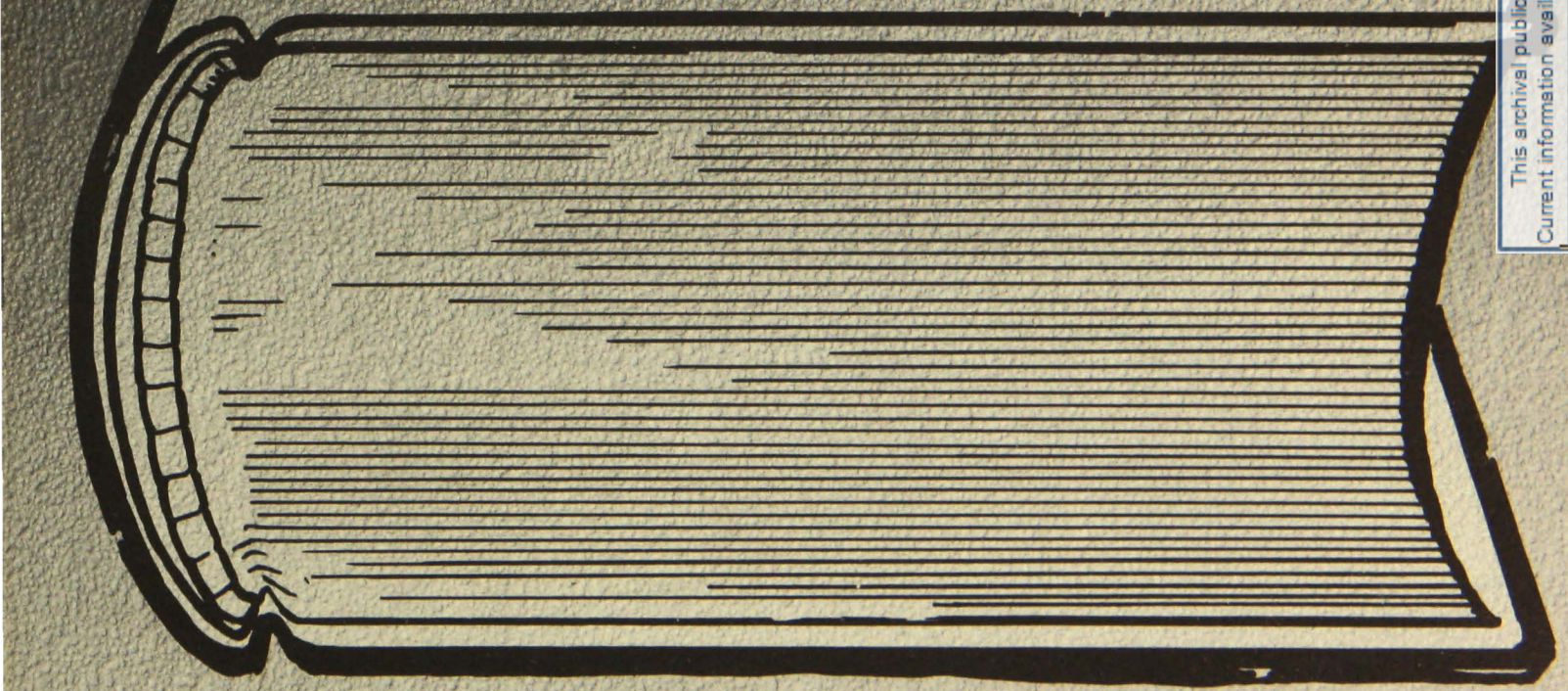
Extension Bulletin 446—1980

Statutory Procedural Requirements for County Zoning Administration in Minnesota

Robert W. Snyder

Agricultural Extension Service
University of Minnesota

1980



CONTENTS PAGE

Robert W. Snyder is an associate professor and extension land economist, Department of Agricultural and Applied Economics, Agricultural Extension Service, University of Minnesota, St. Paul, MN 55108.

The author is indebted to the following persons who provided comments and suggestions: Dale Dahl and Philip Raup, University of Minnesota; Mentor C. Addicks, League of Minnesota Cities; John Chapuran, Association of Minnesota Counties; and William Radzwill, Nelson, Doering and Radzwill, Cokato.

Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Norman A. Brown, Director of Agricultural Extension Service, University of Minnesota, St. Paul, Minnesota 55108. The University of Minnesota, including the Agricultural Extension Service, is committed to the policy that all persons shall have equal access to its programs, facilities, and employment without regard to race, creed, color, sex, national origin, or handicap. 30 cents

Statutory Procedural Requirements for County Zoning Administration in Minnesota

Robert W. Snyder

Introduction

In May 1974, as part of a comprehensive amendment to the planning enabling legislation for counties, Minnesota lawmakers dramatically revised procedural requirements for ordinance administration. The general result was to reduce sharply the degree of discretion in the assignment of administrative responsibilities and to mandate hearing, notice, and review procedures for variances, conditional uses, and rezoning.

Because of a grandfather clause that later was revised, the new procedures could not be enforced for at least four years. The deadline was August 1, 1978. This publication discusses the new administrative procedures.

Most Minnesota counties were granted general authority to regulate land use and development through adoption of zoning ordinances and other "official controls" when Chapter 599, Laws of Minnesota, 1959 became effective in August of that year.[1] Much of the language of that act was patterned after the Standard Zoning Enabling Act (hereinafter SZEA) and the Standard City Planning Enabling Act (hereinafter CPEA) published by the U.S. Department of Commerce in 1926 and 1928, respectively. Although some of the weaknesses in that 1959 county planning act (hereinafter 1959 CPA) are striking when looked back on, it remained basically unchanged for 15 years.

During the early part of this time, this authority was little used, but after 1964, when section 701 of the Federal Housing Act of 1954 was changed to make all counties eligible for federal financial grants for "comprehensive planning," many counties accordingly chose to adopt ordinances developed by planning consultants contracting with counties.[2] Regulatory activity increased with the advent of the state shoreland management program. This was based on a 1969 Minnesota statute that required counties to regulate land use and development in defined shoreland areas by July 1, 1972.

The need for amending the 1959 CPA became clearer with experience in administering zoning ordinances and other official controls. The lack of procedural guidelines was quite troublesome. Aware of rising concern, the Association of Minnesota Counties introduced amendatory legislation. Recommendations were sought from several sources, including a land use committee made up of elected county officials, two county planning directors, a county attorney, and an extension land economist from the University of Minnesota.

After successive drafts had been considered, identical bills, Senate File (SF) 2576 and House File (HF) 2591, were introduced into the legislature. In the Senate, after the adoption of several minor amendments recommended by the Committee on Local Government, SF 2576 was passed on March 8, 1974. The House chose to operate somewhat differently. After adopting amendments recommended by the Committee on Environmental Protection and Natural Resources, but before final passage, HF 2591 was compared with the passed Senate companion bill and indefinitely postponed. In the alternative, the House amended SF 2576 to conform with the postponed house bill, repulsed an attempt to rerefer it to committee, accepted three further amendments presented on the floor, and adopted a revised SF 2576. Following a Senate refusal to concur in the House action on SF 2576, a conference committee considered both versions and reported back with a bill that was passed by both houses and signed into law by the governor.

The 1974 legislation dealt with many sides of the regulatory powers of county governments in Minnesota, but largely it called for an overhaul of zoning administration. This publication centers on these matters. It will consider the county planning act as amended (hereinafter CPAA), not solely the 1974 legislation.

The Minnesota action is especially interesting since it represents a rejection of both the underlying philosophy and the recommendations of the American Law Institute (ALI) as contained in Article 2 of the Model Land Development Code (MLDC). A brief discussion will show the major differences in the two approaches.

While the writers of the MLDC recognized widespread confusion about the proper use of traditional administrative and enforcement plans, they tried to solve the problem by introducing new terminology and giving the local legislative unit almost complete discretion in delegating administrative and ministerial powers. Under the ALI model, all decisions involving the exercise of discretion in granting or withholding permission to build, occupy, or develop land and structures, including rezoning amendments, are made by a "land development agency." This agency might be "the governing body or any committee, commission, board, or officer of the local government." Permission would be granted in the form of a "special development permit," regardless of the legal or theoretical basis for exercising discretion in that particular case.

The distinctions between "use" variances, "non-use" variances, conditional use permits (sometimes called special permits), exceptions, and rezoning—all provided for, though unnamed—would be seen only in the nature of the result of the grant or denial of the request and the reasons stated for it. Only vague and general standards to guide decisions of the land development agency are required. Procedural mandates are strict in comparison, with extensive hearing and notice provisions and requiring a complete record of written findings of fact and conclusions and express reasons for all such decisions.

In the new Minnesota legislation, the attention to discretionary administrative procedures suggests agreement with a basic fact that seems to underline the ALI approach: many regulatory problems can be traced to widespread confusion about the proper use of traditional administrative flexibility devices. But Minnesota has rejected the ALI notion that the cure consists of supplanting customary terminology and separation of functions within the governmental structure. Instead, the statute uses and

[1]Some counties received authority to enact zoning regulations by legislation passed in 1939 and 1941.

[2]Copies of all county ordinances in effect on March 1, 1973, including date of adoption, are on file with the writer.

carefully defines selected terms denoting different types of administrative devices and limits the assignment of discretionary powers by county units so as to mandate or encourage a clear separation of authority to respond to different types of landowner requests on an individual basis. Thus it is in nomenclature and in the degree of local discretion to use a variety of organizational arrangements that the widest divergence can be seen.

A brief outline of the Minnesota approach will show the contrast. The Minnesota CPAA identifies by name and specifies the composition of two citizen boards appointed by the legislative county board: the planning commission and the board of adjustment. The representation of elected officials on both is restricted. Discretionary administrative decisions, also identified by name, are assigned by statute. Rezoning is the ultimate sole responsibility of the county board. Quasi-judicial relief in the form of "non-use" variances may be obtained only from the board of adjustment, and only if statutory findings are present. "Use" variances are declared unlawful.

Conditionally permitted land development activity or construction, defined as a "conditional use," may be authorized only after consideration by the planning commission and only after locally formulated but statutorily required itemized standards and criteria have been satisfied. Final authority to allow conditional uses may be delegated to the planning commission or reserved to the county board. Detailed and individualized minimum notice and hearing requirements are set by statute (an area of agreement with the MLDC).

The Minnesota CPPA differs from the standard zoning and planning acts that established the norm for most state enabling laws, including much of the 1959 CPA, most notably by the enormously greater detail, taking advantage of decades of experience and court decisions in states with a long history of land use controls. A striking departure from that norm is found, however, in provisions allowing assignment of discretionary authority to allow conditional uses (called "exceptions" in the standard act) to the planning commission or the governing body rather than the board of adjustment. Rejection of the traditional division of authority may have been motivated by a belief that some problems encountered in discretionary administration of zoning arose because of a failure to understand important distinctions between the granting of variances and the approval of conditionally permitted development and that the failure may have been partially caused by placing the authority for both in a single body, the board of adjustment.

Going to a detailed look at the end product of legislation, it will help to note that this discussion is limited to statutory provisions related to the discretionary administration of zoning regulations. "Discretionary administration" is defined to include, as well as issuing variances and conditional use permits, adopting amendments that do nothing but change the district classification of one or a few parcels of land. Though this inclusion defies the reasoning of the Minnesota Supreme Court, which has declared such amendments (often referred to as "rezoning") to be legislative, not administrative, in nature, it is satisfactory for our purposes.[3] We will consider, first, statutory provisions affecting the character and authority of governmental entities in which the power to make discretionary administrative decisions is or may be vested and, second, provisions concerning the exercise of the three types of discretion.

The County Board

The county board, more properly but unusually called the board of county commissioners, is the governing legislative body at the county level in Minnesota. It includes five county residents elected for staggered four-year terms from five geographic districts (including urban places) as nearly equal in population as possible.[4] Because decisions by the county board are subject to limited court review, it may, when statutory mandates to the contrary are lacking, exercise a much greater degree of discretion than nonelective bodies. Its members are, of course, at the same time subject to more intense political influence than are members of appointed boards and commissions.

The Planning Commission

The largest appointed body involved with discretionary county zoning administration in Minnesota is likely to be a citizen board statutorily provided for and now statutorily called the planning commission. The name is taken from the CPEA, which assigned to the planning commission final authority on the approval of land subdivision plats. The CPEA also stated that, if appointed, the commission was to have with respect to zoning the same duties as and replace a similar body provided for in the SZEA and called therein a zoning commission. These latter duties were strictly advisory.

In Minnesota, perhaps because sole authority to approve land subdivision plats was already vested in the county board, so that these decisions were not to be made by the commission, the 1959 CPA used the term "planning advisory commission." This name, discouraging the assignment of nonadvisory functions to the commission, prevailed until the 1974 amendment eliminated the middle term and clearly authorized the exercise of delegated nonadvisory functions.

Several statutory provisions, some added in the 1974 amendment, supply procedural mandates and limit the county board's discretion in choosing a planning commission. One of the more interesting provisions says that the commission must be appointed by ordinance, triggering a statutory prior public notice requirement. This newly imposed rule may be unnecessarily burdensome, particularly when the appointment concerns replacing retiring commission members making up only a fraction of total membership. The legislature may have intended only that the creation of the planning commission as an official entity be done by ordinance, as in the case of the board of adjustment, rather than the appointment of members to the commission. But such an interpretation can be reached only by straining the rather clear language of the statute.

Few surprises appear in the composition requirements. Although not specifically declared by the statute, there are two classes of membership: regular and ex-officio. Only regular

---

[3]It might be noted that there is legal precedent elsewhere for the classification used here. *Fasano v. Board of Commissioners*, 264 Ore. 574, 507 P. 2d 23 (1973), *Fleming v. City of Tacoma*, 81 Wash 2d 292, 502 P2d 327 (1972).

[4]Exceptions: (1) Counties with an area exceeding 5,000 square miles and a population exceeding 75,000 have seven-man boards. (2) The board for Ramsey County comprises seven members.

members (5 to 11 may be appointed) hold the power to vote. Language added in 1974 makes it very clear that only one regular member may be a county officer or employee. Previously, one member was to be a county commissioner, but additional representation by elected officials was not specifically prevented. If political detachment will lead to greater objectivity without an offsetting reduction in sense of responsibility, the change should have a positive influence.

Residency requirements, still present but less stringent after the 1974 amendment, continue to reflect an unfortunate preference for absolute numbers instead of more meaningful percentages. The deletion of a previous mandate that at least 3 of the 5 to 11 members be "electors" living in unincorporated areas, as provided in both bills as introduced, survived committee action in both houses. But it was supplanted by a House floor amendment to SF 2576 that was retained in the passed conference committee bill. Consequently, the law now provides for a minimum representation of two residents of unincorporated areas. Given the likely representation of rural interests on the county board and limitations on the territory affected by county zoning ordinances,[5] the effect of this requirement is questionable.

Far more significant is a new provision that forbids service on the commission as a regular member by anyone who has received during the past two years any substantial portion of his or her income from "business operations involving the development of land within the county for urban and urban-related purposes." This apparently strong antidevelopment posture first appeared as a committee amendment to HF 2591 that restricted representation to one such individual. The same language was continued in the House version of SF 2576, but the more restrictive measure appeared in the conference committee bill that was enacted.

This absolute prohibition may be an overreaction to suggestions that land use planning is often ineffective because decision making bodies are controlled by developer interests. To the extent the statutory mandate is observed, it is likely to bias the attitude of the planning commission and seriously affect its ability to represent all citizens in the county. This will both lessen the commission's value in an advisory capacity and reduce the probability that the more broadly representative county board, whose members, especially in developing areas, are likely to be sympathetic to development interests, will delegate to the commission any final decision-making authority. Neither outcome seems desirable. However, failure to observe the statutory rule may open any decision by the planning commission to attack on jurisdictional grounds.

The planning commission's ability to reach wise decisions may be enhanced by the optional appointment of technicians and other knowledgeable persons as ex-officio members. Such appointments, though not limited by number, are confined to persons holding positions as county officers and employees.[6] A committee amendment to HF 2591 extending ex-officio appointment to employees of the state and federal government, though continued in the House version of SF 2576, did not appear in the final conference bill. This means that some useful technicians, such as district conservationists of the Soil Conservation Service, USDA, may not serve on the commission in an ex-officio capacity. They may, of course, participate usefully in other ways.

Capabilities of the planning commission also may improve as a result of provisions added in 1974 for compensation to its members in an amount to be determined by the county board. Previously, payments were limited to reimbursement for expenses.[7] The new allowance may help attract more highly qualified and respected members of the county community to serve.

Duties and Responsibilities of the Planning Commission

Under pre-1974 law, the planning commission's role was described in terms of assisting the "planning agency" in carrying out its duties, including developing recommended official controls. The "planning agency" was defined as the planning director, planning commission or department, or the office of a planning or zoning director or inspector; and the board of adjustment; plus staff members, employees, and consultants of these entities. Organizational patterns and operational relationships under this arrangement were unclear. Through the 1974 deletion of these provisions and adoption of a new subdivision directing the planning commission to cooperate with the planning director and other county employees in developing recommendations to the county board, the commission should be more independent.

In a somewhat similar way, the planning commission before the 1974 amendments had to conduct public hearings on all proposed rezoning actions, then report its findings and conclusions to the "planning agency" for forwarding with planning agency comments to the county board. This provision also has been deleted, but the commission is now one of several entities to which the county board may assign responsibility for conducting public hearings for "one or more purposes," including rezoning. With respect to rezoning, the commission's position now is assured an opportunity for expression through statutorily declared powers of review before the enactment of any ordinance amendment, including rezoning, by the board.

A 1974 statutory change with the potential for more far-reaching consequences concerns the planning commission's role in conditional use permit administration. Previously, the statutory name, "planning advisory commission," coupled with duties described primarily in terms of assisting and advising other entities, as in the familiar SZEA, apparently induced a belief that county officials could not delegate final administrative decision-making authority to the commission. Reinforcement for that limitation could be found in the stated position of

[5]In most Minnesota counties, the majority of the total county population, which elects the county board, lives in unincorporated areas. Even where not true because of a larger city in a particular county, the board is very unlikely to fail to appoint at least two rural residents to a body concerned almost exclusively with land use planning and control outside incorporated areas.

[6]In 1973, 61 counties reported ex-officio planning commission members. Positions commonly represented were highway engineer, agricultural extension agent, attorney, zoning administrator and auditor. Numbers can become excessive. In 1973 one county reported 17 ex-officio members. R. Snyder, Organizational Arrangements for County Planning, Ag. Ext. Serv. Sp. Rept. 48 (rev. 1976, Minn.).

[7]It might be noted that even these payments were prohibited by the CPEA (§ 4) and that the Minnesota municipal planning act and the MLDC avoid the issue altogether.

some officials of the State Planning Agency that issuing conditional use permits resulted in a change of use equal to rezoning and, therefore, should be done only by the legislative board of county commissioners.[8]

Although this characterization seems, in looking back, to have reflected a misunderstanding of the proper role of conditional use permits, the influence of its assertion strengthened a natural preference of county board members to keep a close hold on land use planning and zoning because of their potentially politically destructive nature. The effect of these forces is reflected by conditions in 1973, when only 10 percent of all county zoning ordinances gave the planning advisory commission final authority to act on requests for conditional use permits.

A new statutory provision now expressly authorizes the county board to delegate this authority to planning commissions, prohibits such delegation to any other entity, and mandates review by the planning commission before any final decision whenever the board elects to keep the authority to itself. If counties choose to delegate, which other sections of the CPAA tend to encourage, the availability of expertise represented by ex-officio membership and through cooperation with the planning director and other employees will rise in significance.

The Board of Adjustment

As it has since 1959, the Minnesota county planning act continues to require that a body designated therein as a board of adjustment be created by the county board at the time that the county adopts a zoning ordinance or any other "official control." The method and term of appointment of persons serving on the board, and the designation of their duties and functions in addition to those assigned by statute, are determined by the board of county commissioners within statutorily established limits. Conforming to language added by the 1974 amendment, such decisions must be done by ordinance, requiring prior public notice of official action; thus, frequent changes are unlikely. The size of the board, fixed at three until 1974, now may vary from three to seven members. A predictable consequence will be a five-person board made up of one member from each of the five county commissioner districts.

The make-up of the board of adjustment is subject to certain statutory constraints that remain unchanged by the 1974 amendments. From a quasi-constitutional viewpoint, the most interesting is the one barring appointment to the board of (1) any elected official or (2) any employee of the board of county commissioners.

This observation of the historical separation-of-powers doctrine should make the board of adjustment a truly quasi-judicial body capable of making more objective, almost wholly apolitical decisions. It presents a sharp contrast: Minnesota's municipal planning act expressly allows the governing body to serve as its own board of adjustment. It also differs from MLDC which is even less restrictive than the municipal planning act, and the 1926 SZEA which seemed to assume, but does not mandate, separateness.

The completely separate status also frees the county board and its individual members from time consuming or administrative or quasi-judicial matters, allowing more careful attention to weightier governmental policy issues. Control over actions of the board of adjustment may be exercised through procedural requirements and other directions or, in probably rare cases, legal attack.

To a planner, another continuing compositional mandate may be of at least equal interest: one member of the board of adjustment is required to be a member of the planning commission, if one has been appointed.[9]

The apparent purpose is to help assure that land use planning principles are considered in the board's deliberations. Since "one" is a minimum, not a fixed number, the complete board of adjustment also may serve on the planning commission. In 1973, when the size of the board was limited to three, a survey showed that this actually was the case in seven counties. In eight additional cases, two members of the board were also planning commissioners. Some overlap seems wise, but an excessive amount (1) concentrates citizen participation in fewer persons and (2) may lead to a pro-planning, pro-regulate bias that would distort the board's intermediary role.

The possibility of conflict-of-interest problems also is addressed by language added in the 1974 amendment. First, provision is made for appointing an alternate member on three-person boards who may vote when a regular member's vote might be suspect. Second, regardless of the size of the board, a member with a potential conflict of interest who does not voluntarily abstain from voting on a given issue may be disqualified by a majority vote of the other regular members of the board. This may or may not in fact change the nature of the law, but the express directive should encourage the board to take greater care in observing proper procedures.

Another new provision that may help improve the calibre of decisions by the board of adjustment authorizes compensation to regular and alternate members over and above their necessary expenses. The amount and method of payment is left to local discretion. Previously, only reimbursement of expenses was allowed.

Another provision added in 1974 seems of questionable value, though not because the underlying motive is wrong. In a House floor amendment to SF 2576 that reappeared in the enacted conference bill, it was specified that at least one member be appointed from unincorporated areas of the county. As in the case of a similar mandate for planning commissions, the new provision seems unnecessary.

Duties and Responsibilities of the Board of Adjustment

It was in the specification of powers directly granted to the board of adjustment without delegation by the county board that the pre-1974 statute may have been the most inadequate. The 1959 CPA declared that there were two such powers: (1) to act as an appellate body with respect to decisional acts of zoning enforcement officers and (2) to "act upon all questions as they

[8]Based on personal experience of the writer as a participant in workshops sponsored by the State Planning Agency in the late 1960's.

[9]As of 1973, all but one county coming under these provisions had appointed planning commissions. R. Snyder, Organizational Arrangements for County Planning, Agri. Ext. Ser. Sp. Rept. 48 (rev. 1976, Minn.).

may arise in the administration of any ordinance," including the interpretation of a zoning map. The latter, as would be expected, was the source of many difficulties. We will consider both in order.

Much of statutory language with respect to the board's general appellate power was taken or adapted from the SZEA. It confines the board's jurisdiction to appeals from acts of code enforcement officers; authorizes the board to affirm, reverse, or modify a contested action; and provides that the board's decision is final except for appeal in a de novo[10] trial in district court.

New provisions resulting from the 1974 amendments, noted here without discussion, are: (1) a mandatory stay of all proceedings arising from the action appealed from, (2) the addition of required notice to the public of the hearings on the appeal, [11] (3) a mandate that the stated reasons for the board's decision be in writing, (4) the extension of express statutory standing to appeal board of adjustment decisions to district court to all boards, departments, and commissions of the county and of the state, and (5) the imposition of mandatory recording of all orders of the board acting on such appeals with the county recorder or registrar of titles. [12] [13]

The broader language in the pre-1974 statute granting to the board of adjustment the power to act on all administrative questions "as they may arise" was preceded by a mandatory "shall" that apparently left no option to the county board as to the placement of administrative functions. Its origin is not known to this writer, but it was part of the original 1959 act. It may have been meant as an equivalent alternative to phrases in the SZEA to the effect that the board of adjustment "shall" have the power to authorize variances and to issue conditional use permits. If so, the same language would also have included power to act on appeals, making the express grant of that authority in the 1959 act redundant.

With adoption of recent amendments, interpretation problems have largely evaporated, but responses in the form of county zoning ordinance provisions are interesting. It appears that the offending clause generally was treated as ambiguous. Interpreted literally, for example, it would have required that all conditional use permits be issued only by order of the board of adjustment. Actually this was true in 1973 for only 28 percent of all county zoning ordinances.[14] Literal compliance was much higher, 83 percent, with respect to variances, but it still was less than complete.

Since 1974, there can be no doubt as to the proper assignment of these administrative functions. The amendatory language states that the board of adjustment shall have the exclusive power to grant variances, discussed in detail here, along with its appellate duties and responsibilities.

The authority to grant conditional use permits, also discussed here, may not be exercised by or delegated to the board of adjustment, and is reserved at the option of the county board to itself or the planning commission. This may end a period of statutorily derived administrative confusion in county zoning in Minnesota.

Administrative Procedures for Rezoning

As indicated before "rezoning" means an amendment to an ordinance that changes the district classification of one or a few, usually adjoining parcels of property, most commonly owned by a single party requesting the amendment. Since rezoning is seen as a legislative act in Minnesota, court review is limited by the separation-of-powers doctrine, allowing a great deal of discretion by the county board. Consequently, there is less legal protection against arbitrary, politically motivated acts in rezoning than in variances or conditional use permits.

Only a few statutory constraints relate to rezoning. They can be placed into two categories: (1) those applying to any zoning ordinance amendment and (2) those applying only to those amendments defined herein as rezoning. As to those applying to any amendment, before the 1974 amendment, amendments, although adoptable by resolution and therefore not subject to the nominal notice requirements for all county ordinances, could nevertheless be adopted only after a public hearing conducted by the planning commission, if there was such a body. Subsequently, the planning commission was required to send findings and conclusions based on the hearing to the "planning agency," which in turn was required to forward the same to the county board along with "such comments and recommendations" as it deemed necessary.

As a result of 1974 amendments, somewhat different procedures continue but expand notice and hearing mandates while enhancing the influence of the planning commission. All amendments are now required to be adopted by the county board by ordinance, bringing the action within the scope of Minn. Stat. §375.51. The latter was revised in 1974 to provide in the case of zoning ordinances and other "official controls" for a mandatory prior hearing after 10 days' public notice. In addition, another new provision requires written notice of the hearing to the governing bodies of all cities and townships in the county.

A hearing by the planning commission may still be used to satisfy this requirement. The county board also now has the option of assigning responsibility for this type of hearing, as well as others, to any county official or employee. This clears the way for the appointment of a "hearing examiner" who may possess or develop special skills for such occasions and bring greater formality to the hearing process. (Although there is a cross reference here to Minn. Stat. §375.51, the latter provides no further guidance on the matter.)

Whether or not the planning commission conducts the hearing, it now must have an opportunity to pass judgment on all amendment proposals before passage. By express statutory language, amendments may be initiated by the county board and by

[10]De novo means the court will consider additional evidence, not just matters considered in the original decision.

[11]Compare public hearing notice requirements for variance discussed on page 13.

[12]The apparent rationale for the recordation is the presumed benefits to potential buyers or future owners. Its value seems questionable. See p. 60 *infra.*

[13]It might be noted here that the MLDC has no provisions for quasi-judicial appellate action regarding code enforcement officer decisions. The ombudsman land development agency, whatever its make-up or character, is considered to have made the decision itself.

[14]The percentage undoubtedly would have been lower in the absence of guidance from a model shoreland management ordinance promulgated by the state Department of Natural Resources that designated the board of adjustment for this function. Minn. Reg. Cons. 77. (1970 ed.).

petition of affected property owners, as well as the planning commission itself. The county board may not act on any proposed amendment not initiated by the planning commission until it has received the commission's recommendation after appropriate study.

The commission in turn is directed to cooperate with the planning director and other county employees in preparing and recommending amendments for adoption. The directive undoubtedly carries over to imply coercion to cooperate in reviewing amendments from other sources. Apparently the intent was to prevent the commission from refusing to consider the views of such experts and other employees in making reports to the county board.

When it comes to final enactment by the county board, public notice must be given of the meeting at which the amendment will be considered. The proposal must be approved by a majority vote of all members of the board, not just those present.

The second category of statutory constraints, those that apply only to amendments characterized as rezoning, encompasses a single additional public hearing notice requirement: to all owners of record within one-half mile of the affected property. This further requirement came down from a 1976 amendment flowing from the controversy over the scope of newly required notice for hearings on other discretionary administrative acts. Although the resulting statutory language drawing rezoning hearings into the more detailed express written notice requirement is a bit clumsy, the interpretation given here, though perhaps leading to some redundancy,[15] seems unavoidable.[16]

The singularity of the additional notice requirement may belie its significance, for it is the first inkling that the Minnesota legislature may be edging close to a statutory declaration that rezoning is to be legally classified as an administrative act, rather than legislative. This is a positive sign for those concerned about the way that seemingly arbitrary rezoning type amendments sweep away the protection apparently provided by zoning to farmers and other landowners in fringe areas of suburbia.

Though the scarcity of further statutory restraints subdues enthusiasm, such restraints are perhaps properly omitted. As long as rezoning activities are considered legislative acts, thus subject to limited court review, statutorily imposed requirements concerning standards and criteria, findings, and reasons may interfere improperly with the exercise of authority by an elected representative body. The new notice, hearing, and review procedures may broaden the information base and alter the weight the county board chooses to assign to interests affected by rezoning. But these procedures must be viewed as minor impediments to what in some cases may be an arbitrary decision nearly untouchable by the courts.[17]

Administrative Procedures for Issuing Conditional Use Permits

Conditional use permits in one form or another have long been part of comprehensive zoning. Since at least 1926, when the SZEA was published, it has been recognized that appropriate locations and acceptable physical features of certain quite proper uses of land could not be predetermined and set forth in a zoning ordinance. Permits for such land uses customarily are issued by a body with the discretionary power to determine (1) whether a particular use should be allowed at all at the proposed location and (2) the development standards that must be observed if the development is to be allowed to proceed.

Generally, land uses needing such specialized treatment have inherent characteristics that make them potentially much more damaging to the interest of other property owners and the public than other land uses allowed as a matter of right in compliance with pre-ordained standards (e.g., principal uses). They have passed under various titles, including conditional uses, special exception, special uses, and special permit uses. Discretionary approval authority may have been vested in the governing body or delegated elsewhere. In any case, the courts have insisted that the applicant be protected against arbitrary denial or other unfair treatment infringing on constitutionally protected rights of due process and freedom from unlawful discrimination.

Before the 1974 amendment to the 1959 CPA, Minnesota enabling legislation for land use planning by all political subdivisions was silent on nomenclature and procedures that might be used for land uses needing this specialized treatment.[18] Influenced by planning consultants, a model shoreland ordinance promulgated by DNR, and other sources of guidance, counties proceeded to include provisions of this type in their ordinances. But they lacked statewide consistency. Thus, in 1973, the term "conditional use" appeared in 72 percent of ordinances with zoning provisions, but "special use" was found in 24 percent. Other terms also were used.

Even more variation could be seen with respect to granting authority. It was vested in the county board in two-thirds of the ordinances, in the board of adjustment in 28 percent, and in the planning commission in 10 percent.[19] Similar inconsistencies appeared in hearing and notice requirements and other provisions.

Even if authority to use this administrative device could be implied from general language in the enabling legislation, as the Minnesota Supreme Court found in *Zylka v. Crystal*, the need for statutory guidelines was clear. These were, in 1974, supplied in abundant detail by a wholly new section found in the CPAA, supplemented by revisions and additions in related parts of the statute.

---

[15]Both the first and last paragraphs of Minn. Stat. §394.26 (2) (1976) have the effect of requiring notice to any city within two miles and the situs township of the affected property.

[16]The office of the attorney general does not agree with this interpretation. Letter from Michael R. Gallagher to Benton Co. Attorney Richard T. Jessen, Jan. 17, 1978.

[17]The MLDC does treat rezoning amendments as administrative, stipulating that decisions must be supported by findings and conclusions based on a record as if a "special development permission" had been granted. Op. Cit. §2-312. In this respect the MLDC seems superior to the Minnesota statute. The MLDC also would allow rezoning decisional authority to be delegated to an administrative body. Op. Cit. 2-302.

[18]Minnesota is one of nine states where the statutes are silent on this matter. Most states adopted provisions identical to or modeled after the SZEA, which contained almost no detail or procedural guidance, but used the term "special exception" and assigned granting authority to the board of adjustment.

[19]Id. Some ordinances used more than one granting body. The situation was particularly confusing in counties that had adopted both a shoreland ordinance and a county wide ordinance, with each granting this authority to a different body.

The statutory amendments accomplished eight things: 1) provided a common nomenclature and definitions; 2) mandated that zoning ordinances shall contain standards and criteria for all land uses designated therein for approval on a discretionary basis (conditional uses); 3) limited the assignment of decisional authority; 4) set forth minimum notice and hearing requirements; 5) provided for special restrictions; 6) made special allowance for environmental concerns; 7) required recordation of issued permits; and 8) clarified continuity of permits. These will be discussed in order.

Nomenclature and Definition

The added statutory material defines and exclusively uses "conditional use" to refer to land developments and development activities to be approved on a discretionary basis. The term seems appropriate. It was already being used in most county ordinances and conveys a clearer sense of the manner and purpose of the regulatory measures applied to land uses so designated, i.e., permission will be granted on condition that certain standards and criteria are met, but also may be conditioned on the observance of special restrictions. It also avoids the erroneous implication of the term used in the SZEA, "special exception," that the development or land use was an exception from ordinance requirements, making hazy the distinction between conditionally permitted uses and those allowed pursuant to a variance.

But the true significance of the statutory terminology is simply that it is now part of the law, setting a standard for uniformity that can reduce the obvious communication and educational problems that occur when multiple terms are used.

According to the definition, "conditional use means a land use or development as defined by ordinance that would not be appropriate generally but may be allowed" if certain conditions exist. This is meant to include land development activity (e.g., draining or filling a wetland), as well as the use of land or buildings for some identifiable purpose. It is expressly extended to "planned unit developments" which, though not statutorily defined, are usually considered to include some land areas owned in common and multiple land uses.[20] It is also clear that the legislature recognized the value of placing conditional uses in subcategories that might be handled differently under a local ordinance.

The conditions referred to in the definition include: (1) conditions detailed in the zoning ordinance (standards and criteria as discussed in the next section); (2) conformity with the "comprehensive land use plan of the county;" and (3) compatibility with the existing neighborhood. The plan-conformity requirement is somewhat unclear since the amended statute implies elsewhere that a comprehensive plan shall be the basis for official controls only when adopted by ordinance. In contrast to Minnesota's municipal planning act, there is no provision for adopting "comprehensive" or "comprehensive land use" plans by the county planning commission or any "planning agency" except for the governing body. It seems unlikely that the legislature intended to give legal effect to a plan with no official sanction.

Another somewhat puzzling situtation is presented by the appearance after the 1974 amendment of the term "site plan regulations" as an example of official controls. Site plan regulations or site plan approval involves the use of discretion in a manner virtually indistinguishable from that involved in issuing conditional use permits, especially those for planned unit developments. Did the legislature intend that counties might regulate site plans without observing the statutorily imposed procedures for conditional use permits? Is "site plan regulations" another term describing subdivision controls and a mere redundancy since the term "subdivision controls" is found immediately preceding? Or is site plan approval only a step toward the granting of a conditional use permit? These and other positions are arguable. Such vagueness may encourage counties wishing to avoid certain procedural mandates for conditional use permit administration to adopt "site plan" ordinances as an alternative.

Standards and Criteria

The statute now requires that zoning ordinances include standards and criteria to be used in determining whether to issue a conditional use permit for a given proposal. This may represent a notable change from previous law. The Supreme Court in this state, unlike some other states, has not found that constitutionally protected rights were violated when conditional uses were simply listed in the ordinance without standards or criteria that would guide a decision-making body or inform a landowner or developer of what might be required of him, as long as the decision were made by the governing body. This has allowed almost complete discretion to be exercised, with little protection against arbitrary and discriminatory treatment without resort to litigation.

The standards and criteria now required may do much to reduce the possibility that such treatment will occur in the future. Although there is no mandate that they must be quantitative rather than qualitative as much as possible and it is clear that the less definitive criteria may be stated as an alternative (to standards), the fact that the ordinance must contain "insofar as practicable, requirements specific to each designated conditional use" could have far-reaching significance.

The initial impact may seem to be a negative one, since counties will need to fund studies suitable for developing the required specific standards and criteria and then assume the cost of incorporating them into zoning ordinances by appropriate amendments.[21]

In the longer perspective, however, exercising the approval authority for conditional uses may be easier because of the guidance provided by the ordinance, leaving less need for a broad-ranging study of the impact of each proposed use and greater opportunity to consider more carefully questions left unresolved by the predeveloped standards and criteria.

This could greatly aid the decisional process and produce more uniform and objectively established results, since the major factors in reaching a decision will have been determined before the identity or character of the applicant becomes known. An applicant may also find it to his advantage to know to an

[20]Id. The lack of express provisions and guidelines for planned unit developments remains one of the universal shortcomings of planning enabling legislation for local units in Minnesota. Although "cluster developments" are provided for in the administrative regulations relating to shoreland management and a special condominium statute has been enacted, neither is adequate for this purpose.

[21]This imposition may have been a major factor underlying the legislative decision to delay the required date of compliance with new ordinance and procedural requirements an additional year (to 1978) after the effective date of the 1974 amendments. Minn. Stat. §394.312 1977 Supp.

appropriate degree the standards and criteria that will be used as bases for judging his proposal. This might, among other things, afford a presentation that supplies the facts and circumstances relevant to the ordinance requirements.

Another impact may lie in the possibility that fewer types of developments will be treated as conditional uses. Studies may reveal that some, perhaps many, kinds of development intended at first to be treated as conditional uses may be allowed as a matter of right if they comply with detailed quantitative standards based on study findings. Some take the position that excessive use of the conditional use technique is a serious problem in land use control. If this view is correct, a tendency toward reducing it is a positive step.

Finally, the ordinance standards and criteria requirement may weigh heavily on a county board's decision to reserve final decision-making authority to itself or to delegate it to the planning commission. Previously, as has been observed, if the power were reserved to the elected body, no ordinance standards and criteria were considered necessary. The opposite was true, however, if the power were delegated.

The practical implication of this could not have been lost on local officials. Under the new rules, delegation may be viewed more favorably, gaining the advantages of lowered administrative costs, less delay to the applicant, reduced likelihood of politically motivated decisions, and more opportunity for the county board to do more "sittin' and rockin" over more significant policy decisions. These outcomes must remain conjectural since the reaction by counties is still uncertain, but the potential for improving the decision-making climate seems clear.

Assignment of Decisional Authority

As already noted, previous law discouraged the county board in Minnesota from delegating its authority to order the issuance of conditional use permits to an appointed body. Among those that did, a large majority followed the suggestion supplied by the SZEA and chose the board of adjustment. The CPAA makes delegation to that body unlawful, but it expressly permits delegation to the planning commission. It also now requires review by the planning commission even if decisional power is retained by the county board.

Moreover, the reservation-delegation decision is not just an either-or situation. If the county board wishes to maintain direct control over some listed conditional uses, for example those with stronger potential political repercussions, the statutory language strongly suggesting categorizing conditional uses may lead them to delegate when other conditional uses are involved. A precedent for this arrangement appears in ordinances already adopted in certain counties.[22]

Notice and Hearing Requirements

Action on conditional use permit applications must now take place with full opportunity for interested parties to participate. The statute as amended in 1974 provided that a public hearing must be held with notice to the public, the township containing the affected property, nearby municipalities, and property owners of record within one-half mile. The last requirement proved to be controversial and was revised in 1976 to provide for notice to all owners of record within one-quarter mile of the affected property, or the 10 properties nearest the affected property, whichever would involve more landowners.

Even as revised, the new provisions mandate a notable change from past procedure. In 1973, fewer than 60 percent of county zoning ordinances gave such notice to the public, nearby municipalities, and neighboring landowners, usually those within 500 feet. Fewer than one-third notified the township. A few ordinances had no hearing or notice requirements.

The statutorily mandated notices help assure responsible action by the decision-making body. However, they may also assist neighboring landowners in influencing decisions toward a result favorable to them at the expense of impartial treatment of the applicant. This would seem not to be a serious consequence, since resisting landowners are likely to learn of the proposal even if notice is limited. Court action will still be necessary to correct such injustices.

Effect on the Environment

A new special grant of authority, which seems suggestive rather than meaningful in a legalistic sense, states that the county board may "request" that the applicant for a conditional use permit "demonstrate the nature and extent" of any "material adverse effect on the environment" that the planning commission has identified as a possibility. Although the underlying concept is similar to that of the environmental policy act (which calls for an environmental impact statement when the physical environment may be seriously endangered) the lack of guidelines and of power to demand such environmental information, rather than "request" it, makes the legislative intent uncertain.

There would seem to be no reason why the applicant should not be required to submit environmental impact information to satisfy an appropriately phrased standard or criteria listed in the zoning ordinance. Perhaps the new statutory language is meant only to cover cases where the ordinance has no such standard but the board wishes to expand its review of a proposed conditional use if the applicant will cooperate.

Whatever its meaning, the statute can be overlooked easily since it is located in a separate section distant from and unreferred to by the detailed section on conditional use permit administration. Its location may be explained by the fact that it was not part of the amending bills as introduced but was added in a modified form by committee action in the House. It was retained in the House version of SF 2576 and in the conference bill finally enacted.

Special Restrictions

Land uses or developments treated as conditional uses are often so categorized because of their potentially negative impact on the value and enjoyment of neighboring properties or the neighborhood in general. As noted earlier, a conditional use by definition may be allowed only if it is "compatible with the existing neighborhood."

To adequately protect against any negative effects, the body responsible for issuing conditional use permits is authorized by statute to attach "such additional restrictions or conditions as it deems necessary to protect the public interest." This seems to restore to the decisional body a large part of the flexibility it may have lost as a result of the ordinance standards and criteria requirements. Although the process would not go as far as absolute prohibition, the use of the property might be so restricted as to have the same practical effect.

[22]Freeborn County Zoning Ordinance, adopted Aug. 1, 1967. Olmsted County Zoning Ordinance, adopted Jan. 2, 1970.

Unreasonable restrictions, of course, may be declared unlawful by a court of law, but court delays and attorney's fees may make this an ineffective remedy in many cases. One can argue that the flexibility is necessary and advantageous, despite the possibility of abuse, since it offers opportunities for a greater mixing of land uses, which may be convenient and cost-saving, with minimal conflict. The statute does not itself place limits on or specify the types of restrictions that can be imposed, but it does give some examples: "matters relating to appearance, lighting, hours of operation, and performance characteristics." From these examples, it would appear that the legislature had in mind commercial, light industrial, and perhaps agricultural land uses, rather than residential.

Recordation

If approved conditional uses are subject to special restrictions and conditions not appearing in the ordinance, a future owner, though perhaps legally bound, could acquire the property without knowing that such encumbrances exist. This is now guarded against by a new statutory mandatory filing of record of all conditional use permits with the county recorder or registrar of titles.

If one presumes that restrictions and criteria attached to the permit will appear on it, recordation may be the most effective way to give notice and limit enforcement problems against a succession of landowners. There seems, however, to be little reason to require recording of permits when no special restrictions and conditions are attached. All ordinances are recorded even though they by statute do not constitute encumbrances on property.

The statute also states that "restrictive covenants may be entered into regarding such matters" as special restrictions and conditions. This seems to contribute little since exercising the police power does not depend on such encumbrances, whether recorded or not.

Continuity

Whether a conditional use permit may be used as a practical substitute for a system of periodic licensing by issuing temporary permits is largely resolved by a statutory declaration that such a permit "shall remain in effect for so long as the conditions agreed upon are observed." This, of course, raises the question of whether periodic renewal of the permit may be imposed as a condition at the time of initial approval. Such an interpretation seems unlikely since it would remove most or all meaning to the statutory declaration. More supporting evidence is given by the suggested types of restrictions and conditions. Though not meant to be inclusive, they may, by applying the rule of *expressio unius, exclusio alterius*[23], then, preclude imposing restrictions and criteria dissimilar from and unrelated to the statutory examples. A condition limiting the permit to a term would seem to fall in this category.

Another provision insures that the required continued validity of conditional use permits shall not interfere with enforcing any restrictions that might be imposed by future legislation. Such legislation might, for example, alter development standards or land use restrictions to make the conditional use a nonconformity and thus expose it to limits on expansion, reconstruction or, in an extreme situation, to termination after an appropriate amortization period.

Administrative Procedures for Issuing Variances

From their start in the early 1900's, comprehensive zoning laws and ordinances have recognized that the uniform enforcement of set standards and restrictions over a designated area, such as a zoning district, would not necessarily cause uniform hardship among landowners. To prevent injustice to property owners presented with an unusually burdensome situation, a device called a variance was used to allow departure from the strict terms of the ordinance. Variances were specifically provided for in the SZEA and in most state enabling statutes. As we have seen, despite such language in the earlier municipal planning legislation, Minnesota's original county planning act was an exception.

As Minnesota counties began adopting zoning ordinances in the sixties and early seventies, the statutory vacuum with respect to variances was filled first by the expert but generally nonlegal advice of planning consultant firms hired to develop land use plans and ordinances. After 1970 it was filled by administrative rules concerning control of development in shoreland areas then published by the state Department of Natural Resources.

The results, revealed by a survey of all county ordinances in effect in March 1973, demonstrate the shortcomings of the statute. Although only three of 104 ordinances failed to provide for the issuing of variances, there was considerably less consensus on just how this traditional means of providing relief to harshly affected landowners was to be used. In designating the granting body, for example, the board of adjustment was chosen in 83 percent of the ordinances, but 12 and 5 percent specified the county board and planning commission, respectively. In four counties that had each adopted two ordinances, the documents failed to agree on the assignment of this important quasi-judicial function.

As has been observed, this question was resolved when the 1974 amendment declared that the board of adjustment "shall have exclusive authority to order the issuance of variances." Other areas of confusion needing statutory resolution included, among other things, the definition of a lawful variance, hearing and notice procedures, and findings necessary to justify a variance. How the legislature addressed these and related issues will be discussed here.

What Does 'Variance' Mean?

A basic problem was definition. The word "variance" is an ambiguous term, since it may be used in both a technical and generic sense. Even when used technically, it may convey different messages to different people. Courts in several states and the legal community in general have for a long time recognized a major distinction between a "use" variance, which allowed deviation from the restrictions on types of land uses permitted, and a "non-use" variance, generally used to allow deviation from dimensional standards, such as building set-back or lot area requirements. Interpretative problems of this nature are met in the 1974 amendment by (1) including a definition of "variance," and (2) expressly prohibiting the issuing of variances that would "allow any use that is prohibited in the zoning district in which the subject property is located."

Problems that might arise if, after definition, "variance" is used in a generic sense, are avoided by a definition that is itself

[23]This is a rule of law that statutory examples limit judicial interpretation of a law that is much broader on its face if interpreted literally.

essentially generic: "any modification of variation of official controls" where because of "exceptional circumstances" strict enforcement would cause unnecessary hardship.

An attempt to be more specific failed in the legislature. A committee-sponsored amendment to the original bill HF 2591 would have altered the definition to confine variance to "modifications or variations of land development standards contained in official controls." Though adopted in the House and appearing in the House version of SF 2576, the amendment was not present in the enacted conference bill.

The House bill amendment may have been wise. Under the present language the broad powers of the board of adjustment appear to extend to allowing deviation from procedural requirements, the assignment of responsibilities, and many other types of provisions found in zoning ordinances. This much flexibility is probably unnecessary and could interfere with the effectiveness of statutory safeguards against misuse of regulatory power.

The provision that makes issuing unlawful "use" variances, quoted above, and nearly identical to one found in the municipal planning act, eliminates any prior uncertainty that may have made county officials uneasy, since legality of "use" variances was questionable even before they were statutorily prohibited. Courts in some but not all states have found their issuance equivalent to rezoning and unlawful without full compliance with procedures required for amending a zoning ordinance. The need for legislative clarification was also indicated by an observed lack of uniformity and consistency. County ordinances in 1973 were split 60-40 on the question of "use" variances, with most allowing for their issuance. In 11 counties with multiple zoning ordinances, the ordinances failed to agree on this rather significant issue.

When Is a Variance a Proper Remedy?

In a new subdivision to section 394.27, the 1974 legislature attempted to set forth in considerable detail an exclusive set of circumstances that would justify the issuing of a variance. Unfortunately, not all ambiguities have been eliminated. Some background will be useful.

The two phrases used in granting variances are "practical difficulties" and "unnecessary hardship," the latter referring to a greater level of landowner frustration. In some places a parallel has been drawn between these phrases and the type of variance involved. The courts may find practical difficulty sufficient to justify a "non-use" variance but may require a finding of unnecessary hardship to grant the presumably more disruptive "use" variance. In other places, the two phrases are treated as having largely the same meaning, and any distinction between grounds for use and non-use variances is based on factual circumstances aside from the phrasing.

Neither the Minnesota courts nor the legislature has addressed this issue enough to solve the dilemma. The municipal planning act, which bars "use" variances, uses the single phrase "undue hardship" without defining it, except for requiring that the hardship must exist because of circumstances unique to that particular property. The Supreme Court, deciding a "non-use" variance controversy in St. Paul, quoted both the statute and language in the St. Paul ordinance, including the phrase "practical difficulties or peculiar hardship." It found evidence to support a finding of both practical difficulties and undue hardship but made no commitment as to the meaning of the two terms.

The 1974 legislature was equally unhelpful. The bills amending the county planning act as introduced, in defining "variance" indicated that they might be granted in cases of unnecessary hardship or because strict conformity with an ordinance "would be unreasonable, impracticable, or infeasible under the circumstances." A suspicion that this meant practical difficulty was sufficient grounds for granting a variance seemed to be confirmed by language in a new detailed subdivision on variances that provided that they might be granted only "when there are practical difficulties and particular hardship."[24]

The subsequent legislative history is complicated, but necessary to fully appraise the state of the law. In the House, HF 2591 was altered to eliminate the phrase "practical difficulties" from the new subdivision and remove the "practical difficulty" language from the definition. No "companion amendments" were made to the Senate bill, which, therefore, continued to recognize practical difficulties as a basis for a non-use variance, until the House substituted its own version of SF 2576 for the passed Senate bill. The conference committee, apparently as a compromise, left the phrase "practical difficulty" in the new subdivision on variances (as a basis for granting a variance) but struck the "practical difficulty" language from the definition. This was accepted by both houses in adopting the conference bill.

The end product leaves uncertain the legality of variances issued on the basis of practical difficulties not severe enough to qualify as unnecessary hardships. Ironically, the legislative history, if anything, contributes to the uncertainty. Without it, the great detail defining the elements of unnecessary hardship, contrasted with the single use of the phrase "practical difficulty" with no explanatory language, suggests that the latter is just another term for the former, as some courts have found. Knowing the differences between the two houses of the legislature and the compromise outcome suggests that the term "practical difficulty" is meant to have independent significance.

A second ambiguity as to lawful grounds for granting variances can be found in language in the new detailed subdivision on variances used to define hardship. The original bills both indicated that hardship meant, among other things, that the property could not yield an "equitable return" and that there was no "economic use" for the property. This phrasing is similar to that widely used by the courts. Although neither "equitable" nor "economic" was defined, they clearly imply a sense of fairness within the framework of the marketplace. The use of the property must not be so restricted that it limits the number of potential buyers so as effectively to take it off the market altogether, since no reasonable person would be willing to assume the costs of ownership. Such a criterion leaves room for discretion, but only within the context of the market.

The legislature found these criteria unsatisfactory. Both bills were revised to delete any direct reference to economic circumstances and to introduce language incorporating a more abstract "reasonable use" concept. This now appears in the enacted law. Replacing the equitable return concept with one using "put to a reasonable use" as a criterion may at first seem "reasonable," but closer inspection suggests that reasonableness may be in the eyes of the beholder. This raises questions as

[24]Note the word "particular" instead of "unnecessary." The requirement that a particular hardship also had to be unnecessary to justify a variance is made clear by the definition of hardship which followed this sentence in the bill and now appears in the statute.

to whether the term means a use that is reasonable as viewed by society as a whole, as viewed by a potential purchaser with an eye to exploitation, or as viewed by the Sierra Club.

Moreover, the reasonableness may or may not be interpreted within the framework of private ownership. It may, for example, be perfectly reasonable that a given property be preserved as open space, maintained as wildlife habitat, or paved as a parking area. But is it reasonable to expect a private party to assume the costs of ownership when the benefits of the "reasonable use" are diffused generally throughout a neighborhood or the public in general? Probably not, but the statutory language could lead a conscientious board of adjustment to that conclusion and force a private landowner to go to court to preserve constitutionally protected rights in property.

Recognizing that court action may be necessary to resolve these remaining ambiguities, we will assume for the moment that to get variance an applicant must satisfy the unnecessary hardship criterion. Without raising confounding questions of interpretation, what does the statute require to be found before the board of adjustment legally can make an affirmative response? There appear to be six:

1) The terms of variances must be in harmony with the general purposes and intent of official controls.
2) The subject property cannot be put to a reasonable use as restricted by the ordinance.
3) The plight of the landowner is due to circumstances affecting only that specific property.
4) The landowner did not create the circumstances causing his own difficulties.
5) The issuance of the variance will not alter the essential character of the locality.
6) If the property can be put to a reasonable use as restricted, something more than economic considerations must be involved in the alleged hardship.

All of the above must be present to justify a variance, including number six, which, read literally, seems to take the decision completely out of the context of the market. In a broader legal context, the result of this interpretation is that the statutory requirements for the granting of "non-use" variances in Minnesota counties are as stringent as those generally applied in other states for the granting of "use" variances. It is unlikely that this interpretation is correct, but the point is clearly arguable. Any other interpretation makes the extreme detail defining "hardship" into excess statutory baggage, violating a basic tenet of statutory construction.

Effect on the Environment

The applicant for a variance may face another hurdle if the board of adjustment chooses to exercise an option expressly made available to it in a new section added to the county planning act in 1974. Section 394.362 now provides that if the applied-for variance in the opinion of the board of adjustment "may result in a material adverse effect on the environment," the applicant "may be requested by the board to demonstrate the nature and extent of the effect." How the solicitous nature of this language may affect the discretion of the board seems uncertain, but the new section appears to introduce extrinsically an implied statement of purpose into the local ordinance. As in the case of a similar provision for conditional use permits, the value of the 1974 addition is questionable.

Notice and Hearing Requirements

The 1974 amendments made the process of determining the satisfaction of statutory standards, however interpreted, a very visible one by requiring prior public hearing with written notice to interested parties specified by statute. This has proven to be a controversial measure.

It first should be noted that in 1973, although hearings on zoning variance applications were required in 5/6ths of all county zoning ordinances (either by the ordinance itself or because the decision was made by the board of adjustment, whose acts were required by statute to be preceded by a hearing) notice of the hearings was slight. Only a third of the ordinances required notice to the public, and fewer than 1/6th provided for notice to neighboring landowners, usually confined to those within 300 feet.

The amending bills as introduced mandated a hearing on all applications with notice to the applicant, the public, the town board for that township, the governing body of any city within two miles and all property owners of record within 500 feet. The House, acting on the recommendations of the Committee on Environmental Preservation and Natural Resources, amended the bill to provide for notice to all property owners of record within ½ mile in unincorporated areas and 500 feet in incorporated areas. The Senate bill was similarily amended by floor action in the House, and the same language was retained in the conference bill finally enacted.

The bill subsequently passed both houses and became law in that form. County officials expressed their opposition, and in 1976 a further amendment changed the hearing notice requirement with respect to other landowners in unincorporated areas to owners of record within 500 feet or the 10 properties nearest the property of the applicant, whichever would provide notice to more landowners. This arrangement, which seems equally well-adapted to built-up, unincorporated places, found in many lakeshore areas, and sparsely settled sections of the state, has remained in the statute to date. We may note in passing that neither the municipal planning act nor the enabling legislation for township planning and zoning require procedures of this nature.

An interesting innovation was adopted in the House on recommendation of the House Committee on Environmental Protection and Natural Resources but not appearing in the conference committee bill. It attempted to make hearing notice more meaningful by requiring that language in the notice describe the subject property in a manner designed to be understandable to the layman without reference to legal documents. The logic of such a provision is clear if one concedes the value of citizen participation as a guard against governmental caprice.

Authority to Attach Conditions

The discretionary power of the board of adjustment may be constrained by statutorily imposed prerequisite findings for ordering the issuing of a variance. However, the board's authority in cases where factual circumstances justify an affirmative response is inflated significantly by a statutory provision added in 1974 that allows the board to attach conditions to the variance.

The purpose of such conditions is "to insure compliance and to protect adjacent properties and the public interest." In contrast with similar provisions regarding the issuing of conditional use permits, there are no further guidelines as to the types of

conditions that may be imposed lawfully. The language was taken from the municipal planning act, where it has apparently not been a problem.

Recordation

To provide notice to prospective buyers and mortgagees and other parties with an interest in the value of a property for which a variance has been granted, the statute now requires that a certified copy of the order for the issuance of the variance be filed with the county recorder or registrar of titles. This assures that any conditions attached to the variance, perhaps constituting an encumbrance on the property, will appear on record in the abstract of chain of title.[25]

The required filing seems unnecessary when variances are granted with no conditions attached. Under these circumstances, property developed or used in keeping with the variance would become a lawful non-conformity, and any interested party would receive constructive notice by virtue of the recording of official controls and the opportunity to see the property itself.

Court Review

As to review of a board of adjustment response to a variance request, the statute continues to provide for de novo[26] and exclusive review in the district court of the county where the subject property is located. This statutory appeal on questions of law and fact seems a bit of a curiosity by contrast with Minnesota Supreme Court decisions restricting review of denials of conditional use permits to review in the nature of a certiorari, refusing to allow the introduction of evidence of additional decisional bases at trial.

The difference in scope of review seems unjustified and may be due only to differing attitudes of the Minnesota Supreme Court and the Minnesota Legislature. The latter apparently decided to remain silent on the question of scope of review of denials of applications for conditional use permits. De novo review by the courts may reduce the incentive for the board of adjustment to make thorough investigations and carefully record findings and determinations. In the absence of legal challenge, opportunities for an abuse of discretion are greater where such departures from proper procedures are condoned.

Standing to appeal to district court, limited to 30 days after actual notice of a board's decision, is also awarded statutorily and is apparently confined to any aggrieved person or persons (presumably including corporations and other legal entities) and any department, board, or commission of that county or of the state.

The legislative history is interesting. HF 2591 was amended in committee to provide standing to any department, board, or commission of any political subdivision of the state. Although this extension was preserved through the amendment and adoption by the House of SF 2576, it did not appear in the enacted conference bill. Consequently, the standing of a township or nearby municipality to institute a legal challenge is cast into doubt, despite the notice requirement with respect to hearings that is required before the decision that they might wish to challenge. Standing may arise elsewhere, however.[27]

Concluding Comments

This rather exhaustive account of post-amendment county planning act provisions that authorize but carefully limit the exercise of discretion in the administration of zoning ordinances would be hard to summarize. The reader who feels a compelling need for a cursory review is referred to the portion of the introductory comments that presents an overview of the Minnesota approach juxtaposed with the A.L.I. Model Land Development Code. A re-examination of those introductory remarks may also serve to explain the lack of comparison with the MLDC in the particularized account of statutory law in Minnesota. With rare exception, most obviously with respect to hearing and notice prodedures, the MLDC leaves to each political subdivision decisions that in Minnesota have been largely removed from local discretion.

In neither case, however, has the state invaded delegated local authority to make substantive regulatory law. It is almost totally in the area of procedural law that statewide uniformity is decreed. Express power to regulate has in fact been enlarged. It is the way that power will be exercised that is prescribed.

Two basic premises seem to underline the Minnesota county planning enabling law provisions described in this publication. One is that, in this area of law, the advantages of local control are great enough to justify intensive and detailed state legislative attention. The other is that proper discretionary administration of zoning ordinances is crucial to successfully regulating private land use, perhaps surpassing in importance even the establishment of zoning districts and the adoption of development standards in the ordinance itself.

Neither premise is safe from attack. There are, particularly, those critics who insist that only through higher levels of direct intervention by the state will our natural resources be protected adequately. The influence of this line of thought has been manifested in the enactment of specialized regulatory programs in which state agencies play a leading role. Examples include: Minnesota's wild and scenic rivers, shoreland management, power plant siting, critical areas, and flood plain management programs. Even in these programs, however, the close watch of the state over discretionary administrative decisions demonstrates awareness of their potential impact.

Prior to the 1974 amendments, county land use control programs were hampered by inadequate enabling laws. They probably still are, but the new and continuing provisions discussed in this publication appear to be a major step toward a more favorable institutional climate for future regulatory activity.

---

[25]It should be noted here that copies of ordinances themselves must also be filed for record but do not constitute encumbrances in real estate.

[26]See footnote 10.

[27]Minn. Stat. §116B (9) (1976) as one example (conferring to essentially any conceivable entity the right to intervene in any administrative procedure that may involve impairment of the environment).

References

Court Cases

Brown v. Beuc, 384 SW2d 845 (Mo. App. 1964)

Czech v. City of Blaine, Minn. , 253 NW2d 272 (1977)

Denny v. City of Duluth, 295 Minn. 22, 202 NW2d 892 (1972)

Inland Construction Co. v. City of Bloomington, 292 Minn. 374, 195 NW2d 588 (1972)

Merriam Park Community Council, Inc., v. McDonough, 299 Minn. 285, 210 NW2d 416 (1973)

Metro 500, Inc., v. City of Brooklyn Park, 297 Minn. 294, 211 NW2d 358 (1973)

Minnetonka Congregation of Jehovah's Witnesses, Inc., v. Svee, 303 Minn.79, 226 NW2d 306.

Osius v. St. Clair Shores, 344 Mich. 693, 75 NW2d 25, 58 ALR2d 1079 (1976)

Sun Oil Company v. Village of New Hope, 300 Minn. 326, 220 NW2d 256 (1974)

Zylka v. Crystal, 283 Minn. 192, 167 NW2d 45 (1969)

Statutes

Minn. Stat. §104.01—104.07 (1976)

Minn. Stat. §104.31—104.40 (1976)

Minn. Stat. §105.485 (1976)

Minn. Stat. Ch. 116B (1976) (Environmental Rights Act)

Minn. Stat. Ch. 116C (1976)

Minn. Stat. Ch. 116G (1976)

Minn. Stat. §375.01 and 375.025 (1976)

Minn. Stat. §394.21—394.37 (1971)(1974)(1976)(1977 Supplement)

Minn. Stat. §467 (1976)

Minn. Stat. Ch. 505 (1976)

Minn. Stat. Ch. 514 (1976)

Minn. Stat. Ch. 645 (1976)

Session Laws

Laws of Minn. Ch. 177 (1976)

Laws of Minn. Ch. 210 §1-12 (1949)(repealed 1974)

Laws of Minn. Ch. 340 §1-23 (1939)(repealed 1974)

Laws of Minn. Ch. 571 (1971) (1974)

Laws of Minn. Ch. 559 (1959)

Miscellaneous

Advisory Committee on Zoning, Department of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adapt Zoning Regulations (rev. ed., 1926)

American Land Planning Law (N. Williams, 1977)

American Law Institute, Model Land Development Code (1976)

American Law of Zoning (R.M. Anderson, 1977)

Attorney General Opinion 125a 66, June 6, 1978

Black's Law Dictionary (4th ed. 1968)

Clausen, Suburban Land Conversion in the United States

D. W. Craig, "Discretionary Land Use Controls—The Iron Whim of the Public" in I Proceeding, Institute of Planning, Zoning and Eminent Domain 9, (Southwest Legal Foundation, 1971)

J. J. Davis, Illinois Zoning: Every Use a Special Use, 1974 U. Ill. L.F. 340, 350

House File 2591 (as introduced), 68th Legislature (Minn. 1974)

Journal of the House, 68th Legislature (Minn. 1974)

Journal of the Senate, 68th Legislature (Minn. 1974)

Minn. Reg. Cons. 70 to 77 (1970 ed.)

R. Snyder and J. Jannetta, County Zoning Variance Administration in Minnesota: A Study of Diversity, Extension Bulletin 439 (1979 Minn.)

R. Snyder, Organizational Arrangements for County Planning, Ag. Ext. Serv. Sp. Rept. 48 (rev. 1976, Minn.)

R. Snyder, Zoning Principles and Definitions, Extension Folder 251 (rev. 1978, Minn.)

Samuel Mermim, Law and the Legal System

Senate File 2576 (as introduced), 68th Legislature (Minn. 1974)

Standard City Planning Enabling Act, U.S. Department of Commerce (1928) Act of Sept. 2, 1964, Pub. L. 88-560, Sec. 316, 78 Stat. 793