

ZONING: VARIANCE ADMINISTRATION IN ALAMEDA COUNTY

INTRODUCTION

Zoning legislation has been adopted by states throughout the country to permit the regulation of land uses according to comprehensive plans.¹ Typically, the state legislation vests authority for the adoption of the local zoning ordinance in the local legislative body,² and the administration of the ordinance is committed to the discretion of an administrative body appointed by the city council or the county board of supervisors.³ Administrative discretion includes the authority to confer individual relief in the form of variances⁴ from the strict terms of the ordinance. Since variances legalize land uses that are inconsistent with the comprehensive zoning restrictions established by legislative act, state statutes and local ordinances usually contain definite restrictions on the exercise of the variance power.⁵ At the same time, however, judicial review of variance decisions is very limited. Unless the decision is clearly arbitrary or an abuse of discretion, the courts will usually respect the administrative decision.⁶ Moreover, few individual applicants for variances are represented by legal counsel, and appeals of any sort from administrative variance decisions are infrequent.⁷

Because variance administration is so thoroughly committed to administrative discretion, and because variance decisions are so seldom subjected to judicial scrutiny, the administrative attitude toward variances is crucial in evaluating the fairness and the effectiveness of any zoning program. This Comment investigates

¹ See POWELL, 6 REAL PROPERTY § 868 (1958).

² See, e.g., CAL. GOV'T CODE § 65800; ILL. ANN. STAT. ch. 24, § 73-1 (Smith-Hurd 1960); N.J. STAT. ANN. § 40:55-30 (1961); N.Y. GEN. CITY LAW § 20.24; N.Y. TOWN LAW § 261; VA. CODE ANN. § 15-844 (1956).

³ See, e.g., CAL. GOV'T CODE §§ 65850, 65853, 65891, 65896; ILL. ANN. STAT. ch. 24, § 73-3 (Smith-Hurd 1960); N.J. STAT. ANN. § 40:55-35 (1961); VA. CODE ANN. § 15-850 (1956).

⁴ The Alameda County zoning ordinance uses the term "adjustment" rather than "variance." Since "variance" is the term more commonly used in zoning literature, it will be used throughout this Comment.

⁵ See, e.g., CAL. GOV'T CODE § 65853; COUNTY OF ALAMEDA, CAL., ORDINANCE CODE §§ 9-775, 9-776, 9-779 (1956) [hereinafter cited ALAMEDA COUNTY ORD. CODE].

⁶ See, e.g., *Rubin v. Board of Directors*, 16 Cal. 2d 119, 104 P.2d 1041 (1940); *Flagstad v. City of San Mateo*, 156 Cal. App. 2d 138, 318 P.2d 825 (1957); *Childs v. City Planning Comm'n*, 79 Cal. App. 2d 808, 180 P.2d 433 (1947). See also 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.169 (3d ed. 1950); Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A.L. REV. 179, 182-83 (1958). But see *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960). The petitioners in *Rubin* had been denied a variance and sought a writ of mandate compelling the board to grant the variance. The superior court issued the writ after finding that petitioners had proved the facts necessary for a variance. On appeal, the California Supreme Court reversed, holding that mandamus will not lie to review a decision of the board denying a variance. The conclusion of the court was based on the rationale that the variance power is permissive rather than mandatory. The ordinance said the decision of the city board of directors was final, and "when the board of directors of Pasadena denied petitioners' application for a variance it did not take away a property right, but merely refused to grant a favor." *Rubin v. Board of Directors*, *supra* at 126, 104 P.2d at 1044.

⁷ While there were 332 variance applications in Alameda County during the year, administrative appeals were taken to the board of supervisors in only twenty-one instances. Alameda County Planning Department records indicate there were no judicial appeals taken from the final administrative decisions during this period.

the administrative attitude as reflected in the treatment of the 332 variance applications submitted to the Alameda County Planning Commission and to the Alameda County Board of Zoning Adjustment between July 1, 1960, and June 30, 1961.⁸ Alameda County was chosen for study because it was hoped that an examination of the variance activity of a populous and rapidly changing county would demonstrate the application of variance principles in a variety of situations. It is felt that an examination of the Alameda County experience during one year may help to determine the degree of correlation between the general law, the zoning ordinance, the case law, and the administrative variance practices. The public, judicial, and administrative attitudes, the statutory and case law, and the zoning problems will vary among cities, counties, and states. While the Alameda County variance practices are not necessarily typical, it is likely that the pressures affecting variance decisions recur, in varying degrees, in most communities and counties throughout the country; therefore, the results of this study should prove useful elsewhere.

I

THE STATUTORY AND ORGANIZATIONAL BACKGROUND

A. The California Law

The California Government Code⁹ provides that the local legislative body shall adopt "a comprehensive, long-term general plan for the development of the city, county, area or region, and of any land outside its boundaries which in the Commission's judgment bears relation to its planning."¹⁰ Section 65462 of the Government Code specifies that the master plan shall contain a statement of land use, circulation, and population density objectives. These objectives are reflected in the Alameda County Master Plan:

People desire homes in pleasant neighborhoods with convenient schools and shopping centers, prosperous communities with space for economic activities that offer sufficient and diverse opportunities for employment, a variety of recreation facilities, patterns of urban development that will inspire community pride and participation in cultural and civic affairs, efficient and safe transportation, and many other factors required of our physical environment for living a full life. In a rapidly growing urban area these physical characteristics can be achieved and maintained if there is sufficient forethought and planning, and if plans are carried out.¹¹

The master plan is implemented in part by local zoning regulations adopted in accordance with standards provided in the general laws of the state.¹² These regulations include a comprehensive zoning plan dividing the jurisdiction into districts

⁸ The factual background was derived from a review of the public records available in the Alameda County Planning Department. Planning department employees provided information relating to informal office procedures. Of course, any opinions expressed herein are those of the writer and cannot be imputed to anyone else.

⁹ § 65460.

¹⁰ The procedures for adopting a master plan are set forth in CAL. GOV'T CODE §§ 65500-65516.

¹¹ COUNTY OF ALAMEDA MASTER PLAN 3 (1957).

¹² CAL. GOV'T CODE §§ 65800-951. CAL. GOV'T CODE § 65800 provides:

Pursuant to the provisions of this chapter, the legislative body of any county or city by ordinance may: (a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes. (b) Regulate location,

and a comprehensive zoning ordinance restricting the uses that may be made of land within each district.¹³ The restrictions are of two basic types: (1) those regulating the height and bulk of buildings within the district; and (2) those restricting the qualitative uses to which land within the district may be put.¹⁴ These restrictions will largely govern the character of future development within the district.¹⁵

The zoning ordinance is administered by persons appointed by the local legislative body, and one of their primary administrative functions is the consideration of applications for variances. A variance is an administrative grant allowing an individual to use his land in a manner not permitted by a strict application of the zoning classification created by the legislative body. A variance may be granted to relieve the unnecessary hardship that would result when, due to unique circumstances of the applicant's land, a strict enforcement of the ordinance would deprive the applicant of use of his land comparable to that permitted elsewhere within the district.¹⁶ Thus, the purpose of a variance is to equalize the privileges of property similarly located and classified.¹⁷ A variance presupposes the reasonableness of the

height, bulk, number of stories, and size of buildings and structures; the size of yards, courts and other open spaces; the percentage of a lot which may be occupied by a building or structure. (c) Establish and maintain building setback lines along any street, highway, freeway, road, or alley, and establish and maintain building setback lines for residences and appurtenant buildings situated along the bank of any river, creek, stream or other waterway. (d) Create civic districts around civic centers, public parks, and public buildings and grounds for the purpose of enabling a planning commission to review all plans for buildings or structures within the district prior to the issuance of a building permit in order to assure an orderly development in the vicinity of such public sites and buildings.

The power of cities and counties to enact zoning regulations is derived from CAL. CONST. art. XI, § 11, which provides: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

¹³ Although there is some disagreement, by the weight of authority a zoning plan may be adopted even in the absence of a master plan. See Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary*, 74 HARV. L. REV. 1552, 1554-60 (1961); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955). This problem is outside the scope of this Comment.

The zoning jurisdiction of the Alameda County Board of Supervisors includes only the unincorporated territory within the county. Cf. *City of South San Francisco v. Berry*, 120 Cal. App. 2d 252, 260 P.2d 1045 (1953).

¹⁴ See *Miller v. Board of Public Works*, 195 Cal. 477, 486, 234 Pac. 381, 384 (1925).

¹⁵ The influence of comprehensive zoning ordinances on the development of land was illustrated in *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938). When residential development of land might best serve the interests of the city as a whole and, in the end, might prove the most profitable use of the land, most property owners in the district are willing to bear the burden of taxes while waiting for the eventual development of the land in the most advantageous manner. They cannot do so safely, however, without assurance that the district will be reserved for residential use and will not be spoiled by the intrusion of less desirable uses. The zoning ordinance of a city or county "is calculated to provide such assurance to property owners in the district and to constrain the property owners to develop their land in a manner which in the future will prove of benefit to the city." *Id.* at 229, 15 N.E.2d at 590.

¹⁶ See *Rubin v. Board of Directors*, 16 Cal. 2d 119, 104 P.2d 1041 (1940); BAIR & BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE* 55 (2d ed. 1960).

¹⁷ See *Metcalfe v. County of Los Angeles*, 24 Cal. 2d 267, 148 P.2d 645 (1944).

zoning classification as a whole and is granted to relieve a hardship existing only with respect to a particular piece of property.¹⁸ If a similar hardship exists with respect to land throughout the zone, this fact is evidence of the unreasonableness of the classification of the zone and would provide the basis for a constitutional attack on the zoning classification; it does not provide a proper basis for a variance.¹⁹

The Government Code contains alternative criteria for the granting of a variance. Section 65853 permits a variance to be granted when the following circumstances exist:

(1) That any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which subject property is situate. (2) *That because of special circumstances applicable to subject property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance is found to deprive subject property of privileges enjoyed by other properties in the vicinity and under identical zone classification.*²⁰

As an alternative, section 65896 provides:

In specific cases . . . [the board of zoning adjustment or the zoning administrator may grant] . . . applications for variances from terms of the ordinance as will not be contrary to its intent or to the public interest, safety, health, and welfare, and *where due to special conditions or exceptional characteristics of such property, or its location or surroundings, a literal enforcement of the ordinance would result in practical difficulties or unnecessary hardships.*²¹

Within this general statutory framework, the Alameda County zoning ordinance has been adopted.

¹⁸ See *Minney v. City of Azusa*, 164 Cal. App.2d 12, 330 P.2d 255, *appeal dismissed*, 359 U.S. 436 (1959).

In this respect, a variance is granted as an alternative to "spot zoning"—the term applied to haphazard and piecemeal zoning. "Spot Zoning" is an epithet used by the courts to describe a zoning amendment which is invalid because it is not in accord with a comprehensive plan. "It is the very antithesis of planned zoning." Note, 10 SYRACUSE L. REV. 303 (1959). For a discussion of the conflict between spot zoning and comprehensive zoning, see CALIFORNIA LAND SECURITY AND DEVELOPMENT 615-17 (Cal. Cont. Ed. Bar 1960); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1166-70 (1955).

¹⁹ *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). A variance, which looks to the hardship of the individual lot for which a variance is sought, must be distinguished from a "conditional use" (sometimes called a "special use" or an "exception"). A conditional use is a category of use permitted in a district if the proposed use will not be detrimental to neighboring property or residents and will promote the general welfare. ALAMEDA COUNTY ORD. CODE § 9-811. See *Tullo v. Millburn Township of Essex County*, 54 N.J. Super. 483, 149 A.2d 620 (1959). Because the use may create special problems, such as noise or traffic congestion, unless its location within a district is carefully regulated, the use is allowed only after a permit has been granted by the zoning authorities following a public hearing on the issue. See, e.g., *Tustin Heights Ass'n v. Board of Supervisors*, 170 Cal. App.2d 619, 339 P.2d 914 (1959). Unlike the applicant for a variance, the applicant for a conditional use permit does not have to prove hardship. *Ibid.*; BAIR & BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE* 55 (2d ed. 1960).

²⁰ Emphasis added.

²¹ Emphasis added. The granting of variances is an administrative rather than a legislative function. *Essick v. City of Los Angeles*, 34 Cal.2d 614, 213 P.2d 492 (1950). However, the standards for granting a variance can be changed only by the legislature. See *Johnston v. City of Claremont*, 49 Cal.2d 826, 323 P.2d 71 (1958).

B. The Alameda County Zoning Ordinance

The Alameda County zoning ordinance²² was adopted "to protect the character and the social and economic stability of agricultural, residential, commercial, industrial, and other areas within the County and to assure the orderly and beneficial development of those areas," and to prevent the construction of buildings in a manner that will interfere with traffic movement.²³ The construction of buildings or the use of land in a manner inconsistent with the use, height, and yard requirements of the ordinance is prohibited.²⁴ The ordinance enumerates the zoning classifications that may be used in the county²⁵ and establishes the regulations applicable to each classification.²⁶ It also provides for the enforcement of the ordinance.²⁷ Violation of the ordinance is a misdemeanor, and every day during which any violation of the ordinance continues is a separate offense.²⁸ Each violation is punishable by a fine of not more than \$300 or by imprisonment in the county jail for a term not exceeding three months, or by both.²⁹

In Alameda County, the planning commission and the board of zoning adjustment have been vested with administrative authority to grant variances when the applicant demonstrates:

(a) That there are *exceptional . . . circumstances or conditions applying to the land, building or use referred to in the application, which . . . do not apply generally to land, buildings and uses . . . in the same district.* (b) *[The variance] is necessary for the preservation and enjoyment of [the applicant's] substantial property rights . . . , which rights are enjoyed by other properties similarly situated.* (c) *[The variance, if granted,] will not . . . be materially detrimental. . . .* (d) *[The variance] will be in accord with the purposes and intent of this Ordinance and will not adversely affect the Master Plan. . . .*³⁰

The authority of the board of zoning adjustment to grant variances is limited to applications involving not more than two building sites and to applications requesting variances from building height and bulk restrictions, yard restrictions, or the restrictions on the minimum distances between buildings.³¹ The authority of the planning commission to grant variances extends to all other cases.³²

The planning commission consists of seven members appointed for four year terms by the chairman of the board of supervisors with the approval of the board.³³ The district attorney, the county surveyor, the county building official, and one member of the board of supervisors are ex officio members of the planning commission. There are no statutory qualifications for appointment to the commission; the only statutory restriction on the appointment of members is that they shall be

²² ALAMEDA COUNTY ORD. CODE chs. 2 & 3, tit. 9, as amended up to November 6, 1961. For a discussion of the extent to which the general laws are controlling, see note 61 *infra*.

²³ ALAMEDA COUNTY ORD. CODE § 9-200.

²⁴ ALAMEDA COUNTY ORD. CODE §§ 9-202-06.

²⁵ ALAMEDA COUNTY ORD. CODE §§ 9-350, 9-351.

²⁶ ALAMEDA COUNTY ORD. CODE §§ 9-375-646.

²⁷ ALAMEDA COUNTY ORD. CODE §§ 9-901-06.

²⁸ ALAMEDA COUNTY ORD. CODE § 9-903.

²⁹ ALAMEDA COUNTY ORD. CODE § 9-904.

³⁰ ALAMEDA COUNTY ORD. CODE §§ 9-779 (emphasis added), 9-775, 9-776.

³¹ ALAMEDA COUNTY ORD. CODE § 9-775.

³² ALAMEDA COUNTY ORD. CODE § 9-776.

³³ CAL. GOV'T CODE §§ 65333, 65336; ALAMEDA COUNTY ORD. CODE §§ 2-10, 2-11.

selected to provide adequate agricultural representation.³⁴ Members can be removed by the appointing official, with the approval of the board of supervisors, or by a majority vote of the board of supervisors.³⁵ The board of zoning adjustment consists of three members of the planning commission.

In Alameda County, the zoning administration staff, a part of the county planning department, performs both advisory and ministerial functions. The administrator, who is a civil service employee with a professional planning background, directs a staff of two assistant planners and a stenographer. When an individual with a zoning problem telephones or visits the office, the staff is available to render informal advice. If the individual wishes to use his property in a manner inconsistent with the zoning ordinance, the staff advises him of the inconsistency and may suggest a workable alternative that conforms to the ordinance.³⁶ To apply for a variance an individual submits an application explaining, in terms consistent with the ordinance, his reasons for seeking the variance. The application must be accompanied by a site plan and a fifteen dollar filing fee. The zoning administrator sets a date for a public hearing on the application and notifies the applicant.³⁷ Notice is also posted near the property involved and published in a local newspaper. If the variance would affect any public office other than the planning department,³⁸ a copy of the application is referred to that office for its study and recommendation. The zoning staff then investigates the application and prepares a staff analysis. The analysis states the applicant's objectives and describes the site and the neighborhood. It also contains advisory findings of fact as required by the ordinance and an explanation of each advisory finding. Finally, it contains a recommendation to the planning commission or to the board of zoning adjustment.³⁹

At the public hearing on the application, the commission or the board hears the staff analysis as well as any comments offered by the applicant, his representative, or any interested individual or group. The members of the commission or the board publicly discuss the application and, normally, vote immediately on the application. A resolution is prepared and the applicant is notified by letter of the action taken on his application. Variances become effective fifteen days after the order granting the variance unless a notice of appeal is filed.⁴⁰ Within fifteen days after the order granting or denying a variance, an appeal may be taken to the board of supervisors by any property owner, or other aggrieved person, or by any officer, department, board, or commission of the county affected by the decision of the planning commission or the board of zoning adjustment. In the event of an appeal, the board of supervisors must hold a hearing after giving notice to the

³⁴ CAL. GOV'T CODE § 65330. The present planning commission is made up of two realtors, an insurance claims adjuster, a liquor dealer, a manufacturer of electrical building supplies, and an attorney. There is one vacancy on the commission. For an occupational analysis of thirty-one planning commissions see HAAR, LAND-USE PLANNING 79 (1959).

³⁵ CAL. GOV'T CODE § 65341.

³⁶ It has been reported that the staff is seldom able to convince an individual to accept a suggested alternative solution. A major reason for this lack of success may be the ease with which the applicant can obtain a variance from the board of zoning adjustment or the planning commission, a problem that will be explored further below.

³⁷ The delay between filing and hearing is usually about four weeks and is determined by the time required for the staff investigation of the application and for publication of the notices required by law.

³⁸ E.g., the county health department, flood control districts, sanitary districts, school districts, fire departments, neighboring community planning departments.

³⁹ A copy of a completed staff analysis is reproduced in Appendix A.

⁴⁰ ALAMEDA COUNTY ORD. CODE § 9-783.

applicant and to any other person requesting it. The board of supervisors may simply review the record upon which the action appealed from was taken, or, if it chooses, it may also hear additional evidence. The supervisors may sustain, modify, reject, or overrule any decision of the planning commission or the board of zoning adjustment and may make such independent findings as are consistent with the requirements of state law and the county ordinance.⁴¹

II

APPLICATIONS OF VARIANCE LAW IN ALAMEDA COUNTY

A study of the 332 variance applications submitted to the Alameda County Planning Commission and to the Alameda County Board of Zoning Adjustment between July 1, 1960, and June 30, 1961, suggests that the zoning ordinance is being administered without regard to statutory requirements. Although the commission and the board give each applicant a public hearing and spend a great deal of time considering variance applications, the results suggest that they have misinterpreted the administrative function with respect to variances. As a result, the comprehensive zoning plan adopted by the board of supervisors is being eroded administratively and the zoning objectives are being defeated. While it would be impracticable to discuss every decision rendered during the year, the remainder of this Comment will discuss several areas in which it is felt the administration of the ordinance has been especially deficient and several cases typifying the nature of each deficiency.

A. The Problem of Findings of Fact

Although 284 variances were granted during the year, in only fifteen cases does the record appear to contain substantive evidence of special circumstances and hardship sufficient to warrant a variance.⁴² When the commission or board passes upon a variance application, the usual motion asks simply that the application be approved or denied. After the vote is cast, however, both bodies use one of two nearly identical standardized resolutions to reduce their decision to writing.⁴³ One resolution recites the findings necessary to support a decision to grant a variance, *i.e.*, there are exceptional circumstances; the variance is necessary for the preservation of the applicant's property rights; the variance will not be detrimental to the public welfare or neighboring property; and the variance will be in accord with the intent of the ordinance. The resolution used when the application has been denied recites a negative finding on each ultimate fact. It is submitted that this is an undesirable practice. When the commission or the board expressly states that the requirements for a variance have been met, this statement creates a presumption that the necessary probative facts have been found to exist.⁴⁴ However, the

⁴¹ ALAMEDA COUNTY ORD. CODE § 9-785.

⁴² While 284 variances were granted as a result of the applications submitted during the year, only forty-eight variances were denied. For a statistical analysis of the survey, see Appendix C.

⁴³ Compare the findings of fact in Alameda County Planning Commission Resolution No. 3898, February 8, 1961, with the findings of fact in Alameda County Planning Commission Resolution No. 3930, March 6, 1961. Both resolutions are reproduced in Appendix B.

⁴⁴ *Bartholomae Oil Corp. v. Seager*, 35 Cal. App. 2d 77, 94 P.2d 614 (1939). Furthermore, there is no requirement that the findings set forth the probative facts upon which the resolution granting the variance is based. The law requires only that the zoning authority find the ultimate facts prescribed by the ordinance as a condition precedent to the granting of a variance. *Ames v. City of Pasadena*, 167 Cal. App. 2d 510, 334 P.2d 653 (1959).

standardized language does not necessarily reflect the considerations affecting individual decisions. While the resolutions have apparently been drafted with a view toward satisfying the letter of the law, their indiscriminate use certainly does not satisfy its spirit. When the asserted grounds for variances differ widely, the repeated use of identical resolutions suggests that, as with most boilerplate, the resolutions may be serving as a substitute for thoughtful consideration.⁴⁵

In 208 of the cases reviewed, the planning commission or the board of zoning adjustment rejected the staff recommendation. Significantly, in each instance the staff had recommended disapproval of the application because the applicant had not demonstrated circumstances or hardship justifying a variance. Although the findings presented in the staff analysis are only advisory, these findings are objectively made and reflect the individual circumstances of the applicant and the relationship of the applicant's property to property throughout the district. They are prepared by a full-time staff professionally trained for zoning administration. In most cases, the advisory findings are accompanied by a statement of the reasons supporting the findings, while the planning commission and board of adjustment resolutions do not relate the findings to the individual case. The administrative decision will not be disturbed on judicial appeal in the absence of a clear showing of an abuse of discretion.⁴⁶ However, when identical resolutions are used to support decisions in widely dissimilar factual situations, and when the records contain no facts supporting the administrative decision, it is submitted that this should be sufficient to show an abuse of discretion.

B. The Question of Hardship

Under statutory restrictions similar to those contained in the general laws, it has generally been held that a variance may be granted on grounds of hardship only when it appears that the owner's plight is due to unique circumstances applicable to his land and is not due to general neighborhood conditions that may reflect the unreasonableness of the ordinance.⁴⁷ Nevertheless, the records of the Alameda County Planning Commission and the Board of Zoning Adjustment reveal that, with respect to several types of variances, most applications were approved apparently without regard for the statutory requirement of unique hardship.⁴⁸ Thus, if a landowner wishes to alter his home in violation of district yard requirements, or to eliminate a required off-street parking space, or to ignore the height limitations and setback requirements of the ordinance, he need only apply for a variance. Although the zoning staff usually finds unique hardship or special circumstances to be nonexistent in these cases, the figures in Appendix C show that most applications are approved.⁴⁹ The large number of variances permitting subdividers

⁴⁵ For an interesting example of the indiscriminate use of these standardized resolutions, see variance application, Alameda County Planning Dept., no. V-1688, February 23, 1961. The applicant was seeking a variance to reduce the side yards on his lot from nine feet to three feet. After a public hearing, the board of zoning adjustment voted to allow him to reduce the side yards to six feet. Two resolutions were adopted. The first said: There are *no* exceptional circumstances applicable to the property, etc., in regard to the variance that would have permitted three foot side yards. The second resolution found that there *were* exceptional circumstances, etc., permitting the board to grant the variance for six foot side yards.

⁴⁶ *Flagstad v. City of San Mateo*, 156 Cal. App. 2d 138, 318 P.2d 825 (1957).

⁴⁷ *E.g.*, *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939).

⁴⁸ See, *e.g.*, variance applications, Alameda County Planning Dept., nos. V-1528, Sept. 8, 1960 (arcs); V-1575, Nov. 10, 1960 (height); V-1729, Apr. 4, 1961 (setback); V-1800, June 15, 1961 (off-street parking).

⁴⁹ During the past five years the annual number of variance applications has increased 125% from 147 in 1956-1957 to 332 in 1960-1961. The unincorporated area within the county

to erect advertising signs in districts where such signs are prohibited is also an illustration of the consistent failure of the commission to recognize hardship as a prerequisite to a variance. While the zoning staff found that hardship had been demonstrated in only two instances, the commission approved twenty-seven out of thirty-two applications to build advertising signs in prohibited areas, reciting each time that a finding of hardship had been made. Although the variances usually were temporary, it is difficult to see how a subdivider can demonstrate that a statutory prohibition against advertising signs imposes a hardship upon him that does not equally restrict other property owners in the district.

The effect of such variances is to give the applicant a special privilege by removing the statutory restrictions on the use of the applicant's land, while leaving the restrictions in effect on all other property within the district. This is clearly an improper use of the variance since the result is inconsistent with the express restrictions of the county zoning ordinance and the general laws.⁵⁰ Further, this practice has been recognized as one of the greatest dangers to comprehensive zoning⁵¹ because it amounts to spot zoning⁵² by administrative act. Spot zoning, even by legislative act, is generally considered improper since comprehensive zoning contemplates a uniform rather than a haphazard system of zoning restrictions. If it is contended that existing statutory restrictions on the use of land are unreasonable or arbitrary, then it is the function of the courts to determine the constitutionality of the restrictions.⁵³ If it is contended that the zoning restrictions are unnecessary or undesirable, then it is the function of the board of supervisors to amend the ordinance.⁵⁴ No authority either to determine its reasonableness or to amend the ordinance has been delegated to the administrators. Therefore, until the zoning law is invalidated by the courts or until the restrictions are changed by the legislative body, the planning commission and the board of zoning adjustment should administer the law as it is written⁵⁵ and should refrain from granting variances when the statutory requirements for a variance have not been met.⁵⁶

has decreased from 715 square miles in 1950 to 512 square miles in 1961. (The 1950 figure was taken from California Board of Equalization, Property Tax Assessments, Alameda County (1950); the 1961 figure was reported by the Alameda County Surveyor's Office.) The population of the unincorporated territory in the county increased from 98,000 in 1950 to 118,000 in 1960. The increase in variance applications might be attributable to the increased population density within the county; however, the number of conditional use permit applications (see note 19 *supra*) increased only 19% during the same five year period. The rapid increase in the number of variance applications, therefore, may indicate that the public is becoming aware of the sympathetic attitude of the planning commission and the board of zoning adjustment toward variance applications.

⁵⁰ ALAMEDA COUNTY ORD. CODE § 9-779(b); CAL. GOV'T CODE § 65853(1). See text at notes 20, 30 *supra*.

⁵¹ Morris, *Toward Effective Municipal Zoning*, 35 WASH. L. REV. 534, 577 (1960). See AMERICAN SOC'Y OF PLANNING OFFICIALS, MEASURE OF VARIANCE ACTIVITY, PLANNING ADVISORY INFORMATION REP'T NO. 60 (1954); Comment, 48 NW. U.L. REV. 470 (1953).

⁵² See note 18 *supra*.

⁵³ Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1959). See Rubin v. Board of Directors, 16 Cal. 2d 119, 104 P.2d 1041 (1940); Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939).

⁵⁴ Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958).

⁵⁵ See Essick v. City of Los Angeles, 34 Cal. 2d 614, 213 P.2d 492 (1950); Johnston v. Board of Supervisors, 31 Cal. 2d 66, 187 P.2d 686 (1947).

⁵⁶ Bernstein v. Smutz, 83 Cal. App. 2d 108, 188 P.2d 48 (1947). Cf. Tustin Heights Ass'n v. Board of Supervisors, 170 Cal. App. 2d 619, 339 P.2d 914 (1959); People v. Walton, 70 Cal. App. 2d Supp. 862, 870, 161 P.2d 498, 503 (1945).

C. The Problem of Personal Hardship

The general laws specify that the hardship creating the need for a variance must arise from the circumstances and surroundings of the property rather than from the personal circumstances of the applicant.⁵⁷ Thus, when the zoning restrictions merely prevent the applicant from using his land as he wishes, and when the restrictions apply equally to land similarly situated and classified, the applicant is not entitled to a variance on the grounds of hardship.⁵⁸ In several cases of this type, however, the planning commission and the board of zoning adjustment have granted a variance.⁵⁹ The Alameda County zoning ordinance differs from the general laws in that the ordinance permits a variance to be granted when the hardship is the result of unique circumstances applicable to the "land, building or use" of the applicant.⁶⁰ If "use" in the Alameda County provision is broadly interpreted to mean any use that the applicant wishes to make of his land, then the ordinance is unconstitutional because it is inconsistent with the general laws of the state.⁶¹

⁵⁷ CAL. GOV'T CODE §§ 65853, 65896. See also 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.166 (3d ed. 1950); Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A.L. REV. 179, 189-90 (1958).

⁵⁸ See, e.g., *Minney v. City of Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1959); *Henry Steers, Inc. v. Rembaugh*, 259 App. Div. 908, 20 N.Y.S.2d 72, *aff'd mem.*, 284 N.Y. 617, 29 N.E.2d 934 (1940).

⁵⁹ See, e.g., variance applications, Alameda County Planning Dept., nos. V-1628, Jan. 9, 1961; V-1760, May 23, 1961.

⁶⁰ ALAMEDA COUNTY ORD. CODE § 9-779(a). The statutory criteria for variances, which contain no reference to "use," are set forth in CAL. GOV'T CODE §§ 65853, 65896, quoted in the text at notes 20, 21 *supra*.

⁶¹ With respect to charter cities, there is a question whether land use planning and zoning regulations are "municipal affairs" subject to local home rule under article XI, § 6 of the California Constitution. The constitutional question is moot, however, because CAL. GOV'T CODE § 65304 expressly provides that the provisions governing land use planning and zoning regulations "shall not apply to a chartered city except to the extent that the same may be adopted by charter or ordinance of the city." (Emphasis added.) There is no similar home rule extending to counties (except to cities and counties, such as the City and County of San Francisco, under article XI, § 8 of the California Constitution). However, a county is authorized to enact such "local, police, sanitary and other regulations as are not in conflict with general laws." CAL. CONST. art. XI, § 11. See also ALAMEDA COUNTY CHARTER § 12(g). Thus, the question is whether the Government Code provisions relating to land use planning and zoning regulations have occupied the field. If they have, the counties cannot enact supplementary regulations. *Cf. Agnew v. City of Los Angeles*, 51 Cal. 2d 1, 330 P.2d 385 (1958) (licensing of contractors); *Wilson v. Beville*, 47 Cal. 2d 852, 306 P.2d 789 (1957) (eminent domain); *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482, 147 A.L.R. 515 (1942) (traffic regulation). See *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 682-83, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960). On the other hand, if the general law provisions have not fully occupied the field, then the county may enact supplementary, more restrictive regulations. *Pulcifer v. County of Alameda*, 29 Cal. 2d 258, 175 P.2d 1 (1946) (compensation of elective officers); *Natural Milk Producers Ass'n of California v. City & County of San Francisco*, 20 Cal. 2d 101, 124 P.2d 25 (1942) (milk regulations). See *Pipoly v. Benson*, *supra* at 370, 125 P.2d at 484. Whether the state has occupied the field must be determined by an examination of the statutory language and the purpose of the legislative scheme. See *Abbott v. City of Los Angeles*, *supra* at 682-83, 349 P.2d at 980, 3 Cal. Rptr. at 164; *Agnew v. City of Los Angeles*, 110 Cal. App. 2d 612, 616, 243 P.2d 73, 75 (1952). Since CAL. GOV'T CODE § 65800 expressly permits the adoption of local zoning regulations, it appears that the state zoning legislation is not intended to be exclusive. However, the general law provisions prescribe the substantive conditions under which variances may be granted and it might be contended that the state has occupied the field at least with respect to variances. Under either theory, Alameda County variance standards that are less restrictive than those prescribed in the Government Code would be in conflict with the general laws and hence would be unconstitutional under article XI, § 11. No direct decision on this issue has been found although in *Johnson v. Board of Supervisors*, 31 Cal. 2d 66, 77, 187 P.2d 686, 693 (1947), and in *Mann v. Scott*, 180 Cal. 550, 557, 182 Pac. 281, 283-84 (1919), there is dicta supporting this conclusion.

A broad interpretation would also produce an inconsistency with a later provision of the Alameda County ordinance which authorizes variances only when necessary to the preservation of rights attaching to other property similarly situated and classified.⁶² In order to avoid both an internal inconsistency and a conflict with the general laws, the Alameda County variance provisions should be interpreted to permit a variance only when the hardship alleged is one relating to unique circumstances applicable to the property itself. Under this interpretation, variances based upon hardship cannot properly be granted merely because the applicant needs a larger house to accommodate a growing family. In cases such as this, however, the Alameda County administrators, out of understandable sympathy for individual applicants, continuously stretch the standards of the ordinance in order to grant a variance.⁶³ While these applications may be difficult to turn down, successful comprehensive zoning requires reasonable restrictions on land use. When exceptions from such reasonable restrictions are granted on the basis of personal feelings rather than upon the basis of standards fixed by statute or ordinance, the administration of the ordinance becomes arbitrary and the comprehensive nature of zoning is destroyed.

D. The Improper Use of Administrative Discretion

It is generally said that even when circumstances are present justifying a variance, the power to grant variances should be exercised sparingly because of the detrimental effect of variances upon comprehensive zoning plans.⁶⁴ However, the record of the Alameda County administrators suggests that they have adopted a completely contrary attitude.⁶⁵ The following examples are illustrative. In 1958, an applicant was granted a conditional variance to continue the operation of an antique shop in a single family residential district.⁶⁶ The variance was expressly

⁶² ALAMEDA COUNTY ORD. CODE § 9-779(b). Further, the mere fact that the zoning restriction may, in individual cases, reduce the value of an individual's interest in the land does not establish the constitutional invalidity of the ordinance. *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 222 P.2d 439 (1950).

⁶³ See, e.g., variance applications, Alameda County Planning Dept., nos. V-1482, July 6, 1960; V-1630, Jan. 10, 1961; V-1667, Feb. 8, 1961.

⁶⁴ See, e.g., 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.162 (3d ed. 1950). Since the power to grant variances is permissive, the planning commission or the board of zoning adjustment cannot be compelled by the courts to grant a variance. See *Rubin v. Board of Directors*, 16 Cal. 2d 119, 104 P.2d 1041 (1940). But see *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

⁶⁵ See Appendix C. Of 332 applications during the year, 284 were approved and only 48 were denied.

⁶⁶ Alameda County Planning Commission Resolution No. 2830, June 16, 1958. In all cases in which variances are granted, ALAMEDA COUNTY ORD. CODE § 9-782 requires the planning commission or the board of zoning adjustment to attach such conditions to the variance as will insure that the objectives of the ordinance will be preserved. When enforced, conditions will minimize the harm resulting from an individual being allowed to use his property in a manner not permitted by the zoning ordinance. Conditional variances have been upheld by the courts generally. For an example of the extent to which the zoning authorities are permitted to impose conditions on variances, see *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).

Until recently, Alameda County had no organized means of insuring that the variance holder complied with the conditions imposed. In November, 1959, the office of zoning investigator was created within the county building inspection department. The county has employed two zoning investigators to investigate complaints of zoning violations as well as applications for zoning variances, special use permits, quarry permits, and other matters relating to county zoning. In July, 1960, the zoning investigators began a survey of all conditional variances and special use permits issued since 1946. To date, the survey has been completed through variances and permits issued before 1956.

limited to one year and was nonrenewable. It also required the applicant to remove an illegal advertising sign from his front lawn. He did not remove the sign and, after the variance expired, continued to operate illegally until 1961 when he applied for another variance. Although the violations of the previous variance were brought to its attention, the planning commission granted the second variance without comment.⁶⁷

Another applicant asked for a variance to build an advertising sign forty-eight square feet in size in a residential district. The variance was granted subject to the conditions that a six foot clearance be maintained between the bottom of the sign and the ground and that the applicant submit a written promise to remove the sign at the end of one year. The applicant violated the terms of the variance in the following respects: (1) the sign constructed was 113 square feet in size rather than forty-eight square feet; (2) the sign faced in a direction opposite to that shown in the site plan submitted with the variance application; (3) only one foot clearance was maintained between the bottom of the sign and the ground; and (4) the applicant never submitted the promise to remove the sign. After the term of the previous variance had expired, the applicant requested a second variance. During the public hearing on his application, he acknowledged receipt of the previous resolution stating the conditions of the earlier variance. In spite of these violations, he was given a second variance.⁶⁸

In a third case, the property owner was conducting an illegal bicycle repair business in a two-family residential district. Since his shop was old, he decided to build a new one, but the proposed building violated the front yard requirements of the ordinance. Again, the planning commission granted the variance from the area requirements without discussing the illegality of the repair shop in a residential district.⁶⁹

In many cases home owners altered their homes in violation of the zoning ordinance and applied for variances after the additions were completed. In most of these cases, unique hardship could not have been established before or after the alteration, but rather than enforce the restrictions of the ordinance, the administrators granted a variance permitting the illegal addition to remain.⁷⁰ The willingness of the administrators to grant variances in these situations can only destroy public confidence in zoning and encourage open violation of zoning restrictions.

E. The Problem of the Nonconforming Use

A nonconforming use is a lawful use existing on the day the zoning restriction becomes effective and continuing since that time in nonconformity with the ordinance.⁷¹ Nonconforming uses are undesirable because they are inconsistent with a plan permitting only compatible uses within a district. Consequently, one of

⁶⁷ Variance application, Alameda County Planning Dept., no. V-1757, May 8, 1961.

⁶⁸ Variance application, Alameda County Planning Dept., no. V-1795, June 7, 1961.

⁶⁹ Variance application, Alameda County Planning Dept., no. V-1806, June 23, 1961.

⁷⁰ See, e.g., variance application, Alameda County Planning Dept., no. V-1611, Dec. 15, 1960. After constructing an illegal addition to his house, the owner applied for a variance to legalize the addition. He cited no exceptional circumstances existing with respect to his property and made no claim that the variance was necessary to preserve property rights attaching to other property similarly classified and similarly situated. The zoning staff made negative findings as to each of the statutory prerequisites for a variance. The only notation in the public hearing record is that no opposition was expressed by the audience. On this record, the planning commission granted the variance.

⁷¹ See *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

the primary purposes of zoning is to eliminate nonconforming uses as quickly as possible.⁷²

1. *Expansion of Nonconforming Uses*

Although the Alameda County zoning ordinance permits the continuance of nonconforming uses,⁷³ the policy of the ordinance properly encourages their eventual elimination. Thus, the ordinance prohibits any expansion or structural change in a nonconforming use.⁷⁴ Once a nonconforming use has been abandoned, the ordinance requires future use to conform to the zoning restriction,⁷⁵ and if a nonconforming building is destroyed by fire, explosion, act of God, or act of a public enemy, the ordinance prohibits reconstruction of the nonconforming structure.⁷⁶ Nevertheless, the planning commission and the board of zoning adjustment have granted several variances inconsistent with this legislative policy. In one case, the property owner asked for a variance to relocate a nonconforming garage. Although the zoning staff suggested that it would have been equally possible for the applicant to move the garage to a conforming location on the lot, the board of zoning adjustment permitted the garage to be moved to a new location incompatible with district yard requirements.⁷⁷ In another case, the board allowed the applicant to remove a nonconforming building and to replace it with a new structure in the same nonconforming location.⁷⁸ Since there appears to have been no justification for either variance, these examples seem to be further indications of the laxity of the board of zoning adjustment with respect to the enforcement of the zoning ordinance. In effect, this attitude defeats the legislative policy encouraging the gradual elimination of nonconforming uses.

2. *Elimination of Nonconforming Uses*

In an early case, the California Supreme Court held that a zoning ordinance requiring the immediate termination of nonconforming uses constituted a deprivation of property without due process of law.⁷⁹ Because of this constitutional restriction and "because of the simple fact that most nonconforming uses (such as a store or a filling station in a residential district) have a high earning capacity of a well-situated monopoly created and protected by law," nonconforming uses typically have had an extraordinary vitality.⁸⁰ While the due process requirement prevents the board of supervisors from summarily prohibiting nonconforming uses, an ordinance requiring the termination of nonconforming uses within a reasonable

⁷² See *Dienelt v. County of Monterey*, 113 Cal. App. 2d 128, 247 P.2d 925 (1952).

⁷³ ALAMEDA COUNTY ORD. CODE § 9-830.

⁷⁴ ALAMEDA COUNTY ORD. CODE §§ 9-831, 9-834.

⁷⁵ ALAMEDA COUNTY ORD. CODE § 9-832.

⁷⁶ ALAMEDA COUNTY ORD. CODE § 9-835. The California Supreme Court has been receptive to limitations on the continued existence of nonconforming uses. See, e.g., *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 254 P.2d 865 (1953) (restriction against expansion of nonconforming use). See also *Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528 (Del. 1952) (abandonment of nonconforming use).

⁷⁷ Variance application, Alameda County Planning Dept., no. V-1522, Sept. 2, 1960.

⁷⁸ Variance application, Alameda County Planning Dept., no. V-1735, April 14, 1961.

⁷⁹ *Jones v. City of Los Angeles*, 211 Cal. 304, 295 Pac. 14 (1930). This conclusion has been reiterated in a recent decision of the district court of appeal. *McCaslin v. City of Monterey Park*, 163 Cal. App. 2d 339, 329 P.2d 522 (1958).

⁸⁰ Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305, 308 (1955).

time has been given court approval. In *City of Los Angeles v. Gage*,⁸¹ the petitioner had been enjoined from continuing his nonconforming use beyond the five-year amortization period allowed by the local zoning ordinance. On appeal, the court affirmed the order after expressing its approval of the amortization technique:

In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use—all of which have been held valid exercises of the police power. . . .

The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree.⁸²

As limited, amortization is a legitimate zoning devise. Moreover, amortization has been acknowledged to be the only positive way to eliminate nonconforming uses.⁸³ However, the Alameda County Planning Commission appears to have used the amortization device without proper authority. For instance, several years after an owner had established a hog farm on his property, a zoning restriction was imposed limiting his property to single family residential uses. Because the operation of a hog farm required a health department license, a provision of the zoning ordinance required the owner to secure a use permit to entitle him to continue his nonconforming use.⁸⁴ The owner asked for administrative relief⁸⁵ and, for a reason not appearing in the record, the planning commission treated his application as one for a variance. Although the owner had been raising fifty hogs, the commission granted a temporary variance allowing the owner to continue to raise twenty-five hogs and fifteen pigs, but requiring him to terminate the nonconforming use at the end of six months. Since the zoning ordinance expressly permits

⁸¹ 127 Cal. App.2d 442, 274 P.2d 34 (1954).

⁸² *Id.* at 459-60, 274 P.2d at 44. For a discussion of the amortization technique see Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. OF CHI. L. REV. 477 (1942).

⁸³ See Riddle, *The Elimination of the Nonconforming Use in California*, 8 HASTINGS L.J. 64 (1956).

While the compulsory amortization technique has been approved generally, two recent district court of appeal decisions have restricted the use of the device. In *City of La Mesa v. Tweed & Gambrell Mill*, 146 Cal. App. 2d 762, 304 P.2d 803 (1956), the court sustained a trial court ruling that the defendant could not be required to terminate his nonconforming use within five years. The industrial property concerned had an estimated remaining useful life of twenty-one years and was surrounded on three sides by industrial and commercial operations. In addition, there was considerable dispute over the proper zoning of the property. In *City of Santa Barbara v. Modern Neon Sign Co.*, 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961), the appellate court invalidated an ordinance requiring the amortization within five years of all movable advertising signs within the city. Two reasons for the decision were given. First, since the visual effect of both moving and flashing signs is the same, the statutory distinction between moving signs and flashing signs was found to be arbitrary and unreasonable. Second, the five year amortization requirement deprived the sign owners of their property without due process of law because the reasonable economic life of each sign in question was ten years, and because the signs, if altered to prevent movement, would have been worthless at the end of five years. When a fixed asset is involved, these decisions indicate that courts may require the zoning administrators to allow the owner to continue his nonconforming use for the full estimated life of the asset.

⁸⁴ ALAMEDA COUNTY ORD. CODE § 9-837.

⁸⁵ Variance application, Alameda County Planning Dept., no. V-1726, April 3, 1961.

nonconforming uses to continue indefinitely, the planning commission, in effect, amended the ordinance administratively when it deprived the applicant of his right to continue his nonconforming use for more than six months. Since amendment of the ordinance is a legislative responsibility, this decision of the planning commission went beyond the scope of its administrative authority.

CONCLUSION

When incompatible uses are not segregated, when adequate open spaces are not preserved, and when land is developed without regard for the future, property values are destroyed, desirable residential areas are lost, and the future costs of government are multiplied. Haphazard community development has been recognized as one of the primary causes of slum conditions and blight.⁸⁶ At the same time, the costs of slum clearance and urban redevelopment have proved to be staggering.⁸⁷ In California today, the major urban growth is taking place in the unincorporated areas subject to county jurisdiction. A recent report warns that the rapid population increase coupled with a lack of concern for the future is creating serious problems within California.⁸⁸ Recognizing the danger inherent in overcrowding and the mixing of incompatible land uses in the early stages of community growth, both the state legislature and the Alameda County Board of Supervisors have taken the first step in a program designed to prevent the development of these undesirable conditions. However, the objectives of a comprehensive zoning program can be achieved only if the laws are effectively administered and the restrictions on land use effectively enforced. The record discussed suggests that Alameda County variance practices fall short of these goals, for all too often there is little correlation between the legal foundations and the Alameda County variance practices. When administrators grant variances without regard to zoning objectives, the comprehensive nature of zoning is destroyed. At the same time, when variances are granted without regard to the legal standards established to guide the exercise of administrative discretion, the constitutional basis for zoning administration is destroyed. Since comprehensive zoning is desirable, and since it has been adopted as the legislative policy of Alameda County, it is submitted that the variance procedures, which are basic to the success of any zoning program, should be administered in a manner that comports with legislative objectives and constitutional standards.

Thomas B. Donovan

⁸⁶ Comment, 48 Nw. U.L. Rev. 470, 471-72 (1953).

⁸⁷ E.g., in 1953, Chicago estimated its redevelopment costs at more than one billion dollars. Office of Housing and Redevelopment Coordinator, It's Your Billion, City of Chicago (March 1953) reported in Comment, 48 Nw. U.L. Rev. 470 (1953). More than three hundred million dollars were allocated for slum clearance in an area smaller than two square miles. While the cost of clearing blighted land was estimated at one hundred fifty million dollars per square mile, the cost of a twenty year conservation program was estimated at only fifty or sixty million dollars per square mile. Apparently Chicago's zoning problems persist. See Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. OF CHI. L. REV. 509 (1959).

⁸⁸ WOOD & HELLER, CALIFORNIA, GOING, GOING . . . (1962).

APPENDIX A

The following is a sample of the staff analysis prepared on each variance application by the Alameda County Planning Department zoning staff.

THE PLANNING COMMISSION OF ALAMEDA COUNTY
HAYWARD, CALIFORNIA

STAFF ANALYSIS

WEDNESDAY, MARCH 8, 1961

...
CECIL L. BIGGS, (V-1669), ADJUSTMENT [VARIANCE], to (1) use as a building site for a second dwelling unit a parcel with frontage reduced from the required 31' to 10', and (2) reduce the passageway width from the required 12' to 10', and (3) to reduce the rear yard from the required 35' to 20', located at 20801 CAMBRIDGE AVENUE, west side, about 280' north of its intersection with MEDFORD AVENUE in CHERRYLAND, Eden Township. In an "R-2-B-5" District (Two Family Residence, with 8,750 square foot Minimum Building Site Area) District.

Objective of Applicant: Applicant wishes to erect a second dwelling unit on this parcel which is the back portion of an original 62' x 223' rectangular parcel. A 52' x 80' parcel was cut out of the 62' x 223' parcel in an estate division on September 8, 1954, when the property was in a "U" District. The requirements of that time for "R-1" uses was the same as in the "R-1" district, i.e. 20' front yards, 5' minimum side yards, 20' minimum rear yards, 5,000 square foot minimum building site. The existing dwelling on the 52' x 80' parcel is only 4,160 square feet, has a rear yard of only 8' and one side yard is 3'. The applicant purchased both parcels on November 29, 1954, and to this date retains ownership of both. Section 9-758 permits building on a site with reduced area and width *only* if the applicant owns no adjacent property.

Site Description: Level, consisting of a rectangle 62' x 143' with a 10' wide strip reaching out 80' to the street. The parcel is now developed with a single family dwelling with attached garage; the garage is proposed to be removed to allow for passageway around the existing house to the new house.

Neighborhood Description: Single family dwellings, in some cases two or three to a lot, on large, deep lots.

Findings Required for Commission Action:

1. *Existence of Exceptional or Extraordinary Circumstances:* None. The original lot is of a typical size and shape in the neighborhood.
2. *Necessity for Realization of Property Rights:* Not necessary. Others in the neighborhood would not be allowed to split their lots in this manner. Further, there is not enough area in the original lot to make two lots of 8,750 square feet each.
3. *Probability of Detrimental Effect:* Detrimental from the standpoint of precedent.
4. *Accord with Intent and Purposes of Ordinance Provisions:* Not in accord. In effect, the application is to expand a non-conforming use.

...
Staff Recommendation: Disapproval. Recommend applicant rejoin the two parcels as one as is the ordinance intention. There would then be two single family dwellings on one parcel which is the maximum now permitted in the "R-2-B-5" District.*

APPENDIX B

The following are samples of planning commission resolutions adopted as formal variance decisions. The findings of fact contained in the first resolution are used when the application has been approved. The findings contained in the second resolution are used when the application has been denied. (Emphasis has been added.)

THE COUNTY PLANNING COMMISSION OF ALAMEDA COUNTY
HAYWARD, CALIFORNIA

RESOLUTION No. 3898—At meeting held February 8, 1961

WHEREAS Scherman Construction Company has filed with the County Planning Commission of Alameda County an application for an Adjustment to reduce the set back from passage-

* The planning commission granted the variance.

way from the required 10' to 7', and (2) to reduce the building site area per dwelling unit from the required 1,250 square feet to 1,173 square feet in the construction of a 42 dwelling unit apartment building, located at 20004 Stanton Avenue, east side, approximately across from the intersection of Nordell Avenue, in Castro Valley, Eden Township, in an "R-S-D-3" District (Suburban Multiple Residence with 1,250 Square Foot Minimum Building Site Area per Dwelling Unit), as shown on a plot plan on file with this Commission; and

WHEREAS this Commission did hold a public hearing on said application at the hour of 1:30 p.m. on the 8th day of February, 1961, in the Alameda County Office Building, Room 160, 224 West Winton Avenue, Hayward, California; and

WHEREAS it satisfactorily appears from affidavits on file that newspaper notice of said public hearing was given in all respects as required by law; and

WHEREAS this Commission does find that:

- (a) *There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application which circumstances or conditions do not apply generally to land, buildings and uses or any thereof in the same district.*
- (b) *Granting the application is necessary for the preservation and enjoyment of substantial property rights of the petitioner, which rights are enjoyed by other properties similarly situated.*
- (c) *Granting the application will not, under the circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant, and will not, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements [sic] in the neighborhood.*
- (d) *Granting the application will be in accord with the purposes and intent of the Zoning Ordinance and will not adversely affect the Master Plan of the County or any portion thereof: Now Therefore*

BE IT RESOLVED that this Commission does hereby approve said application to reduce the set back from passageway from the required 10' to 7', and (2) to reduce the building site area per dwelling unit from the required 1,250 square feet to 1,173 square feet in the construction of a 42 dwelling unit apartment building, located at 20004 Stanton Avenue, east side, approximately across from the intersection of Nordell Avenue in Castro Valley, Eden Township, in an "R-S-D-3" (Suburban Multiple Residence with 1,250 Square Foot Minimum Building Site Area per Dwelling Unit) District, as shown on a plot plan labelled "Exhibit A" on file with this Commission, a copy of which shall be forwarded to the County Building Official, subject to the following condition:

Prior to the final inspection by the Building Inspection Division the applicant shall install P.C.C. curb, gutter and sidewalk along the entire frontage of his property to meet the requirements of the County Surveyor's Office.

Except as specifically stated above, the land and use of this property shall comply with all the provisions of the County Zoning Ordinance.

THE COUNTY PLANNING COMMISSION OF ALAMEDA COUNTY HAYWARD, CALIFORNIA

RESOLUTION No. 3930—At meeting held March 6, 1961

WHEREAS John R. Flora, has filed with the County Planning Commission of Alameda County an application for an Adjustment to permit the continuance of a non-conforming use (illegally converted duplex in an "R-1" (Single Family Residence) District), located at 21221 Oceanview Drive, southwest side, approximately 65' northwest of its intersection with Apple Avenue, in Eden Township, as shown on a plot plan on file with this Commission; and

WHEREAS this Commission did hold a public hearing on said application at the hour of 1:30 p.m. on the 6th day of March, 1961, in the Alameda County Office Building, Room 160, 224 West Winton Avenue, Hayward, California; and

WHEREAS it satisfactorily appears from affidavits on file that newspaper notice of said public hearing was given in all respects as required by law; and

WHEREAS this Commission does find that:

- (a) *There are no exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and uses or any thereof in the same district.*

- (b) *Granting the application is not necessary for the preservation and enjoyment of substantial property rights of the petitioner, which rights are enjoyed by other properties similarly situated.*
- (c) *Granting the application will, under the circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood.*
- (d) *Granting the application will not be in accord with the purposes and intent of the Zoning Ordinance and will adversely affect the Master Plan of the County or any portion thereof: Now Therefore*

BE IT RESOLVED that this Commission does hereby *disapprove* said application.

APPENDIX C

This table reflects both the staff recommendations and the administrative decisions on variance applications submitted to either the Alameda County Planning Commission or the Alameda County Board of Zoning Adjustment. In several cases the staff made no recommendation; therefore, the number of decisions exceeds the number of recommendations.

1. HEIGHT AND BULK VARIANCES

Classification of Variance	Classification of Applicant's Property	Zoning Staff Recommendation		Action by Planning Commission or Board of Zoning Adjustment	
		Approve	Deny	Approve	Deny
a. Yard Area Variances					
	Single family residence	24	90	110	6
	Two-family residence	1	2	3	0
	Four-family residence	0	3	2	2
	Suburban multiple residence	6	19	22	3
	Retail business	0	3	2	1
	Nursing home	0	1	1	0
	Church	0	1	1	0
	Advertising sign	0	1	1	0
	Fire station	0	0	1	0
	Mausoleum	0	2	1	1
b. Height Variances					
	Fence	1	5	4	2
	Building	0	2	4	0
	Advertising sign	0	1	1	0
c. Setback Variances					
	Single family residence	3	5	8	0
	Two-family residence	1	0	1	0
	Four-family residence	0	0	1	0
	Suburban multiple residence	1	4	5	0
	Retail business	0	2	2	0
	Rest home	0	1	1	0
	Advertising sign	0	9	8	1
d. Off-street Parking					
	Single family residence	0	8	7	1
	Church	0	1	1	0
	Rest home	0	1	1	0
Total height and bulk variance applications		37	161	188	17

2. USE VARIANCES

(other than variances from access road requirements and advertising sign prohibitions)

Classification of Applicant's Property	Classification of Use for Which Variance Was Requested	Zoning Staff Recommendation		Action by Planning Com- mission or Board of Zoning Adjustment	
		Approve	Deny	Approve	Deny
a.	Single family residence				
	Two-family residence	1	17	10	8
	Four-family residence	0	4	3	1
	Suburban multiple residence	0	3	2	2
	Trailer park	3	5	6	2
	Retail business	2	3	4	1
	General agriculture	0	4	2	2
	Light industry	0	1	1	0
	Parking	0	1	1	0
	Others				
	Recreation	0	0	1	0
	Tract sales office	1	0	1	0
	Tract administration	0	2	2	0
	Stable	0	1	1	0
b.	Two-family residence				
	Four-family residence	0	1	0	1
	Suburban multiple residence	0	1	1	0
	Retail business	0	1	1	0
	Special industry	0	3	1	2
c.	Four-family residence				
	Retail business	0	1	1	0
d.	Suburban multiple residence				
	Retail business	0	1	1	0
	General agriculture	1	0	1	0
e.	Retail business				
	Special industry	0	2	2	0
f.	Heavy industrial				
	General commerce	0	1	1	0
g.	General agriculture				
	Retail business	0	0	1	0
	General commerce	1	0	1	0
	Trailer park	0	2	0	2
	Parking	1	0	1	0
	Special industry	0	1	1	0
	Heavy industry	1	0	1	0
	Recreation	0	0	1	0
h.	Highway frontage				
	Church access	1	0	1	0
	Retail business	1	0	1	0
	total use variances (other than access road and advertising signs) applications	13	55	51	21

3. VARIANCES FROM ACCESS ROAD REQUIREMENT

Classification of Use for Which Variance Was Requested	Zoning Staff Recommendation		Action by Planning Commission	
	Approve	Deny	Approve	Deny
a. Residence				
New	2	12	9	5
Expansion of nonconform- ing use	5	2	8	0
b. Recreation	1	0	1	0
	<hr/>	<hr/>	<hr/>	<hr/>
total applications for vari- ances from access road requirement	8	14	18	5

4. USE VARIANCES PERMITTING ADVERTISING SIGNS

Classification of Applicant's Property	Zoning Staff Recommendation		Action by Planning Commission	
	Approve	Deny	Approve	Deny
a. Single family residence	2	21	21	2
b. Suburban multiple residence	0	6	5	1
c. Retail business	0	2	1	1
d. General agriculture	0	1	0	1
	<hr/>	<hr/>	<hr/>	<hr/>
total applications for use variances permitting advertising signs	2	30	27	5
all applications	60	260	284	48