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REQUIRED STATUTORY PROCEDURES FOR ZONING ORDINANCE
AMENDMENT, ISSUING CONDITIONAL USE PERMITS,
AND GRANTING VARIANCES BY MINNESOTA
COUNTIES AFTER AUGUST 1, 1978

Robert W. Snyder

Agricultural Extension Service



Department of Agricultural and Applied Economics

University of Minnesota
Institute of Agriculture, Forestry and Home Economics
St. Paul, Minnesota 55108

Required Statutory Procedures for Zoning Ordinance
Amendment, Issuing Conditional Use Permits,
and Granting Variances by Minnesota
Counties after August 1, 1978*

by

Robert W. Snyder

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

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TABLE OF CONTENTS

Introduction	1
The County Board	10
Powers and Duties of the County Board	10
The Planning Commission	11
Duties and Responsibilities of Planning Commission	16
The Board of Adjustment	19
Duties and Responsibilities of the Board of Adjustment	22
Administrative Procedures for Rezoning	26
Administrative Procedures for Issuing Conditional Use Permits	30
Nomenclature and Definition	33
Standards and Criteria	36
Assignment of Decisional Authority	39
Notice and Hearing Requirements	40
Effect on the Environment	42
Special Restrictions	43
Recordation	44
Continuity	45
Administrative Procedures for Issuing Variances	46
What Does "Variance" Mean?	48
When Is a Variance a Proper Remedy?	51
Effect on the Environment	56
Notice and Hearing Requirements	57
Authority to Attach Conditions	59
Recordation	60
Court Review	61
Concluding Comments	62

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Introduction

In May 1974, as part of a comprehensive amendment to the planning enabling legislation for counties, Minnesota lawmakers dramatically revised procedural requirements with respect to zoning ordinance administration.¹ 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 was subsequently revised the compliance with the new procedural mandates might be delayed until four years after the effective date of the statute.^{2, 3} The deadline is now August 1, 1978. This paper discusses in detail the new administrative procedures.

Most counties in Minnesota were granted general authority to regulate land use and development through adoption of zoning ordinances and other

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1. Chapter 571, Laws of Minnesota (1974).
 2. Minn. Stat. § 394.312 (1976); as amended, Minn. Stat. § 394.312 (1977 Supp.).
 3. Minn. Stat. § 394.312 (1977 Supp.), amending Minn. Stat. § 394.312 (1976).

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"official controls" when Chapter 599, Laws of Minnesota, 1959 became effective in August of that year.^{4, 5} 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) promulgated by the U.S. Department of Commerce in 1926 and 1928 respectively.^{6, 7}

Although some of the deficiencies in that 1959 county planning act (hereinafter 1959 CPA) are striking when viewed retrospectively, it remained essentially unchanged for 15 years.

During the early part of this interval there was little use of this authority, but after 1964, when section 701 of the Federal Housing Act of 1954 was amended to make all counties eligible for federal financial grants for "comprehensive planning",⁸ many counties chose to adopt ordinances developed by planning consultants contracting with counties pursuant to the federal "701" program.⁹ Regulatory activity accelerated with the implementation of the state shoreland management program based on a 1969 Minnesota statute requiring counties to regulate land use and development in defined

4. Op cit. Some counties received authority to enact zoning regulations by legislation passed in 1939 and 1941. Laws of Minn. Ch. 340 §§ 1-23 (1939) (repealed 1974). Laws of Minn. Ch. 210 §§ 1-12 (1941) (repealed 1974).

5. Minn. Stat. § 645.02 (1976).

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

7. Standard City Planning Enabling Act, U.S. Department of Commerce, (1928).

8. Act of Sept. 2, 1964, Pub. L. 88-560, § 316, 78 Stat. 793.

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

shoreland areas by a deadline date of July 1, 1972.¹⁰

The need for amendment of 1959 CPA became more apparent as experience was gained in the administration of zoning ordinances and other official controls. The lack of procedural guidelines was particularly troublesome. Awareness of rising concern led the Association of Minnesota Counties to initiate steps toward introducing amendatory legislation. Recommendations were solicited from several sources, including a land use committee bringing together elected county officials, two county planning directors, a county attorney, and an extension land economist from the University of Minnesota.¹¹ After successive drafts had been considered, identical bills, Senate File (SF) 2576 and House File (HF) 2591, were caused to be introduced into the legislature. In the Senate, after the adoption of several minor amendments recommended by the Committee on Local Government,¹² SF 2576 was passed on March 8, 1974.¹³ The House chose to operate somewhat differently. Subsequent to the adoption of amendments recommended by the Committee on Environmental Protection and Natural Resources,¹⁴ but prior to final passage, HF 2591 was compared with the passed Senate companion bill and indefinitely postponed.¹⁵ In the alternative,

10. Minn. Stat. § 105.485 (1976).

11. Personal letter to the writer from Mentor C. Addicks, Staff Attorney, Association of Minn. Counties, dated Feb. 28, 1973.

12. 3 Journal of the Senate 4463-66, 68th Legislature (Minn. 1974).

13. 3 Journal of the Senate 5061, 68th Legislature (Minn. 1974).

14. 3 Journal of the House 5362, 68th Legislature (Minn. 1974).

15. 4 Journal of the House 6006 et seq and 6044, 68th Legislature (Minn. 1974).

the House amended SF 2576 to conform with the postponed house bill,¹⁶ repulsed an attempt at rereferral to committee,¹⁷ accepted three further amendments presented on the floor,^{18, 19, 20} and proceeded to adopt a revised SF 2576.²¹ Following a refusal of the Senate to concur in the House action on SF 2576,²² a conference committee considered both versions and reported back with a bill that was passed by both houses^{23, 24} and signed into law by the governor.²⁵

The 1974 legislation dealt with many facets of the regulatory powers of county governments in Minnesota, but a major thrust pointed toward an overhaul of zoning administrative practices and procedures. This paper is confined to a discussion of these matters. It will consider the county planning act as amended (hereinafter CPAA), not solely the 1974 legislation.

16. 4 Journal of the House 6153, 68th Legislature (Minn. 1974).

17. 4 Journal of the House 6154, 68th Legislature (Minn. 1974).

18. Id.

19. 4 Journal of the House 6299, 68th Legislature (Minn. 1978).

20. 4 Journal of the House 6300, 68th Legislature (Minn. 1978).

21. Id.

22. 4 Journal of the House 6459, 68th Legislature (Minn. 1974).

23. 4 Journal of the House 6845-6865, 68th Legislature (Minn. 1974).

24. 4 Journal of the Senate 5975-5992, 68th Legislature (Minn. 1974).

25. See footnote 1.

The Minnesota action is of particular interest in that it represents a rejection of both the underlying philosophy and the recommendations of the American Law Institute (hereinafter ALI) as contained in Article 2 of the recently promulgated Model Land Development Code (hereinafter MLDC).²⁶ A brief discussion will illustrate the major differences in the two approaches.

While the writers of the MLDC recognized the existence of widespread confusion with respect to the proper use of traditional administrative and enforcement mechanisms, they sought to solve the problem by introducing wholly new terminology and giving the local legislative unit almost complete discretion as to the delegation of administrative and ministerial powers.²⁷ 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,²⁸ made by an entity known as a "land development agency" which might be "the governing body or any committee, commission, board or officer of the local government."²⁸ Permission would be granted in the form of a "special development permit", regardless of the legal or theoretical

26. ALI Model Land Dev. Code §§ 2-101 to 2-403 (1976). Tentative drafts nearly identical to the final version were published prior to introduction of the 1974 legislation. The final draft was approved in May 1975.

27. *Id.*

28. ALI Model Land Dev. Code § 2-302 (4) (1976).

29. ALI Model Land Dev. Code § 2-301 (1) (1976).

basis for the exercise of discretion in that particular case.³⁰

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 observable only in the nature of the result of the grant or denial of the request and the reasons stated therefor.³¹ 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 provisions³² and insistence upon a complete record of written findings of fact and conclusions and express reasons for all such discretionary decisions.³³

In the new Minnesota legislation, the attention given to discretionary administrative procedures suggests agreement with a basic premise seeming to underlie the ALI approach: many regulatory difficulties can be traced to widespread confusion regarding 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 carefully defines selected terms denoting different types of administrative devices and circumscribes the assignment of discretionary powers by county

30. Id. § 2-201

31. Id. §§ 2-202, 2-204, 2-205, and 2-207

32. Id. § 2-304

33. Id. § 2-304 (12)

units so as to mandate or encourage a clear separation of authority to respond to different types of landowner requests for individualized consideration. 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 viewed.

A succinct 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 commission³⁴ and the board of adjustment.³⁵ The representation of elected officials on both is restricted.^{36, 37} Discretionary administrative decisions, also identified by name, are statutorily assigned. Rezoning is the ultimate sole responsibility of the county board.³⁸ Quasi-judicial relief in the form of "non-use" variances may be obtained only from the board of adjustment,³⁹ and only if statutory findings are present.⁴⁰ "Use" variances are declared unlawful.⁴¹ Conditionally-permitted land development

34. Minn. Stat. § 394.30 (1) (1976).

35. Minn. Stat. § 394.27 (1) (1976).

36. See footnote 34.

37. Minn. Stat. § 354.27 (2) (1976).

38. Minn. Stat. §§ 394.24 (1) and 394.25 (10) (1976).

39. Minn. Stat. § 394.27 (7) (1976).

40. Id.

41. Id.

activity or construction, defined as a "conditional use",⁴² may be authorized only after consideration by the planning commission⁴³ and only after locally formulated but statutorily required particularized standards and criteria have been found to have been satisfied.⁴⁴ Final authority to allow conditional uses may be delegated to the planning commission or reserved to the county board.⁴⁵ Detailed and individualized minimum notice and hearing requirements are set forth by statute (an area of agreement with the MLDC).⁴⁶

The Minnesota CPPA differs from the standard zoning and planning acts that established the norm for most state enabling laws,⁴⁷ 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.⁴⁸ Rejection of the traditional division of authority may have

42. Minn. Stat. § 394.22 (7) (1976).

43. Minn. Stat. § 394.301 (2) (1976).

44. Minn. Stat. § 394.301 (1) (1976).

45. See footnote 43.

46. Minn. Stat. § 394.26 (1976).

47. See footnotes 6 and 7. Also 1 American Land Planning Law § 1801 (N. Williams, 1977).

48. See footnote 43 and § 7, SZEAA

been motivated by a belief that some difficulties encountered in discretionary administration of zoning arose because of a failure to comprehend important distinctions between the granting of variances and the approval of conditionally-permitted development and that the failure may have been partially caused by the placement of authority for both in a single body, the board of adjustment.

Proceeding to a detailed examination of the end product of legislative activity, it will be instructive to observe 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 the issuance of variances and conditional use permits, the adoption of amendments which have the singular effect of changing 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,⁴⁹ it is satisfactory for our purposes.⁵⁰ The exposition which follows 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, secondly, provisions with respect to the exercise of the three types of discretion.

49. State, by Rochester Association of Neighborhoods v. City of Rochester, _____ Minn. _____, 268 NW2d 885 (1978), Czech v. City of Blaine, _____ Minn. _____, 253 NW2d 272 (1977), Sun Oil Company v. Village of New Hope, 300 Minn. 326, 220 NW2d 256 (1974), Denny v. City of Duluth, 295 Minn. 22, 202 NW2d 892 (1972).

50. 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 Wash2d 292, 502 P2d 327 (1972).

The County Board

The county board, more properly, but unusually, termed the board of county commissioners, is the governing legislative body at the county level of government in Minnesota. It comprises five county residents elected for staggered four year terms from five geographic districts (including urban places) as nearly equal in population as possible.⁵¹ Because decisions by the county board are subject to limited court review,⁵² it may in the absence of statutory mandates to the contrary exercise a significantly greater degree of discretion than nonelective bodies. Its members are, of course, concomitantly subject to more intense politican influence than members of appointed boards and commissions.

Powers and Duties of the County Board

The powers and duties of the county board related to discretionary zoning administration will generally be indicated in succeeding sections. Its main responsibility, obviously fundamental, is the adoption of the comprehensive zoning ordinance. This encompasses, inter alia, the designation and delineation of zoning districts, the specification of land development activities and developments to be treated as conditional uses, and the determination of standards and criteria to be utilized in approving or denying requests for conditional use permits. Many policy-setting actions by the county board may, of course, indirectly impact on zoning administrative practices.

51. Minn Stat. §§ 375.01 and 375.025 (1976). Exceptions: (1) Counties with an area exceeding 5,000 square miles and a population exceeding 75,000 have seven man boards. Minn. Stat. § 375.01 (1976); (2) The board for Ramsey County comprises seven members. Sp. Law 1871, c. 73.

52. See footnote 49. Also *Zylka v. Crystal*, 283 Minn. 192, 167 NW2d 45 (1969).

The Planning Commission

The largest appointive body involved with discretionary county zoning administration in Minnesota is likely to be a citizen board statutorily provided for and now statutorily named the planning commission. The name is taken from the CPEA which assigned to the planning commission final authority with respect to the approval of land subdivision plats, but stated that, if appointed, it was to have with respect to zoning the same responsibilities as and replace a similar body provided for in the SZEPA and called therein a zoning commission.⁵³ These latter responsibilities were strictly advisory.⁵⁴ In Minnesota, perhaps because sole authority to approve land subdivision plats was already vested in the county board,⁵⁵ so these decisions were not to be made by the commission, the 1959 CPA used the term "planning advisory commission".⁵⁶ This nomenclature, discouraging the assignment of nonadvisory functions to the commission,⁵⁷ prevailed until the 1974 amendment eliminated the center term and clearly authorized the exercise of delegated nonadvisory functions.⁵⁸

Several statutory provisions, some added in the 1974 amendment, supply procedural mandates and border the county board's discretion in

53. CPEA § 11 See footnote 7

54. SZEPA § 6 See footnote 6

55. Minn. Stat § 505.09 (1976) (adopted Ch. 225, § 1, Laws of Minn.) (1929).

56. Ch. 571, § 31, Laws of Minn. (1959)

57. See p. 17 et seq. infra.

58. Minn Stat. § 394.30 (1) (1976) (amending Minn. Stat. § 394.30 (1) (1971))

choosing a planning commission.⁵⁹ One of the more interesting provisions states that appointment of the commission must be accomplished by ordinance, triggering a statutory prior public notice mandate for that action by the governing body.⁶¹ This newly imposed requirement may be unnecessarily burdensome, particularly when the appointment concerns the replacement of retiring commission members comprising a fraction of total membership. Although one may suspect that the legislature intended only that the creation of the planning commission as an official entity be accomplished by ordinance, as in the case of the board of adjustment,⁶² rather than the appointment of members to the commission, such an interpretation can be reached only by straining the rather clear language of the statute.

Few surprises appear in the statutory composition requirements. Although not specifically declared by the statute, there are two classes of membership: regular and ex-officio.⁶³ Only regular members, of which five to eleven may be appointed, hold the power to vote. Language added in 1974 makes it very clear that only one regular member may be an officer or employee of the county.⁶⁴ Previously one member was to be a county commissioner, but additional representation by elected

59. See footnote 34. This is wholly unlike Minnesota's municipal planning act which allows almost complete freedom to the governing body. Minn. Stat. § 462.354 (1976).

60. Purposely left blank

61. Minn. Stat. § 375.51 (1) and (2) (1976).

62. See footnote 35.

63. See footnote 34

64. See footnote 58

officials was not specifically precluded.⁶⁵ If political insularity 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 three of the 5 to 11 members be "electors" living in unincorporated areas, as provided in both bills as introduced,⁶⁶ survived committee action in both houses, but was supplanted by a House floor amendment to SF 2576⁶⁷ that was retained in the passed conference committee bill.^{68, 69} Consequently, the law now provides for a minimum representation of two residents of unincorporated areas.⁷⁰ Given the likely representation of rural interests on the county board and limitations on the territory affected by county zoning ordinances,⁷¹ the effect of this requirement is questionable.

65. Minn. Stat. § 394.30 (1) (1971); as amended, Minn. Stat. § 394.30 (1) (1976).

66. SF2576 § 33, and HF2591 § 33 (as introduced) See page 3 supra

67. 4 Journal of the House 6300, 68th Legislature (1974).

68. 4 Journal of the House 6855, 68th Legislature (Minn. 1974).

69. 4 Journal of the Senate 5876, 69th Legislature (Minn. 1974).

70. See footnote 34.

71. 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.

Far more significant is a wholly new provision that proscribes service on the commission as a regular member by any person who has received during the two years prior to appointment 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".⁷² This ostensibly strong antidevelopment posture first appeared as a committee amendment to HF 2591 that restricted representation to one such individual.⁷³ The same language was continued in the House version of SF 2576,⁷⁴ but the more stringent measure appeared in the conference committee bill that was enacted.^{75, 76}

This absolute prohibition may be an overreaction to suggestions from knowledgeable quarters that land use planning is often ineffective because decision making bodies are controlled by developer interests.⁷⁷ To the extent the statutory mandate is observed, it is likely to prejudice the attitude of the planning commission and seriously infringe on its ability to be representative of all citizens in the county. This will both diminish the commission's value in an advisory capacity and reduce the probability

72. See footnote 34.

73. 3 Journal of the House 5361, 68th Legislature (Minn. 1974).

74. See pages 3 and 4 supra.

75. See footnote 68.

76. See footnote 69.

77. Clausen, Suburban Land Conversion in the United States, 102 et seq.

that the more broadly representative county board, whose members, especially in developing areas, are likely to be sympathetic to development interests,⁷⁸ will delegate to the commission any final decision making authority. Neither outcome seems desirable. However, failure to observe the statutory prohibition may open any decision by the planning commission to attack on jurisdictional grounds.

The planning commission's ability to reach wise decisions may be inflated by the optional appointment of technicians and other knowledgeable persons as ex-officio members.⁷⁹ Such appointments, though not limited numerically, are confined to persons holding positions as county officers and employees.⁸⁰ 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 2576,⁸¹ did not appear in the final conference bill.⁸² This means that some useful technicians, such as district conservationists of the Soil Conservation Service, U.S.D.A., may not serve on the commission in an ex-officio capacity. They may, of course, participate usefully in other capacities.

78. Id.

79. See footnote 34.

80. See footnote 56. 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.).

81. 4 Journal of the House 6017, 68th Legislature (Minn. p974).

82. 4 Journal of the House 6855, 68th Legislature (Minn. 1974).

Capabilities of the planning commission may also improve as a result of provisions added in 1974 that provide for compensation to its members in an amount to be determined by the county board.⁸³ Previously, payments were listed to reimbursement for expenses.⁸⁴ The new allowance may assist in obtaining more highly qualified and respected members of the county community to serve the public in that capacity.

Duties and Responsibilities of Planning Commissions

Under pre-1974 law, the planning commission's role was described in terms of assisting the "planning agency" in carrying out its duties, including the development of recommended official controls.⁸⁵ The "planning agency" was defined alternatively and cumulatively 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.⁸⁶ Organizational patterns and operational relationships under this arrangement were ambiguous. 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

83. Minn. Stat. § 394.30 (3) (1976); amending Minn. Stat. § 394.30 (3) (1971).

84. Minn. Stat. § 394.30 (3) (1971); as amended, Minn. Stat. § 394.30 (3) (1976). It might be noted that even these payments were prohibited by the CPEA (§ 4) (see footnote 7) and that the Minnesota municipal planning act and the MLDC avoid the issue altogether. Minn. Stat. § 462.354 (1976). See footnote 26.

85. Ch. 559, § 10 (2), Laws of Minn. (1959) (repealed 1974).

86. Ch. 559, § 2 (5), Laws of Minn. (1959) (repealed 1974).

recommendations to the county board, a more independent status of the commission is indicated.⁸⁷

In a somewhat similar fashion, the planning commission prior to 1974 amendments was required to conduct public hearings on all proposed rezoning actions and report its findings and conclusions to the "planning agency" for forwarding with planning agency comments to the county board.⁸⁸ This provision has also been deleted⁸⁹ 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.⁹⁰ With respect to the latter, the commission's position now is assured an opportunity for expression through statutorily declared powers of review prior to the enactment of any ordinance amendment, including rezoning, by the board.⁹¹

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

87. Minn. Stat. § 394.30 (4) (1976), amending Minn. Stat. § 394.30 (4) (1971)

88. See footnote 85.

89. Ch. 571 § 51 Laws of Minn. (1974).

90. Minn. Stat. § 394.26 (3a) (1976).

91. Minn. Stat. § 394.25 (10) (1976).

authority to the commission. Reinforcement for that limitation could be found in the stated position of some officials of the State Planning Agency that the issuances of conditional use permits resulted in a change of use tantamount to rezoning and therefore should be accomplished only by the legislative board of county commissioners.⁹² Although this characterization seems in retrospect to have reflected a misunderstanding of the proper role of conditional use permits, the influence of its assertion strengthened a natural predilection 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 ten percent of all county zoning ordinances gave the planning advisory commission final authority to act on requests for conditional use permits.⁹³

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 prior to any final decision whenever the board elects to reserve the authority to itself.⁹⁴ If counties choose to exercise the option to delegate, which other sections of the CPAA tend to encourage,⁹⁵ the availability of expertise represented by ex-officio membership and through cooperation with

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

93. Unpublished research findings. Ordinances on file with the writer.

94. See footnotes 87 and 43.

95. See p. 39 infra. But see also p. 15 supra for a source of a counter-tendency.

the planning director and other employees will rise in significance.

The Board of Adjustment

As it has since its inception in 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".⁹⁶ The method and term of appointment of persons serving on the board and the designation of their duties and functions additional to those assigned by statute are matters to be determined by the board of county commissioners within statutorily established boundaries. Pursuant to language inserted by the 1974 amendment, such determinations must be accomplished by ordinance, requiring prior public notice of official action; thus frequent changes are unlikely.^{97, 98} The size of the board, fixed at three until 1974, may now vary from three to seven members.⁹⁹ A predictable consequence will be a five person board comprising one member from each of the five county commissioner districts.¹⁰⁰

The composition of the board of adjustment is subject to certain statutory constraints which remain unchanged by the 1974 amendments.

96. See footnote 35.

97. See footnote 37.

98. See footnote 61.

99. See footnote 37.

100. See p. 10 supra

From a quasi-constitutional perspective, the most interesting is the prohibition of appointment to the board of (1) any elected county official or (2) any employee of the board of county commissioners.¹⁰¹ This observation of the historical separation-of-powers doctrine should have the consequence of making the board of adjustment a truly quasi-judicial body capable of making more objective, almost wholly apolitical decisions. It presents a sharp contrast with Minnesota's municipal planning act, which expressly allows the governing body to serve as its own board of adjustment,¹⁰² the MLDC, which is even less restrictive¹⁰³ and the 1926 SZEA, which seemed to assume but does not mandate separateness.¹⁰⁴ The completely separate status also frees the county board and its individual members from time-consuming administrative or quasi-judicial matters, affording 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 also be a member of the planning commission, if one has been appointed.¹⁰⁵

101. See footnote 37. Apparently appointed county officers (e. g., engineer or assessor) may serve on the board of adjustment.

102. Minn. Stat. § 462.354 (2) (1976).

103. See footnote 29.

104. Op Cit. § 7. See footnote 6.

105. See footnote 37. 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.).

The apparent purpose is to help assure that land use planning considerations are given voice in the board's deliberations. Since "one" is a minimum, not a fixed number, the complete board of adjustment may also serve on the planning commission; in 1973, when the size of the board was limited to three, a survey showed that this was actually the case in seven counties.¹⁰⁶ In eight additional cases, two members of the board were also planning commissioners.¹⁰⁷ Some overlap seems advisable, but an excessive amount (1) concentrates citizen participation in fewer individuals 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 is another issue addressed by language added by the 1974 amendment. First, provision is made for the appointment of an alternate member on three person boards, who may vote when a regular member's vote might be suspect.¹⁰⁸ Secondly, 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.¹⁰⁹ 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 its observation of proper procedures.

106. Agri. Ext. Ser. Sp. Rept 48 (see footnote 105).

107. Id.

108. Minn. Stat. § 394.27 (2) (1976); amending Minn. Stat. § 394.27 (2) (1971).

109. Id.

Another new provision that may help to improve the calibre of decisions by the board of adjustments authorizes compensation to regular and alternate members over and above their necessary expenses.¹¹⁰ The amount and mode of payment is left as a matter of local discretion. Previously, only reimbursement of expenses was allowed.¹¹¹

Another provision added in 1974 seems of questionable value, though not because the underlying motive is defective. In a House floor amendment to SF 2576¹¹² that reappeared in the enacted conference bill, it was specified that at least one member be appointed from the unincorporated area of the county.¹¹³ As in the case of a similar mandate for planning commissions the new provision seems superfluous.¹¹⁴

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 most acutely 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 may arise in the administration of any ordinance", including the

110. Id.

111. Minn. Stat. § 394.27 (2) (1971); as amended Minn. Stat. § 394.27 (2) (1976).

112. 4 Journal of the House 6300, 68th Legislature (Minn. 1974).

113. Ch. 571, § 24, Laws of Minn. (1974).

114. See page 13 and footnote 71 supra.

interpretation of a zoning map.¹¹⁵ The latter, as would be expected, was the source of many difficulties. We will consider them in order.

Much of statutory language with respect to the board's general appellate power was taken or adapted from the SZEa.¹¹⁶ It confines the board's jurisdiction to appeals from acts of code enforcement officials,¹¹⁷ authorizes the board to affirm, reverse, or modify a contested action,¹¹⁸ and provides that the board's decision is final except for appeal in a de novo trial in district court.¹¹⁹ New provisions resulting from the 1974 amendments, noted here without discussion, are: (1) a mandatory stay of all proceedings in furtherance of the action appealed from,¹²⁰ (2) the addition of required notice to the public of the hearings on the appeal,^{121, 122} (3) a mandate that the stated reasons for the board's decision be in writing,¹²³

115. Minn. Stat. § 394.27 (5) (1971); as amended, Minn. Stat. § 394.27 (5) (1976).

116. Op. Cit. § 7. See footnote 7.

117. Minn. Stat. § 394.27 (5) (1976). Prior to the 1974 amendment, authority to act on other types of appeals (e.g., appeals from administrative decisions of the planning commission or county board) may have been conveyed by other language. See footnote 115.

118. Minn. Stat. § 394.27 (6) (1976).

119. Minn. Stat. § 394.27 (8) (1976), generally replacing language previously found at Minn. Stat. § 394.27 (6) (1971).

120. Minn. Stat. § 394.27 (6) (1976), amending Minn. Stat. § 394.27 (6) (1971).

121. Id.

122. Compare public hearing notice requirements for variances discussed at 61 supra. This may be a source of some confusion.

123. See footnote 120.

(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,¹²⁴ 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.^{125, 126}

The broader language in the pre-1974 statute granting to the board of adjustment 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.¹²⁷ Its origin is not known to this writer but it was part of the original 1959 act,¹²⁸ and may have been meant as an alternative but equivalent 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.¹²⁹ If so, the same language would also have included power to act on appeals, making the express grant

124. Minn. Stat. § 394.27 (9) (1976). It is likely that standing is also granted by other statutes, e. g., Minn. Stat. Ch. 116B (1976) (Environmental Rights Act).

125. Minn. Stat. § 394.27 (8) (1976). The apparent rationale for the recordation is the presumed benefits to potential buyers or future owners. Its value seems questionable. See p. 60 infra.

126. 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. Op. Cit. § 2-301 (2).

127. Minn. Stat. § 394.27 (5) (1971); as amended, Minn. Stat. § 394.27 (5) (1976).

128. Ch. 559 § 7 (5) Laws of Minn. (1959).

129. § 7, SZEa. See footnote 7. The actual terminology was somewhat different.

of that authority in the 1959 act redundant.¹³⁰

Though with adoption of recent amendments interpretation problems have largely evaporated, responses in the form of county zoning ordinance provisions are interesting. It appears that the offending clause was generally 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; in actuality, this was true in 1973 for only 28 percent of all county zoning ordinances.¹³¹ Literal compliance was much higher, 83 percent, with respect to variances, but still less than complete.¹³²

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,¹³³ discussed in detail below,¹³⁴ co-existing with its appellate duties and responsibilities.¹³⁵ The authority to grant conditional use permits, also discussed below,¹³⁶ 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.¹³⁷

130. See p. 23 supra.

131. See footnote 93. 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.).

132. See footnote 93.

133. Minn. Stat. § 394.27 (7) (1976); amending Minn. Stat. § 394.27 (7) (1971).

134. See p. 45 et seq. infra.

135. Minn. Stat. § 394.27 (5) (1976).

136. See p. 39 et seq. infra

137. See footnote 44.

This may end a period of statutorily derived administrative confusion in county zoning in Minnesota.

Administrative Procedures for Rezoning

As indicated supra "rezoning" means an amendment to an ordinance that changes the district classification of one or a few, usually contiguous, parcels of property, most commonly owned by a single party requesting the amendatory action.¹³⁸ Since rezoning is considered a legislative act in Minnesota, court review is circumscribed by the separation-of-powers doctrine, allowing the exercise of a great deal of discretion by the county board.¹³⁹ As a consequence, there is less legal protection against arbitrary, politically motivated acts than in the case of 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. Considering the former category first, we must observe that prior to the 1974 amendment, zoning ordinance amendments, although adoptable by resolution¹⁴¹ and therefore not subject to the rather nominal notice requirements for all county ordinances,¹⁴² could nevertheless be adopted only after a public hearing conducted by the planning commission, if such a

138. See p. 9 et seq supra.

139. See footnote 49.

140. Intentionally left blank

141. Minn. Stat. § 394.24 (1) (1971); as amended Minn. Stat. § 394.24 (1) (1976).

142. Minn. Stat. § 375.51 (1) and (2) (1971); as amended Minn. Stat. § 375.51 (1) and (2) (1976).

body had been appointed.^{143, 144} Subsequently the planning commission was required to transmit findings and conclusions based on the hearing to the "planning agency",¹⁴⁵ which in turn was required to forward the same to the county board along with "such comments and recommendations" as it deemed necessary.¹⁴⁶

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,¹⁴⁷ bringing the action within the purview of Minn. Stat. § 375.51, which itself 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.¹⁴⁸ In addition, another new provision mandates written notice of the hearing to the governing bodies of all cities and townships in the county.¹⁴⁹

A hearing conducted by the planning commission may still be used to satisfy this requirement.¹⁵⁰ Alternatively the county board now has the option of assigning responsibility for this type of hearing as well as others

143. Ch. 559, § 6 (1) Laws of Minn. (1959)(repealed 1974).

144. Ch. 559, § 10 (2) Laws of Minn. (1959) (repealed 1974).

145. See description of "planning agency" at p. 16 supra.

146. See footnote 144.

147. Minn. Stat. § 394.24 (1) (1976).

148. Minn. Stat. § 375.51 (1) and (2) (1976), amending Minn. Stat. § 375.51 (1) and (2) (1971).

149. Minn. Stat. § 394.26 (2) (1976), amending Minn. Stat. § 394.26 (2) (1971).

150. Minn. Stat. § 394.26 (3a) (1976), replacing Minn. Stat. § 394.26 (3) (1971).

to any official or employee of the county.¹⁵¹ 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.¹⁵²

Whether or not the planning commission conducts the hearing, it now must have an opportunity to pass judgment on all amendment proposals prior to passage.¹⁵³ Though by express statutory language amendments may be initiated by the county board and by petition of affected property owners, as well as the planning commission itself,¹⁵⁴ 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.¹⁵⁵ The commission in turn is directed to cooperate with the planning director and other county employees in preparing and recommending amendments for adoption.¹⁵⁶ The directive undoubtedly carries over to imply coercion to cooperate in review of amendments from other sources,

151. Id. The Board of Adjustment may also be assigned responsibility for conducting public hearings for "one or more purposes". Id.

152. See footnote 90 and Minn. Stat. § 375.51 (1976).

153. See footnote 91.

154. Id.

155. Id.

156. See footnote 87.

since it appears to have the purpose of preventing 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 and the proposal must be approved by a majority vote of all members of the board, not just those present.¹⁵⁸

The second category of statutory constraints, those that apply only to amendments that are characterized as rezoning¹⁵⁹ encompasses a single additional public hearing notice requirement: to all owners of record within one-half mile of the affected property.¹⁶⁰ This further imposition came down from a 1976 amendment flowing from the controversy over the scope of newly required notice for hearings on other discretionary administrative acts.¹⁶¹ Although the resulting statutory language drawing rezoning hearings into the more detailed express written notice mandate is a bit clumsy, the interpretation given here, though perhaps leading to some redundancy,¹⁶² seems unavoidable.^{162a}

157. Intentionally left blank

158. See footnote 61

159. See p. 9 supra.

160. Minn. Stat. § 394.26 (2) (1976).

161. Ch. 177 § 1, Laws of Minn. (1976).

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

162a. 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.

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 statutory declaration that rezoning is to be legally classified as an administrative act, rather than legislative. This is a positive sign for those concerned over the manner in which seemingly arbitrary rezoning type amendments sweep away the protection ostensibly provided by zoning to farmers and other landowners in fringe areas of suburbia. Though the paucity of further statutory restraints subdue enthusiasm, such restraints are perhaps properly omitted, since so long as rezoning activities are considered legislative acts, and thus subject to limited court review, statutorily imposed requirements with respect to standards and criteria, findings, and reasons may seem to interfere improperly with the exercise of authority by an elected representative body. The new notice, hearing, and review procedures may serve to broaden the information base and to alter the weight the county board chooses to assign to interests affected by rezoning, but they must be viewed as minor impediments to what in some instances may be an arbitrary decision nearly untouchable by the courts.¹⁶³

Administrative Procedures for Issuing Conditional Use Permits

Conditional use permits in one form or another have been part of

163. 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. See footnote 26 and discussion at p. 5 supra. 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.

comprehensive zoning from its early history. Since at least 1926, when the SZE was promulgated, it has been recognized that the appropriate locations and acceptable physical characteristics of certain quite proper uses of land could not be predetermined and set forth in a zoning ordinance.¹⁶⁴ Permits for such land uses are customarily issued by a body possessing the discretionary power to determine (1) whether that 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. Land uses needing such specialized treatment are generally those whose inherent characteristics make them potentially much more damaging to the interests 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., permitted uses). They have passed under various titles, including conditional uses, special exception, special uses, and special permit uses.¹⁶⁵ Discretionary approval authority may have been vested in the governing body or delegated to another entity. In any instance, 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.^{166, 167}

164. Op. Cit. § 7. See footnote 6.

165. 5 American Land Planning Law § 148.07 (N. Williams 1977). R. Snyder, Zoning Principles and Definitions, Ag. Ext. Serv. Folder 251, (rev. 1978, Minn.).

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

167. U.S. Const. Amend. XIV, § 1.

Prior to the 1974 amendment to the 1959 CPA, Minnesota enabling legislation for land use planning by all political subdivisions was silent with respect to nomenclature and procedures that might be used for land uses needing this specialized treatment.¹⁶⁸ Influenced by planning consultants, a model shoreland ordinance promulgated by DNR¹⁶⁹ and other sources of guidance, counties proceeded to include provisions of this nature in their ordinances, but in a manner lacking 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 and other terms were present.¹⁷⁰ Even more variation could be observed with respect to granting authority, which 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.¹⁷¹ Similar inconsistencies were present with regard to hearing and notice requirements and other provisions.¹⁷² Even if authority to use this administrative device

168. Minnesota is one of nine states where the statutes are silent on this matter. Most states adopted provisions identical to or modeled after the SZEAL, which contained almost no detail or procedural guidance, but used the term "special exception" and assigned granting authority to the board of adjustment. 1 American Land Planning Law 369 (N. Williams, 1977).

169. Minn. Reg. Con. 77 (1970 ed.).

170. See footnote 93.

171. *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. *Id.*

172. See p. 40 infra.

could be implied from general language in the enabling legislation, as the Minnesota Supreme Court found in *Zylka v. Crystal*,¹⁷³ 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 other related parts of the statute.¹⁷⁴

The statutory insertions and revisions resulted in eight accomplishments; 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; 8) Clarified the continuity of permits. These will be taken up in order.

Nomenclature and Definition

The added statutory material defines and uses exclusively "conditional use" to refer to land developments and development activities to be approved on a discretionary basis.¹⁷⁵ The term seems appropriate. It was already being used in the majority of county ordinances¹⁷⁶ and conveys a clearer sense of the

173. 283 Minn. 192, 167 N. W. 2d 45 (1969).

174. Ch. 571, §§ 1 (6), 21, 22, 34, 35, and 45 Laws of Minn. (1974), Ch. 177 § 1 Laws of Minn. (1976) supplied additional detail.

175. See footnote 42.

176. See p. 32 supra.

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 and unclear the distinction between conditionally permitted uses and those allowed pursuant to a variance.¹⁷⁷ But the true significance of the statutory terminology is simply that it now exists as part of the law, setting a standard for uniformity that can reduce the obvious communication and educational problems that inhere in the use of multiple terms.

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 are present.¹⁷⁸ This is meant to encompass land development activity (e. g., draining or filling a wetland) as well as the use of land or buildings for some identifiable purpose¹⁷⁹ and is expressly extended to "planned unit developments" which, though not statutorily defined, are commonly considered to include land areas owned

177. § 7, SZEa. Also see footnote 6. The new Minnesota statute precludes allowing deviation from ordinance standards except by issuance of a variance. Attorney General opinion 125 a 66, June 6, 1978.

178. See footnote 42.

179. See footnote 44

in common and multiple land uses.¹⁸⁰ It is also clear that the legislature recognized the value of placing conditional uses in subcategories which might be handled differently under a local ordinance.¹⁸¹

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.¹⁸² The plan conformity requirement is somewhat lacking in clarity since the amended statute elsewhere implies that a comprehensive plan shall be the basis for official controls only when adopted by ordinance.¹⁸³ In contrast to Minnesota's municipal planning act,¹⁸⁴ there is no provision for adoption of "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 that had not received official sanction.

180. *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 (Minn. Reg. Cons. 74 (1970 ed.)) and a special condominium statute has been enacted (Minn. Stat. ch. 514 (1976)), neither is adequate for this purpose.

181. See footnote 43 and Minn. Stat. § 394.30 (5) (1976).

182. See footnote 42.

183. Minn. Stat. § 394.23 (1976).

184. Minn. Stat. § 462.355 (2) (1976).

Another somewhat puzzling situation is presented by the appearance after the 1974 amendment of the term "site plan regulations" as an example of official controls.¹⁸⁵ 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,¹⁸⁶ 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 mere tautology since the term "subdivision controls" is found immediately proceeding? Or is site plan approval only a step toward the granting of a conditional use permit? These and other positions are arguable. Such ambiguity 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 makes mandatory the inclusion in the zoning ordinance of standards and criteria which must be utilized in determining whether to issue a conditional use permit for a given proposal.¹⁸⁷ This may represent a notable change from previous

185. Minn. Stat. § 394.22 (6) (1976), amending Minn. Stat. § 394.22 (6) (1971).

186. Craig, D. W. "Discretionary Land Use Controls -- The Iron Whim of the Public" in 1 Proceeding, Institute on Planning, Zoning and Eminent Domain 9, (Southwest Legal Foundation, 1971).

187. See footnote 44.

law, since the Supreme Court in this state, unlike Michigan and some others, has not found a violation of constitutionally protected rights 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, so long as the decision were made by the governing body.¹⁸⁸ 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 be of far reaching significance.¹⁸⁹

The initial impact may seem to be a negative one, since counties will need to make expenditures for studies that are suitable for developing the required specific standards and criteria and then assume the cost of incorporating them into zoning ordinances by appropriate amendments.¹⁹⁰ In the longer

188. Zylka v. Crystal, see footnote 173. Compare Osius v. St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25, 58 ALR2d 1079 (1976).

189. See footnote 44.

190. 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.)).

perspective, however, exercise of the approval authority for conditional uses may be simplified because of the guidance provided by the ordinance, leaving less need for a broad ranging study of the impact of each proposed use and a greater opportunity to more carefully consider questions left unresolved by the predeveloped standards and criteria. This could be a great aid to the decisional process and produce more uniform and objectively established results, since the major considerations 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 appropriate degree the standards and criteria that will be used as bases for judgment of his proposal; this might inter alia, afford a presentation that supplies the facts and circumstances material 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 initially to be treated as conditional uses may be allowed as a matter of right if they comply with detailed quantitative standards thereby developed. Some take the position that excessive use of the conditional use technique is a serious problem in land use control.¹⁹¹ If this view is correct, a tendency toward reduction is a positive element.

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

Finally, the ordinance standards and criteria requirement may impinge heavily on a county board's decision as to whether to reserve final decision making authority to itself or to delegate it to the planning commission. Previously, as has been observed,¹⁹² 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.¹⁹³ 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 probability of politically motivated decisions, and increased 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 apparent.¹⁹⁴

Assignment of Decisional Authority

As already noted, previous law discouraged the county board in Minnesota from delegating authority to order the issuance of conditional use permits to an appointive body.¹⁹⁵ Among those that did, a large majority followed the

192. See footnote 188.

193. Id.

194. See discussion at p. 15, et seq., supra however, suggesting that other new statutory provisions may militate against delegation.

195. Also see discussion at p. 18 supra

suggestion supplied by the SZEa and chose the board of adjustment.¹⁹⁶

The CPAA makes delegation to that body unlawful, but expressly permits delegation to the planning commission.¹⁹⁷ It also now requires review by the planning commission even if decisional power is retained by the county board.¹⁹⁸ Moreover, the reservation-delegation decision is not confined to an either-or situation. If the county board wishes to maintain direct control with respect to some listed conditional uses, for example those with stronger potential political repercussions, the statutory language strongly suggesting categorization of conditional uses may induce them to delegate where other conditional uses are involved.¹⁹⁹ A precedent for this arrangement appears in ordinances already adopted in certain counties.²⁰⁰

Notice and Hearing Requirements

Action on conditional use permit applications must now be conducted 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.²⁰¹ The last

196. See discussion at p. 18 and p. 25 supra and § 7 SZEa. Also see footnote 6.

197. See footnote 43.

198. See footnote 87.

199. See footnote 43.

200. Freeborn County Zoning Ordinance, adopted Aug. 1, 1967. Olmsted County Zoning Ordinance, Adopted Jan 2, 1970.

201. Minn. Stat. § 394.26 (2) (1974); as amended, Minn. Stat. § 394.26 (2) (1976).

requirement has proven 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 ten properties nearest to the affected property, whichever would provide notice to more landowners.²⁰² 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.²⁰³ Less than one-third notified the township.²⁰⁴ In a few ordinances, no hearing or notice requirements were present.²⁰⁵

The statutorily mandated notices will help assure responsible action by the decision making body, but we may note as a caveat that 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 the element of causation is at least questionable, since resisting landowners are likely to learn of the proposal even if notice is limited. The courts will still be necessary to correct injustices of this nature.²⁰⁶

202. Minn. Stat. § 394.26 (2) (1976), amending Minn. Stat. § 394.26 (2) (1974).

203. See footnote 93.

204. Id.

205. Id.

206. See footnote 166.

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" the applicant for a conditional use permit to "demonstrate the nature and extent" of any "material adverse effect on the environment" that the planning commission has identified as a possibility.²⁰⁷ Although the underlying concept is similar to that of the environmental policy act,²⁰⁸ which calls for an environmental impact statement when the physical environment may be seriously endangered, the lack of guidelines and of power to demand the production of environmental information, rather than "request" it, leave one uncertain as to the legislative intent. There would seem to be nothing standing in the way of the applicant being 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 instances where the ordinance has no such standard, but the board wishes to expand review of a proposed conditional use if the applicant will cooperate.

Whatever its meaning, the statute will be easily overlooked since it is located in a wholly separate section distant from and unreferred to by the detailed section on conditional use permit administration.²⁰⁹ Its location

207. Minn. Stat. § 394.362 (2) (1976).

208. Minn. Stat. Ch. 116D (1976).

209. See footnote 207. Most detail on conditional use permit administration is in Minn. Stat. § 394.301 (1976).

may be explained by the fact that it was not part of the amending bills as introduced²¹⁰ but was added in a modified form by committee action in the House,²¹¹ retained in the House version of SF 2576,²¹² and in the conference bill finally enacted.²¹³

Special Restrictions

Land uses or developments treated as conditional uses are often so categorized because of their potentially harmful or 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".²¹⁴ To ensure adequate protection against negative externalities, the body responsible for the issuance of conditional use permits is authorized by statute to attach "such additional restrictions or conditions as it deems necessary to protect the public interest".²¹⁵ This appears to restore to the decisional body a significant proportion of the flexibility that may have been lost as a result of the ordinance standards and criteria requirements. Although it would not extend to absolute prohibition, the use of the property might be so restricted as to have the same practical effect. Unreasonable

210. HF 2591 and SF 2576, as introduced, 68th Legislature (Minn. 1974).

211. See footnote 14.

212. 4 Journal of the House 6860, 68th Legislature (Minn. 1974).

213. See footnotes 23 and 24.

214. See p. 35 supra.

215. See nootnote 43.

restrictions, of course, may be declared unlawful by a court of competent jurisdiction, but court delays and attorney's fees may make this an ineffective remedy in many instances. One can argue that the flexibility is necessary and advantageous, despite the possibility of abuse, since it offers opportunities to allow a greater mixing of land uses, which may be convenient and cost-saving, with a minimal degree of conflict. The statute does not itself place limits on or specify the types of restrictions that can be imposed, but it does give some illustrative examples: "matters relating to appearance, lighting, hours of operation, and performance characteristics", ²¹⁶ 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 notice or knowledge that such encumbrances exist. This event is guarded against by a new statutory mandatory filing of record of all conditional use permits with the county recorder or registrar of titles. ²¹⁷ If one presumes that restrictions and criteria attached to the permit will appear thereon, recordation may be the most effective means for giving notice to and mitigating enforcement

216. Id.

217. Minn. Stat. § 394.301 (4) (1976).

problems against a succession of landowners. There seems, however, to be little reason to require recordation 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.²¹⁸

The statute also states that "restrictive covenants may be entered into regarding such matters" as special restrictions and conditions.²¹⁹ This seems to contribute little since the exercise of the police power is not dependant upon such encumbrances, whether recorded or not.

Continuity

The question of whether a conditional use permit may be used as a practical substitute for a system of periodic licensing by issuing temporary permits is to a large extent resolved by a statutory declaration that such a permit "shall remain in effect for so long as the conditions agreed upon are observed."²²⁰ This of course raises the question of whether periodic renewal of the permit may be imposed as a condition at the time of the initial approval. Such an interpretation seems unlikely since it would remove most or all meaning to the statutory declaration. Additional supportive evidence is given by the suggested types of restrictions and conditions,²²¹ which though not meant to be inclusive, may, by application of the rule of

218. Minn. Stat. § 394.35 (1976).

219. See footnote 43.

220. Minn. Stat. § 394.301 (3) (1976).

221. See p. 44 supra.

expressio unius, exclusio alterius,²²² preclude the imposition of restrictions and criteria wholly dissimilar from and unrelated to the statutory examples. A condition limiting the permit to a term would seem to fall in this category.

An accompanying provision insures that the required continued validity of conditional use permits shall not interfere with the enforcement of restrictions imposed by future legislative action.²²³ Such action might, for example, alter development standards or land use restrictions to make the conditional use a nonconformity²²⁴ and thus expose it to constraints on expansion, reconstruction, or, in an extreme situation, to termination after an appropriate amortization period.²²⁵

Administrative Procedures for Issuing Variances

From their inception in the early part of this century, comprehensive zoning laws and ordinances have recognized that the uniform enforcement of set standards and restrictions over a designated area, as a zoning district, would not necessarily result in uniformity of hardship among landowners.²²⁶ To prevent an injustice to property owners thereby presented

222. Mermin, Samuel, Law and the Legal System 207.

223. See footnote 220.

224. Minn. Stat. § 394.22 (8) (1976).

225. Minn. Stat. § 394.36 (1976).

226. 5 American Law of Zoning § 129,01, (N. Williams, 1977).

with an unusually burdensome situation a device called a variance was used to allow variation from the strict terms of the ordinance.²²⁷ Variances were specifically provided for in the SZEA and in most state enabling statutes.²²⁸ As we have seen,²²⁹ despite such language in the earlier municipal planning legislation,²³⁰ Minnesota's original county planning act was an exception.²³¹

As counties in Minnesota proceeded to adopt zoning ordinances in the sixties and early seventies, the statutory vacuum with respect to variances was filled by the expert but generally nonlegal advice of planning consultant firms hired to develop land use plans and ordinances and, after 1970, by administrative rules concerning control of development in shoreland areas then promulgated by the state Department of Natural Resources.²³² 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 issuance of variances, there was considerably less consensus with respect to the precise manner in which this traditional means of providing relief to harshly affected landowners was to be utilized. In designating

227. Id.

228. 3 American Law of Zoning § 129.01, (N. Williams, 1977).

229. See p. 22 et seq. supra.

230. Ch. 340 § 3, Laws of Minn. (1929).

231. Ch. 559, Laws of Minn. (1959).

232. Minn. Reg. Cons. 70(d), 75(b) and 77 (1970).

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 and in four counties, which had each adopted 2 ordinances, the documents failed to agree on the assignment of this important quasi-judicial function.²³³ 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."²³⁴ Other areas of confusion needing statutory resolution comprised, inter alia, the definition of a lawful variance, hearing and notice procedures, and findings necessary to justify a variance. The manner in which the legislature spoke to these and related issues will be the focus of the remaining discussion in this section.

What Does "Variance" Mean?

A basic problem area concerns the simple matter of definition. The word "variance" is an ambiguous term, since it may be used in both a technical and generic sense and even when used technically may convey varying messages to different readers or listeners. Further, the courts in several states and the legal community in general have for a long time recognized a major distinction between a "use"

233. See footnote 93. This was only one of several kinds of inconsistencies found in 24 counties that had adopted both shoreland management ordinances (containing several types of controls, including zoning) and countywide zoning ordinances.

234. Ch. 371, § 27, Laws of Minn. (1974), now appearing as Minn. Stat. § 394.27 (7) (1976). See discussion at p. 25 supra.

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.²³⁵ Interpretative problems of this nature are met in the 1974 amendment by (1) the insertion of a definition of "variance",²³⁶ and (2) an express prohibition against the issuance of variances that would "allow any use that is prohibited in the zoning district in which the subject property is located."²³⁷

Problems that might arise if, after definition, "variance" is used in a generic sense, are avoided by a definition that is itself essentially generic: "any modification of variation of official controls" where because of "exceptional circumstances" strict enforcement would cause unnecessary hardship.²³⁸ An attempt to be more specific failed in the legislature when a committee sponsored amendment to the original bill HF 2591 that 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,²³⁹ and appearing in the House version of SF 2576,^{239a} was not present in the enacted conference bill.²⁴⁰ The House bill amendment may have been

235. 4 American Land Planning Law § 132.01 (N. Williams, 1977).

236. Ch. 571 § 5, Laws of Minn. (1974), now appearing as Minn. Stat. s 394.22 (10) (1976).

237. Ch. 571 § 27, Laws of Minn. (1974), now appearing as Minn. Stat. § 394.27 (7) (1976).

238. See footnote 236

239. 3 Journal of the House 5358, 68th Legislature, (Minn. 1974)

239a. 4 Journal of the House 6134, 68th Legislature (Minn. 1974).

240. See footnotes 23 and 24.

wise, since 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, probably unnecessary, could interfere with the effectiveness of statutory safeguards against misuse of regulatory power.

The provision making unlawful the issuance of "use" variances, quoted *supra*, and nearly identical to one found in the municipal planning act,²⁴¹ eliminates any prior uncertainty that may have been disquieting to county officials, since legality of "use" variances was questionable even before statutory prohibition.²⁴² Courts in some, but not all, states have found their issuance tantamount to rezoning and unlawful without full compliance with procedures required for amending a zoning ordinance.²⁴³ 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 allowing for their issuance prevailing,²⁴⁴ and in 11 counties with multiple zoning ordinances, the ordinances failed to agree on this rather significant issue.²⁴⁵

241. Minn. Stat. § 462.357 (6) (1976).

242. 5 American Land Planning Law, §§ 132.01 - .102 (N. Williams, 1977).

243. *Id.*

244. See footnote 93

245. *Id.*

When Is a Variance a Proper Remedy?

In a wholly 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 issuance of a variance.²⁴⁶ Unfortunately, not all ambiguities have been eliminated. Some background will be useful.

The two phrases associated with the grounds for granting variances are "practical difficulties" and "unnecessary hardship", the latter representing a higher plateau of landowner frustration.²⁴⁷ In some jurisdictions a parallel has been drawn between these phrases and the type of variance that is involved, with the courts considering a finding of practical difficulty sufficient to justify a "non-use" variance, but requiring a finding of unnecessary hardship to affirm a grant of the presumably more disruptive "use" variance.²⁴⁸ In others, the two phrases are treated as having substantially the same meaning and any distinction between grounds for use and non-use variances is based on factual circumstances aside from the phraseology.²⁴⁹

Neither the courts nor legislature of Minnesota have spoken to this issue sufficiently to dispel the quandary. The municipal planning act, barring "use" variances,²⁵⁰ uses the single phrase "undue hardship"

246. Ch. 321 § 27, Laws of Minn. (1974), now appearing as Minn. Stat. § 394.27 (7) (1976).

247. 5 American Land Planning Law § 130.01 (N. Williams, 1977).

248. 5 American Law of Zoning, § 18.46 (R. M. Anderson, 1977).

249. 5 American Land Planning Law, § 145.06 (N. Williams, 1977).

250. See footnote 241

sans definition except for the guidance given by a requirement that the hardship exists because of circumstances unique to that particular property.²⁵¹ The Supreme Court, deciding a "non-use" variance controversy in the city of Saint Paul, quoted both the statute and language in the Saint Paul ordinance including the phrase "practical difficulties or peculiar hardship", 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.²⁵²

The 1974 legislature was equally unhelpful. The bills amending the county planning act as introduced used a definition of variance indicating that variances might be granted in cases of unnecessary hardship or because strict conformity with an ordinance "would be unreasonable, impracticable, or infeasible under the circumstances".²⁵³ A suspicion that this meant that practical difficulty was sufficient ground for granting a variance seemed to be confirmed by language in a wholly new detailed subdivision on variances providing that they might be granted only "when there are practical difficulties and particular hardship".²⁵⁴

251. Id.

252. Merriam Park Community Council, Inc. v. McDonough, 299 Minn. 285, 210 N. W. 2d 416 (1973).

253. HF 2591 § 6 and SF 2575 § 6 (as introduced), 68th Legislature (Minn. 1974). The language was actually taken from shoreland management regulations. Minn. Reg. Cons. 77 (1970 ed.).

254. HF 2591 § 29 and SF 2579 § 29 (as introduced). Note the word "particular" instead of "unnecessary". The requirement that a particular hardship had also 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.

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 to remove the "practical difficulty" language from the definition.²⁵⁵ No "companion amendments" were made to the Senate bill, which therefore continued to recognize practical difficulties as a basis for a non-use variance,²⁵⁶ until the House substituted its own version of SF 2576 for the passed Senate bill.²⁵⁷ 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.²⁵⁸ This was accepted by both houses in adoption of 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 ambiguity. 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.²⁵⁹ Knowledge of differences between the two houses of the legislature and

255. 3 Journal of the House 5358, 5360 68th Legislature (Minn. 1974).

256. SF 2596 (as first passed) 3 Journal of the Senate 5061, 68th Legislature (Minn. 1974).

257. See footnote 16.

258. See footnotes 23 and 24.

259. Brown v. Beuc, 384 S. W. 2d 845 (Mo. App. 1964).

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, inter alia, that the property could not yield an "equitable return" and that there was no "economic use" for the property.^{260, 261} This phraseology is similar to that in widespread use by the courts.²⁶² Although neither "equitable" nor "economic" were defined, they clearly imply a sense of fairness within the framework of the marketplace; i. e., the use of the property must not be so restricted that it limits the number of potential buyers so as to effectively 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.^{262a} This now appears in the enacted law.²⁶³ Replacement of the equitable return concept with one using "put to a reasonable use" as a criterion may at first

260. HF 2591 § 29 (as introduced), 68th Legislature (Minn. 1974).

261. SF 2576 § 29 (as introduced), 68th Legislature (Minn. 1974).

262. 3 American Law of Zoning §§ 19.17-.22 (R.M. Anderson, 1977).

262a. 3 Journal of the House 5362, 3 Journal of the Senate 4464, 68th Legislature (Minn. 1874).

263. Minn. Stat. § 394.27 (7) (1976).

seem "reasonable", but closer inspection brings one to the realization the reasonableness may be in the eyes of the beholder, raising questions as 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, reasonableness may or may not be construed within the framework of private ownership. It may, for example, be perfectly reasonable that a given parcel of property in a particular location 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 create the need for a private landowner to litigate to preserve constitutionally protected rights in property.

Recognizing that court action may be necessary to resolve these remaining ambiguities, may we assume for the moment that a successful applicant for a variance must satisfy the unnecessary hardship criterion. Without raising confounding questions of interpretation, what elements does the statute require to be found before the board of adjustment can legally 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.²⁶⁴

The required findings are cumulative, not alternative; all 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.²⁶⁵ It is unlikely that this interpretation is correct, but the point is clearly arguable. Any other interpretation transmutes the extreme detail defining "hardship" into excess statutory baggage, violating a basic tenant of statutory construction.²⁶⁶

Effect on the Environment

The applicant for a variance may face another hurdle if the board of adjustment elects to exercise an option expressly made available to it in a

264. Minn. Stat. § 394.27 (7) (1976).

265. 3 American Law of Zoning, § 18.47 (R. Anderson, 1977).

266. Minn. Stat. § 645.17 (1976).

wholly new section added to the county planning act in 1974. Section 394.362 now provides that if the applicant applied for a 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."²⁶⁷ The effect the solicitous nature of this language may have on 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.²⁶⁸

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.²⁶⁹ This has proven to be a controversial measure.

It should first be noted that in 1973, although hearings on zoning variance applications were required in 5/6th 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 hearing was slight.²⁷⁰ Only a third of the ordinances required notice to the public and fewer than one-sixth provided for

267. Minn. Stat. § 394.362 (1) (1976).

268. See p. 42 supra.

269. Ch. 571, §§ 20 and 21, Laws of Minn. (1974).

270. See footnote 93. Also Minn. Stat. § 394.27 (6) (1971); as amended, Minn. Stat. § 394.27 (6) (1976).

notice to neighboring landowners, usually confined to those within 300 feet.²⁷¹ 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 2 miles and all property owners of record within 500'.²⁷² 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 1/2 mile in unincorporated areas and 500 feet in incorporated areas.²⁷³ The Senate bill was similarly amended by floor action in the House,²⁷⁴ and the same language was retained in the conference bill finally enacted. The bill subsequently passed both houses and became law in that form.²⁷⁵ County officials expressed their opposition²⁷⁶ 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' or the ten properties nearest the property of the applicant,

271. See footnote 93

272. HF 2591 § 23 and SF 2576 § 23 (as introduced), 68th Legislature (Minn. 1974).

273. 3 Journal of the House 5360, 68th Legislature, (Minn. 1974).

274. 4 Journal of the House 6140, 68th Legislature (Minn. 1974).

275. Ch. 371, § 21, Laws of Minn. (1974).

276. The Minnesota State Association of County Planning and Zoning Administrators was particularly outspoken in its resistance to expanded notice to landowners.

whichever would provide notice to a greater number of landowners.²⁷⁸
 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 mandate procedures of this nature.²⁷⁹

An interesting innovation adopted in the House on recommendation of the House Committee on Environmental Protection and Natural Resources but not appearing in the conference committee bill 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.²⁸⁰ The logic of such a provision seems inescapable if one concedes the value of citizen participation as a guard against governmental caprice.²⁸¹

Authority to Attach Conditions

Constrained as the discretionary power of the board of adjustment may be by statutorily imposed prerequisite findings for ordering the issuance of a variance, the board's authority in cases where factual circumstances justify an affirmative response is significantly inflated by another statutory provision added in 1974 allowing the board to attach conditions to the variance.²⁸¹

278. Ch. 177, § 1, Laws of Minn. (1974), now appearing as Minn. Stat. § 394.26 (2) (1976).

279. Minn. Stat. §§ 462.351 et seq., §§ 366.10 et seq., and §§ 368.56 et seq. (1976).

280. See footnote 273.

281. See footnote 39.

The purpose of such conditions is "to insure compliance and to protect adjacent properties and the public interest."²⁸² In contrast with similar provisions with respect to the issuance of conditional use permits, there are no further guidelines as to the types of conditions that may be lawfully imposed.²⁸³ The language was taken from the municipal planning, where it has apparently not been problematic.²⁸⁴

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 for record with the county recorder or registrar of titles.²⁸⁵ This assures that any conditions attached to the variance and perhaps constituting an encumbrance on the property will appear of record in the abstract of chain of title.²⁸⁶ The required filing seems an unnecessary imposition when variances are granted but no conditions are attached. Under these circumstances a parcel of property developed or used in accordance with the variance would assume the status of a non-conformity and any

282. Id.

283. Id. See footnote 221

284. Minn. Stat. § 462.357 (6) (1976).

285. Minn. Stat. § 344.27 (8) (1976).

286. It should be noted here that copies of ordinances themselves must also be filed for record but do not constitute encumbrances in real estate. Minn. Stat. § 394.35 (1976).

interested party would receive constructive notice by virtue of the recordation of official controls and the opportunity to observe the property itself.

Court Review

As a review of a board of adjustment response to a variance request, the statute continues to provide for de novo and exclusive review in the district court of the situs county of the subject property.²⁸⁷ 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.²⁸⁸ 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 having apparently decided to remain silent on the question of scope of review of denials of applications for conditional use permits.²⁸⁹ 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 exist to a greater degree where such departures from proper procedures are condoned.

287. Minn. Stat. § 394.27 (8) (1976), replacing a similar provision found at Minn. Stat. § 394.27 (6) (1971).

288. *Inland Construction Co. v. City of Bloomington*, 292 Minn. 374, 195 N.W.2d 558 (1972); *Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 211 N.W. 2d 358. (1973).

289. Such a provision is conspicuous by its absence in Minn. Stat. § 354.301 (1976) dealing in detail with the issuance of conditional use permits.

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 ²⁹⁰), and any department, board, or commission of that county or of the state.²⁹¹ 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.²⁹² Although through the amendment and adoption by the House of SF 2576 this extension was preserved,²⁹³ it did not appear in the enacted conference bill. As a consequence, 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 prerequisite to the decision that they might wish to challenge. Standing may arise elsewhere, however.²⁹⁴

Concluding Comments

This rather exhaustive recitation of past amendment county planning act provisions that authorize but carefully circumscribe the exercise of

290. Blacks Law Dictionary 1299 (4th ed. 1968).

291. Minn. Stat. § 394.27 (9) (1976). A previous provision deleted in 1974, awarding standing to any person having an interest affected by such ordinance, was found at Minn. Stat. § 321.27 (6) (1971).

292. 4 Journal of the House 5361, 68th Legislature (Minn. 1974).

293. 4 Journal of the House 6140, 68th Legislature (Minn. 1974).

294. 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).

discretion in the administration of zoning ordinances seems unsusceptible to useful summarization. The reader who feels a compelling need for a cursory review is referred to that portion of the introductory comments that presents an overview of the Minnesota approach juxtaposed with the A. L. I. Model Land Development Code.²⁹⁵ A re-examination of those prefatory 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 procedures, 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.²⁹⁶ It is almost totally in the area of procedural law that statewide uniformity is decreed. Express power to regulate has in fact been enlarged;²⁹⁷ it is the manner in which that power will be exercised that is prescribed.

Two basic premises seem to underlie the Minnesota county planning enabling law provisions described in this paper. One is that, in

295. See p. 5 et seq. supra.

296. This is not necessarily true with respect to all state legislation dealing with local land use control; the shoreland management law in Minnesota, for example, preempts certain lawmaking authority to the state. Minn. Stat. § 105.485 and 394.25 (2) (1976). Except for a cross reference to such laws, the county planning act itself does not conflict with local substantive law-making authority. Minn. Stat. § 394.25 (2) (1976).

297. Minn. Stat. § 394.24 (3) (1976) (new in 1974) and § 394.25 (1976), amending § 394.25 (1971).

this area of law, the advantages of local control are sufficient to justify intensive and detailed state legislative attention. The other is that proper discretionary administration of zoning ordinances is crucial to successful regulation of 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 adequately protected. 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,²⁹⁸ shoreland management,²⁹⁹ power plant siting,³⁰⁰ critical areas,³⁰¹ and flood plain management programs.³⁰² 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 the inadequacy of enabling laws. They probably still are, but the new and continuing provisions discussed in this paper appear to represent a major step toward a more favorable institutional climate for future regulatory activity.

298. Minn. Stat. §§ 104.31-.40 (1976).

299. Minn. Stat. § 105.485 (1976).

300. Minn. Stat. §§ 116C.51-.69 (1976).

301. Minn. Stat. §§ 116G.01-.14 (1976).

302. Minn. Stat. §§ 104.01-.07 (1976).