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Jesse Dukeminier Jr.
University of Kentucky

Clyde L. Stapleton
University of Kentucky

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The Zoning Board of Adjustment: A Case Study in Misrule

By JESSE DUKEMINIER, JR.*

and

CLYDE L. STAPLETON**

The question must be asked seriously whether zoning, as it is currently being practiced, is endangering our democratic institutions. A second question stemming from the first is: "Is zoning increasingly becoming the rule of man rather than the rule of law?" I would be inclined to answer both questions affirmatively. —Walter Blucher.¹

Whether through ignorance of the law, political influence, the belief that mistakes in legislation can be cured through administrative relief, or magnification of power for purposes of prestige, the board of appeals in many cities has become a device of danger rather than safety.—John W. Reps.²

Within the last two decades observers of the land planning process have suspected that something has gone wrong with the zoning board of adjustment. It was originally conceived as a safety valve, as a device to insure that broad zoning regulations do not operate inequitably on particular parcels of land. It acts as a court of special privilege, granting dispensations to individuals when compliance with the zoning law results in unnecessary hardship. With increasing vigor critics have charged that boards of adjustment pay little attention to the legal limitations on their powers and operate without safeguards adequate to assure citizens of equal treatment. These are serious charges. They go to competence, to fairness, to responsibility. But to date, the proffered supporting evidence has been slim.

* Professor of Law, University of Kentucky; Visiting Professor of Law, University of California at Los Angeles (Spring, 1962).

** LL.B. 1962, University of Kentucky.

¹ Blucher, *Is Zoning Wagging the Dog?*, in *Planning* 96 (1955).

² Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 *Law & Contemp. Prob.* 280, 282 (1955).

Very little factual information on how boards of adjustment operate is available.³ Boards rarely write opinions, and a transcript of the evidence is seldom made. Because of the staggering number of boards of adjustment throughout the country, a library of high-fidelity recordings of many hearings before many boards is well-nigh impossible to obtain. Nonetheless, an empirical case study of a single board of adjustment is possible and is not without value. We have therefore undertaken to observe and describe the law in practice before the Lexington-Fayette County Zoning Board of Adjustment (hereinafter referred to as the Lexington Board of Adjustment).⁴ This Board has jurisdiction over zoning appeals in Lexington and Fayette County, Kentucky, which in 1960 had a combined population of 131,906. This study covers a period of seventeen months—from the January, 1960, meeting of the Board through the May, 1961, meeting.⁵ During this period the Board had before it some 167 cases. How the Board dealt with these cases will be described in some detail and will be analyzed in terms of compliance with the legal norms applicable to the Board's discretionary powers.

From this study we believe some useful conclusions can be drawn about the operation of zoning boards of adjustment. We cannot say, of course, that the particular practices of the Lexington Board are representative of practices of boards elsewhere. But we believe the basic functional difficulties inherent in the traditional concept of a board of adjustment, which are revealed in the operations of the Lexington Board, will be present almost anywhere a zoning board of adjustment is established. At the end of this article we shall discuss why the power to grant variances has come to be subject to such abuse and why it

³ For a study suggestive of what needs doing, see Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. Pa. L. Rev. 516 (1955). See also Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. Chi. L. Rev. 509 (1959).

⁴ For an earlier, more limited study, see Note, *The Granting of Variances from the Zoning Ordinance by the Lexington-Fayette County Board of Adjustment*, 45 Ky. L.J. 496 (1957).

⁵ Members of the Board during this period were Grover C. Thompson, Jr., attorney, Chairman; John T. Gillig, architect; James L. Jefferson, realtor; Marvin L. Cassell, businessman; Oscar L. White, businessman (from Jan. 1960 through Aug. 1960); Strother Kiser, attorney (from Sept. 1960 through May 1961). All members are appointed for four year terms and serve without compensation. The senior author wishes to thank the chairman, Grover C. Thompson, Jr., for his unflinching courtesy and helpfulness to numerous students who have, from time to time over the past several years, sat in on Board meetings.

is unrealistic to suppose that a board of adjustment can function properly within the legal framework of our traditional zoning system. We shall suggest that the law is out of joint and that our system of land use control is badly in need of reform and rationalization.

The fact that legal norms governing the Board's actions do not satisfy needs and demands of contemporary society respecting land use should be kept in mind in reading the first six sections of this study. In these sections we appraise the Board's actions by these norms, and the resulting picture is not a flattering one. It is necessarily distorted by the narrow purpose in view: comparing action with norms. A more realistic appraisal requires a wider perspective, which we attempt to bring to the problem in the last section of this article.

I. PROCEDURE BEFORE THE LEXINGTON BOARD OF ADJUSTMENT

Under the state enabling act the Board of Adjustment has original jurisdiction to hear applications for variances and special exceptions to the zoning ordinance.⁶ It may also hear appeals from an interpretation of the ordinance by the building inspector.⁷ As a matter of administrative convenience, however, the Board never acts except on appeal from the building inspector, even in cases where it has original jurisdiction. Thus the first step every applicant must take is to apply to the building inspector for a building permit or certificate of occupancy. If the applicant, or any adjacent property owner, is dissatisfied with the building inspector's decision, he may then appeal to the Board.

The Board's rules require that any appeal must be filed within twenty days of the building inspector's decision. It must be accompanied by all plans filed with the inspector, a map of the property in question, and a letter of appeal (hereinafter collectively called "the petition"). After receipt of the petition, the Board sets a time for a public hearing and gives notice thereof in a local newspaper. As a courtesy the Board also sends post-

⁶ Ky. Rev. Stat. § 100.450 (1960).

⁷ Ky. Rev. Stat. § 100.450 (1960). The rules referred to in the text are set forth in Lexington-Fayette County Zoning Board of Adjustment, Rules and Procedure (Jan. 1961) [hereinafter cited as "Board of Adjustment Rules"].

card notices to all adjacent property owners advising them of the appeal and time of hearing.

After the petition has been received, the Board refers the case to a member of the planning commission staff. The staff member examines the petition, inspects the property, and files a written investigation report stating whether the Board has power to grant the petition and making recommendations on the merits. This report sets forth the facts of the case, including any pertinent information acquired through inspection of the property (*e.g.*, the presence or absence of nonconforming uses in the area). It usually also contains a clearer statement of the legal issues involved than does the petition. Almost all of the petitions, including many drafted by counsel, were poorly drafted, stating inadequate legal grounds for relief. Doubtless this is largely due to the unfamiliarity of lawyers and property owners with zoning law, which has developed rapidly during the last thirty years, and to the failure of the Board to require petitioners to frame their petitions with reference to the applicable legal standards.

The Board meets one afternoon every month to hear appeals. On an average afternoon the Board hears from ten to twelve cases. At the hearing the Board hears all evidence introduced by the petitioner, the planning staff, and any protestants. The Board has sometimes taken the view that petitioner need not appear in person or by counsel at the hearing; the appeal can be granted on the basis of the petition alone.⁸ At other times the Board has refused to hear the case until the petitioner was represented by counsel.⁹

Procedure at these hearings is very informal. A large proportion of petitioners and protestants appear in person without counsel before the Board; consequently the rules of evidence are almost wholly dispensed with in the typical case. The Court of Appeals has sanctioned this informality.

The Board of Adjustment and Appeals, for lack of a more accurate term, is a quasi-judicial body with limited powers, and proceedings before it are, necessarily, more or less

⁸ Application of Poole and Jefferson, May 1961. [Hereinafter cases before the Board will simply be cited by the name of the applicant and the date.]

⁹ Sinclair Oil, Feb. 1960; Fugazzi Business College, June 1960.

informal. A wide latitude in the manner of presenting their respective views should be afforded the parties before the board, and technical rules of procedure should not be too zealously enforced.¹⁰

At the outset of the hearing the parties are asked if they wish to take proof for the purpose of preparing a record for appeal to the circuit court. If they do, they must bring in a stenographer at their own expense. If they do not, as is commonly the case, a secretary merely takes some notes of what was said and done at the public hearing and at the executive session following. These notes serve as "Minutes of the Board of Adjustment," which are required by the enabling act.¹¹ They usually consist of no more than a brief paragraph stating the relief sought, some of the contentions of the petitioner, any objections raised by the planning staff or protestants, the number of protestants present, and the decision rendered. Sometimes the minutes also will state what point the Board discussed in executive session, but very seldom do they report any reasons given by the Board for its action. Direct quotations, attributed to members of the Board, are most rare. Thus it is difficult, if not impossible, to determine what was the basis of the Board's decision in most cases.

Appeals may be taken from the Board to the circuit court to determine whether the Board acted in excess of its power, but the decision of the Board is conclusive on all questions of fact, where there is substantial evidence to support the decision.¹² Since the cases before the Board usually involve mixed questions of law and fact, or discretion dependent upon certain findings of fact, and since the appellant has the burden of showing on appeal that there is no substantial supporting evidence, where he does not, at his own expense, bring in a stenographer and make a record, he has ordinarily foreclosed judicial review. Inasmuch as the Board usually will not grant a rehearing for the sole purpose of taking proof, the petitioner must choose before the initial hearing whether to bear the extra expense of a stenographer and save his chances for review. Commonly he chooses to avoid that expense and gamble on favorable Board action. Thus, as a practical matter, in a large majority of cases the decision of the Board of

¹⁰ Goodrich v. Selligman, 298 Ky. 863, 866, 183 S.W.2d 625, 627 (1944).

¹¹ Ky. Rev. Stat. § 100.440(2) (1960).

¹² Ky. Rev. Stat. §§ 100.480, 100.490 (1960).

Adjustment is final. Indeed, of the 167 cases in our study, only two were appealed, and only one of these was successful.

II. VARIANCES

A. THE LEGAL REQUIREMENTS FOR GRANTING VARIANCES

Because of the difficulty in drawing a general zoning ordinance which takes into account all the various existing shapes, sizes, topographical features, and peculiar conditions of every lot in the city, most zoning enabling acts provide for a board of adjustment to grant relief by way of variance where the restrictions contained in the ordinance cause the owner "practical difficulty" or "unnecessary hardship." The Kentucky enabling act is no exception. If a city or county decides to adopt a zoning ordinance, the enabling act requires that a board of adjustment be established with power to "authorize, upon application for variance, such variances from the terms of the ordinance or of any plans, rules, or regulations made thereunder, as will not be contrary to the public interest, where a literal enforcement of the provisions of the ordinance, plans, rules or regulations would result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."¹³

The words "unnecessary hardship" were held in a few early cases in other jurisdictions to be too general and indefinite to furnish a standard to guide the board, and therefore the power to grant variances was held an unconstitutional delegation of legislative authority. Although the issue of unconstitutionality has never been expressly decided in Kentucky, the Court of Appeals has assumed the act to be constitutional in many cases upholding a board's decision denying or granting a variance.¹⁴ It seems fairly certain that if the issue were now raised the court would follow the overwhelming majority of courts and hold the board's power constitutional. By reason of judicial interpretations of "unnecessary hardship" over the last three decades, that standard is not nearly so vague as would appear at first glance.

¹³ Ky. Rev. Stat. § 100.470(1)(c) (1960).

¹⁴ See, e.g., *Smith v. Selligman*, 270 Ky. 69, 109 S.W.2d 14 (1937). Cf. *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959) (dicta that statute "sharply limits" and "narrows in a drastic manner" the board's authority to grant variances).

The Lexington-Fayette County Zoning Ordinance-Resolution, read with the judicial gloss put upon its language, lays down five conditions that must all exist before there is "unnecessary hardship" and before a variance can be granted.¹⁵ They are:

1. Because of exceptional conditions respecting the dimensions or topography of the lot, or some other extraordinary condition, the land in question cannot yield a reasonable return or has no reasonable use if it must comply with the zoning regulations. The fact that the owner could make a greater profit by using the land in a nonconforming way is, by itself, no ground for a variance. The Court of Appeals, along with other courts, has so held.¹⁶ The question is whether the property can be put to *any* conforming use with a fair and reasonable return, not whether the ordinance precludes its most profitable use.¹⁷

2. The hardship must not be self-created.¹⁸

3. The exceptional conditions must be peculiar to the particular lot and not caused by general conditions in the neighborhood. Or, as the New York Court of Appeals said in the leading case of *Otto v. Steinhilber*,¹⁹ it must be shown "that the plight of the owner is due to unique circumstances and not to

¹⁵ Lexington-Fayette County Zoning Ordinance-Resolution §§ 24.4221, 24.4222 (1961) [hereinafter referred to as "Lexington Zoning Ordinance"].

24.4221 Where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of enactment of this Ordinance-Resolution, or by reason of exceptional topographic conditions, or other extraordinary and exceptional situation or condition on such piece of property, the strict application of any provision of this Ordinance-Resolution would result in peculiar and exceptional practical difficulties or exceptional and undue hardship upon the owner of such property, the Board shall have the power to authorize, upon appeal, a variance from such strict application, so as to relieve such difficulties or hardships; provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purposes of this Ordinance-Resolution.

24.4222 No grant or variance shall be authorized unless the Board specifically finds that the condition or situation of the specific piece of property for which the variance is sought is not of so typical or recurrent a nature as to make reasonably practicable the formulation of a general regulation, as a part of this Ordinance-Resolution for such conditions or situations.

¹⁶ *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948); *Schloemer v. City of Louisville*, 298 Ky. 286, 182 S.W.2d 782 (1944).

¹⁷ A recent case containing an excellent exposition of this requirement is *Crossroads Recreation v. Broz*, 4 N.Y.2d 39, 149 N.E.2d 65 (1958). See also *Devany v. Board of Zoning Appeals*, 132 Conn. 537, 45 A.2d 828 (1946).

¹⁸ See *Arrow Transp. Co. v. Planning & Zoning Comm'n of Paducah*, 299 S.W.2d 95 (Ky. 1956); *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948); *Selligman v. Van Allmen Bros.*, 297 Ky. 121, 179 S.W.2d 207 (1944); *accord*, *Caccia v. Zoning Bd. of Review*, 113 A.2d 870 (R.I. 1955).

¹⁹ 282 N.Y. 71, 24 N.E.2d 851 (1939). See Note, *Zoning Variances: The "Unnecessary Hardship" Rule*, 8 Syracuse L. Rev. 85 (1956), discussing the formula set forth in the *Otto* case.

the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself."²⁰ If the owner's plight is due to general conditions in the neighborhood, his remedy is rezoning, not variance.²¹

4. The conditions must not be so typical or recurrent with respect to many pieces of property that they can be dealt with by a general regulation in the ordinance.²² This requirement reflects the policy that problems which recur in many areas should be dealt with by the Planning Commission, not by the Board of Adjustment.

5. The variance will not alter the essential character of the neighborhood nor result in substantial detriment to the public health, safety, or general welfare. Factors to be considered here include the suitability of the proposed use to the character of the neighborhood, the loss in value of nearby properties which will be caused by the variance, and the harm to the public compared with the hardship suffered by the owner.²³

The requirements set forth in the ordinance for granting a variance are, generally speaking, the requirements that have been evolved by the courts in defining "unnecessary hardship."²⁴ Even without such provisions in the ordinance, a board of adjustment's power to grant variances would be limited by substantially the same requirements by case law.²⁵ Inasmuch as a variance is by law permitted only when all these requirements are met, it will be necessary to keep these requirements in mind in appraising the decisions of the Lexington Board of Adjustment.

²⁰ *Id.* at 76, 24 N.E.2d at 853.

²¹ See *Arrow Transp. Co. v. Planning & Zoning Comm'n of Paducah*, 299 S.W.2d 95 (Ky. 1956); *Bray v. Beyer*, 292 Ky. 162, 166 S.W.2d 290 (1942); *accord*, *Stavola v. Bulkeley*, 134 Conn. 186, 56 A.2d 645 (1957); *Clark v. Board of Zoning Appeals of Hempstead*, 301 N.Y. 86, 92 N.E.2d 903 (1950); *Appeal of the Catholic Cemeteries Ass'n*, 379 Pa. 516, 109 A.2d 537 (1955).

²² *Cf. Smith v. Selligman*, 270 Ky. 69, 109 S.W.2d 14 (1937).

²³ See *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948); *LaSalle Nat'l Bank v. City of Chicago*, 5 Ill.2d 344, 125 N.E.2d 609 (1955); *Moriarty v. Pozner*, 21 N.J. 199, 121 A.2d 527 (1956); *Rain or Shine Box Lunch Co. v. Board of Adjustment of Newark*, 53 N.J. Super. 252, 147 A.2d 67 (1958).

²⁴ See I. Rathkopf & Rathkopf, *The Law of Zoning and Planning* 647-718 (3d ed. 1960); Reps, *supra* note 2, at 282-89; Note, 74 Harv. L. Rev. 1396 (1961). Except for the requirement that the hardship not be self-created, these requirements are also set forth in the rules of the Board of Adjustment. Board of Adjustment Rules, pp. 2-3.

²⁵ See Green, *The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinance*, 29 N.C.L. Rev. 245 (1951).

B. USE VARIANCE CASES

1. *The power of the Board to grant use variances.*

Variances can be divided into two types: use variances and bulk variances. A use variance allows a structure or use in a district restricted against such structure or use. A bulk variance gives the property owner relief from some ordinance requirement with respect to area, height, setback, parking spaces, and such. He still uses the property for a conforming use, but he does not have to comply with some bulk regulation.

Use variances have generally been thought to be much more destructive of the values sought by zoning. Courts have viewed them unfavorably and have hedged them in by taking a strict view of the evidence necessary to satisfy the requirements set forth above. Indeed, it is arguable that the Kentucky Court of Appeals has taken the position that the power given a board of adjustment to grant variances does not include the power to grant use variances.

In *Bray v. Beyer*²⁶ the Board of Adjustment of Paducah granted a use variance permitting a gasoline filling station in a residential district, from which it was excluded by the ordinance. In reversing the Board, the court said:

However, the power of authorizing special exceptions to and variations from the general provisions of the zoning law is designed to be exercised only under exceptional circumstances and not for the purpose of amending the law or changing its scheme in essential particulars *such as making changes in boundary lines of districts or authorizing the erection of a building forbidden by the zoning law to be erected.* (Italics supplied.)

We think the action of the Board of Adjustment in the instant case violated the spirit of the ordinance and amounted to legislation by it. Furthermore, there is no showing that a literal enforcement of the provisions of the ordinance with respect to the Beyer lot will result in unnecessary hardship.²⁷

It is difficult to know precisely what the court held in the case. The italicized language can be interpreted as meaning that the board cannot grant a use variance. Or it could be interpreted as

²⁶ 292 Ky. 162, 166 S.W.2d 290 (1942).

²⁷ *Id.* at 167, 166 S.W.2d at 293.

meaning that a board has no power to grant a variance for a use that is *expressly* prohibited in the ordinance (as contrasted with a use that is excluded only because it is not on the list of permissive uses). However, the addition of the last line in the quotation—which was the last line in the opinion—implies that had there been proof of hardship the result might have been different.

In a recent case, *Arrow Transp. Co. v. Planning & Zoning Comm'n of Paducah*,²⁸ the court dealt with this problem again. Here the board granted a variance for the erection of gasoline storage facilities in a general business (B-3) zone. Under the ordinance such facilities could be constructed only in an M-2 zone. The Court of Appeals reversed, citing the *Beyer* case and italicizing the language italicized in the above quotation. To grant the variance, said the court, "would in effect change the property from a B-3 zone to an M-2 zone." Here again, if the court had stopped, the holding would be read as prohibiting a use variance. But the court did not stop. As in *Beyer*, it added a concluding thought: "It is difficult to understand how Gulf could suffer a hardship in the restriction on the use of a property it does not yet own." And then it dismissed the hardship point by invoking the rule that a person with only an option to purchase cannot claim hardship.²⁹

Although the question is not entirely free from doubt, we believe the Court of Appeals did not hold in these cases that a use variance cannot be granted. In our opinion both these cases rest upon the lack of evidence showing that the property was not reasonably adaptable to a conforming use.³⁰ If this evidence were shown and the other requirements met—which admittedly will be a rare case—we think the Court of Appeals would affirm allowance of a use variance. In any event, in appraising decisions of the Board of Adjustment, it is only fair to interpret the law, where ambiguous, in a manner favorable to the Board. We must give it the benefits of any doubts. Therefore, we as-

²⁸ 299 S.W.2d 95 (Ky. 1957).

²⁹ This is a rule of doubtful soundness. It is not the purchaser who brings the hardship into being. It either exists, or does not exist, both before and after his purchase. See *School Committee of City of Pawtucket v. Zoning Bd. of Review of City of Pawtucket*, 133 A.2d 734 (R.I. 1957); *Murphy v. Kramer*, 182 N.Y.S.2d 205 (1958), criticizing and rejecting the rule.

³⁰ Cf. *Smith v. Selligman*, 270 Ky. 69, 109 S.W.2d 14 (1937).

sume it may grant use variances when the requirements of the ordinance are met.

2. *Use variance cases before the Board.*

Between January, 1960, and June, 1961, there were twelve requests for use variances. The Board denied seven and granted three. One has not yet been disposed of. One request was granted as a use variance, but in fact the use was permitted in the district as a special exception.

Requests for the following use variances were denied:

1. a business parking lot in an R-1 district³¹ (this use is first permitted in an R-2 district);
2. a laundry pick-up station in an R-3 district³² (this use is first permitted in a B-1 district);
3. a light industrial plant in a B-1 district³³ (this use is first permitted in an I-1 district);
4. dividing a one-family house into three apartments in an I-1 district³⁴ (new dwellings or apartments are expressly prohibited in a I-1 district);
5. a duplex in an R-1 district (two requests)³⁵ (duplexes are first permitted in an R-2 district);
6. keeping goats in an R-3 district³⁶ (goats are permitted only in an agricultural district).

³¹ R.A. Cormey, March 1960.

³² Fred Sowell and Jay Weaver, Sept. 1960.

³³ Ralph Delph, July 1960.

³⁴ Alberta A. McMahan, April 1960. A bit of pathos is exhibited in the petition of this woman, caught up in the mysteries of the zoning and rezoning process. She stated: "Renting my houses is the only means I have to make honest living as I have no one to help me and if I am allowed to rent what I have, I do want it rezoned back to residential as I did not ask for it to be zoned industrial, it was unbenoence to me and I am asking for exceptions." [Sic] The Board of Health has since started proceedings to condemn her "apartments" as unfit for human habitation.

³⁵ Sally Dunlap, April 1961; R. T. Jordon, May 1960.

³⁶ H. M. Prather, June 1960. Twenty-five protestants appeared. They objected to "the foul odor." They alleged that the goats ate the neighbors' hedges and trees (including one "imported" tree which had "a distinctive connection with the Civil War") and went into the neighbors' yards to die. They further claimed that petitioner already had at least six dogs and several chickens "that ran wild," and that these were enough animals in anybody's backyard. Over thirty complaints had been lodged with the building inspector within the preceding few weeks.

Petitioner answered that the neighbors were only complaining out of spite, that the goats kept his backyard clean and free of insects, and that sick people needed goats milk. He concluded that there could be "no rational objection to the presence of the animals."

This was the only comic relief that appeared in seventeen months. Such is the life of a board member!

In none of these cases was there any evidence in the minutes of the Board or in the petition that the petitioner had met even one of the requirements for a variance set forth above. If no additional evidence was presented at the hearing, the Board had no authority to grant the requests, and they were properly denied.

Requests for the following use variances were granted:

1. a business parking lot in an R-1 district³⁷ (this use is first permitted in an R-2 district). The only difference we can see between this case and another case where the same type of variance was denied³⁸ is that here petitioner wanted to use the parking lot for his *employees*. Where petitioner wanted to use the parking lot for his *customers* the variance was denied. This distinction may be sound, from a planning viewpoint, since a customers' parking lot, with in-and-out traffic, may be more destructive of residential values than an employees' parking lot. But according to our basic assumptions about the Board's function and the limitations upon its power to grant variances, the fact that it might not be bad planning to permit an employees' parking lot in a residential zone is insufficient ground for a variance. The Planning Commission could have drawn this distinction in the zoning ordinance, but the Board is not authorized to draw it unless the other requirements for a variance have been met. Neither the petition nor the minutes show any allegation or evidence of "no reasonable return" or of "unique circumstances" or that other requirements for a variance were met.

2. three apartments in one house in an R-2 two-family residence district³⁹ (this use is first permitted in an R-3 district). The only evidence of hardship was that petitioners had bought this building under the impression that they could rent legally three apartments in the house. Five neighbors protested, alleging the apartments were rented to "very undesirable people." The Board granted the variance on the condition "that the appellants carefully screen their tenants." (How will the building inspector enforce this condition?) If this was all the evidence introduced, the Board was without power to grant this variance. The fact that petitioner bought the property

³⁷ James M. Carr, Dec. 1960.

³⁸ R. A. Corney, March 1960. Both pieces of property were located next to "B" districts. In both cases neighbors objected to the proposed use.

³⁹ J. H. and Mary Hutchins, Aug. 1960.

erroneously believing it to be zoned for three apartments is, of course, immaterial.

3. a gasoline filling station in an R-1 district⁴⁰ (this use is first permitted in a B-1 district). Petitioner in this case had applied to the Planning Commission in November, 1957, for a zone change, which had been denied. Some thirteen neighbors protested granting a variance. Although there is no evidence of record that he met any of the requirements for a variance, the Board granted the variance. The facts in this case are almost identical with the facts in *Bray v. Beyer*,⁴¹ where the petitioner was granted a variance for a filling station in a residential zone after the Planning Commission had refused to grant him a zone change. The Court of Appeals held the Board had no power to grant such a variance. This case is probably the worst single example of the Board's abuse of its power during the seventeen months covered by this study.

These are the only cases where the Board granted use variances as such. In none of them was there any evidence on record that could even come close to satisfying the legal requirements for a variance. The report of the planning staff submitted to the Board in each case recommended denial of these use variances.

There are two peculiar cases involving use variances which cannot be classified as either granted or denied. Both involved permits for billboards. In the *Application of Russell Michael*⁴² the petitioner asked for a permit to construct a billboard advertising the Jolly Roger restaurant in an A-1 district in the county. It was assumed by the planning staff, Michael's lawyer, and the Board that billboards were not permitted in A-1 districts.⁴³ But everyone had overlooked a 1954 ordinance change which permitted billboards in any A-1 district outside the city limits as a special exception. The Board first denied, then granted the petition as a use variance. But in fact the petitioner needed no use variance at all, only a special exception.

⁴⁰ *Brooking Gex*, Dec. 1960.

⁴¹ 292 Ky. 162, 166 S.W.2d 290 (1942). See also *Sims v. Bradley*, 309 Ky. 626, 218 S.W.2d 641 (1949).

⁴² Denied June 1960, reversed and granted Dec. 1960.

⁴³ The Board is quoted as saying, "this use is specifically first permitted in the B-2 district so the Board does not have the authority to grant said permit in an A-1 district." Minutes of the Lexington-Fayette County Zoning Board of Adjustment, June 1960, p. 27. [These minutes are hereinafter referred to as "Minutes of the Board of Adjustment."]

In the *Application of Nat'l Advertising Co.*,⁴⁴ the petitioner wanted a variance for the erection of two billboards, one in an A-1 district in the county (where, as in *Michael*, it was erroneously assumed billboards were prohibited), and one in an R-1 district. At the hearing the building inspector testified that the petitioner previously had erected illegally forty-seven billboards. The Board denied the variance for the two signs, and in addition it ordered the billboards illegally erected removed. On a petition for rehearing the billboard company claimed that it was improper to order the standing billboards removed since they were not the subject matter of the case; it further claimed that some of the billboards were not erected illegally. The Board granted a stay of its order and requested the sign company and the building inspector to come to some agreement on the facts. Today, eighteen months later, the case is still pending.

It should also be noted that the Board may have, in effect, granted use variances under its power to grant home occupations. The Board granted as "home occupations" in residential districts three electrical and television repair shops⁴⁵ and in an agricultural district one printing shop.⁴⁶ Because of the nature of these uses, permitting them as home occupations comes close to varying the use.

C. BULK VARIANCE CASES BEFORE THE BOARD

1. *Bulk variances (excluding variances for signs)*.

By far the largest number of any kind of request was for a bulk variance. The Board acted on fifty cases involving fifty-one such requests (not including requests for sign variances). Of these requests the board granted forty-four—or 88%—and denied seven. Most of these requests were for variations in the side yard, setback, distance, area, and parking space requirements of the ordinance.

Although this percentage of petitions approved is quite high, it would be justified if the Board acted within its powers and

⁴⁴ May 1960.

⁴⁵ Stanley Caywood, May 1960 (repair electric irons, mowers, etc.); Fred Hale, May 1960 (repair electric tools); Herman F. Smith, March 1961 (repair TV sets).

⁴⁶ Holton Wilson, Dec. 1960.

granted only those petitions which met the requirements of hardship.⁴⁷ However, the hard fact is that in not more than a dozen of these petitions did the petitioner plead uniqueness of the lot and attempt to show evidence that would meet the legal requirements.⁴⁸ Usually the petition stated that the petitioner could profit by the variance, that he needed extra living space for his large family or extra room for his booming business, that the proposed building would be "useful to this business," or, most frequently (in about fifty percent of the cases), that there were other nonconforming buildings in the area. After investigating the facts, the planning staff recommended granting twenty of the fifty-one requests. On the basis of the facts alleged in the petition and the evidence in the minutes, in not more than twenty, or approximately forty percent, of these cases were the legal requirements for a variance satisfied.

Denials and apparent inconsistencies. The seven requests denied by the Board included two requests to vary the bulk requirements so that garages could be converted into apartments,⁴⁹ and one to allow four houses to be built on a one acre lot⁵⁰ (the ordinance required one-half acre per house). The other four cases⁵¹ involved requests which seemed to be similar in many respects to requests that were granted: (a) to relax the bulk requirements because the lot size could not accommodate an old house or because it had been reduced by eminent domain; (b) to relax the side yard requirements so as to permit a carport. We shall discuss them briefly.

⁴⁷ For cases showing how these requirements can be met because of unusual topography and small lot size, see *Stout v. Jenkins*, 268 S.W.2d 643 (Ky. 1954); *Willoughby v. Tafel*, 309 Ky. 753, 218 S.W.2d 977 (1949).

⁴⁸ One of these was *Pepsi Cola Bottling Co.*, Dec. 1960. The architectural firm that drew the plans for the building, which violated the bulk requirements of the ordinance, was listed on the building construction plans filed with the building inspector as J. T. Gillig and Associates. Mr. Gillig was a member of the Board of Adjustment. Site plans submitted as part of the petition to the Board were identical with the construction plans, except that the architect's title block had been removed. The Board granted the variance by unanimous vote, with all members, including Gillig, present.

⁴⁹ *Coleman Updike*, Oct. 1960; *Fred E. Littleton*, Dec. 1960. The latter case was reversed and variance granted in July 1961, after the end of our study. In *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948), the court affirmed the Board's denial of a variance to convert servants' quarters over a garage into an apartment.

⁵⁰ *Morris Mofley*, July 1960, rehearing denied Oct. 1960. Compare *Forrest Kirby*, Jan. 1961, where variance of acreage requirement was granted.

⁵¹ *Rector Allen*, Jan. 1960; *Brooks Barnes*, March 1960; *McKnights, Inc.*, May 1960; *Charles E. Snow*, Aug. 1960.

The Board had two requests for permits to move houses onto lots where they would violate bulk requirements. The Board denied one⁵² and granted one.⁵³ The petition of Brooks Barnes was denied because "moving of an old structure to this lot would be detrimental to property owners of the relatively new residences in the neighborhood."⁵⁴ The petition of Joe Hall, whose house and part of his land had been condemned by the state under eminent domain, was granted. As is the usual practice in Kentucky, the state in a gesture of generosity permitted Hall to move the house off the acquired parcel even though the state had paid for it. It had little or no value to the state. Hall wanted to move the house to the remaining portion of his land in an industrial area. This remaining portion was too small for Hall to comply with the bulk zoning requirements for a house. Even though Hall had been paid for the house and presumably for damage to his remaining land, had he been able to prove that the zoning ordinance deprived his land of any reasonably beneficial use, he would have had a good case for a variance. But the report of the planning staff indicated that the remaining portion of his lot had considerable value for industrial and commercial use. Nonetheless, Hall had his cake and ate it too.

Although the *Hall* case can be distinguished from the *Barnes* case in terms of the effect upon the neighborhood, it is not easy to see how it can be distinguished from the *Application of Rector Allen*.⁵⁵ Part of Allen's land in front of his filling station had been condemned, leaving room on only one side of his pumps for cars to park. He asked for permission to move his pumps out a few feet in front of the setback line in order to have room for cars on each side of the pumps. The Board denied the appeal, saying that he had received "just compensation" from the state. If Allen could not complain because he had been paid by the state for his hardship, it is perhaps permissible to ask, how could Joe Hall complain?

The Board had before it four requests for permission to main-

⁵² Brooks Barnes, March 1960.

⁵³ Joe Hall, March 1961.

⁵⁴ Minutes of the Board of Adjustment, March 1960, p. 15.

⁵⁵ Jan. 1960.

tain carports which were erected without permits and in violation of side yard requirements. It denied two, granted one, and allowed one to remain as a temporary use. The first request was from Julian Cobb, which was granted in April, 1960. In May, 1960—one month later—the Board denied the request of an owner of a lot located two doors down the street from Cobb, and ordered the carport torn down.⁵⁶ In August of that year the Board denied the third request.⁵⁷ In October the fourth request met the same fate, but in April, 1961, the Board reversed itself and allowed the carport to remain as “a temporary use.”⁵⁸ We found nothing in the petitions or in the minutes which indicated any one of these lots was unique. From the record we find it difficult, if not impossible, to rationalize their different dispositions.

Petitions after violation; rehearings and reversals. In these bulk variance cases the Board was frequently faced with two problems which usually result from public unawareness of the zoning law. The first is an appeal for a building permit *after* the structure has been erected in violation of the bulk requirements of the ordinance. There were twelve such appeals before the Board.⁵⁹ In three the Board denied the permit and ordered the structures torn down. Two of these were the May and August carport cases mentioned above. The other was a case where a man had built four houses on a one-acre lot, which violated the area requirements of one-half acre per house.⁶⁰ Of the nine such appeals granted, six involved cases where buildings were erected, two where carports were erected, and one where a canopy was erected. One of these violations was caused by an honest mistake as to the property line,⁶¹ and an-

⁵⁶ McKnights, Inc., May 1960.

⁵⁷ Charles E. Snow, Aug. 1960.

⁵⁸ Import Motors, Oct. 1960 and April 1961.

⁵⁹ There were also eleven petitions for sign variances requested after the sign had been erected. Nine were granted. See text accompanying note 109 *infra*. Expenditure of money for prohibited uses is a self-created hardship and therefore not a ground for a variance. *Misuk v. Zoning Bd. of Appeals*, 138 Conn. 477, 86 A.2d 180 (1952); *Selligman v. Van Allmen Bros.*, 297 Ky. 121, 179 S.W.2d 207 (1944).

⁶⁰ *Morris Mofley*, July 1960, rehearing denied Oct. 1960. The Board of Adjustment may have been influenced by the refusal of the Board of Health to issue plumbing permits.

⁶¹ R. C. Coomer, Nov. 1960.

other resulted partially from an error of the building inspector.⁶² In the latter case the petitioner, an experienced builder, obtained a permit through error on the part of the building inspector. After the foundation had been poured, the error was discovered and a "stop order" issued. The petitioner disregarded it, substantially completed the building, and then appealed to the Board, alleging as a hardship that he could not buy any adjoining land to meet the bulk requirements. In still another case,⁶³ also involving an experienced builder, the violation resulted from relying upon newspaper accounts of the Board's action. In February, 1960, the builder had applied for a variance to permit a canopy over gas pumps in a filling station and for a variance to permit a free standing sign. The Board denied the first variance and granted the second. In an account of the Board's action a local newspaper reported that the builder's request had been granted, not noting that there had been two requests. Petitioner alleged that he relied on the newspaper account, never saw the permit as it was issued, and went ahead and built his canopy. At its December, 1961, meeting, the Board told him the newspaper was not the official record of the Board, reheard his case, and granted the variance.

A related problem, perhaps attributable to public ignorance of zoning law, is the problem of frequent rehearings. Although a board of adjustment may make rules regulating procedure before it, the general rule is that it may not re-open or re-hear an application which has once been terminated except upon an allegation of new facts.⁶⁴ This rule is incorporated in the Lexington Board's rules of procedure.⁶⁵ The Board reheard fourteen cases, usually, but not always, upon allegation of new facts. In ten it reversed itself and granted variances which previously had been denied. From this high number of reversals it can be inferred that petitioners often come to the first hearing ill-prepared to meet the issues, perhaps because they do not know what the issues are.

⁶² *Foley Realty Co.*, Jan. 1961. Estoppel may not be invoked as a defense where permit is erroneously issued by the building inspector. *Selligman v. Western & So. Life Ins. Co.*, 277 Ky. 551, 126 S.W.2d 419 (1938).

⁶³ *Phillips Petroleum*, denied Feb. 1960, reversed and granted Dec. 1960 (Thompson and Gillig dissenting).

⁶⁴ *1 Rathkopf & Rathkopf*, *op. cit. supra* note 24, at 697.

⁶⁵ Board of Adjustment Rules, p. 4.

Conclusion. If we judge the Board's actions by the standards set forth at the beginning of this section on variances, the conclusion seems inescapable that in a great number of these cases the Board abused its discretion, in that there were no allegations or evidence of legal hardship in the petitions, no substantial evidence in the minutes to support any finding of hardship, and no findings that conditions or hardships alleged were not typical or recurrent (a finding which section 24.4222 of the zoning ordinance expressly makes a prerequisite for a variance in every case) It is of course possible that evidence which satisfied the legal requirements for a variance was introduced at the hearing and did not find its way into the minutes. We think this is improbable, however, in any substantial number of cases in view of our own observation of Board hearings and of written reports from student observers who have sat in on Board meetings from time to time over the past five years.

This conclusion about the actions of the Lexington Board will not surprise anyone with experience in zoning administration: A few years ago Walter Blucher, who has as wide a knowledge of planning administration as anyone in the country, reached the same conclusion about all zoning boards of adjustment. He stated:

The violations of zoning are to be found at every level of the administrative and legislative process. I have said that in my opinion 50 percent of all the rulings of zoning boards of appeals in the United States are probably illegal usurpations of power.⁶⁶

Blucher's observation is indeed disquieting, but such widespread "illegal usurpations of power" should make us wonder whether the fault lies as much in the system as in the men who run it. We shall examine this question at the end of our study of the Lexington Board.

2. *Bulk variances for signs.*

In this subsection we present a batch of cases that show how a board of adjustment can rewrite the zoning ordinance and bring about almost complete breakdown in enforcement of the law. The cases deal with variances from the zoning regu-

⁶⁶ Blucher, *op. cit. supra* note 1, at 100. See also the despairing remarks of Judge Maltbie, *The Legal Background of Zoning*, 22 Conn. B.J. 2 (1948).

lations respecting size, location, and number of advertising signs.⁶⁷

In appraising the propriety of the Board's action, the reader will remember that a variance for a sign is subject to the same requirements that any other kind of variance is subject to. These have been set out above. They are: (1) because of the uniqueness of the lot, the land will not yield a reasonable return if the signs must conform to the ordinance; (2) the hardship is not created by the petitioner; (3) the owner's plight is peculiar to the lot and not caused by general conditions in the neighborhood; (4) the conditions are not so typical or recurrent that they can be dealt with by a general regulation; (5) the variance will not result in substantial impairment of the community plan.

Between January, 1960, and September, 1960, there were fourteen requests for a sign variance. Three were granted; eleven were denied. In September, 1960, one membership of the Board changed, and so, apparently, did the position of the Board respecting sign variances. Between September, 1960, and June, 1961, the Board had twenty-eight requests for a sign variance, including four requests to reverse earlier decisions. (The planning staff recommended granting three and denying twenty-

⁶⁷ The Lexington zoning ordinance requires all permanent signs in residential districts (except for schools, churches and tourist homes) to be attached flat against the building. Lexington Zoning Ordinance §§ 7.32-.36, 8.21, 8.24, 9.34, 9.35, 10.21, 10.24, 10.25, 11.21.

The set-back requirements in the Lexington zoning ordinance respecting signs in other districts are as follows:

A-1 (agricultural): motels, 25 ft., §§ 20.57, 22.00; other advertising signs, 60 ft. from center line of highway or 2 ft. from right of way, whichever is greater, § 20.4.

B-1 (neighborhood business district): motels, 25 ft., §§ 12.33, 20.57, 22.00; filling stations, 12 ft., §§ 12.33, 19.32; other advertising signs, 20 ft. attached flat against building below the roof line, §§ 12.33, 20.4, 20.646, 22.00.

B-2 (downtown business district): filling stations, 12 ft. unless attached flat against building, § 19.32; other advertising signs, none, §§ 13.32, 20.4, 22.00.

B-3 (highway service district): motels, 25 ft., §§ 20.57, 22.00; filling stations, 12 ft., § 19.32; other advertising signs, 20 ft. city, 40 ft. county, §§ 20.4, 22.00.

B-4 (general business district): same as B-2.

I-1 (light industrial district): motels, 5 ft. city, 10 ft. county, §§ 20.57, 22.00; filling stations, 12 ft., § 19.32; other advertising signs, 20 ft. city, 40 ft. county, §§ 20.4, 22.00.

I-2 (heavy industrial district): same as I-1.

There are other requirements in the ordinance dealing with size and number of signs, but as they are seldom involved in these cases they are not here reproduced. Most of the requests were for free standing signs, over-the-roof signs, and signs within the set-back requirement.

four. It made no recommendation as to one). Of these twenty-eight requests, twenty-four were granted on first hearing. Two were first denied and then granted on rehearing. Only two requests were ultimately denied. Thus the current Board granted ninety-three percent of the requests for sign variances; the planning staff recommended granting only eleven percent.

In not a single one of these cases did the petitioner in his petition attempt to show evidence to meet all the requirements for a variance. Indeed, in very few did the petitioner show sufficient evidence to meet even one requirement. Various hardships were alleged, such as it was "extremely necessary to the success of the commercial enterprise," petitioner's sign could be seen better if it were nonconforming, there were other nonconforming signs in the area, and the building had been so designed that there was no place to put a conforming sign (clearly a self-made hardship). None of these so-called "hardships" is a hardship under the enabling act and ordinance, and none of them is sufficient reason for granting a variance. The minutes of the Board are as devoid of substantiating evidence as the petitions.

One reason for granting sign variances frequently advanced by the Board was that there were other nonconforming signs in the area, but in many areas the existing nonconforming signs were the result of variances previously granted by the Board itself. New Circle Road is such an area. This road originally was built in the late 1940's as a high speed by-pass around the north side of Lexington. After an epic battle over whether or not the adjacent land should be zoned for business, in which the principal protagonists were former County Judge William E. Nichols (for business zoning) and former Planning Commission Chairman Robert D. Hawkins (against business zoning), the forces for business zoning won the day.⁶⁸ If, as Bernard DeVoto said,

⁶⁸ After leading his forces to victory, Judge Nichols was defeated for reelection in November, 1953. A few days later he fired one of his antagonists, Russell Scofield, from the Planning Commission. After serving out his first term, Scofield had never been officially re-appointed but had continued to sit on the Commission with Nichols' consent. Scofield filed suit in circuit court, which temporarily enjoined both Scofield and the new appointee from serving. The Planning Commission decided not to hold any more meetings until the issue could be settled. The crisis was ultimately resolved by the parties agreeing to let

(Footnote continued on next page)

"a highway is a true index of our culture," the cultural rating of Lexington ("The Athens of the West") plummeted sharply with the development of New Circle Road. Today—eight years later—New Circle Road is lined with drive-ins purveying beds, burgers, booze, and Bardot, as well as more durable goods—all advertised by winking, blinking, or fixed illuminated signs. The only part the Board of Adjustment has played in this garish development is in granting bulk variances, usually for signs. At the present time there are numerous signs on New Circle Road within the setback requirement. All of them have been erected since the zoning ordinance was passed, and all of them are there as a result of variances granted by the Board of Adjustment or of nonenforcement of the ordinance by the building inspector.

During the period of our study there were four requests for sign variances on the New Circle Road. The first was the *Application of Joe Isaacs, Jr.*,⁶⁹ which was one of the two sign variances denied after August, 1960, apparently because the business on the adjacent lot had a conforming sign. In his petition Isaacs listed fifty-three nonconforming signs on the New Circle Road between Liberty Road and Broadway, the stretch of the road on which his lot was located. The second request was the *Application of Paul Miller Ford*.⁷⁰ The petitioner wanted to erect a free standing sign within the forty foot setback requirement on the same stretch of the road where Isaac's property lay. Contrary to the decision in *Isaacs*, the Board granted the request, apparently because of other nonconforming signs up and down the road. The third request⁷¹ likewise was granted, because there was one nonconforming sign on the adjacent lot and numerous nonconforming signs in the area. The fourth request⁷² was granted also, on the ground that there were other nonconforming signs in the area and the petitioner would be in competition with some of

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the new Republican county judge name the member. He named a man who had not been involved in the controversy. For details of the beltline battle, see almost any daily issue of the Lexington Herald or the Lexington Leader in 1953; Morris, *The Development of the Belt Line*, May 1957 (study on file at the University of Kentucky College of Law).

⁶⁹ Oct. 1960.

⁷⁰ Jan. 1961.

⁷¹ George B. Smith, Jan. 1961.

⁷² Penny's Drive-In, April 1961.

the businesses that had these nonconforming signs. The Board's action in these and other sign cases moved the planning staff to protest strongly in the fourth case:

The Board has, by their own actions, in the past, all but amended this particular provision of the Zoning Ordinance-Resolution along the Beltline and other arteries. It is unfortunate that the Board's usurpation of legislative authority has not been brought to the attention of the courts before the intent and effect of the Ordinance was destroyed.⁷³

This "usurpation of legislative authority" has not, as the planning staff indicated, been confined to the New Circle Road. Sign variances have been freely granted on other roads, on downtown streets, and in new shopping centers. The Board's actions and motivations are well illustrated by the following cases. They also show, as do the New Circle Road cases, that having let one nonconforming sign in, the Board feels it cannot deny others the same privilege.⁷⁴

In December, 1959, the Board denied a permit to Frisch's Drive-In for a free standing sign advertising "Big Boys" in Idle Hour Shopping Center, a new shopping center on the edge of one of Lexington's finest residential districts. The zoning ordinance requires signs in neighborhood shopping centers to be flat against the building. Nine months later, the Board reheard the case and upon substantially the same evidence (which did not meet the legal requirements of hardship) by a 3 to 2 vote reversed the decision and granted the variance.⁷⁵ When the sign was erected it was the only nonconforming sign in the shopping center. Eight months later a druggist in the same shopping center applied for a permit for a free standing sign, stating that "in order to put his store on a paying basis he has to let the public know it is there. He further stated that Frisch's restaurant . . . was recently granted a free standing sign and that he feels he

⁷³ Staff report, Penny's Drive-In, *supra* note 72.

⁷⁴ It has been uniformly held, however, that permitting some persons to violate a zoning regulation does not preclude its enforcement against others who conceive themselves to be similarly situated. *Matter of Larkin Co. v. Schwab*, 242 N.Y. 330, 151 N.E. 637 (1926); *Ventresca v. Exley*, 358 Pa. 98, 56 A.2d 210 (1948); *Miller v. Cain*, 40 Wash. 2d 216, 242 P.2d 505 (1952).

⁷⁵ Frisch's Drive-In, Sept. 1960 (Thompson and Gillig dissenting).

should be given the same right."⁷⁶ The Board, not to be charged with favoritism, granted the variance.⁷⁷

The complete collapse of sign regulation which results from the Board's ignoring the ordinance and the limitations on its own powers is well illustrated by three cases involving the new Gardenside shopping center. As has been stated, the zoning ordinance provides that in a neighborhood shopping center a sign must be attached flat against the building. Whatever the Board of Adjustment may think of the merits of this regulation, it has no authority to pass upon its merits or to amend the ordinance in any way. That is the function of the Planning Commission.

In the first Gardenside case, the Gardenside Pharmacy applied for a variance to put its symbol (a neon-lit, revolving mortar and pestle) on top of a canopy which extended across the front of the building some three feet below the roof line.⁷⁸ It alleged that the building design was unique and that a revolving sign could be put only on top of the canopy. (Of course, one purpose of requiring signs *flat* against the wall is to prevent the erection of such revolving signs.) The Board granted the variance. Two months later another merchant in the same shopping center petitioned for a variance to put his sign above the same canopy.⁷⁹ The Board denied the permit, 3 to 2. The owner of the shopping center then stepped in and applied for a variance for *all* establishments in the Gardenside shopping center.⁸⁰ The resistance of the three members who had voted to deny the second merchant a variance caved in. The Board granted the variance for all the stores. Doubtless the Board finally decided if it granted a variance to one it must grant a variance to all since the same canopy ran across the front of all their shops. But in doing so the Board in effect amended the ordinance for the shopping center and ignored two primary requirements for a variance: (1) that the alleged hardship be peculiar to one lot and not the result of conditions general in the neighborhood; (2) that the hardship not be self-created. The Board got itself into the soup by granting the

⁷⁶ Minutes of the Board of Adjustment, April 1961, p. 28.

⁷⁷ Edwin G. Spalding, April 1961 (Gillig dissenting).

⁷⁸ Sam L. Sexton, March 1961.

⁷⁹ Rowin, Inc., May 1961 (Jefferson and Kiser dissenting).

⁸⁰ Pierson-Trapp Co., Aug. 1961.

first variance without requiring that the legal conditions for a variance be met. By not following the law it ended up usurping the functions of the Planning Commission. The proper course of action would have been to recommend an amendment to the zoning ordinance.

In the *Application of Airport Motel*,⁸¹ the Board members gave some of their reasons for taking such a free and easy view of hardship. There a new, attractive motel was built on the Versailles Road, one of the most scenic highways through the horse farm district. The motel was well set back from the highway, but the petitioners wanted to put their sign within the twenty-five foot required setback for signs. At the hearing, one Board member said, “. . . you would not know it was a motel if they did not have a sign.” A member of the planning staff replied that they could have a sign—but set back from the highway. Another Board member then stated that petitioners “have a quarter of a million dollars investment there and to spend that much money shows a good faith in the country. . . . They have a nice place with a tremendous investment and a man in business has got to have a sign to attract the public.”⁸² The variance was granted.

While the minutes indicate the Board was articulate in this case, it was not always thus. One of the cases before the Board involved a petition by one of the members of the Board, and another builder, for a sign variance.⁸³ They had erected a free standing sign advertising a doctor's office building in a B-1 zone in violation of an ordinance requirement that signs must be flat against the wall. In their petition, they gave no reason of any kind why the variance should be granted. According to the minutes, they were not represented at the hearing; the petitioning member absented himself from the meeting. The Board granted the petition without recorded comment or explanation.

Filling station signs. A large number of applicants for

⁸¹ Airport Motel, March 1961.

⁸² Minutes of the Board of Adjustment, March 1961, p. 74. One month later this reason for hardship was advanced by petitioner in Levy, Pool, and Wenneker, April 1961: “We feel that a sign with dimensions such as are required by the Ordinance . . . is not sufficient to advertise a million and a half dollar investment in this shopping center.” The Board, hoist on its own petard, granted the variance for an extra-large sign.

⁸³ Poole and Jefferson, May 1961. J. L. Jefferson was a member of the Board.

sign variances were owners of filling stations. They made fifteen requests—seven for signs within the setback requirement, seven for signs above the roof line, and one to build a sign larger than the maximum size permissible. In practically all these cases the hardship, if any, was self-created by the petitioner since he had bought the land for the single purpose of erecting a filling station thereon with full knowledge of the zoning regulations. The principle of *Arrow Transp. Co. v Planning & Zoning Comm'n of Paducah*⁸⁴ would seem to preclude a variance in these cases. In any event seldom was it alleged in these cases that there was anything unique about the lot or about the design of a filling station which would make it difficult to comply with the sign regulations.

In many of these cases the filling station owners seemed to regard themselves as a special class with a right to a variance. The *Application of Standard Oil*⁸⁵ is a good example of this. When this case was first heard in May, 1960, the Board flatly stated that there were "no . . . unique conditions . . . that may be considered unnecessary hardship."⁸⁶ The only hardship alleged was that nearly every other service station in that particular B-1 district had nonconforming signs two feet (rather than the required twelve feet) from the property line. Standard Oil then filed a request for a rehearing. At the hearing on the request for a rehearing, the attorney for Standard Oil stated that the rehearing should be granted because "the consistent policy of this Board in approving such signs for filling stations over a period of several years, has become what might be termed a 'rule of property', and whether that policy was right or wrong, it should be changed only after public pronouncement of the change, and the change should be given prospective application only."⁸⁷ The Board apparently agreed, as it announced in July that "hereafter the Board will conform to the zoning law

⁸⁴ 299 S.W.2d 95 (Ky. 1956). See text accompanying note 29, *supra*.

⁸⁵ Variance denied May 1960, reversed and granted Sept. 1960.

⁸⁶ Minutes of the Board of Adjustment, May 1960, p. 26.

⁸⁷ Minutes of the Board of Adjustment, May 1960, p. 32. How this "policy" came to be established is outlined in a Special Report of the Planning Staff to the Board of Adjustment (Jan. 1960). It reads:

It can certainly be safely said that the Board of Adjustment has been too liberal, indeed lenient, in its granting of variances. The impact of this leniency has been at least twofold: first in damaging the public respect for

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for gas stations.”⁸⁸ In September the Board reversed the *Standard Oil* decision and granted the permit.

The troubling thing about the *Standard Oil* case is that the Board had made the same announcement of requiring conformity in July, 1959.⁸⁹ Moreover, after the announcement in the *Standard Oil* case, the Board continued to grant every application for a filling station sign variance up to the time our study ended. After the *Standard Oil* case the Board granted nine of the nine requests for filling station sign variances. The first four were the *Applications of Shell Oil*.⁹⁰ Shell had four filling stations in different B-1 districts around the city. One of the stations was already built, and the sign already erected in violation of the ordinance. Shell alleged that these stations were all located in areas where other stations had nonconforming signs, that each sign was an integral part of the building design, and that the signs would beautify the city. The planning staff in its report noted that one of the stations was in an area where there were

(Footnote continued from preceding page)

the Zoning Ordinance, and second in all but destroying certain requirements of that ordinance.

A good share of the blame for this situation can be put to the Board's granting of variances without proper proof by the appellant of the existence of unnecessary hardship.

An excellent example of the violence some of these rulings have done to the provisions of the Ordinance has been the fate of Article 19.32 pertaining to filling stations. This article requires, among other things that “. . . no sign . . . shall be located within twelve (12) feet of any street lot line. . . .” On October 10, 1954, the Board of Adjustment granted the Standard Oil Co. a permit to erect their sign within 2 feet of the southern or “inner” right-of-way of New Circle Road at Bryan Station Road. As outlined in the staff report of Planning Director William Rogers, exceptional circumstances did prevail which justified the granting of a temporary variance. Only the northern or “outer” pavement of New Circle Road was then completed. Thus, the property line in this case was 40 feet from the existing pavement. The sign in question would then have been 52 feet from the existing pavement. The Board permitted the sign to be erected 2 feet from the right-of-way line, *but still 42 feet from the pavement*. Rogers' recommendation that conformance to the specifications of the Zoning Ordinance-Resolution be required when the second pavement of New Circle Road was completed went unheeded.

Since this case in 1954, there have been 21 additional appeals to the Board of Adjustment of a similar nature, of which all 21 were granted, and of which *only 2 involved the same unique circumstances* of the first case. The Board had apparently used the original case as precedent to establish a “policy” of requiring only a 2 foot setback for these filling stations rather than the required 12 feet of Article 19.32. Not until the Rector Allen case of the last Board meeting have the requirements of Article 19.32 been upheld.

⁸⁸ Minutes of the Board of Adjustment, July 1960, pp. 36-37.

⁸⁹ Shell Oil Co., July 1959.

⁹⁰ Shell Oil Co. (four cases), Dec. 1960.

no nonconforming signs and one was in an area which had both conforming and nonconforming signs. Nevertheless, the Board granted all four variances, "because," said a member of the Board, "the signs are a part of the buildings and because the stations are located in older established B-1 districts where non-conformance to this same sign regulation is predominate."⁹¹

The reason given in *Shell*, that the filling stations were located in older districts with nonconforming signs, could not be given in the next case to come before the Board, *Application of Imperial Petroleum*.⁹² But the Board again granted the variance.⁹³ In this case, Imperial wished to erect a sign within the setback requirement and another above the roof of the station. There was no question of nearby nonconforming signs. Imperial was located next to an Ashland Oil filling station with conforming signs in the new Zandale shopping center.⁹⁴ The staff report stated there were no nonconforming signs within one-half mile of Imperial's location. The Board found a new reason for a variance. Two members of the Board were recorded as saying, "it is their opinion that operation of the Imperial Petroleum Company is unique and differs from that of National [*sic*] known oil companies in that its products are sold at a cut rate and that it is necessary that their prices be easily seen in order to attract the public."⁹⁵ One of these went on to say, "if a company or a person is not successful financially in the operation of a business it is his opinion that a hardship exists."⁹⁶

After the *Imperial* case the Board granted two sign variances to the American Oil Company⁹⁷ and one to the Spur Oil Company.⁹⁸ In the latter case Spur had illegally erected a free standing sign four feet from the property line. When it noted that other filling stations were erecting signs only two feet from the property line with the Board's permission, it asked, and was granted, permission to move its sign two feet closer to the street.

⁹¹ Minutes of the Board of Adjustment, Dec. 1960, p. 57.

⁹² Jan. 1961.

⁹³ Thompson and Gillig dissented.

⁹⁴ Ashland Oil has since moved its sign across the service road to the planting strip along the highway.

⁹⁵ Minutes of the Board of Adjustment, Jan. 1961, p. 64.

⁹⁶ *Id.* p. 65. The courts appear to take a contrary view. See Rathkopf & Rathkopf, *op. cit. supra* note 24, ch. 42.

⁹⁷ American Oil Co. (two cases), Jan. 1961.

⁹⁸ Spur Oil Co., May 1961.

The announcement in the *Standard Oil* case of "no more automatic filling station sign variances" still stands—a ghost of a policy that endured less than six months. What the Board said yesterday does not bind it today.

It seems reasonably clear that almost every one of the sign variances granted filling stations violated section 24.4222 of the zoning ordinance. That section reads:

No grant or variance shall be authorized unless the Board *specifically* finds that the condition or situation of the specific piece of property for which a variance is sought is not of so typical or recurrent a nature as to make reasonably practicable the formulation of a general regulation, as a part of this Ordinance-Resolution for such conditions or situations. (Emphasis added.)

The minutes of the Board do not show that this specific finding was made in any of these cases. It is difficult to believe that filling station signs cannot be regulated by a general regulation. What is peculiar and unique about the design of Shell, Standard, Gulf, or Sinclair filling stations?

Denials, apparent inconsistencies, and the shift to non-enforcement. Between January and August of 1960 the Board denied eleven requests for sign variances. Four of these were for filling station signs. One of these four, *Standard Oil*, was later reversed. Two of them (for a sign larger than the maximum size allowable⁹⁹ and for a locational variance¹⁰⁰) seem indistinguishable from the requests for filling station sign variances granted after September, 1960. It is likewise difficult to distinguish pre-September, 1960, cases denying variances for signs on other businesses from post-September cases granting variances for such signs. In *Application of Robert Feasy*¹⁰¹ (pre-September) a permit was denied although there were other nonconforming signs in the area, a factor which greatly influenced the Board in pre- and post-September cases. In *Application of Theodore Elkin*¹⁰² (pre-September) a permit was denied for an overhang-

⁹⁹ Dance Oil Co., May 1960.

¹⁰⁰ Joe Fisher, July 1960. Fisher also requested a bulk variance for his building, which was denied in July 1960, reversed and granted in November 1960. The minutes of the Board do not show that the denial of the sign variance was reversed.

¹⁰¹ March 1960.

¹⁰² March 1960.

ing sign in Meadowthorpe shopping center where there were no nonconforming signs. But in *Application of Frisch's Drive-In*¹⁰³ and *Application of Sam L. Sexton*¹⁰⁴ (both post-September), there were no nonconforming signs in the Idle Hour and Garden-side shopping centers in which the respective businesses were located, and variances were granted.

Only two requests for sign variances were denied after September, 1960. One was probably denied because the business next door had a conforming sign.¹⁰⁵ The other was a request by a liquor store for a sign over the roof line near a residential district.¹⁰⁶ The Board also reversed four pre-September, 1960, cases denying permits.¹⁰⁷ In one of them¹⁰⁸ petitioner had at the time of his second appeal flags and streamers attached to the building, a neon sign attached flat against the wall of the building, and a red flashing light on top of the building. He claimed these were not enough to attract customers, and he wanted to add a sign above the roof line. On rehearing, the Board granted permission on condition that he remove the flashing light on top of the building.

Some observers of the Board have inferred from these cases that the Board's policy shifted when one membership changed in September, 1960. This is not verifiable, however, since the decisions were unanimous except in the few cases where dissents have been noted in the footnotes. Yet, without some such explanation, it is difficult to reconcile these apparently inconsistent decisions. Of course consistency may not have been a virtue sought by the Board. We recognize that these decisions may simply be the result of an *ad hoc* approach under which equal treatment in equal circumstances is of minor importance.

One thing more need be noted about these sign variance cases, and that is how often petitioners had erected nonconforming signs without a permit and had then requested a variance from the Board of Adjustment. This was true in eleven

¹⁰³ Denied Dec. 1959, reversed and granted Sept. 1960.

¹⁰⁴ March 1961. See also *Welgo Traders*, denied Oct. 1959, reversed and granted April 1961 (Gillig dissenting).

¹⁰⁵ Joe Isaacs, Jr., Oct. 1960.

¹⁰⁶ Martin Jessee, Oct. 1960, rehearing denied Feb. 1961.

¹⁰⁷ *Frisch's Drive-In*, denied Dec. 1959, granted Sept. 1960; *Standard Oil Co.*, denied May 1960, granted Sept. 1960; *Tommy Shuck*, denied March 1960, granted Feb. 1961; *Welgo Traders*, denied Oct. 1959, granted April 1961.

¹⁰⁸ *Tommy Shuck*, denied March 1960, granted Feb. 1961.

cases, including one case where a variance for an existing sign was granted to a member of the Board of Adjustment.¹⁰⁹ In only two of these cases did the Board finally order the offending sign removed.¹¹⁰ Public realization that sign variances are freely dispensed may lead some persons to erect signs without going through what appears to them to be a mere formality.

Conclusion. Our conclusion is that, in disposing of these sign variance cases, the Board has usurped powers of the Planning Commission and rendered ineffective ordinance provisions regulating signs. We believe the observation of Dennis O'Harrow about the tendency of boards to usurp legislative authority is particularly applicable to the Lexington Board of Adjustment's handling of sign regulations.

You cannot watch zoning activities around the country for long without concluding that all zoning changes are now done by pressure. . . . Probably the weakest link in the zoning chain is the board of appeals. The board must be educated to its responsibilities and its powers. It must not be allowed to usurp legislative authority, which it is prone to do.¹¹¹

In the area of sign regulation the Board's decisions reflect very little concern with the rule of law and the values that emanate therefrom. It is arguable that the rule of law has been replaced here by rule by fiat, but more probably it has been largely replaced by anarchy.

III. SPECIAL EXCEPTIONS

A. THE LEGAL NORMS

Under the enabling act, a board of adjustment may hear applications for special exceptions from the zoning ordinance.¹¹²

¹⁰⁹ Eight variances were granted on first hearing. One request was at first denied, then granted as a temporary use. Import Motors, Oct. 1960, and April 1961.

¹¹⁰ Martin Jessee, Oct. 1960, rehearing denied Feb. 1961; Ernest Back, June 1960. Back's sign was still standing in January, 1962, however.

¹¹¹ O'Harrow, *Trends in Planning*, Public Management, Nov. 1955, pp. 253-54. The remarks of a California judge, in setting aside a variance, are also pertinent here. "If a Board of Zoning Appeals is to be permitted to operate, as it has in this instance, the quicker the City of Los Angeles 'junks' the entire Comprehensive Zoning Plan the better for all concerned as in the long run it will be but an aching memory." Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A. L. Rev. 179, 196 (1958), quoting from Hanson, J., *Beloin v. Blankenhorn*, No. 560,288, Super. Ct., Los Angeles County (Cal.), 1951.

¹¹² Ky. Rev. Stat. § 100.470(1)(b) (1960).

Special exceptions are uses permitted by the zoning ordinance when specified facts and conditions enumerated in the ordinance are found by the board to exist.¹¹³ The planning theory underlying provisions for special exceptions is that certain uses, ordinarily objectionable, may be unobjectionable under certain circumstances. In determining whether or not the conditions set forth in the ordinance are met, the board operates as a fact-finding body. It may grant the special exception if, and only if, it finds the property owner has met the conditions. It has no power to alter or waive the conditions.¹¹⁴

The Lexington ordinance authorizes the Board to grant special exceptions,¹¹⁵ and in a summary provision defining special exceptions it refers by cross reference to all sections wherein exceptions are provided.¹¹⁶ These exceptions may be divided into two kinds: (a) those that permit a use in a specified district if certain conditions are met; (b) those that permit a use in a specified district "when authorized by the Board of Adjustment." The first kind is the "true" special exception or conditional use, which requires the Board to act as a fact-finding body and exercise some limited discretion. The second kind is an absolutely discretionary exception, which permits the Board to exercise very broad powers. There are no standards in the ordinance limiting the discretion of the Board in granting exceptions of the second kind. The only standard (if it can be called such) is to be found in the rules of procedure laid down by the Board itself. It provides: "if the Board finds the use as proposed does not conflict with the purpose and intent of the ordinance, it must approve the application."¹¹⁷

It is questionable whether the sections in the ordinance providing for exceptions to be granted in the absolute discretion of the Board are constitutional. Under orthodox constitutional theory, the legislative body of the city cannot delegate discretionary power unless it supplies safeguards against its arbi-

¹¹³ See *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959), for explanation of the difference between a variance and a special exception.

¹¹⁴ *Abramson v. Zoning Bd. of Appeals*, 143 Conn. 211, 120 A.2d 827 (1956); *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324, 328 (Ky. 1959); I Metzenbaum, *Law of Zoning* 813 (2d ed. 1955).

¹¹⁵ Lexington Zoning Ordinance § 24.41.

¹¹⁶ Lexington Zoning Ordinance § 24.4111.

¹¹⁷ Board of Adjustment Rules, p. 2.

trary exercise. This requirement is usually satisfied by providing a reasonably definite standard to guide its exercise. None is expressly provided in the ordinance. The Court of Appeals has in numerous cases held unconstitutional similar land use control regulations where no reasonably definite standard was provided to guide discretion.¹¹⁸ Even if it is inferred that the first section of the ordinance, which provides the ordinance is "for the purpose of promoting the public health, safety, morals or the general welfare," sets forth a standard applicable to the granting of special exceptions, it would not be a sufficiently definite standard under prior Kentucky cases.¹¹⁹ Indeed, in 1961 the Court of Appeals struck down a Covington ordinance which gave the Board of Commissioners authority to license a trailer park when it would not "jeopardize the public health, safety, morals and welfare of the inhabitants of the City of Covington, . . . [taking] into consideration the topography and density of the population of the location applicable in the particular case."¹²⁰ Appellant argued that although the first clause by itself perhaps did not prescribe a sufficiently definite standard, the addition of the factors of topography and density made it definite. Said the court:

However, in our opinion the mere direction that the board of commissioners shall 'take into consideration' these factors supplies no actual standard at all, and adds nothing to the general direction that the board shall determine what effect the granting of the license would have on public health, safety, morals and welfare, because the latter direction necessarily contemplates that the board will consider

¹¹⁸ See, e.g., *Bowman v. Board of Councilmen*, 303 Ky. 1, 196 S.W.2d 730 (1946); *Town of Jamestown v. Allen*, 284 Ky. 347, 144 S.W.2d 807 (1940) (implied standard of "against public morals, health, safety or public policy" not sufficient); *Town of Bloomfield v. Bayne*, 206 Ky. 68, 266 S.W. 885 (1924).

¹¹⁹ Cf. *Board of Adjustment v. Dixie Suburban Volunteer Fire Dep't.*, 320 S.W.2d 109 (Ky. 1959), where circuit court held invalid a power to grant special exceptions "when found to be in the interest of the public health, safety, morals or general welfare of the community." The Court of Appeals reversed, holding the constitutional question was improperly raised and refusing to pass on it. *But see Schmidt v. Craig*, 345 S.W.2d 292 (Ky. 1962); *Thomson v. Tafel*, 309 Ky. 753, 218 S.W.2d 977 (1949) (affirming grants of discretionary special exceptions; constitutionality not argued); cf. *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959). A recent case indicates the court is shifting from the "reasonably definite standard" test to a "reasonable safeguards in the context" test, in judging the constitutionality of delegation of power to state administrative agencies. *Butler v. United Cerebral Palsy of No. Ky., Inc.*, 352 S.W.2d 203 (Ky. 1961). Whether the court will apply the same test to delegation to local boards remains to be seen.

¹²⁰ *Schneider v. Wink*, 350 S.W.2d 504 (Ky. 1961).

all factors that bear upon health, safety, morals and welfare. The ordinance does not suggest what weight shall be given to the factors of topography and density of population, or what features of topography or what extent of density of population shall be significant.¹²¹

If a standard which prescribes two unweighted factors in addition to general welfare is not sufficiently definite, it would seem that a power measured by a standard prescribing no factors (as is the case of the Lexington zoning ordinance's absolutely discretionary exceptions) is void, unless the court finds other adequate safeguards are built in the board of adjustment system.

If the power to grant absolutely discretionary exceptions is unconstitutional because it vests arbitrary power in the Board, the effect may be either to invalidate the requirement of Board approval (thus permitting the use) or to invalidate the entire section providing for the special exception (thus prohibiting the use until valid standards are prescribed). Cases in other jurisdictions are in conflict on this question, but the latter solution is clearly preferable from the viewpoint of sound planning theory.

B. THE CASES BEFORE THE BOARD

Between January, 1960, and June, 1961, the Board passed upon sixteen cases wherein the applicant requested a special exception. In one of these cases the applicant requested two special exceptions; hence the total number of requests was seventeen. Of these seventeen requests, the Board denied two, both of which were filed by the same applicant.

1. *Conditional exceptions.*

Only two of the requests were for "true" special exceptions, where the required conditions to be met by the applicant were set forth in the ordinance. In both cases the Board granted the exceptions, even though neither applicant met the specific conditions required by the ordinance. In one case¹²² the petitioner wished to build a bowling alley in a neighborhood business district. Under the ordinance a bowling alley is permitted in this district as a special exception only when it is located on a lot

¹²¹ *Id.* at 505.

¹²² Charlie Cottrell, May 1961.

abutting a state or federal highway.¹²³ The particular land in question was not located on either type of highway. Nonetheless, the Board granted the request. The apparent reason for this decision was the color of the prospective bowlers. Negroes are usually denied admission to other bowling alleys in Lexington, and this one was to be built for Negroes in a Negro section of town. However much sympathy one may feel for the Negroes, it is questionable procedure for the Board of Adjustment to attempt to remedy racial inequalities by allowing "separate but equal" bowling facilities that violate requirements of the ordinance. A more basic criticism of this case, however, is that under the law the Board is not authorized to ignore, or to consider the merits of, the ordinance requirements that a bowling alley must be located on a state or federal highway.¹²⁴ No proof of unnecessary hardship, required for a variance, was offered in the case.

In the second case¹²⁵ the petitioner wanted to build a motel in an agricultural district. A motel is permitted in such a district as a special exception only if the "entire tract shall be within 500 feet of a B-3 district."¹²⁶ This is an anti-sprawl provision, requiring motels to be built adjacent to developed areas. The edge of the tract on which the motel was to be built was some 3,200 feet from the nearest B-3 district. The Board apparently decided it could not ignore the 500 feet requirement of the ordinance. Instead it granted a variance, upon the following claim of unnecessary hardship:

A variance should be granted . . . because the construction of this motel will promote the prosperity of the community, will conserve land values in this area and will protect the usefulness of urban land. It will further relieve the petitioners from the practical difficulty and unnecessary hardship of having a very expensive piece of property on their hands and it being zoned only for agricultural uses.

This statement of "hardship" is really a statement of reasons for a zone change. The proper action would have been to refer the petitioner to the Planning Commission.

¹²³ Lexington Zoning Ordinance § 12.171.

¹²⁴ See *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959); *Sims v. Bradley*, 309 Ky. 626, 218 S.W.2d 641 (1949).

¹²⁵ *Stidham Brothers*, Jan. 1961.

¹²⁶ Lexington Zoning Ordinance § 6.291.

2. *Discretionary exceptions.*

Fifteen of the seventeen requests were for absolutely discretionary exceptions—uses permitted “when authorized by the Board of Adjustment.” Thirteen were granted; two were denied.

Seven of these requests were for office buildings in an R-4 (apartment) district. The ordinance requires a certain number of parking spaces for every office building located in a residential district.¹²⁷ Three of the six applicants complied with the parking requirements, and their requests were granted. Two did not comply, but their requests likewise were granted. The other two requests were from the same applicant, who wished to construct two medical office buildings adjacent to a new medical clinic in an R-4 district which he had built under a special exception granted in 1957.¹²⁸ He met the parking requirements of the ordinance. Nonetheless, his requests were “denied on the basis that the intent of the 1957 decision . . . was that the office uses would be confined to the main building and would not scatter to the fringes of the . . . property.”¹²⁹

Other requests included two for rest homes in R-3 and R-4 districts, three for nursery schools in R-1 districts, two for parking lots in R-3 districts (the only two where there were any protestants), and two for businesses in residential districts. All these requests were granted.

Some of the petitioners in these cases appealed to the Board under section 24.422 of the ordinance, which is the section authorizing the Board to grant variances. We have classified the cases as special exceptions, however, for two reasons. First, no evidence of hardship, which is required for a variance, was introduced. Evidence of hardship is not required for a special exception. Second, inasmuch as the requests could not have been properly granted as variances but could have been granted as special exceptions, we believe it is only fair to the Board to assume they were granted as special exceptions. Since our pur-

¹²⁷ Lexington Zoning Ordinance § 19.2. Section 19.23 authorizes the Board to waive parking requirements for office buildings located in business or industrial districts, but there is no express authority for waiving such requirements in a residential district.

¹²⁸ George Young, Inc., Feb. 1960.

¹²⁹ Minutes of the Board of Adjustment, Feb. 1960, pp. 8-9.

pose is to appraise the Board's actions, we have resolved any doubts in favor of the Board.

On the basis of the disposition of these cases it is not possible to say whether the Board acted wisely or unwisely, fairly or unfairly, or whether a sound or unsound planning theory underlay the Board's actions. The minutes of the Board are sketchy, and no written opinions are filed. Without any policies, standards, or rules to guide the Board's decisions, and without any requirement that the Board justify its actions by an opinion, the possibilities of arbitrary use of power are great. But there is no proof here that they have been realized or not realized. We are simply in the dark.

Because the Board turned down only one petitioner it may be contended that any possible complaint about lack of due process is *de minimis*. Yet not only the petitioners but also the public in whose behalf regulation is undertaken have a right to expect, as part of the basic administrative process, that discretionary exceptions will be decided by something more than the individual preferences of Board members and with regard to the public interest. There is no machinery in the ordinance or in the Board's procedure for furthering the realization of that expectation, or for measuring it.

C. TEMPORARY PERMITS

One minor power which the Board has under the ordinance is the power to grant temporary permits for uses that do not conform to the ordinance. These are in the nature of special exceptions for uses "of a true temporary nature" which do "not involve the erection of substantial buildings."¹³⁰ The temporary permit may be granted for not more than twelve months.

¹³⁰ Lexington Zoning Ordinance § 24.111:

In addition to permitting the special exceptions heretofore specified in this Ordinance-Resolution . . . , the Board shall have authority to permit the following:

24.4112 Temporary Uses and Permits

24.41121 The temporary use of a building or premises in any district for a purpose or use that does not conform to the regulations prescribed by this Ordinance-Resolution; provided, that such use be of a true temporary nature and does not involve the erection of substantial buildings. Such permit shall be granted in the form of a temporary and revocable permit for not more than a twelve (12) month period, subject to such conditions as will safeguard the public health, safety, convenience and general welfare.

The Board had six requests for temporary permits. Of these the Board granted five. Two were for uses of an unquestionably "true temporary nature": for use of an R-1 lot as a temporary storage ground for highway equipment while the state repaired the road, and for parking a trailer in a neighborhood business district. Both were granted. Temporary permits were also granted for a "trampoline center" in a highway service district, and to a church for use of a house within twenty feet of a residential lot as a church until a new church was built.¹³¹

The other two temporary permit cases involved structures that had been built in violation of the zoning ordinance. In one, Import Motors had erected a canopy in violation of bulk requirements. In October, 1960, the Board denied a variance and ordered the canopy torn down. Six months later the Board temporarily reversed itself and issued a temporary permit for the canopy and also for a free standing sign.¹³² Whether a canopy and a free standing sign are "of a true temporary nature" is questionable. The Board may be tempted to use the temporary use permit when it properly cannot grant a variance.

The second case involved a single-family structure which the owner, without a proper permit, had converted into multiple-family use in a one-family residential district.¹³³ The owner sought a temporary permit until the Planning Commission could rule upon her application for a zone change. Twenty-two protestants appeared. The Board denied the permit.

IV. INTERPRETATION

Questions sometimes arise as to the correct interpretation of the zoning ordinance. By the enabling act¹³⁴ and the Lexington zoning ordinance¹³⁵ the Board of Adjustment is authorized to hear appeals from the building inspector's decisions interpreting the correct boundary lines of the zoning map and the words of the ordinance. The cases requiring the Board to interpret the ordi-

¹³¹ Lexington Zoning Ordinance § 7.12 permits churches in residential districts when "located not less than 20 feet from any other lot in any residence district."

¹³² Import Motors, variance denied Oct. 1960, temporary permit granted April 1961 (Thompson and Gillig dissenting).

¹³³ Angelee Bryant, Dec. 1960.

¹³⁴ Ky. Rev. Stat. § 100.450 (1960).

¹³⁵ Lexington Zoning Ordinance §§ 4.23, 24.41, 24.421.

nance can be divided into three categories: home occupations, nonconforming uses, and miscellaneous.

A. HOME OCCUPATIONS

The Lexington zoning ordinance provides that the Board may authorize any "customary incidental home occupations when conducted within a dwelling and not in any accessory building."¹³⁶ As readily can be seen the Board's power here is one of interpretation: What are home occupations customarily incidental to the use of the premises as a residence? In determining what is a "customary incidental home occupation," several factors control. First, it must be an incidental, not a primary, use of the property. Second, it must be customary—a variable concept conveying the idea that it is an occupation you would expect to find in the home in this particular community at this particular time. Third, the occupation must be engaged in by a person who is a resident in the house. Fourth, any consequential traffic, noise, or odor must not seriously damage the residential values of the neighborhood. And, fifth, the ordinance prohibits the sale of any goods except such as are made on the premises.

It is not altogether easy to decide in specific cases whether a proposed use is a customary incidental home occupation. During the seventeen months of our study the Board was required to make this determination in twenty-seven cases involving twenty-eight requests. Twenty-four of these requests for home occupations were granted; four were denied.

The applications granted requested permission for various types of home occupations: fourteen beauty shops, three repair

¹³⁶ Lexington Zoning Ordinance § 8.24. The entire section reads: *Accessory Uses Permitted When Authorized by the Board of Adjustment.* Customary incidental home occupations when conducted within a dwelling and not in any accessory building; provided, that no stock in trade is kept or commodities sold except such as are made on the premises, that not more than one person not a resident on the premises is employed, and that not more than one-fourth of the floor area of one story of the dwelling is devoted to such home occupation; provided further, that such occupation shall not require internal or external alteration, or involve construction features or use of mechanical equipment not customary in dwellings, and that the entrance to the space devoted to such occupation shall be from within the dwelling. One sign, containing the name and occupation only, not over one and one-half square feet in area and attached flat against the main building shall be permitted, at the discretion of the Board, in connection with such home occupation.

shops, two real estate offices, an accountant's office, an antique shop, a printing shop, a shop for fabricating rubber stamps, a business telephone for a washing machine repairman who did none of his work at home, and a permit for "breeding and merchandising tropical fish."

Operation of a beauty shop was the home occupation most sought after. The Board granted all such requests, except one where a beauty shop was forbidden by a deed restriction. While a beauty shop may perhaps reasonably be classified as a customary home occupation (the cases are conflicting), the Board's action is subject to criticism on another ground. The Fayette County Board of Health, in a letter to the Board,¹³⁷ strongly opposed any further permits for beauty shops in houses not connected to a public sewer. The increase in septic tank sewerage during the last few years has created a serious danger to public health in the Lexington metropolitan area. Nonetheless, after receipt of this letter, the Board granted three requests for beauty shops in houses that were not on a public sewer. In most of these cases there were strong protests from the neighbors, but to no avail.

Courts have generally excluded real estate offices¹³⁸ and public accountants' offices¹³⁹ from the classification of home occupations. If these are objectionable, it would seem that electrical and television repair shops and printing shops are even more objectionable. Yet the Board classified all of these as customary home occupations.

Of the twenty-four permits granted, ten were granted with conditions imposed by the Board. These conditions varied, but one which was present in all ten cases was that no one who was not a resident of the house could be employed there. In two cases, to cure the objection of the planning staff that there was inadequate parking space, the Board limited the number of customers allowed in the house at one time. In four cases, the Board limited the hours the business could remain open. And in two cases, the permits were granted subject to revocation if the operation interfered with neighborhood television or radio reception or the peace of the neighborhood. The building in-

¹³⁷ Minutes of the Board of Adjustment, Feb. 1961, p. 68.

¹³⁸ *E.g.*, *Village of Riverside v. Kuhne*, 335 Ill. App. 547, 82 N.E.2d 500 (1948).

¹³⁹ *E.g.*, *Kort v. Los Angeles*, 52 Cal. App. 2d 804, 127 P.2d 66 (1942).

spector's office said it would be difficult to enforce most of these conditions, but the Board was satisfied that the neighbors would complain if the conditions were broken. It may be asked, however, whether old neighbors will remember, and new neighbors know of, these conditions and whether setting neighbor against neighbor is really a satisfactory method of enforcement.

Denials. Four home occupation requests were denied. Two of them were denied, however, not on the ground that the proposed use was not a customary incidental home occupation, but on the ground that private restrictive covenants entered into evidence by protesting neighbors prohibited the use and therefore it would be useless for the Board to grant the request. The Board apparently has adopted a policy of not granting a permit for a home occupation where protestants introduce into evidence a deed restriction prohibiting it.¹⁴⁰ This policy appears unsound for two reasons. First, it is the function of a court, not the function of a board of adjustment, to decide whether the neighbors can enforce a private deed restriction. Enforcement turns upon some rather tricky legal doctrines of which the lay members of the board can have no understanding. In the *Application of Virginia Morris*,¹⁴¹ for instance, the deed was ambiguous. And petitioner's attorney argued that the deed could not be construed as excluding a beauty shop. Construction of deeds is a legal question, for which a lay board has no special competence. By deciding this question of construction and thereupon denying the permit, the Board seriously jeopardized petitioner's chances of getting a judicial determination of the matter. The Board should leave private law questions to the courts.^{141a} Second, it is the function of the Board to interpret the ordinance according to common sense and sound planning concepts, taking into consideration the factors mentioned at the beginning of this subsection. A deed restriction may be relevant to the question of interpretation only in a very limited way: many deeds containing private restrictions against, for instance, beauty shops

¹⁴⁰ In one case, however, where the deed restriction was entered into evidence by the planning staff and there were no protestants, the Board granted the application. James Barnett, Jan. 1960.

¹⁴¹ May 1961.

^{141a} Cf. *Perry v. County Bd. of Appeals for Montgomery County*, 211 Md. 294, 127 A.2d 507 (1956); *Chayt v. Maryland Jockey Club*, 179 Md. 390, 18 A.2d 856 (1941).

may be some evidence of what property owners regard as not a customary incidental home occupation. But one restriction is no evidence of the public mind. In any case, even if it could be proved conclusively by deed restrictions what the public thinks a customary home occupation is, this would not justify the Board's policy of turning to the public mind only when there is a deed restriction on the lot involved. If the public mind is to control the question of interpretation of the ordinance, it should control it regardless of whether there are restrictions on the particular lot in question.

The two requests denied as not being for customary home occupations were for a barber shop¹⁴² and a business telephone.¹⁴³ The exclusion of a barber shop as a home occupation accords with general practice elsewhere. The telephone case presented an unusual problem in defining home occupation. The petitioner, a used car salesman, wished to install a business telephone. He stated in his petition that no stock in trade would be kept or sold on the premises. Where the used cars would be kept he did not say. Seventeen neighboring property owners objected on the ground that he planned to use his front lawn as a used car lot, as they alleged he had done in the past. Petitioner denied that such was his intention, but he introduced no evidence of where the cars would be kept. The Board denied his request.

Conclusion. We came to the conclusion that the Board classified as a home occupation almost any occupation that can be performed in, and might occasionally be found in, a home. These home occupation permits were granted in the newer subdivisions as well as in the older areas. What effect they will have on the residential values sought in those areas remains to be seen.

B. NONCONFORMING USES

In discussing variances and special exceptions we have used the term "nonconforming use" to refer to any use of land that does not conform with the requirements of the ordinance, whether the nonconformity began before or after the date the

¹⁴² Morgan and Morgan, May 1961. *Accord*, Gold v. Zoning Bd. of Adjustment, 393 Pa. 401, 143 A.2d 59 (1958).

¹⁴³ A. C. Chandler, April 1961.

ordinance was adopted. This is in accord with the usage of the Board, which regards any nonconformity in the neighborhood as an important factor in determining whether to grant variances and exceptions. Here we deal with nonconforming uses in the technical sense: nonconforming uses that antedate the zoning ordinance. And the term "nonconforming uses" is used in this subsection only in this technical sense. Such nonconforming uses have been protected by the law on the theory that it would be unwise, and perhaps unfair, for the ordinance to have retroactive effect. If it did have retroactive effect, a developer would not be likely to risk his capital, which could be wiped out by an amendment at any time.

Under the enabling act any nonconforming "use of land . . . may be continued, and a nonconforming use of the building or structure may be changed to another nonconforming use of the same or more restricted classification."¹⁴⁴ The Lexington zoning ordinance, in accordance with the statute, allows a use of a nonconforming building or structure to "be changed to a use permitted in the most restricted district in which such nonconforming use is permitted."¹⁴⁵ But the ordinance, contrary to the statute, also provides that "any nonconforming use of land not involving any structure" and "any nonconforming sign, billboard and other similar structure valued at \$750.00 or less" within the city must cease or be removed within two years after the enactment of the ordinance.¹⁴⁶ These provisions, being contrary to the enabling act, are undoubtedly void.

Two other sections of the Lexington ordinance respecting nonconforming uses are of dubious validity. One provides that any nonconforming building destroyed or damaged by fire, flood, or act of God more than sixty-five percent of its fair market value may not be reconstructed.¹⁴⁷ This section appears to be in conflict with *Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment & Appeals*.¹⁴⁸ In this case the Court of Appeals

¹⁴⁴ Ky. Rev. Stat. § 100.355 (1960), added by Ky. Acts 1952, ch. 118.

¹⁴⁵ Lexington Zoning Ordinance § 5.221.

¹⁴⁶ Lexington Zoning Ordinance § 5.21.

¹⁴⁷ Lexington Zoning Ordinance § 5.223.

¹⁴⁸ 311 Ky. 663, 224 S.W.2d 658 (1949). The enabling act for first class cities was amended in 1948 to repeal provisions authorizing amortization of nonconforming uses and prohibition of structural alterations or additions to non-

(Footnote continued on next page)

held that because the enabling act permitted the continued nonconforming use of "land" as well as the continued use of "buildings," the land owner could demolish the existing structure and construct a new, larger building for carrying on his business. If the landowner can by his own action demolish and rebuild, a fortiori he can rebuild when his building is damaged by fire, flood, or act of God.¹⁴⁹ The other doubtful section of the ordinance provides that no building containing a nonconforming use shall be extended.¹⁵⁰ This too appears to be invalid under the *Butler* case, which held that a nonconforming "use of land" may expand within the boundaries of the original tract devoted to the nonconforming use. These sections of the ordinance were enacted prior to the 1952 amendment to the enabling act which allowed nonconforming uses of land to continue. Before 1952 the enabling act contained no provisions respecting nonconforming uses. These sections of the ordinance probably are now invalid, but they have never been repealed.

The Board of Adjustment was requested to grant building permits in two cases to petitioners who wished to alter or enlarge their nonconforming uses. In one the request was to replace an old sign on a nonconforming restaurant with a new sign.¹⁵¹ The Board granted the request, which action appears to be required by *Butler*. In the other case, the petitioner wanted to connect two adjacent houses, both of which were being used as nonconforming tourist homes called jointly the "Yokum Motel."¹⁵² The Board denied the request. This decision was contrary to *Butler*, which held a nonconforming use could be enlarged under the terms of the enabling act, and on appeal the Board's decision was reversed by the local circuit court.¹⁵³ The

(Footnote continued from preceding page)

conforming uses. Ky. Acts 1948, ch. 104. The enabling act provisions permitting continuance of nonconforming uses of land and buildings in first class cities were extended to second class cities in 1952. Ky. Acts 1952, ch. 118. In 1962 an attempt was made in S.B. 224 to authorize amortization of nonconforming uses, but the provision was deleted from the bill before it passed the General Assembly. For a critical analysis of Kentucky law respecting nonconforming uses, see Note, 49 Ky. L.J. 142 (1960).

¹⁴⁹ Cf. *Louisville & Jefferson County Planning & Zoning Comm'n v. Stoker*, 259 S.W.2d 443 (Ky. 1953).

¹⁵⁰ Lexington Zoning Ordinance § 5.225.

¹⁵¹ James W. Lucas, July 1960.

¹⁵² Nancy Yokum Wynn, April 1961.

¹⁵³ *Wynn v. Thompson*, Civil No. 9677, Fayette Cir. Ct. (Ky.), May 31, 1961.

Board cannot be fairly criticized for its decision in the Yokum Motel case, however, since it was applying section 5.225 of the ordinance as written. The Board has no power to consider whether the ordinance is valid. This section had never been expressly declared invalid by a court although it was inferentially invalid under the principle of the *Butler* case.

In one case the Board was called upon to determine whether a nonconforming use ran with the land. Petitioner desired to continue a nonconforming rest home which the present operator, because of ill health, was unable to continue.¹⁵⁴ In accordance with the legal principle that a nonconforming use runs with the land,¹⁵⁵ the Board granted the request.

In the last case involving a nonconforming use, the question was whether the petitioner had lost his right to a nonconforming use by abandonment.¹⁵⁶ This is a fact question, requiring, *inter alia*, a determination of intent to abandon.¹⁵⁷ The Board found petitioner did not intend to abandon his business use even though he had rented part of his empty grocery store for several years to the Newman Club.¹⁵⁸ The decision of the Board was supported by substantial evidence, and on appeal it was affirmed by circuit court.¹⁵⁹ (The minutes of the Board indicate that one member was influenced by the claim that petitioner, if he lost, would be "at the mercy of the University of Kentucky."¹⁶⁰ The University was threatening to, and did thereafter, condemn the petitioner's land for a parking lot. The result of the Board's decision was that the University had to pay a slightly higher price for the lot).

C. MISCELLANEOUS

In eight cases the Board was asked to interpret miscellaneous provisions in the ordinance. In the first case¹⁶¹ the question was what constituted a "trucking terminal" which is expressly

¹⁵⁴ Mary Hensley, April 1960.

¹⁵⁵ 2 Rathkopf & Rathkopf, *op. cit. supra* note 24, at 58-8.

¹⁵⁶ Lexington Zoning Ordinance § 5.222 provides that the right to a nonconforming use is lost if it is "voluntarily discontinued" for two years.

¹⁵⁷ City of Bowling Green v. Miller, 335 S.W.2d 893 (Ky. 1960).

¹⁵⁸ S. C. Guilfoyle, Feb. 1960 (Thompson dissenting).

¹⁵⁹ Commonwealth v. Johnson, Civil No. 8171, Fayette Cir. Ct. (Ky.), April 21, 1960.

¹⁶⁰ Minutes of the Board of Adjustment, Feb. 1960, p. 10.

¹⁶¹ Malvern Bell, April 1960.

prohibited in a general business (B-4) district.¹⁶² The petitioner operated Red Arrow Delivery, a delivery service firm which picks up packages at local stores, takes them to its "terminal" for separation, then delivers them to private homes. The trucks used in the business are not tractor-trailer trucks, but are usually panel trucks. The Board decided a "trucking terminal" did not include a Red Arrow terminal, on the theory that it was not the kind of "trucking terminal" intended to be prohibited in a B-4 district. Accordingly, it granted the permit.

In the second case¹⁶³ the question was whether the Fugazzi Business College was a "school or college for academic instruction," which is permitted in any residential district.¹⁶⁴ The Board held it was.¹⁶⁵ The Fugazzi Business College is a private profit-making institution which offers day and night courses in typing, shorthand, bookkeeping, the use of business machines, business law, and business English. It occupies one building and has no dormitories. It is, in short, a secretarial school. Similar schools can be found in most cities. Had the ordinance permitted any "school" in a residential district, the Fugazzi operation probably would have qualified. The proper test is whether the so-called school is consistent with the residential uses in the area, bearing in mind the purpose of the ordinance in allowing schools in residential areas despite the inconveniences of noise and traffic to the neighborhood. But here the ordinance expressly limited permissible schools to those "for academic instruction." The question, then, is whether or not a profit-making organization teaching white-collar skills is a "school for academic instruction." The word "academic" implies a curriculum of science, liberal arts, or professional knowledge as distinguished from mere skill. On the other hand, the courses taught at the Fugazzi Business College are part of the curriculum of many admittedly academic

¹⁶² Lexington Zoning Ordinance §§ 15.41, 18.4.

¹⁶³ Fugazzi Business College, Sept. 1960.

¹⁶⁴ Lexington Zoning Ordinance § 7.15.

¹⁶⁵ A letter to the Board, signed by Virgil F. Young, president of Fugazzi Business College, is a masterpiece of words-of-one-syllable and should not be lost to posterity. It reads:

It is true that a business college is not normally thought of as an academic college. Neither is a business college a vocational school. It is more academic in nature than vocational since its subjects are economic in nature plus the learning of office skills. We believe then that whether our type school is academic is in fact an academic issue itself and for that reason we believe permission to build should be granted.

schools, including the College of Commerce of the University of Kentucky. However, reference to only part of the curriculum of an academic institution cannot be a proper test, else so-called schools for carpentry, tinsmithing, nursing, dancing, and music (courses offered in many high schools and colleges) qualify. The proper test appears to be whether the curriculum of the secretarial school is similar to the primary curriculum of an academic institution, not to some incidental part. Even under this test, however, it is sometimes—as in this case—difficult to determine what is a “school for academic instruction.” In view of the mixed uses in the area in which Fugazzi wanted to locate, the Board’s determination that it was “a school for academic instruction” seems not unreasonable.¹⁶⁶

In the third case¹⁶⁷ the Board was asked to interpret distance requirements. The petitioner wanted to open a bar in a B-1 district, which is permitted if the “drinking establishment” is “located not less than 100 feet from any Residence district.”¹⁶⁸ The barroom itself was to be some 175 feet from a residential district, but it was to be located in a building which was within 100 feet. The Board decided that 100 feet were required between the barroom and the residential district, not between the outer walls of the building in which the barroom was located and the district. Therefore it granted the petition.

In the fourth case¹⁶⁹ there was a dispute over the location of the zoning district line on the zoning map. Petitioner claimed his lot was in a business rather than a residential district. The Board agreed.¹⁷⁰

¹⁶⁶ Strother Kiser, Fugazzi’s attorney of record, was a member of the Board, having been appointed one day before the Board ruled on the case. The minutes state he disqualified himself from “acting” in the case.

¹⁶⁷ Chakers Theaters, April 1961.

¹⁶⁸ Lexington Zoning Ordinance § 12.17.

¹⁶⁹ Charles Cossett, Sept. 1960.

¹⁷⁰ Strother Kiser, Cossett’s attorney of record, was appointed to the Board the day before the Board ruled on the case. The minutes read:

Mr. Kiser disqualified himself from acting in this case because he is attorney for the appellant on this appeal. Mr. Kiser told the Board that Mr. Cossett had previously proposed to locate a liquor store on this site but that he has entered into a contract to sell the liquor license and that a liquor store will not be located on the property. . . . [Protestants then asked that a restriction be put in the deed prohibiting a liquor store.] Mr. Kiser said that his client would not agree to such a deed restriction.

Minutes of the Board of Adjustment, Sept. 1960, p. 43. Under Canon 31, of the American Bar Association’s Canons of Judicial Ethics it is improper for a

(Footnote continued on next page)

The other four miscellaneous cases involved questions of whether or not a miniature golf course was of the same general character as the uses permitted in a neighborhood business district¹⁷¹ and whether or not Go-Kart tracks were of the same general character as the uses permitted in general business and industrial districts.¹⁷² In each instance the Board answered the questions affirmatively.

The decisions in these miscellaneous interpretation cases were all within the realm of reasonableness and within the limits of the Board's discretion.

V. STATISTICAL SUMMARY

We present here a table showing the number of petitions granted and denied, classified by type of case. These figures are not very significant by themselves. They do show that a high percentage of the petitions were granted, but if all these petitions were properly granted there can be no valid criticism of the Board on the ground that the percentage is high. In the nonconforming use cases, for instance, the Board granted three out of four petitions. But the law required granting all the petitions; the one petition denied was reversed by circuit court. The fundamental question is whether or not the Board acted on each petition in accordance with law, and without substantial injury to the neighborhood and community values, not whether it granted "too many" or "too few" petitions.

Although the data available for comparison are limited, the percentage of variance petitions granted by the Lexington Board (75%) seems generally in line with the percentage granted by boards elsewhere. In Los Angeles during 1960, 63% of the use variance, and 76% of the bulk variance, applications were granted.¹⁷³ In Cambridge, Massachusetts, during 1952, 84% of the use variance, and 86% of the bulk variance, applications

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judge to appear as an attorney in a court in which he is judge. This standard is equally applicable in principle to members of administrative boards. Cf. *Sims v. Bradley*, 309 Ky. 626, 218 S.W.2d 641 (1949); Rathkopf & Rathkopf, *op. cit. supra* note 24, at 22-5 to -12.

¹⁷¹ James Music, April 1961.

¹⁷² M.A.C. Corporation, May 1961; D.L.S. Amusement Co., April 1961; Roy L. Gower, April 1960.

¹⁷³ Los Angeles City Planning Commission, 1960 Accomplishments 43 (1961).

Type of case	No. of petitions	Granted	Denied	Percentage granted	Percentage denied
Use variance	12*	3	7	30%	70%
Bulk variance					
Other than signs	51	44	7	86%	14%
Signs	41	29	12	71%	29%
Special exception	17	15	2	88%	12%
Temporary use	6	5	1	83%	17%
Home occupation	28	24	4	86%	14%
Nonconforming use	4	3	1	75%	25%
Miscellaneous	8	8	0	100%	—
TOTAL	167*	131	34	79%	21%
Planning staff recommendations	159**	69	90	43%	57%

* This figure includes one petition that has not yet been finally disposed of and one petition that was granted as a use variance although the use was permitted as a special exception in the district. Neither of these cases is reported as "granted" or "denied." Both are excluded in computing percentages.

** The planning staff made no recommendation in eight cases.

were granted.¹⁷⁴ In Austin, Texas, during 1946, 67% of all variance applications were granted, while in Milwaukee during that same year 74% were granted.¹⁷⁵ During the period 1926-37, 77% of all variance applications were granted in Cincinnati.¹⁷⁶ Since the various applications from city to city are likely to involve similar patterns of facts, these statistics may be some evidence that the factors which move the Lexington Board to grant variances and exceptions move boards elsewhere.

VI. CONCLUSIONS

In order to evaluate the operations of the Board of Adjustment it is necessary to keep in mind what the function of a board of adjustment is supposed to be under our present Euclidean zoning system. The board was originally conceived as a device to avoid constitutional problems which might be raised when broad, general regulations imposed an unusually severe hardship upon an individual landowner because of the uniqueness of his lot. The board was not instituted to achieve flexibility. Variances were not to be granted merely because the proposed use did not involve a substantial departure from the comprehensive plan nor injuriously affect the adjoining land.

¹⁷⁴ Haar, Land-Use Planning 296 (1959).

¹⁷⁵ *Administration of Zoning Variances in 20 Cities*, 30 Pub. Management 70 (1948).

¹⁷⁶ American Society of Planning Officials, *Zoning Changes and Variances*, Bull. No. 43, p. 3 (April 1938).

Unnecessary hardship, not insubstantial harm, is theoretically the touchstone of the board's jurisdiction.

According to traditional zoning theory, a board of adjustment, unlike a planning commission, does not make broad planning policy. It makes policy only interstitially, as courts make policy, by deciding individual cases within a framework of laws and regulations constructed by others. Operating in a quasi-judicial capacity, the board is not at large to decide cases by its own notions of desirable land use or its personal preferences respecting land use policies. This is in no way gainsaid by the fact that the members of a board are not necessarily law-conditioned and therefore are not expected to apply the strict rules of evidence and procedure a court applies. They are expected to recognize the limitations on their powers set forth in the zoning ordinance and in the enabling act, and to develop and apply techniques and safeguards which will tend to assure citizens equal protection of the law. Otherwise, a board, no less than a court, will lose the confidence of the public. And the democratic process, which is based on rule by law and not by caprice, is endangered.

The problem we have been studying is how well the Lexington Board of Adjustment has fulfilled its function. Our general conclusion is that the Board has not operated in such a manner as to assure citizens equal protection of the law. It has not, during the seventeen months of our study, produced a pattern of consistent, sound, and articulate judgments. Nor have its operations assured the public that the comprehensive plan is not being thwarted through the variance device. We do not mean by this to imply any personal criticism of the individual members of the Board. To the best of our knowledge they are all honest men and good citizens, serving without pay in a thankless job. Our criticism goes to the institution, which we find is functioning badly. We herein seek to indicate why.

A. THE ISSUES BEFORE THE BOARD OF ADJUSTMENT ARE NOT MADE CLEAR BY THE PETITIONERS OR BY THE BOARD

The issues involved in the cases before the Board (Is the property unique? Is this a self-created hardship? Can the problem be handled by general regulations? Etc.) are not made clear

by the parties or by the Board. Petitioners often are not represented by counsel and have no idea what the limits of the Board's power are or what legal standards are applicable to the case. They sometimes assume the Board sits like a Turkish *cadi* dispensing justice out of an unwritten Koran. It is not too much to say that some lawyers appearing before the Board also are unfamiliar with zoning law, which has developed so rapidly over the last thirty years. The form letter of appeal, given petitioners by the building inspector, does not indicate what legal grounds there are for hardship and what evidence they will be expected to produce. As a result of their lack of understanding of the law, petitioners come ill-prepared to focus on an issue and often do not realize they have a burden of proof. This, coupled with informality of procedure, can lead to meandering discussion, confusion, misunderstanding, and public dissatisfaction.¹⁷⁷

One of the techniques evolved by courts for steadying discussion is to draw the issues sharply. This brings a focus to discussion and a realization by the parties of the precise problem. No matter which way the court decides the issue, the parties have the satisfaction of knowing they have had a chance to convince the court on the issue it regards as controlling. And because the issue is drawn carefully, the decision can serve usefully as a precedent.

Doubtless a board of laymen cannot draw an issue as sharply as a law-trained judge. But under present Board procedure issues are frequently not drawn at all, and seldom in advance. Most petitioners filed petitions which showed no more recognition of the legal issues involved than is shown by the following statement, which was commonly inserted as a reason for hardship: "This property is well-suited for the purpose for which

¹⁷⁷ For some shortcomings of procedure, see Note, 48 Ky. L.J. 304 (1960). The position is there taken that hearings of the board of adjustment are similar in nature to hearings of the planning commission and suffer from the same inadequate procedural standards. In view of their different functions, however, it may be contended that the board's procedure should approximate judicial procedure more closely than should the procedure of the commission.

Public dissatisfaction with the operations of the Board of Adjustment has bubbled up in several editorials in the Lexington Herald and the Lexington Leader over the past few years and in outspoken comment by, among others, a leading merchant and the head of a prominent building supply house. See Graves & Schubert, *The Adjustment Sieve*, 3 (Lexington) Citizens Association for Planning Bull. No. 3, March 1961.

we intend to use it." One primary reason why issues are not drawn carefully is that the Board does not insist on it. Another is that the legal requirements for a variance have not been adhered to nor have substitutional standards been articulated by the Board. To phrase an issue requires reference to a standard of some sort.

B. THE BOARD FREQUENTLY DOES NOT FOLLOW THE LAW
APPLICABLE TO VARIANCES

(Herein we suggest what does move the Board.)

Here is the heart of the matter. In section II of this article we set forth the basic evidence that the Board is not functioning properly under our Euclidean zoning system. In our examination of the variance cases, we attempted to test each one by the legal requirements for a variance. We found that in a majority of these cases, and particularly where a sign variance was requested, scant attention was paid to the applicable law. The ordinance also expressly requires specific findings of fact before a variance can be granted. In very few cases were these findings reported in the minutes.^{177a}

Having concluded that the Board did not insist that the legal requirements for a variance be met, we attempted to determine on what grounds the Board was deciding cases. Since the Board seldom gave reasons for its actions, the quest for determining factors had to proceed without the benefit of much illumination from the Board. We undertook to specify a list of variables and test these by our observation of the Board's action and the meager information that could be gleaned from the petitions and the minutes. The ones which seemed to affect decision are set forth below. This is a limited list. It excludes variables that probably affected, or would affect, decision but for which no significant correlation during the period of our study could be discovered. Among these variables are representation by counsel; ability of the advocate to run persuasive legal, policy, and planning arguments; moral, social, economic, and planning

^{177a} After this article was set in type, a study of the Alameda County, Calif., Board of Adjustment appeared in Comment, 50 Calif. L. Rev. 101 (1962). It states "that the zoning ordinance is being administered without regard to statutory requirements" (*id.* at 107), and comes to conclusions about the Alameda County Board which closely parallel our conclusions about the Lexington Board.

policy propositions, stating how values ought to be distributed, advanced at the hearing;¹⁷⁸ all the social, business, and class identifications and demands of individual board members; the personal, business, and social relationships of board members to individual petitioners; and, of course, all the "gastronomic" factors relating to a member's attitude and sense of well-being at a particular hearing.

Moreover, the effect upon decision of those variables for which we found some correlation could not be measured precisely. The Board's approach in dispensing variances is basically *ad hoc*. Each case tends to be decided as an individual case, with no view to precedent. Adventitious factors can come into play and upset any system of assigned weights. Therefore the following variables are presented as probable, but unweighted, counters in decision.

(a) *Who the petitioner is.* Experienced builders and realtors seemed almost invariably to succeed in their petitions.¹⁷⁹ A high degree of success was also obtained by established businesses which wanted to expand or to advertise. The success of these persons was not due to better prepared petitions nor, so far as we could ascertain, to more competent advocacy at the hearings. But it could have been merely fortuitous. The other variables might have worked to the same result irrespective of who the petitioner was. Nonetheless, it is possible that the high incidence of success by established businessmen was attributable to the fact that the Board members have identifications with, and perspectives of, the same business and social groups with which these particular applicants identify.¹⁸⁰

The Board members are, or provide professional services for, businessmen. One of the ideological propositions widely shared

¹⁷⁸ "Moral evaluation of legal doctrine may have more influence on . . . [administrative boards] than on the courts because they are less influenced by precedent and more responsive to morally impressionable popular will than the courts." Johnstone, *Judicial Consideration of Moral Doctrine in Government Land Use Control Litigation*, 8 Kan. L. Rev. 1, 17 (1959).

¹⁷⁹ The only well-known builder who did not succeed in getting a variance or a special exception was George Young, Inc. See text accompanying note 128 *supra*.

¹⁸⁰ Compare Horack & Nolan, *Land Use Controls 176-77* (1955): "The temptation of the members of such boards [of adjustment], particularly in the community where almost everyone is known to everyone else, is to play the good fellow and substitute for the tests specified in the statute and ordinance the following: (1) Will the variance help the applicant, and (2) are the neighbors complaining?"

by businessmen, and occasionally articulated by one or more members of the Board, is that each businessman ought to be able to decide what is best for his business. Yet this proposition, unqualified, would not seem to be a sound basis for granting variances. What is best for one business is not necessarily best for the community. One of the primary purposes of zoning is to prevent one landowner from injuring his neighbors or the community, however profitable a proposed use may be for him. The legislative judgment of when a use causes the community harm is embodied in the zoning ordinance. By frequently overriding this judgment in response to claimed needs of individual businesses, the Board may have become insensitive to planning considerations, including the long range objectives of the comprehensive plan and the impact of one individual's land use upon other land and upon community values.

(b) *Claim of competitive disadvantage.* For clarity we list this as a separate factor, although it is closely related to the first. So frequently did business petitioners who were successful in their application claim that without a variance they were at a disadvantage with business competitors in the area or across the city, we emphasize the probable importance of this claim by listing it separately. The courts have frequently held that it is improper to grant a variance merely because the proposed use of the property would be more profitable.¹⁸¹ The reason is that zoning, by prohibiting specified uses of property, necessarily takes the economic potential of the prohibited use away from the landowner. Thus, if economic disadvantage were held to be an unnecessary hardship, the petition for variance would always have to be granted; zoning would be merely a voluntary system. Is "competitive disadvantage" the same thing as "economic disadvantage?" Is it merely the reverse side of "greater profit?"

(c) *Filling station sign variances.* From September, 1960, to June, 1961, (the end of our study), the Board granted nine out of nine requests for filling station sign variances. These requests covered many different fact situations: signs too large, signs too close to the property line, signs over the roof, signs in older

¹⁸¹ See text accompanying note 16 *supra*.

areas with nonconforming signs, signs in newer areas with conforming signs, signs illegally erected without a permit. The Board made no discriminations in context; apparently the controlling factor was simply that this was a petition for a filling station sign variance. These cases have been analyzed in section II(c)(2) above.¹⁸² We see no reasonable relation between this factor and any proper ground for a variance.

(d) *Nonconforming uses in the neighborhood.* The presence of nonconforming uses or structures in the neighborhood was usually given great weight by the Board in all kinds of cases except those involving home occupations. Where there were such nearby uses, the petitioner's chances of a favorable ruling were materially increased. The number of nonconforming uses—whether many or few—did not seem very important. One or two were sufficient to start this factor operating in petitioner's favor. Whether this is a sound standard is open to question. The basic assumption of orthodox zoning law is that conformity of uses is desirable; many cities have attempted to eliminate existing nonconforming uses by various restrictive and harassing schemes. To grant variances on the ground of nearby nonconforming uses undercuts this basic policy and results in creeping nonconformity and, perhaps, deterioration of the district. It tends to bring about complete nonconformity where the Board, for legitimate reasons, grants one variance. Witness the sign variance cases, where one variance became the camel's nose under the tent. If homogeneity of uses is not to be treated as a goal of planning, it would seem that the planning commission and the city council, not a board of adjustment, should make this decision.

(e) *Insubstantial departure from the zoning ordinance.* If a proposed use did not, in the Board's opinion, substantially affect the comprehensive plan, the petition was likely to succeed. Only 30% of the petitions for use variances were approved, whereas 86% of the petitions for bulk variances were granted. "Insubstantial departures" might be illustrated also by the home occupation and temporary use petitions, which were granted rather freely.

¹⁸² See pp. 297-301 *supra*.

Although insubstantial departure alone is not enough to qualify legally for a variance, in a rational, flexible system of land use control it would clearly be an important variable. It may cause difficulty, however, unless it is evaluated with an eye firmly fixed on the comprehensive plan. If one person wants to make an insubstantial departure, it may be *de minimis*; but if many people want to make the departure the comprehensive plan may begin to unravel. Then, what is "insubstantial"? Lay boards and planning experts may evaluate the circumstances differently. For certain the Lexington Board and the planning staff did not see eye to eye. In two-thirds of the cases where the planning staff, taking into account the effect of the variance on the comprehensive plan, recommended denial, the Board granted the variance. If a building permit is to turn on a criterion as vague as this, the determination should be made by persons who thoroughly comprehend the goals of the community and the various interrelations and effects of uses on one another.

(f) *Injury to the neighborhood.* In a few cases the decision apparently turned on the Board's belief that the proposed use would be positively harmful to the neighborhood. These cases include keeping goats in an R-3 district, moving an old house onto a too-small lot in a new residential neighborhood, using a residential front yard as a used car lot, crowding three families into a one-family house in a slum neighborhood, and establishing a laundry pick-up station in an R-3 district. Use of this factor in dispensing variances is sound. One of the legal requirements for a variance is that the variance not substantially injure the adjoining land.

(g) *Protestants.* The Board granted 63% of the petitions where there were protestants, compared with 85% granted where there were no protestants. Where neighbors favored the petition or said they had no objection provided certain conditions were met, the Board granted 91% of the petitions. (The number of protestants, which ranged from 1 to 120, seemed to have no significant correlation with result.) Giving weight to neighborhood opposition in a quasi-judicial hearing presents certain difficulties. On one hand, protestants may present facts and arguments of which a board is unaware. But mere opposition in and by itself is only indirectly relevant to the question of individual hardship, which

is what the Board is supposed to be deciding in variance cases. It is only some evidence that the neighbors think the variance will have an adverse effect upon the values in the neighborhood. Where there is no opposition it may be the result of inertia or the neighbors may themselves be desirous of applying for a variance at some future date. From an absence of opposition no inferences can be drawn that will support either granting or denying a variance.

If the Board were empowered to make community planning policy or if it were given wide, flexible powers of administration, public support or opposition would be quite important. In legislative and administrative matters the *vox populi* should be heard. Inasmuch as the Board took a broad view of its powers and did not confine itself to a purely adjudicative function, the amount of attention it paid to protestants was surprisingly small.¹⁸³

(h) *Planning staff recommendations.* We list this as a factor, although it may be negligible when the recommendation is for denial of a variance. Of 102 requests for variances, the staff recommended denying 75. The Board denied 26. On the other hand, where the staff recommended granting the variance the Board's action was almost always in accord. The staff recommended granting 25 requests for variances; the Board granted 23 of these requests.

The fact that the Board and the staff were so often at odds gives pause. Was it because the planning staff was applying the legal requirements for a variance, and the Board viewed these requirements as inflexible and unworkable? Or was it because the objectives and values of the comprehensive plan had not been communicated by the staff to the Board? Or was it because the Board was insensitive to planning considerations? We suspect the truth would be an amalgam of three affirmative answers.

(i) *Persistence of petitioner.* Where a petitioner, once denied, applied for a rehearing or applied a second time for a

¹⁸³ The weight accorded protestants by the Lexington Board appears to be much less than that accorded protestants elsewhere. For example, in Philadelphia during a nine-week period in 1954, the board of adjustment granted only 23.9% of variances requested where protestants appeared, compared with 78.7% where there were no protestants. Note, 103 U. Pa. L. Rev. 516, 542 nn. 189, 190 (1955).

variance, his chance of success increased. The board heard fourteen such petitions and reversed itself in ten. The evidence in most of these reversals was substantially the same as was produced on first hearing.¹⁸⁴

(j) *Uniqueness of property.* Where the Board denied a variance, it sometimes stated there was nothing unique about the property, apparently resting on one of the legal requirements for a variance. On the other hand, the uniqueness of the property was seldom mentioned when a variance was granted. Thus one could say that petitioner must prove his hardship is unique if the other factors do not work to his advantage.

Obviously this list of vague variables is of limited use to a person who is interested in predicting the Board's response to a wide variety of fact situations. It is, in a sense, more telling in what it omits than in what it includes. Yet further delineation is hopeless until the Board itself becomes more articulate. Without help from the Board, generalities in the process of refinement dissolve into pure conjecture.

C. THE FAILURE OF THE BOARD TO FIND FACTS AND STATE REASONS SERIOUSLY INHIBITS THE DEVELOPMENT OF A SYSTEM OF ADMINISTRATIVE CASE LAW WHICH ASSURES PETITIONERS OF EQUAL TREATMENT

In any system of *ad hoc* decision-making serious problems of equal protection of the law arise. As indicated above, the Board has to a very large extent shifted to an *ad hoc* system of variance granting. Whatever one may say about the legality of the Board's action in failing to follow standards laid down by the enabling act, the ordinance, and the courts, justice could still be dispensed if the Board promulgated standards of its own making or articulated in each case the substantive factors it considered critical. But it has done neither. The public and the petitioners are not candidly told in advance of a case what factors really move the Board, nor are they told afterwards. To be blunt, why the Board behaves as it does is anyone's guess and anyone's rumor.

¹⁸⁴ In *Sipperley v. Board of Appeals on Zoning*, 140 Conn. 164, 98 A.2d 907 (1953), it was held that a zoning board of appeals has no power to reverse itself unless a change of conditions has occurred since the prior decision or some material new factor then nonexistent has arisen.

The procedures for reporting the Board's actions have not led to a slow case-by-case evolution of standards, which is the least the common law tradition of justice demands. The minutes are inadequately informative. They include, along with the formal orders of the Board, only what evidence or remarks a secretary chooses to include as important or interesting. There is no oral or written opinion by the Board telling interested persons why the decision is right or wise.¹⁸⁵ Nor are there any formal findings of fact or conclusions of law.

Without findings of fact or a statement of reasons for the decision, case-by-case development of standards is near-impossible. After thirty years of Board of Adjustment decisions property owners are as much in the dark about what moves the Board as they were when the Board was organized in 1931. Contrary to what some administrative law writers have claimed with respect to federal agencies,¹⁸⁶ an adequate explanation of decision is not, with respect to local zoning boards, needed primarily to serve as a basis for judicial review. Only two of the 167 cases in our study were appealed. Rather it is needed for the development of a reliable body of precedents and for some assurance of equal protection of the law.

One of the safeguards the common law developed against arbitrary decisions is the practice, usually adhered to, of judges giving reasons or opinions. This requires a judge to justify his decision by doctrine, statute, policy, or logic, with an eye to previous cases with similar facts. Opinion writing thus generates a compelling pressure toward continuity and equal protection of the law.

Under section 8(b) of the federal Administrative Procedure Act federal administrative agencies are required to give a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented."¹⁸⁷ A comparable requirement of findings of fact and conclusions of law can be found in section 12 of the Revised

¹⁸⁵ Failure to give reasons appears to be a characteristic of board practices throughout the country. Professor Haar has noted: "During the year 1952, Cambridge granted 43 use variances, denied 9; granted 51 bulk variances, denied 8. (Incidentally, no decision, either affirming or denying a grant, made any mention of the reasons for the Board's action.)" Haar, *op. cit. supra* note 174, at 296.

¹⁸⁶ See 2 Davis, *Administrative Law Treatise* §§ 16.05, 16.12 (1958).

¹⁸⁷ 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958).

Model State Administrative Procedure Act applicable to state administrative agencies (not adopted in Kentucky).¹⁸⁸ There is no statutory requirement in Kentucky or in most states, however, that local zoning boards set out findings, conclusions, or reasons. Nor have courts generally seen fit to require any of these except as a basis for review in cases that are appealed.

We believe a strong argument can be made that a decision by a local administrative board staffed by laymen, which omits any findings or conclusions or reasons and merely states the petition is "granted" or "denied," denies due process of law. There are some decisions of the United States Supreme Court¹⁸⁹ and of state courts¹⁹⁰ which would support this view. Modern commentators, however, generally take the position that the Constitution does not require administrative findings or statement of reasons; they view the Supreme Court cases as abandoned ships.¹⁹¹ They support this position with an analogy to the practice of judges not to give findings, reasons, or opinions in several kinds of cases. As persuasive as this position is with respect to federal administrative agencies, we are not entirely convinced that no stricter guarantees of due process should be required of local zoning boards than are required of federal agencies and courts. Members of the zoning board of adjustment usually lack both the law-conditioning of judges and the expertise of federal administrators. They are subject to great pressure from people whom they know personally and with whom they do business—pressure which evidence shows they cannot resist half so effectively as independent and salaried judges and federal administrators. Proceedings before a zoning

¹⁸⁸ The statutory requirements in Kentucky respecting administrative findings, conclusions, reasons, and records differ for each state administrative agency and are chaotic. See Kentucky Legislative Research Commission, Report on Kentucky Administrative Procedure Legislation, June 22, 1961, S.B. 354, a bill which failed of passage in the 1962 General Assembly, would have established a uniform administrative procedure in Kentucky based upon the Model Act.

¹⁸⁹ *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Wichita Ry. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48 (1922).

¹⁹⁰ *E.g.*, *Laney v. Holbrook*, 150 Fla. 622, 8 So.2d 465 (1942); *A. Dicillo & Sons v. Chester Zoning Bd.*, 98 N.E.2d 352 (Ohio Ct. of Com. Pleas, 1950). *Cf. Reeves v. Jefferson County*, 245 S.W.2d 606, 610 (Ky. 1952), where the court said, "The order as entered by the Commission was supported by essential findings and in keeping with constitutional and legislative requirements." See also *Louisville & N.R.R. v. Commonwealth*, 314 S.W.2d 940 (Ky. 1958).

¹⁹¹ See 2 *Davis*, *op. cit. supra* note 186, at §§ 16.04, 16.12.

board are ordinarily *ex parte*, with no high-priced expert counsel representing the petitioner and with no adversary ready to appeal any misapplication of law. And unlike federal agencies that deal with cases of great national interest, zoning boards have not come under the scrutiny of administrative law experts, legislative committees, and newspaper reporters. Thus many of the factors which combine to steady judicial and federal administrative decisions even without findings, reasons, or opinions are missing. When the climate surrounding decision making is different, it is arguable that the constitutional requirements for due process of law should adjust accordingly. A state court may, of course, interpret the due process clause of a state constitution to require more in the way of procedural guarantees than are required by the same clause of the federal constitution.

In this connection the procedure of local planning authorities in England may be worth noting. There, before any structure may be built or any existing use changed, planning permission must be granted by the local planning authority. This authority has broad discretionary power to grant or deny permission. But Parliament has provided numerous safeguards against the unbridled use of power. Two are especially pertinent here. First, every local planning authority is required to have a development plan, which provides policy guidelines for the exercise of discretion.¹⁹² This plan is far more articulate than most comprehensive plans in this country in detailing reasons why specified land uses are desirable and in setting forth information from which an intelligent prophecy of decision can be made. Second, if planning permission is granted subject to conditions or is refused, the local authority must give a written statement of reasons.¹⁹³ While the English have no written constitution as such, their traditional conventions of "natural justice," which is roughly equivalent to our "due process," require a statement of reasons for a planning refusal. Moreover, any applicant denied permission may demand an inquiry, which is a *de novo* hearing by an inspector appointed by the Minister of Housing and Local Government. The inspector

¹⁹² Town & Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51, § 5(1).

¹⁹³ Town & Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958).

renders a written report, on the basis of which the Minister may sustain or reverse the local authority's decision.

This procedure protects the individual. No case can be decided against him without his knowing why.¹⁹⁴ The public interest is protected from local abuse of discretion by the policy guidelines set forth in the development plan and by the broad supervisory powers of the Minister. The Minister is authorized to tighten restrictions on, or wholly prohibit, the granting of planning permissions by local authorities in any particular area or in any particular cases. He has a general default power to act himself if the local authority does not operate in a manner he deems satisfactory. And the Minister, of course, must answer in Parliament for his actions. An essential element in English "due process" is that everyone with power must answer to someone; individuals must be told why the state is restraining them in the use of their land.

The main objection advanced against requiring a statement of reasons by a zoning board is the time required. Even assuming that the amount of time available should override traditional safeguards of liberty, this objection may be overcome. Boards could follow the practice of some English courts and deliver oral statements, transcribed by a stenographer. If this practice is not feasible, consideration should be given to putting the variance power in a body which does have time to give reasons. Otherwise the board of adjustment can, and does, rule with no practical limits on its discretion.

If boards of adjustment are to be continued in their present form and are expected to operate in accordance with the prescribed legal standards of Euclidean zoning, a requirement that a board, before it grants a variance, must make a written finding that petitioner does not receive a reasonable return from, or have a reasonably beneficial use of, his property—coupled with a requirement that the board must in every case give a full and adequate statement of its reasons—might do more than

¹⁹⁴ However, local authorities appear to have fallen into the practice of stating perfunctory reasons. See Report of the Committee on Administrative Tribunals and Inquiries (the Franks Committee), Cmd. No. 218, July 1957. The Franks Committee recommended that a full and adequate statement of reasons be required. The Minister of Housing and Local Government has attempted to implement this recommendation in Circular No. 9/58, Feb. 27, 1958.

anything else to make a variance procedure within a Euclidean zoning system work. In section VII we shall suggest that the premises of Euclidean zoning are unsound and that it is unrealistic to expect a board of adjustment to operate within the narrow legal confines of that system. If the necessity of wide discretionary powers is recognized the requirement of an adequate explanation of decision becomes even more imperative.

D. THE BOARD'S VIEW OF ITS FUNCTION IS NOT WHOLLY COMPATIBLE WITH ITS DUTIES AND ITS RESPONSIBILITIES

One commentator has said that boards of adjustment commonly "see their function as a broker for the individual citizen against the inevitable comprehensiveness of the law."¹⁹⁵ This observation might well have been made of the Lexington Board of Adjustment. During the seventeen month period of our study the Board was composed of two lawyers, two businessmen, an architect and a real estate dealer. Quite naturally most of these men moved freely among, and had business connections with, persons in the building industry and property-owning citizens at large. One does not take the veil or the robe when he goes on a board of adjustment. He is not retired from the business world, as judges are.

The fact that a board of adjustment is a lay board, composed largely of businessmen, results in a profound difference in attitude from that of a court. While the ideal is that board members should be as genuinely dispassionate and objective as judges, as a practical matter this is impossible. The independence of full-time professional judges is secured by traditions, influences, and motivations which do not beat upon the consciousness of a part-time lay board of adjustment. Board members who have the same general perspectives as the litigants who appear before them simply cannot meet one afternoon a month and for that one session slough off all their identifications with the business community and the propertied class acquired over the other twenty-nine days. For good psychological reasons they cannot every thirtieth day see themselves as impartial officials enforcing an impartial law.

¹⁹⁵ Frost, *The Trouble with Zoning*, 47 Nat'l Munic. Rev. 275, 277 (1958).

Perhaps because they assume their role with attitudes different from a judge's, some members of the Lexington Board have occasionally acted with doubtful regard for the spirit of judicial proprieties. One member sat and voted in favor of a variance for a building for which his firm was the architect.¹⁹⁶ Another member erected a sign in violation of the ordinance and then applied for a variance, submitting no reasons therefor; the variance was granted.¹⁹⁷ Another member represented a client at a hearing before the Board.¹⁹⁸ And in an unusual display of irritation the Board "ejected" from its April, 1961, meeting the former president of the Lexington Citizens Association for Planning, Richard Schubert, who was sitting as an observer.¹⁹⁹ More recently, one member, casting aside the traditional judicial unwillingness to defend decisions outside of court, replied to a newspaper editorial mildly critical of a decision of the Board with a letter to the editor.²⁰⁰ (The points he made in the letter were all sound, but would it not have been better for them to have been made in a recorded oral or written opinion which would have headed off the newspaper's criticism?)

We wish to make clear, however, that apart from these few actions which may border on impropriety we think the operational weaknesses disclosed by this study are inherent in a board of adjustment system and are not the fault of the present members of the Board. Earlier studies of this same Board when it had three different members came to conclusions about the shortcomings of the Board of Adjustment that are essentially similar to those we have set forth in this section.²⁰¹ Hence we

¹⁹⁶ See note 48 *supra*.

¹⁹⁷ See text accompanying note 83 *supra*.

¹⁹⁸ See note 170 *supra*.

¹⁹⁹ Lexington Leader, April 15, 1961, p. 1, col. 6. The Leader reported that several members of the Board were "incensed" by the CAP March Bulletin, which printed an unsigned article criticizing the high number of variances granted and the procedures of the Board. According to the Leader, one Board member asked Mr. Schubert who wrote the article. Mr. Schubert declined to say; whereupon the member moved to exclude the public from the meeting, which was in executive session. Mr. Schubert then walked out, followed by observers from the League of Women Voters.

²⁰⁰ Lexington Herald, Nov. 22, 1961, p. 4, col. 4.

²⁰¹ See Note, *The Granting of Variances from the Zoning Ordinance by the Lexington-Fayette County Board of Adjustment*, 45 Ky. L.J. 496 (1957); Meade, *Conduct of Hearings before the Lexington Board of Adjustment and Planning Commission*, May 1957 (study on file at the University of Kentucky College of Law); Park, *The Lexington Zoning Board of Adjustment*, May 1957 (study on file at the University of Kentucky College of Law).

doubt that substantially different results would obtain with a change in membership.

The reasons why these weaknesses are inherent in a board of adjustment system are several. First, a zoning board of adjustment is a lay board, usually composed of persons untrained in law and without a strong orientation toward the constitutional values of due process and equal protection of the law. Nor do they have the saving quality of expertise, the strength of the modern administrative process. Lay members commonly lack comprehension of the planning goals of the community and the conditions necessary for achieving those goals. In fairness to the Lexington Board, however, it must be added that the goals of the community have not been revealed to it through any articulate, public-supported series of master plans. Only in the last year has an adequate permanent planning staff been engaged, with explicit instructions from the city fathers to make long-range master plans setting forth policy guidelines for urban development. Second, the members are given the trying task of carefully letting off steam within the tight compartments of a Euclidean zoning scheme where the controlling mechanisms—the legal requirements for a variance—do not respond to pressures for diversity and flexibility. More and more, the difficulties of administering Euclidean zoning are appearing. Third, the law being out of joint with reality, the board has had to re-shape the variance system by Pickwickian language and non-disclosure, with all the unhappy consequences such means entail. Fourth, the climate of opinion in relation to local government involves a complex of attitudes and value relationships which in many cities, including Lexington, is exceedingly tolerant of lax administration. The climate of opinion has affected, and probably will continue to affect, the nature, extent, and efficiency of land use controls exercised by a board of adjustment.

E. WITH WHAT EFFECT ON THE COMMUNITY PLAN?

How did the Board's actions in variance cases affect the achievement of the community's basic values? The large number of interdependent variables one must take into account in determining the effect of use of one parcel of land upon other land and

upon the community at large makes that question exceedingly difficult to answer. These variables include:

- a. the effect on the overall physical design of the city (No one variance was a major land use change which spectacularly enlarged the physical dimensions of the city, but cumulatively variances may have significantly changed the pattern of uses);
- b. the effect on the efficient functioning of the habitation, productive, and servicing components of the community;
- c. the effect on the quantity of land devoted to particular uses;
- d. the effect on residential and commercial density (Did the variances contribute to sprawl and disintegration of the core?);
- e. the effect on real income in the community (Increased or decreased? For few or for many?);
- f. the effect on traffic patterns and congestion;
- g. the effect on public utilities and community facilities;
- h. the effect on the particular neighborhood (Did variances increase or decrease noise, traffic, air pollution, property values, convenience, amenities, privacy, opportunities for social contacts, opportunities for a normal family life?)

Other conditioning factors besides variances also would have to be considered and their influences and interrelations tested. Hence to answer the question would require a study far beyond the scope of this project. (This project was undertaken, we regret to say, without a foundation grant.)

Nonetheless, there is some evidence at hand indicating that a high proportion of these variances had an undesirable effect upon the community plan. The planning staff, which is supposed to have specialized knowledge about the interrelation of land uses, recommended that 26 variances be granted and 75 denied. The Board granted 76 and denied 26, which is almost a precise reversal of the staff ratio. Other evidence can be found in the sign variances granted. No observer of Lexington over the past few years can fail to note the increasing crass ugliness of the city and the increase in nonconforming signs of every kind. On the New Circle Road alone more than sixty signs

have been erected too close to the road, too large, or too high in the air. Three new shopping centers—Idle Hour, Gardenside, and Zandale—have had the symmetry of their design spoiled by nonconforming signs. In addition, in an explosion of capitalist enterprise advertising signs have spilled out on the surrounding green farmland, which Westbrook Pegler, who is not given to encomiums, called “the sweetest countryside on earth.” The ultimate social and economic cost to the community of the Board’s sign dispensations will be difficult to measure. But undesirable effects may already be observed. If the other variances granted have as unfortunate effects as the sign variances, the integrity of the comprehensive plan may be in more danger than we think.

It should also be noted that variances make the zoning map unreliable for purchasers of property. Since a variance is nowhere recorded in a manner so that it is readily discoverable by a purchaser of property in the area, the purchaser buys at his peril. The zoning map gives him notice of uses permitted, but he may find, after purchase, that the owner next door was granted a variance for an objectionable use several years ago and is only now ready to make use of it. There is no practical way under present Board of Adjustment procedures for the purchaser to ascertain this fact prior to purchase.

VII. THE PROBLEM RE-EXAMINED

Some fifty years ago, when zoning began, its advocates assumed that landowners could be protected from the injurious effects of other land uses by dividing up the city—with houses here, businesses over there, and industry somewhere else. This method of land use control, which Professor Haar has aptly called Euclidean zoning after the famous *Euclid* case holding it constitutional,²⁰² rested upon various assumptions about desirable land use, the demands of the market, and economic and social changes. It saw the ideal city as a great pattern of contrasting districts, rigidly separating incompatible types of land uses. It assumed that similar uses naturally tend to congregate in homogenous areas, that development takes place lot-by-lot

²⁰² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See Haar, *Emerging Legal Issues in Zoning*, in *Planning* 138 (1954).

on small parcels, that shifts of social groups and land values come about slowly, and that where and when and how development takes place can be predicted and regulated in advance. It did not reckon with the swift advances in technology, transportation, and communication, and the dynamic growth of American cities, which have wrought changes in every old neighborhood and rung in new kinds of suburban development.

The new technology made old uses obsolete and brought social changes which altered the urban behavior patterns and the demands for land. The automobile doomed the downtown grocery. Convenience shopping has moved to the suburbs, where houses are built not by individuals but by real estate syndicates on large tracts of land. Industry no longer necessarily belches smoke and shatters the eardrums; clean industry claims to be a good neighbor. The never-ending construction of new highways constantly shifts land values from one place to another. Even the basic policy assumption of Euclidean zoning—that homogeneity of uses is desirable—has come to be questioned. Professor Haar and Norman Williams, among others, have pointed out that it can result in undemocratic economic and social segregation.²⁰³ And in a recent provocative book Jane Jacobs leveled a blast at the entire concept of homogeneity; a vital, successful city district, she argues, requires diversity of primary uses.²⁰⁴ Be that as it may, one thing has become clear. The allocation of land use to meet the community's needs and the consumer's demands proved to be much more complex and require much more flexibility than the drafters of Euclidean ordinances dreamed. Experience demonstrated the impossibility of synthesizing the uses of land by a rigid mechanical approach. Euclidean planners were not, after all, seers.

Euclidean zoning ordinances provided three methods by which some flexibility could be introduced into the system. The first was by way of amendment to the ordinance by the legislative body, usually with the advice and consent of the planning commission. The second was by creating special exceptions

²⁰³ Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 Harv. L. Rev. 1051 (1953); Williams, *Planning Law and Democratic Living*, 20 Law & Contemp. Prob. 317 (1955).

²⁰⁴ Jacobs, *The Death and Life of Great American Cities* (1961).

in the ordinance. The third was through variances granted by the board of adjustment. The variance procedure was not designed for the purpose of giving planning flexibility but for the purpose of alleviating a unique hardship. Nonetheless, planning flexibility could, and did, come in by this back door method. Indeed, today it is the most frequently used (or, more accurately, misused) method of administering flexible controls. The primary reason for this metamorphosis is not far to seek. It lies in the unrealistic assumption of Euclidean zoning that little flexibility is needed and in the difficulty of using the amendment and special exception devices to achieve the flexibility which experience has shown to be necessary. A brief examination of these two devices will indicate how the pressures for change have been directed, consciously or unconsciously, to the variance back door.

The landowner who wishes to use his land in a way not permitted by the ordinance can, as a first alternative, go for an amendment. But his path is a tortuous one. By law or by practice both the planning commission and the legislative body must approve the change. And numerous legal as well as planning obstacles must be overcome. Among the legal doctrines restricting the amendment process are the following: (1) No zoning of one lot (the Sin of Spot Zoning). Zoning of one lot is permissible if done "in accordance with a comprehensive plan" and not as a favor to the landowner. But, because the legal meaning of "a comprehensive plan" is unsettled and the possibility of judicial reversal so strong, as a matter of practice planning commissions and local legislatures usually refuse to consider rezoning only one small lot. (2) No zoning for one use only (the Heresy of One-Use Classification).²⁰⁵ (3) No zone change subject to conditions; restrictions must be uniform throughout the

²⁰⁵ See *Pierson Trapp Co. v. Peak*, 340 S.W.2d 456, 459 (Ky. 1960):

Nowhere in the field of zoning law do we find any indication that the zoning authority may establish a zone or district that is limited to only one particular use. Our concept of the legitimate scope of the zoning power does not extend it to the point of embracing the power to restrict the use of property other than to reasonable general classifications.

Cf. *Vernon Park Realty, Inc. v. City of Mt. Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954). This restrictive notion applies to nonresidential classifications only. The power to zone for one type of residential use was established in the *Euclid* case in 1926.

district.^{205a} This doctrine prevents the planning commission from requiring that the proposed use be designed in a way compatible with the neighborhood. If the zone is changed, the proposed use can then be redesigned or changed so as to injure the neighbors. Hence the planning commission is usually reluctant to approve an amendment on the basis of an unenforceable promise by the petitioner that the proposed use will be erected and maintained in accordance with the plan submitted by the petitioner. (4) No contract zoning. The commission cannot require restrictive covenants to be put on the lot as a *quid pro quo* for rezoning.²⁰⁶ (5) No regulations solely for aesthetic objectives.²⁰⁷ This doctrine inhibits the control of design, which is frequently necessary to make mixed uses compatible. (6) No "floating zone."²⁰⁸ A floating zone is a zone provided in the ordinance to which no land is assigned on the zoning map until a landowner requests, and is granted, such zoning classification. It is one method of determining desirable uses lot-by-lot.

In addition to legal doctrines which restrict the amendment process, outmoded and inflexible planning concepts may decrease the landowner's chances of success in securing an amendment. For example, set-back lines and side yard lines, devised for the bungalow on a single lot, may be unsuitable for ranch houses and atrium houses; developers may wish to arrange their open spaces in what they conceive to be a more desirable pattern than results from the standard bulk regulations.²⁰⁹ In a land use

^{205a} Cf. Rathkopf & Rathkopf, *op. cit. supra* note 24, at 26-10 n.14.

²⁰⁶ Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Houston Petroleum Co. v. Automotive Products Credit Ass'n., 9 N.J. 122, 87 A.2d 319 (1952). But see Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680 (1960).

²⁰⁷ See Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 Law & Contemp. Prob. 218 (1955).

²⁰⁸ Eves v. Zoning Bd. of Adjustment of Lower Gwynned Township, 401 Pa. 211, 164 A.2d 7 (1960). *Contra*, Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951). In the *Lower Gwynned* case the court seemed to think the board of adjustment is more fit to administer flexibility than is the legislative body, upon recommendation of the planning commission. ("Under the 'flexible selective zoning' scheme here under attack, changes in the prevailing zoning regulations are to be made on a case by case basis, not, however, by a specialized body such as the zoning board of adjustment, but by the legislative body, without rigid statutory standards. . . ." 401 Pa. at 220, 164 A.2d at 12.) *Quaere*. For an excellent discussion of the legal and planning issues raised by the "floating zone," see Haar & Hering, *The Lower Gwynned Case: Too Flexible Zoning or An Inflexible Judiciary?*, 74 Harv. L. Rev. 241 (1959).

²⁰⁹ See Goldston & Scheuer, *Zoning of Planned Residential Development*, 73 Harv. L. Rev. 241 (1959); New Approaches to Residential Land Development, Urban Land Institute Tech. Bull. No. 40 (1961); Density Zoning, Urban Land Institute Tech. Bull. No. 42 (1961).

control system which lacks the continuing application of intelligence, planning concepts, such as bungalow-based bulk requirements, soon lose touch with the demands of the real estate market for experiments in improved urban design.

What often happened when zoning first swept the country was this: The city fathers called in an outside expert who made a swift survey of the city and then prepared a zoning map. If any master plan or surveys of physical, economic, and sociological conditions in the city were prepared, as likely as not they were filed away in a bottom drawer. The zoning map "stabilized property values" and that was what the city fathers were interested in. No resident planner was hired. Influenced by Euclidean concepts, the city fathers thought the purposes of planning could be achieved by a single exercise; after all, great change was not expected. Not until the smaller cities were beset by the population explosion and urban sprawl in the late 1940's did they begin to hire resident planners. Indeed, not until 1961 did Lexington acquire a staff of long-range planners to re-examine planning concepts incrustated in the zoning ordinance thirty years ago. Thus zoning became out of date through lack of periodic revision. Without expert advice, when an amendment was requested the city fathers usually stuck by the old-fashioned notions of what was desirable and undesirable land use.²¹⁰

All these restrictions on, and defects of, the policy making and administrative apparatus (the legislative body, the planning commission, and the planning staff) created strong pressures on the board of adjustment to grant variances. With some truth it may be said that the rigidity of the amending process proved the undoing of the board of adjustment.

The second method by which some flexibility can be introduced into Euclidean zoning is by way of special exceptions—

²¹⁰ See *Fritts v. City of Ashland*, 348 S.W.2d 712, 714-15 (Ky. 1961); An examination of the multitude of zoning cases that have reached this court leads us to the conclusion that the common practice of zoning agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning. . . . [T]he courts have upheld or invalidated the change according to how flagrant the violation of true zoning principles has been. It is to be hoped that in the future zoning authorities will give recognition to the fact that an essential feature of zoning is *planning*.

uses permitted by the zoning ordinance if they comply with specified conditions. This device, which has great potential for a flexible zoning scheme, has in fact been little used and widely misunderstood. Only in the last decade have courts begun to comprehend clearly the distinction between a special exception and a variance.²¹¹ Many reasons underly its nonuse. One is the enormous difficulty of foreseeing all the different types of uses to which an owner may wish to put his land and of setting forth the conditioning factors by which the compatibility of those uses with the neighborhood may be judged in advance. Therefore, the list of special exceptions in the ordinary zoning ordinance is likely to mirror the past and be limited to a small number of anticipated uses. And even with those, the conditions on which they will be permitted are not usually spelled out in any great detail. Where the ordinance is not periodically revised the special exceptions can become more quaint than useful.

The flexible use of special exceptions, like the flexible use of the amending process, has been regarded suspiciously by judges brought up in the faith of Euclidean zoning. In *Rockhill v. Chesterfield Township*,²¹² for example, the entire town was in effect zoned as one residential district. Neighborhood businesses, shopping centers, restaurants, light industry, and other nonresidential uses were permitted as special exceptions, provided they complied with certain conditions and specifications and "only after investigation has shown that such structures and uses will be beneficial to the general development." The court viewed the ordinance as the "antithesis of zoning," flouting the "essential concept of district zoning according to a comprehensive plan." Thus it was held to be ultra vires the enabling act.

The third way open to the landowner who wants to use his land contrary to the zoning ordinance is to apply to the board of adjustment for a variance. Enabling acts generally empower boards to grant variances where there is some "practical difficulty" or "unnecessary hardship" and the dispensation will "not be contrary to the spirit and intent of the zoning ordinance." Instead of giving this language a broad interpretation, courts

²¹¹ See *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959).

²¹² 23 N.J. 117, 128 A.2d 473 (1956).

have progressively narrowed it, perhaps in reaction to the widespread abuse of the variance power.²¹³ Thus, even though the land-owner is able to prove conclusively that the proposed use is beneficial to the community, does not involve a substantial departure from the comprehensive plan, and will not injuriously affect the neighborhood, this is not enough legally to invoke the board's power to grant a variance. Because of the courts' narrow interpretation of the enabling act, the owner must prove in addition that the land has no reasonably beneficial use without a variance, that the hardship is unique to his lot, and that the hardship is not self-created. Here again, as in the case of amendments and special exceptions, courts have consciously limited flexibility. This judicial attitude reflects a faith that the original concept of a board of adjustment's function in a Euclidean zoning system is still viable.

In truth an unhealthy situation has resulted. A power vacuum has occurred. There is no body with the legal power to permit on *one particular lot one specific use* that is beneficial (or, if not beneficial, at least not harmful) to the community, does not involve a substantial departure from the plan, and will not injuriously affect the neighborhood. This gap in Euclidean theory is well illustrated by two interesting cases which arose in Lexington several years ago. One battled around between the Planning Commission and the Board of Adjustment. The other ultimately went to the Court of Appeals.

The facts of the first case were these. For several years prior to 1935 a house in a Negro district known as "Chicago Bottom" was used as a funeral home—a nonconforming use in a Residence-3 zone. From 1935 to 1954 the house was occupied by a physician as a residence. He also maintained his office on the premises. After his death the house was occupied solely as a residence. In 1956 the Edward W. Jackson Funeral Home de-

²¹³ This attitude of narrow construction appears again and again in modern cases. *E.g.*: The enabling act "sharply limits" and "narrows in a drastic manner" the board's power to grant variances. *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment*, 325 S.W.2d 324, 327, 328 (Ky. 1959). "[T]his court has imposed strict and severe limitations upon the granting of variances." Conway, J., in *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 129, 96 N.E.2d 731, 738 (1951) (dissenting opinion). In reviewing variances, "this Court has been quite demanding." *Eves v. Zoning Bd. of Adjustment of Lower Gwynned Township*, 401 Pa. 211, 220, 164 A.2d 7, 12 (1960).

sired to reopen a funeral home on the premises, but it could not be permitted as a continuation of the nonconforming use, which had long since been abandoned. The owner applied to the Planning Commission for a change of zone from Residence-3 to Business-1, in which district a funeral home is permitted. The neighbors objected. They did not mind the funeral home, but they objected to rezoning on the ground that all sorts of undesirable businesses were permitted in a B-1 zone and if the tract were rezoned it might be used for other than an undertaking parlor. The Planning Commission refused to rezone: there was no way the Commission could restrict the use to a funeral home. The owner then appealed to the Board of Adjustment for a variance. In candor he confessed there was no hardship within the meaning of the statute, and the planning staff advised the Board it had no power to grant a variance. Yet the neighbors appeared and favored a variance that would permit a funeral home, and that use only. The funeral home served as a sort of "neighborhood center" in an area where wakes were part of the cultural pattern and undertakers were community leaders. The Board granted the variance.²¹⁴ While legally this may have been improper, was it bad planning?²¹⁵

A passage in Jane Jacobs' recent book attacking the "familiar superstitions" and "oversimplifications" of orthodox planning illuminates the issues raised by the *Jackson Funeral Home* case. Writes Mrs. Jacobs:

Nowadays, the glue factory has been replaced by a different boggy, the "mortuary," which is trotted out as a crowning example of the horrors that insinuate their way into neighborhoods which lack tight control on uses. Yet mortuaries, or funeral parlors as we call them in the city, seem to do no harm. Perhaps in vital, diversified city neighborhoods, in the midst of life, the reminder of death is not the pall it may be on waning suburban streets. . . .

²¹⁴ Edward W. Jackson Funeral Home, March 1956.

²¹⁵ This question might be asked about a number of board cases which we have previously criticized as not complying with the law. Without a great many more facts than are set forth in the petition or in the minutes concerning the effects of the proposed use on other land uses and community values, the question cannot be answered intelligently. But the point is: In a rational system of land use control, someone with knowledge of all the pertinent facts and the effects of the proposed use on the neighborhood and on community values should be empowered to answer the question and issue permits accordingly.

In low-income neighborhoods of big cities, such as New York's East Harlem, funeral parlors can, and often do, operate as positive and constructive forces. This is because a funeral parlor presupposes an undertaker. Undertakers, like druggists, lawyers, dentists and clergymen, are representatives, in these neighborhoods, of such qualities as dignity, ambition and knowledgeability. They are typically well-known public characters, active in local civic life. Quite often, they eventually go into politics too.

Like so much of orthodox planning, the presumed harm done by this use and that use has been somehow accepted without anyone's asking the questions, "Why is it harmful? Just how does it do harm, and what is this harm?"²¹⁶

The second case illustrating the power vacuum of Euclidean zoning involved the conversion into an apartment of a carriage house on the Near North Side of Lexington. The Near North Side is an old residential quarter of very fine houses with an illustrious past. It has many similarities to Georgetown in Washington, and a good part of it today is in the special "Old and Historic Lexington District," where changes in exterior façade are forbidden without permission of the Board of Architectural Review. Behind many of the houses, or located on mews, are carriage houses or servants' houses. With the disappearance of servants from the American scene, these dependencies fell into disuse. And, quite naturally, many people wanted to convert them into apartments for commercial renting. In 1946 the owner of one of these old houses applied for a variance which would permit him to ignore bulk requirements of the ordinance and rent as an apartment former servants' quarters located on the second floor of the carriage house. The ordinance required that every building used as a dwelling in the district (except as a dwelling for servants) have "an exclusive unobstructed easement or right of way at least 15 feet wide to a street." The owner could not comply with this requirement: the mews on which the carriage house sat was only 11 feet wide, and the larger side yard of the big house was only 15 feet wide, of which 6 feet had to be used under the ordinance as side yard space of the big house and not as easement. The Board refused to grant a vari-

²¹⁶ Jacobs, *op. cit. supra* note 204, at 232-33.

ance and was affirmed on appeal by the Court of Appeals.²¹⁷ The Near North Side is a changing area and obviously will have to regenerate itself into a different kind of life. A persuasive argument can be made that the best use of the carriage houses in this area would be conversion into stylish apartments of great charm, and indeed a few carriage houses in the area with street access which satisfies the ordinance have been so converted and rent at top prices. (This particular carriage house still lies vacant, coveted by nearly all who see it.) But such an argument is misdirected at the Board of Adjustment under Euclidean theory; it is pertinent to the question of hardship only after the hurdles of "no reasonable use" and "uniqueness of the lot" have been overcome. And because of the great difficulty in dealing by general regulation with the different physical locations of numerous carriage houses and garages, the Planning Commission cannot establish realistic, detailed criteria to govern conversion. The interrelation of conditioning factors can seldom be precisely known in advance. Who, then, is to deal with the problem? Must the area decline because there is no flexible way to control land uses to give the neighborhood a desirable new character?

The decline of changing, older areas in our cities has to some extent been exacerbated by Euclidean concepts, which deal only with general types of uses. Euclidean zoning does not ordinarily concern itself with the proposed design of any particular use and its compatibility with the area nor with the quantity of land which can be devoted to one specific use. It assumes that one grocery store is like another grocery store—no matter how designed. And, because it uses general classifications, it assumes a grocery is like a cinema is like a restaurant is like a tailor shop is like a drug store. But in terms of satisfying the needs of a particular area and of compatibility with the area this is not necessarily true. Both the specific kind of use and its design are important to the maintenance of healthy, attractive, and convenient neighborhood units. In many older (and some newer) areas blight has been introduced by the wrong kind of commercial use or by a poorly designed use which damages the amenities of the area.

²¹⁷ Moore v. City of Lexington, 309 Ky. 671, 218 S.W.2d 7 (1948).

What this adds up to is this. Under Euclidean zoning no body legally has power to make individual discriminations in the context of a given locale based upon rational planning considerations, and to permit development accordingly.²¹⁸ The board of adjustment, under pressure from applicant after applicant, has assumed this power. But the variance procedure really falls far short of giving intelligent flexibility within a framework designed to accord equal protection of the law. Planning considerations do not receive careful evaluation there. The board does not have the expertise to know what is trivial and can be disposed of quickly and what is substantial and requires close examination. For lack of time it cannot sit down with the applicant and, by patience, suggestions, and persuasion, bring him around to making changes which will make the use compatible with the area. Furthermore, because of the "strict and severe limitations" courts have imposed on the board's powers, the board is not always prepared to be honest and articulate about its reasons for reaching a particular result. It cannot promulgate the kind of standards we need for administrative decisions, for, queerly enough, they would be illegal. An ideal breeding ground for adventitious factors results. The debilitating effect of operating without known policy guides has been, we think, amply demonstrated in this study.

While the board has moved from adjudication to a vital, strategic position in the administration of the zoning ordinance, this has not been accompanied by a rationalization of techniques. We now have flexibility, it is true, but without any real check on responsibility, or any benefits of expertise, or any articulation of the true rules of the game.

The primary task of lawyers in the land planning area is to devise institutions through which community values can be continuously clarified, intelligent means for their implementation selected, and democratic controls, which assure equal protection of the law, maintained. The planning commission-board of ad-

²¹⁸ We are speaking here about developed areas. With respect to *undeveloped* areas, the planning commission has considerable flexibility. The standard practice is to zone undeveloped areas for agricultural use; thus the would-be developer must ask the commission for a zone change, which is granted or denied on the basis of general guidelines in the master plan. Flexible control over the design of the development, and over the quantity of land devoted to particular uses, can also be wielded through subdivision regulations.

justment system, with attendant legal doctrines, was developed before the great rise of, and experimentation with, federal administrative agencies. It was devised in an era when the distinction between "quasi-legislative" and "quasi-judicial" functions was more meaningful than it is today. It was based on assumptions about social behavior and societal needs that have proven inadequate. Our task today is to determine what alterations in present institutions, practices, and legal norms are necessary to produce a more rational system of land use controls.

There have been several suggestions for reforming the zoning board of adjustment.²¹⁹ They include:

- (a) tightening up the procedures ("judicialization") of the board;
- (b) abolition and replacement by a board of experts;
- (c) abolition and replacement by a single local administrator with a right to appeal to
 - (i) the local legislative body, or
 - (ii) a state-wide board of appeal, or
 - (iii) a committee of the planning commission.

Some of these remedies have merit. But none of them goes to the basic problem: a Euclidean zoning system which, at the age of fifty, is showing definite signs of old age. We are not sure that hardening of the arteries can be cured by small, or even massive, doses of Geritol.

²¹⁹ See Leary, *A Model Procedure for the Administration of Zoning Regulations* 72-92 (1958); Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. Chi. L. Rev. 509 (1959); Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 Law & Contemp. Prob. 280 (1955); Dallstream & Hunt, *Variations, Exceptions and Special Uses*, 1954 U. Ill. L.F. 213; Note, 74 Harv. L. Rev. 1396 (1961).