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“A ZONING ORDINANCE IS NO BETTER THAN
ITS ADMINISTRATION” —
A PLATITUDE PROVED

*The Practices and Procedures of Chicago's Zoning Board
of Appeals*

By RICHARD L. WEXLER*

INTRODUCTION

The decision in *Village of Euclid v. Ambler Realty Co.*,¹ holding that it was within the police power of the states to reasonably regulate land utilization through zoning, encouraged municipalities to “short-term plan” their cities for optimum land use development through the creation of homogeneous and often exclusive land use districts. In the forty-one years following this landmark decision, the great majority of American cities have enacted some form of zoning ordinance under the express authority of state enabling legislation. Generally these enabling acts allow the municipal legislative body to divide the available land into districts according to use classifications and to regulate the land use within each district — the regulations to be uniform for each district-class.² Thus “Euclidian zoning” in theory would demand a rigid symmetry; homogeneous uses allowed within each district-class to the exclusion of all “non-conforming” uses.³ However, since the early Thirties, when most zoning ordinances went into effect, our cities have undergone dramatic physical changes: changes in population mobility affecting residential uses, changes in transportation needs, changes so massive as to dictate flexibility in land-use controls. Although originally adopted as a device for avoiding unconstitutional rigidity in zoning ordinances,⁴ the variation, or variance, has been used ever more frequently to obtain this inner-system flexibility. Yet, in Chicago, and in other cities, the variations and the adminis-

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¹ 272 U.S. 365 (1926).

² Bair & Bartley, *Model Zoning Ordinance*, ¶3 (American Society of Planning Officials, 1960).

³ Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Ky. L. J. 273, 340 (1962).

⁴ Rathkopf & Rathkopf, *The Law of Zoning and Planning*, 37-4 (3rd ed. 1960).

trative procedures for their implementation have reached a point of abuse that endangers the very system they were designed to protect.

Regardless of the degree of care and study applied in the preparation of the zoning ordinance, it will have little effect and little value unless it is enforced. A zoning ordinance, and, thus, the legal land use pattern of a city as large and as complex as Chicago, can be destroyed by laxity or indifference at any one of three levels: (1) by the zoning enforcement officer in executing his responsibilities; (2) on the part of the administrative appeal body in granting variations; and, (3) on the part of the city council in amending the ordinance at the behest of individual property owners. When any of these failures occur, public confidence in zoning is shaken, violators are encouraged, and the securing of needed judicial support for the ordinance is rendered more difficult. An analysis of existing variation practices and procedures of the Chicago Zoning Board of Appeals⁵ will reveal the problems created by present administrative practices.

VARIATIONS: THE HISTORICAL PERSPECTIVE IN CHICAGO

When the courts first upheld the constitutionality of zoning ordinances, the validity was based on the police power of the state to protect the health, safety, and general welfare of the community.⁶ While Chicago's first zoning ordinance met these basic requirements, the 1923 city legislation failed to make adequate provision for the control of variations. Subsequently the City land use pattern was abused through the wholesale approval of variations. From 1923 through 1927, almost 60% of all petitions for variations appealed to the Zoning Board were granted.⁷

⁵ The Chicago Zoning Board of Appeals hears petitions on two types of exceptions to the zoning ordinance: variation and special use. The latter presents a lesser problem to the Board as the "special uses" for each district-class are expressly provided in the ordinance with appropriate standards for their implementation by the Board. The variation exception allows the Board broader discretion. While the courts frequently fail to distinguish the two, the differences are significant as different standards apply to each — differences created by the state and municipal legislation. In *Rosenfeld v. Zoning Board of Appeals of Chicago*, 19 Ill. App. 2d 447, 450; 154 N.E. 2d, 323, 325 (1958) the Court explained that the special use differs from the variation in that:

"[I]t is a permission by the Board to an owner to use his property in a manner contrary to the ordinance provided that the intended use is one of those specifically listed in the ordinance and provided that the public convenience will be served by the use, while a variance is a grant of relief to an owner from the literal requirements of the ordinance where literal enforcement would cause him undue hardship."

⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

⁷ Between 1923 and 1937 there were 4,124 appeals on variations, of which 2,379 or 57.7% were granted by the Board of Appeals. *Planning and Zoning Administration in Chicago* (Metropolitan Housing and Planning Council of Chicago 1938) p. 17.

1942 saw Chicago make its first major revision of the original ordinance, but, unrelated to any comprehensive plan of City development, it too became subject to innumerable variations. Beginning in 1952, the City Council through its Committee on Buildings and Zoning undertook a comprehensive revision and, after five years of study and analysis, the Comprehensive Amendment to the Chicago Zoning Ordinance was enacted.⁸

The Illinois Revised Statutes, in enabling municipalities to adopt zoning ordinances, state the objectives of zoning:

"To the end that adequate light, pure air, and safety from fire and other dangers may be secured, that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided . . . and that the public health, safety, comfort, morals, and welfare may otherwise be promoted"⁹

The 1957 Comprehensive Amendment to the Chicago ordinance stated a more detailed basis for the use of the police power to zone:

"(1) To promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people; . . . (3) To protect the character and maintain the stability of residential, business, commercial, and manufacturing areas within the City, and to promote the orderly and beneficial development of such areas; . . . (8) To prohibit uses, buildings or structures which are incompatible with the character of development or the permitted uses within specified zoning districts; (9) To prevent such additions to, and alterations or remodeling of existing buildings or structures as would comply with the restrictions and limitations imposed hereunder; . . . (14) To provide for the gradual elimination of those uses of land, buildings, and structures which do not conform with the standards of the district in which they are respectively located"¹⁰

The State Zoning Enabling Act further provides the methodology for obtaining variations from the strict letter of the ordinance and the general framework for establishing Zoning Boards of Appeal.¹¹ Here, again, the Chicago Zoning Ordinance follows the State mandate.¹² While the 1957 Comprehensive Amendment to the Chicago Zoning Ordinance was never expected to be a panacea,¹³ changes in the administration of the ordinance were key features.

The stated rationale in both State and Chicago zoning legislation is the prohibition and elimination of any use of property contrary to the ordinance. Thus, at the heart of the legislation

⁸ Passed by Chicago City Council, May 29, 1957.

⁹ ILL. REV. STAT., ch. 24, § 11-13-1 (1965).

¹⁰ CHICAGO, ILLINOIS, MUNICIPAL CODE, ch. 194A, §1, Art. II (1966).

¹¹ ILL. REV. STAT., ch. 24, §§11-13-3 to 11-13-12 (1965).

¹² CHICAGO, ILLINOIS, MUNICIPAL CODE, ch. 194A, §1, Art. II (1966).

¹³ For a full discussion of the changes made and the expectations caused by the passage of the 1957 Amendment, see Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U. L. REV. 174 (1957).

is the premise that variations from the ordinance only be permitted in rare situations — in those instances of the extreme need. The 1957 Comprehensive Amendment completely eliminated the use variation from the Board's powers and established specific limitations to control the type and extent of non-use variations to be granted by the Board. In addition, to prevent the wholesale approval of variations, the Amendment set up standards for the granting of variations to guide the Board of Appeals in its decisions.

In the first four years of operation under these new and stricter guidelines, the Board of Appeals granted 466 variations and denied only 23 — or, 95% of all petitions were granted.¹⁴ Over an eight-month span of observation in 1965, of 269 decided petitions, variations were granted in 253 cases — a total of 94% granted petitions.¹⁵ During this 1965 period, in which the Board met twenty-five times to decide petitions seeking a variation from one of the bulk, yard or parking requirements of the ordinance, the petitioners' success record was 97%.¹⁶ These grants of variations are constantly accompanied by findings of "practical difficulties or particular hardship in the way of carrying out the strict letter"¹⁷ of the ordinance. Thus, the liberal provisions added in the 1957 Amendment for the amortization of non-conforming property in order to reduce the number of variations granted was of little effect.

"The 1957 Comprehensive Amendment goes on the theory that the danger spots in zoning are non-conforming uses. Under the old practice they were frozen, and could not expand; therefore, they were believed to be doomed to elimination. Experience has shown that, to the contrary, non-conforming uses thrive on their own monopolistic position or that they serve as comfortable excuses for the intrusion of other non-conforming uses which in turn lead to a breakdown of the entire zoning program. It is believed necessary, therefore, to provide for their elimination without the costly process of condemnation but after a period of grace in which they would enjoy a virtual monopoly and could "amortize" their investment."¹⁸

The Chicago Zoning Board of Appeals, from the statistics compiled, now hears more appeals and grants proportionately more variations than ever before.

The majority of these buildings and land uses which would be considered "non-conforming" under the ordinance are located in the City's deteriorating neighborhoods: neighborhoods which

¹⁴ Davies, *The Chicago Zoning Board of Appeals: A Three Month Study* (unpublished Master's Thesis, University of Pittsburgh, 1962).

¹⁵ Studies by the author for the Metropolitan Housing and Planning Council of Chicago in conjunction with an examination of the effectiveness of the administrative provisions under the 1957 Comprehensive Amendments.

¹⁶ *Id.*

¹⁷ ILL. REV. STAT., ch. 24, §11-13-4 (1965).

¹⁸ Babcock, *supra* note 13 at 191.

are the concern of the City of Chicago's basic policy of redevelopment, conservation and rehabilitation. 71% of the petitions granted by the Board of Appeals between May and December, 1965, affected properties located in community areas with the highest percentage of dilapidated and deteriorating structure condition.¹⁹ This City policy and that of the Board of Appeals passed each other like ships in the night.

PROCEDURES: CHICAGO'S ZONING BOARD OF APPEALS

The hearing.

The Chicago Zoning Board of Appeals has the power, within the boundaries set by its enabling legislation, to promulgate its own rules of procedure for its hearings. While the Board often makes verbal reference to its "rules,"²⁰ few are privy to any written document containing the Board's operating rules. While there are some definitive standards prescribed by the statutes and the courts, the latter have yet to state all of the essentials for fair and impartial administrative hearings by zoning boards of appeal.²¹ This lack of uniformity has caused at least one commentator on the problem to note that: "There is, in short, nothing approaching a continuity of administrative practice or standards in the field of zoning law as it is carried on in Illinois."²² It is nonetheless possible to set out some basic standards which should be met to insure a fair and impartial hearing

¹⁹ The author plotted on an outline map of Chicago the 253 granted variations and then superimposed a map of Chicago's defined Community areas. Using structure data from the *Local Community Fact Book — Chicago Metropolitan Area*, 1960 (Kitagawa & Taeuber, University of Chicago), the 71% figure was reached. As this percentage was based solely on Census information and not on professional structural surveys, it represents a minimum figure only.

Merely to indicate that the Board's policy on variations is continuous, the results of hearings on the thirty-three (33) petitions decided at the January 24, 1967, and February 14 and 21, 1967, hearings were: thirty-two petitions for variation granted and one denied of thirty-three decided (98%). Records, Chicago Zoning Board of Appeals (1967).

²⁰ See, e.g., Chicago Tribune, January 12, 1967, wherein John Iglewski, Chief Zoning Examiner of the Chicago Zoning Board of Appeals, cited the "procedural rules by which the board has operated for thirty years" as requiring only three members for a quorum.

²¹ "In general, administrative agencies are not bound by the technical common law rules of evidence, but they must observe the basic rules of fairness as to parties appearing before them." *Dal Maso v. Board of County Commissioners*, 238 Md. 333, 209 A. 2d 62, 64 (1965).

"Under the general law the city council or village board of trustees shall determine its own rules of procedure in the matter of adoption of ordinances, subject to the statutory requirements therein referred to." *The People v. Strohm*, 285 Ill. 580, 585; 121 N.E. 223, 225 (1918).

²² "One local board may insist upon a transcribed record of proceedings, another may be content with a *pro forma* record. Board A may swear all witnesses; Board B may base its findings upon unsworn testimony . . ." Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV., 509, n.102 (1959).

by zoning boards — standards with which to measure the actions of Chicago's Board of Appeals.

The zoning appeal procedure is initiated with the filing of an application for a variation to be presented before the Board with an accompanying statement of the nature of the variation requested. The applicant must also submit a list of property owners within 250 feet of the proposed variation to satisfy statutory notice requirements.²³ In addition to the notice to these immediate property owners, a published notice is required to be printed at least once.²⁴ Thus, objectors are invited to be present and testify at the Zoning Board of Appeals' hearing, yet they may have no standing to initiate any further proceedings.²⁵

The courts have granted the zoning boards great freedom in the use of testimony offered,²⁶ and only rarely has there been any criticism voiced of the board's exclusion of some testimony and the admission of other. Only in extreme or salient cases of abuse have the courts responded with any criticism. In *Rosenfeld v. Zoning Board of Appeals of Chicago*,²⁷ the Board members opened the proceedings on a proposed variation by stating: "We know all about this lot,"²⁸ and later refused to hear plaintiff's expert witness on the propriety of the variation because: "We remember him."²⁹ The court found this conduct to be highly prejudicial to the rights of the petitioner. With a member of the City of Chicago's Department of Law sitting as an adviser to the Board at its hearings, this writer has himself observed the Chicago Board of Appeals admit hearsay testimony on one petition while denying the petitioner next to come before them the opportunity to offer an almost identical hearsay statement. Testimony offered as to direct observations of the property in question is frequently excluded by the Board as "hearsay."³⁰

Ex parte contacts — the "hidden" problem.

While the courts and statutes require a full administrative proceeding, a growing problem is one of *ex parte* contacts. Increasing concern has manifested itself in recent years on *ex*

²³ ILL. REV. STAT., ch. 24, § 11-13-7 (1965).

²⁴ *Id.*

²⁵ See text at notes 55-61, *infra*.

²⁶ *The People v. Strohm*, 285 Ill. 580, 121 N.E. 223 (1918); *Flick v. Gately*, 328 Ill. App. 81, 65 N.E. 2d 137 (1946). Cf. *Village of Justice v. Jamieson*, 7 Ill. App. 2d 113, 129 N.E. 2d 269 (1955).

²⁷ 19 Ill. App. 2d 447, 154 N.E. 2d 323 (1958).

²⁸ *Id.* at 452, 154 N.E. 2d at 326.

²⁹ *Id.*

³⁰ Direct observations of the author over the study period.

parte contacts at the federal level³¹ — a concern that is not evident with respect to state and local administrative agencies. Several reasons can be suggested as to why this problem has failed to date to come before our state courts in considering the problems of zoning administration. First, the majority of cases that come before zoning boards are uncontested, and, when contested many of the objectors find themselves with no standing later in the courts. The nature of the application for a variation is such that the matter, while vitally affecting the interests of the City's overall planning and policies, rarely has an effect on the immediate interests of other private individuals. Also, the very nature of *ex parte* contacts in the context of the informal procedures followed by zoning boards of appeal makes them extremely difficult to uncover, and once detected, presents the most insurmountable problems of proof. For these reasons, many *ex parte* contacts go unnoticed. However, at the federal level, secret communications to a hearing officer by friends to whom he felt obligated concerning matters before the Federal Communications Commission,³² letters and private conversations by applicants to board members after the record on the proceedings had been closed,³³ have all been vigorously condemned as *ex parte* contacts violative of federal due process of law. This increasing concern with *ex parte* contacts at the federal level extends to the zoning area as well as to other federal regulatory agencies. In *Jarrott v. Scrivener*,³⁴ the facts revealed that the District of Columbia Zoning Board of Appeals, after conducting two hearings on the matter of permitting the Soviet Embassy a variation for purpose of establishing a Chancery in a residential district of Washington, approved the petition. Neighboring home owners and civic organizations, contesting the grant of the variation, appealed to the Federal District Court for the District of Columbia to set aside the Board's decision, alleging that they were denied a fair and impartial hearing when "high ranking federal officials" had contacted the Board membership and

³¹ Landis, *Report on Regulatory Agencies to the President-elect* (1960). For a full discussion of the Federal response to the *ex parte* contact problem, See Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233 (1962).

³² *W.K.A.T. Inc. v. FCC*, 258 F. 2d 418 (D.C. Cir. 1958). An F.C.C. Commissioner participating in a pending decision was contacted on behalf of applicants for a television construction permit. The subsequent grant of the permit was voided on appeal because the *ex parte* contacts violated due process, and further because of violations of "judicial ethics."

³³ *Sangamon Valley Television Corp. v. United States*, 358 U.S. 49 (1958). An applicant for a television construction permit wrote letters to and made gifts to all F.C.C. Commissioners months after the deadline for the entry of arguments and comments into the record. The Commissioners' subsequent decision in the applicant's favor, not supported by the record, was struck down.

³⁴ 225 F. Supp. 827 (D.D.C. 1964).

had made it known that a favorable decision would be "in the national interest." These *ex parte* contacts were not written into the record of the Board's proceeding. The Court held the decision of the Zoning Board violative of due process and ordered that a new Board be constituted to rehear the petition. *Jarrott* marks the first time a zoning board of appeal's decision has been reviewed on the due process question raised by *ex parte* contacts.³⁵

In Chicago the "interest of the Ward" or "the best interest of the City" is the criterion rather than "the national interest," but the results are the same. Petitioners commonly solicit their aldermen to appeal to the Board and the question of "how your alderman feels about the variation" is one frequently asked of petitioners by the Zoning Board itself,³⁶ although cross-examination of the alderman would not be possible and no evidence of the contact would appear in the record. The appropriate statutory safeguards require a public hearing. The Illinois courts have established that a public hearing is effectively denied when an administrative agency denies the right to examine and cross-examine a witness:

"An administrative tribunal or agency cannot rely upon its information for support of its findings, but an order must be based upon evidence produced in the hearing at which an opportunity is given to all interested parties to offer evidence and cross-examine witnesses."³⁷

"Executive Sessions": the "hidden" hearing.

Chicago's Zoning Board of Appeals has a statutorily declared membership of five³⁸ and "the concurring vote of 4 members of the board is necessary . . . to decide in favor of the applicant

³⁵ For a further analysis of *Jarrott*, see note 12, U.C.L.A. L. Rev. 969 (1965).

³⁶ "There is heavy political pressure behind some of these zoning deals, many bordering on conflicts of interest." Chicago Daily News, October 28, 1965.

"Zoning in Chicago is so shot with exceptions won by political corruption that on occasion city lawyers have hesitated to appeal adverse rulings of the lower courts for fear the Supreme Court would say that the whole zoning code . . . is unconstitutional." Chicago Tribune, February 19, 1954.

The author observed during the study period in 1965 that in every contested matter before the Board, the feelings of the alderman were solicited by the Board: the alderman was either present, sent one of his staff or the parties were urged by the Board to contact their alderman.

³⁷ *Curtis v. State Police Merit Board*, 349 Ill. App. 448, 457; 111 N.E. 2d 159, 163 (1953). See also *Braden v. Much*, 403 Ill. 507, 87 N.E. 2d 620 (1949) wherein the Court stated:

"We have previously defined the words 'public hearing' before any tribunal or body, by the accepted definitions of lexicographers and courts, to mean the right to appear and . . . examine the witnesses whose testimony is presented by opposing parties." *Id.* at 513, 87 N.E. 2d at 623.

It should be noted that the Board does permit cross-examination of the witnesses present. This right is summarily denied by the City Council Committee on Buildings and Zoning as their "rules don't permit it."

³⁸ ILL. REV. STAT., ch. 24, §11-13-3(A) (1965).

any matter upon which it is required to . . . affect any variation in the ordinance"³⁹ The practice of the Board is to have three or four members take testimony and examine witnesses at the officially designated public hearing for which notice has been given. When the proponents and opponents have finished, the members present announce that the petition will be "taken under advisement." An "executive session" of the Board is then convened at a later date, from which the public is barred,⁴⁰ after which a resolution issues from the Board containing its "findings" and decision, signed by the requisite four endorsing members.⁴¹ Although this precise question has not yet been decided by the Illinois courts, the Zoning Enabling Act would suggest that four members of the Board must be present as a quorum necessary to convene the public hearing on variations. In *McAlpine v. Garfield Water Commission*,⁴² the New Jersey Supreme Court was faced with the same problem of statutory construction that would face our Illinois courts; an employee of the City of Garfield's Water Commission was fired after a public hearing attended by less than the requisite number of members of the Water Commission — although all were present at the "executive session."

"Only one question is presented on this appeal. Where the dismissal of an employee is based upon a hearing conducted by the members of a municipal commission, and one of the members did not hear all of the evidence adduced, is the action of the commission vitiated by the participation of such a member in the final deliberations and vote of dismissal?"⁴³

The Court answered the question presented and overturned the commission ruling:

"Since it is not feasible to evaluate the personal influence which may be exerted by any one member, we believe it necessarily follows that fairness and impartiality can only be assured when the members participating in the deliberations and decision of the board or commission, following a hearing . . . have had an equal opportunity to hear and evaluate all of the evidence presented at the hearing. . . . 'The rule is fundamental that a person who has not heard the testimony in a given case occupies no legal status as arbiter or judge to adjudicate upon the cause'."⁴⁴

³⁹ ILL. REV. STAT., ch. 24, §11-13-3(E) (1965).

⁴⁰ The author attempted, unsuccessfully, to obtain dates, times and places of the "executive sessions" from the staff of the Zoning Board of Appeals.

⁴¹ Earl S. McMahon, member of the Board, died July 19, 1966. No replacement has been appointed at the time of this writing. Another member had failed to attend a public hearing for six months due to illness; however, his vote always appeared, duly inscribed on the Board's resolutions. This latter member was replaced in 1967.

⁴² 135 N.J.L. 497, 52 A. 2d 759 (1947); see also *Eisberg v. Cliffside Park*, 92 N.J.L. 321, 105 A. 2d 716 (1919).

⁴³ *McAlpine v. Garfield Water Commission*, 135 N.J.L. 497, 52 A. 2d 759, 760 (1947).

⁴⁴ *Id.* 52 A. 2d at 761.

Meanwhile, the official position of the Chicago Zoning Board of Appeals continues to be that a quorum of four or more is not essential to the hearing.⁴⁵ Moreover, unlike the Chicago School Board and other local agencies, the Zoning Board of Appeals employs no court reporter to transcribe the public hearings.

The "executive session" procedure used by the Board should first be examined in light of its enabling legislation providing that "All meetings of the Board shall be open to the public."⁴⁶ Though the language therein is clear, even more so is the Illinois Public Meeting Act of 1965.⁴⁷ This Act expressly states:

"It is the public policy of this State that the public commissions, committees, boards, and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of this Act that their actions be taken openly and that their official deliberations be conducted openly."⁴⁸

This untested statute, provides for the extraordinary remedy of a writ of mandamus to force public bodies in Illinois to open their meetings; however, the Chicago Zoning Board of Appeals, as well as other agencies and boards,⁴⁹ continues its official deliberations in the seclusion of "executive session."

Findings of facts.

The Illinois Zoning Enabling Act requires that every variation by boards of appeal "shall be accompanied by findings of facts specifying the reason or reasons for making the variation."⁵⁰

"The diversity among boards with respect to the quantum of the 'findings of fact' which they deem a prerequisite to a grant of relief is notorious. In some municipalities the findings are precise and deal with the specific character of the property and its surroundings. Many boards, however, are content to parrot the conclusions set out in the enabling act that there exists 'practical difficulty or particular hardship'."⁵¹

The Chicago Board consistently restates the statutory conclusions without specifying any factual basis for granting the variation

⁴⁵ The Chicago Zoning Board of Appeals, in defending a member's absence in a controversial matter on which he later voted, stated: "As long as testimony of witnesses is recorded, three members or even one member can conduct a legal hearing. Testimony in this case was recorded and turned over to the absent member . . . who read it and reached an affirmative decision." Chicago Tribune, January 12, 1967.

⁴⁶ ILL. REV. STAT., ch. 24, §11-13-3(C) (1965).

⁴⁷ ILL. REV. STAT., ch. 102, §41 (1965).

⁴⁸ Id.

⁴⁹ See Chicago's American, Editorial "Those 'Public' Meetings," March 16, 1966.

⁵⁰ ILL. REV. STAT., ch. 24, §11-13-11 (1965).

⁵¹ Babcock, *The Unhappy State of Zoning Administration*, *supra* note 22, n. 102 (1959).

requested.⁵² In *Lindburg v. Zoning Board of Appeals*,⁵³ the Illinois Supreme Court rejected the statutory recital still employed by the Chicago Board. The Court in *Lindburg* admonished the Springfield Zoning Board of Appeals, stating: "The requirement of the statute is not met by parroting the highly generalized statutory phrases, 'practical difficulties' and 'particular hardship'."⁵⁴ While other zoning boards in Illinois and elsewhere⁵⁵ have to defend their records in light of *Lindburg* and similar decisions, the Chicago Zoning Board of Appeals has not.⁵⁶

The procedures required to be followed by the Chicago Zoning Board of Appeals would seemingly be well defined by statute, ordinance and court decision. The fact that these procedural safeguards can be ignored so often would indicate that their definition is not clear enough. That the built-in procedural safeguards can be overlooked with such consistency endangers the totality of substantive provisions of the ordinance.

BEYOND THE BOARD: PROBLEMS ON APPEAL

When an appeal is taken from the decision of the Zoning Board of Appeals, the record is sent to the Circuit Court as provided in the Illinois Administrative Review Act.⁵⁷ The record of the Board presents the Court with the following problems on review: statutory conclusions were stated rather than pure "findings of facts;" a decision rendered in closed "executive session"

⁵² The following resolution typifies the Board's "findings of facts": "WHEREAS, the Board of Appeals, having fully heard the testimony and arguments of the parties and being fully advised in the premises finds that in this case the proposed use is to be located in an R3 General Residence District; that there is unnecessary hardship in the way of carrying out the strict letter of the Zoning Ordinance; that the property in question cannot yield a reasonable return nor can it be put to reasonable use if permitted to be used only under the conditions allowed by the regulations in that zone; that the plight of the owner is due to unique circumstances; that the variation, if granted, will not alter the essential character of the locality . . ."

This resolution is part of the "record" in petition #402-65-Z (July 20, 1965), and is typical of the "findings of facts" in all resolutions reviewed.

⁵³ 8 Ill. 2d 254, 133 N.E. 2d 266 (1956); *But see also* Rosenfeld v. Zoning Board of Appeals, 19 Ill. App. 2d 447, 154 N.E. 2d 323 (1958).

⁵⁴ 8 Ill. 2d 254, 256; 133 N.E. 2d 266, 268 (1956).

⁵⁵ Similar problems have been ascertained in other states. For example, in Pennsylvania the courts' mandate that "findings of facts" be made part of the record by the zoning board is "continually disregarded." Craig, *Pennsylvania Building and Zoning Laws — An Allegheny County Appraisal*, p. 249, (University of Pittsburgh, 1961). *See also*, Faught, *Zoning Under Changing Conditions in Pennsylvania*, 10 U. PITT. L. REV. 310, 311 (1949).

In Illinois, for example, the *Lindburg* decision required a re-examination of the City of Elmhurst zoning ordinance in *Kaczarewski v. Elmhurst-Chicago Stone Co.*, 10 Ill. 2d 582, 141 N.E. 2d 14 (1957).

⁵⁶ *Lindburg* was apparently ignored when the Cook County Circuit Court approved the statutory recital by the Zoning Board of Appeals as valid "findings of facts" in *Wolbach v. Zoning Board of Appeals*, 65 L. 287, --- Ill. App. 2d --- (1967).

⁵⁷ ILL. REV. STAT., ch. 110, §§264-279 (1965).

by the Board when less than a quorum was present when testimony was offered at the public hearing; a decision which failed to state the weight given admitted hearsay testimony and failed to state what testimony was excluded and why. The court then is to base its decision upon this record, deeming it to be "prima facie true and correct."⁵⁸ The burden of proof, notwithstanding the faults in the record, is on the "appellant," whomever he may be, and not on the Board of Appeals.⁵⁹

The objectors at the public hearing before the Board are free to voice their opposition. Thus, community organizations chartered to preserve and conserve their neighborhoods can express the specific area's concern to the Board. Yet in any appeal from Board to court, these same objectors are deemed to lack the requisite standing to be party plaintiffs, and are recognized only as witnesses at the original proceeding. In *222 E. Chestnut Street Corp. v. Board of Appeals of City of Chicago*,⁶⁰ the plaintiff appealed the grant of a variation by the Chicago Board of Appeals. He complained to the Court that fumes, noise and dust would be created if a parking lot were permitted to be erected across from his apartment building. The Court stated that the plaintiff lacked standing to sue as "... the right to maintain a suit in such cases depends upon whether the zoning inflicts a special or peculiar injury upon the party bringing the suit"⁶¹ as opposed to the public generally. Thus, the same standing is required to appeal an administrative decision of the Zoning Board as is demanded by the courts to bring a tort action for private nuisance. In fact, nuisance law has had a strong influence on the development of zoning practice. The law of nuisance, as it applies to land use, encompasses the situation in which harmful acts, undertaken by one landowner on his land, injure the land of an adjoining landowner.⁶² This gives rise to a bill in equity for an injunction by the injured landowner. However, nuisance and zoning law alike place the burden of proof on the landowner alleging the objectionable harm, and both require that the harm,

⁵⁸ *Id.*, at §274.

"Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. *The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.*" (Emphasis added.)

⁵⁹ *Dawson v. Board of Appeals*, 41 Ill. App. 2d 125, 190 N.E. 2d 123 (1963).

⁶⁰ 14 Ill. 2d 190, 152 N.E. 2d 465 (1958).

⁶¹ *Id.*, at 192.

⁶² For a full discussion of nuisance application to land use problems see Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*. 1955 WIS. L. REV., 440.

and therefore the cause of action, be strictly personal to him. Unless the harm falls in the public nuisance category, the property owner sues to redress injury to his own rights in land, but not to redress injury to community or area interests.⁶³ That *private* nuisance doctrine must be invoked for standing in a court of law when a variation of the ordinance has been granted in violation of the constitutional and legislative basis for zoning — the health, safety and public welfare — remains a basic and historical anachronism. However, it is the law:

“As one may not assume the role of champion of a community to challenge public officers to meet him in courts of justice to defend their official acts, . . . so one having only a general interest may not adopt the part of an advocate of municipal welfare . . . to promote a judicial enforcement or interpretation of zoning regulations.”⁶⁴

The effect of the decisions in this area is to place the total burden upon zoning boards of appeal to protect the integrity of the ordinance and thereby protect the public health, safety and welfare.

Thus, on appeal, one whose future damages are thought to be speculative or no different than those suffered by the public generally has no standing in the courts. Yet, the same variation which affects him only generally and is, therefore, approved by the courts, subsequently provides the Board of Appeals with a “precedent” for granting a later variation which will affect the very same protestor directly: the Board relying upon the existing land use approved earlier by it and the court as a basis for the present variation. The Illinois Supreme Court has noted this anomaly, stating: “One encroachment brings on another with a resulting detriment to the whole community.”⁶⁵

THE ZONING BOARD OF APPEALS AND THE FUTURE

The City of Chicago's Department of Development and Planning recently published the “Comprehensive Plan of Chicago”⁶⁶ after years of effort. Ultimately it will devolve upon the Chicago Zoning Board of Appeals to protect the integrity of this plan, for upon this body has fallen the task of preserving the purposes of zoning through proper enforcement of community planning interests. If steps are not taken to improve the actions of the Board, the City of Chicago can expect its long awaited Comprehensive Plan to meet the fate of its earlier land use plans — a

⁶³ See Mandelker, *The Role of Law in the Planning Process*, 30 LAW & CONTEMP. PROBLEMS, 26, 28 (1965), for examples of the consequences.

⁶⁴ *Garner v. County of Du Page*, 8 Ill. 2d 155, 160; 133 N.E. 2d 303, 305 (1956). Pennsylvania offers a viable alternative allowing “any person aggrieved . . . or any taxpayer . . .” to institute an appeal in the zoning situation, 53 P.S. 9813, as amended.

⁶⁵ *Skrysak v. Village of Mount Prospect*, 13 Ill. 2d 329, 334; 148 N.E. 2d 721, 723 (1958).

⁶⁶ City of Chicago, *The Comprehensive Plan of Chicago*, December 1966.

gradual erosion through the wholesale granting of variations. The courts have shown a reluctance at interjecting themselves in the ultimate decision as to whether a variation should or should not be granted. They see the question as one of purely local concern:

"In the absence of outrageous discrimination the court wants to avoid the hopeless task of weighing, from briefs and extracts filed in Springfield, the relative merits of a plea affecting a parcel of land at a street intersection in Carlinville, South Beloit, Chicago or Arlington Heights."⁶⁷

As the courts have set the most minimal of guidelines, the legislature must assume the task of eliminating the hopeless confusion in the procedure and makeup of zoning boards, not only in Chicago, but throughout the State. The solutions are difficult, often complex, but they should be explored.

The confidence which early authorities expressed in zoning administration through a board of appeals was based, at least in part, upon the assumption that such boards could be and would be composed of persons with some training and experience in the matters which would come before them. While the Illinois Courts in the early years of zoning termed the boards "minor administrative bodies,"⁶⁸ the present assumption in Illinois is better reflected in the respect accorded decisions of the zoning boards — treating them, as in New York, as if they were "an expert body entrusted by the legislature to enforce the provisions of the Zoning Law."⁶⁹ This expertise is attributed to zoning boards because of the actions they should take, not the actions they actually take; because of their theoretical rather than actual composition. The failure to require that members of zoning boards of appeal be trained or experienced in some occupation or discipline related to the regulation of land use has resulted in boards composed of persons drawn from a variety of occupations.

"Commonly, the business community furnishes a majority of members. A board may include an attorney or a realtor . . . occasionally a board will include a member who is identifiable as a representative of organized labor. It is customary for the appointing authority to name members from each of the major political parties in the community."⁷⁰

In Chicago, though requirements for membership are set out by

⁶⁷ Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U. L. REV. 174, 176 (1957).

⁶⁸ Behnke v. President and Board of Trustees, 366 Ill. 516. 9 N.E. 2d 232 (1937).

⁶⁹ Chapmald Realty Corp. v. Board of Standards, 76 N. Y. S. 2d 296 (1948). See also Welton v. Hamilton, 344 Ill. 82, 76 N.E. 333 (1931).

⁷⁰ Anderson, *The Board of Zoning Appeals — Villain or Victim?* 13 SYRACUSE L. REV. 353 (1962).

ordinance,⁷¹ the pattern of membership has been, consciously or unconsciously, to meet the common criteria set out above and to balance the membership of the Board of Appeals ethnically.⁷² The apparent assumption is that there are but two criteria necessary to adjudge the need for granting or denying petitions for variations: common sense and some knowledge of the City.

"The unspoken premise is that the board of zoning appeals is a jury designed to adjust the conflicts between imperfect regulations and existing property interests, and the essential quality of membership is a balanced representation of the principle economic and political interests of the community."⁷³

If the Zoning Board of Appeals is ever to be an "expert body" entitled to assume the trust and burdens put upon it by the legislature, and not merely "experts at compromise,"⁷⁴ then the legislature itself, either City or State, must prescribe some basic qualifications of membership. As competency is a necessary concomitant to fair decision-making, qualifications such as length of residence, vocational experience and pecuniary disinterest should be stated. Such standards should require that whenever feasible the Board be in part composed of professional land planners, and that restrictions against (rather than in favor of) the number of board members with occupational ties to property or property interests be employed. A stated set of qualifications could go far in assuring impartiality and discouraging the influence of *ex parte* contacts.⁷⁵

The promulgation of an established set of standardized procedures could further assure a more uniform, formalized treatment of zoning variation petitions by the Zoning Board of Appeals. The Model State Administrative Procedure Acts,⁷⁶ though primarily directed to licensing problems, offer noteworthy efforts toward the elimination of *ad hoc* procedures in the zoning area. Those who prepared one draft of the Act well stated the problem to be solved:

"The procedures themselves are generally of an *ad hoc* nature, and

⁷¹ CHICAGO, ILLINOIS, MUNICIPAL CODE, ch. 20, §1 (1966). "a majority of said members at the time of the appointment shall be members of the Illinois Society of Architects, the Western Society of Engineers, the Chicago Real Estate Board, the Cook County Real Estate Board, the Building Managers' Association of Chicago, the Building Construction Employers' Association or the Chicago Building Trades Council . . . or shall be a citizen who has outstanding experience in zoning administration." *Id.*

⁷² The present membership of the Board has broad appeal: Greek-American, Jewish-American, Irish-American and Swedish-American.

⁷³ Anderson, *supra*, note 68 at 353.

⁷⁴ BAKER, THE LEGAL ASPECTS OF ZONING 86 (1927).

⁷⁵ See text at notes 27-33 *supra* for a full discussion of *ex parte* contacts.

⁷⁶ Two such Acts were studied:

National Conference of Commissioners on Uniform State Laws, MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 9c UNIFORM LAWS ANNOTATED 179 (1957); and A State Municipal Administrative Procedure Act, 3 HARVARD JOURNAL ON LEGISLATION 323 (1966).

the potential dangers in the delegation of such broad discretion to county (sic) and municipal agencies are of increasing concern as the changing character of American towns and cities lessens the likelihood of social pressure operating to prevent arbitrary action The protection of procedural rights . . . will only come through legislation aimed specifically at establishing general procedural requirements."⁷⁷

If *these* standardized procedures, once enacted, are constantly violated by Chicago's Zoning Board, then the time will have come for Illinois' courts to realize that they are abdicating too great a responsibility to too unresponsive a body.

If Illinois prefers to limit changes in procedural prerequisites to the zoning area, any proposed amendment to the Illinois Zoning Enabling Act must provide statutory prerequisites for the provision of an adequate record by the administrative body. Absent a record, the courts are entirely unable to exercise any control over the administrative discretion in deciding any question on appeal pertaining to the variation granted below. With its present "record" merely restating the statutory conclusions without findings of facts, the Zoning Board of Appeals has been able effectively to tie the hands of the courts, and perhaps helps to explain the courts' obvious reluctance to involve themselves in zoning administration. The stenographic recording of the proceedings in Chicago today is provided solely by the petitioners when and if they want a record. The Secretary of the Zoning Board of Appeals takes down the names of all witnesses, but very little else.⁷⁸ Any legislation in this area must provide that the Board and not the litigant will provide a full and complete stenographic record of all proceedings on the matter in question.

Another important suggestion has been the creation of a state-wide Zoning Commission that would not only establish uniform procedure throughout the state, but would also provide the situs for direct appeal from the local Board.⁷⁹ Through this "super board" device, the courts would be relieved of the burden of a type of litigation they obviously consider onerous, and men of the greatest knowledge and competence in the field could be appointed to review the decision of boards lower down the hier-

⁷⁷ *A State Municipal Administrative Procedure Act*, 3 HARVARD JOURNAL OF LEGISLATION 323 (1966).

⁷⁸ The "record" is transcribed by the Secretary in shorthand. Parties, in controversial matters before the Board, will bring their own stenographers to the hearing to fill two functions: (1) as a visible "threat" that as the party is willing to hire a stenographer, he would further be willing to pay the cost of an appeal of an adverse decision; and, (2) the court on review will have the benefit of the precise testimony of all parties, including experts, even if the Board will not. The Secretary's shorthand notations should be compared with: "The zoning board of appeals shall designate one of its employees to act as its secretary who has experience in zoning matters and who is qualified to make stenographic reports of the record of all proceedings of said board" CHICAGO, ILLINOIS, MUNICIPAL CODE, ch. 20, § 6 (1965).

⁷⁹ Babcock, *supra* note 22 at 538-39.

archy. Also, such a commission could alleviate the nuisance-oriented standing requirements now necessary in zoning matters before the Illinois courts and, thereby, allow community and civic organizations to "share the burden," so to speak, of protecting the city's land use patterns.

Perhaps, the time has come, after forty-plus years in Chicago watching the substance of zoning ordinances improve without commensurate improvement in the administration thereof, that the Zoning Board of Appeals be completely dissolved and replaced with a single, professional "zoning administrator."⁸⁰ This method, already underway in San Francisco⁸¹ and other cities,⁸² has proved successful in limiting appeals and in placing greater emphasis on the comprehensive plan-zoning relationship. The administrator would be an official of Chicago's Department of Development and Planning in charge of its Zoning Division rather than tied within the confines of the Department of Buildings. His two basic responsibilities would be: (1) administration and enforcement of the zoning ordinance as a planning function; and, (2) the hearing-deciding of petitions for variations. A three-man citizen board would then be established to review the administrator's decisions subject to the *same* limitations placed upon the administrator by the ordinance. The discretion of the administrator would be limited, as the ordinance would relate variations to the comprehensive planning process, and permit the grant of a variation *only* after a finding:

1. That strict application of the provisions of the zoning ordinance would result in practical difficulties or unnecessary hardships inconsistent with the general purpose and intent of the ordinance;

2. That there exist exceptional circumstances applicable to the property involved or to the *intended use or development* of the property that do not apply generally to other property in the same zone or neighborhood;

3. That the grant of a variation will not be materially detrimental to the public welfare or injurious to the property or improvements in such zone or neighborhood in which the property is located; and,

⁸⁰ This is not to be confused with Chicago's "Zoning Administrator" provided for in the CHICAGO, ILLINOIS MUNICIPAL CODE, ch. 194A, §§11.2-1 & 11.2-2 (1966). That appointee is solely responsible for the ministerial enforcement of the ordinance and several clerical functions.

⁸¹ For a full discussion of the San Francisco zoning operation see Fisher, *Land Use Control Through Zoning: The San Francisco Experience*, 13 HASTINGS L. J. 322 (1962).

⁸² Smutz, *Is Zoning Wagging the Dog?* AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1955, 102 (1956).

4. That the grant of a variation will not be contrary to the objectives of the comprehensive plan.⁸³

As the former Zoning Administrator in Los Angeles has stated:

"Under this system . . . there is definite fixed responsibility and a better chance of following consistent policies than under the former system . . . Zone variances are now made administrative, quasi-judicial matters handled by a full-time administrator, protected by civil service regulations. The administrator, due to this essential protection, is thus able to act impartially on the facts and merits of a case and to maintain consistent policies. Although the procedure for appeal to the board of zoning appeals does not relieve the administrator of any of his responsibility, it does provide a means of review and a safety valve that prevents criticism to the effect that the administrator is vested with too much authority."⁸⁴

As Chicago now has a Comprehensive Plan this method of preserving its efficacy might be explored.

One long-time observer of zoning administration in Chicago has commented: "Some cities die in cataclysmic disasters. In the modern world, it's much more likely that they'll die one lot at a time with the zoning officials performing the last rites."⁸⁵ This need not be the case. But the time has come for dramatic action in the area of zoning administration. Our society is not so complex that the zoning boards of appeal need continue unchecked.

⁸³ *Id.*

⁸⁴ *Id.* at 105.

⁸⁵ McMullen, *Zoning Mystery: Mayor Stands Aside*, Chicago Daily News, October 28, 1965.

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