

The Zoning Variance Power - Constructive in Theory, Destructive in Practice

Ronald M. Shapiro

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Ronald M. Shapiro, *The Zoning Variance Power - Constructive in Theory, Destructive in Practice*, 29 Md. L. Rev. 3 (1969)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol29/iss1/4>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME XXIX

WINTER, 1969

NUMBER 1

© *Copyright Maryland Law Review, Inc., 1969*

THE ZONING VARIANCE POWER — CONSTRUCTIVE IN THEORY, DESTRUCTIVE IN PRACTICE

By RONALD M. SHAPIRO*

The variance power, to be consistent with its theoretical objectives and legal limitations, should be exercised sparingly, with particular care to avoid harmful side effects. However, the local boards of appeal, the possessors of the variance power, have apparently given little effect to these legal and theoretical restraints. Board decisions are frequently the product of improper considerations, ranging beyond the scope of legal limitations and legitimate land use policies. This course of conduct has led and will increasingly lead to a flood of illegal variations which challenge the protective aims of zoning and, consequently, endanger the integrity and desirability of urban neighborhoods.

The striking disparity between the theory of the variance power and its practical application is the theme of this article. The article will examine in detail the nature of this disparity, its consequences with respect to the specific problems of urban areas, and the possible directions which a reform of the variance procedure could take. While the discussion will cover variance problems in several cities, its dominant foci will be Boston and Baltimore, cities in which sparse research has been done on this topic. Boston offers two particularly compelling inducements for study. First, it presents a variance situation which is analogous to urban land use situations in other areas. Second, Boston recently enacted a zoning code aimed at, among other things, a reform of the Boston variance machinery. The experience in Boston under the new code may provide valuable insight for cities, like Baltimore, which are contemplating the passage of new zoning ordinances.

I. THE VARIANCE IN THEORY — ZONING'S SAFETY VALVE

Theoretically, at least, the board of appeals variance procedure is not the proper method for correcting imperfect zoning. The appropriate remedy is legislative amendment of the zoning ordinance¹ by the

* Associate, Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; Lecturer, University of Maryland School of Law; A.B., 1964, Haverford College; LL.B., 1967, Harvard Law School.

1. F. BAIR & E. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE WITH COMMENTARY* 57 (3d ed. 1966).

City Council, as in Baltimore,² or by a zoning commission, as in Boston.³ Conceptually, the variance is a "permitted violation" of the zoning regulations; it does not involve a change in the ordinance or in the zoning map. Historically, variances were designed to serve as administrative "safety valves" which would save zoning schemes from the threat of endless litigation. It was feared that zoning ordinances might be challenged as illegal deprivations of property unless a procedure existed to waive the restrictions where they appeared to impose unconstitutional limitations on the use of property.⁴ The more widely supported view today, however, considers the variance an administrative remedy intended to alleviate situations where hardship on a particular landowner outweighs the value that would be derived by the community if strict adherence to the ordinance were maintained.⁵

An accurate appraisal of variances necessitates an analysis of the often substantial distinction between legal theory and enforcement practices.⁶ The legal authority for the issuance of the variance lies in municipal ordinances enacted under the authority of state enabling acts.⁷ Ordinarily the statutes empower local boards of appeal to vary the application of zoning regulations in certain unusual cases.⁸ Board members, usually appointed by the local executive authority,⁹ are selected typically on the basis of political considerations: "[T]hey are not necessarily chosen either on the basis of expertise in land-use planning or of any particular professional qualification to perform a quasi-judicial function."¹⁰

In most jurisdictions a board of appeals must make at least two essential findings before authorizing a variance. First, the board must ascertain whether enforcement of the ordinance against the applicant would, due to special conditions on his property, impose "unnecessary hardship" upon him. Second, the board must find that the proposed variance will not alter the character of the neighborhood nor interfere with the public purposes of the ordinance.¹¹ These requirements are usually stated in statutes which offer no definition of unnecessary hardship. As a result, boards of appeal must often fend for themselves in applying the standard, deriving as much knowledge as they can from court decisions on the subject.

While there is some confusion in Baltimore between variances and their zoning cousin, the special exception,¹² there are basically

2. MD. ANN. CODE art. 66B, § 1 (1967).

3. Ch. 665, [1956] Mass. Acts 610.

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

5. *Id.* See also Sussna, *Zoning Boards*, 37 LAND ECONOMICS 82 (1961).

6. Compare parts I and II of this Article.

7. MD. ANN. CODE art. 66B (1967). See also note 11 *infra*.

8. See notes 11-16 *infra* and accompanying text.

9. In Boston the selection is made by the Mayor. See MASS. ANN. LAWS ch. 40A, § 14 (1966). See also BALTIMORE, MD., CODE art. 30, § 39(a) (1966).

10. C. HAAR, LAW AND LAND 135 (1964).

11. *E.g.*, MASS. ANN. LAWS ch. 40A, § 15(3) (Ter. ed. 1958); R.I. GEN. LAWS § 45-24-13 (1956).

12. A special exception is a specific use permitted by the ordinance if the comprehensive zoning plan is generally conformed to and the neighborhood is not adversely

three provisions of the Baltimore zoning ordinance which govern the grant of what may generally be considered a zoning variance. Pursuant to this ordinance, the Baltimore Board of Zoning Appeals may allow a variation, or, in the language of the ordinance, "make special exceptions," when "there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions" of the ordinance,¹³ or where "the use or change of use of land, buildings or structures proposed to be used is limited as to its location because of the size of buildings, size of yards, irregularity of shape of land or buildings, topography, grade or accessibility,"¹⁴ and, where the proposed variation "shall not create hazards from fire or disease or shall not menace the public health, security, or morals."¹⁵

In 1965, after almost forty years observance of a zoning law which included the general variance standards described above, the Boston Zoning Commission adopted a new zoning code.¹⁶ The new code attempts to focus more directly on the factors which the Boston Board of Appeals should consider in determining whether or not a variance would be proper.¹⁷ The operative subsection appears to be grounded on judicial decisions which have elaborated upon the meaning and intent of the unnecessary hardship standard.¹⁸ Although the code describes the criteria in three parts,¹⁹ a close reading reveals that five conjunctive prerequisites must be met before a variance may be granted by the Board of Appeals: (1) that "special circumstances or conditions" apply to the property for which the variance is sought; (2) that such conditions are peculiar to that property and are not present in the neighborhood in general; (3) that for reasons of "practical difficulty and demonstrable substantial hardship" the variance is necessary for "reasonable use" of the property; (4) that the variance grant will not derogate from the "general purpose" of the code and "will not be injurious to the neighborhood or otherwise detrimental to the public welfare"; and, (5) that the proposed variance would be the "minimum variance that will accomplish this purpose."²⁰ This statutory pattern follows the outline of the Model Zoning Ordinance in attempting to give the Board of Appeals clearer guidelines for decision, insofar as indefinite terms can be given precise meaning.²¹ Because all

affected. A variance is a violation of the zoning plan which is permitted because of a showing of hardship. See Carson, *Reclassification, Variances, and Special Exceptions in Maryland*, 21 Md. L. Rev. 306, 314-17 (1961). In Baltimore, however, this difference is not apparent, "since an *exception*, apparently, overlaps a *variance* inasmuch as both may be granted where there are 'practical difficulties or unnecessary hardships.'" *Marino v. Mayor and City Council*, 215 Md. 206, 216, 137 A.2d 198, 201 (1957).

13. BALTIMORE, MD., CODE art. 30, § 40(c) (1966).

14. *Id.* § 40(b).

15. *Id.* § 39(j).

16. BOSTON, MASS., ZONING CODE (1955). The code was enacted under the authority of the 1956 enabling act, ch. 665, [1956] Mass. Acts 610.

17. BOSTON, MASS., ZONING CODE § 7-3 (1955).

18. See cases discussed notes 23-43 *infra*.

19. BOSTON, MASS., ZONING CODE § 7-3 (1955).

20. *Id.*

21. F. BAIR & E. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE WITH COMMENTARY* § 9-3, at 52 (3d ed. 1966).

of the prerequisites have a basis in judicial decisions, they should be sufficiently insulated from judicial attack.

Although ordinances such as the new Boston code, or to a more limited extent the Baltimore zoning ordinance, provide standards for variance applicants and for the boards of appeal, they do not comprise the total legal framework which attends the variance power. Because legislative standards are necessarily vague, judicial elaboration of these standards provides the precise theoretical limitations on board of appeals variance activity. A survey of judicial authority in various states reveals the rigid tests which variance grants must meet if they are to be sustained on judicial review.²² Setting the trend for other jurisdictions, the Supreme Judicial Court of Massachusetts disclosed its antipathy toward indiscriminate allowance of variances at a very early date. In 1926, just two years after the adoption of Boston's first zoning code, the court declared:

It is manifest from the tenor of the zoning act as a whole . . . that the power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised. It is only in rare instances and under exceptional circumstances that the relaxation of the general restrictions established by the statute ought to be permitted.²³

In the same vein, the Maryland Court of Appeals has stated: "[The board of appeals is] not to authorize a granting for the mere convenience to the owner but to require a showing of urgent necessity, hardship peculiar to the particular property, and a burden upon the owner not justified by the public health, safety and welfare."²⁴

In addition, the courts have refined and particularized the elements necessary to obtain a variance. "Unnecessary hardship" has traditionally been the prime requirement for the issuance of a variance. Because variances were not devised as a remedy for difficulties arising out of an individual's peculiar circumstances, the hardship must bear some relationship to the property itself²⁵ and must not merely arise from the personal situation of the owner-applicant.²⁶ Regardless of the individual situation of the owner, if some other person could use the property for the purpose for which it is zoned there is no hardship.²⁷ Unnecessary hardship exists where, in the absence of a variance, no feasible use can be made of the land,²⁸ that is, if the requirements of the zoning ordinance would cause a "taking in the constitutional sense" of the property.²⁹ The hardship must pertain directly to property which would receive the variation. The situation often arises where the

22. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 282-89 (1955).

23. *Norcross v. Board of Appeal*, 225 Mass. 177, 185, 150 N.E. 887, 890 (1926) (dictum).

24. *Mayor and City Council v. Polakoff*, 233 Md. 1, 9, 194 A.2d 819, 824 (1963).

25. *Id.*

26. *Planning Board v. Board of Appeals*, 338 Mass. 160, 154 N.E.2d 349 (1958).

27. SHURTLEFF & CANTELMO, *PLANNING LAW AND ADMINISTRATION IN MASSACHUSETTS* 57 (1964).

28. Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1960).

29. *Sapero v. Mayor and City Council*, 235 Md. 1, 3, 200 A.2d 74, 75 (1964).

owner of a business desires to utilize adjoining or nearby property, located in a non-business district, for purposes of expansion. In such cases the Supreme Judicial Court of Massachusetts has uniformly insisted that hardship related to the principal business property does not attach to the property for which the variance is sought.³⁰

Since a board of appeals is at least partially analogous to a court of equity, the difficulties which a variance applicant is pleading must not be the result of his own doing. For example: "Hardship cannot be claimed by one who purchases with knowledge of restrictions."³¹ Moreover, if the adversity is not unique to the property in question but affects generally the properties in the zoning district, the hardship requirement is not satisfied.³² For example, an applicant may seek a variation to build a two-story business building in a general residence use district. He may urge as hardship that the nature of the soil makes it impractical to construct apartments, a permitted use. The board should disallow the variance if it appears that the soil condition extends generally throughout the particular use classification area.³³ When there is a general hardship, this situation must be remedied by revision of the general zoning regulations, a legislative act beyond the scope of board of appeals power, not by granting special privileges or variations to single owners. In effect, an applicant must show that a variance will not give him an advantage over his neighbors — that he will not gain any special privilege not enjoyed by the remaining lands and buildings adhering to the zoning restrictions of the district.

Although economic considerations enter into most appeals, financial hardship alone cannot be asserted as the basis for a variance.³⁴ The fact that the applicant is unable to put the premises to a more profitable use does not itself warrant relief.³⁵ Only in cases of extreme pecuniary hardship due to the peculiarities of the property, such as an applicant who will be driven out of business in the absence of a remedy, will monetary distress appeal to the courts.³⁶

The courts have rejected arguments which emphasize the contiguity of the applicant's land to a zone where the use sought would

30. *Hurley v. Kolligan*, 333 Mass. 170, 129 N.E.2d 920 (1955); *accord*, *Brackett v. Board of Appeal*, 311 Mass. 52, 39 N.E.2d 956 (1942).

31. *Reps, Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 285 (1955). *See also* *Gleason v. Keswick Imp. Ass'n*, 197 Md. 46, 50 (1951); *Pem Construction Co. v. City of Baltimore*, 233 Md. 372, 377, 196 A.2d 879, 881 (1964). *But see* *Frankel v. Mayor and City Council*, 223 Md. 97, 101, 162 A.2d 447, 449-50 (1959), in which the Court of Appeals has stated that this rule does not apply where the applicant could make no reasonable use of the property without the variance.

32. *Kennerly v. Mayor and City Council*, 247 Md. 601, 233 A.2d 800 (1967); *Vainas v. Board of Appeals*, 337 Mass. 591, 150 N.E.2d 721 (1958); *Easter v. Mayor and City Council*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).

33. *Bicknell Realty Co. v. Board of Appeal*, 330 Mass. 676, 116 N.E.2d 570, 573 (1953).

34. *Easter v. Mayor and City Council*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950). *Cf. DiRico v. Board of Appeals*, 341 Mass. 607, 171 N.E.2d 144 (1961). *See also* SHURTLEFF & CANTELMO, *PLANNING LAW AND ADMINISTRATION IN MASSACHUSETTS* 57, 76 (1964).

35. *Bicknell Realty Co. v. Board of Appeal*, 330 Mass. 676, 116 N.E.2d 570 (1953); *cf. Mayor and City Council v. Borinsky*, 239 Md. 611, 212 A.2d 508 (1965).

36. Note, *Zoning in New England*, 36 Bost. L. Rev. 354, 438 (1956).

be permissible,³⁷ even where it is shown that existing use restrictions reduce sharply the value of a property in comparison to its worth if a variation were granted.³⁸ It is well established that hardship caused by proximity to areas of commercial activity is not a sufficient basis to justify the exercise of the narrowly confined power of granting a variance.³⁹ While this rule appears harsh in its effect on the applicant, the integrity of a comprehensive zoning plan, according to the courts, requires its application. Reversing a board decision which permitted the construction of stores in a residence district near a long-existing business section, a Massachusetts court articulated the following rationale for disallowing variances based on contiguity to districts which permit the desired use: "A district has to end somewhere. Care should be taken lest the boundaries of a district be pared down in successive proceedings granting variances to owners who from time to time through such proceedings find their respective properties abutting upon premises newly devoted to business purposes."⁴⁰ A similar rationale has been advanced by the Maryland Court of Appeals to support its rejection of variations based on the existence of non-conforming uses of the type sought by the applicant on other properties in the same zoning district.⁴¹

Even when the applicant has satisfied all other requirements, variances have been refused by the courts where they would effect a substantial change in the zoning of a neighborhood.⁴² Such an effect would be in derogation of the protective purposes of the zoning ordinance. A board considering a request for a commercial use in a residential district must weigh possible detrimental consequences to the neighborhood; the possibility of increased fire hazards, enlarged traffic problems or inordinately reduced property values should deter the board from authorizing a variation.⁴³ The Maryland Court of Appeals has stated: "[T]he detriment to the applicant must be weighed against the benefit to the community in maintaining the general plan."⁴⁴ The Massachusetts court revealed its policy for protecting neighborhood integrity from harmful variations when it observed: "The dominant design of any zoning act is to promote the general welfare The stability of the neighborhood and the protection of property of others

37. *Mayor and City Council v. Borinsky*, 239 Md. 611, 212 A.2d 508 (1965).

38. *Sullivan v. Board of Appeals*, 346 Mass. 81, 190 N.E.2d 83 (1963).

39. *Id.*

40. *Real Properties, Inc. v. Board of Appeal*, 319 Mass. 180, 184, 65 N.E.2d 199, 201 (1946). *See also* *Coolidge v. Zoning Board of Appeals*, 343 Mass. 742, 180 N.E.2d 670 (1962). *But see* *Tanzilli v. Casassa*, 324 Mass. 113, 85 N.E.2d 220 (1949).

41. The Maryland Court of Appeals has stated:

[It is not] material that three buildings, some distance to the north, extend to the building line "Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If this were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board."

Easter v. Mayor and City Council, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).

42. *Atherton v. Board of Appeals*, 334 Mass. 451, 136 N.E.2d 201 (1960).

43. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1405 (1960). *E.g.*, *Everpure Ice Mfg. Co., Inc. v. Board of Appeals*, 324 Mass. 433, 86 N.E.2d 906 (1949).

44. *Easter v. Mayor and City Council*, 195 Md. 395, 401, 73 A.2d 491, 493 (1950).

in the vicinity are important considerations."⁴⁵ A landowner in a particular district has the right to expect that the zone will enjoy a "fair degree of permanency."⁴⁶ If the relief applied for will harm the neighborhood, then the applicant must suffer to maintain the welfare of the public.

Court decisions, such as those of the Maryland and Massachusetts courts, and zoning ordinances like the new Boston code have clearly circumscribed the power of boards of appeal to grant variances. Theoretically, very specific standards relating to hardship, the nature of the property and protection of the surrounding neighborhood must be met before zoning's "safety valve" can open. The law clearly indicates that variations should not be granted indiscriminately. Nevertheless, it appears that boards of appeal have turned a blind eye toward zoning regulations and a deaf ear to the rulings of the courts. Because boards have performed dismally in adhering to proper standards, the variance procedure in practice is a far cry from the theoretical and legal framework outlined in the statutes and refined by the courts.

II. THE VARIANCE IN PRACTICE — THE SAFETY VALVE LEAKS

In spite of the courts' consistent attitude of disapproval, the integrity of zoning ordinances and the desirability of urban residential areas have been constantly threatened by the possibility of improper variances. By the mid-1930's critics already were charging that "easy and erratic" variance practices "nibble away at existing zoning giving special privileges to the chosen few."⁴⁷ More recently, one planning expert estimated that fifty per cent of all board of appeals decisions, the majority of them involving variances, were illegal usurpations of power.⁴⁸ The board of appeals variance procedure, conceived as the "safety valve" of the zoning ordinance, has ruptured into a steady "leak" through which variations based on improper zoning objectives increasingly escape. The integrity of the comprehensive zoning plan may be seriously eroded by such indiscriminate variances.⁴⁹ The incompatible land uses which result from this leak in the variance machinery contribute to the spread of urban blight.⁵⁰ For example, in Boston, a city with a high rate of variance awards,⁵¹ the Redevelop-

45. *Prusik v. Board of Appeal*, 262 Mass. 451, 457, 160 N.E. 312, 314 (1928).

46. *Everpure, Inc. v. Board of Appeals*, 324 Mass. 433, 86 N.E.2d 906 (1949).

47. WOODRUFF, *A ZONING PRIMER* 66 (Proceedings of the Annual Planning Conference 1935).

48. Blucher, *Planning and Zoning Principles Violated*, 13 ARK. L. REV. 1, 7 (1958).

49. Pomeroy, *Losing the Effectiveness of Zoning Through Leakage*, PLANNING AND CIVIC COMMENT 8-9 (Oct. 1941):

And it doesn't take very many such leaks to exhaust the strength of the zoning plan. Even if excess densities, or the fudging of yard and area requirements, or mayhap, the change in use, permitted by the Board of Appeals do not greatly affect the broad land use and density pattern (if any) of the master plan, they do start a disintegration of the zoning plan, and they do undermine confidence in its integrity.

50. Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953).

51. See text at note 68 *infra*.

ment Authority has pointed to incompatible land uses as one major cause of such blighting influences as the splitting up of neighborhoods, residential obsolescence, physical isolation and lack of sunlight.⁵² A recent study of Baltimore Board of Zoning Appeals action along the "strip zoned" Belair Road area reveals not only an inordinately high rate of variance and special exception grants, but also a seepage of commercial interests into surrounding residentially zoned sections.⁵³ Such seepage cultivates the seeds of urban deterioration in those areas.

Illegal variances are a prime cause of decay in residential neighborhoods.⁵⁴ The presence of unjustified commercial and industrial variations in a residential district creates eyesores, makes a high level of maintenance impossible, and invariably lessens the residential desirability of an area. "A lowered residential desirability, in turn, further weakens the resistance of a neighborhood to the inroads of business, rooming houses, crowded tenements, and other undesirable uses."⁵⁵ Good examples of this creeping erosion of residential areas may be found in the increasing number of industrial variations that blot the Roxbury section of Boston and in the spreading commercial encroachment in the Belair and Reisterstown Road areas of Baltimore. As departures from the neighborhood pattern accumulate, the basic aims of zoning are increasingly ignored. Zoning's protective purposes — conservation of property values, provision of adequate light and air, maintenance of public health and safety and the preservation and promotion of the city's amenities — may be lost in the tide of improper variances created by the boards of appeal.

Abuse of the variance procedure also weakens the use of zoning as a positive measure in city replanning.⁵⁶ The basic premise of comprehensive planning is that it is based on long-range projections; proper projection of land uses should not be distorted by immediate pressures and short-sighted considerations.⁵⁷ Granting a variance for reasons other than extreme hardship may seem innocuous in its present impact on the immediate neighborhood. However, "long-range planning may show that this will result in a flood of such demands, or be inconsistent with the desirable allocation of land uses for commercial purposes in the entire municipality, or hinder the proposed future evolution of the area into a fine residential one."⁵⁸ Thus, improper variances not only threaten neighborhood integrity and undercut the protective purposes of zoning, but they also challenge the objectives of comprehensive urban planning.

52. Boston Redevelopment Authority, General Plan for the City of Boston, II-3 (1964).

53. Geiselman, *Belair Road: A Zoning Jungle*, Evening Sun (Baltimore), Jan. 3, 1968, § B at 1, col. 1.

54. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280 (1955).

55. Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470, 471 (1953).

56. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280 (1955).

57. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353, 372 (1955).

58. *Id.*

Proof of actual improprieties is hard to obtain, but a sampling of statistics gathered in various cities supports the allegation that an alarming number of illegal variances are granted. In Cincinnati, one of the earliest exponents of master planning, 1,493 of 1,940 variance requests were granted in a ten year period from 1926 to 1937. Philadelphia's Board of Adjustment granted 4,000 of 4,800 variance applications from 1933 to 1937.⁵⁹ Statistics compiled for 1946 summarize the situation in Austin, where 240 of 358 appeals were granted, in Milwaukee, where 121 of 163 were allowed, and in Rochester, where 230 variances were permitted out of 325 cases heard.⁶⁰ More current reports show that variations were granted in 952 of 1,134 cases in Los Angeles during 1955 alone⁶¹ and that a total of 2,640 variations were allowed in Chicago from 1942 to 1953.⁶² During 1952, the Cambridge, Massachusetts, Board of Appeals granted 99 variances and denied 17; 48 of the variances granted were for use and the other 51 were dimensional variations.⁶³ "While mere numbers are not proof of improper action they are certainly grounds for suspicion."⁶⁴ Some reputable authorities assert that boards of appeal act illegally in well over half the cases they hear.⁶⁵

Because of the confusion between variances and special exceptions in Baltimore, and because the Board records prevent accurate isolation of variance actions, the statistics for Baltimore must be based on a combined summary of all Board actions, a number of which are apparently variances.⁶⁶ In 1966, the Board approved or conditionally approved 399 of 535 applications made to it, and in 1967, 379 of 464 requests received either approval or conditional approval from the Board.⁶⁷ The Boston situation may also bear out statistical inferences of impropriety. In Boston, from July 1, 1965 to June 30, 1966, 367 variance applications were filed; 18 of these were withdrawn before hearing, and of the remainder heard, 283 were granted.⁶⁸ Out of

59. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280 (1955). See Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955), which shows fewer grants for Philadelphia in 1955 in terms of absolute numbers, but also indicates that the ratio of grants to denials was still significantly high.

60. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 282 (1955).

61. Los Angeles City Planning Comm'n, *Accomplishments*, 1955.

62. Comment, *Zoning Amendments and Variations and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953).

63. C. HAAR, *LAND-USE PLANNING* 296 (1959).

64. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 281 (1955).

65. See LEARY, *MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS* 10 (1959).

66. See Geiselman, *Belair Road: A Zoning Jungle*, *Evening Sun* (Baltimore), Jan. 3, 1968, § B at 1, col. 1. See also note 12 *supra*.

67. Statistical Report on Zoning Appeals Scheduled for Hearing Year of 1966 (and Report of 1967) Showing Action Taken By the Board — Compiled by the Office of the Board of the Municipal and Zoning Appeals, Baltimore.

68. Statistics compiled by Thomas E. McCormick, Director of Zoning in the Boston Redevelopment Authority, for inclusion in Boston's workable program. The figure is unpublished and was given by Mr. McCormick to the writer.

approximately 95 cases heard by the Board from November 1, 1966, to February 8, 1967, 71 variances were authorized.⁶⁹

Several recent cases illustrate that the Boston Board tends to disregard potential harmful consequences of its decisions. In December, 1966, the Board gave a variance allowing a wholesale departure from use restrictions in an apartment district in spots over a two block area.⁷⁰ The decision authorized the establishment of retail stores (subject to several conditions), offices and a bank branch, along with departures from side-yard, rear-yard and set-back limitations. Perhaps the fact that the applicant was a children's hospital influenced the Board; legal variance standards certainly could not have. Zoning planners in the Redevelopment Authority could find no hardship with respect to the properties in question and could foresee deleterious consequences for the surrounding neighborhood should the variance pass. The planners, to no avail, recommended denial of the request. One Boston planner expressed the attitude of most zoning experts toward such arbitrary board action: "This kind of action, wholly out of kilter with the statute and neighborhood considerations, makes our job futile. We plan and recommend with zoning objectives in mind, and the Board continually ignores us. . . . I estimate that the Board disregards our recommendations about 60% of the time."⁷¹ The land use expertise of the city planning staff makes it uniquely qualified to maintain the integrity of both neighborhood zoning and the overall city plan. "It should therefore be respected when it speaks to the question of whether the granting of a variance would result in a substantial change in the character of the neighborhood. . . ."⁷²

The advice of planners seems to have little effect on the Baltimore Board. In a recent appeal taken under Section 40(c) of the Baltimore

69. These statistics were compiled by the writer. They are only "approximate" because all Board decisions for this period were not yet on file at the time they were compiled. A breakdown of the Boston decisions since 1965 discloses that most variances fall into four broad categories: (1) dimensional variations, including departures from yard, area and height requirements, account for over 50% of the grants; (2) use variances, frequently approving commercial or industrial activity in a residential or apartment zone, comprise over 20%; (3) parking modifications, relaxing off-street parking regulations outlined by the new code, occur about 10% of the time; and, (4) permission for multiple dwellings, often necessitating a combination of dimensional and use variations, account for 8%. An analysis of Baltimore statistics also discloses high percentages for use and dimensional variations, though in Baltimore the percentage of use variations exceeds the dimensional figures, and an almost identical percentage exists for family or multiple dwelling grants. See Statistical Report, *supra* note 67.

The high percentage of dimensional variances has been attributed to the view, common to boards of appeal, that an adjustment in set-back or yard restrictions will have only a slight effect on neighboring property owners. A three foot rear building addition would not seem to block an appreciable amount of light and air, see Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955), but a "slight effect" rationalization cannot explain the large number of use variances which ordinarily permit burgeoning commercialization of residence districts or the growth of malignant industrial activity in apartment zones.

70. Children's Hospital Medical Center, 340-350 Longwood Ave. and 410 Brookline Ave., Ward 4, Dec. 7, 1966. These decisions are taken from Boston Building Department files and from notes taken while observing Board hearings.

71. This statement was made to the writer "off the record" by an official of the Zoning Redevelopment of the Boston Redevelopment Authority on Feb. 24, 1967.

72. Note, *Syracuse Board of Zoning Appeals — An Appraisal*, 16 SYR. L. REV. 632, 639 (1965).

zoning ordinance, the hardship provision, the Board granted the request of an applicant to house six families and two roomers on premises situated in a residence use district.⁷³ The area requirements for this property permitted only four families to occupy the premises. The file in this case contains a letter, dated July 19, 1968, from Robert C. Embry, Jr., Commissioner of the Department of Housing and Community Development of Baltimore City, to Gilbert Rubin, Executive Director of the Baltimore Board. This letter, filed as a protest to the grant of the variance in question, states, *inter alia*:

The Department of Housing and Community Development opposes this application, since the requested use exceeds the Density Provisions of Section 29(p) of the Zoning Ordinance of Baltimore City and there is no apparent reason for an exception thereunder. The Board of Municipal and Zoning Appeals is urged to disapprove this appeal.⁷⁴

Nevertheless, in approving the applicant's request as to the number of families that may occupy the premises, the Board's written decision completely ignored the recommendation of the Commissioner of Housing and Community Development⁷⁵ and made no mention of the existence of any hardship — the basic legal requirement for allowing a variation under Section 40(c).⁷⁶

A pattern generally prevalent in variance decisions is the distinct absence of specific findings based on legal standards. Instead, boards generally support their variance grants with boilerplate language such as that on which the Boston Board rested its verdict in one variance case: "The Board finds . . . that exceptional circumstances peculiar to this specific case justify a relaxation of the restrictions imposed by the statute, and that the varying of the terms of the Zoning Act . . . will not conflict with the intent and spirit of the Zoning Act. . . ."⁷⁷ This finding, because of its lack of substance, would not withstand

73. Appeal No. 264-268, 18 E. Madison Street, July 25, 1968.

74. Letter from Robert C. Embry, Jr. to Gilbert Rubin, July 19, 1968, record, Appeal No. 264-268, 18 E. Madison Street, July 25, 1968.

75. For another example of the Board's ignoring planner's recommendations and legal requirements, see Appeal No. 159-68, and appeals related thereto on the 1800 Block of Eutaw Place, decided May 31, 1968.

The Boston Board recently authorized a use variance to allow the expansion of a woodworking factory in a single residence zone; Johnson Woodworking Co., 33 Moreland St., Nov. 30, 1966; and a short time later permitted a metal company to expand its operation in a general residence district by granting use, yard and parking variations. Cambridge Lee Metal Co., 15 Empire St., Ward 22, Jan. 20, 1967. Neither decision makes mention of neighborhood considerations. Both appear to have been influenced by the existence of non-conforming uses in the area proximate to the properties in question. Boards in other cities have also been swayed by nearby non-conformity. See Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955); Note, *Syracuse Board of Zoning Appeals — An Appraisal*, 16 SYR. L. REV. 632, 639 (1965). The courts, however, have rejected such justifications as an unlawful basis for continuously cutting into a residential neighborhood with a commercial carving knife. See notes 37-41 *supra*.

76. BALTIMORE, MD., CODE art. 30, § 40(c) (1966).

77. Cambridge Lee Metal Co., 15 Empire St., Ward 22, Jan. 20, 1967. For examples of Baltimore decisions similarly ignoring legal limitations and land use considerations, see Appeal No. 45-68, 31, 37-39 Eastern Avenue; Appeal No. 75-68, 5901-13 Eastern Avenue.

judicial challenge. Variance relief will only be upheld by a reviewing court where there is "a definite statement of rational causes and motives founded upon adequate findings" and "not mere repetition of statutory words."⁷⁸ Yet the boards seem no more inclined to ponder judicial standards of legality than to recognize that they might be planting the seeds of urban blight in a particular area.

A salient factor in board decisions which permit variances is apparently the absence of opposition to the variance. In fact, a high-ranking Baltimore Board official has stated that the presence of protestants is the one factor which most frequently causes the Board to adhere to legal requirements for variations.⁷⁹ A recent study in Philadelphia reports that the absence of protestants also has a "significant effect" on board action in that city.⁸⁰ In Ithaca, New York, three years of regular observation revealed that "where no opposition is voiced the Board bats very close to 1.000 in approvals."⁸¹ The correlation between the absence of protestants and successful requests, however, may be only ostensibly meaningful.⁸² Protestants have attended too few cases to venture significant conclusions about their influence on the boards' decisional processes.⁸³ At least in the case of Boston, most Board hearings are attended only by the variance applicants. At any rate, "it is frightening to think that the criterion used by the Board of Appeals for approval or disapproval of variance applications is the presence or absence of protests. If such is the case, then the rule is of men and not the law."⁸⁴ If this is true, the legal standards of the

78. *Prusik v. Board of Appeal*, 262 Mass. 451, 160 N.E. 312 (1928). See also *Kennerly v. Mayor and City Council*, 247 Md. 601, 607, 233 A.2d 800, 804 (1967).

79. Statement made by the Executive Director of the Baltimore Board in an interview with the writer.

80. Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 541-45 (1955). This Note uncovers patterns based more on types of variances and neighborhood circumstances than does this article. The discrepancy in views between the Note and the instant offering may be explained by the different techniques used in the two projects. The law review staff assigned to the Philadelphia project worked very closely with the Philadelphia Board of Adjustment; the writer of this article did more observing of, rather than working with, the Boston and Baltimore Boards. While this article does not purport to make as probing a statistical analysis as did the Philadelphia project, it is hoped that the techniques used will avoid the Hawthorne effect which apparently crept into the law review's efforts. One member of the review (at the time of the survey) felt that the Board of Adjustment was "on its best behavior throughout" the period of observation.

81. LEARY, MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS 10 (1959).

82. On the basis of Boston decisions since 1965 reviewed by the writer, it is estimated that protestants attend only about 3% of the Board's hearings. This low figure may be due to the lack of immediacy most residents in low income neighborhoods feel concerning variances. Also, attendance at Board hearings may be difficult due to the day on which they are held — Wednesday of each week; it seems unlikely that an employer would be willing to allow an employee time off to attend a variance hearing. The Boston notice requirements that copies of variance applications be delivered to neighboring property owners and published in newspapers follow the pattern existing in other jurisdictions. They seem adequate to apprise most potential protestants of the hearing.

83. See note 82 *supra*.

84. LEARY, MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS 10, 11 (1959).

variance procedure, as imposed by statute and expounded by the judiciary, become even more illusory.⁸⁵

Accounts of board improprieties have been recorded in a number of cities.⁸⁶ There are numerous Boston and Baltimore cases where the boards have relaxed lot and family restrictions, despite non-compliance with statutory standards, to allow conversion of single family homes to multi-family residences.⁸⁷ Some of these cases may be the product of questionable *ex parte* influence. Whatever the source of their illegality, unjustified multiple-dwelling variances pierce the protective veil of the zoning code. They cause the population of a neighborhood to increase without any relation to the locational requirements of the ordinance. Again the variance procedure in practice exceeds its theoretical and legal limitations, and the danger of urban blight increases.

The actual operation of the variance machinery of Boston and Baltimore, when compared with court opinions on variance power, suggests that variance decisions possess a high degree of legal vulnerability: "A very high percentage of them would not survive review by even the most tolerant court."⁸⁸ Why, then, has there not been a judicial

85. While a first hand observation of a board of appeals hearing may not be statistically significant, it does convey a sense of the atmosphere in which this disregard for legal standards and planning recommendations occurs. In February, 1967, an applicant came before the Boston Board requesting that she be able to make use of her home as a three family apartment. The property was located in an S-5 district which allowed semi-detached residences, with one family on each side of a party wall, as the most intensive use in the zone. The desired variance not only necessitated use deviations, but also involved departures from lot requirements. When asked to state her reasons for the appeal, the applicant recounted the following story: "My family has changed so that only my husband and me are left in the house. We would like to live there, but we would also like to rent as much of it as possible so that we can get some needed money out of it — to help us with our living expenses and taxes . . ."

In response, one Board member stated: "I don't see any hardship here. Certainly someone can use the property under existing zoning regulations." The applicant answered: "I needed the whole house for a number of years while I was taking care of my deceased sister's children. Now that they're gone, I would like to live in it and use the extra space for income." The Board appeared more sympathetically disposed toward the applicant at this point, but the member who spoke previously then stated: "A variance cannot be granted solely for an applicant's personal benefit." Somewhat confused, the applicant closed her case by saying that she did not think it should make a difference that others could use the property, and that she should "be able to use it to make enough money so that I can continue to live in it."

The case, theoretically, seemed destined for a negative disposition, but the forces that so often prostitute the variance machinery began to show themselves. At the conclusion of the hearing a Building Department staff member happened by the Board room. He proceeded to inform the Board that the "lady at the Larchmont Street property certainly has need for a variance. I've seen her house, and know her case well. She's a friend of my sister, and can't hurt anyone by making some apartments." Replying to a Board question of whether he thought hardship existed, the staff member answered affirmatively without explanation. The Board then implied to him that favorable action would be taken on the request. 26 Larchmont St., Dorchester, Feb. 24, 1967. The dialogue in this case comes from notes taken by the writer at the Board of Appeals hearing in this case.

86. *E.g.*, SMITH, CITIZEN'S GUIDE TO ZONING 97 (1965).

87. *E.g.*, Sullivan, 87 Wallingford Rd., Ward 21, Jan. 11, 1967 (Boston); Bowen, 668 Lagrange, Jan. 25, 1967 (Boston); Lonno, 17 Snow St., Ward 21, Jan. 20, 1967 (Boston); Fahey, 20 Birchland St., Ward 20, Jan. 4, 1967 (Boston); Appeal No. 165-68, 162-68, 187-68, 209-68 (Balto.). For a review of a similar experience in Philadelphia, see Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 547 (1955).

88. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 294 (1955).

curtailment of the alleged flood of unjustified variance grants? The answer to this question probably lies in the fact that only a handful of the three hundred or more annual board of appeals decisions in each of these cities actually reach the courts.⁸⁹ Perhaps some decisions go unchallenged because they stand on sound legal ground. However, if inferences of board improprieties are correct, the paucity of judicial review must be explained differently. Unjustified variations apparently are not subjected to judicial review because the individuals most seriously affected by them, low income residents of declining neighborhoods, lack the resources and legal understanding to level a judicial attack.⁹⁰ The expense of a court appeal, involving attorney's fees and the expert witnesses which are almost always necessary in zoning cases, can be exorbitant. Even where legal resources have been available, "it is only in flagrant cases of abuse of authority — and then only if the financial stakes are sufficiently large — that decisions are taken to *any* court."⁹¹ Occasionally, a frustrated planning board will seek to protect the public interest by bringing actions to reverse unjustified variations.⁹² Public officials, however, largely tend to ignore legal lapses by the boards of appeal:

For some inexplicable reason the fact is that the zoning ordinance, which was probably very costly in time, effort, and dollars, is being shot full of holes and those who are charged with preservation of the public interest and also protection of the public funds cannot seem to work up any excitement about this grievous waste.⁹³

Thus, property owners in areas affected by illegal variances must often accept their plight without effective recourse. As a result, the role of zoning as a protective measure sinks lower in their estimation.

The lack of effective judicial review may in part explain the gap between the theory and practice of the variance, but there are other asserted causes of variance abuse which warrant mention. Unjustified variations may be fostered in many cities by the lack of meaningful criteria which has traditionally characterized the variance sections of zoning ordinances.⁹⁴ Statutory vagueness has made the variance pro-

89. From 1949 to 1963, only twenty-nine appeals from variance decisions in Massachusetts, aside from those involving purely procedural or jurisdictional questions, were taken to the Supreme Judicial Court. The right to take an appeal (first to the Superior Court) is given to an "aggrieved person" in Massachusetts and in numerous other jurisdictions. The "aggrieved person" concept is broad enough to cover most property owners in the area if they are able to show some reasonable probability of injury, economic or physical. For a discussion of this requirement, see Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1400 (1960). In Baltimore only 15 of 464 cases heard by the Board were appealed to the Baltimore City Court.

90. Community legal services, such as Harvard University's Community Legal Assistance Office, may be able to give these poorer individuals a weapon against illegal variances. See Birgbauer, *Legal Service for the Poor* (unpublished paper in the Harvard Law School Library).

91. Repts., *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 294 (1955).

92. *E.g.*, *Planning Board v. Board of Appeals*, 338 Mass. 160, 154 N.E.2d 349 (1958).

93. LEARY, MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS 11 (1959).

94. See Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1406 (1960).

cedure particularly susceptible to the dispensation of special favors⁹⁵ or to the decision of variance applications on the basis of the board's sympathies rather than genuine land use considerations.⁹⁶ In fact, one leading planner has recommended more specificity in zoning statutes as the panacea for eliminating board of appeals abuses.⁹⁷ Yet recent experiences reveal that even where statutory standards have been made more definite, as in Boston and Syracuse,⁹⁸ the tide of abuse does not appear to have been stemmed. At most, boards will make formal findings on each statutory requirement. This has not, however, deterred them from "discovering hardship in commercial inconvenience, uniqueness in disadvantages shared by a neighborhood, and an absence of adverse effect in the expansion of a non-conforming use."⁹⁹ Uncertain standards may make variance misuse more frequent, but inadequate statutory definition certainly cannot be viewed as the major cause of illegal variations. Cities undertaking the enactment of new zoning codes should not expect that more specific statutory standards, by themselves, will result in an ebb in the flow of questionable variations from the boards of appeal.

Zoning in general, and the variance procedure in particular, have frequently been regarded as invitations to improper influence.¹⁰⁰ Some have characterized illegal variances as a product of the venality of politics. For example, in Chicago it has been asserted that:

Political influence often determines whether Council approval is obtained, and narrow ward interests are substituted for interests of the entire city. As is often true, one variation becomes the basis for a well-grounded request for subsequent variation, and a snow ball movement begins, opening the way for complete destruction of the effectiveness of the zoning ordinance.¹⁰¹

The most significant cause of the breakdown in zoning's variance safety valve lies in the nature of its mainspring, the board of appeals.

95. *Id.*

96. SMITH, *CITIZEN'S GUIDE TO ZONING* (1965).

97. Pomeroy, *Modern Trends in Zoning*, NEW YORK STATE PLANNING NEWS 4 (Sept.-Oct. 1960).

98. See SYRACUSE, N.Y., *ZONING RULES AND REGULATIONS* art. 5.4.8 (1961).

99. Anderson, *Board of Zoning Appeals — Villain or Victim?*, 13 SYR. L. REV. 353, 386 (1961).

100. For examples and discussion of these improper influences as they bear on zoning, see Shapiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267, 282-83 (1968). In Boston, a zoning official has alleged "off the record" that the "big boys" have no trouble in getting their variance applications approved. "When fellows like . . . [a large Boston based construction firm] seek variances, planning recommendations and statutory requirements are almost totally ignored." Thomas E. McCormick, Director of Zoning, Boston Redevelopment Authority, Feb. 24, 1967. The innuendo of corrupt politics underlying these statements, in the absence of a full scale and probing investigation, defies proof. Moreover, at least in the case of Baltimore and Boston, corruption cannot be condemned as a sole cause of the deleterious effects of variance abuse. It is probable that only a few of the large number of allegedly improper variances are actually attributable to political machinations. A review of Baltimore and Boston board decisions discloses few applicants who would be in a position to command political influence or who have the financial means for "marketable" variations.

101. Comment, *Zoning Amendments and Variations and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953). In Chicago, the city legislative body has ultimate authority over variances.

The board itself must bear the responsibility for the tide of illegal variations which robs the zoning concept of its effectiveness as a protective and planning mechanism. With regard to the Baltimore Board, it has been said:

Because of its powers to grant exceptions and variances, the Zoning Board over the years has been the chief instrument for breaking down zoning protection, allowing commercial operations to encroach upon residential properties. By granting a commercial extension in one place and a new sign in another the board has satisfied the steady stream of petitioners and in the process helped to create the sorry hodgepodes to be found along such thoroughfares as Belair Road. . . .¹⁰²

The crucial shortcoming of the board of appeals is its lack of expertise. Most board members are not trained in municipal planning, zoning law or any other discipline relevant to their duties.¹⁰³ This may explain why they frequently reject the advice of planners in favor of their own parochial notions.¹⁰⁴ Political considerations often govern the selection of the board;¹⁰⁵ most boards are appointed by the mayor and are "citizen agencies" composed of representatives of various political and business interests in the community.¹⁰⁶ Their business and political orientation makes board members much more likely to be impressed by the "practical" business effects of relief rather than by technical legal limitations, social consequences or planning implications: "Certainly there is a prejudgment if zoning board members are allied to the very interests which they are expected to control."¹⁰⁷ At best, the qualifications of board members may be said to stem from a close association with the community, familiarity with the areas involved and a supposed harmony with public opinion.¹⁰⁸ This local background, however, may be a mixed blessing, since it may make board members vulnerable to the pressure of friends, business associates or politicians.¹⁰⁹

Board members are susceptible not only to the practical arguments of business interests or close associates; they have also displayed a general tendency to help individuals circumvent the law. Because they are selected from the community at large, they have "a natural disposition not to be too harsh on [their] neighbors."¹¹⁰ For example, an applicant appeared before the Boston Board seeking permission for

102. *The Sun* (Baltimore), Jan. 4, 1968, at A14, col. 1.

103. C. HAAR, *LAW & LAND* 135 (1964).

104. Note, *Judicial Control Over Zoning Boards of Appeals: Suggestions for Reform*, 12 U.C.L.A.L. REV. 937 (1965).

105. C. HAAR, *LAW & LAND* 135 (1964).

106. Anderson, *Board of Zoning Appeals — Villain or Victim?*, 13 SYR. L. REV. 353, 387 (1961).

107. Note, *Judicial Control Over Zoning Boards of Appeals: Suggestions for Reform*, 12 U.C.L.A.L. REV. 937, 946 (1965).

108. *Id.*

109. *Id.* See also note 85 *supra*.

110. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1407 (1960).

substantial lot and yard variations.¹¹¹ The applicant explained that he had "inadvertently" subdivided in violation of the zoning regulations for his residential district. Board members studied his plans and tried to suggest various ways in which he could reduce his violation. The applicant refused to make any changes. He demonstrated neither the unique circumstances nor the hardship to his property necessary, in theory, to obtain a variance. The acting Board chairman rhetorically asked him if he had "given us some reasons showing hardship." The applicant again stated that he had made an "unfortunate error" in subdividing — certainly not a proper showing of adversity. Despite the absence of any legal findings, the Board expressed its commiseration with the applicant's plight and indicated that the variance would be allowed.¹¹²

Board members are often willing to grant applications where the variance sought apparently could cause little immediate harm. In a recent case before the Baltimore Board, the applicant sought to build fifty-eight apartment units on land located in a residence use district.¹¹³ Although no legal justification appeared to exist for the applicant's request, the Board granted him an exception. In its decision, the Board emphasized that the applicant had obtained the consent of the neighbors of the property in question. It is submitted, however, that the mere non-existence of protest from neighbors should not blind the board to overall long-range community interest in maintaining population densities within the legal limitations prescribed by the zoning ordinance.

It has become increasingly clear that the board of appeals, in its present form, is not well suited for its task. Its members generally lack an understanding of the technicalities and policies of the zoning ordinance and show little concern for the overall integrity of the zoning scheme. As long as this situation continues, the flow of illegal variations will persist and the consequent problem of neighborhood decline will remain unsolved. Repairs are needed for the mechanism of zoning's safety valve; the board of appeals must be reformed so that the variance procedure will operate in the way it was designed. Other aspects of the variance machinery should undergo reform to insure that variations, in practice, stay within their theoretical bounds.

III. VARIANCE REFORM — PROPOSALS FOR REPAIRING THE LEAKAGE

Whatever one's view of the extent of flexibility needed in zoning administration, it is patent that the administration of the vari-

111. 735 & 739 Truman Highway, Feb. 24, 1967; based on notes taken at the hearing by the writer.

112. Similar experiences have been recounted by New Jersey's former chief planner, who has summarized this tendency of boards as a desire to:
"help this poor fellow in his time of trouble" — his "trouble" being, in nine cases out of ten, that he wants to do something that the established law will not permit. . . . Applicants, in many cases, are individuals who have paid taxes for the past forty years, . . . are "good" people, and the members of the Board just don't want to offend them.

SMITH, *CITIZEN'S GUIDE TO ZONING* 96-99 (1965).

113. Appeal No. 127-68, 6503 Park Heights Ave.

ance . . . procedures is inadequate under existing institutions. Discriminations may be rampant in individual cities and towns and standards may vary markedly from municipality to municipality within the same metropolitan area. Certainly the situation has reached the point where extensive reform is in order.¹¹⁴

The need for variance reform is emphasized by the absence of any other land use device to fulfill the legitimate zoning functions for which variances were designed. Amendments to the comprehensive zoning ordinance and zoning map were not intended to relieve hardship applicable only to individual pieces of property. Instead, the amendment process was conceived to correct mistakes in the original zoning scheme, or to accommodate general changes in conditions which occur after the enactment of the ordinance. The amendment process, essentially legislative in character, is more complicated and time consuming than the variance procedure: "As a practical matter, since it involves municipal legislative action, it may be available only where municipal officials perceive initially the need for the change or become convinced of its desirability on the urging of interested individuals."¹¹⁵

The only possible alternative to the variance is the special exception, which is sometimes referred to as a conditional use. The exception is better suited to provide individual relief than an amendment. When compared to variances, exceptions have the advantage of greater certainty, because the purposes for which they may be granted are explicitly enumerated in the zoning ordinance.¹¹⁶ However, because exceptions are part of a statutory scheme, their exclusive use may preclude relief in justifiable situations not foreseen by the local legislative body, the very situations which variances were designed to remedy. There are, thus, no existing alternatives which satisfactorily accomplish the safety valve objectives of variations; a properly functioning variance procedure is necessary to provide readily available interstitial relief where individual hardship arises.

Any effort toward reform must first be directed at the present source of variances, the board of appeals. It has become distressingly clear that: "The concept of the board of appeals as a kind of poor man's court where common sense justice is dispensed by one's friends and neighbors no longer has much validity."¹¹⁷ The increasing complexity of zoning ordinances, especially in large urban areas like Baltimore and Boston, and the growing demands for more positive zoning to aid in community planning, housing conservation and urban renewal, dictate that those qualified through professional training or experience have a greater say in the variance procedure. This view may have inspired the drafters of the new Boston code to require planning reports in certain variance cases. Under the new code, the Boston Board of Appeals must receive recommendations from the Redevelopment

114. C. HAAR, *LAW & LAND* 141 (1964).

115. *Id.* at 143.

116. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1407 (1960).

117. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 296 (1955).

Authority on four "critical" kinds of variance applications.¹¹⁸ The drafters of the code felt that the advice of experts would be particularly necessary where requests were made for height variations, for commercial or industrial uses in residential districts, or for expansion of non-conforming uses which presently exceed certain floor space or lot measurements.¹¹⁹ The new ordinance also makes it clear that planning reports may be desirable in other types of variance applications.¹²⁰ However, in view of the board of appeals' tendency not to follow the recommendations of planners, this Boston scheme for expanding the advisory role of zoning planners in the variance process will probably accomplish little.

The most direct approach to the prevention of variance abuses would be to eliminate the board of appeals and to confer its functions on the local planning board.¹²¹ There is, however, a less drastic reform that may appease those who believe that the voice of the layman must continue to be heard in the variance process. Under such an approach a municipal zoning administrator or zoning ombudsman could be delegated the power to appeal to the courts any decision of the board which he believes to be illegal. In this way, the preservation of the zoning ordinance and the protection it affords various neighborhoods would be made a public duty, and would not depend on the vicissitudes of private initiative. This practice, already implemented in Denver, Colorado, appears to have made one board of appeals recognize the legal limits of its authority.¹²² Analogous reforms might empower local planning commissions or state zoning authorities to appeal or to veto board decisions.¹²³ Again, the role of the board would not be eliminated, but its excesses would be checked by an authority with a broader perspective of land use needs and the overall public interest.

Another recurrent target of variance reformers is the so-called use variance.¹²⁴ Use variations are often necessary to the operation of profitable commercial or industrial activities in residential districts. Where the financial stake of an applicant is sufficiently large, political and monetary inducements, rather than legal standards, have been said

118. BOSTON, MASS., ZONING CODE § 7-2 (1955).

119. WEISMANTEL, PROCEDURE OF THE NEW ZONING CODE 20 (Boston Redevelopment Authority Planning Dep't, 1965).

120. *Id.*

121. SHURTLEFF & CANTELMO, PLANNING LAW AND ADMINISTRATION IN MASSACHUSETTS 64 (1964).

122. LEARY, MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS 85 (1959). The theory underlying the Denver approach is that the Board of Zoning Appeals is a quasi-judicial body and as such is a distinct level in the judicial system. The decisions of the Board are treated in the same manner as decisions of a regular court. Thus, the Board does not become a party to an appeal taken from one of its decisions. The applicant is liable for defense of an appeal taken against his variance. This should have the effect of further discouraging unnecessary applications.

123. See Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959).

124. See F. BAIR & E. BARTLEY, THE TEXT OF A MODEL ZONING ORDINANCE WITH COMMENTARY § 9-3, at 52 (3d ed. 1966); LEARY, MODEL PROCEDURE FOR THE ADMINISTRATION OF ZONING REGULATIONS 10, 76 (1959): "The granting of the use variance is a pernicious practice and one which must be eliminated if zoning and its benefits are to endure." See also Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 296 (1955).

to guide some boards to favorable use variance decisions.¹²⁵ A use variation is rarely, if ever, the "minimum" variance necessary to relieve hardship;¹²⁶ a dimensional deviation should almost always afford adequate relief. A review of Baltimore and Boston use variance cases over the last two years discloses no situation in which there was no person who could utilize the property under existing use limitations. Similarly, an "[e]xamination of the use variances granted by the Syracuse board reveals few applicants whose situation was so acute as to support a claim that the regulations were unconstitutional as applied to them."¹²⁷ Under legal standards of hardship, unique circumstances, and preservation of neighborhood integrity, use variations can only be justified in extremely rare situations. In the light of the obvious danger of abuse, therefore, it seems wise to prohibit them altogether.¹²⁸ Indeed, in some states the use variation has already received a judicial burial.¹²⁹ In *Josephson v. Autrey*,¹³⁰ a Florida case, the court stated that a board cannot employ its variance authority to accomplish what would be, in effect, a rezoning. The court felt that the allowance of a prohibited use through the granting of a variance would have the effect of an amendment to the zoning ordinance, which a board of appeals is powerless to enact. The immediate effect of this decision is to assure that the policy-making function of zoning is kept in the legislative realm, where it belongs. While no statistics are available concerning this approach to reform, its effective operation in some areas of the country at least permits the conclusion that it may be reasonably successful in reducing variance abuse.¹³¹

A tenable, although as yet untried avenue of reform would be to require that zoning maps show the location of variances. Maps indicating the locus of all variances should serve as a constant reminder to the boards of the cumulative effect of their actions and might, therefore, deter them from granting variations with unwarranted liberality.¹³² Where variance symbols on the map are highly concentrated, the board should recognize conditions of general hardship which do not warrant variance relief, but point to the need for rezoning. The zoning ordinance and map could be amended periodically in order to assure that the inability to make a reasonable use of the land did not arise from

125. Von Eckardt, *Zoning Corrupts Gov't*, Boston Globe, Oct. 12, 1966, at 31, col. 4 (A.M. ed.).

126. See text at note 20 *supra*.

127. Anderson, *Board of Zoning Appeals — Villain or Victim?*, 13 SYR. L. REV. 353, 387 (1961).

128. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 296 (1955). *E.g.*, N.J. REV. STAT. § 40:55-39(c) (1948, as amended 1953).

129. See F. BAIR & E. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE WITH COMMENTARY* (3d ed. 1966).

130. 96 So. 2d 784 (Fla. 1957).

131. SHURTLEFF & CANTELMO, *PLANNING LAW AND ADMINISTRATION IN MASSACHUSETTS* 64 (1964).

132. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 295 (1955): "The cumulative damage done to the municipal zoning plan is little understood by most boards, immersed as they are in the regular flood of applications to be considered each week or month."

poor zoning.¹³³ This periodic revision could be a most effective means for reducing the need for individual relief.

Although they do not warrant detailed discussion, other corrective measures should be considered when making repairs of the variance machinery. These measures involve the institution of certain procedural requirements, almost non-existent in today's variance process. First, variance application forms should be cast in the form of pleadings. Applicants would then be forced to state their reasons for requesting a variance in terms of the legal standards outlined in the ordinance. This requirement should reduce confusion, eliminate irrelevant lines of inquiry, and compel both the applicant and the board to consider only the essential issues.¹³⁴ Second, testimony heard in connection with variance applications should be under oath and should be confined to statements relevant to the legal issues under consideration. The requiring of sworn testimony should apprise both applicant and board of the seriousness of the matter at hand. Furthermore, the relevancy requirement might preclude the introduction of statements which would improperly arouse board sympathies. Third, the board, in its statement of findings, should be required to specifically accept or reject every consideration raised in the application and explicitly state the reasons for such action.¹³⁵ Such a requirement would, again, make the board more aware of its responsibility to consider a variance application solely on the basis of its legal merit.

IV. CONCLUSION

If the suggested reforms are ignored, the protective shield provided by zoning ordinances will continue to be pierced by indiscriminately authorized variations. Repeated abuse by boards of appeal has transformed the variance from a device for zoning safety into a dangerous threat to the integrity of land use control. Unless this abuse is halted, the destructive consequences of illegal variances will spread increasing blight throughout our urban neighborhoods. If, however, reforms are instituted, variance practice can be brought closer to its theoretical objectives and, once again, may be applied to constructive rather than disruptive ends.

133. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1408 (1960).

134. Repts, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 295 (1955).

135. Note, *Board of Zoning Appeals Procedure*, 16 SYR. L. REV. 568, 581 (1965).