An Agricultural Law Research Article

Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices

by

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Part 2 of 3

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theless, more than eighty percent of all use variance requests are approved by the county boards of adjustment in Iowa.[410] In order for such a request to be granted, the proposed variant use would have to be the only reasonable use of the property.[411] Indeed, situations in which the effective use of property is prevented by the ordinance are very rare.[412]

b. Area Variances

Applications for area variances comprise nearly ninety percent of all variance requests considered by county boards of adjustment in Iowa.[413] These applications ordinarily relate to reductions in lot size or to front, rear, or side yard setbacks.[414] In the latter case, a frequent request is for the waiver of the minimum acreage requirements for residential lots in agricultural districts.[415] Another similar area variance commonly requested is for the severence of an existing farmstead.[416] Both of these common types of variances are nearly always granted by county boards of adjustment.[417]

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410. *Id.*

411. *See* text accompanying notes 707-13 *infra*.

412. *See* Gamanche v. Town of Acushnet, 14 Mass. App. 215, 217 n.6, 438 N.E.2d 82, 84 n.6 (1982); Anderson, *supra* note 358, at 387; Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 22 (1969).

413. *See* note 403 *supra*.

414. *E.g.*, Black Hawk County Board of Adjustment Minutes, Petition of West (Sept. 22, 1980) (variance of setback regulations for garage); Calhoun County Board of Adjustment Minutes, Petition of Willis (Oct. 23, 1980) (variance of rear setback requirements for storage shed); Emmet County Board of Adjustment Minutes, Petition of Olson (Aug. 15, 1978) (reduction of minimum lot size for rural dwelling).

415. The range for minimum lot size for single-family dwellings in A-1 agricultural districts is from 40,000 square feet, *see, e.g.*, Allamakee County, Iowa, Zoning Ordinance § 2.08 (1979), to 40 acres, *see, e.g.*, Calhoun County, Iowa, Zoning Ordinance § 840.1 (1980), with no consensus on any particular size.

416. Some county zoning ordinances expressly provide that if an existing farmstead is voluntarily severed from the rest of the farm, it must conform to the lot and area regulations of the district in which it is located. Franklin County, Iowa, Zoning Ordinance § 412 (1976). In other counties the severance of existing farmsteads may constitute a violation of self-created hardship provisions. *See* text accompanying notes 749-50 *infra*.

417. In Kossuth County the granting of variances to permit severance of existing farmsteads that do not conform to minimum lot-size requirements is so routine that a standard form entitled "Variance Approval"—on which board members need only fill in the name of the petitioning landowner and other identifying information—has been devised. In three and one-half years the Kossuth County Board of Adjustment has granted 23 such requests while denying none. Unlike some ordinances that might impose a burdensome minimum acreage requirement for severance of an existing farmstead, the Kossuth County Ordinance only requires that landowners in an A-1 agricultural district sever at least five acres with the farmstead. Kossuth County, Iowa, Zoning Ordinance § 6.09 (1973). In Jasper County the ordinance required a minimum of 35 acres to sever an existing farmstead. The Jasper County Board of Adjustment, however, granted eight variances to this requirement within one year after the ordinance had been enacted. *See* text accompanying notes 720-24 *infra*. Consequently, the Board of Supervisors amended the ordinance to reduce the minimum lot size to five acres. Jasper County, Iowa, Amendments to the Jasper County Zoning Ordinance (June 15, 1982).

However, a request for waiver of lot-size requirements for agricultural dwellings or a variance for severing an existing farmstead seldom meets the criteria for a variance.[418] These types of requests are more appropriately treated as special exceptions when the board of supervisors approves of such deviations from the ordinance. A few counties have promulgated special exception provisions for rural dwellings or severing existing farmsteads.[419] The majority of county boards of adjustment that choose to grant variances in these situations have usurped the supervisors' legislative authority.

Area variances frequently involve minor deviations from the zoning ordinance that have minimal impact on the county's land use plan.[420] For example, the public most likely will not be aware that a building has been allowed to be constructed several feet closer to the lot line than permitted by the ordinance. Some jurisdictions, therefore, require that the petitioner for an area variance show only "practical difficulties"[421] rather than the more stringent "unnecessary hardship."[422] Regardless of the standard to be applied, however, the quality of variance decisions is largely a function of the competence of board of adjustment members in applying the appropriate criteria.

C. Characteristics of County Boards of Adjustment

Section 358A.11 of the Iowa Code merely provides that county boards of adjustment be comprised of five members, "a majority of whom shall

418. *See* text accompanying notes 697-736 *infra* (discussion of unnecessary hardship).

419. In Dallas County the board of adjustment is empowered by ordinance to grant "special use permits" for "single family dwellings on existing farmstead[s] of less than five (5) acres." Dallas County, Iowa, Amendments to the Dallas County Zoning Ordinance (Mar. 20, 1978). A similar situation exists in Linn County, Linn County, Iowa, Zoning Regulations §§ 2.08 (3.23), (4.1) (1981) (conditional use for severing existing farmsteads of one acre or more), and Story County, Story County, Iowa, Land-Use Policies, Zoning Ordinance and Subdivision Regulations art. XXII(M) (1977) (special exception allowed for severing farmsteads of one acre or more provided farmstead was in existence at time of enactment of zoning ordinance).

Some counties simply have special requirements for severing farmsteads in existence when the ordinance was enacted that are lower than the lot-size requirements for construction of a new dwelling. *E.g.*, Buchanan County, Iowa, Zoning Ordinance § VII(D) (1974) (35-acre minimum for establishing a residence in an agricultural district compared with 3 acres required for severing an existing farmstead); Calhoun County, Iowa, Zoning Ordinance § 600.2 (1980) (1 acre required for severing existing farmstead; 40 acres minimum lot size required for new dwellings); Mitchell County, Iowa, Zoning Ordinance art. VII(13) (1980) (1 acre required for severing farmstead in existence at inception of ordinance); Woodbury County, Iowa, Zoning and Subdivision Ordinances § 9(D)(1) (1981) (2 acres for rural dwellings; 20,000 square feet for severing existing farmsteads).

420. *E.g.*, Dickinson County Board of Adjustment Minutes, Petition of Scott (June 15, 1981) (variance to build deck one foot higher); *id.* Petition of Gumm (Mar. 2, 1981) (variance of one foot to build a fireplace); *id.* Petition of Olson (May 30, 1980) (variance for one foot deviation).

421. *See* text accompanying notes 758-73 *infra*.

422. *See* text accompanying notes 697-736 *infra*.

reside within the county but outside the corporate limits of any city."[423] This language seems to imply that all the members of the board need not be residents of the county; rather, it appears that only a majority need be. Although there is no authority for this interpretation of the statute, the appointment of nonresidents might serve a useful purpose: providing a minority of disinterested persons on the board.[424] Whether or not all board of adjustment members should reside within the county, clearly most, if not all, do.[425]

1. Selection Criteria for Members

Very few counties have established more specific standards than those articulated in section 358A.11,[426] although some county supervisors stated that the basis for the selection of individual board members was to create equal geographic representation of the county[427] or to appoint board members with particular political convictions.[428] Other considerations included whether potential board members were familiar with real property[429] or had demonstrated an ability to be "level-headed."[430]

One notable exception to the lack of formal standards for board of adjustment selection is Story County, where the board of supervisors has promulgated standards for selection of both the zoning commission and board of adjustment members.[431] The Story County selection provisions require that board members meet the statutory requirements of section 358A.11, be willing and able to serve, and possess desirable background characteristics.[432] Those background characteristics include a knowledge of soils, an understanding of environmental issues, and a knowledge of subdivision and zoning principles.[433] It is not clear how the Story County Board of Supervisors determines whether potential board of adjustment

423. IOWA CODE § 358A.11 (1983).

424. Many board of adjustment members are subject to an inherent bias because board members and petitioners are frequently social or business acquaintances. Dukeminier & Stapleton, *supra* note 358, at 335; *see also* text accompanying notes 603-05 *infra*. Nonresident board members might, therefore, contribute a more objective viewpoint to the board's decision-making process.

425. The Project writers are not aware of any county board of adjustment members who reside outside of the county for which they are board members.

426. IOWA CODE § 358A.11 (1983).

427. *E.g.*, Board of Supervisors Interview No. 313 (June 30, 1982); Board of Supervisors Interview No. 304 (June 21, 1982); Board of Supervisors Interview No. 306 (June 15, 1982).

428. Board of Supervisors Interview No. 316 (July 22, 1982); Board of Supervisors Interview No. 306 (June 15, 1982).

429. *E.g.*, Board of Supervisors Interview No. 308 (June 14, 1982); Board of Supervisors Interview No. 301 (June 9, 1982).

430. Board of Supervisors Interview No. 315 (July 20, 1982).

431. Story County, Iowa, Board of Supervisors, Selection of a Planning and Zoning Commissioner (also used for selection of board of adjustment members).

432. *Id.*

433. *Id.*

members possess the desired qualities, and there is still an element of subjectivity involved. The expressed criteria, however, make it more likely that the objective capabilities of persons considered for the board will be given appropriate emphasis.

The selection of board of adjustment members too often is made on the basis of mere willingness to serve.[434] The board members are seldom compensated for more than mileage costs,[435] and the job is considered a thankless task by many.[436] Thus, recruitment of eager board members is difficult, and county boards of supervisors frequently are satisfied to appoint persons who simply are willing to tolerate the job.

2. *Profile of Board Members*

Obviously, the requirement that a majority of the board be comprised of residents of unincorporated areas[437] makes likely that farmers will be chosen to serve on the board. Over one-half of the board members responding to the Project questionnaire were people engaged in farming or spouses of farmers.[438] Also, most board of adjustment members are long-time residents of their counties. Only two percent have lived in their counties for less than ten years,[439] while over eighty percent have resided in their counties for more than thirty years.[440]

A clear majority of county board of adjustment members have high school degrees; only six and one-half percent have less than a high school education.[441] Board members rarely possess any formal education related to land use planning, however. Although one-third of all county board of adjustment members in Iowa have some education beyond high school,[442] only four percent have a formal education related to land use planning.[443]

At least one-half of the county board of adjustment members responding to the questionnaire have served more than one term.[444] Nearly sixty

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434. *E.g.*, Board of Supervisors Interview No. 314 (June 24, 1982); Board of Supervisors Interview No. 303 (June 21, 1982); Board of Supervisors Interview No. 309 (June 7, 1982).

435. *See* Appendix IV *infra* (Table 23). The level of compensation received by county board of adjustment members is highly and positively correlated to correct variance analysis, even in circumstances in which only mileage expenses are paid. *See* Appendix V *infra* (Table 6). Thus, perhaps some payment—no matter how minimal—instills a greater sense of accountability in board members. It also may be true that counties are able to attract more competent board members by compensating them, at least for their out-of-pocket expenses.

436. *See* note 560 *infra*.

437. IOWA CODE § 358A.11 (1983).

438. *See* Appendix IV *infra* (Table 5).

439. *See id.* (Table 6).

440. *Id.*

441. *See id.* (Table 3).

442. *Id.*

443. *See id.* (Table 4).

444. *See id.* (Table 16).

percent of those members, however, failed to disclose how many terms they had served on the board.[445] Perhaps this is due to some confusion concerning the length of a board member's term. Apparently, some board members consider each year a new term[446] even though Iowa Code section 358A.11 states that the terms are to run for five years.[447]

Board of adjustment members were asked twenty-five questions relating to variance criteria in order to evaluate how personal traits of board members influence board decisions.[448] Each question presented a hypothetical fact that could apply to any variance application. Board members were asked to assess how, and to what extent, the presence of each fact would affect their decision to grant or deny a variance.[449] The Project writers assigned one or more "correct" answers to each hypothetical, based on case law from Iowa and other jurisdictions.[450] Personal characteristics were then correlated to the total number of correct answers given by each board member.[451]

The general education level of board members was one of very few factors that proved to be a statistically significant predictor of correct variance responses.[452] It seems that the more education board members have, the more likely they apply correct standards to variance requests.[453] On the other hand, the significance of education as a factor related to knowledge of variance criteria might be substantially diminished if all board members were adequately prepared for their positions. Over three-fourths of the respondent board members indicated that they had learned their skills from on-the-job experience.[454] Surprisingly, however, the length of service on the board of adjustment did not increase the likelihood that board members were aware of the proper variance criteria.[455] Similarly, the frequency of board of adjustment meetings and the number of variance applications considered were of no significance.[456] Apparently, experience is an inadequate training device for county board of adjustment members. Rather than suggesting that there should be a minimum education requirement for board membership, the results indicate that some type of instruc-

445. *See id.* (Table 17).

446. Many board of adjustment members responded that they had served a number of terms equal to the number of years that they had served on the board. *See, e.g.*, Board of Adjustment Questionnaires Nos. 105, 231, 261, 454.

447. IOWA CODE § 358A.11 (1983). However, when the board is first created, there are to be terms of five years, four years, three years, two years, and one year, to enable the terms to be staggered. *Id.*

448. *See* Appendix I, *B infra* (Questions E-1 to -25).

449. *Id.*

450. *See* Appendix IV *infra* (Table 35).

451. For a discussion of the statistical methods utilized in this Project, see note 32 *supra*.

452. *See* Appendix V *infra* (Table 6). Another factor positively related to correct variance analysis is the compensation of board of adjustment members. *See id.*; note 435 *supra*.

453. *See* Appendix V *infra* (Table 6).

454. *See* Appendix IV *infra* (Table 8).

455. *See* Appendix V *infra* (Table 5).

456. *See id.* (Table 7).

tion is needed to provide board members with a basic understanding of zoning principles.

Board members' comprehension of substantive variance standards is essential if boards of adjustment are to function consistently within the scope of their delegated authority. Knowledge of substantive criteria, however, is only one component of a proper variance decision. To assure fairness to the hearing participants and general public, observance of procedural safeguards is equally important.

D. Board of Adjustment Procedures

Boards of adjustment exist to make exceptions to the general zoning map in individual cases according to delegated standards.[457] Although the board exercises a discretionary jurisdiction,[458] its relief is available in described factual circumstances without regard to the personal characteristics of the applicant. Relief in the form of a variance or special use permit makes legal a use of property that would otherwise be illegal. Because the state has created the opportunity to pursue relief from the zoning restrictions, due process requires that procedural protections be afforded to parties to minimize the risk of erroneous administrative action.[459] Procedures find their source either in statutes or in judicial interpretations of the due process clauses of state and federal constitutions.[460] In Iowa four statutes are specifically applicable to county board of adjustment procedure: Iowa Code chapter 358A, county zoning ordinances, the Iowa Open Meetings Law,[461] and the Iowa Public Records Law.[462]

Traditionally, boards of adjustment are subject to few statutory procedural requirements.[463] This may be because the boards emerged in the early part of this century,[464] preceding the public concern over administrative action that led to passage of the comprehensive federal and state administrative procedures acts.[465] Additionally, recognition of zoning as

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457. IOWA CODE § 358A.10 (1983); Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 353-54 (1962).

458. *See, e.g.*, Devaney v. Board of Zoning Appeals, 143 Conn. 322, 326, 122 A.2d 303, 305-06 (1956); Carlyle-Lowell, Inc. v. Ennis, 330 S.W.2d 164, 168 (Mo. Ct. App. 1959); 3 E YOKLEY, *supra* note 42, § 21-4, at 270.

459. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 853-54 (E.D. Va. 1980); Wedergren v. Board of Directors, 307 N.W.2d 12, 16-18 (Iowa 1981).

460. *See* Goldberg v. Kelly, 397 U.S. 254, 258-63 (1970) (due process may require procedural protections beyond those afforded by statute); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 852 (E.D. Va. 1980) (absent statutory procedures, court will define minimal procedural requirements of due process).

461. IOWA CODE ch. 28A (1983).

462. *Id.* ch. 68A.

463. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 538 (1959); Newbern, *Zoning Flexibility: Bored of Adjustment?*, 30 ARK. L. REV. 491, 500-02 (1977).

464. *See* note 357 *supra*.

465. The Federal Administrative Procedure Act, Pub. L. No. 60-404, 60 Stat. 237

a particularly local affair prevented later application of those acts to local zoning boards.[466] For whatever reason, the legislatures have been reluctant to impose any but the most rudimentary procedural requirements on local zoning authorities.

Similarly, in most states judicial imposition of procedures on zoning boards as requirements of procedural due process has been rare.[467] When property rights are at stake, as they are in board of adjustment cases, agencies are required to provide notice and "*some* kind of hearing."[468] Analysis of the contents of the hearing required by due process involves a balancing approach that weighs the private interest at stake in the proceeding against the government's interest in efficient decisionmaking.[469]

While the balancing approach language has not been used in the board of adjustment context, courts frequently discuss the government interests involved, most often in terms of the historical nature of board proceedings. It is frequently stated that board of adjustment hearings are purposefully informal.[470] Informality maximizes the advantage of administrative expertise while avoiding the cost of embroiling the administrators and participants in legal technicalities.[471] The hearing is nonadversary, and lawyers are rarely present.[472]

The Iowa Supreme Court, however, recently has begun to recognize the other side of the balance—the private interest at stake in board of adjustment cases. Since 1979, the Iowa court has admonished county boards for noncompliance with even the minimal statutory procedural guarantees.[473] Moreover, the court has reevaluated its own precedent and imposed

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(1946) (current version in scattered sections of 5 U.S.C.), was enacted in 1946. Iowa passed its comprehensive administrative procedure act in 1974. Act of May 29, 1974, ch. 1090, 1974 Iowa Acts 165 (current version at IOWA CODE ch. 17A (1983)).

466. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 762 (1975).

467. 3 R. ANDERSON, *supra* note 9, § 20.01. Professor Anderson states that

> [c]ourts commonly apply the broadest standards of fairness, live with the disquieting looseness and informality of the process, and move on to determine the matter on the merits, provided that some notion of the facts can be culled from the papers.

Id. at 464.

468. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis original).

469. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The private interest includes factors such as the interest affected by official action, the risk of error, and the incremental benefit of imposing additional procedures. The government interest centers on the cost of additional safeguards. *Id.* at 335. The competing interests are considered in light of history and past course of dealing. Ingraham v. Wright, 430 U.S. 651, 675 (1977).

470. "It must be borne in mind . . . that we are dealing with a group of laymen who may not always express themselves with the nicety of a Philadelphia lawyer." Couch v. Zoning Comm'n, 141 Conn. 349, 358, 106 A.2d 173, 178 (1954).

471. *See* note 525 *infra* and accompanying text.

472. 3 R. ANDERSON, *supra* note 9, § 20.01. Similar historical informality and nonadversarial setting were important in Goss v. Lopez, 419 U.S. 565, 578 (1975). *See also* note 526 *infra*.

473. Brock v. Dickinson County Bd. of Adjustment, 287 N.W.2d 566, 570 (Iowa 1980).

new requirements by reversing board decisions solely on the basis of procedural defects.[474]

Procedural guarantees afforded to parties are probably the most —and possibly the only—effective means of checking substantive abuse of board of adjustment action.[475] This section will expand on the analysis presaged by recent Iowa Supreme Court decisions by reviewing the procedural requirements currently applicable to Iowa boards of adjustment and the adherence to those requirements in Iowa counties. Additionally, areas requiring further expansion of procedural safeguards will be discussed.

1. Appeal Procedure

In order to invoke the power of the board of adjustment, a petitioner must first perfect an appeal from a zoning administrator's adverse decision. Section 358A.13 of the Iowa Code details the procedure for making an appeal to the board of adjustment.[476] A person seeking to build in a county must first seek a permit from the zoning administrator.[477] The zoning administrator then either recommends the pursuit of a variance or special use permit, or approves or denies the building permit outright. Appeals from the zoning administrator's decision may be taken "by any person aggrieved or by any officer, department, board or bureau of the county affected."[478]

Such appeals must be taken within a "reasonable time," as provided by board of adjustment rule, by filing a notice of appeal that states the grounds therefor.[479] The reasonable-time requirement has been defined in two recent Iowa cases: *Brock v. Dickinson County Board of Adjustment*[480]

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474. Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 923 (Iowa 1979).

475. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 294 (1955); Note, *Board of Zoning Appeals Procedure—Informality Breeds Contempt*, 16 SYRACUSE L. REV. 568, 569 (1965).

476. Section 358A.13 provides:

> Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the county affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

IOWA CODE § 358A.13 (1983).

477. *See, e.g.*, Audubon County, Iowa, Zoning Ordinance and Subdivision Regulations § XXV(A) (1977); Clayton County, Iowa, Zoning Ordinance and Subdivision Regulations § 2.7 (1980); Montgomery County, Iowa, Zoning Ordinance and Subdivision Regulations § 15(A) (2d ed. 1977).

478. IOWA CODE § 358A.13 (1983); *see also* note 476 *supra*.

479. IOWA CODE § 358A.13 (1983).

480. 287 N.W.2d 566 (Iowa 1980).

and *Arkae Development, Inc. v. Zoning Board of Adjustment*.[481] The appeal must be taken within the time specified in board of adjustment rules, not the county ordinance.[482] Until a county board adopts a rule defining what is a "reasonable time," the board and the reviewing court are left to decide on an ad hoc basis what time period is reasonable.[483] The statutory time period begins to run only when the appealing party has notice of the decision on which the appeal will be based.[484]

Iowa Code section 358A.13 requires that the officer from whom a decision is appealed forward all papers constituting the record of the decision challenged.[485] In most counties the record consists of an appeal form prepared by the zoning administrator.[486] Most zoning administrators take an active role in counselling those denied building permits on available alternatives. Many administrators also advise applicants of their potential for success if an appeal is taken.[487]

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481. 312 N.W.2d 574 (Iowa 1981).

482. *Brock*, 287 N.W.2d at 569.

483. *Id.* at 569-70.

484. *Arkae*, 312 N.W.2d at 576-77; *Brock*, 287 N.W.2d at 570. Determining when notice has been given to a person seeking the permit is relatively simple—he or she has notice of the decision when the administrator conveys the decision not to grant the permit. In the case of neighbors who desire to appeal a grant of a permit, Iowa law requires either actual notice of the decision appealed from, constructive notice based on facts such as commencement of construction, or notice given "in a reasonable, specified manner." *Arkae*, 312 N.W.2d at 577.

Constructive notice can pose some interesting problems because Iowa courts hold that reliance on a building permit does not confer vested rights on the builder until the time period in which to appeal the granting of the permit passes. In Grandview Baptist Church v. Zoning Bd. of Adjustment, 301 N.W.2d 704 (Iowa 1981), the court ordered the removal of a storage building constructed after a building permit was obtained, but before the appeal period had run. The *Grandview* court held that the rights of neighbors to appeal the grant of the permit survived the commencement of construction. *Id.* at 709. Thus, although a person with a building permit may give notice to potential appellants by commencing construction, there is assurance that the money spent in construction will be lost if any person does seek to appeal the building permit grant.

The third method of effecting notice that was developed in *Arkae* is therefore very important to building permit holders. Presumably, that method must be "specified" by board rules, as must the time period. Without the promulgation of a rule allowing a permit holder an opportunity to give notice, a builder can vest his right to build against potential objections by neighbors only by commencing construction and then waiting for the statutory time period to run. Commencing construction without other notice results in the possibility of the same wasted effort that occurred in *Grandview*. Boards of adjustment, therefore, should include a provision defining an acceptable method of giving notice to neighbors when they promulgate their procedural rules. *See* text accompanying notes 505-15 *infra* (describing general obligation to promulgate procedural rules).

485. IOWA CODE § 358A.13 (1983).

486. For sample forms, see Appendix VIII *infra*. The Project writers found that several boards of adjustment accept letters from applicants rather than from appeals. *See, e.g.*, Letter from Maurene McQuillen to Cedar County Board of Adjustment (May 13, 1982); Letter from Ike Adreon and Illan Adreon to Osceola County Board of Adjustment, Osceola County Engineer, and to whom it may concern (May 4, 1981).

487. *See* Appendix VI *infra* (Tables 24-26). Such advice raises some interesting ques-

2. *Notice of Hearing*

Once the jurisdiction of the board of adjustment is invoked under the statutory appeal procedure, notice of the adjudicatory hearing must issue.[488] Iowa Code chapter 358A does not indicate who must be notified before the board of adjustment acts.[489] Neither does it state what type of notice must be given, when the notice must be delivered, or what elements the notice must contain.[490] Counties, therefore, are left to define by ordinance or by board of adjustment rule what notice shall be provided and to whom it shall be given, subject only to a reasonableness standard.[491]

County zoning ordinances provide a generally uniform description of who is to be notified of pending board of adjustment action and the manner by which notice is to be effected.[492] Most county zoning ordinances also contain similar provisions defining the content of notice.[493] Due to the large number of board of adjustment cases examined, the Project writers were unable to study the actual notice provided in every case. However, some gross abuses of the notice requirement were evident from board minutes and interviews.

In Cedar County the zoning ordinance contains no specific notice

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tions. On the one hand, the high rate of success of applications for variances and special use permits may be due in part to zoning administrators' success in discouraging spurious appeals. If that is true, both the county and the applicant would benefit from administrators acting as consultants for potential appellants. On the other hand, one must question the accuracy and propriety of zoning administrators' predictions of potential success. No one has devised a method that can predict board of adjustment action based on legal criteria. *See, e.g.*, Dukeminier & Stapleton, *supra* note 358, at 330; Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 553 (1955); *see also* text accompanying notes 774-884 *infra*. The zoning administrator has no statutory authority to decide whether an applicant is entitled to relief from the administrator's own ruling. *See* IOWA CODE § 358A.9 (1983). The lack of any external oversight is a good reason for boards of adjustment to promulgate substantive rules that would be available to the public. *See* text accompanying notes 516-75 *infra*. Such rules would permit an applicant to decide whether to pursue relief under Iowa Code § 358A.13 rather than leaving the decision to the unrestrained discretion of the zoning administrator.

488. 3 R. ANDERSON, *supra* note 9, § 20.17.

489. *See* IOWA CODE ch. 358A (1983).

490. *See id.*

491. 3 R. ANDERSON, *supra* note 9, § 20.17.

492. Most ordinances provide for mailed notice to neighbors. *See, e.g.*, Carroll County, Iowa, Zoning Ordinance § 16.13 (1980) (abutting neighbors only); Clinton County, Iowa, Zoning Ordinance § 3.13 (1981); Louisa County, Iowa, Zoning Ordinance § 16.13 (1971); Poweshiek County, Iowa, Zoning Ordinance § 17(3) (1976) (neighbors within 500 feet). *But see* Black Hawk County, Iowa, Zoning Ordinance § XXVI(D) (1980) (requiring only published notice); Calhoun County, Iowa, Zoning Ordinance § 1930 (1980) (requiring only published notice).

493. Notice generally contains the legal description of the property involved and a description of the proposed use. *See, e.g.*, Cherokee County, Iowa, Board of Adjustment, Notice of Hearing, Petition of Noethe (Sept. 28, 1976); Osceola County, Iowa, Board of Adjustment, Notice of Hearing, Petition of Heilman (May 19, 1981); Scott County Zoning Ordinance § XXIV(4)(a) (1981).

requirement. Board of adjustment rules provide only that notice be mailed "if possible" to adjoining property owners within two hundred feet of the property in question.[494] During one meeting, the Cedar County Board of Adjustment approved an area variance for a garage, the foundation of which had already been poured, just four days after the petitioner first requested the variance.[495] Although the Project writers could not determine what type of notice was given, the short time period between the request and the board action very likely precluded interested parties from preparing any kind of presentation. Thus, notice in that case was at best an empty gesture.

The Hardin County Zoning Ordinance provides for published notice fifteen days before a hearing and mailed notice to all property owners within five hundred feet of the subject tract.[496] In one case, however, both the notice to adjoining owners and the hearing were waived by a unanimous vote of the board, and a variance was granted to subdivide one lot into two.[497] It is unquestionably outside the power of the board to waive the rights of potential objectors.[498]

The zoning ordinance of Kossuth County requires published notice in one newspaper and mailed notice to all adjacent property owners.[499] The agricultural district regulations of that ordinance require a minimum lot size of five acres.[500] However, due to a large number of requests for variances to legalize sales of less than five acres, the Kossuth County Board of Adjustment has dispensed with the notice and hearing requirements in such cases. Instead, the Board now utilizes a procedure requiring a form letter of approval to be issued by the zoning administrator, followed by published notice of issuance. If no one objects to its issuance, the variance takes effect without the Board having taken any action.[501]

The Fremont County Zoning Ordinance requires notice by mail more

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494. Cedar County, Iowa, Board of Adjustment Rules of Procedure art. IV, § 5 (not dated).

495. *See* Cedar County Board of Adjustment Minutes, Petition of McQuillen (May 17, 1982); Letter from Maurene McQuillen to Cedar County Board of Adjustment (May 13, 1982).

496. Hardin County, Iowa, Zoning Ordinance § XVIII(D) (1979).

497. Hardin County Board of Adjustment Minutes, Petition of Johnson (Oct. 15, 1980).

498. 3 R. ANDERSON, *supra* note 9, § 20.17.

499. Kossuth County, Iowa, Zoning Ordinance § 23.13 (1973).

500. *Id.* § 6.4.

501. Kossuth County Board of Adjustment Minutes (Apr. 15, 1981). After adoption of the procedure, four dispositions without notice and hearing were recorded. *Id.* Petition of Laubenthal (June 4, 1981); *id.* Petition of Davidson-Larsen Farms (Aug. 3, 1981); *id.* Petition of Junkermeier (Aug. 30, 1981); *id.* Petition of Buffington (Dec. 21, 1981).

The reason for the summary procedure suggests more than just notice problems. A variance is intended to remedy hardships *unique to the land in question*. *See* note 715 *infra*; text accompanying notes 714-17 *infra*. Adoption of a summary procedure because of a recurring situation shows that the Kossuth Board consistently failed to consider the uniqueness of the land.

than ten days before the hearing to all property owners located within five hundred feet of the subject tract.[502] Compliance, however, is difficult to assess because no records of board proceedings are kept. An interview with the zoning administrator revealed that the Fremont County Board of Adjustment does not even require that petitioners submit written applications.[503] When someone telephones the zoning administrator to explain the proposed variance, the administrator contacts the board of adjustment members by telephone and sets up a meeting at the site of the proposed variance. Disposition of the petition then occurs within twenty-four hours of the "application."[504]

3. Procedural Rules

Section 358A.12 of the Iowa Code establishes five specific procedures required or permitted for board of adjustment action.[505] First, the board is required to adopt rules "in accordance with the provisions of any regulation or ordinance adopted pursuant to this chapter."[506] In *Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*[507] the Iowa Supreme Court ruled, on statutory grounds alone, that the "rules provision" was mandatory and jurisdictional.[508] The *Pottawattamie County* court explained the rules provision as requiring the promulgation of procedural rules defining permitted or required conduct of both the board and participants at board of adjustment hearings. The court nullified the Pottawattamie County Board of Adjustment's approval of a special use permit, basing its conclusion solely on the ground that the

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502. Fremont County, Iowa, Zoning Ordinance § 17(C)(3) (1969).

503. Telephone interview with Carl Christensen, Fremont County, Iowa, Engineer and Zoning Administrator (June 30, 1982). Mr. Christensen further stated that almost all of the applications he received were for variances from setback requirements for grain bins and that he was not sure the county could regulate such placement due to IOWA CODE § 358A.2 (1983) (exemption of farms from regulations). *Id.*

504. Telephone interview with Carl Christensen, Fremont County, Iowa, Engineer and Zoning Administrator (June 30, 1982).

505. Section 358A.12 provides:

> The board shall adopt rules in accordance with the provisions of any regulation or ordinance adopted pursuant to this chapter. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence, the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

IOWA CODE § 358A.12 (1983).

506. *Id.* For a discussion of the other procedures defined in § 358A.12, see text accompanying notes 576-77, 650-61 *infra*.

507. 277 N.W.2d 921 (Iowa 1979).

508. *Id.* at 923-24.

Board had failed to adopt rules in accordance with Iowa Code section 358A.12.[509]

The Project writers found that county boards of adjustment had complied with the statutory rule-making requirement in only eighteen counties.[510] Therefore, under the *Pottawattamie County* holding, forty-eight county boards of adjustment have acted without legal effect since 1979. The county zoning officials' apparent disregard of the *Pottawattamie County* decision is disquieting in two respects. First, it suggests that judicial review is ineffective in controlling board action. Infrequency of appeal effectively insulates board action from judicial scrutiny.[511] Thus, boards are able to ignore clear judicial directives. Second, disregard of the rule-making requirement may show that legislatively imposed procedural safeguards are as ineffective as judicial review in limiting board of adjustment discretion. The rule-making requirement, after all, appears in section 358A.12 in mandatory terms.[512]

Iowa law specifies only one rule that must be included in every county's compilation. Boards of adjustment must define by rule a reasonable time within which appeals thereto must be taken.[513] It is also clear that board rules must be consistent with the higher species of law on the subject—the county zoning ordinance and chapter 358A.[514] Although county boards of adjustment have wide latitude in determining the exact provisions of their procedural rules, the general purpose of the rule requirement must be achieved. In *Pottawattamie County* the Iowa Supreme Court noted that parties should be advised of their rights and duties when appearing before administrative agencies.[515] Therefore, the important contents of rules seem to be provisions defining procedures and time limits for taking appeals, order of proceedings, rules of evidence, and rights of parties—including availability of counsel, cross-examination, subpoenas, or other aids to a petitioner's presentation of a case. Such rules fairly apprise a potential

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509. *Id.*

510. Boards of adjustment in the following counties promulgated procedural rules prior to June 1982: Black Hawk, Buchanan, Butler, Cedar, Clay, Dickinson, Dubuque, Hardin, Humboldt, Jackson, Linn, Marion, Mitchell, Polk, Pottawattamie, Scott, Story, and Woodbury.

511. *See* text accompanying notes 914, 925-30 *infra*; Appendix IX *infra* (Table 2).

512. IOWA CODE § 358A.12 (1983) ("the board *shall* adopt rules") (emphasis added); *see* note 505 *supra*.

513. IOWA CODE § 358A.13 (1983); *see* text accompanying notes 479-84 *supra*.

514. *E.g.*, Pacific Gas & Elec. Co. v. United States, 664 F.2d 1133, 1135-36 (9th Cir. 1981); Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610, 615-16 (Iowa 1976); Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 961, 77 N.W.2d 613, 616 (1956).

515. 277 N.W.2d at 924. Because notice to potential contestants is the important consideration, unwritten rules, no matter how well established by past practice, should be ineffective. *See* Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 16 Or. App. 63, 72-73, 517 P.2d 289, 293-94 (1973), *quoted in Pottawattamie County*, 277 N.W.2d at 924.

party of permitted or required self-conduct and of the conduct that can be expected of the board at the hearing.

4. Substantive Rules

The requirement that Iowa boards of adjustment promulgate and publish rules of procedure derives mainly from an interest in fairness to, and consistent treatment of, parties that appear before administrative agencies. Notification to parties of their rights and duties when appearing before administrative agencies is a recognized necessity.[516] The due process and fundamental fairness concerns that compel adherence to a published procedural code also require agency action to be guided by substantive standards.[517] Such standards serve to notify members of the public of the factual circumstances that will qualify a person for administrative beneficence or subject a person to administrative penalty.

There are several sources of specification of the substantive standard under which an agency operates. First, the standard must be spelled out in detail sufficient to enable a reviewing court to determine whether an agency action is within the range of authority intended by the legislature.[518] The statutory standards that demarcate the field in which Iowa county boards of adjustment operate are found in Iowa Code section 358A.15.[519]

Within the general statutory standard that marks the boundaries of an agency's jurisdiction, the agency must develop and refine the standard. This elaboration may be done either by rulemaking or case-by-case adjudication.[520] In *Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*[521] the Iowa Supreme Court expressly declined to impose a requirement that boards of adjustment pro-

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516. The Iowa Supreme Court has recognized the necessity of promulgation of procedural rules. Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 961-62, 77 N.W.2d 613, 616 (1956). Legislatures also have recognized such a necessity. *See, e.g.*, 5 U.S.C. § 552(a)(1)(C), (D) (1976) (Federal Administrative Procedure Act); IOWA CODE § 17A.4 (1983) (Iowa Administrative Procedure Act); *see also* Northern Cal. Power Agency v. Morton, 396 F. Supp. 1187, 1191-92 (D.D.C. 1975) ("Congress wisely recognized after years of experience that [administrative] proceedings require the discipline which a published set of rules drawn up in advance can provide."), *aff'd sub nom.* Northern Cal. Power Agency v. Kleppe, 539 F.2d 243 (D.C. Cir. 1976).

517. Gonzalez v. Freeman, 334 F.2d 570, 578-79 (D.C. Cir. 1964); Chicago, R.I. & P.R.R. v. Liddle, 253 Iowa 402, 410-11, 112 N.W.2d 852, 855 (1962).

518. *See* Iron Worker's Local No. 67 v. Hart, 191 N.W.2d 758, 772-73 (Iowa 1971); Elk Run Tel. Co. v. General Tel. Co., 160 N.W.2d 311, 315-17 (Iowa 1968). The *Hart* court held that procedural safeguards afforded to parties are a more important consideration than the preciseness of the standard. 191 N.W.2d at 772-73. The statement in *Elk Run* that the standard must establish reasonable bounds in which the agency may fill in the details, 160 N.W.2d at 316, presumably survives.

519. IOWA CODE § 358A.15 (1983).

520. *See* SEC v. Chenery Corp., 318 U.S. 80, 89, 92-93 (1943); Young Plumbing & Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979).

521. 277 N.W.2d 921 (Iowa 1979).

mulgate substantive rules that further define their delegated powers.[522] No county board of adjustment has voluntarily adopted substantive rules. Thus, the only elaboration of the standards for a variance or special use permit that has occurred in Iowa is found in cases before boards of adjustment or the courts. The Iowa Supreme Court's refusal to require boards of adjustment to utilize their rule-making powers to elaborate on the statutory standard should be reexamined in light of the modern balancing approach to defining the appropriate contents of procedural due process. Due process requires an analysis of the competing interests of the parties and the local government involved, viewed against the background of history, reason, and past decisions.[523]

The government interest in, and the historical background of, board of adjustment adjudication are fairly well established. The government's primary interest is efficient administration of the zoning system. The board of adjustment was established as a "safety valve" to relieve particular cases of hardship, thus eliminating the need to resort to a takings challenge in court.[524] In the interest of efficiency, proceedings are as informal as possible, and specific procedural safeguards such as required rulemaking are avoided.[525]

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522. *Id.* at 923.

523. Ingraham v. Wright, 430 U.S. 651, 675 (1977); Goldberg v. Kelly, 397 U.S. 254, 262-65 (1970). The Iowa Supreme Court has relied on the federal balancing approach in an administrative context not involving a board of adjustment. *See* Auxier v. Woodward State Hospital School, 266 N.W.2d 139, 141-43 (Iowa) (administrative revocation of worker's compensation), *cert. denied*, 439 U.S. 930 (1978).

524. *See* note 361 *supra* and accompanying text.

525. A major purpose of informality in board of adjustment proceedings is to provide a forum accessible to the general community wherein the important evidence can be gathered without the interference of procedural technicalities. Mitchell Land Co. v. Planning & Zoning Bd. of Appeals, 140 Conn. 527, 536, 102 A.2d 316, 320-21 (1953); Boffo v. Boone County Bd. of Zoning Appeals, ___ Ind. App. ___, ___, 421 N.E.2d 1119, 1129 (1981); Bartz v. Board of Adjustment, 80 Wash. 2d 209, 221, 492 P.2d 1374, 1381 (1972); 3 E. YOKLEY, *supra* note 42, § 18-9(b). At the same time, courts frequently discuss the board's substantive expertise as a reason for deference to the board's decision. Boffo v. Boone County Bd. of Zoning Appeals, ___ Ind. App. ___, ___, 421 N.E.2d 1119, 1125 (1981); Brouillett v. Eudowood Shopping Plaza, Inc., 249 Md. 606, 608-09, 241 A.2d 404, 405 (1968); Cottonwood Heights Citizens Ass'n v. Board of Comm'rs, 593 P.2d 138, 140 (Utah 1979); 4 R. ANDERSON, *supra* note 9, § 25.26, at 266-67. Thus, it is anomalous that courts require the promulgation of procedural rules but not substantive rules.

Some informality is required for local agencies made up of part-time volunteers. That the problems faced by local agencies differ from those faced by state and federal agencies is indicated by the Iowa Legislature's failure to make the Iowa Administrative Procedure Act applicable to local agencies. *See* text accompanying note 466 *supra*. However, due process still requires procedures to ensure fairness, even at the local level. Other courts have imposed rule-making requirements on local agencies. *See, e.g.*, White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968). One court has even required a zoning board of adjustment to promulgate substantive rules. Harnett v. Board of Zoning, Subdivision & Bldg. Appeals, 350 F. Supp. 1159, 1160-61 (D.V.I. 1972).

The most common reason that boards of adjustment have not been required to promulgate substantive rules freqeuently is discussed in terms of the historical nature of the board's variance power.[526] Variances were originally intended to provide relief in rare circumstances and in situations in which peculiarities of real estate precluded fair application of a general rule.[527] The argument against substantive rulemaking by boards of adjustment is that each piece of property is unique and thus, each case must be decided on its own facts.[528] No single factor conclusively determines whether a hardship exists; instead, all factors must be weighed.[529] Consequently, it was deemed infeasible to generate rules prospectively.

Although the "uniqueness argument" is widely followed, a reappraisal is necessary. Sixty years of experience with variance cases ought to disclose some recurring situations in which administrative rulemaking would be appropriate. Even the courts that recite the adage that variance cases must be decided on particular facts often find a generality from their precedents that is applicable to the case at hand.[530] Boards of adjustment hear more

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526. Another traditional feature of board of adjustment hearings—one that has entered into the due process balance in other contexts—is the nonadversarial nature of the hearing. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583 (1975) (school suspension hearings); Franklin v. Shields, 569 F.2d 784, 790 (4th Cir. 1977) (parole consideration hearings), *cert. denied*, 435 U.S. 1003 (1978). That factor should not bear on the analysis of a rule-making requirement. In *Goss* and *Franklin* the nonadversarial function received weight only in the discussion of common aspects of trials such as the provision of counsel and the right to confront and cross-examine witnesses. The *Franklin* court required promulgation of rules to precede hearings on parole eligibility. 569 F.2d at 793.

527. 3 R. ANDERSON, *supra* note 9, § 17.10.

528. *See, e.g.*, Arant v. Board of Adjustment, 271 Ala. 600, 605, 126 So. 2d 100, 105 (1960) (quoting Board of Adjustment v. Boykin, 265 Ala. 504, 510, 92 So. 2d 906, 910 (1957)); Roumel v. District of Columbia Bd. of Zoning Adjustment, 417 A.2d 405, 407 (D.C. 1980); City of East Chicago v. Sinclair Ref. Co., 232 Ind. 295, 309, 111 N.E.2d 459, 464-65 (1953); State *ex rel.* Maple Area Residents, Inc. v. Board of Zoning Adjustments, 365 So. 2d 891, 894 (La. Ct. App. 1978); Methodist Homes for the Aged Fund v. Lawson, 61 Misc. 2d 184, 187, 305 N.Y.S.2d 192, 196 (Sup. Ct. 1969); Beerman v. City of Kettering, 43 Ohio Op. 2d 354, 358, 237 N.E.2d 644, 649 (C.P. 1965).

529. "There is and can be no all-inclusive definition of what constitutes sufficient difficulty and hardship to warrant the granting of a variance . . . ." Carlyle-Lowell, Inc. v. Ennis, 330 S.W.2d 164, 168 (Mo. Ct. App. 1959). *Accord* State *ex rel.* Maple Area Residents, Inc. v. Board of Zoning Adjustment, 365 So. 2d 891, 894 (La. Ct. App. 1978).

530. *See, e.g.*, Arant v. Board of Adjustment, 271 Ala. 600, 606, 126 So. 2d 100, 106 (1960) (following precedent holding that part of lot zoned residential may be used for access to another part of lot in same ownership on which business use is lawfully conducted and such use for access is within spirit of ordinance); Roumel v. District of Columbia Bd. of Zoning Adjustment, 417 A.2d 405, 409 (D.C. 1980) (citing precedent establishing that variance may not be granted, even to alleviate hardship, if it would adversely affect the surrounding neighborhood); City of E. Chicago v. Sinclair Ref. Co., 232 Ind. 295, 311-12, 111 N.E.2d 459, 466 (1953) (concluding that case "clearly" falls in line with precedent declaring that board of adjustment authority is not limited to petitions involving any maximum size tract of land); State *ex rel.* Maple Area Residents, Inc. v. Board of Zoning Adjustments, 365 So. 2d 891, 893-94 (La. Ct. App. 1978) (citing no authority, but adopting rule cited elsewhere: lot platted prior to zoning is factor weighing in favor

variance cases than courts and thus, similarly should to be able to find recurring situations.[531]

In addition to evaluating governmental interests, the balancing approach to defining the contents of due process requires analysis of the private interest at stake, the risk of error in the administrative disposition of that interest, and the value of any additional procedure.[532] Those three factors have received less attention in evaluation of board of adjustment procedures than the governmental interests discussed above. Thus, case law applicable to administrative agencies other than the board of adjustment will be explored.

Once private interest triggers due process protection, the characteristics of the private interest at stake are evaluated and balanced against the weight of the governmental interests.[533] An individual's right to free use of property has always been accorded great reverence.[534] Although strong, the private interest at stake in a variance proceeding—the interest in free use of property—is no more quantifiable than the government interest. Because of the inherent indiscernibility of the governmental and private interests, the risk of error and the value of additional procedures are the most important analytical considerations in the board of adjustment context. Even if the government interest outweighs the private property interest at stake in board of adjustment cases, the high risk of error in board determinations and the benefits that would accrue from the implementation of a rule-making requirement make it essential that courts compel boards of adjustment to promulgate rules defining the unnecessary hardship standard.

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of variance to bulk requirements to allow conforming use); Methodist Homes for the Aged Fund v. Lawson, 61 Misc. 2d 184, 187, 305 N.Y.S.2d 192, 196 (Sup. Ct. 1969) (following precedent which holds that fact of hardship being self-created receives little weight in deciding whether to grant area variance); Beerman v. City of Kettering, 43 Ohio Op. 2d 354, 357, 155-56, 237 N.E.2d 644, 648-49 (C.P. 1965) (citing many cases as establishing proposition that petitioner's prior knowledge of zoning restrictions does not preclude grant of variance). Both the *Arant* and *City of E. Chicago* courts took pains to limit their holdings to the facts of the particular case under consideration and disclaimed any attempt to lay down general rules. *Arant*, 271 Ala. at 606, 126 So. 2d at 106; *City of E. Chicago*, 232 Ind. at 309, 111 N.E.2d at 465.

Courts do not have constitutional authority to lay down general rules of prospective applicability. Agencies, however, do have that authority, and there are situations when courts ought to require agencies to make rules. 2 K. DAVIS, *supra* note 313, § 7:24. One such situation arises when an agency does not use a system of precedents to guide its discretion. *Id.* § 7:26, at 128; *see also* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (unlike courts, administrative agencies *can* make rules and, therefore, ought to whenever possible).

531. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 296 (1955). For examples, see note 530 *supra* and text accompanying notes 572-75 *infra*.

532. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

533. *See* note 523 *supra* and accompanying text.

534. *See* 1 E. YOKLEY, *supra* note 42, § 1-4, at 5; Comment, *Rural Zoning in Nebraska*, *supra* note 92, at 151.

The significant risk of error in board of adjustment variance proceedings is partially due to the calculated ambiguities of the "unnecessary hardship" standard.[535] Moreover, the standard has been very unpredictable. Even if boards of adjustment apply the unnecessary hardship standard correctly[536] it is difficult for lay petitioners to understand that standard.[537] The language of Iowa Code section 358A.15(3) is uninstructive, and the Iowa Supreme Court has rarely expounded on the meaning of unnecessary hardship.[538] Moreover, deriving a semblance of the meaning

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535. The Iowa Supreme Court has held that the unnecessary hardship standard is not so clearly arbitrary that it constitutes an unconstitutional delegation of authority. Anderson v. Jester, 206 Iowa 452, 459-60, 221 N.W. 354, 357-58 (1928). Furthermore, Deardorf v. Board of Adjustment, 254 Iowa 380, 118 N.W.2d 78 (1962), provided a judicial interpretation of the standard. *Id.* at 386-88, 118 N.W.2d at 81-82; *see* text accompanying notes 700-05 *infra*. Commentators, however, have generally criticized the standard, even as narrowed by judicial interpretation, saying that it does not provide a meaningful guide to parties, board members, or courts in determining when a variance should issue. *See, e.g.*, Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 771 (1977) (unnecessary hardship is an opaque standard); Newbern, *Zoning Flexibility: Bored of Adjustment?*, 30 ARK. L. REV. 491, 507-09 (1977) (explaining court's difficulty in applying unnecessary hardship standard); Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50, 56 (1974) (practical difficulties and unnecessary hardship standards provide boards with little guidance).

536. The Project writers do not wish to debate the propriety of the unnecessary hardship standard. When it is said that a decision is illegal, no implication regarding good or bad *policy* is intended. Other writers have contended that a board of adjustment's poor record in applying the unnecessary hardship standard justifies reevaluation of the standard. *See, e.g.*, Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 781-82 (1977); Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 342-44, 358-59 (1972). The present analysis, however, is concerned only with better administration under the current standard.

537. At this point, it must be remembered that most variances are sought by petitioners without legal training or assistance. *See* text accompanying notes 589-90 *infra*. Moreover, even lawyers and judges often disagree over the definition of unnecessary hardship. *See* note 535 *supra*. Rulemaking is particularly important in areas of the law that defy clear definition. *Cf.* United States v. Barbera, 514 F.2d 294, 302-04 (2d Cir. 1975) (fourth amendment search and seizure rights are so elusive of clear definition that administrative discretion involving searches should be guided by rules). A lay petitioner can hardly be expected to perform the kind of legal research and analysis necessary to demonstrate unnecessary hardship effectively in a particular case. Thus, petitioners would have a hard time using cases as precedent even if boards of adjustment produced an intelligible series of cases. An increase in the risk of error in variance decisions occurs because petitioners do not know in advance what evidence the board will consider important at the hearing. Petitioners, therefore, are greatly hindered in the presentation of their cases.

538. In Board of Adjustment v. Ruble, 193 N.W.2d 497 (Iowa 1972), the court held that revision of a frontage requirement, which compelled an owner of adjacent platted lots to combine the lots to comply with the ordinance, did not constitute unnecessary hardship. *Id.* at 503-04. In Deardorf v. Board of Adjustment, 254 Iowa 380, 118 N.W.2d 78 (1962), the court held that a conclusion of unnecessary hardship requires a finding of a unique condition in the petitioner's land, virtual impossibility of reasonable use under the current regulations, and a proposed use not injurious to the character of the surrounding neighborhood. *Id.* at 386, 118 N.W.2d at 81.

of the unnecessary hardship standard through an analysis of variance cases in a particular county is difficult and unhelpful. Most board minutes do not state the grounds relied on by the board in granting a variance.[539] Thus, petitioners often are unable to present facts that are material to the unnecessary hardship analysis.[540] The ambiguity of the standard, at least to petitioners, thus raises a significant potential cause of error.

Moreover, evidence indicates that there is more than mere *potential* for error. The empirical analysis conducted in preparation of this Project shows that board of adjustment members fail to apply the unnecessary hardship standard properly.[541] Although the bases for county board of adjustment variance decisions are not given on the record in many counties, in cases in which the reasons for the variance decisions are given, those reasons rarely satisfy the legal requirements for the granting of a variance.[542] Although a court reviewing an individual board of adjustment appeal cannot make a similar analysis, the findings of this Project should not be ignored.

The remaining factor in the due process balancing standard is the benefit that would accrue from imposing the substantive rule requirement on boards of adjustment.[543] First, the substantive rule requirement would benefit interested parties by affording them notice of the factors the board will consider important in assessing a variance petition. Due process requires notice to affected parties of the standards under which an administrative agency exercises its function.[544] In some cases agencies acting under a broad delegation of authority have been forced to promulgate rules to effectuate the notice requirement without any analysis of the due process balance.[545] Acknowledging that the provision of an administrative fact-

539. Most county boards recorded nothing relevant to defining hardship in their minutes. In a few counties transcripts were prepared, but the boards in those counties made no statement about what factors indicated that a hardship existed. Only 14 counties attempted to make findings on what factors constitute hardship in a particular case. *See* text accompanying notes 622-39 *infra*.

540. Dukeminier & Stapleton, *supra* note 358, at 323.

541. *See* text accompanying notes 774-878 *infra*.

542. Empirical analyses in other jurisdictions have yielded similar results. *See, e.g.*, Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 386 (1962); Dukeminier & Stapleton, *supra* note 358, at 324.

543. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see* text accompanying note 523 *supra*.

544. *See* text accompanying notes 516-20 *supra*. Lack of administrative standards defining a broad statutory delegation is itself an indicium of denial of due process. Franklin v. Shields, 569 F.2d 784, 792 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978).

545. *See, e.g.*, Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 854, 856-57 (E.D. Va. 1980) (structure and confinement of agency discretion through safeguards, standards, principles, and rules requires no balancing; due process requires such confinement); Harnett v. Board of Zoning, Subdivision & Bldg. Appeals, 350 F. Supp. 1159, 1160-61 (D.V.I. 1972) (standard of unnecessary hardship for zoning ordinance must be refined by agency rule); Woods v. District of Columbia Nurses' Examining Bd., 436 A.2d 369, 373-74 (D.C. 1981) (general standards require rules in the interest of notice); Laureano

finding hearing is an empty gesture if parties are not informed of the issues in dispute, courts have recognized the responsibility of agencies to explain those issues.[546]

The United States Supreme Court has held that administrative agencies generally are free to choose whether to expound their delegated standard by rules of prospective applicability or by case-by-case adjudication.[547] However, development by adjudication is adequate only if the decisions yield reasoned opinions that provide interested parties with a persuasive, if not precedential, guide to future agency actions.[548] Records of county board of adjustment variance cases usually do not explain either the facts found or the legal standard applied.[549] Thus, variance cases do not provide interested parties with guidance on how county boards of adjustment will act in given circumstances, and case-by-case adjudication has not proven to be a viable alternative.[550]

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v. Koch, 116 Misc. 2d 287, 293-94, 454 N.Y.S.2d 956, 960-61 (Sup. Ct. 1982) (city housing agency must notify public by rule of standards for modifying rent in public housing); Megdal v. Oregon State Bd. of Dental Examiners, 288 Or. 293, 313-14, 605 P.2d 273, 283 (1980) (broad standard such as "unprofessional conduct" for discipline of dentists indicates legislative intent that agency supply further definition by rule).

546. Block v. Thompson, 472 F.2d 587, 588 (5th Cir. 1973) ("The idea of a hearing is fine. But what is to be heard? For all that appears, the Council after hearing views pro and con could take a show of hands and then adapt its decision to this momentary plebiscite."); *see also* White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976).

547. NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). The deference to federal agency discretion granted in *Chenery* may be misplaced with respect to local agencies. Prospective standards at the local level are particularly important because of procedural informality and the lack of political attention accorded to, and lack of political responsibility in, local agencies. Note, *The Administration of Zoning Flexibility Devices: An Explanation For Recent Judicial Frustration*, 49 MINN. L. REV. 973, 1001 (1965); *see also* Dukeminier & Stapleton, *supra* note 358, at 332-33 (due process requires stricter controls of local agencies than of state and federal agencies).

548. Courts of law do not regard administrative adjudication as precedent that is binding in the manner of judicial opinions. *See, e.g.*, Port Terminal R.R. Ass'n v. United States, 551 F.2d 1336, 1340 (5th Cir. 1977). However, administrative agencies most likely defer to their own precedent. *See* Young Plumbing & Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979).

549. *See* text accompanying notes 622-49 *infra*.

550. The findings requirement, *see* text accompanying notes 624, 632-49 *infra*, may improve the utility of past cases as guidelines for predicting future board actions. However, even if past board cases could be used as precedent, rules would be preferable in the board of adjustment context. In general, precedent lacks the prospective force and consequent predictive value of a rule. The public input available in the rule-making process is also lost when an agency relies on cases alone to develop its standards. 2 K. DAVIS, *supra* note 313, § 7:25, at 119. With specific regard to boards of adjustment, rules are easier to understand. A variance case compels analysis of all the relevant circumstances of the land in question. *See, e.g.*, Suess v. Vogelgesang, 151 Ind. App. 631, 636-37, 281 N.E.2d 536, 540 (1972); Beerman v. City of Kettering, 43 Ohio Op. 2d 354, 356, 237 N.E.2d 644, 648 (C.P. 1965). Reference to a rule at least enables a petitioner to determine what weight a particular factor that is present in the case may be given. The same information is much

Second, substantive rulemaking in the board of adjustment context facilitates the confinement of administrative discretion within structured principles. Such confinement benefits the general public as well as interested parties. At the very least, publication of rules defining the standards under which the board of adjustment operates will foster public confidence in the board of adjustment process.[551] Currently, the actual standards that guide variance disposition are a mystery. It has been stated that the injury to the public that results from covert decisionmaking is more serious than the injury to the individual who loses out in a particular case.[552] Publication of rules would "foster the belief, so important in a democratic society, that justice has been served."[553]

Moreover, variances granted without substantiated legal reasoning cause injury to more than the public psyche. Failure to enforce the statutory hardship standard results in variances being granted that may adversely affect the character of a neighborhood in derogation of neighbors' rights to rely on the current zoning classification.[554] Board of adjustment action that is unguided by intelligible standards encourages arbitrary and capricious action.[555] If board of adjustment discretion is delimited by the

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more difficult to derive from a survey of past cases, in which several factors, many of which may not be present in the case in question, bore on the decision.

Ease of understanding variance law is particularly important in a system that encourages pro se pursuit of claims. At least one court has compared the relative substantive expertise of the agency to that of the parties seeking relief in requiring that rulemaking be utilized to guide the distribution of township welfare assistance. Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976).

Courts occasionally have held that, due to the variety of factors that enter into a board of adjustment case, the use of precedent is impracticable. *See* 3 E. YOKLEY, *supra* note 42, § 21-11. When the body of past cases is inaccessible or unintelligible, notice has not been given. For that reason, the use of findings as a substitute for rules to effect notice of an agency's standards has been compared to locking the barn door after the horse is gone. Franklin v. Shields, 569 F.2d 784, 793 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978); *see also* Port Terminal R.R. Ass'n v. United States, 551 F.2d 1336, 1344-45 (5th Cir. 1977).

551. *See* Franklin v. Shields, 569 F.2d 784, 793 (4th Cir. 1977) (citing NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 397 (1973)), *cert. denied*, 435 U.S. 1003 (1978).

552. Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964).

553. Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976) (discussing standardless distribution of township welfare assistance).

554. *See* text accompanying note 554. Of course, the police power enables local governments to change the zoning classification for good reasons. *See* Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 744 (Iowa 1969). However, the public interest should not be abrogated by unauthorized acts of government officials. Maurice Callahan & Sons, Inc. v. Cooley, 126 Vt. 9, 11, 220 A.2d 467, 469 (1966).

555. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (vague vagrancy ordinance encourages arbitrary enforcement); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) (absence of ascertainable liquor license standards invites abusive decisions); Woods v. District of Columbia Nurses' Examining Bd., 436 A.2d 369, 375 (D.C. 1981) (vague nursing license reinstatement criteria encourages arbitrary decisions).

promulgation of substantive rules, county land use plans would be relatively less subject to abuse.[556]

Frequently, there is no effective recourse by which to challenge errors made by boards of adjustment. Initially, the cost of judicial review prevents the pursuit of many appeals; furthermore, the cost mitigates the satisfaction derived from a successful appeal.[557] Also, the deferential standard of review prevents correction of all but the most glaring abuses.[558] If the board makes the basis for its decision clear, public frustration with the process should decrease.

The rule-making requirement also could benefit boards of adjustment and their individual members. An increase in public respect for the board's function, as discussed above,[559] should accrue to board members in their individual capacities.[560] Moreover, publication of rules should make the board's job easier. If parties are told in advance of the criteria considered by the board, they should be better prepared to present their cases. Preparation by petitioners could alleviate the need for the board to visit the land under consideration. Additionally, rules could assist the board in confining testimony to relevant issues. Furthermore, in the event of appeal, the board should be able to present a more complete record to the reviewing court, thus obviating the need for personal testimony to justify the disposition of a case.[561]

Courts reviewing board of adjustment action also would benefit from a rule-making requirement. The objective of judicial review of agency action is to persuade the agency to police itself:

> When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative

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556. *Cf.* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (discussing discretionary power of administrator of EPA); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 853-54 (E.D. Va. 1980) (discussing discretionary power of Secretary of the Interior); City of Santa Clara v. Kleppe, 418 F. Supp. 1243, 1261 (N.D. Cal. 1976) (discussing discretionary power of Secretary of the Interior), *aff'd in part and rev'd in part on other grounds sub nom.*, City of Santa Clara v. Andrews, 572 F.2d 660 (4th Cir.), *cert. denied*, 439 U.S. 859 (1978).

557. Reps, *Discretionary Powers of the Zoning Appeals Board*, 20 LAW & CONTEMP. PROBS. 280, 294 (1955); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 16 (1969).

558. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 16 (1969); *see* Oakes Constr. Co. v. City of Iowa City, 304 N.W.2d 797, 806 (Iowa 1981).

559. *See* text accompanying notes 551-53 *supra*.

560. The Project questionnaires elicited several comments from board members about the thankless nature of their job. *See* Board of Adjustment Questionnaire Nos. 204, 261. Perhaps this is the result of decisionmaking without explanation.

561. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

process, and to improve the quality of judicial review in those cases where judicial review is sought.[562]

Board of adjustment rules should reduce the number of petitions appealed to the courts. If parties are satisfied that they had a chance to fully and fairly contest the important issues at the board hearing, they may be less likely to appeal. In many cases the only way to ascertain the reasons for a board's decision is to bring suit. Confining board discretion to fixed, discernible standards should promote accurate and legally correct action.

Publication of rules would also improve the quality of judicial review in cases that are appealed.[563] The Iowa Supreme Court adheres to a deferential standard of review, often stating that only assigned claims of illegality are open to judicial scrutiny and that new evidence is allowed only when necessary.[564] Currently, deficient board of adjustment records often compel a virtual repetition of the board's hearing at the district court level.[565] Rules would not only facilitate creation of a record but also would provide a ready measure of the propriety of a variance decision.

Frequently, courts in the past simply bowed to the mysteries of the administrative process on questions of substance.[566] There is, however, a growing trend toward examination of the legality of agency action.[567] Therefore, courts need to know the reasons underlying an agency's ruling.[568] The high risk of error in a board variance hearing due to the vagueness of the unnecessary hardship standard impinges on the recognized private interest in the free use of property. The documented rate of error in board of adjustment proceedings[569] compels reexamination of the procedures under which the boards operate. Required rulemaking presents a powerful vehicle for improvement.[570]

In defining the content of board of adjustment rules, it is necessary to accommodate the realities of variance cases. As stated earlier, there

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562. *Id.*

563. *Id.*

564. *See* text accompanying note 904 *infra*.

565. *See* text accompanying notes 905-08 *infra*.

566. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

567. *Id.* at 597-98.

568. *See id.*

569. *See* text accompanying notes 774-884 *infra*.

570. " 'The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules.' " Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969) (quoting FULLER, LAW AND MORALITY 46 (1965)).

Of course, the legal sufficiency of rules may still be challenged in court because the Iowa Supreme Court is the final arbiter of whether an agency rule comports with the standard of delegation contained in the enabling act. Carr v. Iowa Employment Sec. Comm'n, 256 N.W.2d 211, 215-16 (Iowa 1977).

is not one all-inclusive definition of unnecessary hardship.[571] However, recurring or at least analogous situations obviously occur. Boards should identify significant factors, state them in a general proposition, assign a positive or negative weight to their presence in an individual case, and incorporate them into codified rules.[572] Some current zoning ordinances attempt this. For example, Cerro Gordo County has problems with developments around Clear Lake that sprang up before the county enacted zoning regulations. Thus, presentation to the board of a lot platted prior to zoning in violation of the currently applicable area requirements is a factor that weighs in favor of granting a variance.[573]

Court cases provide further guidance on recurring generalities that constitute hardship. For instance, if a landowner himself creates the condition alleged as a hardship, such as by subdividing and selling part of a lot and retaining a lot too small to conform to the ordinance, the board should consider that as militating against the grant of a variance.[574] The possibility that a petitioner can alter construction plans to conform to the ordinance and still end up with a reasonable use of property, even if not the most profitable use, suggests that a variance should be denied.[575]

Mere promulgation of rules will not make variance practice perfect. That is no reason, however, not to require rules. Combined with a findings requirement, rules would serve to notify parties of the criteria involved in a variance case in advance and to guide the board in its disposition of the case.

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571. *See* text accompanying notes 528-29 *supra*. The difficulty of foreseeing every situation that may qualify as hardship should not excuse boards of adjustment from promulgating some rules describing historically recurrent situations. *See* Silva v. Secretary of Labor, 518 F.2d 301, 311 (1st Cir. 1975) (problems with determining standard of eligibility of alien workers for domestic employment does not excuse Secretary of Labor from promulgating some rules defining eligibility).

The proposed MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981), 14 U.L.A. 54 (Supp. 1983), suggests a pragmatic guide to board of adjustment rulemaking. Under the Model Act, agencies would be required to, "as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases." *Id.* § 2-104 (4), 14 U.L.A. at 73. In other words, boards of adjustment would be able to deal with new and unique situations on a case-by-case basis. However, the board would be required to promulgate some substantive rules to apply in recurring situations, *see* text accompanying notes 530-31 *supra*, for the benefit of the affected members of the public.

572. Rules are not intended to foreclose exercise of all discretion on the part of the board of adjustment. Elimination of discretion is undesirable in a system designed for individual fairness. 2 K. DAVIS, *supra* note 313, § 8:7. Rules, therefore, should be designed primarily to notify the public of what factors are important to the variance decision and which way they cut, rather than specifically defining factors that absolutely determine a variance disposition.

573. Cerro Gordo County, Iowa, Zoning Ordinance § 24(D)(3) (1971).

574. *See* text accompanying notes 737-40 *infra*.

575. *See id.*

5. Hearing Procedure

The only aspects of county board of adjustment hearing procedure defined by state law appear in Iowa Code section 358A.12.[576] That section provides, first, that meetings shall be held whenever called by the chairman or at such other times as the board may determine. Second, the chairman is granted power to administer oaths and compel witnesses to attend board meetings. Third, board of adjustment hearings must be open to the public. Last, the board is required to keep a record of its proceedings and make the record available for public inspection.[577] All other aspects of hearing procedure are left to the discretion of the local board of adjustment, subject to the requirements of procedural due process. This section will examine the extent to which boards of adjustment incorporate elements of a judicial trial—either optionally or as a matter of due process. Aspects of the hearing to be covered include pleadings, the right to counsel, the subpoena power, the exclusivity of the hearing as a basis for decision, and the factfindings and minutes that boards of adjustment are required to keep.

In a judicial trial the pleadings consist of formal allegations exchanged by parties to establish their respective claims and defenses.[578] In the administrative context the requirements for pleadings developed through the common law emphasize substance and informality.[579] At a minimum, pleadings in board of adjustment cases must inform the board of the relief sought and show the grounds for the exercise of the board's jurisdiction.[580] However, no particular form of pleading is required.[581]

Zoning administrators in most Iowa counties provide petitioners with a pleading form. Although these forms are intended to aid petitioners in fulfilling the requirements of pleading, few guidelines are offered for the petitioner to follow. For example, most forms contain only a section intended to elicit a legal description of the property, a checkoff space for the relief sought, and a blank space for a description of the property's characteristics.[582] Zoning administrators or other officials are available to

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576. IOWA CODE § 358A.12 (1983).

577. *Id.*

578. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (1969).

579. Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 906 (2d Cir. 1977); Kuhn v. Civil Aeronautics Bd., 183 F.2d 839, 841-42 (D.C. Cir. 1950); 3 K. DAVIS, *supra* note 313, § 14:11 (1980) ("The most important fact about pleadings in the administrative process is their unimportance.").

580. 3 R. ANDERSON, *supra* note 9, § 20.13; 7 P. ROHAN, *supra* note 70, § 51.03[1] (1982).

581. 3 R. ANDERSON, *supra* note 9, § 20.13.

582. *See, e.g.*, Appeal to the Zoning Board of Adjustment, Clayton County, Iowa; Appeal to the Zoning Board of Adjustment, Crawford County, Iowa; Application for Variation and/or Change of Zoning Ordinance Requirements, Linn County, Iowa; Appendix VIII *infra.*

offer some assistance to petitioners, but formulation of the petition is left largely to the petitioner himself.

Possibilities for improvement of pleadings for the benefit of both board members and petitioners exist.[583] The most significant improvement would be to have boards of adjustment publish rules defining the significant substantive criteria to be considered at the hearing.[584] Petitioners rarely read cases or articles in legal journals. It is not surprising that, when asked why a certain permit is desired, petitioners most often respond that the permit is necessary to enable the petitioner to build the desired structure.[585] By providing petitioners with the information needed to assess the characteristics of their land with respect to the criteria described in board rules, boards of adjustment will waste less time on spurious petitions and will be able to decide individual petitions more quickly.

The conduct of board of adjustment hearings diverges from the adversarial nature of a trial immediately at the pleadings stage. There is no response to the petitioner's request, in the form of an answer or otherwise.[586] Therefore, the petitioner rarely knows what supporting evidence will be required or what facts may be challenged at the board hearing. However, despite the absence of advance notice of a petitioner's burden of production, a continuance of a petition to another meeting is rare.[587]

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583. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 295 (1955). Professor Reps suggests that the failure at the pleadings stage to sharply define the issues to be addressed causes problems that pervade the rest of the process. *Id*; Dukeminier & Stapleton, *supra* note 358, at 322-24 (issues before board of adjustment are seldom clarified by petitioners or board members).

584. *See* text accompanying notes 544-50 *supra*.

585. *See, e.g.*, Appeal to the Zoning Board of Adjustment, Allamakee County, Iowa, Petition of Mount (May 5, 1982) (application states only that purpose of appeal is to permit "continued construction" of new garage for storage purposes); Appeal to the Zoning Board of Adjustment, Clayton County, Iowa, Petition of Howe (Mar. 12, 1982) (application states only that request is for erection of broadcast tower); Appeal to the Zoning Board of Adjustment, Crawford County, Iowa, Petition of Bauer (Mar. 24, 1980) (application states only that purpose of appeal is to permit construction on lot smaller than that required by ordinance); Untitled Variance Request Form, Jasper County, Iowa, Petition of Circle S Grain Farms (Mar. 3, 1982) (application states only that appeal is made to enable sale of nonconforming lot); Application for Public Hearing to Johnson County Board of Adjustment, Johnson County, Iowa, Petition of Donovan (Mar. 22, 1982) (application states only that request is for construction of seasonal cabin); Application for Variation and/or Change of Zoning Ordinance Requirements, Linn County, Iowa, Petition of Prochaska (Mar. 4, 1982) (application states only that appeal is taken to allow temporary placement of mobile home on 6.79-acre lot).

586. The lack of response to a petitioner's request is common. Note, *Board of Zoning Appeals Procedure—Informality Breeds Contempt*, 16 SYRACUSE L. REV. 568, 573 (1965). The Project writers did not encounter any county boards of adjustment in Iowa that require a response by potential objectors prior to the hearing.

587. The Project writers found very few cases in which a hearing on a petition was continued at a second meeting. Most postponements that did occur were due to lack of

Informal pleadings are commonly accepted by administrative agencies. However, due process requires that a party be notified of the issues to be tried at an adjudicatory hearing sufficiently in advance of the hearing to permit adequate preparation.[588] Rules promulgated by the board of adjustment would be of great assistance in apprising petitioners of what facts must be pleaded and proved before boards of adjustment.

Petitioners receive little aid from pleadings in the preparation of their case. Also, few petitioners obtain the aid of an attorney to present their case to the board.[589] No county board of adjustment in Iowa expressly restricts the privilege of representation by an attorney or any other agent on behalf of anyone who appears at a hearing. However, courts and zoning officials may implicitly discourage retention of counsel.[590] Again, the need for rules to apprise persons who appear at board hearings of their rights and duties arises. If board of adjustment relief is available to the layman acting without counsel, the procedure for obtaining that relief should be made clear to him.

One of the procedural aids expressly mentioned in section 358A.12 is the power to subpoena witnesses.[591] However, there is little use of the board of adjustment subpoena power in Iowa counties.[592] Board of adjustment members take an active role in most proceedings, asking questions and directing testimony of witnesses who appear voluntarily. Additionally, board members commonly visit the site of the property named in the petition.[593] Because so few people attend most board of adjustment hear-

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a quorum rather than a desire to gather more information.

Continuance of a hearing can substitute for detailed pleadings as a means of notice. *See, e.g.*, Kuhn v. Civil Aeronautics Bd., 183 F.2d 839, 842-43 (D.C. Cir. 1950); Grandview Baptist Church v. Zoning Bd. of Adjustment, 301 N.W.2d 704, 707-08 (Iowa 1981).

588. *See* NLRB v. Temple-Eastex, Inc., 579 F.2d 932, 936 (5th Cir. 1978); 3 K. DAVIS, *supra* note 313, § 14:11 (1980).

589. *See* Appendix VII *infra* (Table 3). Whether counsel is a help or a hindrance has been debated. In at least one jurisdiction, petitioners represented by attorneys are denied the relief they request more often than petitioners proceeding pro se. This may be due to the greater propensity to seek legal advice in cases that promise to be controversial or more difficult to justify. Note, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398, 406 n.59 (1968). Results of the board of adjustment questionnaire indicate that a petitioner's retention of counsel is a factor that weighs against the granting of a variance. *See* Appendix IV *infra* (Table 35(11)).

590. One purpose of the procedural informality discussed throughout this section is to provide a forum that is accessible to the general citizenry without impedence by technical rules. 3 E. YOKLEY, *supra* note 42, § 18-9(b). One commentator suggests that lack of a requirement of informative pleadings in particular encourages pro se pursuit of claims. Note, *Board of Zoning Appeals Procedure—Informality Breeds Contempt*, 16 SYRACUSE L. REV. 568, 573 (1965). Also, several board of adjustment members expressed a distaste for attorneys in their comments to the Project questionnaire. *See, e.g.*, Board of Adjustment Questionnaire Nos. 143, 404.

591. IOWA CODE § 358A.12 (1983); *see* note 505 *supra*.

592. *See* Appendix IV *infra* (Table 32).

593. *See id.* (Table 34).

ings, however, the subpoena power may sometimes be necessary as a coercive means for assembling all the evidence necessary to rule on a particular petition.[594]

The very fact that boards of adjustment provide a hearing before deciding whether to grant the relief requested indicates that the hearing should be the exclusive basis for the board of adjustment's decision. Allowing factors known to or gathered by board members outside the board hearing to enter into the decision-making process without providing opportunity for rebuttal makes the hearing a meaningless gesture.[595] Outside the zoning context, the Iowa Supreme Court has held that administrative agencies acting in a quasi-judicial capacity cannot treat anything as evidence that has not been introduced as evidence in the agency hearing.[596] According to the court, the exclusivity requirement derives from an interest in both fairness to interested parties and proper judicial review.[597]

Although the subject has never been addressed directly, it is difficult to perceive how the exclusivity requirement could have been applied to board of adjustment hearings in the past. De novo review allows the reviewing court to assemble evidence needed to show the basis of the board decision without a corresponding record of the hearing. In the interest of informality, courts have long tolerated nonexistent records and suffered the task of seeking evidence de novo to support the board of adjustment decision.[598] However, this judicially sanctioned deficiency of records prevents any comparison of the evidence exposed at a de novo trial with that presented at the hearing.[599]

In the interest of fairness and proper judicial review, the Iowa court abandoned its tolerance of the nonexistent board of adjustment records. In *Citizens Against the Lewis and Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*[600] the Iowa Supreme Court concluded that all subse-

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594. *Cf.* 3 R. ANDERSON, *supra* note 9, § 20.30 (purpose of board of adjustment hearing is to gather all evidence necessary to make decision on petition; subpoena power is one means of achieving that purpose).

595. Mazza v. Cavicchia, 15 N.J. 498, 514-16, 105 A.2d 545, 554-55 (1954).

596. *In re* Reorganization of Lone Tree Community School Dist., 260 Iowa 719, 723, 150 N.W.2d 637, 639-40 (1967).

597. *Id.*, 150 N.W.2d at 640.

598. *See* note 467 *supra*; text accompanying notes 905-07 *infra*.

599. Deficient records, historically accepted by Iowa courts, compelled board of adjustment members to testify at trial to justify board actions. *See, e.g.*, Olsen v. Cass County Bd. of Adjustment, Equity No. 59-18957 (Iowa Dist. Ct., Cass County, Aug. 7, 1981); Brink v. Clay County, Iowa, Bd. of Adjustment, Law No. 19625 (Iowa Dist. Ct., Clay County, Dec. 22, 1979). Such examinations of agency officials are usually discouraged. *See* United States v. Morgan, 313 U.S. 409, 421-22 (1941). In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the United States Supreme Court sanctioned the taking of testimony from an agency official to explain the basis of a decision. *Id.* at 420. However, that situation is distinguishable from current Iowa board of adjustment review because *Volpe* involved a nonadjudicatory, quasi-legislative judgment, *id.* at 415, for which findings were not required, *id.* at 417.

600. 277 N.W.2d 921 (1979).

quent board of adjustment decisions would have to be supported by written factfindings sufficient to enable a reviewing court to determine the basis for each board decision.[601] As the court refines its *Pottawattamie County* holding in the years to come, the exclusivity requirement enunciated in *In re Reorganization of Lone Tree Community School District*[602] should be enforced in the board of adjustment context to the extent that it applies to other adjudicatory proceedings.

Problems with the requirement of the consideration of extra-record evidence arise when board members possess personal knowledge of the facts of a petition, decide to visit the site of an application before disposition, or determine the outcome of an application prior to the hearing. Board members' personal knowledge of a county and its residents inheres in the county land use regulation system.[603] Board members are often long-time residents of their counties[604] and maintain full-time occupations within their communities.[605] Thus, most board members have both close ties to other county residents and an awareness of county land use development.

Site visits by the county board of adjustment, either as a group or on an individual basis, are common in Iowa. Some boards routinely visit sites, while others do so only occasionally.[606] Such a practice may be the most efficient method for county boards of adjustment to gather evidence on a petition and is almost universally accepted.[607] Ex parte methods of acquiring information, such as site visits and personal knowledge, are invaluable sources of information and should be encouraged.[608] The relative lack of expertise of persons appearing before the board make ex parte knowledge a valuable resource in the decision-making process. However, it is crucial that any information possessed by the board or gathered in an ex parte investigation be fully disclosed at the hearing to allow persons appearing to contest its validity or importance and to allow judicial inquiry into the grounds for a decision.[609]

The volume of cases surveyed by the Project writers precludes an in-depth analysis of predisposition or bias in the board of adjustment process. However, the recurrence in several counties of two methods of disposition of a petition—phone-in or mail-in votes made before a hearing and "informal" disposition prior to the hearing—require some comment. The willingness to approve petitions without attending a hearing

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601. *Id.* at 925.

602. 260 Iowa 719, 723, 150 N.W.2d 637, 639-40 (1967); *see* text accompanying notes 596-97 *supra*.

603. 3 R. ANDERSON, *supra* note 9, § 20.37.

604. *See* Appendix IV *infra* (Table 6); text accompanying notes 439-40 *supra*.

605. *See* Appendix IV *infra* (Table 5).

606. *See id.* (Table 34).

607. 3 R. ANDERSON, *supra* note 9, § 20.38.

608. *See id.* § 20.37 (undesirable to prevent board members from using acquired knowledge of community).

609. *Id.*; 7 P. ROHAN, *supra* note 70, § 51.05[5].

casts a shadow on the respect usually granted to a board of adjustment's factfinding function.

Predisposition on the outcome of an adjudication is a ground for disqualification of the biased agency official, and the failure of such an official to disqualify himself rises to the level of a denial of due process.[610] While predisposition on questions of law or policy does not generally require disqualification,[611] board of adjustment authority does not include the power to make general land use planning policy decisions. That function is reserved to the board of supervisors in enacting and amending the ordinance.[612] The function of the board of adjustment is restricted to adjudication of individual claims of hardship imposed by the strictures of the ordinance.[613] Therefore, predisposition on the outcome of a variance or special use permit application indicates a violation of due process requirements.

The minutes of at least five county boards of adjustment reveal voting conducted either by mail or by phone calls by board members who failed to subsequently attend a hearing.[614] Another county board recorded instances in which board members met by conference telephone call to grant "informal" approval to a petition up to six months before the hearing.[615] In most of those cases a quorum of the board acted on the petition at the hearing without resorting to use of the absentee ballot.[616] However, such "absentee voting" suggests that some board members are willing to approve any petition without attending the hearing.

In *Anstey v. Iowa State Commerce Commission*[617] the Iowa Supreme Court stated that members of administrative bodies charged with making deci-

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610. Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964), *cited in* Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 391 (Iowa 1980).

611. Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 390 (Iowa 1980).

612. *See* notes 847-48 *supra* and accompanying text.

613. *Id.*.

614. Clayton County Board of Adjustment Minutes, Petition of Smith (Apr. 22, 1982) (board member Finnegan's vote recorded by telephone; permit approved 2-0); Dubuque County Board of Adjustment Minutes, Petition of Schmitt (Sept. 1, 1981) (board chairman Wagner recommended approval of variance by mail; petition approved 4-0); Guthrie County Board of Adjustment Minutes, Petition of Madren (June 5, 1979) (board member Chaloupka "reported earlier in the day that he would . . . approve the project if his opinion were needed"; variance approved 3-0); Kossuth County Board of Adjustment Minutes, Petition of Plathe (Oct. 17, 1979) (board member Christensen gave approval by mail; request approved 4-0); *id.* Petition of Nelson (Sept. 20, 1978) (board member Hurlburt contacted by telephone during meeting for his vote; petition approved 2-0); Madison County Board of Adjustment Minutes, Petition of Driskill (Feb. 28, 1980) (two board members communicated support of petition by mail; petition approved 3-0). In this note the vote totals were tallied without the absent members' votes.

615. Fayette County Board of Adjustment Minutes, Petition of West Union Country Club (June 2, 1982); *id.* Petition of White (Apr. 20, 1982).

616. Only the Petition of Smith in Clayton County and the Petition of Nelson in Kossuth County required an absentee vote for a quorum. *See* note 614 *supra*.

617. 292 N.W.2d 380 (Iowa 1980).

sions of great import should be guided by the same canon of the Code of Judicial Conduct that counsels against the appearance of impropriety on the part of judges.[618] If absentee voting indicates that board members are predisposed to approve petitions, the *Anstey* decision suggests a clear violation of due process.[619]

The repeated use of preliminary disposition procedures raises questions about the value of a hearing in any case that comes before boards of adjustment that use such procedures.[620] The existence of absentee voting suggests that some board members are willing to approve any petition regardless of its particular facts. From an economic standpoint, it seems pointless for county government to offer the pretense of a hearing if the evidence gathered therein will make no difference in the disposition of the case. From a legal standpoint, such automatic administrative relaxation of zoning ordinance requirements unfairly ignores the rights of neighbors and should not be tolerated. The plausibility of such a scenario suggests at least the appearance of impropriety discussed in *Anstey*.[621]

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618. *Id.* at 390. *Anstey* involved a challenge to the Iowa State Commerce Commission's selection of a route for electric transmission lines. The Commission order authorized, inter alia, a power company to acquire an easement by eminent domain across the plaintiff's property. *Id.* at 382. Thus, a real property right was at stake in the Commission hearing. Similarly, restrictions on the free use of property are at stake in board of adjustment hearings, so the board's decision should qualify as a decision "of great import."

619. Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964), *cited and distinguished in* Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 391 (Iowa 1980).

620. Further evidence of predisposition is found in the remarkable success rate of petitions brought before the county boards that use absentee voting methods. In the six counties listed in notes 614-15 *supra*, only 6 out of 181 petitions for variances or special use permits during the period studied by this Project were denied. All of the dispositions that resulted in denial were attended by neighbors who opposed the relief sought. *See* text accompanying notes 791-98 *infra*.

In Clayton County all 29 petitions brought before its board of adjustment were approved without a single dissenting vote. The Dubuque County Board of Adjustment considered 71 cases and voted for approval in 68. Several objectors were present at each of the three denials. Dubuque County Board of Adjustment Minutes, Petition of Schmitt (Oct. 7, 1980); *id.* Petition of Wagner (Oct. 7, 1980); *id.* Petition of Sharkey (Sept. 2, 1980). In Guthrie County only eight petitions were presented to the board, and all eight were approved. The Kossuth County Board of Adjustment considered 31 petitions and approved 29. Objectors were present at the two denials. Kossuth County Board of Adjustment Minutes, Petition of Graf (June 21, 1978); *id.* Petition of Schiltz (Dec. 5, 1978). Fayette County's Board approved 23 variance and special exception permits. Only one denial was recorded and that was for a use variance, Fayette County Board of Adjustment Minutes, Petition of Ashby (Sept. 23, 1980), which is prohibited by the Fayette County Zoning Ordinance, Fayette County, Iowa, Zoning and Subdivision Ordinances § 23(B) (1973). The Madison County Board considered 19 petitions and denied only 1. Madison County Board of Adjustment Minutes, Petition of McKinney (May 29, 1980). Although such a high success rate is not in itself proof of impropriety, it is at least ground for suspicion. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 281 (1955).

621. Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 390 (Iowa 1980); *see* text accompanying note 618 *supra*.

The final aspect of hearing procedure to be discussed addresses the documentary evidence that a board of adjustment must produce to support its decision. Section 358A.12 of the Iowa Code requires only that the minutes of the board's proceedings be kept.[622] In *Citizens Against the Lewis and Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*[623] the court imposed the additional requirement that the board make written findings of fact "sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted."[624]

Only one county board of adjustment in Iowa fails to keep minutes of its proceedings.[625] Several counties, however, keep minutes wholly inadequate for any conceivable purpose, recounting no more than a legal description of the property, the names of people in attendance, and the motion and vote of the board.[626] The brevity of records kept by many county boards of adjustment is exemplified by the following minutes of one board meeting:

> The . . . meeting was called to order by [the] chairman . . . at 11:00 A.M., March 10, 1982.
>
> The following members were present: [all members present].
>
> Others in attendance were: [several interested citizens in attendance].
>
> A motion was made by [a board member] to grant a special use permit for the following described land:
>
> Legal description: [full legal description recorded].
>
> A motion was made by [a board member] that permission be granted for a hog station to be erected on the above described property. [A board member] seconded the motion and it carried.
>
> The meeting was adjourned at 11:40 A.M.
>
> /s/
>
> Secretary[627]

Only fourteen county boards of adjustment in Iowa make even a pretense of keeping written factfindings.[628] Like *Pottawattamie County*'s rulemaking requirement,[629] the findings requirement has either not come to

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622. IOWA CODE § 358A.12 (1983).

623. 277 N.W.2d 921 (Iowa 1979).

624. *Id.* at 925.

625. The board that does not keep minutes is the Fremont County Board of Adjustment. *See* text accompanying notes 503-04 *supra*.

626. *See, e.g.*, Franklin County Board of Adjustment Minutes (Mar. 16, 1982); Harrison County Board of Adjustment Minutes (Feb. 10, 1981); Osceola County Board of Adjustment Minutes (Mar. 11, 1982); Plymouth County Board of Adjustment Minutes (Apr. 14, 1982).

627. Page County Board of Adjustment Minutes (Mar. 10, 1982).

628. *See* Appendix IX *infra* (Table 2).

629. Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 923-24 (Iowa 1979).

the attention of, or else has been ignored by, most county boards of adjustment. Of the fourteen boards that do record findings, eight merely cite the language of the ordinance that spells out permissible findings, without incorporating the facts of the specific petition involved.[630] A finding "that the . . . request does show a hardship"[631] is a particularly conclusory, though representative, example.

In *Cedar Rapids Steel Transport, Inc. v. Iowa State Commerce Commission*[632] Iowa, for the first time, adopted a findings requirement for administrative agencies. The *Cedar Rapids Steel* court determined that findings must be sufficient to enable a reviewing court to recognize the facts and legal principles that moved the agency to act as it did.[633] Also, the findings must inform the parties of what they must, may, or may not do as a result of the agency action.[634] Only findings of ultimate facts are required, and every presumption weighs in favor of upholding the judgment rather than defeating it.[635]

Judicial scrutiny of agency factfindings emphasizes substance rather than form.[636] Whether the findings made in a particular case will satisfy the *Pottawattamie County* requirement depends primarily on whether they achieve the purpose for imposing such a requirement.[637] The *Pottawattamie County* court listed several purposes for the factfinding requirement: facilitation of judicial review, prevention of judicial usurpation of the agency's function, assurance of more careful consideration of the case by the agency members, definition of the issues parties may raise on rehearing or review, and restriction of agencies to their legal jurisdiction.[638]

Those purposes suggest several minimal substantive requirements. First, the findings must clearly identify the action taken and the legal reasons therefor.[639] Neither parties nor courts are assisted in preparing or assess-

630. *See* note 643 *infra* and accompanying text.

631. Scott County Board of Adjustment Minutes, Petition of Iossi (July 31, 1980).

632. 160 N.W.2d 825 (Iowa 1968).

633. *Id.* at 837-38.

634. *Id.* at 837.

635. *Id.* at 838. The *Cedar Rapids Steel* court defined ultimate facts as those that are "determined by a process of reasoning and inference from basic facts" but are not "bare conclusions or mere expressions of statutory standards." *Id.* at 837-38.

636. *Id.* at 837; South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 21, 569 P.2d 1063, 1076 (1977).

637. 3 R. ANDERSON, *supra* note 9, § 20.42, at 545.

638. 277 N.W.2d at 925 (citing K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16:05 (1968)).

639. Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm'n, 160 N.W.2d 825, 837 (Iowa 1968).

In a variance case the board must find, at a minimum, that the current zoning classification makes the property incapable of supporting any reasonable use because of unique conditions (specified in the findings), and that the proposed use is in harmony with the spirit of the ordinance and the surrounding neighborhood character. The county zoning ordinance may impose additional prerequisites. *See* text accompanying notes 572-73 *supra*.

Several county boards of adjustment fail to find facts relating to those criteria. For example, the Clinton County Board of Adjustment makes findings of the ordinance's pre-

ing an appeal if the findings do not present intelligible grounds for analysis. Second, in order to avoid judicial usurpation of agency functions and to keep the agency within its jurisdiction, the findings must include the ultimate facts that support the agency's decision and the evidentiary facts that lead to its legal conclusion.[640] In other words, a finding that a "petitioner displays unnecessary hardship" is not enough.[641] The finding must include the characteristics of the property that result in hardship. For example, a finding that hardship is caused by a ravine forty-five feet from the front lot line which prevents construction in compliance with a thirty-foot setback requirement relates the contextual detail necessary for proper judicial review.

Findings that merely repeat in conclusory terms the language of the ordinance or rule defining the criteria that must be found should be insufficient to support a decision. Many jurisdictions so hold.[642] However, most

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requisites for a special exception when considering a petition for a variance. In one variance case the Board found:

a. No problems were envisioned with regard to ingress and egress to the property with reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
b. No problems were envisioned with respect to off-street parking, loading and service areas where required.
c. No problems were envisioned with regard to economic, noise, dust, heat, glare or odorous effects of the variance on surrounding property.
d. Utilities would be available with regard to the area involved and would be adequate to accommodate the intended use.
e. The area involved and the intended use is compatible with surrounding properties.
f. No problems were envisioned with regard to required yards or other open spaces.

Clinton County Board of Adjustment Minutes, Petition of Nelson (June 10, 1981). Such findings fail to consider the characteristics of the property that prevent uses allowed under the current zoning classification.

Few boards of adjustment consider all the legal prerequisites in every case. *See, e.g.*, Scott County Board of Adjustment Decision, Petition of Andrews (May 27, 1982) (fails to consider uniqueness of condition or affect on neighborhood and intent of ordinance); Story County Board of Adjustment Minutes, Petition of Wombacher (Nov. 19, 1980) (fails to consider uniqueness of the condition allegedly causing hardship).

640. Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm'n, 160 N.W.2d 825, 837-38 (Iowa 1968).

641. Findings that "[a] literal enforcement of the provisions of the Zoning By-laws would involve substantial hardship to the present owner," that "[t]he desired variance may be granted without detriment to the public good," and that "[t]he desired variance may be granted without nullifying or substantially derogating from the intent or purpose of the Zoning By-laws" also have been held conclusory and insufficient. Warren v. Board of Appeals, 1981 Mass. Adv. Sh. 522, 532-33 & n.12, 416 N.E.2d 1382, 1388-89 & n.12 (1981). Similarly, findings made in general terms—such as "traffic hazards" or "detrimental effects"—without reference to any statutory requirements are insufficient to support denial of an application for a subdivision plat. Goodman v. Board of Comm'rs, 49 Pa. Commw. 35, 45, 411 A.2d 838, 843 (1980).

642. 3 R. ANDERSON, *supra* note 9, § 20.44; 7 P. ROHAN, *supra* note 70, § 51.06[3].

counties in Iowa that make findings rarely do more than quote their ordinance or rule.[643] If a board's final resolution is not supported by any facts peculiar to a petition, courts must still do the agency's job of finding the supporting evidence on which to base the conclusion. A generic pair of findings applicable to any case—either that there is hardship or that there is not—does no more to restrict the board to its substantive jurisdiction than the conclusion of grant or denial.

Finally, the factfindings must be the basis of the board of adjustment's ultimate decision. Findings made by each individual board member, or findings made after the disposition of a case, fail to achieve the purpose of assuring more careful consideration of the facts. Two county boards of adjustment in Iowa record findings made separately by individual board members.[644] Essentially, board members making individual findings are each voting on a separate resolution and the required majority cannot be achieved. Thus, a decision supported by separate findings does not result in binding action.[645]

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643. Some county boards of adjustment in Iowa make findings that merely recite the zoning ordinance provision setting forth the variance requirements without relating any facts of the individual case to those requirements. *See, e.g.*, Cerro Gordo County Board of Adjustment Resolution, Petition of McCourt (Feb. 16, 1982):

> The possibilities of the size of the home, the location on the lot and the location of the county road was [sic] considered.
>
> The character of the neighborhood and the existing building line were considered.
>
> The improvement is not feasible unless a variance is granted.
>
> A granting of a variance in this situation will not be contrary to the public interest.
>
> Special conditions in the said situation are such that a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship to said Ramona A. McCourt without a variance of the minimum yard requirements of the Cerro Gordo County Zoning Ordinance.
>
> A public hearing was held as required by law and there were no objections presented.
>
> The said variance can be granted in keeping with the nature of the neighborhood and the spirit of the Ordinance will be observed and substantial justice done to the public and to Ramona A. McCourt.

These findings can be described as boilerplate, not only because of their generality, but because they reappear from meeting to meeting with only the applicant's name changed. *See, e.g.*, Cerro Gordo County Board of Adjustment Resolution, Petition of Zerble (Sept. 8, 1981); *id.* Petition of Allen (June 16, 1981).

644. In Black Hawk County, *e.g.*, Black Hawk County Board of Adjustment Minutes, Petition of Webb (Mar. 22, 1982), and Jasper County, *e.g.*, Jasper County Records of Member Vote, Petition of G. C. Barnes Tooling & Mfg., Inc. (June 10, 1982), each board member made separate findings. Moreover, not every board member took the time to fill out the records of decision in every case.

645. Administrative agency decisions either stand or fall on the basis of the reasons given by the agency. Such decisions cannot be sustained on reasons given only after the agency acts or on reasons provided by the court. Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974); Motor & Equip. Mfrs. Corp. v. EPA, 627 F.2d 1095, 1104 n.18 (1979), *cert. denied sub. nom.* General Motors Corp. v. Castle, 446 U.S. 952 (1980);

In two counties the planning staff or the zoning administrator prepares findings for the final printed record following the board's hearing.[646] Findings are culled from the testimony of the witnesses rather than the words of the board. That situation differs from the former state of review only in that the planning staff or the zoning administrator—nonindependent third parties—rather than the court performs the review. Preparation of findings by an assistant of the board would satisfy the requirement only if the findings are proposed before the vote so that the board could base its decision on the findings.

Beyond the minimal factfinding requirements of clarity, factual support, and personal preparation or approval as prospective grounds for decision by the board, any more formality is optional.[647] The Linn County Board of Adjustment currently incorporates its findings of fact into the oral discussion.[648] One member states proposed findings, together with the ultimate disposition, in the form of a resolution. The board then votes on the entire resolution.[649] There does not seem to be a persuasive rationale for requiring that factfindings be made part of a separate writing. Requir-

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In re United Corp., 184 F. Supp. 502, 518 (D. Del. 1960), *aff'd*, 283 F.2d 593, 597. Furthermore, a county board of adjustment can act only as a unit; actions of individual members are not binding. Grensel v. O'Brien County, 223 Iowa 747, 750-51, 273 N.W. 853, 854-55 (1937); Cram v. Gibson, 73 Mich. App. 192, 200, 250 N.W.2d 792, 796 (1977); City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex. Civ. App. 1973). Because a court may not supply reasons for an agency action that the agency did not propound in its record, the court ought not impute the findings of one member of the agency to the other members.

646. In Marion and Polk Counties, findings are prepared after the hearing by the staff or the zoning administrator. Marion County Board of Adjustment Minutes, Petition of McCormick (Dec. 17, 1981) (findings prepared by zoning administrator); Polk County Board of Adjustment Minutes, Petition of Robertson (May 17, 1982) (findings taken verbatim out of staff recommendations presented at hearing). Courts generally refuse to accept post hoc rationalizations for agency action stated by counsel at trial. Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974); Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255, 1260 (5th Cir. 1981); Compania de Gas de Nuevo Laredo, S. A. v. Federal Energy Regulatory Comm'n, 606 F.2d 1024, 1030-31 (D.C. Cir. 1979). Nor are findings made by the trial judge after appeal is taken sufficient to uphold board action. Alpert v. Board of Appeals, 6 Mass. App. Ct. 888, 889, 376 N.E.2d 1265, 1265 (1978). County zoning staffs are no more qualified to put words in the agency's mouth after a hearing than is the agency's counsel or a judge at trial.

647. One court has accepted a letter written to the petitioner spelling out the decision and the reasons therefor as an adequate substitute for formal, written findings. Douglass v. City of Spokane, 25 Wash. App. 823, 829, 609 P.2d 979, 983 (1980).

648. *See, e.g.*, Linn County Board of Adjustment Minutes, Petition of Keeney (July 27, 1981); *id.* Petition of Drees (Mar. 24, 1982). Although the oral resolution format may be acceptable, the findings made by the Linn County Board of Adjustment are conclusory in nature. For example, a finding such as "[i]t is in the public interest that this use be permitted in Linn County" is typical. *Id.* Petition of Iowa Elec. Light & Power Co. (Aug. 24, 1981); *see also id.* Petition of Keeney (July 27, 1981); *id.* Petition of Drees (Mar. 24, 1982).

649. *See id.* Petition of Keeney (July 27, 1981); *id.* Petition of Drees (Mar. 24, 1982).

ing that each board of adjustment make only one record, including both minutes and findings, would accommodate both the board's informal approach and the need for a record on review. In light of de novo review, findings in the record can substitute effectively for transcripts or other costly, detailed minutes. If the board makes a finding in terms of the evidentiary facts that support it, the reasons for the board's action are clear without need to search the record.

Currently, evidence to support the decision must be taken because of the deficiency of the record. With findings on the record, the taking of evidence de novo would require less judicial intrusion into the administrative process. Thus, even if the minutes do not give an exact account of the relevant evidence, the recitation in the findings at least will enable the reviewing court to see that the evidence taken was before the board.

6. Open Meetings and Public Records

One of the most important means of ensuring responsible administrative action is to keep agency meetings and records open to the public. Section 358A.12 requires that all meetings of the county board of adjustment be open to the public, that the board keep minutes of its meetings and record the vote of each member on each question, and that all minutes and records of the board be kept filed and open to the public.[650] The Iowa Open Meetings Law[651] and Public Records Law[652] also regulate such actions of the board.

The Iowa Open Meetings Law establishes specific procedures for notifying the public of an upcoming meeting and for closing a meeting, and provides penalties for violation. Section 28A.4 establishes notice requirements. It provides that notice of meetings must be given to any member of the news media who requests such notice. It also requires that notice be posted on a bulletin board at the principal office of the agency at least twenty-four hours before the meeting.[653] Meetings may be closed only for the reasons specified in section 28A.5(1), and closure requires a public vote of two-thirds of the agency members.[654] Available means of enforcing the open meetings law include an action for damages against any member of the board who voted for the closed session. However, both good faith belief in compliance and reliance on advice of counsel are available defenses.[655]

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650. IOWA CODE § 358A.12 (1983).

651. *Id.* ch. 28A. Agencies created by any political subdivision of the state, including county boards of adjustment, are included in the chapter's coverage. *See id.* § 28A.2(1)(b).

652. *Id.* ch. 68A. Records belonging to agencies created by any political subdivision of the state, including county boards of adjustment, are included in the chapter's coverage. *See id.* § 68A.1.

653. *Id.* § 28A.4.

654. *Id.* § 28A.5(1).

655. *Id.* § 28A.6(3)(a).

There is a clear requirement that all board of adjustment records be filed for public access under both section 358A.12[656] and the Iowa Public Records Law, chapter 68A of the Iowa Code.[657] The specific provisions of chapter 68A define the right of public access. Essentially, all citizens have a right to examine and copy, at their own expense, any "public records."[658] Section 68A.4 requires that public records be made available to the public during the customary office hours of the custodian of the records.[659] The zoning administrator is the designated custodian of board of adjustment records in most Iowa counties.[660] A knowing violation of the Iowa Public Records Law by the custodian is a simple misdemeanor.[661]

In their efforts to search and copy board of adjustment records, the Project writers encountered few problems. There were exceptions, however. For example, the Fremont County Board of Adjustment keeps no records. In an interview the zoning administrator said that meetings have been held and variances granted, but he did not know how many meetings had been held because no minutes were kept.[662] The Poweshiek County Board of Adjustment does keep records, but records for 1979 and 1980 are missing. No one in the Poweshiek County government office will hazard a guess about what may have happened to the missing records.[663] Finally, records of the Harrison County Board of Adjustment are kept at the home of the zoning administrator.[664]

Requests for examination of county board of adjustment documents are rare in most counties. A certain laxity on the part of some zoning officials results. The statutory mandate, however, is clear. If the custodian of board documents customarily keeps less than thirty office hours per week, the Iowa Public Records Law establishes a schedule of thirty

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656. *Id.* § 358A.12.

657. *Id.* §§ 68A.1-.3.

658. *Id.* §§ 68A.2-.3. Under the Public Records Law, " 'public records' includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing." *Id.* § 68A.1. Section 358A.12 also identifies county board of adjustment documents as public records. *Id.* § 358A.12.

659. *Id.* § 68A.4. If the custodian does not have customary office hours of at least 30 hours per week, public records must be made available from 9:00 a.m. to noon and from 1:00 p.m. to 4:00 p.m., Monday through Friday, excluding legal holidays. *Id.*

660. Even if the zoning administrator is not officially designated as the lawful custodian, nearly all the records collected by the Project writers were obtained from the zoning administrator of each county.

661. IOWA CODE § 68A.6 (1983).

662. Interview with Carl Christensen, Fremont County Engineer and Zoning Administrator, in Sidney, Iowa (June 16, 1982).

663. Interview with Slim Hedrick, Poweshiek County Zoning Administrator, in Montezuma, Iowa (July 8, 1982).

664. Telephone interview with Charles Korn, Harrison County Zoning Administrator (July 14, 1982).

hours per week during which board records must be made available.[665] Records can be kept in the county courthouse where they would be available during courthouse business hours if the custodian has no regular office.

7. Decision Process

Iowa Code sections 358A.16 through 358A.17 regulate the manner by which county boards of adjustment decide the cases brought before them.[666] Under section 358A.16, boards possess power to "reverse or affirm, wholly or partly, or [to] modify" the determination appealed from, "and to that end shall have all the powers of the officer from whom the appeal is taken"; boards are directed to make such decision as "ought to be made."[667]

The decision that "ought to be made" often involves modifying a petitioner's request. County boards of adjustment in Iowa routinely impose conditions on grants of both variances and special use permits.[668] Courts in other jurisdictions generally uphold the power to impose conditions.[669] Restrictions imposed on the boards' power to place conditions on relief include the requirement that conditions imposed must be in harmony with the spirit and intent of the zoning ordinance[670] and that conditions relate only to the land at issue in the petition rather than the person pursuing the permit.[671]

The legal requirements for a variance imply that conditions imposed by a board of adjustment on the issuance thereof may not relate to the identity of the owner. The board's decision to grant a variance must result from a condition of the land in question, not its use or its owner.[672]

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665. *See* note 659 *supra*.

666. IOWA CODE §§ 358A.16, .17.

667. *Id.* § 358A.16.

668. *See, e.g.*, Linn County Board of Adjustment Minutes, Petition of Smith (Apr. 26, 1982) (variance for temporary mobile home placement approved subject to conditions, including expiration after two years and installation of adequate water and sewer system); Muscatine County Board of Adjustment Minutes, Petition of Schoultz (Oct. 6, 1981) (special use permit for used car lot approved subject to condition that no junk cars be stored on lot); Polk County Board of Adjustment Minutes, Petition of Cunningham (May 17, 1982) (variance to allow construction of structure housing animals (rabbits and pigeons) less than required 150 feet from nearest resident approved subject to condition that no more than 12 animals be housed at one time).

669. 3 E. YOKLEY, *supra* note 42, § 21-12.

670. *See, e.g.*, Wentworth Hotel, Inc. v. Town of New Castle, 112 N.H. 21, 27, 287 A.2d 615, 619 (1972); Dexter v. Town Bd. of Gates, 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 508 (1975); Olevson v. Zoning Bd. of Review, 71 R.I. 303, 306-07, 44 A.2d 720, 721-22 (1945).

671. *See* Zakessian v. City of Sausalito, 28 Cal. App. 3d 794, 799-801, 105 Cal. Rptr. 105, 108-09 (1972); Vlahos Realty Co. v. Little Boar's Head Dist., 101 N.H. 460, 463-64, 146 A.2d 257, 260 (1958); Gerla v. Tacoma, 12 Wash. App. 883, 892-94, 533 P.2d 416, 421-22 (1975).

672. *See, e.g.*, V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 394-95, 86 A.2d 127, 131-32 (1952); Olevson v. Zoning Bd. of Review, 71 R.I. 303, 307-08, 44 A.2d 720, 722 (1945).

Therefore, a board of adjustment may condition a variance to expire after a term of years if the term has a rational basis in some legitimate planning goal.[673] However, a board may not condition a variance to expire upon change of ownership.[674]

This Project found only a few abuses of the board's power to impose conditions. In Guthrie County, for example, one variance was conditioned on the applicant's promise not to apply for any more variances.[675] No matter how obnoxious an applicant may be to a board, a variance is a statutory right available to petitioners when specified conditions are shown. In some instances a court may force a board to impose conditions or in rare cases impose its own conditions.[676] This Project found one case that seemed to cry out for judicial imposition of conditions. In a particularly remarkable showing of beneficence, the Tama Court Zoning Commission issued a "blanket permit" to a large industry to do anything it chose.[677] Presumably, no court would sanction such action.

Section 358A.17 of the Iowa Code requires a concurring vote of three members of the board of adjustment to approve any resolution within the board's section 358A.15 jurisdiction.[678] Thus, a majority of the board members present may not be sufficient: a majority of the entire five-person board is required. This requirement can cause problems for petitioners. Because a petitioner has no control over board attendence, if only a few members show up for a hearing, the petitioner must sway a higher percentage of those present in order to get the requested relief.[679] This fact gives a single board member an effective "veto power" in cases in which only three board members attend a hearing.

Other jurisdictions and some of the Iowa county ordinances recognize and provide solutions to the problems that the three-vote requirement can pose. In Louisiana, for instance, an alternate board member attends all hearings and votes if a regular member is absent.[680] In Polk County a

673. *In re* Douglaston Civic Ass'n v. Board of Standards & Appeals, 278 A.D. 659, 660, 102 N.Y.S.2d 582, 583, *aff'd*, 302 N.Y. 920, 922, 100 N.E.2d 187, 187 (1951); Guenther v. Zoning Bd. of Review, 85 R.I. 37, 40-41, 125 A.2d 214, 216-17 (1956).

674. *See, e.g.*, V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 394-95, 86 A.2d 127, 131-32 (1952); Olevson v. Zoning Bd. of Review, 71 R.I. 303, 308, 44 A.2d 720, 722 (1945).

675. Guthrie County Board of Adjustment Minutes, Petition of Henderson (Aug. 25, 1981).

676. East Camelback Homeowners Ass'n v. Arizona Found. for Neurology & Psychiatry, 19 Ariz. App. 118, 119, 505 P.2d 286, 287 (1973); Spadafora v. Ferguson, 182 Misc. 161, 163-64, 48 N.Y.S. 2d 698, 700 (Sup. Ct.), *aff'd*, 268 A.D. 820, 820, 50 N.Y.S.2d 408, 408 (1944); *In re* Gage, 402 Pa. 244, 250, 167 A.2d 292, 295 (1961); *see also* 3 R. ANDERSON, *supra* note 9, § 18.62.

677. Tama County Zoning Commission Minutes, Petition of Pioneer Hi-Bred (Aug. 3, 1981).

678. IOWA CODE § 358A.17 (1983).

679. For example, if only three board members attend a hearing, the petition must gain 100% approval, whereas 60% approval is required if all five board members attend.

680. LA. REV. STAT. ANN. § 33:4727 (West Supp. 1983).

petitioner faced with a board of less than five members has an option to proceed or postpone the hearing until the following month.[681] Depending on the absentee rate of a county's board of adjustment members, the adoption of such options may be appropriate.

In practice, some counties persist in devising some rather remarkable methods for dealing with absentees. Some county boards ignore the three-vote requirement when the need arises. For instance, several counties record disposition of variance and special use petitions with only two board members present.[682] Additionally, the Project writers encountered a Kossuth County case in which the zoning administrator granted a variance at a hearing at which *no* board of adjustment members were present. The administrator justified his action on the ground that "[t]he past policy of the Board of Adjustment has been to grant all variances of this nature."[683] One variance petition in Hardin County was approved by a 2-1 vote.[684]

Kossuth County pioneered another method of complying with the three-vote requirement: the board sometimes telephones absent board members to obtain the required majority.[685] Clayton County has utilized the same practice.[686] The minutes of the Fayette County Board of Adjustment recount conference calls months before the hearing for "informal approval" only.[687] Votes by mail are accepted and recorded in Kossuth County.[688]

The desire to dispose of a petition without requiring the petitioner to appear before the board of adjustment a second time may be strong. However, the three-vote requirement of Iowa Code section 358A.17 stands without exception or qualification. Proceeding without a quorum and hoping that no one complains is clearly not acceptable. County boards of adjustment should plan ahead for meetings in which three or more board members may be absent by implementing a legally acceptable method for handling the situation.

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681. Polk County Board of Adjustment Rules of Procedure § 4.11 (1979) (petitioner may request deferral anytime prior to board's decision); *id.* § 4.14(B)(1) (if only three members are present and petition is not approved by unanimous vote, rehearing is automatically scheduled).

682. *E.g.*, Butler County Board of Adjustment Minutes (Sept. 24, 1980) (petition approved 2-0, one member abstaining); Poweshiek County Board of Adjustment Minutes (Mar. 7, 1978) (two petitions approved and one denied by vote of 2-0); Tama County Zoning Commission Minutes (May 17, 1982) (two variances approved 5-0; two members present; three members absent and voting "in abstentia") (Tama County Zoning Commission handles both amendments and board of adjustment jurisdiction).

683. Kossuth County Board of Adjustment Minutes, Petition of Federson (Oct. 7, 1980).

684. Hardin County Board of Adjustment Minutes, Petition of Vinton (Oct. 21, 1981).

685. Kossuth County Board of Adjustment Minutes, Petition of Nelson (Sept. 20, 1978).

686. Clayton County Board of Adjustment Minutes, Petition of Smith (Apr. 22, 1982).

687. Fayette County Board of Adjustment Minutes, Petition of West Union Country Club (June 2, 1982); *id.* Petition of White (Apr. 20, 1982).

688. The Kossuth County Board of Adjustment recorded three petitions approved by mail: Petition of Laubenthal (June 4, 1981), Petition of Davidson-Larson Farms (Aug. 3, 1981), and Petition of Junkermeier (Aug. 30, 1981).

Procedural protections are designed to provide a uniform decision-making structure within which various petitioners can receive fair and equal treatment. Such a structure should facilitate uniform and non-discriminatory application of substantive legal requirements. The next part focuses on how county boards of adjustment in Iowa apply substantive zoning law and the subsequent effect of board of adjustment action on county land use planning.

V. VARIANCES AND THEIR EFFECT ON COUNTY LAND USE PLANS

Although variances are supposedly an extraordinary remedy,[689] county zoning records reveal that variances are granted casually, frequently without regard for the established legal criteria.[690] Nine out of every ten variance petitions that were considered by county boards of adjustment during the two-year period studied were approved.[691] Moreover, in nearly one-third of the counties with zoning boards of adjustment, the approval rate was one hundred percent.[692] Only six of the thirty boards that considered more than five variance petitions over the past two years denied more than twenty percent of those petitions.[693]

This remarkable rate of variance success, in itself, is not conclusive evidence of impropriety.[694] However, an overwhelming majority of these requests were granted without any recorded factual justification, the board minutes being devoid of any substantial reasons for approval or denial.[695] Of those boards that stated reasons, very few recited sufficient grounds to satisfy the legal variance standards.[696]

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689. Priest v. Griffin, 284 Ala. 97, 102, 222 So. 2d 353, 357 (1969); Dolan v. Zoning Bd. of Appeals, 156 Conn. 426, 429, 242 A.2d 713, 715 (1968); Deardorf v. Board of Adjustment, 254 Iowa 380, 390, 118 N.W.2d 78, 83 (1962); Lovely v. Zoning Bd. of Appeals, 259 A.2d 666, 670 (Me. 1969); Rosedale-Skinker Improvement Ass'n v. Board of Adjustment, 425 S.W.2d 929, 936 (Mo. 1968); Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 67 Pa. Commw. 233, 237, 446 A.2d 993, 995 (1982).

690. *See* text accompanying notes 774-884 *infra*.

691. *See* Appendix VII *infra* (Table 1).

692. *See* Appendix III *infra* (Table 8).

693. *See id.*

694. Several zoning administrators explained that the high rate of variance approval was due to their screening of meritless appeals so that only the most worthy applications reach the board of adjustment. The likelihood that such conduct is responsible for the generally high rate of approval is controverted by the questionnaire responses. More than one-third of the zoning administrators indicated that they either did not attempt to discourage variance appeals or dissuaded fewer than 25% of the potential petitioners from seeking relief from the board of adjustment. *See* Appendix VI *infra* (Table 26). Undoubtedly, some zoning administrators try to persuade potential variance petitioners to forego administrative remedies. However, it is clear that a great many of the requests that eventually reach the board of adjustment are still inadequate by unnecessary hardship standards. *See* text accompanying notes 774-884 *infra*.

695. More than one-half of the county board of adjustment variance decisions covered by this study were not supported by any recorded factual justifications. *See* Appendix VII *infra* (Table 2).

696. *See* text accompanying notes 774-884 *infra*.

The inescapable conclusion is that variances from county zoning ordinances are common rather than exceptional. The de facto reduction of the legal requirements for a variance predictably results in a gradual erosion of the county's land use plan. In the following subpart the substantive legal basis for variances will be discussed in detail before the actual decisions of county boards of adjustment and the effect of those decisions are evaluated.

A. Substantive Variance Criteria

Enabling acts commonly express "unnecessary hardship" as the requisite ground for the issuance of a variance.[697] Yet, without further clarification, unnecessary hardship is a somewhat illusive standard.[698]

1. Unnecessary Hardship

Some zoning enabling statutes expressly define unnecessary hardship. One such statute provides:

> "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to his property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality.[699]

However, most statutes and ordinances fail to delineate the specific elements of unnecessary hardship. Consequently, the courts and local authorities have been responsible for interpreting the substantive components of the standard.

In its oft-cited opinion in *Otto v. Steinhilber*[700] the New York Court of Appeals articulated what has become the predominant definition of unnecessary hardship. The *Otto* test involves three considerations:

> 1. The land in question cannot yield a reasonable return if used only for a purpose allowed in that zone;
>
> 2. The plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood, which may reflect the unreasonableness of the ordinance itself; and
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> 3. The use to be authorized by the variance will not alter the essential character of the locality.[701]

The unnecessary hardship test is stated conjunctively; therefore, the absence of any one element is fatal.[702] For instance, a uniquely narrow strip of

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697. *E.g.*, IOWA CODE § 358A.15 (1983); MONT. CODE ANN. § 76-2-223(1)(c) (1981).
698. *See* text accompanying notes 535-40 *supra*.
699. MINN. STAT. § 394.27 (1982).
700. 282 N.Y. 71, 24 N.E.2d 851 (1939).
701. *Id.* at 76, 24 N.E.2d at 853.
702. *See* Spaulding v. Board of Appeals, 334 Mass. 688, 692, 138 N.E.2d 367, 370 (1956).

property may not be suitable for a permitted use. However, no finding of unnecessary hardship would follow if the proposed use were a billboard to be erected in the midst of single family dwellings such that the neighborhood's essential character would be altered.

The Iowa Supreme Court adopted the *Otto* test in *Deardorf v. Board of Adjustment.*[703] Thus, variances granted by Iowa county boards of adjustment must satisfy *Otto*'s three elements of unnecessary hardship. Notwithstanding *Deardorf*, however, it is likely that many county board of adjustment members have never heard of unnecessary hardship or its substantive components. More than sixty percent of the board members who responded to the questionnaire were not aware of the provisions in Iowa Code chapter 358A,[704] and over eighty percent were unfamiliar with any zoning cases decided by the Iowa Supreme Court.[705] Personal interviews with board of adjustment members provided further evidence that board members are unfamiliar with the concept of unnecessary hardship. Nearly all of those persons interviewed either had never heard of unnecessary hardship or gave an incorrect definition of the term.[706] Without such basic knowledge, it is inconceivable that board of adjustment members are able to properly evaluate variance requests.

a. Reasonable Return

A petitioner for variance must demonstrate that a "reasonable return" cannot be realized unless the variance is granted.[707] For instance, the petitioner may prove that all beneficial use of the property has been lost by showing that the property is not suitable for any permitted use.[708] This notion is consistent with a fundamental characteristic of variances: variances run with the land and are unrelated to personal considerations.[709] Absent evidence that the property cannot be utilized beneficially in any manner provided for in the ordinance, the property owner is not entitled to a variance.

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703. 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962); *see also* Graziano v. Board of Adjustment, 323 N.W.2d 233, 236 (Iowa 1982).

704. *See* Appendix IV *infra* (Table 9).

705. *See id.* (Table 10). In contrast, 77% of the zoning administrators were familiar with chapter 358A, *see* Appendix VI *infra* (Table 9), but only 23% knew of cases decided by the Iowa Supreme Court, *see id.* (Table 10).

706. *E.g.*, Board of Adjustment Member Interview No. 113 (June 24, 1982) (not familiar with term); Board of Adjustment Member Interview No. 101 (June 22, 1982) (relies on zoning administrator to know the law); Board of Adjustment Member Inverview No. 111 (June 10, 1982) (unaware of standard).

707. Deardorf v. Board of Adjustment, 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962).

708. *E.g.*, Russell v. District of Columbia Bd. of Zoning Adjustment, 402 A.2d 1231, 1236 (D.C. 1979); John R. Green Assocs. v. Zoning Hearing Bd., 56 Pa. Commw. 605, 608, 426 A.2d 175, 176 (1981).

709. *E.g.*, Garibaldi v. Zoning Bd. of Appeals, 163 Conn. 235, 239, 303 A.2d 743, 745 (1972); Vassallo v. Penn Rose Civic Ass'n, 429 A.2d 168, 172 (Del. 1981); Associated Home Utilities, Inc. v. Town of Bedford, 120 N.H. 812, 817, 424 A.2d 186, 189-90 (1980); Rinck v. Zoning Bd. of Adjustment, 19 Pa. Commw. 153, 156, 339 A.2d 190, 192 (1975).

Likewise, the petitioner may be deprived of a reasonable return if the "productive use" of the property is denied by the ordinance.[710] For example, neighboring property may change such that the use for which a tract was originally zoned is no longer feasible and development for a permitted use would be economically impractical. In such cases the ordinance may prevent the productive use of the property, resulting in the denial of a reasonable return.

Lack of reasonable return is not established by the mere fact that a property owner is denied a more profitable use.[711] Similarly, the fact that property depreciates in value due to the restrictions placed on it by the zoning ordinance is not a sufficient ground for a variance.[712] Economic hardship will not justify a variance unless the property is rendered practically valueless.[713]

b. Unique Circumstances

County boards of adjustment are empowered to grant variances only when the petitioner proves that "special conditions" exist on the tract of land.[714] This statutory language corresponds to the second judicial component of unnecessary hardship: uniqueness.[715] Variances originally were intended to insulate the zoning ordinance form constitutional attacks based on its exceptionally harsh impact on particular parcels of property.[716] When the ordinance affects a certain piece of property in the same manner as other similarly situated properties, it theoretically functions the way the legislative body intended. If that intent is not compatible with public objectives, citizens are entitled to petition the legislative body for a change in zoning classification or to express their displeasure democratically at the polls. Thus, when hardship is common to an entire area, the appropriate

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710. *See, e.g.*, Poster Advertising Co. v. Zoning Bd. of Adjustment, 408 Pa. 248, 252, 182 A.2d 521, 524 (1962); Carter Corp. v. Zoning Bd. of Review, 98 R.I. 270, 272, 201 A.2d 153, 155 (1964).

711. *E.g.*, Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 774-75, 427 P.2d 810, 815, 59 Cal. Rptr. 146, 151 (1967); Banks v. City of Beticany, 541 P.2d 178, 181 (Okla. 1975); Board of Adjustment v. Drop, 6 Pa. Commw. 64, 67, 293 A.2d 144, 146 (1972); Johnson & Wales College v. DiPrete, ___ R.I. ___, ___, 448 A.2d 1271, 1280 (1982).

712. *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 674 n.8 (1976); Simone v. Board of Appeals, 6 Mass. App. Ct. 601, 603, 380 N.E.2d 718, 719 (1978).

713. Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 67 Pa. Commw. 233, 237, 446 A.2d 993, 995 (1982); Alfano v. Zoning Hearing Bd., 14 Pa. Commw. 334, 337, 324 A.2d 851, 853 (1974).

714. IOWA CODE § 358A.15(3) (1983).

715. Like the requirement that the ordinance must prevent a reasonable return before hardship can be found, the uniqueness element relates to the land and not the personal circumstances of the petitioner. *See, e.g.*, Allen v. Zoning Bd. of Appeals, 155 Conn. 506, 510-11, 235 A.2d 654, 656 (1967); Rowe v. Town of Salem, 119 N.H. 505, 507, 403 A.2d 428, 429 (1979); Rinck v. Zoning Bd. of Adjustment, 19 Pa. Commw. 153, 156, 339 A.2d 190, 192 (1975).

716. *See* text accompanying notes 361-63, 527 *supra*.

relief is legislative amendment rather than an administrative variance.[717] When variances are issued in cases of common hardship, special privileges are awarded to a handful of property owners at the expense of those who are still subject to the restrictive provisions of the ordinance.

Recurring situations, in which variances might otherwise be justified, are common to recreational lake areas in Iowa where lots are often below the minimum area requirements or are irregularly shaped. In effect, county boards of adjustment in these lake areas rezone their lakeside property on a case-by-case basis with variances[718] rather than leaving that responsibility to the politically sensitive boards of supervisors.[719]

Similarly, the severance of existing farmsteads is a recurring situation in several counties.[720] In Jasper County the continual granting of variances by the board of adjustment led to an amendment of the ordinance by the county board of supervisors less than two years after its enactment.[721] If the ordinance was flawed, it would have been more appropriate for the board of adjustment to deny the first variance petition and recommend that the applicant seek rezoning.[722] Instead, rezoning did not occur until eight variances had been granted[723] and the county and several land-

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717. Deardorf v. Board of Adjustment, 254 Iowa 380, 388, 118 N.W.2d 78, 82-83 (1962) (citing 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.168, at 401 (3d ed. rev. 1957)).

718. In Dickinson County, for example, an area called Triboji has been the subject of a number of requests for deviation from the area regulations. *See* Dickinson County Board of Adjustment Minutes, Petition of James (May 17, 1982); *id.* Petition of Kluver (Apr. 26, 1982); *id.* Petition of Lampe (Dec. 7, 1981); *id.* Petition of Zellers (Dec. 7, 1981); *id.* Petition of Steele (June 15, 1981). A similar situation has occurred in Buena Vista County with regard to an area referred to as Casino Beach. *See* Buena Vista County Board of Adjustment Minutes, Petition of Moore (Dec. 21, 1981); *id.* Petition of Francis (July 6, 1981); *id.* Petition of Harpenau (Dec. 8, 1980). In contrast to these two counties, Clay County provides a special zoning classification for similar areas called "Lake Residential." Clay County, Iowa, Zoning and Subdivision Regulations art. XI (1979).

719. *See* Hendrix v. Board of Zoning Appeals, 222 Va. 57, 61, 278 S.E.2d 814, 816-17 (1981) (use of variance to solve recurring problems is prohibited when legislative enactment is practicable, because piecemeal variances would eventually nullify zoning throughout the district).

720. *See* note 417 *supra*; text accompanying note 416 *supra*.

721. Jasper County, Iowa, Amendments to the Jasper County Zoning Ordinance (June 15, 1982).

722. The Jasper County Zoning Ordinance contains the following specific language:

> No grant or variance shall be authorized unless the Board specifically finds 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, under an amendment of the regulations, for such conditions or situations.

Jasper County, Iowa, Zoning Ordinance § 19.3(C)(3) (1981).

723. Jasper County Board of Adjustment Minutes, Petition of Krueger (June 10, 1982); *id.* Petition of Circle S Grain Farms (Apr. 1, 1982); *id.* Petition of Boertje (Mar. 4, 1982); *id.* Petition of Herbold (Dec. 4, 1981); *id.* Petition of Antle (Nov. 5, 1981); *id.* Petition of Heffelfinger (Nov. 5, 1981); *id.* Petition of Van Wyk (Oct. 1, 1981); *id.* Petition of Van Arkel (Sept. 3, 1981).

owners had expended much time and money. On the other hand, before the board of adjustment acted, the Jasper County Ordinance may have been functioning just as the board of supervisors had intended. Thus, the board of adjustment may have forced the supervisors to amend the ordinance to ensure that all property owners would be treated equally.[724]

The situation in Kossuth County illustrates a more drastic departure from the principle that variances are to be granted only in unique circumstances. Prior to amendment, the Jasper County Zoning Ordinance had required that dwellings in agricultural districts be located on a minimum of thirty-five acres.[725] In Kossuth County, where the minimum is five acres[726]—the same minimum required by the amended Jasper County Ordinance[727]—the board of adjustment, in a three and one-half year period, granted all twenty requests to sever farmsteads with less than the minimum acreage.[728] Even though the Kossuth County Board of Supervisors did not respond by amending its zoning ordinance, as did the supervisors in Jasper County, the Kossuth County Zoning Ordinance was, no less, effectively amended.[729] In granting these variances, the Jasper County and Kossuth County boards of adjustment essentially ignored the second element of the unnecessary hardship standard: the alleged hardship must be unique to the property.[730]

c. Essential Character of the Locality

Finally, to demonstrate unnecessary hardship, the petitioner must prove that the proposed use conforms to the essential character of the neighborhood.[731] This requirement serves two purposes. First, it is designed to protect the private interest of neighboring property owners from the encroachment of incompatible uses.[732] Second, as language in the enabling

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724. Another example of this phenomenon occurred in Scott County, where the zoning administrator said that so many variances of setback provisions had been granted in one area that the ordinance was amended in April 1981 to ensure that all landowners in the district would be treated equally. Interview with Philip J. Rovang, Scott County, Iowa, Zoning Administrator, in Davenport, Iowa (June 2, 1982).

725. Jasper County, Iowa, Zoning Ordinance § 5.5 (1981).

726. Kossuth County, Iowa, Zoning Ordinance § 6.4 (1973).

727. Jasper County, Iowa, Amendments to the Jasper County Zoning Ordinance (June 15, 1982).

728. *See* note 417 *supra*.

729. Some boards of adjustment are not as subtle in amending the ordinance by variance. In Crawford County, for instance, the board of adjustment granted reduced lot size variances for an entire plat, reasoning that it constituted "the best land use of [the] area." Crawford County Board of Adjustment Minutes, Petition of Hunt (Apr. 30, 1981). Similarly, the Kossuth County Board granted variances for an entire subdivision. Kossuth County Board of Adjustment Minutes, Petition of Country Estates (Mar. 12, 1980).

730. Deardorf v. Board of Adjustment, 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962).

731. *Id.*

732. 3 R. ANDERSON, *supra* note 9, § 18.41.

statute suggests,[733] the requirement serves to protect the public interests underlying the zoning scheme.[734]

A variance may alter the character of the neighborhood in many ways. It may cause traffic congestion or safety and health hazards. The variance may decrease property values, even though no significant dangers are created, or it may simply be an eyesore in an otherwise picturesque neighborhood. In determining whether a variance will alter the essential character of a locality, the board may consider several factors. For instance, the board may look to nearby zoning classifications to determine the essential character of the area.[735] Similarly, it may examine other uses in the immediate area to ascertain whether the variant use is incompatible.[736] However, care must be taken to prevent a gradual erosion of the zoning classification, especially when previous variances are evidence of the character of the area. Each variance could serve as justification for future variances until, eventually, the board of adjustment has effectively amended the ordinance.

2. *Self-Created Hardship*

Many jurisdictions impose a qualification on the finding of unnecessary hardship: the hardship cannot be caused or created by the property owner or predecessors in title.[737] The rationale supporting this doctrine is that hardship relates to the land and petitioners should not be allowed to take advantage of hardship created by their own acts rather than by operation of the zoning ordinance.[738]

Self-created hardship includes both intentionally and inadvertently created hardship. For example, when the applicant deliberately disregards

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733. *See* IOWA CODE § 358A.15(3) (1983) (variance shall not be "contrary to the public interest," and the "spirit of the ordinance shall be observed").

734. 3 R. ANDERSON, *supra* note 9, § 18.39, at 240-41. The private interests of neighboring landowners and the public interests that support the zoning plan often complement each other. *Id.* For instance, a variance for a commercial use in a residential area may infringe on private interests by lowering the property values of neighboring landowners. The commercial use may be contrary to the public interest because it may endanger local citizens by creating traffic congestion.

735. Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 67 Pa. Commw. 233, 237, 446 A.2d 993, 995 (1982).

736. Boston Edison Co. v. Boston Redev. Auth., 374 Mass. 37, 66, 371 N.E.2d 728, 747 (1977).

737. *E.g.*, Murray v. Board of Adjustment, 42 Colo. App. 113, 115, 594 P.2d 596, 597-98 (1979); Pollard v. Zoning Bd. of Appeals, 186 Conn. 32, 39, 438 A.2d 1186, 1190 (1982); Vassallo v. Penn Rose Civic Ass'n, 429 A.2d 168, 172 (Del. 1981); Clarke v. Morgan, 327 So. 2d 769, 773 (Fla. 1975); Fail v. LaPorte County Bd. of Zoning Appeals, 171 Ind. App. 192, 200, 355 N.E.2d 455, 460 (1976); Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 606, 410 A.2d 1138, 1143 (1980); Ignelzi v. Zoning Bd. of Adjustment, 61 Pa. Commw. 101, 104, 433 A.2d 158, 160 (1981); Rozes v. Smith, 120 R.I. 515, 521-22, 388 A.2d 816, 820 (1978).

738. *See* De Azcarate v. District of Columbia Bd. of Zoning Adjustment, 388 A.2d 1233, 1239 (D.C. 1978).

the ordinance and builds before seeking a variance, courts have held that the variance request should be denied.[739] Courts also have held that hardship resulting even from a good faith error in measurement is self-inflicted and bars a variance.[740] Some jurisdictions, however, have been willing to make an exception for good faith errors.[741] Other courts have adopted a more lenient view of self-created hardship, holding that it is only a factor to be considered and does not foreclose the board of adjustment from granting a variance.[742] Thus, the board of adjustment is free to consider other factors relating to a particular variance application.

Purchasing property with knowledge of existing zoning restrictions is considered a type of self-created hardship.[743] Under this variation of the self-created hardship doctrine, if a purchaser of realty is actually aware or had reason to know of an ordinance that prohibits the intended use, that purchaser is not entitled to a variance.[744] The purchase-with-knowledge doctrine, however, seems to cut against the fundamental principle that variances are appurtenant to land.[745] If a petitioner for variance satisfies the burden of showing unnecessary hardship, the owner's personal knowledge of the zoning regulations should be irrelevant.[746] Also, if no reasonable use can be made of a particular parcel of property under the zoning regulations, this doctrine would tend to unreasonably restrain the alienability of the property; surely no one would purchase property that

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739. Banos v. Colborn, 35 A.D.2d 281, 285-86, 317 N.Y.S.2d 450, 455 (1970), *aff'd*, 30 N.Y.2d 502, 504, 280 N.E.2d 650, 650, 329 N.Y.S.2d 819, 819 (1972); Stratford Arms, Inc. v. Zoning Bd. of Adjustment, 429 Pa. 132, 135-36, 239 A.2d 325, 327-28 (1968).

740. Misuk v. Zoning Bd. of Appeal, 138 Conn. 477, 481, 86 A.2d 180, 182-83 (1952); State *ex rel.* Rabenau v. Beckemeier, 436 S.W.2d 52, 57 (Mo. Ct. App. 1968); Deer-Glen Estates v. Board of Adjustment, 39 N.J. Super. 380, 386-87, 121 A.2d 26, 29 (Super. Ct. App. Div. 1956); Kovacs v. Board of Adjustment, 173 Pa. Commw. 66, 74, 95 A.2d 350, 354 (1953).

741. Jayne Estates, Inc. v. Raynor, 22 N.Y.S.2d 417, 422, 239 N.E.2d 713, 716, 293 N.Y.S.2d 75, 79 (1968); DeFelice v. Zoning Bd. of Review, 96 R.I. 99, 105, 189 A.2d 685, 688 (1963).

742. Wolf v. District of Columbia Bd. of Zoning Adjustment, 397 A.2d 936, 945 (D.C. 1979) (self-created hardship doctrine is not applicable to area variances); DeSena v. Board of Zoning Appeals, 45 N.Y.2d 105, 108, 379 N.E.2d 1144, 1145, 408 N.Y.S.2d 14, 15 (1978) (self-created hardship does not preclude an area variance and is only a factor to be considered); Beerman v. Kettering, 43 Ohio Op. 2d 354, 357, 237 N.E.2d 644, 649 (C.P. 1965) (self-created hardship is to be considered in determining application for variance but is not absolute bar), *aff'd*, 13 Ohio St. 2d 149, 150, 235 N.E.2d 231, 232 (1968).

743. *See* 3 A. RATHKOPF, *supra* note 46, § 39.02, at 39-7.

744. A.L.W., Inc. v. District of Columbia Bd. of Zoning Adjustment, 338 A.2d 428, 431 (D.C. 1975); O'Neill v. Zoning Bd. of Adjustment, 434 Pa. 331, 334-35, 254 A.2d 12, 14 (1969); L.M. Pike & Son, Inc. v. Town of Waterford, 130 Vt. 432, 436, 296 A.2d 262, 265 (1972); Snyder v. Waukesha County Zoning Bd. of Adjustment, 74 Wis. 2d 468, 477, 247 N.W.2d 98, 103 (1976).

745. *See* text accompanying note 709 *supra*.

746. Indian Village Manor Co. v. City of Detroit, 5 Mich. App. 679, 685, 147 N.W.2d 731, 734 (1967) (when hardship has been established, purchaser's knowledge of zoning regulations when property was acquired is irrelevant).

has no beneficial use when the mere act of purchasing the property with such knowledge would bar the purchaser from ever acquiring a variance. In reality, however, very few variances that are denied on self-created hardship grounds are sustained by the courts without evidence of an affirmative act creating the hardship or evidence that at least one of the elements for granting a variance is absent.[747] Therefore, the purchase-with-knowledge doctrine may be of little practical significance.

It is not clear where Iowa stands on self-created hardship.[748] Both the enabling statute and the courts are silent on the self-created hardship doctrine. Some counties, however, prohibit by ordinance the granting of variances in cases of self-created hardship. Numerous counties prohibit variances in limited situations of self-imposed hardship by requiring that all lots created after the effective date of the ordinance may not be reduced so that its minimum requirements are not met.[749] Others simply provide that the special conditions alleged in a variance petition may not be the result of actions taken by the applicant.[750]

It is difficult to tell how often county boards of adjustment encounter cases of self-created hardship or if self-created hardship significantly influences variance decisions. In most cases it is impossible to determine from board minutes whether the alleged hardship resulted from the petitioner's own acts. However, one-third of the board of adjustment members who responded to the questionnaire thought that the fact that hardship may be self-imposed had no bearing on their determination of variance petitions.[751] Only eighteen percent thought that self-created hardship is conclusive evidence that a variance should be denied.[752] Overall, there

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747. 3 A. RATHKOPF, *supra* note 46, § 39.02, at 39-17. Even in some jurisdictions that adhere to the self-created hardship doctrine, purchasers with actual or constructive knowledge are not precluded from seeking a variance. *See* Johnny Cake, Inc. v. Zoning Bd. of Appeals, 180 Conn. 296, 300, 429 A.2d 883, 885 (1980); City of Coral Gables v. Geary, 383 So. 2d 1127, 1129 (Fla. Dist. Ct. App. 1980); Bowman v. Metropolitan Bd. of Zoning Appeals, 165 Ind. App. 212, 219, 331 N.E.2d 739, 742 (1975); Haverford Township v. Zoning Hearing Bd., 55 Pa. Commw. 209, 213, 423 A.2d 757, 759 (1981); DeStefano v. Zoning Bd. of Review, 405 A.2d 1167, 1171 (R.I. 1979).

748. In Board of Adjustment v. Ruble, 193 N.W.2d 497 (Iowa 1972), however, the Iowa Supreme Court declined to create a good faith exception for a violation of an ordinance that prohibited the reduction of lot size below minimum requirements. *Id.* at 505. As of the date of this Project, the Iowa Supreme Court had not faced the issue whether unnecessary hardship, in the absence of an ordinance provision, prohibits variances granted in cases of self-created hardship.

749. *E.g.*, Kossuth County, Iowa, Zoning Ordinance § 3.7 (1973); Linn County, Iowa, Zoning Regulations § 2.07(1) (1981).

750. *E.g.*, Crawford County, Iowa, Zoning Ordinance § 2.15.3(a)(3) (1976); Story County, Iowa, Zoning Ordinance art. 23(E)(2) (1977). Many county zoning ordinances make no mention of self-created hardship. *See, e.g.*, Bremer County, Iowa, Zoning Ordinance (1975); Humboldt County, Iowa, Zoning Regulations (1976); Marshall County, Iowa, Zoning Ordinance (1962).

751. *See* Appendix IV *infra* (Table 35).

752. *Id.*

was only a slight tendency for board of adjustment members to respond that the presence of self-created hardship made it more likely that a variance application would be denied.[753] This evidence seems to suggest that self-created hardship is merely a factor, albeit a minor one, that board members consider in variance cases.

In the few cases in which the minutes reveal that the asserted hardship was clearly self-imposed, county boards of adjustment rarely used this fact to deny a variance request, even when the zoning ordinance expressly prohibited variances in cases of self-created hardship.[754] In Kossuth County the board of adjustment was cognizant of the petitioner's intention to divide a conforming lot into two nonconforming parcels but, nonetheless, granted the variance.[755] Not only did this variance violate an ordinance provision prohibiting the reduction of lots below specified minimum requirements,[756] but it also was granted before the division of the property had been made and any hardship had been imposed.[757]

3. Practical Difficulties

Occasionally, unnecessary hardship is expressed in combination with "practical difficulties" in enabling statutes as a standard for variances.[758] In *Village of Bronxville v. Francis*[759] a New York court held that the practical difficulties standard was distinctly different from unnecessary hardship and authorized boards of adjustment to grant *area* variances in cases of practical difficulties.[760] No court has attempted to define practical difficulties

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753. *Id.*

754. In a Linn County Board of Adjustment case the petitioner appealed the zoning administrator's decision to revoke a building permit. Previously, after the property had been divided in violation of a prohibition against the reduction of lot sizes below the minimum ordinance requirements, a variance had been conditionally granted. Linn County Board of Adjustment Minutes, Petition of Berstler (July 27, 1981). When the petitioner apparently violated the conditions, the zoning administrator revoked the building permit, but the revocation was overruled by the board of adjustment. *Id.*, Petition of Miller (Nov. 23, 1981). *See also* Hardin County Board of Adjustment Minutes, Petition of Johnson (Oct. 15, 1980) (petitioner allowed to split conforming lot into two nonconforming parcels in contravention of ordinance prohibiting reduction of lot size).

755. Kossuth County Board of Adjustment Minutes, Petition of Muller (July 16, 1980).

756. Kossuth County, Iowa, Zoning Ordinance § 3.71 (1973).

757. Kossuth County Board of Adjustment Minutes, Petition of Muller (July 16, 1980).

758. *E.g.*, COLO. REV. STAT. § 30-28-118(2)(c) (1977) ("peculiar and exceptional practical difficulties . . . or exceptional and undue hardship"); DEL. CODE ANN. tit. 9, § 1352(a)(3) (1974) ("unnecessary hardship or exceptional practical difficulties").

759. 1 A.D.2d 236, 150 N.Y.S.2d 906, *aff'd*, 1 N.Y.2d 839, 841, 135 N.E.2d 724, 725, 153 N.Y.S.2d 220, 221 (1956).

760. *Id.* at 238-39, 150 N.Y.S.2d at 908-09. The New York approach is followed in a minority of jurisdictions. *See, e.g.*, Board of Adjustment v. Kwik-Check Realty, Inc., 389 A.2d 1289, 1291 (Del. 1978); Wolf v. District of Columbia Bd. of Zoning Adjustment, 397 A.2d 936, 941 (D.C. 1979); Loyola Fed. Sav. & Loan Ass'n v. Buschman, 227 Md. 243, 249-51, 176 A.2d 355, 358-59 (1961); Indian Village Manor Co. v. Detroit, 5 Mich. App. 679, 684-85, 147 N.W.2d 731, 734 (1967). *But see* City & Borough of Juneau

as succinctly as the *Otto* court described unnecessary hardship, but practical difficulties is clearly a less rigorous standard than unnecessary hardship.[761] The rationale for imposing a lighter burden on the petitioner seeking an area variance is that the area variance seldom will alter the character of the zoning district and usually has an insignificant impact on the land use plan compared to that of use variances.[762]

The practical difficulties standard, however, is not unlimited. The petitioner still must demonstrate that the variance is necessary because of unique characteristics of the property.[763] Also, the fact that a more profitable use may be made of the property if the area variance were granted is insufficient to establish practical difficulties,[764] just as it is for unnecessary hardship.[765] Moreover, an applicant cannot qualify for an area variance under the practical difficulties standard merely by showing inconvenience or personal difficulties.[766]

The practical difficulties standard is not mentioned in either chapter 358A or chapter 414 of the Iowa Code.[767] Apparently, county board of adjustment members make some distinction between use and area variances as a practical matter, though, because the approval rate for area variances is slightly higher than the rate for use variances.[768] At least one county zoning ordinance, adopted in Kossuth County, states the power to grant variances in terms of "exceptional practical difficulties or exceptional and undue hardship."[769] However, it does not appear that the Kossuth County Board of Adjustment has made any attempt to distinguish the two terms. Also, the same ordinance prohibits use variances.[770] Thus, it is unlikely that the Kossuth County Board of Supervisors intended the "practical difficulties" language to constitute a standard separate from unnecessary hardship. Otherwise, unnecessary hardship would be meaningless because,

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v. Thibodeau, 595 P.2d 626, 634 (Alaska 1979) (when "practical difficulties" is stated conjunctively with "unnecessary hardship" in the enabling legislation, there is no reduced standard for area variances).

761. *See, e.g.*, Ivancovich v. City of Tuscon Bd. of Adjustment, 22 Ariz. App. 530, 536-37, 529 P.2d 242, 248-49 (1974); Anderson v. Board of Appeals, 22 Md. App. 28, 38-39, 322 A.2d 220, 226-27 (1974); Hoffman v. Harris, 17 N.Y.2d 138, 144, 216 N.E.2d 326, 329-30, 269 N.Y.S.2d 119, 123 (1966).

762. *See* Ivancovich v. City of Tuscon Bd. of Adjustment, 22 Ariz. App. 530, 536, 529 P.2d 242, 248 (1974); *see also* text accompanying notes 420-22 *supra*.

763. *E.g.*, Russell v. District of Columbia Bd. of Zoning Adjustment, 402 A.2d 1231, 1235 (D.C. 1979); Glasgow v. Beaty, 476 P.2d 75, 78 (Okla. 170).

764. *E.g.*, Howland v. Acting Sup't of Bldgs., 328 Mass. 155, 160-61, 102 N.E.2d 423, 426 (1951); Lovell v. Planning Comm'n, 37 Or. App. 3, 7, 586 P.2d 99, 101 (1978).

765. *See* text accompanying note 711 *supra*.

766. *E.g.*, Carney v. City of Baltimore, 201 Md. 130, 137, 93 A.2d 74, 76-77 (1952); Aronson v. Board of Appeals, 349 Mass. 593, 595, 211 N.E.2d 228, 229 (1965).

767. The Iowa Supreme Court declined to authorize a lesser burden for area variances in Board of Adjustment v. Ruble, 193 N.W.2d 497, 505-06 (Iowa 1972).

768. *See* Appendix VII *infra* (Table 1).

769. Kossuth County, Iowa, Zoning Ordinance § 23.2221 (1973).

770. *Id.* § 23.2224.

presumably, only area variances would ever come before the board. Even if the supervisors had intended a lower standard for area variances, this provision may be invalid because it would exceed the authority delegated in Iowa Code section 358A.15 to grant variances only in cases of "unnecessary hardship."[771]

The substantive criteria underlying the evaluation of variance petitions has been established. The lines are not always clear, but, nonetheless, judicial interpretation such as that in *Otto v. Steinhilber*[772] and *Deardorf v. Board of Adjustment*[773] has aided in clarifying some patent ambiguities. The ultimate test of any body of legal standards, however, lies in its practical application. Thus, inquiry into the actual justifications advanced by county boards of adjustment for variance decisions is necessary.

B. Factors Influencing Variance Decisions by County Boards of Adjustment

In many Iowa counties it is difficult to determine what factors influence board of adjustment variance decisions. Very few boards of adjustment issue written findings of fact,[774] and in more than one-half of the cases the minutes are devoid of any explanation for variance decisions.[775] Thus, the conclusions drawn here are derived from what little documentation of board decisions is available, interviews with board members and zoning administrators, and questionnaire responses to hypothetical fact situations. The pervasive explanations given for variance decisions defy succinct tabulation, but an attempt will be made to classify the factors within broad categories.

1. Physical Considerations

Physical considerations include those structural characteristics of the property, usually pertaining to dimensional aspects, that prevent development according to the zoning regulations. One typical example is an irregularly shaped lot on which no construction can occur unless the minimum setback requirements of the zoning ordinance are waived. Cases similar to this example constitute more than one-eighth of the cases in which reasons are cited for approval or denial of a variance.[776] In cases that are known to involve physical considerations, nearly ninety-seven percent of the variance requests are approved.[777] This fact indicates that county

771. IOWA CODE § 358A.15 (1983). *See also* Cole v. Board of Zoning Appeals, 39 Ohio App. 2d 177, 182, 317 N.E.2d 65, 68-69 (1973) (when state enabling act contained only the words "unnecessary hardship," local ordinance was inoperative to the extent that it purported to impose a lower practical difficulties standard).

772. 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939).

773. 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962).

774. *See* text accompanying notes 628-31 *supra*.

775. *See* Appendix VII *infra* (Table 2).

776. *See id.*

777. *See id.*

board of adjustment members consider physical impediments to be reasonably conclusive evidence that a variance should be granted.

Physical limitations are perhaps the most obvious examples of unnecessary hardship because the presence of such restrictions often prevents the reasonable use of the property. However, the mere presence of a physical limitation does not entitle the landowner to a variance. To satisfy the three-part test of *Deardorf v. Board of Adjustment*,[778] the proposed variance also must arise out of unique circumstances and must not alter the essential character of the neighborhood.[779]

Many county boards of adjustment end their inquiry without considering the uniqueness element or the potential effect of the proposed use on the character of the neighborhood. For instance, several boards routinely grant area variances for odd-shaped or undersized lots common to large areas near recreational lakes.[780] In situations in which these area variances are granted repeatedly, an amendment to the zoning ordinance would be more appropriate. Not only would a legislative amendment be the most appropriate remedy, but it also would save much of the time and expense involved in repeated variance applications.

The doctrine of self-imposed hardship is especially relevant to physical considerations.[781] Although a particular parcel of property may otherwise qualify, a variance may not be granted if the physical abnormality results from the actions of the petitioner or a predecessor in interest.[782] For instance, the petitioner may divide a lot that conforms to the minimum area requirements into two nonconforming lots.

Another situation that may be classified as a physical consideration occurs when the variance would purportedly result in a loss of productive agricultural land. County board of adjustment members and zoning administrators tend to think that if the grant of a variance would result in the loss of prime agricultural soils, the variance request should be denied.[783] Both groups rated this factor as one of the most conclusive in rejecting a variance application.[784]

As a practical matter, however, county board of adjustment members rarely deny variance requests due to the loss of farmland. Only slightly more than two percent of the minutes from variance cases mentioned prime farmland,[785] and only four variances were denied because granting the variance would result in the loss of prime agricultural soil.[786] More often,

778. 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962).
779. *Id.*, 118 N.W.2d at 81; *see* text accompanying notes 714-36 *supra*.
780. *See* text accompanying notes 718-19 *supra*.
781. *See* text accompanying notes 737-47 *supra*.
782. *See id.*
783. *See* Appendix IV *infra* (Table 35); Appendix VI *infra* (Table 33).
784. *See* Appendix IV *infra* (Table 35); Appendix VI *infra* (Table 33).
785. *See* Appendix VII *infra* (Table 2).
786. *Id.*

county boards of adjustment in Iowa state, as one of their reasons for approval of a variance, that no productive agricultural land will be lost because of the variance.[787] However, the mere fact that no prime agricultural soil is lost as a result of the granting of a variance falls short of a showing of unnecessary hardship.[788]

2. *Persons Involved in Board of Adjustment Hearings*

Board of adjustment hearings sometimes involve a number of people other than the board members themselves. Each group of persons may exert a positive or negative influence on the board's variance decision.

a. *Objectors and Proponents*

Many variance cases are heard without significant citizen input. In fact, in no more than fourteen percent of all variance applications before county boards of adjustment was there any vocal objection or support from any person other than the petitioner.[789] This may explain why so few board actions are challenged in court.[790]

When there are objectors to a proposed variance, the denial rate is three times greater than the normal rate of variance denial.[791] Similarly, the presence of proponents of a variance application tends to influence the decisions reached by county boards of adjustment in favor of the citizens making an appearance at the hearing. No cases were found in which a variance was denied if it was actively supported by citizens other than the petitioner. Thus, the boards of adjustment seem to seek the most politically popular ground. Results of the Project's board of adjustment questionnaire confirm the conclusion that objectors and proponents are important factors in variance decisions. Board member responses indicate a marked tendency to deny a variance request if there are objectors[792] and to grant the request if there are proponents.[793]

Perhaps a more common influence than the presence of objectors or proponents is the absence of objectors. In several counties the absence of objectors appears to be the exclusive criterion on which county boards of adjustment base their variance decisions. For example, the Kossuth

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787. *Id.*; *see, e.g.*, Calhoun County Board of Adjustment Minutes, Petition of Irwin (Dec. 3, 1980) (granting variance to allow swimming lessons at rural farmstead because no land would be taken out of production); Dubuque County Board of Adjustment Minutes, Petition of Locker (Sept. 1, 1981) (approving variance because property was unsuitable for agricultural uses); Story County Board of Adjustment Minutes, Petition of Wombacher (Nov. 19, 1980) (variance granted for agriculturally unproductive parcel).

788. *See* text accompanying notes 697-736 *supra* (discussion of unnecessary hardship).

789. *See* Appendix VII *infra* (Table 3).

790. *See* text accompanying note 919 *infra*.

791. *See* Appendix VII *infra* (Table 3).

792. *See* Appendix IV *infra* (Table 35).

793. *See id.*

County Board of Adjustment approved certain variances prior to public notice on the condition that its approval could be retracted, and the variance denied, if objections were raised after public notice was given.[794] The Allamakee County Board of Adjustment requested that petitioners receive written approval from neighboring landowners before variances were granted.[795] In Jackson County the board of adjustment granted a variance conditioned upon the petitioner's acquiring notorized approval from neighboring property owners.[796] Other boards simply stated in their minutes that variances were approved due to lack of objections.[797]

The active support of proponents and the presence or lack of objectors clearly constitute major factors in many variance decisions. Perhaps board of adjustment members strive subconsciously to reach variance decisions that will cause the least controversy, but the support or dissent of the public is not in itself a valid variance consideration.[798] Citizen input is not wholly immaterial to variance decisions, however. The involvement of citizens in the hearing is often important for determining the factual background of the case, especially in evaluating the effect that a proposed variance will have on the character of the immediate neighborhood.[799] However, if the high denial rate in cases in which objectors are present is due to enhanced factfinding, the clear majority of variance cases—those attended only by the petitioner[800]—apparently are decided on inadequate factual grounds.

b. Attorneys

Board of adjustment hearings normally are informal, and therefore, very few parties are represented by an attorney.[801] Obviously, whether a party is represented by legal counsel should not affect the substantive validity of that party's position. Nearly all board of adjustment members and zoning administrators stated that the presence of an attorney in variance

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794. Kossuth County Board of Adjustment Minutes, Petition of Buffington (Dec. 21, 1981); *id.* Petition of Potter (Apr. 15, 1981); *id,* Petition of Bass (Oct. 17, 1979); *id.* Petition of Holzey & Johnson (June 21, 1978).

795. The approval from neighboring landowners is recorded on a standard form entitled "Decision of Adjoining Property Owners."

796. Jackson County Board of Adjustment Minutes, Petition of Headington (Oct. 8, 1981). *But see* Luger v. City of Burnsville, 295 N.W.2d 609, 614-15 (1980) (variance may not be conditioned on the approval of abutting property owners).

797. *E.g.*, Buena Vista County Board of Adjustment Minutes, Petition of Francis (July 6, 1981); Emmet County Board of Adjustment Minutes, Petition of Peterson (May 19, 1981).

798. *See* North Shore Equities, Inc. v. Fritts, 81 A.D.2d 985, 986, 440 N.Y.S.2d 84, 85 (1981); Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 67 Pa. Commw. 233, ____, 446 A.2d 993, 996 n.5 (1982).

799. *See* Board of Adjustment v. Ruble, 193 N.W.2d 497, 506 (Iowa 1972).

800. *See* text accompanying note 789 *supra*.

801. *See* Appendix VII *infra* (Table 3).

proceedings made little difference in the board's decision-making process.[802] Zoning administrators, however, think that there is a tendency among board members to favor the party who is represented by an attorney.[803]

Although there are not enough cases to substantiate the zoning administrators' position, an interesting pattern emerges from those cases involving parties represented by attorneys. When only the petitioner is represented by counsel, the approval rate is close to the average rate of variance approval.[804] However, when an objector retains an attorney—which occurs with less than one-half the frequency with which petitioners retain counsel[805]—the approval rate is reduced to fifty percent.[806] In cases in which both sides have attorneys, the approval rate is only twenty-five percent.[807] One possible explanation for this disparity is that when both sides have attorneys, the board members are better able to distinguish the legal issues without regard to personal influences, and therefore, the grant of a variance becomes more exceptional than common. Another, more probable, explanation is that both sides retain attorneys only when the variance sought is extraordinarily controversial and thus, more likely to be denied anyway.

c. Other County Officials

Occasionally other county officials offer recommendations on variance applications to boards of adjustment. These recommendations may be volunteered, requested, or required by ordinance. Recommendations from other county officials are the exception rather than the rule, however. In only thirteen and one-half percent of variance cases are recommendations made by other county officials.[808]

Boards of adjustment are not bound by the recommendations of other officials on variance applications.[809] Such recommendations are significant, however, because they normally are prepared by persons with professional training or special expertise in land use matters.[810] If a recommendation supporting the grant of a variance is made, the variance is usually granted.[811] When denial is recommended, however, two-thirds of the variance petitions are granted notwithstanding the unfavorable recommendation.[812]

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802. *See* Appendix IV *infra* (Table 35); Appendix VI *infra* (Table 33).
803. *See* Appendix VI *infra* (Table 33).
804. *See* Appendix VII *infra* (Table 3).
805. *See id.*
806. *See id.*
807. *See id.*
808. *See id.* (Table 2).
809. Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 108 (1962).
810. *Id.*
811. *See* Appendix VII *infra* (Table 2).
812. *See id.*

The county board of adjustment members who responded to the Project questionnaire indicated that they are inclined to follow outside recommendations.[813] However, the zoning administrators indicated that board members were likely to accord undue weight to a favorable variance recommendation and less than appropriate weight to an unfavorable one.[814] This evidence is consistent with the notion that, although board members are easily influenced to grant variances, they resist efforts that would result in denials.

3. Economic Benefit or Detriment to the Petitioner

A variance cannot be justified solely on the ground that a more profitable use of the property could be made if the variance were granted.[815] The zoning ordinance must prohibit any reasonable economic utilization of the petitioner's property before a variance may be granted.[816] County boards of adjustment in Iowa, however, are exceptionally sympathetic to pleas of financial burden by variance petitioners. In fifteen cases in which it was alleged that the petitioner would benefit financially from the approval of a variance,[817] only one request was denied.[818]

In most of these cases the petitioner was not prevented by the ordinance from making reasonable use of the property in question. Rather, compliance would have required extra expenditures or resulted in a lower return on the petitioner's investment. For instance, in one case before the Dickinson County Board of Adjustment, the petitioner alleged that there would be additional cost in changing the construction plans to conform with the zoning regulations.[819] The petitioner did not claim that the extra cost involved would be so unreasonable as to render the use unprofitable. Rather, it seemed that the petitioner's business merely would have been less profitable. Nevertheless, the board of adjustment approved the variance unanimously.[820]

Economic hardship may result from the petitioner's own actions. Such self-imposed hardship occurs when a building is constructed in violation

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813. *See* Appendix IV *infra* (Table 35).

814. *See* Appendix VI *infra* (Table 33).

815. *See* text accompanying note 711 *supra*.

816. *See* text accompanying notes 707-13 *supra*.

817. *See* Appendix VII *infra* (Table 2). Aside from the cases in which financial benefit or detriment is specifically alleged and recorded in the minutes, there are numerous cases in which these concerns are implicated. For instance, applications for mobile home variances invariably involve considerations of financial difficulties. *See* text accompanying notes 831-35 *infra*.

818. *See* Appendix VII *infra* (Table 2); Warren County Board of Adjustment Minutes, Petition of Stanbrough Constr. Co. (Apr. 6, 1982) (petitioner alleged inability to increase rental income from additional apartment units).

819. Dickinson County Board of Adjustment Minutes, Petition of Iowa Great Lakes Sanitary Dist. (Mar. 2, 1981).

820. *Id.*

of the zoning regulations, often without a building permit. Board of adjustment members have demonstrated a great reluctance to deny variances that have the effect of "legalizing" these nonconforming structures.[821] Board members apparently consider the financial burden of removing or altering the structure too harsh a penalty for what are normally regarded as minor public benefits. Thus, in these situations county boards of adjustment tend to balance the private and public interests rather than adhere to established variance criteria.

The balancing of financial burdens by county boards of adjustment in Iowa sometimes leads to disparate treatment. The Linn County Board of Adjustment granted a variance in a case in which the petitioner had poured the concrete foundation for a garage before becoming aware of the zoning restrictions.[822] However, a similar request filed before construction had begun was denied due to "insufficient evidence of hardship."[823] Thus, the board of adjustment was less sensitive to the problems of the party who had abided by the ordinance than the party who had begun to build in violation of the ordinance.

In Black Hawk County one property owner applied for a variance to legitimize a building that had been built too close to the property line and his neighbors objected.[824] The board of adjustment could not see how any of the parties could possibly reach a mutual agreement so the variance was approved.[825] Thus, the board protected the petitioner who had violated the terms of the ordinance rather than the objectors claiming protection under the ordinance. The record reveals no consideration of unnecessary hardship.[826]

Occasionally, a petitioner makes a good faith effort to abide by the zoning regulations, but an error in measurement results in a violation. County boards of adjustment in these rare situations seem to base their decisions on what the board determines the petitioner's motives to have been. In a case before the Woodbury County Board of Adjustment, for example, a church had been built in violation of the ordinance's frontyard setback requirements.[827] Convinced of the builder's innocent intentions, the Board granted an area variance.[828] In another case the Cedar County Board of Adjustment denied a variance for a storage building seemingly

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821. *See* Appendix IV *infra* (Table 35).

822. Linn County Board of Adjustment Minutes, Petition of Frazier (Sept. 28, 1981).

823. *Id.* Petition of Lawrence (July 27, 1981).

824. Black Hawk County Board of Adjustment Minutes, Petition of Hinders (Sept. 21, 1981).

825. *Id.*

826. *Id.*

827. Woodbury County Board of Adjustment Minutes, Petition of Bethel Lutheran Church (May 7, 1979). At the same meeting, a variance involving a similar mistake in measurement was approved. *Id.* Petition of Westbrook (May 7, 1979).

828. *Id.* Petition of Bethel Lutheran Church (May 7, 1979).