ZONING VARIANCE ADMINISTRATION IN VERMONT

INTRODUCTION

For several decades, scholars have criticized the administration of variances from zoning bylaws.[1] They complain that local administrative bodies, or zoning boards of adjustment, habitually abuse the variance power,[2] and regularly exceed their statutory authority by granting variances without regard for the statutory standards.[3] Two cases recently decided by the Vermont Supreme Court suggest that local boards in Vermont suffer from the same afflictions.[4] These cases illustrate the confusion that exists regarding the statutory criteria under which zoning boards are to grant variances from zoning bylaws.

In *Gadhue v. Marcotte*,[5] the applicant, Marcotte, sought a variance from the 150-foot-lot width requirement set forth in the local zoning bylaws.[6] The zoning board of adjustment[7] granted Marcotte's request. Gadhue, an adjoining property owner, appealed the board's decision under chapter 117 of Vermont's Mu-

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1. *See* Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353 (1962); Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959); Blucher, *Let Us Throw Out the Baby to Get Rid of the Bathtub*, 12 ZONING DIGEST 145 (1960); Dallstream & Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213; Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Green, *Rough Justice: Baby or Bath Water?*, 13 ZONING DIGEST 161 (1961); Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280 (1955); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969).

2. Dukeminier & Stapleton, *supra* note 1, at 303; Reps, *supra* note 1, at 282; Shapiro, *supra* note 1, at 13-19.

3. Shapiro, *supra* note 1, at 15-19.

4. Gadhue v. Marcotte, 141 Vt. 238, 446 A.2d 375 (1982); *In re* Ray Reilly Tire Mart, Inc., 141 Vt. 330, 449 A.2d 910 (1982).

5. 141 Vt. 238, 446 A.2d 375 (1982).

6. *Id.* at 239, 446 A.2d at 376.

7. The term "zoning board of adjustment" comes from the Standard State Zoning Enabling Act first prepared by the Advisory Committee on Zoning in 1926. The Committee was established by the United States Department of Commerce. *See* A Standard State Zoning Enabling Act, U.S. DEP'T OF COMMERCE (1926), *reprinted in* A.L.I. MODEL LAND DEVELOPMENT CODE app. A, at 210-21 (Tent. Draft No. 1, 1968). Zoning boards of adjustment, as they are referred to in Vermont, are responsible for hearing appeals from decisions of the local zoning administrator and deciding upon applications for variances or conditional use permits. *See* VT. STAT. ANN. tit. 24, §§ 4407, 4442, 4461, 4464, 4468 (1975 & Cum. Supp. 1983).

nicipal and County Government Law.[8] The superior court, after a trial *de novo*,[9] found that Marcotte had satisfied the statutory criteria[10] for a zoning variance.[11] Gadhue then appealed to the Vermont Supreme Court. The supreme court reversed the lower court's decision and held that Marcotte had not satisfied the statutory variance prerequisites.[12]

In re Ray Reilly Tire Mart, Inc.[13] also involved the question of whether the applicant had satisfied the statutory variance criteria. As in *Gadhue*, a local zoning board of adjustment granted the applicant's request for a variance. The superior court, on appeal, upheld the variance award. However, the Vermont Supreme Court, iterating its holding in *Gadhue*, struck down the variance.[14] The court concluded that the applicant had not satisfied the statutory criteria.[15] Thus, in both cases, the supreme court held that the zoning boards of adjustment had improperly granted variances to the respective applicants.

As these two cases illustrate, local zoning boards often encounter difficulties interpreting and applying the statutory variance criteria. This note undertakes a review and analysis of variance law and administration in Vermont. Its discussion focuses on whether local zoning boards throughout the state generally comply with the statutory requirements for granting a zoning variance. Section I re-

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8. *See* VT. STAT. ANN. tit. 24, § 4471 (Cum. Supp. 1983). Under this section, "[a]n interested person may appeal a decision of a board of adjustment to the superior court . . . ." *Id.* An "interested person" is defined as:

> A person owning or occupying property in the immediate neighborhood of a property which is the subject of any decision or act taken under this chapter, who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality.

VT. STAT. ANN. tit. 24, § 4464(b)(3) (Cum. Supp. 1983).

9. *See* VT. STAT. ANN. tit. 24, § 4472(a) (1975) (statute authorizing trial *de novo*).

10. *See infra* notes 57-60 and accompanying text.

11. *Gadhue*, 141 Vt. at 240, 446 A.2d at 376.

12. *Id.* at 241, 446 A.2d at 377.

13. 141 Vt. 330, 449 A.2d 910 (1982).

14. *Id.* at 335, 449 A.2d at 912. Unlike *Gadhue*, the variance in this case was a use variance, not an area variance. See *infra* notes 39-42 and accompanying text for a discussion of the difference between the two. The Vermont Supreme Court, however, did not consider the difference significant and stated: "[B]oth [parties] place great reliance on the asserted distinction between 'use' and 'area' variances. Whatever the merits of this distinction might be, under our statute this reliance is misplaced." *Tire Mart*, 141 Vt. at 332, 449 A.2d at 911. The court did not, however, consider the question of whether use variances are prohibited by title 24, section 4473 of the Vermont Statutes Annotated (1975). This is probably because neither party would assert that position. *See infra* text accompanying note 168-69.

15. *Tire Mart*, 141 Vt. at 335, 449 A.2d at 912.

views the policies, the purposes, and the theories underlying zoning and zoning variances. Section II analyzes Vermont's statutory variance criteria and the related case law. Section III analyzes how selected zoning boards throughout the state administer variances, and whether such administration in fact comports with the statutory requirements. Section IV questions whether boards excessively grant variances because board members instinctively balance the interests involved, thereby injecting flexibility into zoning, or because the members are unsophisticated. Section V proposes a system by which the exercise of board discretion can be checked. The concluding section asserts the need for reform and reevaluation of zoning variance administration.

I. Zoning and Zoning Variances

Zoning is a land use mechanism,[16] a planning tool,[17] and a means by which the development and use of land is controlled and directed.[18] Both the power to zone and the purpose of zoning are products of the state police power[19]—the power to promote and

16. 1 N. Williams, American Land Planning Law § 16.03 (1974).

17. 1 R. Anderson, American Law of Zoning § 1.13 at 19 (2d ed. 1976).

18. *See* D. Hagman, Urban Planning and Land Development Control Law § 5 (1971).

19. Dewitt v. Town of Brattleboro Zoning Bd. of Adjustment, 128 Vt. 313, 262 A.2d 472 (1970). "It is a fundamental theory of a zoning scheme that it shall be for the general good, to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith." *Id.* at 319, 262 A.2d at 476 (citation omitted); *see* Galanes v. Town of Brattleboro, 136 Vt. 235, 240-41, 388 A.2d 406, 409-10 (1978).

In 1926 the United States Supreme Court held that zoning constituted a valid exercise of the state's police power. Euclid v. Amber Realty, 272 U.S. 365 (1926). Because a state's police power is limited, zoning power likewise is limited. The exercise of zoning power is justified only insofar as it implements a valid land use plan that promotes or protects the general public welfare. *Id.* at 390.

In recent years, legislatures and courts have expanded the concept of the general public welfare to include regulation of such things as aesthetics, historic preservation, maintenance of property values, population density, and numerous other land use concerns. *See, e.g.*, Vt. Stat. Ann. tit. 24, § 4302 (Cum. Supp. 1983); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Yet, certain zoning regulations, such as those amounting to exclusionary or fiscal zoning, have been struck down as irrational. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Home Builders League of South Jersey v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979); NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975). *See also* Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 Vt. L. Rev. 509 (1981). Others have been struck down as violative of first amendment protections. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). Unless zoning regulations bear a rational and legitimate relationship to valid police power

protect the public health, safety, morals, and general welfare. Although zoning has many objectives,[20] its basic intent is to implement and give effect to a comprehensive land use plan.[21] The enactment of a zoning ordinance is not the conclusion, but the beginning of controlled development.[22] The local legislature is charged with continually reevaluating, modifying, and updating zoning bylaws as conditions change.[23] When the legislature neglects these duties, the local zoning board of adjustment may be tempted to take the initiative and ostensibly "rezone" marginal areas that surface because of economic changes in the community.[24] In addition, when a bylaw becomes outdated, it may collide with the interests of private property owners who, because of changed circumstances, desire to develop their land in ways contrary to the adopted plan or ordinance. Consequently, the boards of adjustment employ the flexibility of the variance mechanism to take account of these changes and to rectify planning errors and deficiencies in the local plans and bylaws.[25]

The variance is a local administrative tool. Typically, the state government delegates the power to zone to local municipalities.[26] The delegating statute, often referred to as the enabling act,[27] out-

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goals, they are subject to constitutional attack on the ground that they seek attainment of illegitimate ends. *Id.* at 68; *see* Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Galanes v. Town of Brattleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978); Rutland v. Keiffer, 124 Vt. 357, 359, 205 A.2d 400, 402 (1964).

20. *See* R. ANDERSON, *supra* note 17, §§ 7.01-.33.

21. *See id.* at § 5.02.

22. 5 N. WILLIAMS, *supra* note 16, § 137.02, at 76 (quoting English v. Zoning Board of Adjustment of Norristown, 395 Pa. 118, 121, 148 A.2d 912, 914-15 (1959)).

23. *Id.*

24. *See* Dukeminier & Stapleton, *supra* note 1, at 349.

25. *See generally* Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 781-840 (1977). Professor Bryden's article is an exhaustive, critical and enlightening study of the effects of area variances on lake shore development in two Minnesota counties. Bryden reviewed the planners' justifications for two area restrictions: building setbacks and septic tank drainfield setbacks. He then investigated and analyzed the impact that variances from these restrictions had on the environment. With regard to drainfield setbacks, he concluded that "variance administration need not be strict; it need only be fair." *Id.* at 838. His deductions concerning the impact of variances from building setback requirements were less concrete. Nonetheless, the import of his study was that variances are granted to correct planning errors and to inject flexibility and fairness into zoning.

26. In Vermont, the specific delegation of authority is set forth in title 24, section 4401 of the Vermont Statutes Annotated (Cum. Supp. 1983). A summary of other states' delegating statutes can be found in R. ANDERSON & B. ROSWIG, PLANNING, ZONING & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES (1966).

27. The term "enabling act" comes from the Standard State Zoning Enabling Act; *see supra* note 7.

lines the purposes, procedures, scope and administration of local zoning.[28] The statute often directs the local municipality to appoint a zoning administrator or inspector who is charged with the literal enforcement of the zoning bylaws.[29] The statute also provides for the establishment of a zoning board of adjustment.[30] This board has the power to review the decisions of the administrator and to grant variances from the literal enforcement of the bylaws.[31] Because of the inevitable clash between public and private interests in land use, the variance power has been considered a necessary component of zoning authority.[32]

A variance is a privilege granted by a zoning board of adjustment that allows a landowner to deviate from certain provisions of a zoning bylaw.[33] Since zoning bylaws cannot address every situation that may arise, the variance power exists to prevent the imposition of an "unnecessary hardship"[34] upon a landowner affected by a zoning ordinance.[35] The variance also is considered a "safety

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28. VT. STAT. ANN. tit. 24, §§ 4301-4494 (Cum. Supp. 1983).

29. *Id.* at § 4442.

30. *Id.* at § 4461.

31. *Id.* at § 4464.

32. *See* 3 R. ANDERSON, *supra* note 17, §§ 17.08-.12; Shapiro, *supra* note 1, at 4; Comment, *Variance Law in New York: An Examination and Proposal*, 44 ALB. L. REV. 781, 784 (1980). *See also* Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 410 A.2d 1138 (1980). "Hearings before the board of adjustment serve as the focal point for resolution of conflicting interests between public restraints on the use of private property and the owner's right to utilize his land as he wishes." *Id.* at ____, 410 A.2d at 1144 (1980).

33. Benzie v. Town of Underhill, 142 Vt. 263, 265, 454 A.2d 1233, 1234 (1982); 3 R. ANDERSON, *supra* note 17, § 18.02.

34. There are two views of the unnecessary hardship standard. One view holds that unnecessary hardship exists when the burden imposed upon a property owner by a particular zoning regulation is greater than the public purpose justifying the strict enforcement of the provision. *See* Comment, *The General Welfare, Welfare Economics and Zoning Variances*, 38 S. CAL. L. REV. 548, 576-89 (1965); *see also* Comment, *supra* note 32. The other view, which several courts have espoused, requires a finding that the applicant will suffer unnecessary hardship when

> the physical characteristics of the property are such that it cannot be used for any permitted purpose or that it could be so used only at prohibitive expense or . . . [when] the characteristics of the area are such that the property has no value or has only distress value if used for a purpose permitted by the ordinance.

Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 67 Pa. Commw. 223, ____, 446 A.2d 993, 995 (1982) (emphasis and citations omitted). *Accord* DeStefano v. Zoning Bd. of Review, ____ R.I. ____, ____, 405 A.2d 1167, 1171 (1979); Thornton v. Lothridge, 447 A.2d 473 (Me. 1982); Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, ____, 410 A.2d 1138, 1142 (1980). For a discussion of the Vermont Supreme Court's view on this question, see *infra* note 75.

35. 3 R. ANDERSON, *supra* note 17, § 18.09; L & M Pike & Son, Inc. v. Town of Waterford, 130 Vt. 432, 436, 296 A.2d 262, 265 (1972) (unnecessary hardship is the heart of a

valve"[36]—a device insulating an otherwise highly restrictive ordinance from constitutional attack under the "taking" doctrine.[37] Both of these views of the variance power contemplate the infrequent and restrained use of such authority.[38]

Commentators generally recognize two types of variances: "use" variances and "area" variances.[39] A use variance allows a landowner to use his property in some manner otherwise prohibited in the zoning district where the land is located.[40] For example, building and operating a gas station in a district zoned "residential" ordinarily would require a use variance.[41] An area or bulk[42] variance, on the other hand, excuses a landowner from lot size, yard setback, frontage, height, or other space-related requirements of the zoning bylaws.[43] *Gadhue v. Marcotte*,[44] for example, involved an application for an area variance to build upon a lot that did not meet the 150-foot-lot width requirement of the zoning bylaw.

In the main, Vermont's statutory variance criteria are more restrictive than those of other states.[45] In New York, for instance,

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zoning variance).

36. Shapiro, *supra* note 1, at 3-4.

37. In Nectow v. Cambridge, 277 U.S. 183 (1928), the Supreme Court struck down a zoning ordinance on the ground that it deprived the landowner of all reasonable use of his property. Such deprivation of property without due process of law or just compensation is an unconstitutional confiscation or taking contrary to the precepts of the fourteenth amendment. *Id.* at 188. Vermont's constitution also provides that a property owner should be compensated when his land is taken for public use or in the public interest. VT. CONST. ch. I, art. II.

38. *See* Shapiro, *supra* note 1, at 6; 5 N. WILLIAMS, *supra* note 16, §§ 141-141.02; *see generally* Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60.

39. 3 R. ANDERSON, *supra* note 17, §§ 18.06-.07; 5 N. WILLIAMS, *supra* note 16, § 145.05.

40. 3 R. ANDERSON, *supra* note 17, § 18.06.

41. *See, e.g.*, 2 R. ANDERSON, *supra* note 17, § 15.39; *see also* Dewitt v. Brattleboro Zoning Board of Adjustment, 128 Vt. 313, 262 A.2d 472 (1970) (striking down the award of a use variance to a gas station owner who sought to extend the size of his operation even though it was a prior nonconforming use).

42. Some commentators refer to area variances as bulk variances. *See, e.g.*, Dukeminier & Stapleton, *supra* note 1, at 281.

43. 3 R. ANDERSON, *supra* note 17, § 18.07.

44. 141 Vt. 238, 446 A.2d 375 (1982).

45. Vermont's statute, unlike the laws of its northeastern neighbors, relies entirely upon the "unnecessary hardship" standard under which boards may grant variances. VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983). New York, as noted above, sets forth a dual standard—practical difficulties and unnecessary hardship. N.Y. GEN. CITY LAW § 81 (McKinney 1968 & Supp. 1982-83); N.Y. TOWN LAW § 267 (McKinney 1965 & Supp. 1982-83); N.Y. VILLAGE LAW § 7-712 (McKinney 1973 & Supp. 1982-83). New Jersey also uses a dual

the courts distinguish between the statutory criteria zoning boards are to apply when considering use as opposed to area variance applications.[46] They have held that use variances require a showing of unnecessary hardship, whereas area variances only require a showing of "practical difficulties," a lesser standard.[47] In Vermont, however, the supreme court has refused to apply this double standard.[48] The primary reason for this refusal is that Vermont's variance statute,[49] unlike New York's,[50] makes no mention of the practical difficulties standard. Moreover, it is questionable whether boards in Vermont have the power to grant use variances.[51] Although they are empowered to issue special or conditional use per-

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standard, though the statute's language is somewhat more elaborate than New York's. The statute states that the board shall have the power to grant a variance if the strict application of the zoning ordinance "would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property . . . ." N.J. STAT. ANN. § 40:55D-70(c) (West Supp. 1983-84). The Maine statute, on the other hand, uses a single criterion, "undue hardship." ME. REV. STAT. ANN. tit. 30, § 4963 (West Supp. 1982-83). The Maine Legislature, however, has proceeded to define what undue hardship means:

> A. That the land in question cannot yield a reasonable return unless a variance is granted;
> B. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; and
> C. That the granting of a variance will not alter the essential character of the locality; and
> D. That the hardship is not the result of action taken by the applicant or a prior owner.

Id. The Maine statute also allows municipalities to restrict, limit or condition the award of use variances. *Id.* Massachusetts also uses a single standard. That state, however, uses the term "substantial hardship, financial or otherwise." MASS. GEN. LAWS ANN. ch. 40A, § 10 (Michie/Law. Co-op. 1983). The same section allows municipalities to adopt provisions that prohibit the award of use variances. *Id.* New Hampshire, like Vermont, uses the single, unnecessary hardship standard. N.H. REV. STAT. ANN. § 31:72 (1970). But the New Hampshire statute, unlike Vermont's, does not prohibit use variances. *Id.* Rhode Island's law is almost identical to New Hampshire's. It too uses the single, unnecessary hardship test and likewise permits use variances. R.I. GEN. LAWS § 45-24-19 (1980).

46. *See* Village of Bronxville v. Francis, 1 N.Y.2d 839, 840, 153 N.Y.S.2d 220, 221, 135 N.E.2d 724, 725 (1956); Consolidated Edison Co. v. Hoffman, 43 N.Y.2d 598, 606, 403 N.Y.S.2d 193, 196, 374 N.E.2d 105, 108 (1978); *cf.* National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 393 N.Y.S.2d 379, 361 N.E.2d 1028 (1977).

47. Village of Bronxville v. Francis, 1 N.Y.2d 839, 840, 153 N.Y.S.2d 220, 221, 135 N.E.2d 724, 725 (1956).

48. Gadhue v. Marcotte, 141 Vt. 238, 241, 446 A.2d 375, 377 (1982); *In re* Ray Reilly Tire Mart, Inc., 140 Vt. 331, 332, 449 A.2d 910, 911 (1982).

49. VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983).

50. N.Y. TOWN LAW § 267, subd. 5 (McKinney 1965 & Supp. 1982-83); N.Y. VILLAGE LAW § 7-712(2)(c) (McKinney 1973 & Supp. 1982-83); N.Y. GEN. CITY LAW § 81, subd. 4 (McKinney 1968 & Supp. 1982-83).

51. *See* VT. STAT. ANN. tit. 24, § 4473 (1975); *see also infra* notes 135-36 and accompanying text.

mits,[52] these permits differ from variances. Variances authorize the contravention of the literal terms of the bylaw, whereas the permits allow certain uses which the bylaws only permit upon satisfaction of specific conditions and approval by the zoning board of adjustment.[53] An applicant for a special use permit, unlike an applicant for a variance, does not have to show unnecessary hardship.[54] Accordingly, the board of adjustment may only issue a special use permit if the zoning bylaws provide for the particular conditional use in the zone for which the permit is sought.[55]

Zoning, thus considered, is a delegated power, subject to constitutional limitations, that enables communities to control and direct the development of land. Theoretically, the variance is a mechanism that allows a community to insulate its zoning regulations from constitutional attack. The question is whether variance administration in Vermont comports with the theoretical justification for the variance device.

II. Vermont's Variance Criteria

One way for a Vermont landowner to be excused from the literal application of a municipality's zoning bylaw is to apply for a variance.[56] The application is first submitted to a local board of

52. Vt. Stat. Ann. tit. 24, § 4407(2) (Cum. Supp. 1983).
53. 3 R. Anderson, *supra* note 17, § 19.02.
54. *Id.*; Vt. Stat. Ann. tit. 24, § 4407(2) (Cum. Supp. 1983).
55. *Id.*
56. Title 24, section 4472 of Vermont Statutes Annotated provides:

> (a) Except as provided in subsection (b) and (c) hereof, the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, under this chapter or with respect to any one or more of the provisions of any plan or bylaw shall be the appeal to the board of adjustment under section 4464 of this title, and the appeal to a superior court from an adverse decision upon such appeal under section 4471 of this title. The appeal to the superior court shall be governed by the Vermont rules of civil procedure and such interested person shall be entitled to a de novo trial in the superior court.
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> (b) The remedy of an interested person with respect to the constitutionality of any one or more of the provisions of any bylaw or development plan shall be governed by the Vermont rules of civil procedure with a de novo trial in the superior court. In such cases hearings before the zoning board of adjustment shall not be required.
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> (c) The provisions of this section shall not be construed as preventing appeals to the supreme court from decisions of the superior courts in accordance with Vermont rules of civil procedure and the Vermont rules of appellate procedure.
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> (d) Upon the failure of any interested person to appeal to a board of

adjustment. This board is comprised of three to nine persons appointed by the municipality's legislative body.[57] In deciding upon the variance application, the board is bound by the statutory criteria governing the issuance of a variance.[58] These criteria are set forth in title 24, section 4468(a) of the Municipal and Regional Planning and Development Act.[59] This section specifies five criteria that must be satisfied before a board may grant a variance.[60] The board of adjustment must find and specify in its decision the following:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning regulation in the neighborhood or district in which the property is located;
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> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning regulation and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
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> (3) That the unnecessary hardship has not been created by the appellant;
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> (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the

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> adjustment under section 4464 of this title, or to appeal to a superior court under section 4471 of this title, all interested persons affected shall be bound by such decision or act of such officer, such provisions, or such decisions of the board, as the case may be, and shall not thereafter contest, either directly or indirectly, such decision or act, such provision, or such decision of the board in any proceeding, including, without limitation, any proceeding brought to enforce this chapter.

VT. STAT. ANN. tit. 24, § 4472 (1975) (footnote omitted). Under subsection (b), a landowner may seek relief from the application of a zoning bylaw by challenging the constitutionality of the ordinance in a declaratory judgment action before the superior court. In Fisher v. Town of Marlboro, 132 Vt. 533, 323 A.2d 577 (1974), the court stated that "[o]n constitutional issues, the necessity for a hearing before the zoning board of adjustment prior to the *de novo* trial in the Superior Court is dispensed with." *Id.* at 534, 323 A.2d at 578. *See* Harvey v. Town of Waitsfield, 137 Vt. 80, 83, 401 A.2d 900, 902 (1979).

57. VT. STAT. ANN. tit. 24, § 4461 (1975).

58. *See* VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983).

59. *Id.*

60. *Id.*

> property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare; and
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> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the plan.[61]

A board must make specific findings of fact that each of the five criteria have been satisfied before it may issue a variance.[62]

The leading case in Vermont regarding the statutory variance criteria is *Sorg v. North Hero Zoning Board*.[63] Dr. and Mrs. Sorg desired to build a greenhouse addition to their existing restaurant business. The addition would have intruded ten feet beyond the twenty-five foot sideyard setback requirement of the town's zoning ordinance. Because of this, the Sorgs applied to the town board of adjustment for an area variance. The board denied their application, and the Sorgs appealed. The superior court granted the variance application, finding that the Sorgs had suffered an unnecessary hardship resulting from a peculiarity on their property. A leach field previously had been installed in their backyard, and the addition, therefore, could not be constructed on the back of the building. The supreme court reversed this decision, holding that the Sorgs failed to demonstrate unnecessary hardship due to unique physical circumstances or conditions.[64]

In considering the characteristics of the property, the court noted that the presence of a leach field in a rural area was not peculiar.[65] Moreover, because there was no evidence of the impracticability of either moving the leach field or building upon piles above it, the court could not find that the field's presence resulted in an unnecessary hardship.[66] Since the zoning bylaws did not impede the usual operations of the restaurant, and since the Sorgs only wanted to increase the attractiveness of their building, and not to expand its dining room capacity, the court held that the

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61. *Id.*

62. *See* Sorg v. North Hero Zoning Board, 135 Vt. 423, 427, 378 A.2d 98, 102 (1977); *see also* VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983).

63. 135 Vt. 423, 378 A.2d 98 (1977).

64. *Id.* at 425, 378 A.2d at 101.

65. *Id.*

66. *Id.* at 426, 378 A.2d at 101.

setback requirements did not deprive the Sorgs of all reasonable use of their land.[67] The court did not determine whether the Sorgs created their own hardship.[68]

Looking to the fourth criterion, however, the court was inclined to agree with the trial court's analysis.[69] Based on the evidence, the court could not conclude that the greenhouse addition would alter the essential character of the neighborhood, impair the development of adjacent properties, or adversely affect the public welfare.[70]

In addition, because there was no evidence that the Sorgs' restaurant had to be expanded,[71] it was impossible for the court to find that the proposed variance represented the minimum variance necessary to afford relief. Thus, the Sorgs' variance application had to satisfy each of the five statutory criteria before a variance could be issued.[72] "For relief by way of a variance the statute governing its granting must prevail, rather than a judicial finding indicating, at best, general desirability."[73]

To satisfy the first criterion, unique physical circumstances or conditions, it is not enough for an applicant to show that his property has a unique characteristic. He must also show that such a characteristic is not generally found in other properties located in similarly zoned areas, and that the alleged peculiar conditions and hardship are not generally created by the zoning ordinance.[74] Furthermore, the unique circumstances and conditions must relate to the property, and not to the financial or personal predicament of the property owner.[75]

To satisfy the second criterion, the impossibility of any property development in strict conformity with the zoning regulations, a landowner must show that without a variance he will be deprived

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67. *Id.*. at 427, 378 A.2d at 102.
68. *Id.* at 427, 378 A.2d at 101-02.
69. *Id.* at 427, 378 A.2d at 102.
70. *Id.*
71. *Id.* at 426-27, 378 A.2d at 101-02.
72. *Id.*
73. *Id.* at 427-28, 378 A.2d at 102.
74. *See id.* at 425-26, 378 A.2d at 101.
75. *See* Brassard Bros., Inc. v. Barre Town Zoning Bd. of Adjustment, 128 Vt. 416, 264 A.2d 814 (1970). The court held that the applicant's desire to reside above his business, located in a district zoned commercial, was insufficient to sustain a claim of hardship warranting a variance. *Id.* at 421, 264 A.2d at 817. *See also* Dewitt v. Brattleboro Zoning Bd. of Adjustment, 128 Vt. 313, 321, 262 A.2d 472, 477 (1970).

of all reasonable use of his property.[76] If, for example, a person owned a house on a parcel of land, and the dimensions of the property would not allow an addition to the house without a zoning variance, the statutory criterion still would not be satisfied. Since the house is an existing reasonable use of the property,[77] the fact that the property cannot be developed further does not constitute a deprivation of all reasonable use.[78] Indeed, the reference to development in the second criterion refers not to extensions of existing structures, but to initial development of a given parcel.[79] Proof of the third criterion, that the unnecessary hardship is not self-created, requires a showing that the landowner did not subdivide or otherwise alter his property in such a way that would preclude development in conformance with the zoning bylaws.[80] For instance, if a landowner sold a portion of his property, and thereby decreased the space upon which he could build on the lot he retained, he could not expect variance relief. Because the landowner would not have needed a variance if he had not sold part of his

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76. The second statutory criterion appears to be an elaboration of what is meant by "unnecessary hardship" in the first statutory criterion. Accepting this proposition, it appears from the factual settings underlying the Vermont Supreme Court's variance decisions that a variance award is only proper if a landowner would be deprived of all or most of his property's value because of the zoning ordinance's enforcement. In *Sorg*, the court noted that appellants' inn had existed for eighty-seven years. *Sorg*, 135 Vt. at 427, 378 A.2d at 101. The Sorgs did not want to redevelop the property under the inn; they only wanted to enlarge the size of the inn. Since the inn was a present development of the land, and since there was no evidence that the Sorgs had to expand the inn's size in order to maintain it, the court found that the inn was a reasonable use of the land, and that the Sorgs had not satisfied the second criterion. *Id.* Similarly, in Gadhue v. Marcotte, 141 Vt. 238, 446 A.2d 375 (1982), the court said, "if any reasonable use can be made of the property which is in strict conformity with the zoning regulations, 24 V.S.A. § 4468(a)(2) will not be satisfied." *Id.* at 240, 446 A.2d at 376. This view of reasonable use seems to be in accord with the views of other courts regarding the definition of unnecessary hardship. *See supra* note 34.

77. *See Sorg*, 135 Vt. at 427, 378 A.2d at 101 (1977).

78. The reasonable use standard would be meaningless, arbitrary and ineffectual if it referred to further development. Such a standard would mean that so long as the board of adjustment found the proposed addition to be reasonable, it could grant a variance. The question becomes whether it is appropriate for a board to say that a garage is reasonable but a greenhouse is not. Indeed, a board is not a jury. Moreover, a board of adjustment could grant multiple variances to the same property if reasonable use referred to continued development. As a result, area requirements would be meaningless, because a landowner could always get variances for reasonable additions to his existing building. Given the *Sorg* and *Gadhue* decisions, it is clear that reasonable use refers to initial development and not to additional construction.

79. *See supra* note 78.

80. *In re* Ray Reilly Tire Mart, Inc., 141 Vt. 330, 332, 449 A.2d 910, 911 (1982). *But cf.* Lewis v. Pickering, 134 Vt. 22, 349 A.2d 715 (1975) (purchase of land with knowledge of its nonconformance with the zoning ordinance did not constitute a self-created hardship where the prior owner would have been entitled to the variance requested).

property, he created his own hardship.[81]

The applicant's showing that nearby properties diverge from the zoning requirements will not satisfy the fourth criterion, that the variance not alter the essential character of the neighborhood.[82] The applicant must demonstrate that the variance will be neither contrary to the goals of the zoning ordinance nor detrimental to other properties in the zoning district or area. Ordinarily, a variance will be deemed to alter the character of the neighborhood if it substantially decreases property values, blocks light and air to adjacent properties, or is aesthetically displeasing.[83]

Finally, an applicant fulfills the fifth criterion if he proves that no variance other than that proposed would relieve him of the burden imposed by strict enforcement of the ordinance. This requires the applicant to prove that alternative building designs and locations are either unavailable or impractical.

Whenever a board of adjustment makes a decision regarding the variance criteria, it is required to set forth findings of fact supporting that decision.[84] In *Potter v. Hartford Zoning Board of Adjustment*,[85] the supreme court held that section 4470(a)[86] operated to grant a variance immediately if a zoning board fails to issue adequate findings of fact supporting its decision.[87] The board of adjustment had included its findings within its hearing minutes. Both the trial court and the supreme court noted that these findings merely amounted to boilerplate recitations of the statutory criteria.[88] Since such conclusory findings failed to fulfill the require-

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81. *In re* Ray Reilly Tire Mart, Inc., 141 Vt. 330, 332, 449 A.2d 910, 911 (1982).
82. *See* 3 R. ANDERSON, *supra* note 17, §§ 18.25, .40.
83. *See id.* at § 18.40.
84. VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983).
85. 137 Vt. 445, 407 A.2d 170 (1979).
86. VT. STAT. ANN. tit. 24, § 4470(a) (1975) states:

> (a) The board shall render its decision, which shall include findings of fact, within forty-five days after completing the hearing, and shall within that period send to the appellant, by certified mail, a copy of the decision. Copies of the decision shall also be mailed to every person or body appearing and having been heard at the hearing, and a copy thereof shall be filed with the administrative officer and the clerk of the municipality as a part of the public records thereof. If the board does not render its decision within the period prescribed by this chapter, the board shall be deemed to have rendered a decision in favor of the appellant and granted the relief requested by him on the last day of such period.

87. *Potter*, 137 Vt. at 447, 407 A.2d at 171-72.
88. *Id.* at 446, 407 A.2d at 171.

ments of section 4468(a),[89] a variance automatically was issued under section 4470(a).[90] Yet, despite this mandate that boards clearly express their findings of fact, variance decisions often are supported by conclusory findings.[91]

In a recent case, *Benzie v. Town of Underhill*,[92] the court extended its holding in *Potter* to situations in which a board has not specified its findings of fact in its notice of decision to the applicant. Citing the language of section 4470(a),[93] the court held that a variance automatically is issued if a board of adjustment fails to include findings of fact in its variance decision and thereby fails to issue a complete decision within the forty-five day requirement of section 4470(a).[94] As a result of the board's inadvertence, the Benzies received a variance. Although this decision enforces the statute, it may have ramifications contrary to the statutory goal of ensuring prompt decisions in variance cases.[95]

The *Benzie* decision seems to give boards a way to delay the variance process or to avoid the statutory criteria. Rather than risk the automatic issuance of a variance, an unsure or divided board may table the application and request the applicant's return to present more evidence. If the unsuspecting applicant did come before the board again, the facts in *Benzie* indicate that this new date would constitute the final hearing.[96] Nothing stops an undecided board from pushing back the forty-five day requirement by requesting more evidence. On the other hand, if a board believes that a particular variance application should be granted despite its noncompliance with the statutory criteria, the board need not act, for the variance will be issued automatically. Thus, the *Benzie* decision apparently enables boards of adjustment to subvert the process of prompt decision-making and to avoid the requirements of the statutory criteria.

In most situations, a landowner will not be able to satisfy each

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89. *See supra* text accompanying note 61.

90. *Potter*, 137 Vt. at 448, 407 A.2d at 172.

91. *See infra* notes 106-89 and accompanying text.

92. 142 Vt. 263, 454 A.2d 1233 (1982).

93. *See supra* note 86.

94. *Benzie*, 142 Vt. at 267, 454 A.2d at 1235.

95. *See* Potter v. Hartford Zoning Bd. of Adjustment, 137 Vt. 445, 447, 407 A.2d 170, 171 (1979).

96. *Benzie*, 142 Vt. at 264, 454 A.2d at 1233; *see* Glabach v. Sardelli, 132 Vt. 490, 321 A.2d 1 (1974).

statutory criterion.[97] Variances, after all, are to be granted sparingly and only in the most extraordinary circumstances.[98] Critics of the variance power, however, contend that zoning boards do not comply with the statutory variance standards.[99] They argue that boards of adjustment indiscriminately grant numerous variances, and that the "'safety valve' . . . has ruptured into a steady leak."[100] Some contend that the boards are abusing their discretionary powers and undermining the purposes of zoning by granting too many variances.[101] One scholar has noted that "improper variances not only threaten neighborhood integrity and undercut the protective purposes of zoning, but they also challenge the objectives of comprehensive urban planning."[102] Others say that the boards are destroying public confidence in local land use control, exercising legislative authority by ostensibly amending bylaws, distorting comprehensive plans, enforcing bylaws unequally and without regard for precedent, and causing growing communities to avoid the adoption of zoning ordinances.[103] Several empirical studies of local variance administration outside of Vermont support the contention that zoning boards do not heed the statutory mandates.[104]

However, because Vermont's variance criteria are distinct from and more restrictive than other states' standards,[105] an examination of the frequency of variance approvals in Vermont follows. Given Vermont's statutory scheme, if the frequency of variance approvals is high, it may not be true that local zoning bylaws are being subverted and rendered ineffectual.

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97. *See infra* text accompanying notes 106-89.

98. Shapiro, *supra* note 1, at 6.

99. *Id.* at 15-19; Dukeminier & Stapleton, *supra* note 1, at 303.

100. Shapiro, *supra* note 1, at 9.

101. Shapiro, *supra* note 1; Dallstream & Hunt, *supra* note 1.

102. Shapiro, *supra* note 1, at 10.

103. Anderson, *supra* note 1; Babcock, *supra* note 1; Blucher, *supra* note 1; Dallstream & Hunt, *supra* note 1; Dukeminier & Stapleton, *supra* note 1; Reps, *supra* note 1; Shapiro, *supra* note 1; Note, *supra* note 1; Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953).

104. Bryden, *supra* note 25; Note, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101 (1962); Note, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398 (1968); Note, *Variance Administration in Indiana—Problems and Remedies*, 48 IND. L.J. 240 (1973); Note, *Syracuse Board of Zoning Appeals—An Appraisal*, 16 SYRACUSE L. REV. 632 (1965); Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955).

105. *See supra* note 45.

III. Local Zoning Administration

There are approximately 250 zoned communities in Vermont.[106] Zoning has been in force in almost all of these communities for at least five years. All of the communities have zoning boards of adjustment,[107] and, for the most part, these boards are comprised of local residents.[108] As quasi-judicial administrative bodies,[109] the boards are placed in the center of the struggle between public and private interests.[110] As a result, they must take into account and weigh both interests when deciding upon a variance application. Critics note that boards generally make a conscientious effort to accommodate these interests.[111]

Board accommodation is most evident with regard to area variances—variances from setback, lot size, frontage and other space related requirements. These requirements are included in zoning bylaws for a variety of reasons. Setback and lot size standards, for instance, often are intended to control population density[112] and to

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106. *See* Reports from the Twelve Vermont Regional Planning and Development Commissions on the Status of Plans and Bylaws (Dec. 31, 1980) (on file with the Agency of Development and Community Affairs, Department of Housing and Community Affairs, Montpelier, Vermont).

107. Vt. Stat. Ann. tit. 24, § 4461 (1975) (mandating the creation of boards of adjustment). In instances where the planning commission of a rural town or urban municipality does not sit as a board of adjustment, the local legislature must appoint members to the board. Local legislatures may also create joint boards of adjustment for municipalities having joint planning commissions. *Id.*

108. Many scholars have criticized the composition of local zoning boards, arguing that persons untrained in planning matters cannot appreciate the reasons for certain regulations. *See, e.g.*, Shapiro, *supra* note 1, at 18. "The crucial shortcoming of the board of appeals is its lack of expertise." *Id.* In addition, because boards are comprised of local residents, they may be "vulnerable to the pressure of friends, business associates or politicians." *Id.* At the same time, however, some critics have acknowledged that local residents, because of their familiarity with the community, its conditions and its residents, are uniquely qualified to sit on the boards. *See id.*; Note, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A. L. Rev. 937, 946 (1965); Dallstream & Hunt, *supra* note 1, at 239. "As a matter of sound policy, the power to grant variations should be exercised exclusively by boards of zoning appeals." *Id.* Some critics would like to see the boards comprised of local experts, or at least the educated elite. *See, e.g.*, Reps, *supra* note 1, at 296.

109. *See* 3 R. Anderson, *supra* note 17, § 18.01, at 134-36 (discussing quasi-judicial powers of municipal agencies).

110. *See supra* note 32.

111. *See* Dallstream & Hunt, *supra* note 1, at 239; Dukeminier & Stapleton, *supra* note 1, at 349; Shapiro, *supra* note 1, at 18-19; Comment, *Administration of Zoning in Maine*, 20 Me. L. Rev. 207, 234-36 (1968).

112. 2 R. Anderson, *supra* note 17, §§ 9.50, .60, 10.02; 2 N. Williams, *supra* note 16, §§ 38.01-.10, at 1-19.

assure adequate light, air and privacy.[113] Minimum frontage requirements usually exist to facilitate access to parcels and to guarantee a measure of uniformity in the community.[114] Other space restrictions, such as height and floor space provisions, generally seek to regulate growth and to avoid overcrowding.[115] Undoubtedly, area restrictions also have aesthetic purposes and may exist to protect property values.[116] These purposes for area restrictions usually are not articulated in zoning bylaws.[117] Despite the absence of articulation, however, zoning boards recognize that area restrictions exist to promote the general public health, safety and welfare of the community.[118]

In Vermont, board recognition of these public purposes is most evident in cases dealing with residential area variances. Boards throughout the state frequently grant requests for area variances even when the applicants have failed to satisfy all of the statutory criteria. The following survey of five boards of adjustment in communities of various sizes, characteristics and zoning bylaws reveals that the boards rarely deny applications for area variances that do not involve signs or conditional use permits.[119]

A. *The Brattleboro Board of Adjustment*

Brattleboro is a large town by Vermont standards. It has a population of slightly fewer than 12,000 people.[120] Located in southern Vermont, not far from the Massachusetts border, it is

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113. 2 R. ANDERSON, *supra* note 17, §§ 9.50, .60, 10.02; 2 N. WILLIAMS, *supra* note 16, §§ 38.01-.10 at 1-19; Dallstream & Hunt, *supra* note 1, at 228.

114. *See* 2 R. ANDERSON, *supra* note 17, § 9.61, at 239; *see also* 2 N. WILLIAMS, *supra* note 16, §§ 4.01-.03, at 191-97.

115. *See* 2 R. ANDERSON, *supra* note 17, §§ 9.50, .51, at 213-17; *see also* 2 N. WILLIAMS, *supra* note 16, §§ 67.01-.08, at 153-77.

116. *See* 2 N. WILLIAMS, *supra* note 16, §§ 38.01, .06, at 2, 15-16.

117. *See* MONTPELIER, VT., ZONING REGULATIONS ch. 15 (1973); BRATTLEBORO, VT., ZONING ORDINANCE, *as amended* (1977); SPRINGFIELD, VT., ORDINANCE NO. 0-76-5 (1976); EAST MONTPELIER, VT., ZONING REGULATIONS (1982). *But cf.* RUTLAND, VT., CODE tit. 31, § 5714 (1973) ("To promote the health, safety or the general welfare of all the inhabitants of the City of Rutland and to protect and conserve the value of property . . . .") *Id.*

118. *See infra* text accompanying notes 183-86.

119. The survey focuses mainly on area restrictions, since sign and conditional use provisions vary considerably from community to community. Although the analysis of variance decision making among several boards only demonstrates the activities of some boards, it is likely that other boards act in the same manner as those surveyed here.

120. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. PC 80-1-A47 VT., 1980 CENSUS OF POPULATION AND HOUSING, Number of Inhabitants, Table 5a, 47-13 (1981) [hereinafter cited as 1980 CENSUS].

both a regional and industrial center. Brattleboro's present zoning bylaws were enacted in 1973.[121] Since then, the town has passed four amendments,[122] the last of which became effective in August, 1981. The 1981 amendment dealt with changes in sign restrictions and conditional use permits.[123] Prior to that, the town had last amended its bylaws in 1977.[124]

From January 1979 to October 1982, the Brattleboro Board of Adjustment received eighty-eight applications for area variances not involving signs or conditional use permits.[125] Of that number, the board granted fifty-seven requests, denied sixteen and dismissed or recorded a withdrawal of the remaining applications. Most of the applications granted by the board concerned residential additions,[126] garages,[127] decks[128] and storage sheds.[129] In a few instances, however, the board denied variances to extend residential structures.[130] These denials usually followed a finding either that the structure could be built elsewhere or that reconstruction of an existing structure need not include extension.[131] However, because the findings were often scattered throughout the board's hearing minutes and not related to a statutory criterion, one cannot be sure that the denials were not based on other considerations.

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121. *See* BRATTLEBORO, VT., ZONING ORDINANCE § 730 (1973).

122. *Id.* at 1981 Addenda (the dates on which the ordinance was amended can be found on page 53 of the ordinance).

123. *Id.* at 1981 Addenda.

124. *Id.* at 53. The type, frequency and timeliness of town amendments are important because changes in area restrictions will affect the number of variances requested following the changes. Because none of the towns surveyed neither have neglected their area restrictions nor have recently changed them, the generalizations concerning the number of variances granted by the boards of adjustment will not be skewed significantly. Moreover, the survey is more valuable for its examination of board activities, than for its indication of the frequency of those activities.

125. *See* Brattleboro Zoning Board of Adjustment, *Minutes* (Jan. 1979 - Oct. 1982) (available at Brattleboro Zoning Administrator's office).

126. *See, e.g.*, Case Nos. 48-82, 8-82, 67-81, 53-81, 17-81, 42-80, 17-80, 10-79, 23-79 (available at Brattleboro Zoning Administrator's office).

127. *See, e.g.*, Case Nos. 27-80, 34-80, 4-79 (available at Brattleboro Zoning Administrator's office).

128. *See, e.g.*, Case Nos. 53-81, 29-80, (available at Brattleboro Zoning Administrator's office).

129. *See, e.g.*, Case Nos. 11-82, 11-81, 39-81 (available at Brattleboro Zoning Administrator's office).

130. *See, e.g.*, Case Nos. 50-82, 51-82, 44-81, 11-80, 16-79 (available at Brattleboro Zoning Administrator's office).

131. *See, e.g.*, Case Nos. 50-82, 51-82 (available at Brattleboro Zoning Administrator's office).

The Brattleboro Board, unlike some other boards, records its findings in two documents. Hearing minutes contain the facts presented and, to some extent, the viewpoints of board members. "Findings of Fact," on the other hand, set forth three or four findings and conclude with several bald statements as to whether the applicant has or has not satisfied the statutory criteria. Generally, the board does not explain which facts support its decision. The critical reader rarely can deduce from the minutes and the findings of fact the methods by which the board arrived at its conclusion.

B. *The Rutland Board of Adjustment*

The situation in Rutland is somewhat different from that in Brattleboro. Rutland is a city of 18,500 people[132] and is located in the western portion of the state. Like Brattleboro, it is a regional and industrial center subject to intense developmental pressures. Unlike Brattleboro, however, its zoning bylaws have not been substantially amended. Since 1973, only a few minor changes have been made.[133]

Perhaps the most outstanding difference between the two places is that Rutland's bylaws include only two provisions for conditional use permits.[134] As a result, the Rutland Board of Adjustment must treat certain requests as use variances, which seem to be prohibited by section 4473 of the Municipal and Regional Planning and Development Act.[135] That section clearly states that "no board of adjustment may . . . allow any *use* not permitted by any zoning regulations or other bylaw."[136] The Rutland board, however,

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132. 1980 CENSUS, *supra* note 120, Table 5, at 47-12.

133. Interview with Lawrence LaMontaigne, Zoning Administrator of Rutland, Vermont, in Rutland (Feb. 22, 1983) (Since 1973, the Rutland sideyard setback requirements for residence A districts (single family homes) were increased from twelve feet to fifteen feet and from fifteen feet to the current twenty feet minimum.).

134. RUTLAND, VT., CODE tit. 31, §§ 5707(13), 5708(7) (1973).

135. VT. STAT. ANN. tit. 24, § 4473 (1975).

136. *Id.* (emphasis added).

It may be argued that section 4473 does not prohibit use variances, because it does not specifically refer to such variances. The limitation provided by that section only refers to "use" in the context of a board of adjustment's enforcement of the bylaw provisions. Moreover, because the Vermont Supreme Court failed to rule in two cases which alluded to the issue that title 24, chapter 117 prohibits use variances, (*see* Gadhue v. Marcotte, 141 Vt. 238, 241, 446 A.2d 375, 377 (1982); *In re* Ray Reilly Tire Mart, Inc., 141 Vt. 330, 332, 449 A.2d 910, 911 (1982)), the court tacitly acknowledged the availability of such variances. However, these arguments are not unassailable.

Section 4473 is an express limitation on the powers of boards of adjustment. VT. STAT.

has been granting use variances for at least the past three years. In fact, in *In re Ray Reilley Tire Mart, Inc.*,[137] the supreme court struck down the Rutland board's award of a use variance.[138] The question of whether use variances are prohibited under section 4473, however, was not addressed by the court.

In addition to granting use variances, the Rutland board, grants area variances which are of questionable legality. For example, in one case, the board granted a thirteen to twenty foot variance from the side yard requirements so that the applicant could build a garage.[139] The applicant did not show that without the garage he would suffer unnecessary hardship, nor did he prove the absence of alternative construction sites and designs. In another case, the board granted six side yard variances permitting housing construction on six lots on Central Avenue.[140] There was no show-

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ANN. tit. 24, § 4473 (1975). The section states that a board may not "allow any use not permitted by any zoning regulations or other bylaw." *Id.* Section 4473 neither refers to the statutory variance criteria of title 24, section 4468(a) of the Vermont Statutes Annotated, nor specifically mentions use variances. However, the language of section 4473 logically dictates the prohibition of these variances. If a board granted a use variance, it would thereby allow a use not permitted by a zoning bylaw. It follows, therefore, that a board cannot grant use variances; it can only grant conditional use permits. *See* VT. STAT. ANN. tit. 24, § 4407(2) (Cum. Supp. 1983). Since section 4473 does not refer to the statutory variance criteria, it is unlikely that use variances are implicitly permitted by all zoning ordinances. In fact, the only specific provision in chapter 117 for uses which conflict with zoning bylaws is the provision authorizing conditional use permits. *Id.* Section 4468 does not specifically mention use variances. Thus, the "[e]xcept as specifically provided" language of section 4473 instructs that a board is prohibited from allowing uses that are not specifically provided for under a zoning regulation or bylaw.

The Vermont Supreme Court's decisions in *Gadhue* and *Tire Mart* do not contradict this analysis. In those decisions, the question of whether use variances are prohibited under title 24, chapter 117 was not squarely before the court. *See Gadhue*, 141 Vt. at 240, 446 A.2d at 376; *Tire Mart*, 141 Vt. at 331, 449 A.2d at 911. In both cases, the court stated that section 4468 makes no distinction between use and area variances, and that "[a]ll variances . . . must meet the five criteria enunciated in the statute." *Gadhue*, 141 Vt. at 241, 446 A.2d at 377; *Tire Mart*, 141 Vt. at 332, 449 A.2d at 911. Because section 4473, unlike section 4468, specifically mentions use and not area, the court's decisions in no way control the import of section 4473. Moreover, in *Tire Mart*, neither the town nor Ray Reilly Tire Mart, Inc. would have raised the argument that section 4473 prohibits use variances. The corporation, of course, wanted a use variance. The board had been granting use variances prior to the appeal, and probably would have been estopped from denying their validity if the issue had been raised on appeal. Furthermore, appellants in the case, interested persons, apparently argued only that section 4468(a), the variance criteria imposed a stricter standard for use variances. *See Tire Mart*, 141 Vt. at 332, 449 A.2d at 911.

137. 141 Vt. 330, 449 A.2D 910 (1982).

138. *Id.* at 335, 449 A.2d at 912.

139. Application of Peter & Julianna Abatiell, 10 Birchwood Avenue, Feb. 7, 1980 (decision available at Rutland Zoning Administrator's office).

140. Application of Joseph Giancola, 6 lots on Central Ave., Aug. 21, 1980 (decision

ing that the lots could not be joined or that slightly smaller homes could not be built instead.[141] Indeed, even if these variance awards satisfied the statutory criteria, the zoning board failed to explain the facts and circumstances that justified its decisions.

To be sure, unlike the Board in Brattleboro, the Rutland Board retains transcripts of its proceedings in addition to hearing minutes. But here, too, the board's findings often are conclusory recitations of the statutory criteria. Similarly, the board's "Findings of Fact," included with its notice of decision to the applicants, merely reiterate the statutory provisions in section 4468(a).[142]

C. *The Montpelier Board of Adjustment*

Montpelier, the capital of Vermont, is a city with some 8,000 residents.[143] It, too, is a regional and employment center subject to intense developmental pressures. Its current zoning ordinance was enacted in 1973[144] and has been amended three times since then.[145] Its bylaws and their administration are very similar to Brattleboro's.

The Montpelier Board of Adjustment has received and has granted many applications for area variances. From January 1979 to October 1982, the board received seventy-one requests for such variances.[146] It granted fifty-one of those requests, denied twelve, and withdrew or tabled the remainder. In many cases, the board permitted applicants to build a garage or porch that would exceed the required lot sizes.[147] But, when one resident wanted to install a solar panel beyond the established setback lines, the board denied his variance request.[148] In April of 1980, three months after that

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available at Rutland Zoning Administrator's office).

141. *Id.*

142. *See, e.g.*, Application of Mr. & Mrs. Frey, 12 Belmont Ave., July 5, 1979 (sideyard variance to construct garage); *see also* Application of Peter & Julianna Abatiell, 10 Birchwood Ave. Feb. 7, 1980. (decisions available at Rutland Zoning Administrator's office).

143. 1980 CENSUS, *supra* note 120, Table 5, at 47-12.

144. MONTPELIER, VT., REGULATIONS ch. 15 (1973).

145. *See id.* at p. 30.

146. *See* Montpelier Zoning Board of Adjustment, *Minutes* (Jan. 1971 - Oct. 1982) (available at Montpelier Zoning Administrator's office).

147. *See. e.g.*, Application of Leroy Walbridge, 209 Main St., Sept. 4, 1979 (deck); Application of Stephen & Jill Cano, 42 Summer St., April 10, 1979 (playroom addition attached to a garage, constructed two years earlier, for which a variance also was granted). (decisions available at Montpelier Zoning Administrator's office).

148. Application of Donald Hoffman, Feb. 1980, *appealed to* Washington County Superior Court, No. S-7-80 WNM (filed Mar. 7, 1980) (stipulation for variance entered, Nov. 18,

denial, the state legislature amended section 4468 to give a board more flexibility when deciding upon variances involving renewable energy resource structures.[149] Curiously, the Montpelier board had already exercised flexibility in cases involving garages.

D. *The Springfield Board of Adjustment*

Springfield, north of Brattleboro in eastern Vermont, is an industrial town of 10,000 people.[150] Its current zoning ordinance was enacted in 1976.[151] Since then, the town has amended the ordinance at least five times.[152] Most of these amendments increased the number of permissible conditional uses.[153] Because of these conditional use provisions, the town board of adjustment hears more requests for permits than it does for variances.[154] But, like the other boards, the Springfield board often grants variances without regard for the statutory criteria.

From January 1980 to September 1982, the board received twenty-two requests for area variances. It granted nineteen and denied two; the last was withdrawn.[155] Of the nineteen the board granted, twelve involved either an addition to an existing structure, a garage, or a storage shed.[156] The remaining seven pertained either to initial construction on a lot or to the subdivision of a parcel.[157] In one case, the board specifically found that the addition of a garage was reasonable, because the harshness of Vermont weather requires that cars be kept under cover during the winter.[158] In another instance, the board approved an eight-foot exten-

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1980) (available at Washington County Superior Court Clerk's office, Montpelier).

149. VT. STAT. ANN. tit. 24, § 4468(b) (Cum. Supp. 1983).

150. 1980 CENSUS, *supra* note 120, Table 5a, at 47-13.

151. SPRINGFIELD, VT., ORDINANCE NO. 0-76-5 (1976).

152. Interview with William Speal, Springfield Zoning Administrator, in Springfield, Vt. (Feb. 15, 1983).

153. *Id.*

154. *See* Springfield Zoning Board of Adjustment, *Minutes* (Jan. 1980 - Oct. 1982) (available at Springfield Zoning Administrator's office).

155. *Id.*

156. *See, e.g.*, Application of Picard, July 7, 1980; Application of Hall, June 2, 1980; Application of Berg, Aug. 11, 1982. (decisions available at Springfield Zoning Administrator's office).

157. *See, e.g.*, Application of Valley Carpet & Tile, Sept. 8, 1982; Application of Brown, Jan. 27, 1980; Application of Watkins, Feb. 25, 1980. (decisions available at Springfield Zoning Administrator's office).

158. Application of Kinsman, Apr. 28, 1980. (decision available at Springfield Zoning Administrator's office).

sion of an existing garage, finding that the variance from the side-line requirement was minimal.[159] And, in a case reminiscent of *Sorg v. North Hero Zoning Board*,[160] the board approved a variance for a garage, because a leach field existed in the applicant's backyard.[161]

In each of these cases, valid reasons for a variance may have been present, but the board's minutes never clearly connected its findings to the statutory criteria. Many of the board's decisions used conclusory language that merely reiterated the criteria. Indeed, such boilerplate language rendered it impossible to determine the exact grounds of the board's decisions.

E. *The East Montpelier Board of Adjustment*

East Montpelier, a small town on the outskirts of Montpelier with a population of 2,200,[162] is markedly different from the municipalities just reviewed. Its bylaws are shorter and less complex than those of the other towns. Unlike the other towns, its bylaws were revised in September of 1982.[163] However, the town did not change its area restrictions in this revision. The following data on variance administration, therefore, are still indicative of the present situation in East Montpelier.

Between January 1979 and October 1982 the East Montpelier Board of Adjustment received fifty-nine requests for area variances.[164] It granted forty-four of these requests, denied nine, and dismissed the rest due to the applicants' failure to appear, or to his voluntary withdrawal. Like the other boards, the East Montpelier board granted many garage, tool shed, and residential addition variances. In a few cases, it placed conditions on these variances. In some cases, it even denied garage variances. But, because its minutes were unclear and conclusory, there was no way of determining why nearly identical facts brought about opposite results.

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159. Application of Berg, Aug. 11, 1982. (decision available at Springfield Zoning Administrator's office).

160. 135 Vt. 423, 378 A.2d 98 (1977); *see supra* text accompanying notes 63-73.

161. Application of Hall, June 2, 1980 (desire to watch children in backyard cited as alternative ground for granting the variance). (decision available at Springfield Zoning Administrator's office).

162. 1980 CENSUS *supra* note 120, Table 5a, at 47-13.

163. *See* EAST MONTPELIER, VT., ZONING REGULATIONS, 18 (1982).

164. *See* East Montpelier Zoning Board of Adjustment, *Minutes*, (Jan. 1979 - Oct. 1982) (available at East Montpelier Town Clerk's office).

Some of the decisions apparently were based on board members' personal observations of the property involved. Nonetheless, the minutes did not reflect any distinguishing rationale, nor did they connect the facts to the statutory criteria. The board, as with the other town boards, simply said that unnecessary hardship was present when it granted a variance.

F. *Analysis of the Boards' Actions*

The review of the activities of several town boards reveals that they are not strictly following the legal standards governing variance administration. The East Montpelier and Springfield boards still include findings of fact within the hearing minutes.[165] While the other boards do issue separate findings of fact, most often these simply include the same boilerplate language the court held to be inadequate in *Potter v. Hartford Zoning Board of Adjustment*.[166] Because the boards rarely deny variance requests,[167] these deficiencies are infrequently subject to scrutiny. Furthermore, given the supreme court's recent decision in *Benzie v. Town of Underhill*,[168] a neighbor who challenges a questionable variance award by citing the deficiency of the board's findings will lose his case, for the variance will be issued automatically if the findings are inadequate.[169] Thus, while the local zoning boards remain insulated from scrupulous review of their variance decisions, the neighbor faces a Catch-22.

In addition, the zoning boards fail to apply properly the five individual variance criteria of section 4468(a).[170] The first criterion states that the alleged unnecessary hardship must arise from the unique physical circumstances of the property.[171] Nevertheless, it is obvious that the personal and financial situation of the applicant plays a significant role in board decisions.[172] The first criterion also

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165. *See supra* text accompanying notes 150-64.

166. 137 Vt. 445, 407 A.2d 170 (1979); *see supra* text accompanying notes 85-91.

167. Certainly it is true that neighbors can and do appeal variance awards. The number of such appeals, however, is small because the appellant must incur considerable costs. Also, as noted above, a neighbor objecting to a variance award is not likely to call attention to the deficiencies in board findings. *See supra* notes 95-97 and accompanying text.

168. 142 Vt. 263, 454 A.2d 1233 (1982).

169. *See supra* text accompanying notes 92-96.

170. VT. STAT. ANN. tit. 24, § 4468(a) (Cum. Supp. 1983).

171. *Id.* § 4468(a)(1).

172. For example, the Springfield board readily took into account the harshness of Vermont winters and the necessity to keep one's car out of the weather. Application of Kins-

states that the circumstances or conditions peculiar to the property must not be due to the general effect of the zoning regulations in the neighborhood.[173] In granting the six variances for properties all located on Central Avenue, the Rutland board clearly ignored this statutory requirement.[174]

Similarly, the boards frequently distort the second statutory criterion, that the property cannot be developed in strict conformity with the zoning bylaws.[175] They uniformly construe "development" to mean additional construction irrespective of any existing reasonable use of the property.[176] For instance, even when a particular parcel has a house situated upon it, a board may still grant a variance permitting the addition of a garage that would otherwise transgress a town's setback requirements.[177] Because denial of the variance would not deprive the homeowner of all reasonable use of his property,[178] the second criterion, in such a case, is not satisfied. In granting the variance, the board exceeds its statutory authority.

The boards do not misapply the succeeding three criteria as much as they ignore their importance. To be sure, all of the boards refuse to grant a variance when the grounds advanced are that the applicant will suffer unnecessary hardship because he failed to secure a variance before starting construction.[179] Yet, boards often avoid the prohibition of self-created hardship[180] by stating that the applicant would have been entitled to a variance even before he commenced construction.[181] Here again, the boards may be exceeding their statutory authority.

The fourth criterion, which mandates that a variance not alter

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man, Apr. 28, 1980. Similarly, the board granted a variance for a side room addition because a "major re-arrangement of the kitchen" would have been required otherwise. Application of Benson, Mar. 21, 1982. (decisions available at Springfield Zoning Administrator's office).

173. VT. STAT. ANN. tit. 24, § 4468(a)(1) (Cum. Supp. 1983).

174. *See supra* text accompanying notes 140-41.

175. VT. STAT. ANN. tit. 24, § 4468(a)(2) (Cum. Supp. 1983).

176. The boards all granted variances for garages, decks, and other additions, even though existing residences already constituted reasonable uses of the properties. Obviously, the variance is being used as something more than a "safety valve".

177. *See supra* text accompanying notes 120-64.

178. *See supra* notes 76 and 78 and accompanying text.

179. In the period surveyed no board permitted a variance because the owner failed to secure a building permit before he started construction.

180. VT. STAT. ANN. tit. 24, § 4468(a)(3) (Cum. Supp. 1983).

181. In such a situation, it is easier to grant a variance than to force a property owner to tear down a completed or partially complete structure. Compromise seems to be a more effective solution. *See* Lewis v. Pickering, 134 Vt. 22, 26-27, 349 A.2d 715, 717-18 (1975).

the essential character of the neighborhood,[182] often plays a significant but silent role in variance decisions. This criterion, more so than the others, represents the public interest in preserving the integrity of the zoning bylaws. Since many area variance applications seek only minor dimensional variations, the boards often conclude that the essential character of the neighborhood will not be altered by any given variance.[183] The boards use this criterion, in conjunction with the first, to weigh the relative harms involved.[184] If the inconvenience of a variance denial is considerable and the size and the impact of a variance grant are minor, then the board will grant the request.[185] Board minutes indicate that this balancing of relative harms goes into every variance decision.[186] However, the boards do not articulate this balancing process in their notice of decision. The fourth criterion thus plays a silent role in all variance decisions.

The fifth criterion requires that the variance requested be the minimum variance necessary to afford relief.[187] The boards either ignore this criterion or attach conditions to the variance.[188] Because board members are familiar with the property or have visited the site, they apply the fifth criterion by looking to whether the location for a structure seems reasonable. If the board finds that the location is reasonable, then it will grant a variance, sometimes with conditions attached relating to the size of the structure and its appearance. In general, rather than following the statutory criteria, the boards take a common sense approach to variance administration,[189] balancing the interests involved and allowing for minor deviations despite the absence of hardship.

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182. VT. STAT. ANN. tit. 24, § 4468(a)(4) (Cum. Supp. 1983).

183. It may well be that *de minimis* variations should be condoned under the statute, for fairness and the appearance of justice demand lenity at times. *See, e.g.*, Pyzdrowski v. Pittsburgh Bd. of Adjustment, 437 Pa. 481, 263 A.2d 426 (1970); *but cf.* King v. Zoning Hearing Bd. of Nazareth, ___ Pa. Commw. ___, 463 A.2d 505 (1983).

184. *See* Comment, *supra* note 111, at 235.

185. *Id.*

186. Board members often voice their opinions that the variance requested will not do much harm, and that the property owner "needs" the garage, playroom, or storage space.

187. VT. STAT. ANN. tit. 24, § 4468(a)(5) (Cum. Supp. 1983).

188. Title 24, section 4468(c) of the Vermont Statutes Annotated (Cum. Supp. 1983) authorizes a board to attach conditions to any variance award. Variances and any conditions, of course, run with the land. *See* 3 R. ANDERSON, *supra* note 17, § 18.02; *see also* 6 P. ROHAN, ZONING AND LAND USE CONTROLS, § 43.03, at 43-41 to -48 (1983).

189. *See* Comment, *supra* note 103.

IV. The Common Sense Balancing Approach to Variance Administration

Critics of the variance power have long recognized that boards of adjustment do not comply with the statutory variance criteria.[190] Indeed, as the previous section demonstrates, boards in Vermont are no different from those cited by the critics. This does not mean, however, that Vermont's boards are unsophisticated, nor does it imply that political, business, and familial relationships control board members' decisions.[191] On the contrary, this failure to adhere rigidly to the statutory criteria indicates that board members engage in a highly sophisticated decision-making process;[192] one that is atuned to and balances the various interests involved.[193] "More often than scholars have habitually supposed, the leniency of zoning boards may be associated with, if not necessarily

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190. *See, e.g.*, Dallstream & Hunt, *supra* note 1; Dukeminier & Stapleton, *supra* note 1; Reps, *supra* note 1; Shapiro, *supra* note 1.

191. *Cf.* Dukeminier & Stapleton, *supra* note 1; Shapiro, *supra* note 1.

192. *See* Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975). Professor Tribe attacks "rule of thumb" or "fixed-rule" decision-making as being contrary to important social and individual values. He argues that in order to ensure a dialogue that provides for social and moral change and for the evolution of law reflecting that change, individualized decisions, according to flexible standards of fairness, are required. *See id.* at 306-10.

> [T]he hope implicit in the solution here described is that the individual decisionmaker, confronting each case in all its particularity and constrained only by indeterminate standards, would be more open to evolving norms and expectations than any codification could be, and that moral sensitivity would justify the attendant risks of arbitrary or capricious judgment.

Id. at 309-10 (footnote omitted). To be sure, Tribe also points out that his system requires a decisionmaker to articulate his rationale for a particular decision.

> A citizen whose basic liberty is subject to control is always entitled to some answer (as a matter of minimum rationality—substantive due process) when she asks why the control is being enforced at all, just as she is entitled to be told (as a matter of procedural due process) why the controls apply to her.

Id. at 302 (emphasis omitted). Tribe finally condemns rigid, fixed—rule decision-making as not only contrary to right-to-know and evolutionary interests, but also to intrinsic values of community or fraternity. *Id.* at 310-14.

Because zoning board members, like most other people, have an intuitive sense of fairness and community, they often refuse to abide by the rigid statutory criteria governing variance awards. This refusal is only wrong in the sense that board members do not articulate their reasons for disregarding the criteria. Even if the board members only stated that it would be unfair to follow the statutory criteria in a particular circumstance, they would be contributing to a dialogue and an understanding about the relative values of zoning controls. Since the boards already refuse to follow the statutory criteria, the goal should be to design a system that would encourage explanations for this refusal and justifications for the zoning rules sought to be varied.

193. *See* Comment, *supra* note 111, at 234-36.

caused by, the absence of cogent justifications for the rules being varied, notwithstanding the clichés about the presumptive wisdom of planners."[194]

Zoning remains a rigid system of districting.[195] When a community adopts an ordinance, it divides areas into zones, separating the incompatible land uses from each other and collecting the compatible uses together.[196] This system of land use control basically amounts to line drawing. Apart from performance standards and other innovations,[197] the lines are necessarily definite and inflexible.[198] The system is based upon several assumptions.[199] It assumes that like uses attract like uses; that development is slow and methodical; that all zoning regulations are equally important; that a community can easily change its development plans when economic conditions require; that a community can coach, funnel, and retard development by broadly classifying certain areas; and that certain land use values and aspirations are transcendent.[200] Yet, in today's dynamic society of fluctuating growth, rapidly advancing technology, and troublesome economics, the assumptions underlying zoning are not always correct.[201] Because zoning cannot respond to individual circumstances,[202] nor quickly adapt to changing conditions, a flexible mechanism is needed. As quasi-judicial bodies, boards of adjustment are in the unique position of being

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194. Bryden, *supra* note 25, at 839.

195. *See* Dukeminier & Stapleton, *supra* note 1, at 339-44.

196. *Id.* at 339.

197. Title 24, section 4407 of the Vermont Statutes Annotated (Cum. Supp. 1983) sets out several permissible types of zoning innovations, including performance standards. Performance standards, unlike traditional Euclidean zoning, require a developer to meet certain standards relating to such things as noise, odor, size, location, smoke odor, and other nuisance-related items. Rather than creating rigid zones, a municipality merely adopts such standards and require their satisfaction before building commences and while the use continues. For an excellent discussion on performance standards see McDougal, *Performance Standards: A Viable Alternative to Euclidean Zoning?* 47 TUL. L. REV. 255 (1973). Section 4407 also permits design control districting and planned unit development. Design districting is a means by which a certain area can place restrictions on the design of development. *See, e.g.*, Note, *Enhancing the Vermont Townscape: Design Review*, 7 VT. L. REV. 363 (1983). It is most useful in historic areas. Planned unit development (PUD) is a way in which a municipality can, in effect, design and encourage a development. All of these innovations have so far received little attention in Vermont.

198. *See* McDougal, *supra* note 197, at 255-57 & n.3; *see also* Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287 (1966-67).

199. Dukeminier & Stapleton, *supra* note 1, at 339.

200. *Id.* at 339-40.

201. *Id.*

202. *Id.*; *see* Bryden, *supra* note 198, at 288.

able to respond to quickly changing conditions, and to inject flexibility into an otherwise rigid system of zoning.

The Vermont State Legislature itself has recognized this need for flexibility in zoning administration. As mentioned before, it amended section 4468 in 1980.[203] That amendment, however, merely added a second set of variance criteria which are only applicable to renewable energy resource structures.[204] Interestingly, the criteria are not that different from the general variance criteria. Rather than the unnecessary hardship standard, the first criterion sets forth an "unusually difficult or unduly expensive" standard.[205] The second criterion, the deprivation of reasonable use standard, has been omitted in the amendment.[206] And, instead of a prohibition against self-created *unnecessary* hardship, the new third criterion just refers to "hardship."[207] The other criteria remain unchanged.

It may appear that the amendment is no more flexible than the general variance criteria. The legislative history, however, shows that section 4468(b) was intended to give boards more flexibility.[208] Bernard Johnson, the Assistant Director of the State Planning Office, gave the following testimony before the senate committee reporting the bill:

> I indicated earlier to the committee that there has been a Supreme Court decision [*Sorg*] in this state which has made it difficult for a zoning board of adjustment to allow solar collectors to be developed on a residential property for example. The reason it is difficult is because the current language on variances does not grant a great deal of flexibility in terms of the way in which a request for a variance may be handled by a local board of adjustment. If you read the existing law, there are some strict guidelines that they must follow in rendering their decision.[209]

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203. VT. STAT. ANN. tit. 24, § 4468(b) (Cum. Supp. 1983). *See supra* text accompanying note 149.

204. VT. STAT. ANN. tit. 24, § 4468(b) (Cum. Supp. 1983).

205. *Id.*

206. *Id.*

207. *Id.*

208. *See Energy Conservation and Development Through Municipal Zoning: Hearings on H. 731, S. 174 Before the Senate Energy and Natural Resources Committee*, 1979 Adj. Sess., March 27, 1980, at 1 (testimony of Bernard Johnson, Assistant Director of the State Planning Office).

209. *Id.* at 29.

Mr. Johnson later stated that the new subsection, 4468(b), would include "conditions that will provide more flexibility for a Board of Adjustment that would allow for the construction of alternative energy systems."[210]

The need for such variance flexibility stems from the problem of applying a fixed standard to diverse conditions. At local zoning proceedings, laypeople present their grievances and attempt to obtain relief from a board composed of other laypeople.[211] As the Vermont Supreme Court has said, "the legislative intent in enacting zoning laws was to set forth easily understandable procedures so that laymen boards, unassisted by lawyers, could reach a final determination on the facts presented to them, and so that the laymen litigants could be informed of the decisions affecting them with certainty. . . ."[212] Yet, the boards fail to follow the statutory variance procedures.[213] This failure may be in part due to a perception by the boards that fairness to the applicants is more important than adherence to the statutory criteria.[214] Thus, it may be true that the statutory criteria fail to effect the legislative intent underlying their provisions.

As Mr. Johnson indicated, the section 4468(a) criteria are very rigid.[215] The boards do not heed these statutory requirements,[216] choosing instead to use their own balancing approach to variance decision-making.[217] Consequently, the boards are providing the necessary flexibility. Forcing the boards to act within the limits of the rigid variance criteria, without providing justifications for such confinement, is both disingenuous and ineffectual. "While it is possible that respect for zoning can be increased by more rigid adherence to ordinance requirements, a denial of a variance may not be understood unless it has an immediate protective purpose."[218] In fact, unarticulated planning goals[219] may be less persuasive to the zoning boards than the protection of individual landowners.[220]

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210. *Id.* at 30.
211. *See* Galbach v. Sardelli, 132 Vt. 490, 494, 321 A.2d 1, 5 (1974).
212. *Id.* at 494, 321 A.2d at 4.
213. *See supra* text accompanying notes 165-89.
214. *See supra* note 192.
215. *See supra* note 208 and accompanying text.
216. *See supra* text accompanying notes 165-89.
217. *See* Comment, *supra* note 111, at 234-36.
218. *Id.* at 236.
219. *See supra* note 117 and accompanying text.
220. Comment, *supra* note 111, at 236.

The variance procedure is uniquely suited to providing the flexibility necessary to Euclidean zoning.[221] Some say that amendment of the bylaws is the proper action to take when an ordinance is too rigid.[222] The amendment process, however, is too slow, cumbersome, and encompassing.[223] In addition, an amendment cannot be used to permit single lot variations, for such use would constitute spot zoning, which is clearly discriminatory.[224] A form of the conditional use permit[225] could provide another device for flexibility. The problem with using this device in the realm of area variations is that a range of permissible variations must be uniformly enacted with the bylaws.[226] As noted previously, Rutland has been unable to enact even traditional conditional use provisions and has been forced to grant illegal use variances.[227] The conditional permits also require planners to anticipate possible variance conditions.[228] However, it is unrealistic to expect omniscience when a bylaw is drafted and enacted. Should the need arise to add to the range of permissible conditional variations, the same amendment problems of spot zoning and popular consent would surface. Thus, the variance power, if properly checked, is uniquely suited to provide the easiest and most effective means of achieving flexible and fair zoning administration.

The statutory criteria, however, do not provide proper checks of the variance authority. At times, the criteria are not adhered to because the boards find them too restrictive. When the boards do act within the criteria, their action appears unfair. Arguably, section 4468 provides a check upon arbitrary or discriminatory abuse of variance power. The criteria are essentially meaningless, however, because the statutory limitation is rarely and only passively enforced by the courts after an appeal has been taken.[229] The key

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221. Dukeminier & Stapleton, *supra* note 1, at 341.

222. Shapiro, *supra* note 1, at 1.

223. Dukeminier & Stapleton, *supra* note 1, at 341-42.

224. *See* Galanes v. Town of Brattleboro, 136 Vt. 235, 239, 388 A.2d 406, 409 (1978); *see also* 3 R. ANDERSON, *supra* note 17, § 18.04.

225. *See supra* text accompanying notes 52-55.

226. *See* VT. STAT. ANN. tit. 24, § 4407(2) (Cum. Supp. 1983). This section requires that a municipality make provision for a particular conditional use before a board can grant a permit allowing such a use.

227. Interview with Lawrence LaMontaigne, Zoning Administrator of Rutland, Vt., in Rutland (Feb. 22, 1983).

228. A zoning board may only issue a permit for those uses which the local legislature has designated may exist conditionally in the area. VT. STAT. ANN. tit. 24, § 4407(2) (Cum. Supp. 1983).

229. As noted before, because the boards grant many variances and because neighbors

to curtailing what the critics call "variance abuse" lies not with reform of the local boards,[230] but with reform of the check on the boards' discretionary powers.

V. Variance Reform

There is no reason why all variances must be granted sparingly. If a board's variance power is limited to deciding only upon area variations, as the Vermont law seems to provide,[231] variance abuse can be avoided while sustaining the general objectives of zoning under more lenient statutory standards. Allowing the boards more discretion with regard to area variances would avoid the disparity between variance law in theory and variance administration in practice.[232] Furthermore, increased flexibility through relaxed variance standards may make zoning more attractive to communities that have shunned zoning to date.[233] Expanded local control may also alleviate the appearance of injustice caused by the denial of minor variations, thereby enhancing the credibility of zoning.[234]

Increased variance discretion, however, does not mean unrestrained authority. Standards and institutional checks could be developed to ensure that boards do not exercise their power in arbitrary, discriminatory, and deleterious ways. One proposal is to give a board clear guidance as to the relative importance of particular area restrictions.[235] This guidance could include statements as to whether certain setback, frontage, or lot size requirements are necessary to prevent overcrowding, to control the demand on community resources, to avert drainage problems, or to maintain the aesthetics of the area. A standard of review then could be employed which inquires whether an applicant's justification for a variance outweighs the purposes of the area restrictions sought to be varied. This standard would require a board to focus on the goals of the particular bylaw, rather than on the limits of the board's authority

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do not appeal many of these grants, the courts do not often rule on the conduct of boards of adjustment. *See supra* note 167.

230. *See* Bryden, *supra* note 25, at 837-40; Comment, *supra* note 111, at 236.

231. *See supra* note 127 and accompanying text.

232. *Cf.* Shapiro, *supra* note 1, at 19-23.

233. Perhaps one reason localities have avoided zoning is that they perceive zoning to be too restrictive. *See generally* Bryden, *supra* note 198.

234. *See* Comment, *supra* note 111, at 236; *cf.* Vache, *Appearance of Fairness: Doctrine or Delusion?*, 13 Williamette L.J. 479 (1977).

235. *See* Bryden, *supra* note 25, at 839.

under the unnecessary hardship standard. This would not impose a substantial burden on local boards if, at the same time, they were subject to an active institutional check which furnished guidance as well as variance review.[236]

An institutional check could take the form of a state board of zoning review.[237] Unlike the courts, this board could actively review the dispensation of variances rather than wait for a party to appeal a local board's decision.[238] The state board could also set forth specific substantive variance criteria, provide guidance to local boards, and generally assist in zoning administration.[239] This board would be able to consider regional, state, and local land use goals.[240] Finally, the state board of review could supplant the superior court in trial *de novo* proceedings.[241] Possessing greater expertise, and not being limited by the shortcomings of the adversarial process, the review board could render decisions that are subject to supreme court review only as to abuses of discretion.[242] Despite the advantages of a state board of variance review, the idea has not gained much political support because zoning traditionally has been considered a local matter.[243] Such political antipathy, however, can be remedied by modifying the design of the review board.

A zoning review board could operate on the regional rather than on the state level. In Vermont, the existing regional planning commissions[244] could serve as bases upon which zoning variance review structures could be developed. Review on the regional level has the advantage of increased contact with zoned localities. As the municipalities are familiar with the regional commissions, variance review would face fewer political obstacles.[245] The regional com-

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236. Babcock, *supra* note 1, at 538-41.

237. *Id.*

238. *Id.*

239. *See id.* at 539.

240. *Id.*

241. *See* VT. STAT. ANN. tit. 24, § 4472(a) (1975).

242. *See* Babcock, *supra* note 1, at 539; *see also* Town of Sheldon v. Central Vermont Ry., 141 Vt. 447, 480, 449 A.2d 976, 978 (1982) (citation omitted). *Cf. In re* Young, 134 Vt. 569, 570-71, 367 A.2d 665, 666 (1976) (clearly erroneous standard of review of administrative agency's findings of fact).

243. Interview with Richard Babcock, Professor of Law, University of Chicago School of Law, in South Royalton, Vt., (Oct. 3, 1982).

244. There are presently twelve regional planning commissions throughout the state. Title 24, section 4341 of the Vermont Statutes Annotated (1975 & Cum. Supp. 1983) authorizes towns to join and create such commissions. The commissions develop regional plans and assist municipalities in developing local plans.

245. Of the twelve commissions, nine responded to a survey questioning their familiar-

missions would have the same duties and functions as a state board. Undoubtedly, expanding the tasks of the existing commissions would require a corresponding expansion of staff, funding, and resources. These costs would be offset by the long-term benefits realized from more efficient and realistic zoning administration, decreased litigation costs, and more effective and credible land use laws. With the gradual increase of expertise in the regional commissions, municipalities would be better able to gauge and direct the impact of development on their surroundings. Thus, regional variance review in Vermont is not only politically and administratively feasible, but it is also environmentally desirable.

It may be that Euclidean zoning as a land use device is obsolete.[246] Zoning, however, with all its drawbacks, is not likely to be discarded in the near future. For now, it is worthwhile to improve the system, rather than to resign oneself to the position that zoning is inherently flawed and politically untouchable. Increased local discretion with an active regional check is just one reform directed at solving the many problems of zoning administration.

Conclusion

This note sought to review variance law in Vermont and to see how variance administration in practice compares with that law. The review of zoning board decisions proves that variance administration in practice diverges from the statutory criteria. This divergence does not prove the inadequacies of local zoning boards as much as it demonstrates the unrealistic ideals of the statutory variance criteria. The variance is not, and cannot be, just a "safety valve." It is a necessary device to add flexibility that is grounded more on common sense than on legal principle. Because the variance power is, in effect, an equitable balance, any attempt to confine it to rigid standards is necessarily doomed to failure. Yet, any exercise of discretion must be limited in some way. The existing statutory admonitions, however, are merely paper checks on zoning authority that occasionally hinder the zoning boards' attempts to render fair decisions.

One way to secure flexibility and fairness in variance administration is to establish an active institutional check on zoning

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ity with the communities in their region. In general, most were quite familiar with the characteristics and bylaws of the communities. (Survey available at *Vermont Law Review*).

246. *See* Krasnoweicki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980).

boards of adjustment. This could be accomplished with either state or regional commissions of variance review. The corresponding increase in local control over zoning would presumably mitigate the political difficulties facing the establishment of this system. Further, the existence of regional commissions in Vermont, which can be converted for variance review, provide ready-made structures to support the proposed system.

Under relaxed statutory standards and an effective review system, perhaps the problems in *Gadhue*,[247] *Tire Mart*,[248] and *Benzie*[249] could have been resolved or avoided without the involvement of the supreme court. It becomes increasingly apparent with each new judicial decision that zoning variance cases do not readily lend themselves to uniform treatment. Because each case involves a different parcel and type of property, and because each municipality has its own vision of land use control, judicial decisions often fail to clarify the state of the law. The better approach is to permit local flexibility and, at the same time, to provide an active check on the abuse of discretion by zoning boards.

Michael D. Donovan

247. 141 Vt. 238, 446 A.2d 375 (1982).
248. 141 Vt. 330, 449 A.2d 910 (1982).
249. 142 Vt. 263, 454 A.2d 1233 (1982).