courts insisted on reviewing variance decisions only on the basis of the record, petitioners would be encouraged to put all the facts supporting their case before the board, thus permitting the board to make better informed decisions. Courts should also pay particular attention to whether the board's determinations of "ultimate facts" are supported by its findings of the "basic facts." Basic facts are those determinable without reference to the statute; ultimate facts are determinations of whether the basic facts fit within the area of those factual situations which are contemplated by the statutory scheme.<sup>66</sup> For example, how much loss a neighboring property owner will suffer if a variance is granted is a basic fact. Whether such loss constitutes a substantially adverse effect under the statute is an ultimate fact. Where board findings of fact are determined to be insufficient, the court should remand the case and state the guidelines for further board action. Such court action should encourage improved board performance in future cases.

Perhaps another way to provide more effective control over boards is to enact uniform procedural rules for board hearings and deliberations by revising the applicable statutes. Until such revision is accomplished, all local boards should adopt procedural rules,<sup>67</sup> make them available to the public, and furnish copies to all parties. For example, petitioners should be required to state the legal grounds for their requests. Also, testimony should be under oath, and should be confined to the relevant legal issues. Finally, "decision forms" that require each board member to record the facts supporting his findings should be used.<sup>68</sup> Such forms

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with first class cities); IND. CODE § 18-7-4-88 (1971), IND. ANN. STAT. § 53-1087 (1964) (counties with area planning departments); IND. CODE § 18-7-5-92 (1971), IND. ANN. STAT. § 53-788 (1964) (all other counties).

65. If the variance is granted and not appealed, the petitioner has avoided the inconvenience of gathering and presenting evidence. If the variance is denied, he can supplement the evidence on appeal to persuade the court to reverse the board. Similarly, if the variance is granted and appealed, the evidence necessary to support the grant can be introduced for the first time before the court.

66. L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 1051 (3d ed. 1968).

67. See note 49 *supra*.

68. Although written findings are required, boards often fail to supply them. The requirement of written findings is not statutory but was recognized in *Carlton v. Bd. of Zoning Appeals*, 252 Ind. 56, 245 N.E.2d 337 (1969). "[T]he Board may [not] grant a variance merely by making the five statutory requirements in the words of the statute itself. For reasons which exist independently of the statute, the Board is required to set out findings of fact which support those determinations." *Id.* at 64, 245 N.E.2d at 343. "[U]nder Indiana law, in order for . . . judicial review to be done adequately the Board of Zoning Appeals has to set out written findings of fact in support of each of its five statutory findings." *Id.* at 66, 245 N.E.2d at 344. In

should contain the findings of the board as a whole, as well as those of individual members. The findings must be of the basic facts as well as the ultimate facts.

These procedural reforms would have several beneficial effects. First, they would direct a board member's attention to the relevant factors in a decision and discourage the introduction of legally irrelevant but potentially influential evidence. Second, they would clarify what has occurred at the board level, thus making it easier to identify and correct problems through judicial or administrative review. Third, all parties before a board could better anticipate what information the board will require, and thus present and argue their cases in a manner that gives the board more information on which to base its decisions. Fourth, written findings would encourage more careful consideration of the issues by board members.<sup>69</sup>

Finally, the boards should keep zoning maps with all variances recorded on them. These maps would help prevent the board from granting so many variances in an area as to change its essential character. As variances accumulated in any area, such maps would indicate a *de facto* rezoning. In this case, further variances would be beyond the jurisdiction of the board and an official rezoning by the plan commission would be required.

#### CONCLUSION

Since the malfunctioning of the variance granting system jeopardizes the effectiveness of planning in general, these proposals should be implemented as soon as possible. They are designed as a guide to immediate action. The remedies do not in any way change the substantive concepts behind the variance granting power. They only reform the system which holds that power, in order to make it better able to carry out its function.

MARCIA R. GELPE

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*Vogelgesang v. Shackelford*, 146 Ind. App. 248, 254 N.E.2d 205 (1970), the court, citing *Carlton*, remanded to the trial court with orders to make written findings of basic facts before the court would review the decision. *Id.* at 262, 254 N.E.2d at 213.

69. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05, at 444 (1958).