A Research Report on the Theory and Practices of Citizen Boards of Appeals and Zoning Hearing Examiners

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EXECUTIVE SUMMARY

The County Council asked OLO to research the policy and planning theory behind a zoning board of appeals and a hearing examiner and to describe the typical duties under each approach. The Council hoped this information would help legislators decide whether a board of appeals or a hearing examiner is more appropriate to administer special exception decisions.

OLO identified three separate administrative models embedded in the origins and evolution of zoning: an administrative board composed of experts; an administrative board composed of citizen representatives; and a single expert administrator.

An expert board. The model of an administrative board of experts was envisioned by Edward Bassett, the founding father of zoning. In theory, this board was expected to hear and decide applications for variances and special exceptions, guided by clearly defined regulatory standards and procedural guidelines adopted by the legislative body. Bassett hoped the board would function as a safety valve to provide relief in cases where an applicant could demonstrate hardship created by the strict application of the ordinance.

In 1924, the federal government published the Standard State Zoning Enabling Act to promote the adoption of zoning across the country. The New York City Charter amendments were the basis for the Standard State Zoning Enabling Act. Under the New York City structure, the board of appeals was a sub-committee of a larger board of municipal administrators. The law required three of the six subcommittee members to have at least ten years of professional experience in engineering, architecture or building.

Edward Bassett played a lead role in drafting both the New York legislation and the Standard State Zoning Enabling Act. Although he referred to the board of appeals as a board of experts; language from the New York City amendments was not incorporated into the Standard State Zoning Enabling Act. As a result, the model of an administrative board of experts was never implemented and no information exists about the effectiveness of this approach.

A citizen board. As zoning took hold in the 1930's, jurisdictions established citizen boards to administer zoning variances and special exceptions. In general, jurisdictions substituted political party affiliations or special interest group characteristics for the professional or technical membership qualifications envisioned by the founding fathers. In many jurisdictions, the business community was often well represented. No theoretical justification exists for this approach because the founding fathers had not envisioned a board of citizen representatives to administer zoning law.

Local legislatures delegated to citizen boards the same duties originally envisioned for a board of experts, namely to hear and decide applications for variances and special exceptions. The research suggests local legislators established deliberately vague standards to guide the board in its decisions because the legislature purposefully intended to give the board maximum discretion. Scholars also note that ambiguous standards conveniently address the impossible task of trying to pre-regulate the uses, bulk, and height of buildings in each and every city block.

In practice, citizen boards have played a central role in the administration of a zoning ordinance. They have functioned as a jury and worked to adjust the conflicts between the imperfections of the zoning regulations and existing property interests. In this role, a balanced representation of the economic and political interests of a community has been critical to the successful function of a board.

Legal scholars and planning professionals have strongly criticized citizen boards of appeals. Early critics faulted boards of appeals for granting too many variances and undermining the comprehensiveness of the zoning system. Later studies reported that citizen boards had not operated to assure citizens equal protection or to produce a pattern of consistent, sound and articulate judgments. One study identified several procedural shortcomings that contributed to this outcome. The authors observed that the board lacked time, that it could not distinguish between trivial and substantial information, and that it could not promulgate standards for administrative decisions

An expert administrator. Montgomery County and Anne Arundel County were the first jurisdictions to establish a single expert administrator in the mid-sixties. This approach, modeled after a federal hearing examiner, was implemented in Washington, Oregon, and Indiana in the 1970's and 1980's. Most jurisdictions establish a hearing examiner in zoning administration to improve due process and the fairness of hearings.

The duties of a zoning examiner vary. In some jurisdictions, an examiner hears only land use matters; in others, an examiner may also hear personnel matters, contract disputes or ethic complaints. The authority of a hearing examiner also varies. Some examiners hear cases and make recommendations to a legislative body. Others hear and decide cases, and these decisions may be appealed to a board of appeals or a legislative body.

According to the professional literature, a hearing examiner improves compliance with the legal requirements of due process; increases the likelihood of reaching a decision based on logic instead of politics or emotion, and insures fairness and consistency through more professional and timely decisions. The disadvantages of a hearing examiner are that this approach leads to the loss of diverse views, the loss of an outsider's perspective, and the loss of a generalist's perspective. Other disadvantages are the increased cost to all parties due to the more formal decision-making procedures and the lack of accountability to the voters.

Special Exception Approval Procedures in Four Maryland Counties. In Montgomery County, special exception applications are filed with the Board of Appeals and forwarded to the Planning staff for review and a hearing before the Planning Board. Under the law, both the Planning staff and the Planning Board recommendations are forwarded for the administrative public hearing before the Board of Appeals or the Hearing Examiner. The Board of Appeals hears and decides most special exceptions. The law delegates to the Hearing Examiner the authority to hear and decide some special exceptions. The law also provides that the Board of Appeals may ask the Hearing Examiner to hear a special exception case and make a recommendation to the Board of Appeals. Decisions of the Board of Appeals may be appealed to Circuit Court.

Anne Arundel County, Baltimore County and Prince Georges County all use a professional zoning officer to hear and decide special exception petitions. In Anne Arundel County and Baltimore County, a decision of the hearing officer may be appealed to the Board of Appeals. In Prince Georges County, a decision may be appealed to the District Council.

In Anne Arundel and Baltimore Counties, the hearing examiner has the authority to hear and decide *all* development review matters, including subdivision applications, site plan applications, and variance requests. This system allows the hearing examiner to consolidate all of the required project approvals into one hearing process. In Prince Georges and Montgomery Counties, zoning and development review approvals are dispersed among the Planning Board, the Board of Appeals, the Hearing Examiner and the District Council.

I. Authority, Purpose, Scope, Methodology, Organization and Acknowledgments

Authority. FY 2000 Work Program of the Office of Legislative Oversight, County Council Resolution 14-242 adopted August 3, 1999.

Purpose. The purpose of the study is to provide the Council with a better understanding of administrative models for approving special exception petitions. The County Council asked the Office of Legislative Oversight (OLO) to research the theory of a citizen board of appeals and a professional hearing examiner and to describe the typical duties of each. The Council hoped this information would help legislators decide whether a board of appeals or a hearing examiner is more appropriate to administer special exception decisions.

Scope. This study is an academic inquiry into the origins of zoning and zoning administration practices. This study presents the outlines of zoning governance in four Maryland counties and describes the special exception decision structure in each jurisdiction.

This report focuses on the theory of zoning administration, general administrative practices, and special exception approval procedures. This study does not examine the scope or adequacy of each County's special exception laws, the pattern of special exception approvals, or the procedures to modify, revoke or enforce approved special exceptions.

This study does not evaluate the practices of the Board of Appeals or of the Hearing Examiner in Montgomery County and does not recommend changes to the administration of special exceptions in Montgomery County. An in-depth review of cases and an analysis of the pattern of special exception decisions would be required to identify specific problems and to draw conclusions about the effectiveness of one administrative approach or another.

Methodology. OLO conducted an academic and professional literature review to find the theoretical reasons in zoning for an administrative lay board and a professional hearing examiner. OLO relied on law review articles and professional planning studies to document the practices of each administrative approach. OLO consulted local ordinances and conducted telephone interviews to understand the hearing examiner's role in the special exception approvals in the selected Maryland counties.

Organization. This report has six chapters and four appendices.

- Chapter II explains the current structure of the special exception approvals in Montgomery County.
- Chapter III presents the role of the Board of Appeals in theory and practice.
- Chapter IV examines alternative proposals for zoning administration.

- Chapter V traces the origins and use of a hearing examiner in zoning administration.
- Chapter VI describes the role of the hearing examiner in the special exception decision processes in Anne Arundel, Baltimore, and Prince Georges counties.

The appendices provide important information to supplement this study.

Appendix A responds to the Council's request to research the historical origins of a citizen's administrative board. The appendix describes the historical setting for zoning's origins and reports the details of four milestone events.[1] This information is important and instructive for at least three reasons. First, the research shows that no historical justification for a citizen's board of appeals exists because the zoning board of appeals was originally established as a sub-committee of a municipal board of professional administrators. Second, the stories about the adoption of zoning ordinances illustrate how the forces of reform and racism helped zoning to succeed in both the cities (New York) and in newly incorporated, emerging suburbs (Euclid). Finally, these events identify some of the inconsistencies embedded in zoning that shape many current expectations and debates.

Appendix B summarizes information about the practices of the Lexington-Fayette County Board of Appeals from a study by Jesse Dukeminier and Clyde Stapleton. This analysis is useful because the authors identify specific characteristics of this board's practices. The authors report that the board frequently did not follow the law applicable to variances and that other factors usually influenced the decisions. These factors included: who the petitioner was; opposition to the petition; and the persistence of a petitioner.

Appendix C reports on the experience with a hearing examiner in Indianapolis and Seattle. This summary illustrates how citizen zoning boards have persisted and survived, despite decades of criticism from legal scholars and planning professionals.

Appendix D is a memorandum from the Office of the County Attorney for Montgomery County that describes the legislative history of special exceptions and the development of the law of special exceptions in the courts.

Acknowledgments. This study was conducted by Sue Richards, Program Evaluator. OLO would like to acknowledge the contributions of Donald Spence, Chair of the Montgomery County Board of Appeals; Philip J. Tierney, former Montgomery County Hearing Examiner; Martin Klauber, People's Counsel for Montgomery County; Tedi Osias, former Executive Secretary of the Montgomery County Board of Appeals; and the Hearing Examiner offices in Anne Arundel, Baltimore and Prince Georges Counties.

[1] The events are: the adoption on New York City zoning legislation in 1916; the lobbying effort to gain nationwide acceptance of the New York City approach, the federal government's distribution of the Standard State Zoning Enabling Act in 1924, and the Supreme Court decision in the Euclid v. Ambler case in 1926.

II. An Overview of Zoning Governance, Special Exceptions and the Special Exception Approval Process in Montgomery County

Land use decisions determine the quality of life of individuals, neighborhoods, and regions. Governments regulate the use of land to further the public health, safety, and welfare of a community. The "basket" of land use controls typically includes the master plan, a zoning ordinance, subdivision regulations, and the building code.

An Overview of Zoning Governance Structure. Zoning is an exercise of the state police power that is implemented locally. The state government creates local governments and places limits on the scope of local government's zoning authority. The state government enables local government to control the use of land by delegating powers in enabling legislation.

In most jurisdictions, the primary decision-making bodies that administer zoning are a legislature, a zoning board of adjustment or board of appeals[2], and a planning board. Typically, a local legislative body exercises the most important role in land use control. In most jurisdictions, a council has the authority to:

- Adopt and amend the zoning ordinance, the zoning map, subdivision regulations, site plan controls and special permit provisions;
- Establish and decide what authority to delegate to agencies such as a planning board, a board of appeals, or a hearing examiner; and
- Adopt and amend the comprehensive plan of the community to articulate land use policy to guide and direct the deliberations and decisions of these bodies.

A local legislature may establish a planning board as a purely advisory body or as an advisory body with certain administrative functions. A local legislative body may delegate to a planning board the following activities:

- Prepare draft master or sector plans;
- Review and comment on specific requests for changes to the zoning ordinance;
- Review and comment on specific requests for zoning reclassifications;
- Review and comment on applications for special exceptions;
- Review and approve site plan and subdivision applications[3]; and
- Review and comment on the adoption of a capital budget.

A local legislature may establish a zoning board of appeals as a quasi-judicial board. A council may delegate to a board of appeals the authority to hear and decide applications for special exceptions, variances and waivers, and to hear and decide appeals from decisions to administer the zoning ordinance and building codes.

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[2] The name varies from one jurisdiction to the next. This study will use the term Board of Appeals.

[3] In Montgomery County and Prince Georges County, the state delegates this power through the Regional District Act.

Zoning Governance Structure in Maryland. Governmental regulation of land use in Maryland is derived from the police power of the counties and municipalities, as authorized by the Maryland State Constitution and the Acts of the Maryland General Assembly.

The county forms the basic unit of local government in Maryland and the four counties in this study, Anne Arundel, Baltimore, Montgomery and Prince Georges, are all charter home rule counties. Charter counties are created when the registered voters of the county adopt a charter. In a charter county the county council has legislative authority expressly delegated by the General Assembly to enact laws on a broad spectrum of subjects. The following state laws structure planning, zoning and subdivision powers in Maryland.

- Article 25A and Article 25B give charter and code home rule counties planning and zoning authority. These laws generally authorize charter counties to "enact local laws relating to zoning and planning..." and to establish Boards of Appeals to hear and determine zoning variances, special exceptions, and other matters. These local laws must also be consistent with Article 66B of the Maryland Code.

- Article 28, the Regional District Act, establishes a bi-county agency (the Maryland-National Park and Planning Commission) to co-ordinate planning, zoning, and park administration in Montgomery and Prince Georges counties. The 10-member Commission consists of two county planning boards. Each board separately prepares master plans, acts on subdivision and site plan applications, and advises its county government on other planning and land use issues.

An Overview of Special Exceptions. The term "special exception" refers to certain uses in a zoning ordinance that are permitted, subject to specific conditions of approval. A special exception approval allows local lawmakers to consider uses which may be essential or desirable to a community but which zoning controls do not permit as a matter of right.

Purpose. At its inception, zoning separated uses into single use districts, reflecting the belief that the strict separation of uses was necessary to protect the public health, safety, and welfare. Since this approach excluded a variety of uses historically associated with one another, e.g. a church in a residential neighborhood, lawmakers achieved diversity by adding special uses to those uses permitted by right.

As zoning evolved, lawmakers expanded the use of the special exception to control certain uses that could have a detrimental impact on a community. Legislators used the special exception permit to balance the adverse effects of a use against the public benefits and the rights of a property owner. (In a few jurisdictions, lawmakers used special use permits for large projects to provide a stricter level of review.)

Authority and rules. State statutes, case law and local zoning ordinances typically provide the rules under which special exceptions may be approved. State statutes typically define a special exception permit, empower the local legislative body to authorize a local agency to grant such permits, allow conditions to be attached to them, require public hearings before making a decision, require compliance with environmental review provisions in state law, provide for filing of decisions, and allow review of a decision by the courts.

The authority to grant or withhold a special exception permit is a delegated power. If the local legislature reserves the power to grant a special exception permit, the special exception regulations in the zoning ordinance may be broad and phrased in general terms.

If lawmakers delegate the power to grant special exception permits, the legislature must specify a decision board and adopt standards for the delegation to be valid. A local legislature typically authorizes a planning board, a zoning board of appeals, a zoning administrator, or other local administrative body to conduct a public hearing and decide a special exception application. In this case, the approval of a special exception is typically an administrative, quasi-judicial act.

Standards. The issuance of a special exception permit involves a project specific change in the uses allowed on a specific property. It applies the provisions of the zoning ordinance and zoning standards to a specific set of circumstances, which characterize the proposed use. It does not require a change in zone and it does not involve the establishment of new codes, regulations, or policies.

The legislature must adopt standards to guide the review, approval, and conditioning of uses. The standards that must be enumerated vary from one place to another; however, the general standards ensure the protection of the public interest and consistency with the general plan. There may also be standards that are specific to a special exception use. These standards guide the board in placing conditions on the operation of a specific special exception use. The types of standards may include:

- a general welfare standard,
- a nuisance standard,
- a general plan consistency standard, and
- a zoning consistency standard.

Procedures. The procedures for deciding a special exception permit usually consist of public notice, a public hearing patterned after a trial, and a written opinion with findings of fact and conclusions of law. The hearing provides an opportunity for the decision-maker to hear and consider the opinions of the proponent and nearby property owners before making a decision.

Judicial Review. The decision to reserve or delegate the power to grant a special exception not only determines whether a decision is considered quasi-judicial or legislative but also affects the scope of review by a court. If a decision is legislative, then a court's review is based on whether the decision bears a relationship to the public health, safety and welfare. If a decision is quasi-judicial, then judicial review is:

- allowed only after administrative remedies have been exhausted;
- limited to the record; and
- limited to a determination of whether the action was illegal, arbitrary or abuse of discretion.

The Special Exception Approval Process in Montgomery County. Montgomery County has an elected County Executive and an elected County Council. Five of the Councilmembers are elected at-large and four are elected by district. Zoning and planning powers in the County are governed by Article 28 of the Maryland Code, which establishes the Maryland-National Capital Planning Commission (M-NCPPC). The M-NCPPC is a ten-member body composed of the two separate planning boards for Montgomery and Prince Georges counties.

The District Council appoints the five members of the Montgomery County Planning Board, the five members of the Montgomery County Board of Appeals, a Hearing Examiner[4], and a People's Counsel.

The Special Exception Process. The authority to hear and decide special exceptions in Montgomery County is shared among the Board of Appeals, the Hearing Examiner, and the District Council. The Montgomery County Zoning Ordinance, Section 59-G-1.11, delegates to the Board of Appeals the general authority "to grant petitions for special exceptions" as authorized in Section 59-A-4.1[5] In practice, the Board of Appeals hears and decides the majority of special exception petitions.

[4] The Office of Zoning and Administrative Hearings administers public hearings in certain land use matters in a manner that protects the due process rights of participants and the public interest. The hearing examiner conducts hearings and makes recommendations for local map amendments, development plan amendments, and some special exceptions. The hearing examiner also takes referrals from the Board of Appeals, the human relations commission, and the merit system protection board.

[5] Section 59-A-4.11 of the Zoning Ordinance authorizes the Board of Appeals to hear and decide special exceptions, variances, administrative appeals, appeals regarding property affected by highway master plans, public nuisance petitions, and appeals from the Sign Review Board or the Director in administering the sign ordinance. Section 59-A-4.12 gives the Board of Appeals the power to compel the attendance of witnesses at hearings, requires a quorum of three members to act, and requires the board to act by written resolution. The law empowers the board to request technical assistance from the planning commission and the county government.

When a petitioner files an application with the Board of Appeals, the Zoning Ordinance gives the Board of Appeals the option of conducting its own hearing or requesting that the hearing examiner conduct a hearing.[6] Generally, the Board of Appeals conducts its own hearings. In these cases, the Board of Appeals sets a hearing date and forwards a copy of the application to the Planning staff of the M-NCPPC. The Planning staff prepares a written staff report and presents its report to the Planning Board in a public meeting. The Planning Board makes a recommendation on the proposed petition and forwards the Planning Staff's report and recommendation and the Planning Board recommendation to the Board of Appeals.

The Board of Appeals conducts a hearing for a special exception according to the Rules of Procedure for the Board of Appeals, adopted by the County Council. Applicants and supporters of a petition present their case, followed by the opponents. Each speaker is subject to cross-examination. Groups are encouraged to designate a spokesperson. Rebuttal witnesses are permitted after each side has been heard. Each side is also permitted a closing statement. Whenever possible, the Board of Appeals decides a case immediately after the close of a hearing. If a case is complicated or lengthy, the Board may defer a decision until after a worksession. The Board must mail an opinion within 30 days after the record is closed. Decisions of the Board may be appealed to Circuit Court.

The Zoning Ordinance, Section 59-1.12, authorizes the Hearing Examiner to hear and decide some special exception petitions "in addition to the authorization given to the county board of appeals." The Zoning Ordinance grants this authority for seven use categories.[7]

The Zoning Ordinance requires the Hearing Examiner to hold a public hearing before making a decision and to provide notice in accordance with the same requirements for special exceptions that are heard by the Board of Appeals. The Zoning Ordinance states that the decision of the Hearing Examiner should be based on the evidence presented at the hearing. The decision should be in writing and contain a statement of the grounds and findings on which it is based.

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[6] Section 59-A-4.125. Hearing examiner. states "Upon request of the board of appeals and with the approval of three of its members, the hearing examiner's office shall have the functions and duties of scheduling and conducting public hearings and rendering written reports and recommendations to the board of appeals on specific matters pending before the board. The county board of appeals shall have the sole authority to render a decision upon the merits of such petitions for special exceptions or other cases referred to the office by the board."

[7] The categories are (1) Boardinghouses for 3 guests or fewer in the R-30, R-20 and R-10 zones; (2) Home occupations in the R-30, R-20 or R-10 zones; (3) Noncommercial riding stable for not more than two horses, for personal or family use in the RE-2 zone; (4) Temporary structures in residential zones; (5) Renewals of temporary special exceptions originally granted by the board, director or hearing examiner for boardinghouses, and home occupations; (6) Farm tenant mobile homes for more than one but less than four; and (7) Child day care facilities for up to 30 children.

A petitioner may appeal the decision of the Hearing Examiner to the County Board of Appeals, which reviews the decision on the record compiled by the Hearing Examiner. The Zoning Ordinance authorizes the Board of Appeals to hear oral arguments. The Board may affirm, reverse, or modify the Hearing Examiner's decision or remand the matter for further proceedings.

The Zoning Ordinance gives the District Council sole authority to decide special exception requests for cemeteries and family burial sites. In these cases, the Zoning Ordinance delegates to the Hearing Examiner the authority to conduct a hearing and issue a written report with recommended findings and a decision with conditions of approval.

In 1999, the County Council enacted Bill 14-99 to allow the Council to employ a People's Counsel as a term merit system employee. The purpose of the People's Counsel is to increase public confidence in the County land use process. The People's Counsel may participate in special exception proceedings before the Board of Appeals, the Hearing Examiner, or the County Council. The People's Counsel must file a notice of intent to participate. After this notice is filed, the People's Counsel is entitled to all notices and may participate by making motions, introducing evidence, and calling witnesses. The People's Counsel may file and argue an appeal, the same as any other party to the proceeding.

III. The Role of the Board of Appeals in Theory and Practice

Zoning's founders expected the administration of zoning law to operate as a simple, self- regulating system with a minor role for the Board of Appeals. Richard P. Fishman described the intended operations as follows:

> The zoning ordinance was to be a neutral tool for implementing the master plan. It was to be largely self-executing and therefore would need little administrative machinery. A building inspector would review all applications for zoning (use) permit. Individual applications would be compared with regulations. If the application did not fit the specifications, the permit would not be issued. In unusual instances, in which this system of non-discretionary review might be inadequate, the Standard Zoning Enabling Act provided safeguards through the use of special exceptions, variances, and rezonings.[8]

The Board of Appeals was charged with administering the special exceptions and variances to supplement the simple administrative machinery the law required. Early practitioners applauded the concept of an administrative board. They especially

[8] American Bar Association and Advisory Commission on Housing and Urban Growth, *Housing for All Under the Law: New directions in housing, land use, and planning law*, Richard P. Fishman, ed. Ballinger Publishing Company, Cambridge, MA, 1978, p. 44.

welcomed the public access it provided. In 1924, the ABA Journal published an article lauding this innovative arrangement. The authors predicted that the public forum would help protect zoning administration from the influence of special interests.[9]

The Board of Appeals in Theory. In 1936, Bassett published *Zoning: The Laws, Administration, and Court Decisions during the First Twenty Years*.[10] In this book, Bassett reviewed early court cases and described his expectations for the composition, operations, and practices of the Board of Appeals. The excerpts below provide some insights into the theoretical underpinnings of the Board of Appeals.

Bassett reported there was value in establishing a Board of Appeals because a municipality "furnishes a forum where an applicant can be heard who thinks he should be allowed some amelioration of the strict letter of the law." He observed that the board "is presumed to be composed of experts" and reported that the courts have called the board an administrative or quasi-judicial body. He noted in this capacity "It cannot make laws. Its main function is to make variance permits in exceptional cases, subject to court review."[11]

Bassett expected the Board of Appeals to exercise substantive discretion at its review of each variance but to conduct its review within certain procedural limits. As he described it:

> Each variance must stand on its own feet. No two cases are exactly alike. Accordingly, the Board of Appeals should not in every case follow an established system of precedents. A decision is not justified because it follows a prior decision on what was apparently the same environment. Courts uphold the Boards of Appeals in discriminating the merits of each case and do not criticize them because two instances apparently the same are decided differently.[12]

In the exercise of this discretion, however, Bassett stated the Board of Appeals was not left free to make any determination that it may prefer. It must comply with the rules of conduct prescribed by the state legislature or by the local legislature acting under a directive or permission from the state legislature. Bassett also established a high threshold for the Board of Appeals to grant a variance in response to a hardship case, suggesting that a vote to grant a variance "should be greater than a mere majority." He explained:

> Inasmuch as exceptional situations come only before a board of appeals, there is always a presumption that the applicant, like all other citizens, should observe the strict letter of the zoning ordinance. Therefore, if an exception is to be made, the

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[9] The authors stated "In view of the great publicity provided for, and the numerous opportunities afforded for expression of public opinion, it seems extremely unlikely that any special interests could influence the zoning authorities to enact changes which would benefit only a small group of persons." Quoted by Seymour Toll, *Zoned American*, Grossman Publishers, New York, 1969, p. 209.

[10] Russell Sage Foundation, New York, 1936, Chapter 6.

[11] Bassett, p. 121.

[12] Bassett, p. 123.

vote of the board should be greater than a mere majority. In other words, an applicant desiring an exception should be able to convince a large portion of the board. State enabling acts usually provide for this.[13]

Finally, Bassett expected the Board of Appeals to be controversial and to make mistakes. However, he believed the values of maintaining the integrity of a zoning plan and of customizing an "iron-clad" ordinance to fit special situations outweighed "an occasional wrong decision." He wrote:

> Complaints will always be made against boards of appeals and probably such boards will always abuse their discretion once in a while. If, however, a city administration is not able to establish a competent board of appeals, it probably is not able to administer a zoning ordinance fairly.
>
> An occasional wrong decision by such a board is of less importance to the community than the unrelieved arbitrariness of an iron-clad ordinance. ... A board of appeals should be able to ameliorate the exceptional instances wherein alone lies the danger to the entire zoning plan. These cases demand the most careful attention for the integrity of the zoning plan under the police power, as the courts have repeatedly pointed out, depends on its reasonableness and a zoning regulation is not reasonable if it is arbitrary.[14]

Early Criticisms of the Board of Appeals. History shows the initial optimism of the American Bar Association was short-lived and that "in many jurisdictions, theory and practice on boards of adjustment parted early."[15] By 1927, a reform group in New York City was demanding a purge of the Board of Appeals. That same year, E.T. Hartman, Executive Secretary of the Massachusetts Federation of Planning Boards, observed:

> I think the most critical point in regard to the whole zoning scheme lies in board of appeals administration, where a board assumes the power to vary the law to suit itself, and where... personal interest, favoritism, politics and cash affect the opinions of members of boards of appeals, no law will produce satisfactory results.[16]

In *Zoned American*, Seymour Toll concluded "the twenties were years which not only produced zoning in hundreds of American cities but also a standard technique for subverting its administration.... Before the (twenties) were over there were serious signs

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[13] Bassett, p. 125.
[14] Bassett, p. 130.
[15] Frederick H. Bair, *The Zoning Board Manual*, American Planning Association, Washington, D.C., 1984, p. 13
[16] Quoted in Bair, p. 14.

that the zoning board of adjustment was in danger of becoming a latter-day version of the municipal bodies which the infinitely ingenious formula of money and politics had corrupted earlier in the century." [17]

The Board of Appeals in Practice. This section describes the operations of a Board of Appeals in practice to understand how the operations of a typical board differ from Bassett's original vision. The beginning of this section explains the purpose, function, and operations of a board of appeals in practice. The second half presents findings and observations from legal studies of two Boards of Appeals conducted in the early sixties.

Purpose. According to Robert Anderson, a legislative body achieves many purposes by delegating discretionary power to a public board, such as a board of appeals. Some of these purposes are common to other systems of law enforcement. They are to:

- Safeguard the rights of property owners;
- Avoid the arbitrary use of police power; and
- Ensure fair application of the regulations (to help enhance the popularity of the law).

Other purposes for delegating power to Boards of Appeals are peculiar to zoning. They are to:

- Keep zoning regulations out of courts;
- Avoid the need for minor amendments to go to a legislative body; and
- Perfect regulations through the exercise of administrative discretion.

In the introduction to a study of the Syracuse Board of Appeals, Anderson explains how the Board of Appeals as an "expert administrative board" "was expected to keep zoning out of the courts and how the board was expected to keep zoning out of the hands of the legislators." He states, "The early pioneers were concerned that if hardship cases were not disposed of on an administrative level, decisions against zoning would multiply and this instrument of land use control would be destroyed."[18] The pioneers believed the purpose of zoning would be frustrated unless cases, which reached courts, did so on the record before an "expert administrative body."

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[17] Toll continues, " ...If all that had happened was the corruption of public office, it would have been historically monotonous business. American municipal villainy did not have to wait upon zoning to find its first expression. The original feature of this particular bit of malfeasance was its imposition upon what was supposed to be an initial and important effort to make a planning device into an American legal institution. Both business and political decision-makers in a great American city were profoundly indifferent to even the most modest efforts at using law to help the city grow intelligently. In such an environment, it is all that planning can do to stay alive, let alone prosper." p. 207.

[18] Robert M. Anderson, "The Board of Zoning Appeals – Villain or Victim?," *Syracuse Law Review*, Vol. 13 No. 3, Spring, 1962, p. 356.

Anderson stated that the early pioneers' mistrust of the courts was equaled by a lack of confidence in the local legislature. The founders envisioned legislators who would enact numerous destructive amendments unless they could be forestalled by administrative relief of hardship cases. Thus, the board of appeals was expected to amend zoning regulations by modifying the application of regulations to specific cases. This approach would be more expeditious for a landowner and safer for those concerned with protecting the integrity of the community plan because it minimized the need for legislative changes or opportunities for legislative meddling.

Jurisdiction. The jurisdiction of a board of appeals is established in state enabling legislation and by a legislative body in local zoning law. Typically, local legislators grant a board of appeals jurisdiction over administrative appeals, variances, and special exceptions. Zoning ordinances usually define administrative appeals as appeals from the decision of a building official or building inspector. However, the definitions of the terms "variance" and "special exception" differ from one state and one ordinance to another. As a result, the jurisdiction or authority a legislature grants to a board of appeals varies from place to place.

In the broadest sense, enabling legislation may define a variance to mean the authority to vary *any* zoning regulation. Thus, in some ordinances a board of appeals may grant a use variance to permit a use that is otherwise not permitted in the zone, or an area variance to change a setback or height requirement. In other places, a variance is defined more narrowly as an amendment only to the bulk, height or setback regulations of the ordinance. In these cases, the authority to grant a variance allows a board to alter only the physical requirements in the ordinance.

A board of appeals is typically authorized to hear and decide special exceptions or special use permits. Again, definitions of these terms in local zoning law vary widely. Many ordinances define a special exception as a use permitted in a specified district if certain conditions are met. In other instances, however, an ordinance may also define a special exception as "any use in a specified jurisdiction when authorized by the Board of Appeals." The first definition limits the jurisdiction of the board of appeals to approve only uses previously identified by the legislature in the ordinance. The second definition gives a board jurisdiction to exercise very broad, discretionary powers.

Standards. A local legislative body cannot delegate its power to vary the application of zoning regulations to an administrative body without adopting standards to guide the board and provide a basis for judicial review.

Early zoning law and zoning enabling legislation was written by committees with diverse opinions as to what the terms should mean. On matters relating to boards of appeals, doubts about how far zoning could or should go produced language that leaves plenty of maneuvering room. As a result, state enabling legislation contains general, vague standards. In New York, for example, these standards limited the exercise of power to cases where strict application of the ordinance would result in "unnecessary

hardship" or where the requested relief would "observe the spirit of the ordinance, secure the public health, safety and welfare, and achieve substantial justice." The draftsmen purposefully designed these standards to give the board maximum discretion, believing that stricter or more detailed standards were neither desirable nor feasible.

Judicial review of these standards has varied. In early zoning cases, courts held these standards were too vague and that the delegation of power was invalid. Most jurisdictions held the standards to be sufficient and the courts undertook to establish specific rules. Over time, court decisions have interpreted the vague language in the enabling legislation resulting in standards that delineate the power of a board to grant a variance.

Personnel. In theory, Edward Bassett presumed a board of appeals would be composed of experts. Scholars believe this view originated from language in the New York City Charter that required some members of the board of appeals to have training relevant to their tasks.[19] Scholars are not able to document why this language was not included in the New York zoning enabling acts or the Standard State Zoning Enabling Act.

In practice, most cities have eliminated any technical qualifications in favor of the more democratic "anybody can join" approach. Enabling legislation typically specifies the number of members and the appointing authority without any further membership qualifications. In some cities, legislators have enacted qualifications so that members represent special interest groups. In these instances, members are not equipped to handle zoning as impartial experts but they know what they want zoning to accomplish.[20]

Function. In theory, a board of appeals functions as "a device to avoid constitutional problems which might occur when broad, general regulations impose severe hardship on an individual landowner." A board exercises this function by granting a variance when an applicant demonstrates that the zoning law has created an "unnecessary hardship." In general, a board was not meant to function as a device to achieve flexibility. It was also not meant to modify the standard for granting a variance from one of "unnecessary hardship," to one of "insubstantial harm."

In theory, a board of appeals, unlike a planning commission, does not set broad planning policy. Instead, it makes policy "interstitially" by deciding individual cases within a framework of laws and regulations constructed by others. A board is not free to decide cases based on its own notions of what might be desirable. Rather, the function of a board of appeals is to recognize the limitations of its powers and to develop and apply techniques to assure citizens equal protection of the law.

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[19] See Appendix A, page A-5, for a description of the governance structure in the New York charter amendments.

[20] Anderson's study in Syracuse found that commonly the business community furnishes a majority of members. He observed that a board may include an attorney or a realtor, and most boards have one or more female members. 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.

However, in practice, the departure in membership requirements from an "expert administrative body " has affected how a board functions. As Robert Anderson explains:

> The apparent assumption is that common sense and some knowledge of the community are all that is needed in this service. 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 that the essential quality of the membership is a balanced representation of the principal economic and political interests of the community.[21]

Observations about the Role of the Board of Appeals in Practice. In the early 1960's, legal scholars conducted studies that described the operations of specific boards, and reported the practices and decision patterns of these boards based on a review of actual cases.[22] These studies assessed how well a particular board of appeals fulfilled its functions based on an understanding of the law and a review of case decisions.

Jesse Dukeminier and Clyde Stapleton's study of the Lexington-Fayette County Zoning Board of Adjustment in Kentucky documented poor procedural practices and an inconsistent pattern of decision making, based on a review of 167 cases over a 17-month period.[23] The Dukeminier study concluded that the Lexington Board "has not operated to assure citizens equal protection ... and ... has not produced a pattern of consistent, sound and articulate judgments." [24] The study also found the operations of the board "have not assured the public that the comprehensive plan is not being thwarted by overuse of the variance device."[25]

The practices of the boards in these studies clearly do not represent the operations of every board. These studies are useful, however, because the scholars who have studied the decisions of a specific board understand how the practices and decisions of a board of appeals fit within an overall zoning governance structure. The authors recognize that the board of appeals plays a central role in the administration of zoning. They also recognize the structural weaknesses inherent in zoning governance. Finally, they credit the board for stepping forward to make decisions in a legal structure with few guidelines, framed by unrealistic expectations.

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[21] Anderson, p. 358.

[22] Note, "Zoning Variances and Exceptions: The Philadelphia Experience, 103," *U. Pa. L. Rev.* 516 (1955); Babcock, "The Unhappy State of Zoning Administration in Illinois," 26 *U. Chi. L. Rev.* 509 (1959); Note, "The Granting of Variances from the Zoning Ordinance by the Lexington-Fayette County Board of Adjustment," 45 *Ky, L.J.* 496 (1957).

[23] Jesse Dukeminier, Jr. and Clyde L. Stapleton, "The Zoning Board of Adjustment: A Case Study in Misrule,"" 50 *Kentucky Law Journal* 322 (1962), p. 274. See Appendix B for a description of the operating characteristics of the Lexington Board that contributed to its poor functioning.

[24] Dukeminier and Stapleton, p. 322.

[25] Dukeminier and Stapleton, p. 322.

The Lexington Board of Appeals. In their study of the Lexington Board, Dukeminier and Stapleton concluded that under the structure of Euclidean zoning nobody legally has power to make "individual discriminations" in the context of a given locale based upon rational planning considerations, and to permit development accordingly. They found that the Board of Appeals, under pressure from applicant after applicant, has assumed this power despite the lack of procedural guidelines or safeguards.

The authors reported that they identified several procedural shortcomings during their observations of the Board's proceedings and practices. Specifically, they found:

- Planning considerations did not receive careful evaluation.
- The Board did not have the expertise to know what was trivial and could be disposed of quickly and what was substantial and required close examination.
- The Board lacked time.
- The Board could not be honest and articulate about reasons for a result.
- The Board could not promulgate standards for administrative decisions because that would be illegal.

The authors concluded, "While the Board has moved from adjudication to a vital strategic position in the administration of the zoning ordinance, this has not been accompanied by a rationalization of techniques. We now have flexibility it is true but without any real check on responsibility or any benefit of expertise or any articulation of the true rules of the game." [26]

The Syracuse Board of Appeals. In a similar study of the Syracuse Board of Appeals, Robert Anderson found the Board of Appeals had done the best it could to fulfill its responsibilities. He characterized the unrealistic expectations embedded in the structure of zoning governance in introductory remarks to his study. He observed:

> In short, when zoning was new, its most vigorous advocates were aware of its inherent imperfections, its doubtful institutionalization, and its imperfectly understood terminology. In spite of these problems, they detected a need for controlling land use, which was so urgent as to demand enactment of zoning regulations. The Board of Appeals was created to interpret, to effect and to ensure the validity of zoning. And it was expected to accomplish these things by deciding the hard cases, by articulating new techniques and concepts, and by building records which would display zoning in a favorable light when the cases reached the courts. If the Board of Zoning Appeals had achieved these ends, they would have brought about a legal miracle. The task would have challenged an experienced jurist aided by a task force of technicians. It is not surprising that lay boards, functioning with a minimum of legal or professional help, have neither accomplished all of these objectives nor pleased the lawyers, planners, and litigants in the course of their efforts.[27]

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[26] Dukeminier and Stapleton, p. 349.
[27] Anderson, p. 357.

Anderson also summarized the important responsibilities assigned to a Board of Appeals, how they have fulfilled these tasks, and how these decisions have been received by others in the zoning process.

> Since zoning began, boards of zoning appeals have occupied an uncomfortable position in the center of the struggle between property owners and the state. The task of perfecting crude regulations and preventing the serious inequities which might flow from a literal enforcement of such regulations was assigned to these boards. The power to achieve these ends was delegated in broad language sufficient to enable boards to relieve, adjust and amend. But the courts have construed these powers so narrowly that the boards legally can effect only minor adjustments, relieve only major hardships and are without power to grant relief which may be construed as an amendment of the regulations. In short, where court decisions are respected, the board possesses very limited powers.
>
> During the early years, the boards were expected to accomplish a major task with minor tools. These administrative bodies were composed of citizens with a minimum knowledge of law or municipal planning. Conversant with the demands of their communities if not with the niceties of legal construction, the boards defined their own powers in terms of their practical estimates of local needs. This process of redefinition, clearly observable in the Syracuse decisions, achieved for the boards a freedom from formal legal restraint, and generated the decisions which have been the target of most criticism of board behavior. Thus, the decision making process is so erratic as to be unpredictable on the basis of established judicial standards. This is disconcerting to lawyers, losing litigants, and others concerned with the orderly disposition of disputes. In addition, the boards have gained a strong if not a decisive voice in the development of planning policy. This distresses the professional planners and the citizen planning boards who conduct studies and draft legislation only to see their work distorted by board decisions which endorse privately devised plans which ignore the studies and bypass the legislation.[28]

IV. Overview of Alternative Proposals for Zoning Administration

OLO's review of the professional literature identified a range of solutions to address the weaknesses in the operations of the board of appeals. The options include:

- Keep a lay board and give it more technical support;
- Keep a lay board and limit its powers;
- Replace a lay board with a board of experts; or
- Replace a lay board with a hearing examiner.

[28] Anderson, p. 386.

Keep a Lay Board. Alternative proposals for zoning administration turn on the question of whether zoning decisions are primarily driven by information or values. The founders of zoning anticipated that the decisions would be based on information and data. The history of zoning suggests that data is never complete and that decisions are ultimately based on community values. Seymour Toll, making the argument that zoning issues are ultimately political decisions, states:

> In last analysis, the large questions in zoning were not informational or technical but in the highest sense political. Every one of them eventually went, not to the meaning of facts, but to issues of political judgment. Once the power of law is acquired, what is to be done with it. The answers do not lie in the same realm as those which describe the rhythm of the cosmos or the structure of the atom. In matters of urban planning, value judgements were at the center. Microcosms like the Manhattan skyscraper and Fifth Avenue revealed enough of the urban process to teach the fact hunter that no amount of information would generate the best solution. Indeed, information often seemed to have nothing to do with how decisions got made.[29]

Proposals to keep a lay board reflect the role of values in weighing land use decisions. These options focus on improving the selection, training, staff support, and oversight of a lay board.

Some reformers advise that legislators should emphasize the careful selection and training of members of the board. The assumption is that if a board of appeals is to be vested with delicate jurisdiction, and if decisions are to be accorded the respect given to expert bodies, then members should have some concept of jurisdiction and some claim to expertise.

In the same vein, others suggest legislators give the board maximum guidance through standards and criteria contained in the zoning ordinance concerning how its powers should be exercised. For instance, an applicant's burden of proof can be spelled out or the board should be informed about what must be demonstrated before a special exception may be properly granted. However, such an approach would depart from the pervasive trend that has meant that boards adhere to the standards or requirements contained in judicial decisions.

The board should also be provided with adequate legal counsel so they know what courts have found to be legal and illegal. Part of this direction should come from the zoning ordinance; another part should come from ongoing education. Other options suggest legislators require a board to consider an expert opinion, provide a tie to the local planning department (usually through staff support), or include an ombudsman (e.g. people's counsel) in the process to grant a variance.

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[29] Toll, p. 206.

Another area of focus for those who believe in the value of a lay board is to fix the regulations that the board must follow. Zoning ordinances are frequently vague, confusing, and inconsistent. As a result, they provide little useful guidance or support to a board in the execution of its duties. An alternative approach has been to replace restrictive standards with performance standards.

Reformers also suggest that the weaknesses of a lay board could be addressed by improving a board's procedures and administrative practices. Some specific suggestions include enacting uniform procedural rules and tightening up procedures and/or using decision forms that require each board member to record facts supporting his findings.[30]

A final area of emphasis for those who support a citizen's board is to improve legislative oversight of the board. In *The Zoning Board Manual*, Frederick Bair highlights the fact that the Standard Zoning Enabling Act put the legislature in charge of the administrative board. He believes this structure has been overlooked and suggests that legislatures should exercise their oversight more often.

Keep a lay board with limited powers. A second group of reform proposals suggests keeping the board of appeals but reducing its jurisdiction. Many of these proposals focus on the authority of a board to grant use variances. In some places, the courts have addressed this issue by declaring a use variance invalid. In other places, reformers have proposed transferring special exception decisions to the planning commission. The rationale for this approach is that the planning commission is in a better position to deal with special exceptions because it has a better understanding of the policy issues and more staff support.

Replace a lay board with a board of experts. This approach returns to the structure originally envisioned to administer the zoning ordinance. A board of experts would maintain diverse points of view but also contribute a level of expertise that is missing from the current structure.

Replace a lay board with a single administrator. This option replaces a board of appeals with a trained zoning examiner or an administrative lawyer. Proposals differ regarding whether the appeal from an administrator's decision would go to a Board of Appeals, the local legislative body or a statewide board of appeal. The next chapter examines this approach in detail.

[30] The use of a decision form with written findings could (1) Help direct the board members' attention to relevant factors and discourage the introduction of legally irrelevant but influential evidence; (2) Clarify what has occurred at the board level and make it easier to identify and correct problems through judicial or administrative review; (3) Help parties to better anticipate information the board will require; and (4) Encourage more careful consideration of issues by members because the findings would be in writing.

V. The Hearing Examiner in Zoning Administration

This chapter reports on the use of a hearing examiner in zoning administration. The chapter describes the origins of the hearing examiner system in the federal government and examines the use of the hearing examiner in land use decisions.

The Origins of the Hearing Examiner in Federal Government Agencies. According to Daniel Lauber's study, *The Hearing Examiner in Zoning Administration*, the concept of an administrative hearing examiner was pioneered by the Interstate Commerce Commission and spread widely throughout the federal government. The federal process assumes Congress may rely on federal executive agencies to apply Congress's policies in the public interest through administrative regulations and decisions. The federal process is designed to ensure the proper formulation and application of an established system of legal principles in any broad field of national activity.

Lauber reports that the federal hearing examiner fulfills several roles in the administrative process to help compile the facts and evidence about an issue so that the agency can make an informed decision. The hearing examiner has extensive authority[31] and typically is responsible for:

- Holding fair hearings;
- Preparing intelligible and objective hearing records that allow an agency to make determination of fact in light of evidence presented;
- Ensuring the orderly, clear development of a case during a hearing and initial recommendation; and,
- Drawing and applying conclusions of law to the facts and recommending an appropriate decision.

Under the federal system, the agency determines the basic relevant facts, interprets the law, and sets policy, which is binding on the examiner. As a result, the agency has the power to affirm or reverse its hearing examiner's rulings, findings, and conclusions. The agency also retains the authority for the final decision and thus can accept or reject the examiner's recommendations.

[31] Federal examiners typically have the authority to (1) administer oaths; (2) issue subpoenas; (3) rule upon offers of proof and receive evidence; (4) take or cause dispositions to be taken; (5) regulate the course of the hearing; (6) hold conferences for settlement or simplification of the issues by consent; (7) dispose of procedural requests or similar matters; (8) make decisions or recommend decisions; and (9) take other actions authorized by agency rule.

The Use of the Hearing Examiner in Zoning Administration. In the 1960's, Montgomery County and Anne Arundel County established the position of a hearing examiner to assist with zoning administration. Since then, hearing examiners have been established in Oregon and Washington and select jurisdictions in Indiana and Arizona.[32]

The professional literature cites many reasons for establishing a zoning hearing examiner system. Many jurisdictions have instituted a hearing examiner to respond to court rulings that require improved due process or more fairness. Others have established an examiner to deal with the increasing complexity of zoning administration.[33]

Powers and Duties. The duties and powers of hearing examiners in zoning administration vary widely from one jurisdiction to another. All hearing examiners conduct public hearings in quasi-judicial matters and enter written findings based on the record. Some examiners make decisions about variances, special uses, or parcel re-zonings while others hear cases and make recommendations to a local legislative body.

The types of permits hearing examiners consider also vary. Some hear only rezonings and major land use applications. Others consider applications for subdivisions, planned unit developments, signs, and/or historic district permits. In cities and counties in Washington State, for example, a hearing examiner conducts hearings on subdivisions, shoreline permits, conditional use permits, re-zonings, and variances. The trend in Washington State law is to allow local governments to give more authority to a hearing examiner to make final decisions on quasi-judicial project permit applications. For example, a local legislature can specify that the legal effect of a hearing examiner's decision on a preliminary plat application is the "final decision of the legislative body."

In addition to hearing and deciding land use permits, a hearing examiner's roles can also include:

- Appeals of administrative State Environmental Protection Act decisions;
- On the record appeals of administrative decisions made by local planning staff;
- Land use code interpretations; and
- Land use code enforcement proceedings.

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[32] See Appendix C for a summary of the hearing examiner experiences in Indianapolis and Seattle.

[33] For example, Montgomery County, Maryland established a hearing examiner in 1967 to respond to a large backlog of zoning amendment applications and to respond to a Maryland Court of Appeals ruling requiring cross examination to be permitted during a zoning hearing. Jurisdictions across Oregon established a hearing examiner to respond to the *Fasano* decision issued by the Oregon Supreme Court in the spring of 1973. The court's decision declared individual rezonings were adjudicatory (not legislative) acts. The court also imposed certain procedural requirements to be followed during quasi-judicial land use hearings. The effect of the decision was to increase the time and staffing requirements for rezoning requests for local governments, which were already processing large volume of zoning requests. To meet these requirements, the governments decided to "professionalize" some of the decision-making processes. King County, Washington established a hearing examiner primarily to ensure procedural fairness. The specific purposes were to separate the application of regulatory controls to the land from planning; to better protect and promote interest of the public and private elements of the community; and to expand the principles of fairness and due process in public hearings.

Finally, some hearing examiners are also given the authority to hear and decide other decisions, not related to land use issues.[34]

Advantages of a Hearing Examiner. The professional literature identifies many advantages of a hearing examiner. Many of these relate to the reason a jurisdiction might hire a hearing examiner in the first place. The advantages cited include:

- Resolving many land use decisions without requiring a lot of time from local officials or board members;
- Providing a precise and defined system in which all participants are aware of the procedures and methods;
- Insuring fairness and consistency by rendering more professional and timely decisions;
- Eliminating lobbying or the influencing of decision-makers;
- Increasing the likelihood of reaching an objective decision based on logic instead of politics or emotion;
- Improving compliance with legal requirements including due process, appearance of fairness and record preparation;
- Separating quasi-judicial functions from policy making or advisory functions;
- Removing quasi-judicial decision-making from the political arena; and,
- Providing an opportunity for feedback to improve plans and regulations.

Disadvantages of a Hearing Examiner. The literature recognizes that transferring land use decisions from a citizen's board to a professional lawyer or planner changes the forces that shape these decisions. Many of the disadvantages of a hearing examiner speak to the contributions of a lay board in the decision-making process. The disadvantages of a professional hearing examiner include:

- The loss of diverse views;
- The loss of the outsider's perspective;
- The loss of the generalist's perspective;
- The cost to the county;
- The increased cost to parties due to more formal decision-making procedures; and
- The lack of accountability to voters.

[34] The literature reports a hearing examiner might decide discrimination complaints under local personnel policies; employment decisions and personnel grievances; ethics complaints by citizens or employees; local improvement district formation hearings; public nuisance complaints; civil infractions; property forfeiture hearings; tax and licensing decision appeals; and whistleblower retaliation claims.

VI. The Special Exception Decision Process and the Role of the Hearing Examiner in Anne Arundel, Baltimore, and Prince Georges Counties

This section describes three Maryland counties where the hearing examiner plays a role in the special exception decision process.

Anne Arundel County. Anne Arundel County has an elected County Executive and an elected, seven-member County Council. The County Executive appoints an Administrative Hearing Officer[35], a Planning and Zoning Officer[36], and seven members of the Planning Advisory Board[37]. The County Council adopts the zoning map and the zoning ordinance and appoints seven members of the Board of Appeals[38].

The Special Exception Process. A property owner or contract purchaser who wishes to file for a special exception use in Anne Arundel County must file an application, site plan, and filing fee with the Office of Planning and Zoning (OPZ). Within 20 days, the OPZ forwards the application and file to the Administrative Hearing Office (AHO) to set a public hearing date. The OPZ also distributes the applications to other county departments for review and comment.[39]

The AHO conducts hearings on all petitions for zoning reclassifications, special exceptions, and variances. (The office also hears appeals of certain construction contract disputes.) The special exception and site plan are combined in the special exception application. If an application also requires a variance, the petition for the variance will be heard with the special exception application.

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[35] According to Article V, Section 534 (a) of the Anne Arundel County Code, the Administrative Hearing Officer is appointed by the County Executive, with "such training or experience as will qualify the individual to conduct hearings on zoning and other matters." The Reporter's note in the ordinance states that the Charter Board believed it was more important to require qualifications for a judicial temperament. The note also explains that the Baltimore County practice of delegating the power to reclassify parcels of property to a Board of Appeals and a Zoning Commissioner has been accepted by planning authorities as a unique device for relieving the Council of an onerous and technical chore.

[36] According to Article V, Section 530 and 531, the Planning and Zoning Officer administers the Office of Planning and Zoning. The office plans for the physical development and growth of the County, including the preparation, administration and enforcement of master plans, subdivision ordinances, the zoning map, and the zoning ordinance.

[37] According to the Reporter's Note in the Anne Arundel County Code, the Board must hold at least 10 meetings per year. The main duty of the Planning Advisory Board is to make advisory recommendations to the Planning and Zoning Officer and the County Council relating to the Master Plan, zoning maps, etc. The Advisory Board has no administrative duties.

[38] Section 1-101 of the County Code states "members of the County Board of Appeals are expected to be diligent, industrious, and judicious and participate in all appeals unless there is good cause for their absence."

[39] The departments are the Board of Education, Fire, Recreation and Parks, Soil Conservation, Health, Traffic, and Utilities. If the property is located in a Critical Area, the application is also forwarded to the Critical Area Commission.

The Zoning Ordinance, Article 28, Section 16-206, provides that a hearing "shall be conducted in public in an impartial and orderly manner. Each witness shall testify under oath...and the Administrative Hearing Officer shall regulate the conduct of each hearing and rule on procedural matters, applications, modifications and objections made during the course of a hearing."

The hearing follows requirements set forth in the County Code and is conducted in the following order. A representative from the OPZ presents its findings and recommendations and enters comments from the public agency into the record. The applicant (or the applicant's representative) explains why the petition should be granted. Any people opposing or supporting the applicant's request present their view. The applicant may call witnesses to testify at the hearing. Witnesses testify under oath and may be cross-examined by a representative of the OPZ, the applicant or anyone opposing or supporting the request.

The Administrative Hearing Officer makes a decision and files a written memorandum setting forth findings of facts and conclusions of law. The Hearing Officer issues a recommendation within 30 days after the end of the hearing and makes it available to anyone who attends the hearing and signs in. The Zoning Ordinance gives the Administrative Hearing Officer the authority to decide special exceptions and to impose additional restrictions, conditions "considered appropriate to preserve, improve, or protect the general character of the land or improvements." The law also authorizes the Administrative Hearing Officer to approve or disapprove the design of buildings, construction, landscaping, or other improvements, alternations, or changes to assure conformity with the intent and purpose of the law.

A petitioner may appeal a special exception decision of the Administrative Hearing Officer to the Board of Appeals within 30 days.[40] An appeal may be taken by any person, official, office, department, corporation, board or bureau aggrieved by the decision and a party to the proceedings before the Administrative Hearing Officer. The seven-member citizen board hears an appeal de novo. It is aware of the Administrative Hearing Officer's recommendation as part of the appeal request, but the Board does not consider the Administrative Hearing Officer's memorandum. A lawyer for the Board of Appeals sits with the Board during the hearing to answer legal questions. The decision of the Board of Appeals may be appealed to Circuit Court.

County staff observes that controversial applications (for example, mobile home parks or sand and gravel pits) are more likely to be appealed. They also state that approximately half of the applicants who appear before the Administrative Hearing Officer represent themselves. Most applicants who appear before the Board of Appeals are represented by an attorney. Cases generally receive a more detailed review before the Board of Appeals.

[40] In addition to hearing appeals of special exception decisions, the Board renders final decisions on appeals related to licenses, permits, executive, administrative and judicatory orders.

Baltimore County. Baltimore County has an elected County Executive and an elected, seven-member County Council. The County Charter gives the County Council the "power by legislative act to reorganize the office of planing and zoning, to define the duties of the director, to establish the powers, duties and compensation of the planning board, and to establish the duties and responsibilities of the zoning commissioner and deputy zoning commissioners, so that planning and zoning functions shall be conducted in the best interests of the county and its future development and growth."

The County Executive appoints the Director of the Department of Permits and Development Management, the Zoning Commissioner,[41] and the People's Counsel.[42] The County Councilmembers, who are elected by district, each appoint one member of the seven-member Board of Appeals. Members of the Board of Appeals have overlapping, four-year terms. The law provides that no more than five members can be from the same political party.

The Special Exception Process. A property owner seeking a special exception use in Baltimore County must schedule an appointment to file a petition with the Department of Permits and Development Management (PDM). PDM reviews the application for completeness, schedules a hearing date with the Zoning Commissioner, and manages the advertising and posting of the property.

DPM distributes a summary of the proposal to interested public agencies. The distribution list has more than a dozen agencies, including Building Inspections, Code Enforcement, Development Plans Review, the Recreation Department, Economic Development, Community Conservation, the People's Counsel, the Maryland Department of Planning and the Maryland Department of Natural Resources.) PDM receives comments from select public agencies (typically State Highway, the Fire Department, the Planning Department, and the Environment Department) and forwards copies of the comments to the petitioner. A week before the hearing, PDM forwards the case files for the following week to the Zoning Commissioner.

The Zoning Commissioner's Office conducts hearings on all zoning and development review applications in Baltimore County. The Zoning Commissioner conducts zoning hearings to hear petitions for special exceptions, petitions for variances, or requests for a special hearing.[43] The Zoning Commissioner conducts a hearing

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[41] The Zoning Commissioner is appointed for a four-year term and can only be removed for cause.

[42] The People's Counsel represents the interests of the public in zoning matters. The People's Counsel may appear before the Zoning Commissioner, the Board of Appeals, the planning board and the courts to defend any master plan or comprehensive zoning map enacted by the council. The People's Counsel may conduct investigations, have full access to county records, and hire experts as needed in connection with the proceedings.

[43] *A Citizen's Guide to Zoning in Baltimore City* provides the following definition of a special hearing – The Zoning Commissioner has the authority to conduct hearings involving any violation, alleged violation or the interpretation of any zoning regulation upon notice to "the parties of interest" and subject to the right of appeal to the Board of Appeals. Any "interested person" may petition for a public hearing which must be advertised, and posted if a specific property is involved.

officer's hearing to decide development review applications. If a proposal requires two applications or a zoning hearing and a development review hearing, the Zoning Commissioner will consolidate the applications and conduct one hearing.

The hearings are quasi-judicial or administrative in nature. The petitioner, the opponents, and the county agencies are all treated as parties to the proceedings. County law requires the zoning commissioner to give deference to the public agency comments; however, as an independent officer, the zoning commissioner is free to make an independent decision. The hearing is conducted according to Rules of Procedure adopted by the County Council and incorporated in the Zoning Ordinance. Hearings on small, uncontested applications are more informal than hearings on large, complex, controversial proposals. A petitioner may retain an attorney. Citizens appearing before the Zoning Commissioner frequently speak on their own behalf. The parties may stipulate to agreed on facts. The Zoning Commissioner may issue subpoenas and may require briefs to be filed.

The Zoning Commissioner issues written opinions and makes final decisions on special exception petitions. (The County Council and the County Executive are prohibited by law from interfering with the zoning commissioner's decisions). The Zoning Commissioner's decision may be appealed to the Board of Appeals by the People's Counsel, a County department, or a party to the proceeding. The Zoning Commissioner states that approximately five to ten percent of his decisions are appealed. Examples of controversial cases that are typically appealed include petitions for a church or a golf course in an agricultural zone, petitions for a service garage in a business zone, or requests for unusual uses like tattoo parlor. A petition for a special exception to operate a professional office in a residential zone can also generate controversy.

The People's Counsel reviews every decision of the Zoning Commissioner and will file an appeal if he believes the decision threatens the public interest. Appeals of zoning cases, including special exception petitions, are heard de novo. Appeals of development review cases are heard on the record. Civic associations participating in an appeal before the Board of Appeals must document that they have taken certain steps to satisfy the Board that the spokesperson is, in fact, speaking on behalf of the association. The County Attorney is available to provide legal advice but a representative of the County Attorney's office does not sit with the Board of Appeals during the hearing. Decisions of the Board of Appeals are appealed to Circuit Court.

The Zoning Commissioner believes the quasi-judicial, administrative hearing system has been very successful since it was established in 1991. He states changes to the system, including the use of a hearing officer, have improved the system in three ways. First, it has given the development community a project timeline so projects don't get stalled in the review process. Second, it has given the community a way to participate

in the process. (This is especially true for development review matters because the law requires the developer to hold an informational meeting in the community before the zoning commissioner hearing.) Third, the system has also made standards more definitive because the ordinance was amended to specify the information required to accompany development plan applications.

The Zoning Commissioner thinks that the administrative hearing process is more professional. He states that the courtroom setting of the hearing helps people to respect the system. Participants recognize that everyone will be given an opportunity to speak. As a result, generally there is not a lot of shouting and screaming.

Prince Georges County. Prince Georges County has an elected County Executive and an elected County Council. The nine-member Council is elected by district. The Council and the Executive are elected to four-year terms. Planning and zoning powers have been delegated to the County by Article 28 of the Maryland Code. The County Executive appoints the five Planning Board members.[44] The District Council appoints the People's Counsel,[45] the Hearing Examiner,[46] and the Board of Appeals members.[47]

The Special Exception Process. A petitioner wishing to pursue a special exception files an application with the Park and Planning Department. Staff reviews the application for completeness and accuracy. After the petitioner has submitted a final application, planning staff posts the property and distributes the application to public agencies for review and comment. The application is assigned to a planner who reviews the application, compiles the public agency comments, and prepares a staff report. Copies of the staff report are forwarded to the Zoning Hearing Examiner and the People's Counsel.

The law provides that the applicant can request a Planning Board meeting following the issuance of the planning staff report or the Planning Board can ask to consider the matter. According to the Hearing Examiner, in practice, most applications are taken to the Planning Board for a recommendation and the Hearing Examiner does not schedule a hearing until recommendations from the Planning staff and the Planning Board are available.

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[44] The Planning Board conducts administrative meetings to hear and decide subdivisions and site plan applications.

[45] The People's Counsel serves a five-year term. The appointee must be a member of the Maryland bar and experienced in zoning law and procedure. The law requires the People's Zoning Counsel to participate in the review of all Comprehensive Design Plans filed with the Planning Board and its staff for the purpose of protecting the public interest and insuring the compilation of a complete record on needed public facilities.

[46] Section 27-126 of the County Code establishes the qualifications for the Hearing Examiner. The law requires the examiner: (1) to be an attorney, (2) to possess a judicial temperament, (3) to have at least five years experience in administrative litigation, and (4) to demonstrate a knowledge of administrative and zoning law practice and procedure by a competitive written exam.

[47] The Board of Appeals is a three-member body authorized to hear variances and administrative appeals. The law has been amended over the years so that the Board of Appeals no longer hears variances that are part of a special exception application. The Board of Appeals plays no role in the special exception approval process.

The Prince Georges Zoning Ordinance authorizes the Hearing Examiner to conduct hearings for applications for special exceptions and variance applications related to a special exception application. In addition to special exception applications, the hearing examiner conducts hearings for applications for zoning map amendments, petitions for revocation or modification of a special exception, fence waivers, amendments of map amendment approvals and basic plans, reviews of certification of nonconforming uses, amendments of approved special exceptions and special exception site plans, complaints regarding medical practitioners offices in single family dwellings and race tracks, parking waivers, appeals from the Historic Preservation Commission, and any other case for which the District Council directs a hearing be held.

The hearing is conducted according to guidelines found in the Zoning Ordinance. There is a one-hour limit for each presentation, unless the hearing examiner extends the time. First, the applicant presents the case and the opponent presents a response. Next, the applicant has an opportunity for rebuttal, followed by rebuttal by the opposition. Then, there is time for public agency comments and questions. The hearing closes with a summation by the opponent, followed by a summation by the applicant. The Hearing Examiner indicates that approximately three-quarters of all petitioners are represented by an attorney.

The People's Zoning Counsel regularly participates in special exception hearings before the Zoning Hearing Examiner.[48] The law authorizes the People's Zoning Counsel to "summon, examine and cross-examine witnesses, introduce documentary evidence into the record, file exceptions, and make such argument to the hearing examiner or the Council as the law and the evidence in the case may warrant." In practice, the People's Counsel insures that the evidence introduced into the hearing is relevant and that citizen representatives are, in fact, speaking on behalf of the community.

After the conclusion of the hearing, the Hearing Examiner prepares a written decision with specific findings of fact and conclusions of law. There are no time requirements in the law, but the Hearing Examiner tries to publish an opinion within 30 days. The law gives the Hearing Examiner the authority to approve or deny most special exception applications. If the Hearing Examiner makes the final decision, the law also gives the Hearing Examiner the authority to approve site plan amendments, to grant time extensions, and to exercise the reconsideration powers normally given to the District Council.

[48] Under the County charter and the law, the People's Zoning Counsel may appear at all zoning case hearings "for the purpose of protecting the public interest and insuring the compilation of a full and complete record."

The Zoning Ordinance identifies certain instances where the Hearing Examiner does not have the authority to make a final special exception decision. The first is if the decision is appealed to the District Council.[49] The second is if, after receiving notice of the decision from the Hearing Examiner, a majority of the District Council votes to make the final decision on its own. The third is if, for cases located within a municipality, the hearing examiner's recommendation is contrary to the recommendation of the municipality. For these cases, the hearing examiner submits findings of fact, conclusions of law, and a recommended case disposition to the District Council, which makes the final decision. A two-thirds vote of the District Council is required to override the recommendation of a municipality. The District Council has also reserved the right to decide certain special exception uses such as medical resident campuses and commercial recreation attractions.

If the decision of a hearing examiner is appealed to District Council, the appeal is heard on the record. The hearing examiner states that controversial applications are frequently appealed. Special exception applications that require a variance are also routinely appealed. This is because the Zoning Hearing Examiner has adopted a policy that it will not approve variances as part of a special exception. The Hearing Examiner states the District Council upholds some decisions and overturns others.

The Zoning Hearing Examiner states that the hearing examiner system has saved the District Council time. The Hearing Examiner also observes that the process is more streamlined because the rules of evidence apply and the examiner, more so than the District Council or a citizen's board, has the ability to limit discussion and comments to relevant issues.

[49] Section 27-131 authorizes any person of record or the People's Zoning Counsel to file within 30 days an appeal from the Zoning Hearing Examiner decision, exceptions to the decision, or a request for oral argument.

APPENDIX A

The Origins of Zoning

There are four milestone events that shaped the governance structure of today's zoning law:

- The adoption of zoning legislation in New York City;
- The lobbying effort to gain nationwide acceptance of the New York City approach;
- The federal government's drafting and distribution of the Standard State Zoning Enabling Act; and
- The decision of the U.S. Supreme Court in the Euclid v. Ambler case.

This appendix describes the historical setting for zoning's origins and reports the details of the four milestone events.

The Historical Context. The beginning of the 20th century was characterized as "a golden age of the Republic" with "a shining view of American life that overflowed into popular culture." [1]This optimism shone at a time when American cities were overflowing with record numbers of immigrants from Eastern Europe and African Americans migrating from the South. In 1907, immigration reached the highest point in the American history with more than a million and a quarter people.

At the edges of metropolitan areas, cities tried to annex land from adjacent villages to house this rapidly growing population. Village residents frequently opposed these efforts. As Joe R. Feagin states in *Zoning and the American Dream* "These suburban areas...sought to protect their families, homes, and neighborhoods from the noise, pollution, congestion, and other negative consequences of industrial expansion, as well as from white immigrant and nonwhite workers drawn to cities by the new industries."[2]

Villages often responded by incorporating as a separate municipal government. According to Feagin, the turn of the century "was accompanied by growth in the number and significance of local governmental units. From the 1890s to the 1930s (and again after World War II) there was a major increase in the incorporation of municipalities around cities. By 1920, Cook County (Chicago) had 109 such municipalities walled off from the central city. Pittsburgh had 107 and New York City had 204. During the decade of the 1920s, new suburban areas were created by the dozens around US cities."[3]

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[1] Seymour Toll, *Zoned American*, (New York, N.Y.: Grossman Publishers, 1969, p. 20.
[2] Joe R. Feagin, "Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective," *Zoning and The American Dream: Promises Still to Keep*, Charles M. Haar and Jerold S. Kayden, editors. APA: Chicago, IL, 1989. P.81
[3] Feagin, p. 81.

The convergence of optimism and immigration fueled reforms focussed on the cities. Social reformers, led by Jacob Riis, exposed unsanitary living conditions in slums and tenements and fought vigorously to legislate industrial building standards and labor conditions. Political reformers focussed on improving the administration of municipal government and aimed to rid cities of the corruption that flowed from the influence of big business. These reformers worked to replace the practice of political favoritism and influence with an administrative system based on scientific management and professionalism.

Some progressive reformers, including Benjamin Marsh, Frederic Howe and Edward Bassett, were captivated by cities they had visited Germany and England. These cities had originated the concept of regulating land use by districts or zones at the end of the 19th century to address the poor physical condition of city workers. Howe, Marsh, and Bassett were "struck by the contrast between the conditions in American cities and what they believed to be the achievements of land use regulation that they had observed in Germany."[45] They believed fervently that "planning was the antidote for the spread of congestion and blight" and that "zoning (should) be the process by which plans were to be implemented."[6] Their passion and commitment gave birth to the American city planning movement. In 1909, Benjamin Marsh published a book that explained the principles of city planning and zoning. Several annual national conferences on city planning followed.

The Establishment of Zoning controls in New York City. As reported by Seymour Toll in his book *Zoned American*, New York City gave birth to the concept that eventually came to be called Euclidean zoning. Two reports, one issued in 1913 and a second released in 1916, set the groundwork for the use of districts and the establishment of an administrative board to decide hardship cases. Edward Bassett played a central role in drafting each report.

The 1913 Report. The 1913 Commission, called "The Heights of Building Commission," simultaneously addressed concerns about congestion in lower Manhattan raised by Edward Basset and concerns about the encroachment of the garment industry voiced by the Fifth Avenue Merchants Association.[7]

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[4] Yale Rabin, "Expulsive Zoning: The Inequitable Legacy of Euclid," *Zoning and the American Dream,* p. 104.

[5] The German system of land planning and regulation differed sharply from the land use and land use controls in the United States at the turn of the century. In the United States, the use of land was based on a surplus of unused land, and a mindset reflected by land settlement experiences in the 19th century. The land use controls were very permissive. Owners could build when, where and how they wanted constrained only loosely by the nuisance law. When municipalities and states began adopting building, zoning, and other regulations in the early 1900s, courts generally struck down these regulations as unconstitutional. The courts recognized a limited power to deal with nuisances and exclude certain objectionable occupations from towns or residential areas; however, the courts invalidated attempts to restrict commercial uses in residential areas and voiced great concern about land use regulations for aesthetic reasons.

[6] Rabin, p. 104

[7] Robert Cooke had founded the Fifth Avenue Merchants Association in 1907 because luxury retail merchants believed the immigrant garment industry workers were frightening their shoppers and destroying their trade. From the outset, the purpose of the association was to eliminate or control the garment

The 1913 Report found that injury to Fifth Avenue was not an isolated problem but one part of a larger problem confronting the entire city. The report characterized the Fifth Avenue Association's support for height restrictions as "a demand for greater public control over city planning and building."[8] Seeking to strengthen the legality of height controls proposed for Fifth Avenue, the report proposed citywide regulations with "different height regulations, court regulations, and land use controls applied in various districts established throughout the city."[9] These guidelines became the blueprint for the future zoning law.

The 1913 Report stopped short of justifying zoning solely to protect the general welfare because Commission members recognized zoning would only proceed with the support of the business community. To calm anxious businessmen and real estate interests, the vice chairman of the commission, Lawson Purdy, drafted a resolution that affirmed the commission would "pay reasonable regard to the character of buildings in making its zoning regulations in order to enhance the value of land and preserve the value of buildings."[10] Reflecting this commitment, the report proposed zoning as a tool to protect both private property values and the general welfare. Six months later, in 1914, the New York State legislature amended the charter to give the city the authority to zone.

In June, 1914, the Commission on Building Districts and Restrictions was established. The goal of this Commission was to fashion the city's grant of police power into a resolution and to create a receptive political climate for its introduction. Despite many public meetings, the Commission's progress was slowed by concerns about the unconstitutionality of zoning and its progress languished.

In February 1916, C. Howes Burton was elected to the Board of Directors of the Fifth Avenue Association, which was still struggling with the garment industry. Burton devised a three-pronged strategy to move the garment industry off Fifth Avenue. It consisted of a public education campaign, a threatened boycott, and the adoption of zoning. In March, Burton placed an advertisement in *The New York Times* that reported the factory invasion of the shopping district and issued a call to the public to save New York. He threatened the garment manufacturers with a boycott unless they cooperated with a voluntary relocation program. He also publicly encouraged Bassett's Commission to complete its work and issue an interim report.

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industry. According to Toll, the Heights of Building Commission was McAnney's second attempt to address the Association's concerns. In May 1912, McAneny had introduced a building height regulation to discourage the construction of garment loft buildings and force the garment industry to relocate their businesses. The Board of Estimate and Apportionment did not act on the building height restriction and Robert Cooke met with McAneny several times over the summer and winter of 1912 to push the merchants' interests. During the same period, Edward Bassett and McAneny met to discuss how the new subways were aggravating the skyscraper problem by delivering a multitude of office workers to a small area in Manhattan. Bassett, impressed by effects of town planning he had witnessed in visits to Germany and England, believed in the wide distribution of offices and homes. He wanted regulations to prevent the extension of the subway from producing more high-density housing.

[8] Toll, p. 169.

[9] Toll, p. 163.

[10] Toll, p. 150.

In March 1916, Bassett's Commission issued a temporary report and began public hearings. In June, the Commission issued its final report. One month later, on July 25, 1916, the first *New York City Building Zone Resolution* was adopted and zoning became law. By mid-summer, 95 percent of the manufacturers in the garment industry had signed pledges that indicated a willingness to move. (In *Zoned American*, Seymour Toll observed what the new zoning law promised was actually less than Burton's committee accomplished by private action.)

The 1916 Resolution. The New York City Building Zone Resolution of 1916 proposed a "complete and comprehensive system of building and land use control for all the five boroughs of New York City."[11] The system consisted of three "use districts." The regulations within each district varied in detail and strictness.

The detail and complexity of the zoning regulations masked the reality that the regulations could neither change the status quo nor direct future growth. In contrast to the exercise of police power in other areas – for example, factory regulations or health codes – zoning did not require property owners to cure existing problems. Instead, keeping an earlier promise to businessmen to "stabilize and protect lawful investments," the system established the concept of a non-conforming use to protect existing structures from the requirements of the new regulations.

The zoning system also established relative standards that generally confirmed what was already developed, instead of proposing absolute standards to control building or improve building practices. This meant zoning would be used to replicate the character of existing development. Finally, the resolution affirmed the utility of zoning as a method to achieve urban planning; however, the system failed to require a comprehensive plan.

Scholars have commented on the misconceptions and inconsistencies embedded in zoning's New York origins. In *Zoning and the American Dream*, Yale Rabin states:

> What emerges from Toll's narrative is the account of a transformation. What began as a means of improving the blighted physical environment in which people lived and worked, was transformed into a device for protecting property values and excluding the undesirable. And what was conceived as a process for implementing plans for an improved future was transformed into a mechanism for preserving the status quo and committing the future to its reproduction.
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> It was not the desire to eliminate what Marsh had termed the "evil influence of slum tenement district" that motivated New York's lawmakers to adopt comprehensive land use regulations. Instead, it was growing demands by the luxury merchants and wealthy residents of Fifth Avenue for protection from the

[11] Daniel R. Mandelker, Roger A. Cunningham and John M. Payne, Planning and Control of Land Development: Cases and Materials, Fourth Edition, (Michie: Charlottesville, VA, 1995, p. 193).

unwelcome incursion of the expanding garment industry, whose thousands of Western European immigrant workers crowded the sidewalks in front of their elegant shops and "violated the ambience in which luxury retailing thrives."[12],[13]

The 1916 Resolution also proposed the establishment of a Board of Standards and Appeals. This board was empowered to grant relief from the strict implementation of the law in cases of hardship. As described by Frederick H. Bair in *The Zoning Board Manual,* the New York charter amendment framework consisted of four bodies - the Commission on Building Districts and Restrictions, the Board of Estimate and Apportionment, the Board of Standards and Appeals, and the Board of Appeals.

- **The Commission on Building Districts and Restrictions** was an appointed advisory body, which prepared recommendations as to original district boundaries and regulations, made tentative reports, held public hearings, and submitted a final report to...

- **The Board of Estimate and Apportionment** consisted of the mayor, the comptroller, the president of the board of aldermen and five borough presidents (all elected officials). The charter amendments empowered this board to adopt zoning regulations after receiving a final report from the Commission on Building Districts and Restrictions and holding another public hearing. The Board was also empowered to amend regulations after public notice and hearing. (The Commission on Building Districts and Restrictions was not involved in preparing or processing amendments.)

- **The Board of Standards and Appeals** included the fire commissioner, the chief of the uniformed fire department, the superintendent of buildings, and six other members appointed by the mayor. This Board was charged with making a broad range of administrative rules and regulations, e.g. construction, fire and labor codes. When operating as whole, the Board had NO appellate functions.

- **The Board of Appeals** was a subgroup of six appointed members of Board of Standards and Appeals (One who chaired both boards) plus the chief of fire departments. This board heard appeals from the decisions of the Board of Standards and Appeals. Appeals from the decisions of this body went to the courts. Original appointments to the Board were for overlapping terms and succeeding appointments were for three years. A member could not decide any question if he had an interest. The charter amendments required strong professional and technical qualifications for four of six appointed members. Specifically, the charter required the chairman to be an architect or structural engineer with 15 years experience who could not hold another occupation while serving as chairman. The charter required one of each of the remaining members to have 10 years experience as an architect, builder, or structural engineer. All members were well paid.

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[12] Toll, p. 158.
[13] Rabin, p. 105.

The "spreading process." After the adoption of the New York charter amendments and the 1916 Resolution, the city fathers established the zoning committee of New York and hired Edward Basset as legal counsel. The purpose of the zoning committee was "to assist in administration of the law and to introduce and extend the concept of zoning throughout the country." By the spring of 1918, New York had become a Mecca for pilgrimages of citizens and officials.

Bassett's mission was to gain widespread public approval of zoning to assure the constitutionality of zoning in the courts. To do this, Bassett implemented the "spreading process." Between 1917 and 1927, he visited every state and all the large cities of the country. For a uniform charge of $100 per day, he "made talks before boards of trade and legislative bodies, assisted in drawing zoning ordinances and state enabling acts, tried zoning cases, and argued test cases before appellate courts."[14]

With Bassett's advocacy, the New York zoning law was influential in dispersing the concept of zoning to cities across the country. By 1920, there were 904 zoning ordinances according to a survey of the U.S. Bureau of Standards. Altogether, 82 of the 93 cities with population over 100,000 had zoning laws. After a New York court sustained the constitutionality of the New York City Resolution, zoning spread even more rapidly. In 1922, it was reported that 20 state zoning enabling acts and 50 municipal zoning ordinances were in force or in the process of formulation. [15]

Secretary Hoover's Advisory Committee on Planning and Zoning. In 1922, Herbert Hoover, Secretary of Commerce convened the Advisory Committee on Planning and Zoning to draft model planning and zoning statutes that could be adopted by states.[16]

The membership of the Advisory Committee on Planing and Zoning included representatives from the U.S. Chamber of Commerce, the National Association of Real Estate Boards, the American Civic Association, the National Municipal League, the National Housing Association, and the National Conference on City Planning.[17] Although some business leaders were initially opposed to zoning, the views of the leadership of the National Association of Real Estate Boards soon reflected the fact that local boards were strong supporters of zoning. According to Davies, these real estate boards played an important role in framing the model zoning enabling act in 1925.

The drafting subcommittee. A subcommittee of the Advisory Committee on Planning and Zoning composed of Edward Bassett, Morris Knowles of the U. S. Chamber of Commerce, Nelson Lewis of the National Municipal League, and Lawrence Veiller drafted the zoning enabling act. The subcommittee members shared an urgency

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[14] Toll, p. 195.
[15] Mandelker, p.194.
[16] Hoover established the Committee at a time when courts were beginning to grapple with right of government to regulate land use. Several states and municipalities that had adopted zoning ordinances without state enabling legislation were being subjected to adverse court decisions.
[17] Ruth Knack, Stuart Meck, AICP, and Israel Stollman, AICP, "The Real Story Behind the Standard Planning and Zoning Acts of the 1920s," *Land Use Law and Zoning Digest,* Vol. 48, No. 2February 1996, p. 3.

to draft a model code that would create a model framework for zoning that could withstand judicial scrutiny. However, there were divergent views about the acceptability of zoning and the ability of elected officials to make objective decisions.[18]

The SZEA and the New York Resolution. The final language of the standard act was based on the New York City enabling act but departed significantly from it in some key aspects. The act affirmed the basic assumption the Heights of Building Commissioners had nervously made, namely that "zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States." The act carried forward the purposes of zoning which the reports of 1913 and 1916 had cited in defense of land use controls. The act also stated that planning was at the heart of the system of land use controls.

Half of the Standard State Zoning Enabling Act was devoted to the composition, jurisdiction, and procedures of the Board of Adjustment in Section 7.[19] According to an analysis by Frederick Bair, the division of functions for the Board of Adjustment in the Standard State Zoning Enabling Act departed substantially from the framework established under the New York Charter amendment.[20] The Standard State Zoning Enabling Act did not provide for a Board of Standard and Appeals. More importantly, its provisions for a Board of Appeals differed substantially from the Board of Appeals established under the New York model. The New York charter amendments established qualifications for membership, overlapping terms to provide for continuity of experience, and explicit prohibitions against participating in cases with conflicts of interest. The Standard State Zoning Enabling Act did not include these provisions. Frederick Bair summarizes the differences in the two approaches in the following way:

> Under the New York arrangement, a well-qualified, well paid board with a full time chairman was responsible to a considerable extent for drafting and adopting a broad range of administrative rules and regulations. Its appellate subcommittee was responsible (a) for interpretation of such controls on appeal from decision of

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[18] In the first draft, Bassett purposefully left discretion to local officials and oversight to the courts. Although he mistrusted local officials, he trusted the courts, on a case by case basis, to establish standards for boards of adjustment that might overstep their powers. Veiller prepared the second draft. He preferred a framework of detailed standards and vigorous enforcement. He wanted to restrict the power of the Board of Appeals to make only slight adjustments in cases of hardship. Alfred Bettman and Frederick Law Olmstead shared Veiller's concerns about the potential for abuse by the Board of Appeals. Olmstead believed the ambiguous language of the act could lead to back door amendments. Bettman, who had drafted zoning enabling legislation for the State of Ohio, wanted to delineate the specific powers of the board of appeals. To respond to these concerns, Bassett redrafted Veiller's language to establish the concept of a variance and to more clearly circumscribe the power of the Board of Appeals. Veiller accepted this compromise in the final draft but continued to have concerns about the potential abuse of power by the Board of Appeals.

[19] In *American Law of Zoning*, Robert M. Anderson observed "Apparently the draftsmen of the Standard Act felt the Board of Adjustment was at once an essential component of the administrative machinery, and a device so novel as to require minute description of both its organization and powers. ... Unlike matters of adoption, amendment and repeal, which the committee left largely to local discretion, the Standard Zoning Enabling Act prescribed in some detail the composition, appointment, procedure and jurisdiction in an effort to remove doubts and provide standards."

[20] Bair, Frederick H., Jr. The Zoning Board Manual, (APA: Chicago, IL, 1984, pp. 8-14)

administrative officials; (b) for making determinations and decisions in specified use exception cases under the zoning resolution; and (c) for varying strict application of the letter of the law in cases of practical difficulties or unnecessary hardships involving zoning or any of the other controls within its jurisdiction.

Under the Standard Act, a board (usually uncompensated), whose members usually had nothing to do with framing original controls, which has no powers to adopt or amend either legislative enactments or administrative regulations, and which has not required qualifications for members, is expected to perform parallel functions but only in relation to zoning. (In most jurisdictions, one or several other boards, usually with specified qualifications for members, go their separate ways in performing appellate and administrative duties in connection with construction, housing, health and fire codes.)[21]

Hoover's Committee completed its work in less than a year. The Standard State Zoning Enabling Act furnished state and local governments with a text, which, if adopted by state legislatures, granted their towns and cities the police power to zoning. The first printing in 1924 sold more than 55,000 copies. By 1925, nearly one-quarter of the states had passed enabling acts modeled substantially on the Standard Act. In 1926, the Department of Commerce published the final version of the Standard State Zoning Enabling Act.

The publication and distribution of the Standard State Zoning Enabling Act in the twenties helped to accelerate the dispersion of zoning across the country. It also proliferated a structure for zoning governance that contained vague standards and the provisions that hardship cases would be decided by a loosely defined administrative board.

The Village of Euclid, Ohio v. Ambler Realty Co. By 1926, thanks to the tireless advocacy of the peripatetic Edward Bassett, the support of the federal government, and the United States Chamber of Commerce, zoning was sweeping the country. More than 20 million people lived in urban or urbanizing communities that had adopted zoning. While enabling legislation varied[22], virtually all ordinances adopted New York's system of mapped use, height and area districts along with supporting text, which described the uses allowed in each district, the height and building bulk or form controls, and the area regulations regarding yards and courts.

In Ohio, the city of Cleveland was struggling to meet postwar housing shortages. Planning consultant Robert Whitten, who had served on the New York Board of Estimate and Apportionment with Edward Bassett, prepared zoning ordinances for some of the villages surrounding Cleveland. The villages successfully used these ordinances to resist Cleveland's efforts to annex land and the builders' efforts to develop high rise apartment

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[21] Bair, p. 13.

[22] Most of the zoning enabling legislation originally adopted prior to 1924 was based on the New York general city enabling act of 1917. Most of the zoning enabling acts adopted after 1924 were modeled after the Standard State Zoning Enabling Act. Mandelker, p. 197.

buildings. The village of Lakewood adopted a zoning ordinance in 1918 that successfully enabled it to maintain its suburban, segregated residential character. In 1920, a judge "vigorously held right of (the village of East Cleveland) to use the police power to establish a systematic and complete zoning plan." [23]

Euclid, Ohio was a rural village of 5,000 to 10,000 people, located east of Cleveland on Lake Erie. Its shared border with Cleveland was a heavily working class neighborhood. Seeing the success of the Lakewood and East Cleveland apartment house litigation, on November 13, 1922, Euclid adopted a zoning ordinance to keep its population stable.[24]

Although zoning had more than broken even in the lower courts as a justifiable exercise of local police power to protect public health, safety and welfare; "judicial acceptance of zoning was still in question.[25] According to Jerold S. Kayden, there were two basic requirements for constitutional zoning under the due process and equal protection clauses of state constitutions. First, zoning must promote goals related to or identifiable as health, safety, morals or general welfare. Second, zoning must promote these goals in ways that would result in their achievement.

On November 22, 1926, the Supreme Court issued its opinion in *Village of Euclid v. Ambler Realty Co.* The Court held that the new zoning technique in its general aspects did not violate the Fourteenth Amendment's due process clause.[26] While the logic of the court was "not compelling" the opinion showed that the goals of zoning fell within ambit of police power and zoning's hallmark mechanism of exclusive use districts rationally achieved these goals.[27] Although state courts were still free after Euclid to find that zoning violated state constitutional provisions, judicial attention shifted from the concept of zoning to the details of its implementation.

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[23] William M. Randle, "Professors, Reformers, Bureaucrats, and Cronies: The Players in *Euclid v. Ambler*," *Zoning and the American Dream*, p. 39.

[24] Arthur V.N. Brooks, "The Office File Box – Emanations from the Battlefield," Zoning and the American Dream, p. 4.

[25] Decisions favorable to the constitutionality of zoning had been rendered by the highest courts of California, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, New York, Ohio, Oregon, Maryland and Wisconsin. Adverse decisions had been rendered by the highest courts of Delaware, Georgia, Missouri and New Jersey. Mandelker, p. 194 and Robert M. Anderson, *American Law of Zoning*, 4th Edition, Section 3.08, Vol. 1, p. 96. "In Maryland, specific ordinances were held invalid, although the courts left open the possibility of a valid zoning ordinance if one were drafted which served the public health, safety, morals, or welfare."

[26] Mandelker, p. 194.

[27] Jerold S. Kayden, *Zoning and The American Dream*, p. 226.

Scholars recognize *Euclid* as a landmark case because the court found that the transfer of the power to regulate land use from a state court to a local jurisdiction was constitutional. As Randle states:

> The constitutional validation of zoning in Euclid in 1926 gave local governments the full use of the police power to determine uses, subject only to a rational basis test, the reasonableness of the ordinances in question, and an understood deference to the legislative body enacting the laws. Zoning as a result provided the suburbs and other local government entities with a powerful tool to limit and define their areas on economic, social welfare and (in practice and covertly) class and racial bases. Like Lakewood and Euclid, such communities were able to maintain pristine, middle class segregated communities while avoiding their "fair share" of the potential social and economic costs of urban sprawl and blight.[28]

Scholars acknowledge that the *Euclid* case institutionalized the form of zoning that had begun in New York City. As Mandelker states, "The Supreme Court's validation of Euclid's ordinance not only brought fame to the village but also tended to place in cement the form of zoning espoused by the village, a form similar in large measure to New York City ordinance."[2930] In this way, *Euclid* carried forward the progressive components and exclusive sentiments embedded in the formation of the New York ordinance.[31]

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[28] Randle, Zoning and the American Dream, p. 41.

[29] Mandelker, p. 194.

[30] In Anderson's American Law of Zoning, 4th Edition, Section 301, page 79, footnote 2 "Euclidean Zoning" is described in the following terms: "...a division of the territory of a municipality into districts and an assignment of particular uses to each district."

[31] As Michael Allan Wolf states in "The Prescience and Centrality of Euclid v. Ambler, " "In many ways, Euclidean zoning is a quintessential Progressive concept. Many of the key components are present: the reliance on experts to craft and enforce a regulatory scheme; the belief that a pleasant environment would foster health, responsible citizens; and the trust in decentralized control, a belief in what Frederick Howe called The City: The Hope of Democracy. ... But there was another sentiment shared by many active in the Progressive movement that was underlying zoning and that contributed to its approval and popularity in the conservative climate of the 1920s: a decidedly negative view of the immigrants, particularly Southern and eastern Europeans who from the 1880s to the mid-1920s poured into American cities at "alarming rates." Zoning and the American Dream, p. 255.

APPENDIX B

Summary of Lexington-Fayette Zoning Board of Adjustment Study

Summary conclusions from of a legal study of the Lexington-Fayette Zoning Board of Adjustment by Jesse Dukeminier, Jr. and Clyde L. Stapleton. Published in the Kentucky Law Journal, Vol. 50, 1962.

#1 –The issues before the Board of Zoning Adjustment are not made clear by petitioners nor by the BZA.

Dukeminer reported that petitioners appearing before the board were not represented by counsel and generally had no idea of the limits of Board's power or what legal standards were applicable to the case. He found many lawyers appearing before the Board were ill-prepared and that the form for filing an appeal did not indicate the legal grounds for hardship or the evidence required. Dukeminer observed that these conditions, "Coupled with informality of procedure, can lead to meandering discussion, confusion, misunderstanding and public dissatisfaction."

Dukeminier and Stapleton made the case that one of the techniques used by courts to steady the discussion is to identify the issues sharply. They stated this approach "brings a focus to the discussion and a realization by the parties of the precise problem. No matter which way the court decides the issue, the parties have the satisfaction of knowing they have had a chance to convince the court on the issue it regards as controlling."

While Dukeminier and Stapleton acknowledged that "laymen cannot draw issues as sharply as judge," they found under the present Board procedure "issues are frequently not drawn at all and seldom in advance." They noted that issues were not drawn sharply because the board members did not insist on it, because the legal requirements for a variance were not adhered to, and because substitutional standards had not been articulated by the board.

#2 – The Board frequently does not follow the law applicable to variances.

In reviewing each case to determine whether the decision complied with the legal requirements for a variance, Dukeminier and Stapleton found that in the majority of cases scant attention was paid to the law. Dukeminier and Stapleton also attempted to determine on what grounds the Board was deciding cases. They identified a list of variables that consisted of:

"representation by counsel; ability of the advocate to run persuasive legal, policy and planning arguments; moral, social, economic, and planning policy propositions, stating how values ought to be distributed, advanced at the hearing; all the social,

business, and class identifications and demands of individual board members; the personal, business and social relationships of board members to individual petitioners; and of course, all the "gastronomic" factors relating to a member's attitude and sense of well-being at a particular hearing."

They also found that each of the Board's decisions could be weighted by many other factors such as:

- who the petitioner is (experienced builders and established businesses had a high degree of success);
- the presence of non-conforming uses in the neighborhood;
- whether the petition represented an insubstantial departure from the zoning ordinance;
- the Board's perception of injury to the neighborhood;
- the presence of citizens opposed to the petition;
- planning staff recommendations;
- the persistence of a petitioner; and
- the uniqueness of the property.

#3 – The failure of the Board to find facts and state reasons seriously inhibits the development of system of administrative case law which assures petitioners of equal treatment.

Dukeminier and Stapleton found that the procedures for reporting the Board's actions lacking. The minutes were inadequately informative. There were no oral or written opinions explaining why the decision was "right or wise" and there were no formal findings of facts or conclusions of law. This made the development of standards from cases nearly impossible.

Dukeminier and Stapleton explained that an adequate record of the Board's actions that articulates the reasons for its decisions are needed "for the development of a reliable body of precedents and for some assurance of equal protection under the law." They noted this need differed from that of federal agencies where an adequate explanation of the decision is needed as a basis for judicial review. (In this study, only two of the 167 cases were appealed.). With respect to local zoning boards, they stated informative minutes, written opinions, formal findings of fact and conclusions of law were the building blocks that established the development of standards on a case by case basis.

#4 The Board's View of Its Function Is Not Wholly Compatible with its duties and responsibilities.

Dukeminier and Stapleton reported that during the period of the study, the Lexington Board was composed of two lawyers, two businessmen, an architect and a real estate dealer. They found "A lay board, composed largely of businessmen resulted in a

profound difference in attitude from that of a court. While the ideal is that board members should be as genuinely dispassionate and objective as judges, as a practical matter this is impossible."

They suggested several reasons why the operational weaknesses identified in the study were inherent in a board, and not reflective on any specific members. The reasons were:

- First, a zoning board is a lay board, usually composed of persons untrained in law and without a strong orientation toward the constitutional values of due process and equal protection of the law. Nor do they have the saving quality of expertise, the strength of the modern administrative process.

- Second, they are given the trying task of carefully letting off steam within the tight compartments of a Euclidean zoning scheme where the controlling mechanisms – the legal requirements for a variance- do not respond to pressures for diversity and flexibility.

- Third, the law being out of joint with reality, the board has had to re-shape the variance system by Pickwickian language and non-disclosure, with all the unhappy consequences such means entail.

- Fourth, the climate of opinion in relation to local government involves a complex of attitudes and value relationships which is exceedingly tolerant of lax administration. This climate has affected and probably will continue to affect, the nature, extent, and efficiency of land use controls exercised by a board of adjustment.

APPENDIX C

Observations on the Hearing Examiner Role in Practice.

Richard Babcock, a well known zoning lawyer, and Clifford L. Weaver reported on the use of a hearing examiner in Indianapolis and Seattle in the late seventies in their book *City Zoning: The Once and Future Frontier*. They concluded there was no theoretically right answer to the question of whether a hearing examiner or lay board should be used to decide quasi-judicial land use matters. They stated, "The poison you pick must depend on the evil that currently besets you. Sometimes the cure is worse than the disease; sometimes it is not."

The authors' perception of the experience in Seattle and Indianapolis was a hearing examiner was neither a cure-all nor a catastrophe. They found when a hearing examiner had been used the purpose was almost entirely to institute procedural reform rather than to increase professionalism in the decision-making process.

Indianapolis. In Indianapolis, Babcock and Weaver found that the hearing examiner was established as a part-time position to relieve the local planning body (the metropolitan development commission) of non-controversial cases. The hearing examiner's jurisdiction was limited to making recommendations to the Commission on applications for rezoning. The Commission reserved the right to bypass the hearing examiner process.

In practice, if both parties to a decision requested a waiver, the hearing examiner waived the matter directly to Commission. If no one contested the hearing examiner's recommendation, it bypassed the Commission and went directly to the City Council. If someone did contest a hearing examiner recommendation, the case was heard de novo by the Commission. Babcock and Weaver reported, in practice, only 10 to 20 percent of the hearing examiner recommendations were appealed to the Commission and the Commission sustained the hearing examiner's recommendation 80 percent of the time. Most cases involved no expert testimony and the right to cross-examine was seldom invoked.

The authors' concluded the hearing examiner office appeared to be a way of eliminating non-controversial cases from the docket of lay boards and politicians. They stated no one was willing to trust the professional process with the final decision of any matter thought to be controversial. Instead, the hearing examiner was a way to weed out cases that no one cared about. This served a valuable function because it gave the Commission more time to hear the more important cases.

Seattle. In Seattle, Babcock and Weaver reported that the hearing examiner had broad jurisdiction which had grown since 1974. The hearing examiner could hold public hearings and make final decisions on variances, specified conditional uses, special exceptions and sign variances. The hearing examiner's decision was appealable to the Zoning Board of Appeals. The hearing examiner also conducted hearings and made

recommendations to the city council on zoning map amendments and specified conditional uses. The city council retained final decision-making authority.

Babcock and Weaver reported the Seattle system was structured to promote procedural fairness. The hearing examiner was appointed by the Council for a fixed, four-year term. The office was separate and independent from council staff.

The authors' found that the hearing examiner system had its greatest influence in rezoning cases where the examiner's jurisdiction was limited to making recommendations to City Council. They believed the hearing examiner's role of making a recommendation in the rezoning process had made the process more predictable. They stated that a recommendation from the hearing examiner made it easier to predict whether somebody could get zoning or not.

Babcock and Weaver also found a difference between the theory and practice regarding the jurisdiction of the hearing examiner to make a final decision. The ordinance provided that an appeal from a Hearing Examiner decision was to be decided on the record. However, in practice, the Board of Appeals would hear a case de novo. They explained that the Board of Appeals members said they wanted to hear from the people and revolted at the idea of being a purely appellate body, reviewing the record in a very legal fashion.

Babcock and Weaver found between 25 to 40 percent of the hearing examiner decisions were appealed to Zoning Board of Appeals, compared to a 95 percent Council acceptance of hearing examiner recommendations on rezoning. When a decision was appealed to the Board of Appeals, there was a 50/50 chance that the Board of Appeals would reverse the decision. Babcock and Weaver stated that the difference in the percentage of reversals suggested that a Hearing Examiner's hearing on Board of Appeals matters became little more than a practice run where a smart petitioner would not disclose all the pertinent information.

Babcock and Weaver concluded, in Seattle, an odd result of reform was that the Board of Appeals saw its power increase, even though it was one of the principal objects of reform. They noted that before the system was changed, the Board of Appeals heard the initial hearing and the City Council heard the appeal. Under this modified system, the City Council served as a check on the Board of Appeals. Now, even though there were a lot of complaints against what the Board of Appeals was doing, they were now in the final decision making role.

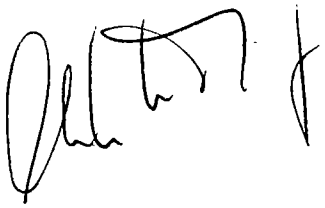
Office of the County Attorney
Montgomery County, Maryland

MEMORANDUM

September 29, 1998

TO: Hon. William E. Hanna, Jr.
Chair, PHED Committee

FROM: Charles W. Thompson, Jr.
County Attorney



RE: Special Exceptions

You have asked for my advice concerning the law of zoning as it relates to "special exceptions" and specifically to respond to a request for what might be an appropriate definition of a "special exception." I told the Committee that I believed we should look first to Article 28 of the Maryland Code to determine what the legislature meant when it authorized "special exceptions" and then to case law for guidance. In doing so, I have consulted other articles of the State Code to compare language used to authorize special exceptions.

Summary of Advice

As a result of my review I advise you that a "special exception" has a far different meaning today than was originally intended. Based upon my research, I believe that the term initially meant what today we refer to as a "use variance." Over the years, special exceptions in Maryland have become what many jurisdictions refer to as "special permits." In essence, the concept has changed dramatically over the years. From a statutory device intended to remediate unconstitutional "takings," a special exception has become a land use device that is presumptively authorized and that may be allowed subject to various conditions. These conditions may be imposed to reduce inherent and anticipated adverse consequences on neighboring properties and the community within which the use is located.

While there have been many influences on this development, one inherent and constant influence has been the courts' effort to find consistency in zoning policy despite the myriad and diverse sources of enabling law and an even more diverse adaptation of that authority

in local zoning ordinances. In short, the courts have often failed to recognize the distinct differences between the enabling authority of a particular zoning ordinance and the individual use of specific zoning tools by different zoning ordinances. Based upon this history, the District Council ought to define a "special exception" for purposes of Montgomery County land use in the same way that the General Assembly has chosen for counties and municipalities throughout the state by using the language of Article 66B of the State Code.

The Legislative History of Special Exceptions before Charter Government.

To analyze the authority of the Council regarding special exceptions, history provides a good starting point by helping to understand what special exceptions are and what authority the Council has to establish and regulate them. This means we must begin in 1927[1] when the General Assembly created the Maryland-National Park and Planning Commission. By Chapter 448 of the Laws of Maryland 1927, the legislature accomplished the following: established the District within which the M-NCPPC was to have authority, established that the County Commissioners of Prince George's County and Montgomery County were to act as "District Councils" for those areas of the District within each county, and enabled those District Councils to enact zoning regulations.

As part of this regulatory scheme, Chapter 448 provided for Boards of zoning appeals in each county and authorized those boards:

> a) to permit a non-conforming use as an incidental accessory[2] to a conforming principal use on the same lot, subject to such conditions as will safeguard the health morals safety or welfare;
> b) where the strict application of any provision of the zoning regulations as to height and area of buildings and other structures would result in undue hardship upon the owner of specific property, or where there is reasonable doubt as to any provision of

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[1] Some might argue that we should begin our analysis with the Standard State Zoning Enabling Act published originally by the Department of Commerce only a few years before. That Act, as published in 1926, formed the model for both Chapter 448, *infra,* and Chapter 705, *infra*, and specifically provided for a "board of adjustment" that was authorized "in appropriate cases and subject to appropriate conditions and safeguards, [to] make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with specific rules therein contained" and to "hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance."

[2] Perhaps the word "use" was left out, but this is as written in Chapter 448.

> said regulations or the maps as applied to such property, to modify such strict application or to interpret the meaning of said regulations so as to relieve such hardship.

Chapter 448, §27.

During the same year, by Chapter 705, the legislature granted zoning power to Baltimore City and other municipalities having more than 10,000 residents. This law became Article 66B of the State Code and unlike Chapter 448, included "special exception" language:

> Such local legislative body may provide for the appointment of a board of Zoning Appeals, and in the regulations and restrictions adopted pursuant to the authority of this Act may provide that the said Board of Zoning Appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
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> * * *
>
> The Board of Zoning Appeals shall have the following powers:
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> * * *
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> 2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
> 3. To authorize upon appeal in specific cases variance from the terms of the ordinance as is necessary to avoid arbitrariness and so the spirit of the ordinance shall be observed and substantial justice done.

Chapter 705, §1 (7). Interestingly, this law required the board to act through a supermajority whenever it acted to reverse a decision of the administrative official on appeal, or to grant a special exception or variance. Chapter 705, §1 (7).

Thereafter, several additional revisions occurred before the charter from of government was established in Montgomery County. In 1939, the original law was repealed and reenacted by Chapter 714 of the Laws of Maryland of that year. Where the prior law allowed the District Council to establish a board of zoning appeals, the new law created the boards of zoning appeals in Montgomery and Prince George's counties. The law also modified the provisions affecting these boards, including their power to grant special exceptions:

> * * * a District Council may in its zoning regulations, provide that the Zoning Board of Appeals, may, in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent. * * * §22, Chapter 714.

In cases before it, the Board was granted the power:

> (2) To hear and decide, in accordance with the provisions of the regulations enacted by the District Council, requests for special exceptions * * * . §23, Chapter 714.

In 1943, Chapter 992 of the Laws of Maryland repealed and reenacted the provisions affecting the Regional District that had been enacted as public local laws and created a bi-county Act. This resulted in some changes in the section references, but no substantive alterations. Finally, in 1947, the legislature repealed and reenacted the law governing the District Council's authority to regulate special exceptions and authorized both the board of zoning appeals and the District Council to review and grant special exceptions.

The Advent of Charter Government.

With the advent of charter government in Montgomery County, many changes were taking place in its zoning regulations and procedures, not the least of which was exercise of its authority in 1952 to create a Board of Appeals under the authority of Article 25A and delegate to it the power and authority of the Board of Zoning Appeals legislatively created and empowered by the Regional District Act[3]. Chapter 15, §2, Laws of Mont. Co. 1952.

In 1959, the Regional District Act was again repealed and reenacted, but with some significant amendments to its provisions affecting the grant of special exceptions:

> A District Council in its zoning regulations may provide that the Board of Zoning Appeals or the District Council, or in Montgomery County an administrative officer designated by the District Council, in appropriate cases and subject to appropriate

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[3] We could find no opinion of this Office that addressed the legality of supplanting a public body, created by state public general law, with a body created under Home Rule power. In 1959, the legislature implicitly authorized the County's use of its powers under Article 25A to supplant the board of zoning appeals created in the Regional District Act. By that amendment, the legislature resolved any potential legal problem regarding the interplay between public general and public local law regarding creation of the Board of Appeals.

> principles, standards, rules, conditions, and safeguards set forth in the regulations, may make special exceptions to the provisions of the zoning regulations in harmony with their general purposes and intent. The decisions of the administrative officer in Montgomery County shall be subject to an appeal to the Board of Appeals. The District Council may also authorize the Board of Zoning Appeals to interpret the zoning maps or pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the regulations[4]. §1(83).

This amendment had the dual effect of implicitly recognizing the authority of Montgomery County to create a Board of Appeals under the authority of Article 25A with powers to address zoning matters arising under the Regional District Act and to authorize an officer of the County to grant special exceptions rather than the Board. Research of the county's code does not suggest that this authority was properly exercised, but rather that the Board of Appeals actually continued to exercise the authority granted an administrative officer.

Apparently, this oversight eventually was discovered, because in 1968, the General Assembly repealed and reenacted §1(83)[5] to authorize the delegation of special exception authority to either an "administrative office or agency"[6] and made other changes that affected special exceptions and addressed "variances" by name for the first time:

> A district council, in its zoning regulations, may provide that the board of zoning appeals or the district council, or in Montgomery County, an administrative office or agency designated by the district council, in appropriate cases and subject to appropriate principals (sic), standards, rules, conditions, and safeguards set forth in the regulations, may either grant or deny, upon such conditions as may be deemed necessary to carry out the purposes of this Chapter, special exceptions and variances

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[4] Apparently, Montgomery County, while seeing the need to address the authority of its Board of Appeals to address issues involving special exceptions, did not see the need to authorize its Board to pass on issues of boundary lines and other map interpretations.

[5] The amendment also changed what was §70-95 of the Montgomery County Code of Public Local Laws and §59-89 of the Prince George's County Code of Public Local Laws, as the Regional District Act was apparently also codified by both counties in their codes of Public Local Laws.

[6] Chapter 625 as printed in the Laws of Maryland suggests that the General Assembly did not intend to amend the word "officer" and that its transformation into the word "office" was purely typographical.

> to the provisions of the zoning regulations in harmony with their general purposes and intent. The decisions of the administrative office or agency in Montgomery County shall be subject to an appeal to either the board of appeals or such other administrative body as may be designated by the district council, and such appeal shall follow that procedure which may, from time to time, be determined by the district council. The district council may also authorize the board of zoning appeals to interpret the zoning maps or pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the regulations.

In 1975[7], the legislature directed that these laws be codified in Article 66D, and in 1983[8] codified in Article 28 of the Annotated Code of Maryland with various revisions as to section number and format. As it exists today, though modified over the years to authorize other administrative agencies or officials to act on special exceptions, the numbers of votes necessary to do so, and to approve variances, the law remains essentially as it was in 1939:

> (1) A district council in either county, in its zoning regulations, may provide that the board of zoning appeals, the district council, or an administrative office or agency designated by the district council, in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, may either grant or deny, upon conditions as may be deemed necessary to carry out the purposes of this article, special exceptions and variances to the provisions of the zoning regulations in harmony with their general purposes and intent.
> (2) (i) In Montgomery County, the district council in its zoning regulations may provide that the affirmative vote of:
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> 1. At least four members of the board of appeals are required to adopt a resolution that grants, revokes, suspends, amends, extends the time in which to implement, or modifies a special exception; and
> 2. A majority of the board of appeals is required to adopt a procedural motion regarding a special exception application.
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> (ii) In exercising its authority under this paragraph, the district council may enact, for any zone, different voting requirements for different uses.
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[7] Chapter 892.

[8] Chapter 57.

> (4) The decisions of the administrative office or agency in Montgomery County shall be subject to an appeal to either the board of appeals or other administrative body as may be designated by the district council. In either county, the appeal shall follow that procedure which may from time to time be determined by the district council.
> (5) The district council in either county also may authorize the board of zoning appeals[9] to interpret the zoning maps or pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the regulations.

Article 28, §8-110(a).

The Development of the Law of Special Exceptions in the Courts.

During this period of legislative development, the courts were interpreting the law and the Board's and Council's authority with respect to special exceptions. Early on, the courts questioned whether legislation could validly delegate authority to an administrative agency to vary the terms of a legislative enactment, whether by variance or exception. *Sugar v. North Baltimore Methodist Protestant Church*, 164 Md. 487 (1933). Indeed, in *Sugar*, the Court of Appeals determined that the legislative grant to Baltimore City authorizing it to grant its board of appeals the authority "when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of any of the provisions of this ordinance" constituted an unlawful delegation of power to an administrative board, because the power was not properly limited. *Sugar*, 164 Md. at 495.

Subsequent to *Sugar*, the Court addressed special exceptions in a way that substantiates the early belief that these zoning tools were to be used in a way that might be described as "use variances" today. Specifically, in *Ellicott v. Mayor of Baltimore*, 180 Md. 176 (1942), the Court spoke of the limitations on a Board's powers to vary the legislatively created zoning restrictions, the need to do so only in unique situations and a requirement that the regulations prohibit all otherwise reasonable uses of the property before an exception could be granted:

> The purpose of the zoning law is, of course, to devote general areas or districts to selected uses. "The whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged." *Rehfeld v. City and County of San Francisco*, 218 Cal. 83, 85, 21 P. 2d 419, 420. . . . An exception of one such lot as

[9] After the passage of this much time, one must assume that the legislature really intends that this authority includes the power to delegate these functions, in Montgomery County, to the board of appeals.

> that of Levine for a filling station would be a departure from the purpose, and unless made by reason of some exceptional conditions, under authority of the enabling act, would be illegal, even if attempted by municipal ordinance. Clearly there can be no valid exception of one lot merely as a favor to the one owner, because it is more profitable to him. The court has already spoken on this.
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> * * *
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> So long as this district continues zoned for residential purposes, it must be dealt with as a residential district, and the segregation of a lot within it for a commercial use must be dealt with as a discrimination. Not all discriminations are, however, departures from the authority of the enabling act, or unconstitutional. . . . But the power to change or modify a restriction applicable to a district must include the power to relieve a particular lot from it if the peculiar conditions of that lot or the public good requires it. If a lot should be susceptible of only a use different from that prescribed for the district, the special hardship of a prohibition of that one use might justify an exception from the general restriction. *City of North Muskegon v. Miller*, 249 Mich. 52, 227 N. W. 743; *Tews v. Woolhiser*, 352 Ill. 212, 185 N. E. 827. And a question of reasonableness of the municipality's exercise of the power under the enabling act might also present itself. *State v. Gurry*, 121 Md. 534, 541, 88 A. 546 47 L. R. A., N. S., 1087, Ann. Cas. 1915B, 957; *Baltimore v. Hampton Court Co.*, 138 Md. 271, 113 A. 850, 15 A. L. R. 304; *Dowsey v. Village of Kensington*, 257 N. Y. 221, 177 N. E. 427, 86 A. L. R. 642.

The effort by the court to explain that "special exceptions" were to be granted only under circumstances of undue hardship and because the property was unique by virtue of its topography or dimensions suggests that the courts were concerned that administrative modifications to legislatively prescribed zoning regulations be held to a minimum. The Court was also describing something far different from what has become known as a special exception under Article 66B, or under Maryland law in the lexicon of present day jurisprudence.

In the context of the development of the law in Montgomery County, the change that occurred in 1939 added a requirement that grants of special exception and variance be subject to standards, conditions and limitations imposed by the zoning regulations. In so doing, the legislature apparently responded to the court's concerns in *Sugar*. This response worked.

In *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279 (1953), the Court of Appeals was called upon to address the County's Board's authority with respect to granting special exceptions and did so noting its prior ruling in *Sugar*:

> * * * It has never been held since *Sugar v. North Baltimore Methodist Protestant Church*, 164 Md. 487, 165 A. 703, that the provisions for exceptions in the Baltimore City zoning ordinance are valid although several times we have assumed the validity of those provisions and held that the facts did not warrant the exception. *Hoffman v. Mayor and C. C. of Baltimore*, 197 Md. 294, 79 A.2d 367; and *Cassel v. Mayor and C. C. of Baltimore*, 195 Md. 348, 73 A.2d 486. What Section 13 g[10] does is to delegate to the Zoning Board a limited authority to permit enumerated uses which the legislative body finds in effect prima facie properly residential, absent any fact or circumstance in a particular case which would change this presumptive finding. The duties given the Board are to judge whether the neighboring properties and the general neighborhood would be adversely affected, and whether the use, in the particular case, is in harmony with the general purpose and intent of the zoning plan. We think that these standards, as applied to the specific uses enumerated in this Section, are sufficient on which to base a factual claim. Yokley, *Zoning Law and Practice*, Sec. 118; *Bishop v. Board of Zoning Appeals*, 133 Conn. 614, 53 A.2d 659; *Potts v. Board of Adjustment*, 133 N. J. L. 230, 43 A.2d 850; *Mayor and C. C. of Baltimore v. Biermann*, 187 Md. 514, 50 A.2d 804; *Maryland Advertising Co. v. Mayor and C. C. of Baltimore*, 199 Md. 214, 86 A.2d 169. (Footnote added.)

202 Md. at 287-8.

Both the county, in its zoning regulations §13(g), and the Court of Appeals in *Merlands* seemed to recognize as "special exceptions" uses that were specifically identified in the zoning regulations and which might be granted by a board of appeals. Neither addressed the concept that "exception" was a technique which apparently authorized use variances as "exceptions" based upon the zoning laws of Baltimore City. *Frankel v. Mayor of Baltimore*, 223 Md. 97 (1960); *Mayor of Baltimore v. Sapero*, 230 Md. 291 (1962). In *Frankel*, the Court

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[10] Section 13g provided: "Upon appeals, the Board is hereby empowered to decide requests for and grant requests for the following special exceptions and decisions upon the following special questions when in the judgment of the Board such special exceptions and grants and decisions shall be in harmony with the general purpose and intent of the zone plan embodied in these Zoning Regulations and the Zoning Map, and will not tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with said zone plan: (1) Permit, in any residential district, an aviation field, a radio broadcasting station, a private club, a country club as such is defined by existing State and county law applicable to Montgomery County, or an antique shop in residence of proprietor when operated as a home occupation".

discussed the basis on which exceptions should be granted:

> We shall first consider the contention made by the appellee that the appellant has no standing. The City correctly states that the appellant obtained the lot with full knowledge of its zoning classification; and it argues that this fact precludes him from asserting any claim of hardship. We think that the evidence in this case, as will be pointed out below, shows that under the present zoning classification, without the benefit of any exception, the appellant's property cannot be put to any reasonable use. The case, then, is not merely one of hardship, but of a taking in a constitutional sense. *Nectow v. City of Cambridge*, 277 U.S. 183; *City of Baltimore v. Cohn*, 204 Md. 523, 105 A.2d 482. *Cf. Walker v. Talbot County*, 208 Md. 72, 116 A.2d 393; *Marino v. City of Baltimore*, 215 Md. 206, 220, 137 A.2d 198; *Hoffman v. Mayor & C. C. of Baltimore*, 197 Md. 294, 79 A.2d 367. We, therefore, find it unnecessary to consider whether any limitation should be placed on the rule stated in *Gleason v. Keswick Imp'v't Ass'n*, 197 Md. 46, 50, 78 A.2d 164, which stands in the way of one seeking a variance (or its equivalent), because of alleged hardship, when he has purchased the property with full knowledge of the zoning restrictions of which he complains.

230 Md. at 101. When the Court determined that the zoning classification, "without benefit of any exception," would deprive Mr. Frankel of all reasonable use, it did so in the context of determining that his application to build a professional office building in a residential zone should not have been denied. Thus, the Court was effectively equating the "exception" to a "use variance," but doing so under the unique provisions of the Baltimore City zoning laws.

The term "exception" first used with relationship to zoning in Montgomery County in 1927 most likely was intended to have the meaning that is addressed in *Frankel,* rather than as a use that was permitted by special permit[11] as seems to have been used in *Merlands*. The change in meaning was most likely prompted by the requirements that *Sugar* imposed on legislative delegations of "exception" granting authority. For example, what could be more clear legislative direction than naming those "exceptions" that an administrative agency could make.

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[11] In Anderson, *Law of Zoning 3rd*, §21.01 (fn.5) and §21.02, the author notes that Maryland has likened special exceptions to special permits and distinguished them from variances. The author does not follow the historical development of special exceptions in Maryland, nor analyze how decisions like *Frankel* and *Sapero* can be rationalized with these conclusions. Nevertheless, the author has accurately described current Maryland law, regardless of how it evolved.

Admittedly, this interpretation does not square well with the description of a "special exception" found in *Schultz v. Pritts*, 291 Md. 1 (1981). However, *Schultz* dealt with "special exceptions" that were defined in Article 66B, §1.00 to be:

> 'Special exception' means a grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special exceptions as detailed in the zoning ordinance exist, that the use conforms to the plan and is compatible with the existing neighborhood.

Neither Article 28 nor the Montgomery County Code define the term "special exception." The use of the term for the first time in 1968 was most likely a result of other language changes[12] than any specific intent to impose a meaning similar to what is the definition now found in Article 66B. In fact, no definition existed for "special exception" in the 1968 Annotated Code. Nevertheless, Judge Moylan in a thorough analysis for the Court of Special Appeals showed the links between special exceptions, "conditional uses" and "special permits," concluding that the terms were interchangeable by citing several authorities, a law encyclopedia and several Maryland cases:

> Thus, the broad phenomenon does have, here as elsewhere, many labels. Whether the label employed on a particular occasion happens to be "special permit," "conditional use," "special use," "use permit," or "special exception," the type of relief described is the same. . . .

Hofmeister v. Frank Realty Co., 35 Md. App. 691(1977).

In one of its most recent pronouncements on the subject, the Court of Appeals, despite repeated past observations of the interchange ability of the term, apparently recognized that a jurisdiction that establishes procedures for handling "special exceptions," but identifies a use as a "conditional use" implicitly has separated their meanings and made them distinct:

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[12] When authorizing the board to grant or deny special exceptions, the legislature did so by deleting the language "may make special exceptions" in favor of the language "may grant or deny ... special exceptions and variances". Without some evidence to the contrary, the most likely focus of legislative intent was on the change that accommodated including the new power to grant variances. This change clearly would not have achieved the same result had the language remained "make special exceptions and variances" and for that reason what was once an "exception" that the legislature intended to be "special" became a "special exception" that is not really special, nor an exception.

> For example, one of the ordinances at issue, County Code Art. 28, § 3-403, classifies adult bookstores and adult motion picture theaters as conditional uses in the C4-Highway Commercial District and the W3-Heavy Industrial District. The County apparently has no written or established procedures for obtaining approval of a conditional use. The Court of Special Appeals noted this and stated "it is not clear to us what the actual process is for obtaining approval as a conditional use. There are extensive provisions relating to the procedure for obtaining a special exception, but the zoning law is silent with respect to conditional use approval." *Annapolis Road*, 113 Md. App. at 132-33, 686 A.2d at 741. This amorphous administrative procedure is coupled with the requirement that an adult motion picture theater "was not to be used for the display of obscene films or other performances." The Court of Special Appeals agreed with the county that condition four was an objective condition and that the issuance of a zoning certificate of use was simply a ministerial act. "If the applicant's use is authorized by the zoning ordinance -- if the facility is in a C4 or W3 zone and the five objective conditions are satisfied -- the certificate must be granted." *Annapolis Road*, 113 Md. App. at 134, 686 A.2d at 742. * * *

Gresser v. Anne Arundel County, ___Md. ___ (1998).

The Court of Appeals has not finally decided that a local government can adopt a different standard from that espoused in *Schultz*. *Harford Co. v. Earl E. Preston, Jr., Inc*,. 322 Md. 493 (1991). In *Harford Co.*, the Court specifically determined that it was not called upon to decide the issue of whether the legislative body could vary the *Schultz* standard. In so determining it referred to *dicta* in *Gotach Center v. Board of County Commissioners*, 60 Md. App. 477, (1984). *Gotach* was authored by Judge Wilner, who now sits on the Court of Appeals and its reasoning supports the Council's authority to vary the *Schultz* standard:

> [U]nder *Gowl*, the focus is on whether, with respect to a given factor stated in the ordinance, the proposed conditional use would affect the neighborhood more adversely than any of the uses permitted without special exception. Under *Schultz*, the possible effects of permitted uses are not considered; the focus, rather, is on whether, with respect to that factor, the proposed conditional use would have a more adverse effect on the particular location at issue than it would have generally in the zone. *Schultz* is a more particularized, and normally a more stringent, test for an applicant to meet than is *Gowl*.
>
> The underpinning of the *Schultz* analysis is the legislative discretion necessarily involved in the "balancing process." We do not read that case as binding county legislative bodies to the particular analysis used there. All that *Schultz* seems to say is

> that, absent some clear legislative direction to the contrary, if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in *Schultz* and not by that stated in *Gowl*. We see no reason, however, why a county legislative body cannot adopt a *Gowl* -type standard in the ordinance itself, if it chooses to do so. There is nothing inherently improper about comparing the effect of a particular conditional use with that of a permitted use; it simply is not the kind of comparison normally regarded as consistent with general legislative intent.

Gotach, 60 Md. App. at 485,

The broad power given the District Council ought to be viewed as sufficient authority to regulate the basis upon which special exceptions can be granted[13] based upon *Gotach*, the history of the enabling authority of Article 28, Section 8-110 and absent a decision by the Court of Appeals to the contrary. This power is limited by the requirement that all regulations within districts and classes of use must be uniform[14]. *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1978). Thus, provisions authorizing special exceptions that might be viewed as discriminatory (in the zoning sense), would be prohibited, while regulations that did not go so far would be proper.

Long before *Schultz,* the Court of Appeals recognized that the standards required by *Sugar* could include issues such as "need":

> Memco next contends that Section 59-124 (f) in using the words "need" and "general neighborhood," without further definition, is invalid as an attempted

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[13] The language of Art. 28, §8-110 limits the Council's authority to provide for special exceptions and variances to those cases where to grant them is "in harmony with [the zoning regulations] general purposes and intent". Thus, even a Council-authorized special exception could be challenged if it were found not to harmonize with the general purpose and intent of the zoning regulations.

[14] *Ellicott* also described the basis for uniformity, but did so in the context of non-discriminatory zoning.

> delegation of legislative power without sufficient guides and standards. We have already observed, however, in *Neuman* that these words have received a judicial gloss, sufficiently definite "to protect the people against any arbitrary or unreasonable exercise of power" in zoning cases, *Heath v. Mayor & City Council of Baltimore*, 187 Md. 296, 303, 49 A.2d 799, 803 (1946), but, at the same time, giving sufficient "flexibility necessary to enable the administrative officials to carry out the legislative will," *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816, 822 (1956). See *Givner v. Commissioner of Health*, 207 Md. 184, 113 A.2d 899 (1955) and *McBriety v. Mayor & City Council of Baltimore*, 219 Md. 223, 148 A.2d 408 (1959). In our opinion, the guides and standards in Section 59-124 (f) are sufficient to sustain the constitutionality of this provision against the charge of the lack of such guides and standards.

Lucky Stores v. Board of Appeals of Montgomery Cty, 270 Md. 513 (1973).

Indeed, in *Lucky Stores* the Court determined that the Board was authorized to deny a special exception use to a filling station because the general neighborhood did not need another such use. *Schultz* should not be viewed as changing this holding. *Schultz*, after all, was a case that sought to give meaning to a provision found in most zoning ordinances in which a board is required to determine if a proposed use will have an "adverse effect" on the neighborhood[15]. The Court merely interpreted an ordinance that was silent on the issue of how adverse impact was to be calculated, i.e., by comparison to the impact of a principal use, by measurement of its effect on other property and the community alone, or, as adopted in *Schultz*, by measurement against that same use at another location. Absent such legislative intent, under Article 66B, the court determined the proper procedure to be followed. Had the zoning ordinance included specific measuring devices, the court would not have been called upon to address the ambiguity of what constituted an "adverse effect" on the neighborhood.

Defining Special Exception.

Because the term "special exception" is widely used, the Council could determine that the best course would be to continue to use that term in the county law without defining it. Inasmuch as Article 66B already defines the term, it makes sense to harmonize the

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[15] The Carroll County Zoning Ordinance, upon which *Schultz* was decided, provided: ". . .The application for a conditional use shall not be approved where the Board finds the proposed use would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. . . ." *Carroll County Zoning Ordinance, §17.6.*

county's definition with that of Article 66B, rather than to create a different definition and risk a court's misconstruction of the Council's intended meaning. The definition in Article 66B provides: " 'Special exception' means a grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special exceptions as detailed in the zoning ordinance exist, that the use conforms to the plan and is compatible with the existing neighborhood."

As discussed in this memorandum, the etymology of "special exception" leads to a conclusion that the term once described an action more in keeping with what might be described today as a "use variance," than a "special permit." If Council chooses to authorize "special permits," rather than "special exceptions," or in addition to "special exceptions," or to authorize "conditional uses," it could do so, but must take great care in drafting the authorization and limitations for each use to be certain that the courts do not misconstrue the intent of the Council.. Using greater specificity in describing the limitations under which the Board might grant its permission will also better protect against uses being allowed which affect adjacent properties, neighborhoods or communities in ways that are disruptive. Obviously, this analysis should take place based upon a review of the specific district and uses that are proposed.

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BIBLIOGRAPHY

American Bar Association and Advisory Commission on Housing and Urban Growth, *Housing for All Under the Law: New directions in housing, land use, and planning law*, Richard P. Fishman, (ed.), Ballinger Publishing Company, Cambridge, MA, 1978.

Anderson, Robert M., *American Law of Zoning,* 4th ed. Clark, Boardman, Callaghan, Rochester, NY, 1996.

------ "The Board of Zoning Appeals – Villian or Victim?" *Syracuse Law Review*, Vol. 13, No. 3, Spring 1962.

Babcock, Richard F., *The Zoning Game: Municipal Practices and Policies*, The University of Wisconsin Press, Madison, WI, 1966.

------"The Unhappy State of Zoning Administration in Illinois," 26 *U.Chi.L.Rev.*, 1959.

------ and Clyde L. Weaver, *City Zoning: The Once and Future Frontier*, American Planning Association, Washington, D.C., 1979, pp. 155-180.

Bair, Jr., Frederick H., *The Zoning Board Manual*, American Planning Association, Washington, D.C., 1984.

Bassett, Edward M., *Zoning: The Laws, Administration, And Court Decisions During The First Twenty Years*, Russell Sage Foundation, New York, NY, 1936.

Crane, Stephen J., "The Hearing Examiner System in the State of Washington," Washington State Office of Community Development, Olympia, WA, April, 1977.

Driscoll, James and Theodore Hunter, *Land Use Decisions: Assuring Fairness*, ICMA, IQ Service Report, Volume 31, Number 9, September 1999.

Dukeminier, Jesse and Clyde L. Stapleton, "The Zoning Board of Adjustment: A Case Study in Misrule," 50 *Kentucky Law Journal* 322, 1962.

Haar, Charles M. and Jerold S. Kayden (eds), *Zoning and the American Dream: Promises Still to Keep*, APA Planners Press, Washington, DC, 1989.

Knack, Ruth et al., "The Real Story Behind the Standard Planning and Zoning Acts of the 1920's," *Land Use Law and Zoning Digest*, Vol. 48, No. 2. February 1996, pp. 2-4.

Lauber, Daniel, *The Hearing Examiner in Zoning Administration*, American Society of Planning Officials, Chicago, IL, 1975.

Mandelker, Daniel R. et al., *Planning and Control of Land Development: Cases and Materials*, Fourth Edition, Michie Law Publishers, Charlottesville, VA, 1995.

Meshenberg, Michael J., "The Administration of Flexible Zoning Techniques," Planning Advisory Service Report No. 318, American Society of Planning Officials, 1976.

Municipal Research Services Center of Washington, *The Appearance of Fairness Doctrine in Washington State*, Report #32, January 1995.

Municipal Research Services Center of Washington, *The Use of Hearing Examiners by Cities and Counties in Washington*, May 1999.

Peterson, Craig A. and Claire McCarthy, "Small Tract Rezonings: Toward Expanded Procedural Safeguards," Land *Use Law and Zoning Digest*, Vol. 31, No 4, April, 1979, pp. 3-6.

Schnidman et al., *Handling the Land Use Case*, Little, Brown and Co., Boston, 1984.

So, Frank S. et al., (eds.) *The Practice of Local Government Planning*, International City Management Association, Washington, DC, 1979.

Vranicar, John et al., *Streamlining Land Use Regulation: A Guidebook for Local Governments*, APA Planners Press, November 1980.

The Use of Hearings Officers in Land Use Decisions – 1975 Planning Notes, Urban Service Program of the League of Oregon Cities and the Bureau of Governmental Research and Service, University of Oregon, Eugene, OR, August, 1975.

Washington State, Office of Community Development, Office of the Governor, *The Hearing Examiner System in the State of Washington*, Stephen J. Crane, Attorney at Law, April 1977.

Zoning Ordinance and Its Amendment: Basic Tools and Techniques, Issue #2 Pace Law School Web Site.

Toll, Seymour I., *Zoned American*, Grossman Publishers, New York, 1969.