

Introduction to the Zoning Board of Adjustment

April 25, 2007

Introduction

Torma: Welcome. I am Carolyn Torma. As APA's Director of Education, it is my pleasure to inform you that this program is brought to you by the American Planning Association and the Lincoln Institute of Land Policy.

Let's begin with some basic instructions for our audience. For those of you using the online Conference Visuals, pressing "Control H" or "F5" allows you view the PowerPoint full screen. And for those of you who downloaded the PowerPoint, you'll be cued with the phrase "Next Slide" when it is time to change the slide.

We've gathered useful reading materials and websites for you on the special conference website—this is a great resource for all attendees to use, so please visit the site whose URL is listed onscreen. These materials will also be included in the forthcoming conference CD-ROM. Please use the program resource materials to enhance your educational experience.

If you have been a regular attendee of these audio/web conferences, you will notice that this program is somewhat different. There will be no question-and-answer period in this program; instead your local host or staff will handle the Q and A at your local site.

Next slide, number two. The three parts of today's program will have different speakers and will cover:

1. Conducting the zoning board of appeals hearing
2. Zoning variances and findings of fact
3. Conditional and special uses.

Next slide. Stuart, please get us started with the basics about the zoning board of adjustment and its hearings.

Conducting the Zoning Board of Appeals Hearing: Zoning Clinic 2004

Meck: Hello, this is Stuart Meck with APA's Research Department in Chicago. Welcome, everybody. Today's topic is Zoning Board of Appeals, also called the Zoning Board of Adjustment -- what it is, how it functions, why we have them and how BZAs or ZBAs can function more effectively. Later in this program, I'll talk more about the history of these boards. But by way of introduction, our panel of experts is here today to help you do your job better as a board member, a planning commission or staff.

Next slide. Let's meet our panel of national experts. With us is Jeri Parish. Jeri is the Advertising Manager for APA's *Planning* magazine and *The Journal of the American Planning Association*. In her other life, she is a commissioner serving on the Board of Zoning Appeals with the City of Country Club Hills, Illinois, which is one of the southern suburbs in Cook County. And she has been on the board for twelve years. Jeri, hello.

Parish: Hello, Stuart.

Meck: Jim Driscoll is a hearings examiner in Washington and a principal in the firm Driscoll and Hunter. He is the author of the publication *You Be the Judge*, which is written for land use decision makers. Welcome, Jim.

Driscoll: Glad to be here, Stuart.

Meck: And we welcome back Dwight Merriam to this audio conference. Dwight has participated in past audio conferences on legal issues. And he is a planning and land use attorney with Robinson and Cole in Hartford, Connecticut. Hello, Dwight.

Merriam: Hello, Stuart.

Meck: We're going to talk about the ZBA's functions and how those functions may differ from state to state. We'll talk about how the ZBA's approach to decision making works and how BZA members can improve the conduct of hearings and the quality of fact finding. We'll discuss an alternative to the ZBA used in some parts of the country, one that Jim is familiar with -- a hearings examiner -- a zoning hearings examiner.

Let's go to the next slide and begin with Jim. Jim, what are the ZBA's functions?

Driscoll: Well, Stuart, the ZBA has numerous functions. It has an advisory role, which advises the city councils and the cities on zoning, types of zoning and the comprehensive plans and things of that nature. However, the main function that we would look at today is their quasi-judicial function. That's where they hear appeals of decisions made by administrative officers in connection with applications for permits. They also hear the permits themselves in some circumstances, such as a variance or conditional use permit. In doing so, the boards hold hearings, they make findings, they create the record on which their findings are made and they issue decisions. These decisions are binding. They go with the land, usually. And they are enforceable by the local communities.

Also in some communities, the zoning boards have the authority to make recommendations to the legislative body on other types of permits, be it plats and that. But for the most part the authority in the quasi-judicial hearing is related to variances and conditional use permits or special use permits. It all depends on what language your community uses in defining them.

Meck: Let's go to the next slide. And let me ask you, Jim, the functions you just described -- only held by ZBAs? Or can other entities perform these functions? What I'm really saying is are there differences from state to state?

Driscoll: Yes, there are. And you have to look at your state enabling act and your local legislation to determine just exactly what your authority is. Sometimes the planning commission will function as a ZBA. And this, however, becomes a bit of a problem if there is an appeal because who does the appeal go to? Can it go to a planning commission? Or it usually ends up in the city council. And anybody who has sat through a city council meeting knows that sometimes these types of appeals get heard, oh, about 1:30 in the morning.

In some communities, the hearings examiners hold them. We'll be discussing that a little bit more later on in this proceeding. And then in some other jurisdictions -- very rarely, though -- there is a commission set up just for the sole purpose of hearing one particular type of variance or conditional use permit. That is really the minority, though. The majority of states do have zoning boards hearing these type of permits.

Meck: Let's go to the next slide and turn to Jeri. Jeri, you serve on a ZBA here in Illinois. What kind of powers does your ZBA have and what kinds doesn't it have?

Parish: Well, Stuart, we have the power to adopt rules necessary for the proper conduct of our meetings and hearings, provided those rules are consistent with Illinois statutes. My board is a fact-finding board. Therefore we make written recommendations to the city council. We do not have the power to make final decisions.

Meck: Let's go to the next slide and turn to Dwight. Dwight, what are the categories of variances? Are there more than one?

Merriam: Well, Stuart, variances probably come in at least two flavors, and maybe one variation of that. And I think most of our listeners are probably mouthing the words right now. First of all, the bulk and area variances. I sometimes call them dimensional variances. That's like the person who wants to encroach three feet in a fifteen-foot wide side yard set back in order to add a carport. And I suppose I would throw in with these signs and parking variances as well. They are the most typical ones that are approved.

And then there are use variances. Remember, Stuart, that a variance, regardless of whether it's a dimension or use variance, is asking for permission to do something that is otherwise illegal under the ordinance. And use variances are highly disfavored. They're prohibited in some states by common law and by statutory law. They would be somebody, for example, wanting to put a gasoline fueling station in a residential area.

And then I would say there is probably one variation. I'm not sure it's really a variance, but it's a little like curbside justice where the zoning enforcement officer interprets the ordinance to allow a use. I think probably a pretty good example is one we see again and again -- a country club that puts up a tent periodically for weddings and banquets and so forth in the summer. And the zoning enforcement officer says, well, that's not a permanent structure. It's not a banquet hall. It's a temporary use that's accessory to the country club. And they let it go.

So I think those are the two or three types. You know, the late Donald Hagman -- you remember him, Stuart?

Meck: Yes.

Merriam: The late Donald Hagman in his book said that probably 90 to 95% of the variances are granted illegally. I think that's true, whether they're dimensional or use. But most people don't challenge them. Variances add some flexibility to the otherwise tight joints of our zoning ordinances, and that's the role they play.

Meck: Don Hagman was a Professor of Law, I believe, at UCLA.

Merriam: Yes, that's correct. And now Julian Juergensmeyer is a co-author of his treatise, which is still out there and I think still reflects that 90% rule.

Meck: Okay. Let's go to the next slide and stay with Dwight. Let's talk about the criteria. For a variance petition to be acceptable, what criteria must it satisfy?

Merriam: Well, almost always somebody is going to claim that there is a special condition, whether it exists or not. The familiar litany is "unnecessary hardship and practical difficulties" -- wonderful terms that defy clear definition.

We do want to see that the proposed variance is consistent with the spirit of the ordinance. This does vary. These tests vary and their application vary tremendously from state to state. You really need to look at the state statutes and the common law just to give you a couple of examples of how they can vary. In New Jersey, public utilities are held to a lesser standard. They also have a D type variance from a subsection where you find it for special reasons, which does not require a showing of hardship. But usually we look for a practical difficulty and unnecessary hardship with some special conditions on the site.

Meck: Okay, this is really vague language. What does it really mean in practical terms?

Merriam: Well, it means a lot of work for lawyers, Stuart. That's pretty important. But in practical terms, as you can see on this slide here --

Merriam: We're looking for conditions that are unique to the property. The classic one that everybody remembers from their law training and planning school or in law school is the rock outcrop that keeps you from building a house except one that encroaches in what would otherwise be a side yard or rear yard setback. There is a case about a triangular lot that if you

applied all the setbacks and side yards, you'd end up with ten square feet. So it has to be something peculiar to the lot -- the shape or the physical characteristics.

It can't be something that arises from other than the conditions of the lot. For example, one case -- an antique car collector asked for a variance for a bigger garage. Well, that's not a hardship that arises from the lot. Another case, a family with an asthmatic child asked to put a porch in a side yard. No, that doesn't arise from something that's unique to the lot. You don't get a variance for that.

The hardship, of course, can't be self-imposed. The triangular lot case -- suppose that you were the subdivider. You laid out nine lots and you've left this crummy piece of triangular lot at the end and then you ask for a variance. You're quite unlikely to get it because you created that hardship by laying out the other nine lots.

We've seen a number of cases, which I think are terribly interesting, of people building in violation and then asking for a variance. If they build intentionally in violation, they are not likely to get a variance in most states.

Meck: Imagine that.

Merriam: Yeah, imagine that. But Stuart, the really interesting ones are where they hire a surveyor and the surveyor makes a mistake or the contractor makes a mistake and they put this addition on the house. They find out it's in the side yard's setback. Is that the owner's problem? Well, it probably isn't if the contractor is independent of the homeowner. So it can get very complex. APA filed an amicus brief on a case in New York where they had to lop off twelve stories of a building that was built incorrectly and could not get a variance. And we just had a case in Connecticut where they had to lop off the side of a building because they built illegally.

The last category, Stuart, quickly, is if somebody buys with knowledge. If you buy that triangular lot that I talked about and you knew you only had ten square feet, do you get a variance? Maybe. That's the short answer.

Meck: Well, let's go to the next slide, and I thought I would just provide about a minute or so of historical background on why this language is so vague. And in fact, it turns out that there are some good reasons for it.

The Zoning Board of Appeals was a creation of the Standard State Zoning Enabling Act, which was drafted in the 1920s by an advisory committee of the U.S. Department of Commerce. It was appointed by Commerce Secretary, and later President, Herbert Hoover. And this legislation served as the basis for most zoning statutes in the country. We have a copy of it on the website.

The ZBA idea was based on a similar board in New York City, which adopted the nation's first zoning ordinance in 1916. So what the drafters of the Standard State Zoning Enabling Act did was they took this idea that was created for New York City and grafted it onto the model for the nation. Interestingly enough, the advisory committee's biggest debate was over the powers of the ZBA. And the lead drafter of the act was the man who had actually drafted the New York City zoning code, Edward Bassett, who was a New York City attorney. And he favored a ZBA with very broad authority to vary or modify the terms and conditions of the zoning ordinance.

It turns out this was the biggest tug-of-war. There was a substantial minority of the committee, including the famed landscape architect and planner, Frederick Law Olmsted. And he opposed giving boards such powers. He in particular was concerned about backdoor zoning code amendments. There was a lot of horse trading concerning this particular section of the zoning act. But eventually Bassett, basically by the strength of his personality and the forcefulness of his opinion, won out.

And if you look at the Standard State Zoning Enabling Act, in contrast to other sections, there is no cautionary commentary in the ZBA section about the consequences of delineating a ZBA's authority broadly or narrowly. So it's no surprise today that we have a very difficult time with phrases like "practical difficulties" or "unnecessary hardship" or "special conditions" because the zoning act, the model act, never really defined what these terms were.

Let's go to the next slide and return to Jeri. Jeri, how does an appeal or a variance petition come to the ZBA in your community?

Parish: Well, the building, planning or our zoning official makes a determination on an application for permit. And the determination may involve an interpretation. Or the zoning ordinance may not permit what the applicant wants to do. The zoning administrator advises the

applicant -- always in writing -- what alternatives are available. Now, all of our meetings of the board are held at the call of the Chairman or the City Clerk. A hearing is scheduled. The notice is published about two weeks prior to the meeting. And the notice is also provided to the neighboring property.

Meck: Let's go to the next slide. How do you conduct your hearings?

Parish: We hold our hearings once a month. ZBA commissioners are sent an agenda by the staff about two weeks prior to the meeting. This agenda is reviewed and we brush up on the zoning code relevant to that appeal. We have to be very careful, Stuart, that we do not discuss any issues outside of a public hearing. Often I do a site visit and so do my other board members, because many times we've run into each other at the site. And although it's tempting, still, we do not discuss the appeal. The plaintiff comes before the board. Our board listens to testimony and records it.

Meck: Do you record the testimony with a tape recorder? Or do you have a court reporter there?

Parish: We have a tape recorder.

Meck: Tape recorder, okay. Let's go to the next slide. Jeri, do you have time limits?

Parish: No, we do not have any set time limits. But we try to keep the testimony within, say, 15 to 20 minutes. And we do this by guiding the plaintiff if the testimony is redundant. If the plaintiff has witnesses, they are always given the opportunity to speak after being sworn in. The floor is open and then closed to the public.

Our planning director plays a real key role. She reads the notice, answers questions, offers clarifications when needed. Sometimes if a case is especially difficult, we might have a municipal attorney present, although this doesn't happen very often. Finally, we go to the findings of fact and write conclusions of findings for recommendation to the City Council.

Now I might add that the Board keeps minutes of these proceedings, showing the vote of each member upon each question. It keeps records of the examinations and other actions. And these findings are filed in the office of the City Clerk and is a matter of public record.

Meck: Let's go to the next slide and Jeri, I'd like you to talk about testimony and the mechanics of doing findings of fact. In what order does the testimony proceed? One problem I used to run into is keeping the witnesses focused. How do you do that?

Parish: Well, first of all, before any testimony is given and at the start of the hearing, our board chairman describes the rules of procedure. The testimony starts with the applicant who has identified himself and is sworn in. The entire hearing is recorded.

It is important to remember that the burden of proof falls on the applicant. So other than verbal testimony, testimony may also consist of photos, maps, outside reports or any other methods that the witness needs to prove his case.

How do we stay focused? Well, that can be a challenge sometimes. But we have to ask very leading questions to get the appropriate testimony out of the applicant and witness. Sometimes there is redundancy, say, from the second and third witness. We always let that second and third witness know that prior testimony has been recorded and we encourage other witnesses to offer new testimony if they have it, but not to repeat what has already been said. It's important to get factual testimony from the plaintiff and the witnesses so that we can adequately make a rationale, findings of fact and make a determination.

Meck: How is the room set up? Is the room set up so that everybody can see the exhibits and things?

Parish: Absolutely. Our meetings are held in City Council chambers. The room is open and wide, brightly lit. It is not crowded. All of the records are right there in the front. Everything is so that you can see all of the photos, maps, reports or whatever may be presented.

Meck: Let's go to the next slide. Jim, there is an alternative to the zoning board of appeals, and that's the hearings examiner. Why don't you tell us a little bit about this system and where it's used and how well it works?

Driscoll: Okay. The hearings examiners are individuals who are retained by local jurisdictions for the purpose of holding hearings in the same manner that zoning boards do. They are used most commonly in the West, with the States of Washington and Oregon being the most common places. But Florida and Maryland also have active hearings examiners systems.

Over the years I've done different research about hearings examiners, and I have found approximately 20 states have enabling legislation that would allow for hearings examiners. But it seems like Washington, Oregon, Florida and Maryland are the only ones that are really implemented to a great degree. I may be wrong in that. There may be some listeners out there that say, "He doesn't know what he's talking about. We use it here."

Meck: Idaho has it, I believe.

Driscoll: They have enabling, but isn't that common. It came about in the State of Washington because there were so many conflicts of interest. The State of Washington appellate courts said that a land use hearing not only had to be fair, but it had to appear to be fair. So they said that if there was even the potential of a conflict of interest, such as contributing to somebody's campaign or employment of somebody's relative or having past knowledge of somebody's business, anything of that nature could be considered an appearance of fairness issue.

Well, the Washington Legislature decided that rather than fool around with appearance of fairness any longer, they would just create the office of Hearings Examiner, and this is an office where the hearings examiner conducts the hearings, he develops the record, he meets with the parties oftentimes in pre-hearing conferences. He sets the agenda. He controls the hearing and he or she then takes the matter under advisement and drafts findings of facts based upon the record that's developed.

There are some benefits to it. Obviously you eliminate a lot of conflicts. Another benefit to it is that you get legally defensible decisions and you usually get records that can be defended should they go to court. The downside of it is that the decision comes out about a week or two after the hearing. Nobody makes their decision right on the spot. But for the most part, I would venture to guess that almost every community in the State of Washington and the State of Oregon who have gone to the hearings examiner system would not switch back.

Meck: We have some examples on the website of materials on hearings examiners, one of which is the Everett example -- Everett, Washington, which is where Boeing is. I believe it's north of Seattle. Am I correct?

Driscoll: You're right. It's about 30 miles north of Seattle. I have been the hearings examiner of the City of Everett for about 23, 24 years. And on the webpage for the City of Everett, we have the rules of procedure and a fairly complete description of the hearings examiner system. That system in Everett has been one of the premier systems in the entire State of Washington.

Meck: Do you periodically prepare any type of report on your activities?

Driscoll: Yes, Stuart, I do. I make a yearly report to the local city council or the board of commissioners, if it's a county. And during that report I give them background as to the number of cases that have been heard, the type of issues that have been heard and so on. I also advise them of different ordinances that I have had difficulty in interpreting, and I make suggestions to them as to where they are vague, where they should be changed and what should be done. The city council then takes it under advisement and has the planning commissions in the various communities draft the new legislation taking into consideration my suggestions. So it's kind of a checks-and-balance type system. And it works very well because we've had situations where we've had the vague language for variances. And after the city council has taken my recommendation, they have come back with new ordinances, or at least made them less vague -- let's put it that way.

Meck: Let's go to the next slide and go back to Dwight. Findings of fact, Dwight -- how do you make them?

Merriam: Well, findings of fact are important for everybody in all jurisdictions. And it's a matter of simply paying attention to the evidence. If they just parrot that criteria and say, "Well, this is unique. It's not self-created. It arises from conditions on the lot. And it's not going to adversely affect adjacent property," that doesn't help anybody. But if they list under what's unique about the property, like the triangular lot case -- the lot is triangular shaped. There is only ten square feet remaining to build a house. It arises from conditions of the property, not the person creating it. And then describe what the evidence was that supports that. And then make sure that you prove the negative -- that it wasn't self-imposed. This triangular shaped lot was created in 1922, long before zoning. The lot was purchased as it was.

And then adopt that decision in a formal way through a vote and through discussion of exactly what's in it. I think the decisions that are made quickly are probably the ones that are most easily challenged. So people need to slow down and think about how they marshal that evidence and report it in the findings of fact. It is important to write it down. Ones that are taken from oral statements that are made during the meeting are sometimes not as good as ones that are written out.

Meck: Let's go to the next slide. Now even though they're difficult for groups to make, why are they important?

Merriam: I think in the difficult cases, many of our boards and commissions like to decide by consensus. And when they have tough cases, they sort of have soft decisions. So in the first instance, it's critical to show clearly what the rationale was for the decision. And then it's also absolutely important to make sure that the court knows exactly the basis for the decisions so that the court can then decide whether that comports with the law of the state.

Meck: Let's go to the next slide and talk about what's out of line in testimony. Let's talk to Jim first, and then to Jeri.

Driscoll: Well, out of line testimony is kind of like the old Justice Stewart comment about pornography. He can't define it, but everybody knows what it is. And you probably can't define what out of line testimony is, but you know it when you see it in a hearing.

But the best way to have people avoid doing it, I believe, is have the planning board or the zoning board, before every hearing, set the limits and set the standards of the hearing. The worst thing they can do is to allow cheering and booing and hissing and make it sound like an Oprah show -- or worse, Jerry Springer show. That's not what they're there to do. Take as much emotion out of this and just say, "We're here for the facts. We don't want you to be cheering out there for anybody because it puts us in a difficult situation where we have to either show our bias one way or another when we're trying to be fair. So help us by not cheering." That gets a lot of the showboating out of the way because the people realize that they are performing now for the decision-maker and not the audience. And remember, the decision-maker is the one making the decision. So if the board can take that and do that from the very outset, they're going to get a lot less out of line testimony.

Meck: Jeri, out of line testimony -- probably never happens in Country Club Hills.

Parish: Well, it rarely happens in Country Club Hills. I do agree with everything Jim said. The only thing that I would add would be to offer an incentive to commissioners -- discount coupons at the local eatery or theater tickets -- it won't work. I'd also go with -- and we have not had this -- but foul language or any kind of obnoxious behavior, displays of emotions -- we want you to stay with the facts. That's it. Just give us the facts so that we can make a decision. And give us the facts in an even tone without the emotions so that we can do our jobs. That's all we ask.

Meck: The next two slides. Jeri, let's stay on with you and talk about conflicts of interest and the general problem of living in a small town where you know everyone. How do you manage to remain objective? I used to find myself, when I used to live in a small town shopping at 11:30 at night so I wouldn't run into anybody I know. And what would happen is I would run into everybody else from the city staff doing the same thing. Then I want Dwight and Jim to respond as well. Jeri?

Parish: It's interesting you should mention shopping at night so you don't run into someone. I've done that several times. It's not always easy. The plaintiff, as you know, is very often someone you know. And you just have to keep an impartial attitude, Stuart. You must always show that appearance of fairness, and you cannot base your decisions on outside influences.

Now our board is also very careful of ex parte communications. You know, when we're confronted outside of the hearing or before a meeting, you cannot show hostility. You cannot show favoritism. And we encourage the plaintiffs to address the issues always at the hearing. We avoid conflicts of interest by recusing ourselves from any hearing that may benefit us in any way or in which we might have a personal interest.

Meck: Okay, Dwight, what's your test?

Merriam: I think the best thing that people can do is what I and others call the "Light of Day Test." If the people are out there in the audience that you respect and your peers and others knew about the relationship, would it make you feel uncomfortable. And if you feel that way, that's the

time to surface it. Surface that relationship if it saw the light of day, it would make you uncomfortable.

In most of these cases, you should surface them before the meeting or hearing by calling the chair or calling the chief elected official or the manager or the municipal attorney and saying, “You know, I’ve got an interest in a partnership that the applicant is involved in. But it’s got nothing to do with this application. What do you think about it?” Or “I’m a real estate broker, and if this is approved, there is a chance that I, along with several other brokers from the various agencies in town, would get a listing. I could make some money off of this. Is that a problem?” And just surface it. And if everyone decides that, if you can vote objectively, then you just surface that at the time of the hearing if you think it’s important enough to do so and say, “This is the situation, but I can vote objectively and I’m going to sit.”

If you’re not going to sit -- if you’ve decided that you should recuse yourself, please leave the room. I have seen too many board members who have such a personal or financial interest in the outcome of a proceeding get too excited during a meeting, jump up and start to participate, and that’s a very uncomfortable thing for all concerned. Just leave the room. Somebody will come get you later.

Meck: Jim?

Driscoll: Well, this is kind of the big question here as far as conflicts of interest in hearings examiners because this is the main reason that the hearings examiner system was created in the State of Washington. We live outside the communities in which we serve as the examiners. We have no financial interest at all. We don’t even have friends in those cities. We more or less are just outsiders that come in and make the decision.

I know that isn’t much help. That answer isn’t much help to the people listening because they’re all members of the board. But I would echo what has just been said by Dwight, and that is do not hide it. If you have a conflict of interest or a potential conflict of interest, make it known at the outset and clear the air. Because, if you don’t it could come back to haunt you. That’s going to be a lot worse when it comes back to haunt you than it is when you are clearing the air.

Meck: When I was a planning director, whenever I encountered hostility at BZA or Planning Commission meetings I would pretend that I had an invisible alter ego. And the hostility was directed at the Bad Stuart Meck. And I would vow at the end of the hearing to have a talk with him.

Merriam: Okay, Stuart. We can get you some professional help.

Meck: I know, I understand.

Driscoll: Did the people say, “Oh, the Bad Stuart is the one who made the decision on that one”?

Meck: Yes. In fact, I actually had Dwight come to my board of zoning appeals meeting and he sat --

Merriam: Yes, to see what it was like. Thank goodness the Good Stuart was there. But Stuart, you know, when you were hiding out at the market at 11:30 and all those people showed up, did it ever occur to you that they were at 11:30 so that they wouldn’t bump into you during the day?

Meck: Oh, that’s true. That’s true. That’s crossed my mind.

Torma: Thanks Stuart. That concludes part one—conducting the zoning board of appeals hearing. Part two focuses on Zoning Variances and Findings of Fact and will begin in one minute. [30 seconds of music]

Our program will begin again shortly. [30 seconds of music]

Welcome back. In this section—Zoning Variances and Findings of Fact—we begin with Slide 21. Jim Schwab, APA’s Senior Research Associate, is leading the discussion for the remainder of the program. Jim, we are ready to continue.

Zoning Variances and Findings of Fact: Zoning Clinic 2005

Schwab: Hello, I am Jim Schwab. Welcome. Our topic today is zoning and the work of the zoning board of appeal or adjustment. Our panel will discuss variances and findings of fact.

This program draws upon a new book from APA Planners Press called *The Board of Adjustment*, written by one of our panelists, Gail Easley, and her co-author, David Theriaque. As you may know, the foundation for an appeals board was embedded in the Standard State Zoning Enabling Act of the 1920s.

Next slide. Let's meet our panel of national experts. Gail Easley, FAICP, is President of the Gail Easley Company in Crystal River, Florida. It specializes in land development regulations for local governments and model regulations for state agencies. As we mentioned, she is also the co-author of the upcoming book on zoning boards of adjustment. Hello, Gail.

Easley: Hi, Jim.

Schwab: Richard Lehmann, AICP, is a planner and attorney in Madison, Wisconsin with the Boardman Law Firm. Like our other panelists, Dick is a frequent trainer for planning commissions and zoning boards. Welcome, Dick.

Lehmann: Thank you, Jim.

Schwab: Stephen Sizemore, AICP, is also a planner and an attorney. He is the editor of *Planning and Environmental Law* and a member of APA's Research Department. Hello, Stephen.

Sizemore: Hello, Jim.

Schwab: Next slide. Gail, our audience said they found it challenging to understand when it was and when it was not appropriate to grant the variance. Perhaps you could start us off by defining a variance and set the groundwork for the rest of our discussion.

Easley: Sure. A variance is really a minor departure or some kind of exception from a strict and literal interpretation of the zoning ordinance. We have variances because we need some kind of relief valve for individual property owners. And that's because zonings and the zoning districts are based on lists of uses and sets of design standards that are based on the zoning definition intended to create uniformity within that zoning district. The real problem though is that land is

not uniform. We know that lots have unique features. And we also know that zoning is not inherently flexible. It is very prescriptive.

So we are faced with the fact that the combination of unique features on a particular lot and the imposition of the zoning standards can lead to a possible hardship. So the variance there as one means to seek some kind of relief from that hardship. I should also note that variances should not be granted based on economic reasons or even an emotional appeal that's made by the owner.

Schwab: Next slide. Gail and Stephen, do states provide any guidance in granting variances?

Easley: Well, in fact, some states have a very clear list of variances that can be granted or the reasons for the variances, such as the topography of the lot or the shape of the lot. And some state laws provide very specific lists. But others have more general guidelines, and some don't even have any legislation for variances. As an example, New Jersey and Kentucky and California prohibit the use variance.

Schwab: Stephen?

Sizemore: Well, I've found that there is very little consistency among states in their statutes or how their courts define variance criteria. Most commonly, they contain two basic requirements. One is that because of circumstances or physical characteristics that are unique or special to the property, strict application of a zoning regulation creates an undue or exceptional or unnecessary hardship to or practical difficulties for the applicant. And secondly, that granting the variance would not be contrary to or substantially undermine the spirit or purpose or intent or integrity of the zoning ordinance or harm the public good.

But these requirements raise a number of questions, such as when are circumstances unique to the property, as opposed to generally characteristic of the neighborhood or the zoning district? What constitutes an undue or unnecessary hardship? Or what constitutes practical difficulties? For instance, at what point does granting a variance undermine the spirit or the purpose of the zoning regulations? Although some state statutes address these questions with more detailed variance criteria, most do not. Instead, they leave it up to the state courts to interpret what the basic criteria mean. And the courts do so in very different ways, even in states that essentially have the same statutory criteria.

Schwab: Okay, let's move to the next slide. What are the most common reasons for people asking for a variance, Dick?

Lehmann: Well, one certainly is the circumstance under which the applicant argues that the regulations in their strict interpretation and their strict application allow no economic use of the property. Now, that's essentially a takings argument, and if that is demonstrated satisfactorily to the satisfaction of the board of adjustment, that would certainly meet the hardship portion of the standard. So that's one -- a safety valve to allow relief where there would be a Lucas type categorical taking.

But more commonly, the argument is not that without the variance there is no use, but that without the variance, there is a limited use available of the property under the permitted uses for the district and under the dimensional or area standards. But the property owner wants more than the ordinance allows -- wants to go from a modest amount of economic use to a larger amount of economic use. There was a case that Steve sent out to the members of the National Amicus Curiae Committee, on which I serve, from Pennsylvania very recently in which the downtown zoning district apparently allowed buildings as tall as 16 stories, and this property owner wanted 50 stories in a downtown building. The variance was granted, but was then stricken by a court on grounds that that was asking for too much.

The other issue is where a business was fine with the standards of the ordinance when it began, but the family grew or the business grew, and now they want to be able to stay on the site, but grow their structure -- usually the case -- or the amount of land occupied. That's a very common circumstance.

And then we have these after-the-fact variance requests where the property owner went ahead and built it. And then it was discovered that they should not have been either permitted to build it, or likely that they didn't even bother to get a permit, and now they're asking for forgiveness after the fact through the mechanism of a variance.

Schwab: Next slide. Gail, would you like to tell us about your experience in this area?

Easley: Well, in Florida, one common request deals with setbacks from the water. We of course have a lot of waterfront development here in Florida. People build a house and either they put off

building a pool or enclosing the pool with a cage until some later date. And then they find that they cannot make this addition. There is not sufficient space within the setback for the pool or the pool cage. Yet they feel like they're being singled out for denial because their neighbors have pools and their neighbors have enclosures around the pools.

So one thing that happens is the ZBA will get the same kind of request over and over, and maybe even grant this same type of variance over and over. When that happens, it might be time to rethink the standards that are in the ordinance, specifically in the case I'm mentioning -- setback standards.

The real situation is that the owner did not plan ahead to make future additions such as the pool, and they are not able to do so in compliance with the zoning standards. This leads to an important point. The ZBA really must be able to explain the purpose of the setback. If the board cannot justify or provide a purpose for, in this case, the setback, then once again the community may need to look at changing the ordinance itself.

Schwab: Next slide. Well, Gail, other than pooling the requests, how should the ZBA respond to them?

Easley: Well, first of all, they need to look at the special circumstances that we mentioned in the beginning in defining a variance. Those special circumstances need to be particular to the lot -- a steep slope, maybe a ravine or an irregular shape. The circumstances are peculiar to the property, not peculiar to the applicant. So you have an example where maybe an owner wants to subdivide the lot, and if the subdivision were allowed, one lot might be too small to build on. Well, this is a hardship for the owner, but it's not peculiar to the lot when it was zoned. It's something created by the owner. Of course, we have then the situation, what if that was done and someone else comes along and buys that smaller lot. Aren't they really inheriting the hardship? And this is one of the reasons that it's very difficult for a ZBA to make the decisions about variances because they're trying to balance or look at all of the standards and the rules against the evidence that's there and the support for the standards that are set for the variance.

So we really have to look at, does the hardship come from the standard being applied to the property? And again, just as I said a moment ago, if you're getting a significant number of the same variance requests and the same approvals, I think the problem lies with the rules

themselves. And the setback example I was using, if we're saying, oh, 25 feet is enough. You don't really have to be set back 30 or 35, well, then the ZBA needs to talk to the elected body and make sure that they're considering whether the rules are right. And be really careful that the owner is not left with no reasonable use when they make their decision.

Schwab: Let's go to the next slide and go to Stephen. What about enforcement as a tool? Are there some other issues that Gail's example raises?

Sizemore: Yes. If any zoning regulation is to be effective, it must be enforced in a consistent manner, with variances limited to exceptional circumstances. If a board of adjustment time after time grants variances from a particular zoning regulation, it's undermining the effectiveness of that regulation. And if the board of appeal continually wants to stretch hardship criteria to grant variances from the same regulation, it's certainly time for that board to notify the governing body of the situation and explain why the regulation seems unduly harsh. Then it's up to the governing body to decide if the regulation is indeed a bad one that should be eliminated or replaced, or if it's a good one that should be enforced. If it's the latter, the governing body should tell the board of appeals to shape up and strictly apply variance criteria to requests for variances from that regulation. Thus regular communication between the board of appeals and the governing board is essential to keeping your zoning regulations effective.

Schwab: Okay, next slide. Dick, how should the ZBA grant variances then?

Lehmann: Well, the first thing I think the ZBA and particularly new members of the ZBA, or old members as they're going into a difficult case, needs to do is first look inward in terms of what are the procedures that the state law and the ordinances require them to follow. There are almost assuredly will be the requirement of a public hearing and a requirement of certain notices published or posted for that hearing. There will also be agendas posted and so forth, and probably also legal notices of the hearing in the newspaper.

And the board has to determine how the states Open Meeting or Sunshine law applies. Is there any portion of the variance proceeding that can be done in closed, vs. open session? That's a state law matter under the Sunshine law. And the board needs to review the procedures for conduct of the hearing. And those procedures may be in *Robert's Rules*. They may be in *Robert's*

Rules plus adopted rules, adopted by the board for the board or adopted by the local legislative body for the board.

And while it's not on the slide, they also need to examine whether their decision when they come to making a decision on a particular variance is a simple majority rule decision, or does the state law require an extraordinary majority. In Wisconsin, to grant a variance at the municipal level, the five-member board has to have four of its five member voting to grant the variance. That's a statutory matter. It's not just the usual majority vote.

So that's a set of things to get clear from the beginning what the ground rules are going to be. Then another type of ground rule is what is the legal standard that governs a variance decision. That was discussed in this seminar a few minutes ago. Usually those are basically spelled out in the state statute, but not always, and also in the local ordinance. The exact language of what it says about hardship -- is it hardship? Is it severe hardship? Is it unnecessary hardship? Get clear on all of the language and the standards. And I think that's important to do before the hearing begins.

Now we come to the opening of the hearing -- the taking of testimony and the receiving of letters and documents and petitions and other forms of evidence. I think it is important for the board members and the board collectively to pay close attention during this hearing, to be taking notes and to be sort of underscoring or highlighting those particular items of information received that that member may want to incorporate in the motion or make reference to later on in the discussion with the other board members.

Then after the hearing is concluded, the members individually and ultimately collectively the board has to decide whether the applicant has presented information at this hearing that is reasonably convincing to the members that each and all of the standards have been met because the burden is on the applicant. And if there is conflicting testimony -- if the other side, neighbors or whatever, present testimony on the same questions, but testimony arguing in a different direction -- trending in a different direction -- that has to be evaluated to see whether that has undermined the credibility of the applicant's information.

And then because some of the standards are sort of often vague -- like "compatibility with the neighborhood," just to pick one -- the members have to realize that if they're going to make a

finding on that, they have to have some actual facts that were presented at the hearing -- detailed facts that speak to that, not just general conclusions. "I think it's incompatible" but no explanation of why. So you have to be looking for where these facts are that will go into findings of facts.

And the board members and the board have to realize that this is not a popularity contest. It's not sufficient to justify the granting of a variance that everybody up and down the street signed a petition in support of it. There have to be facts generated as to why the application meets the standards of the ordinance. And if there is no opposition, that's not by itself justification. There has to be an explanation presented to the hearing and to the satisfaction of the board as to why that would be the case -- why that's the conclusion that there are not negative impacts.

And then in conclusion -- and this is somewhat reiterating what's already been said, if we look at this variance procedure and compare the procedures for other forms of regulation -- speed limits or whatever -- it is a very unusual circumstance to have a governmental regulation system set up with a citizen appeals board you can go to and get permission not to comply fully. And that's a very powerful power, and it has to be exercised very sparingly by this board. They're not just there to do justice. They are there to grant under specific defined circumstances.

Schwab: Good. Next slide. Gail, could you expand upon the issue of findings of fact and tell us how ZBAs can create the appropriate record for a decision?

Easley: Well, I think it all starts with a good staff report. A good staff report is going to contain the basic information about the property, the subject of the variance request. The report is going to identify criteria that pertain to making the decision and provide a staff evaluation of how the request does or does not comply with those criteria or those rules, and then provide a recommendation. There are several criteria that will be contained in the local ordinance. I've identified six general criteria in the book on boards of adjustment, and that might be a helpful place to start if it's not contained or explained fully in your local ordinance.

The other thing that you need would be attached to the staff report would be any supporting reports or documents, the application itself and the applicant's justification as well as maps of the vicinity or conditions about the property, and then any other testimony would be attached to the report.

What's essential is that you end up with a written record. And that record contains the written evidence that I've just described, and then transcripts of the verbal evidence. People will speak at the hearing, and that's also evidence. And there needs to be a tape recording or some kind of a transcript made of those hearings. And that's because if there is an appeal of this decision, that appeal is going to be decided based on the record. So it's important to get everything -- the facts that are listed and the conclusions that are drawn into that record.

It's also important to determine the nature of the variance. Many variances have to do with dimensions. So if it is a dimensional question, it might be necessary, for example, to have a survey of the parcel that will confirm the dimensions that are being discussed and are in question. So there are a lot of things that might be attached to that report to support what's being put in writing.

Schwab: Thank you. Next slide. Stephen, are there other things that can help with defensible decision making?

Sizemore: Well, I would start by informing potential applicants and the general public about the board's decision making processes and the criteria that they use as early and as often as possible. First I'd use websites or brochures to notify, again, potential applicants and the public about the decision making process that's applicable to each action that goes before the board as well as the decision criteria applicable to each. And give examples, for instance. Also, I'd have the application forms list and require applicants to address each of the required criteria. Don't let them come to the board with just a general request for a variance from a particular regulation. You have to have them actually address the criteria. And also include a description of that decision making process and the criteria in or with the hearing notices that may be sent to neighboring property owners so that they too will come in informed about the criteria.

I think this saves everybody involved in the process unnecessary time and aggravation. First, potential applicants are more likely to either forego submitting a groundless application, or they'll prepare applications that are as well supported as they can be. At the very least, they will recognize the weak spots in their applications. The potential objectors to an application are more likely to both drop irrelevant objections and organize their objections around the relevant issues. The staff is more likely to prepare staff reports and recommendations to accurately anticipate and

appropriately address the relevant evidence and issues. There is a little less likelihood that there will be new issues brought up at the hearing that staff did not anticipate.

And most importantly, the board itself is going to be more likely to keep its hearing and deliberations focused on relevant issues and to come up with a well-reasoned and, importantly, a well-stated decision with the appropriate conclusions backed by reasonable findings of fact that are supported by the evidence that they've heard. Any such a decision is going to be more likely to be understood and accepted by all involved, even if they disagree with it. And thus a decision is less likely to be appealed to the courts, and if it is, more likely to withstand legal scrutiny.

Schwab: Good. Next slide. And Dick, let's discuss some procedural issues such as when and how to draft your conclusions. And Stephen, please add anything pertinent.

Lehmann: Well, this is an interesting and sometimes surprisingly complex area. Let's start by building off of what was just said. Assuming that there is a staff report, and a good, competent staff report, that can certainly be the basis for a motion. That is, somebody could say, "I move to approve or disapprove based upon the information and evidence included in the staff report." And assuming that there is a lot of pertinent information included, that's where a motion can start.

Now you've really got to hesitate with the thought of that's all you do because if the staff report, which it in all likelihood was, was written by the staff before the hearing began -- okay, back in the office before the hearing began -- that was written without the staff hearing the testimony presented at the hearing. And maybe nothing new -- nothing came in at the hearing that wasn't anticipated. But likely new information did come in. So that somebody making a motion to essentially adopt the staff report as a statement of reasons needs to ask whether they need to say - - to take a position based on the staff report "and based upon the following items of information that are not discussed in the staff report, but were presented at this hearing." So that you're not leaving out of the supportive factual body of information any information that was not in the staff report because it showed up at the first time at the hearing. So that's point number one.

And if that's kind of requiring someone to be faster on their feet in terms of being able to quickly digest and incorporate the most pertinent information that was received at the hearing, but that's why I recommended that board members take careful notes during the testimony. It may be wise

or necessary for the decision to be laid over to a later meeting so that the decision makers can have the benefit of the transcript or summary of the hearing in order to draw from that describing information that was generated at the hearing, in addition to referring to the staff report.

Now sometimes that may be difficult. We don't have this situation under Wisconsin law, but if there is a statutory or ordinance time limit on how long the board has to act or a "deemed approved" clause that if the board doesn't act within a certain number of days or weeks, it's deemed approved, then it may be difficult to lay it over to a later meeting. So that's something also to keep in mind. But again, that comes down to taking careful notes during the meeting and maybe taking a recess -- have the board take a recess at the end of the hearing for board members to make notes and create a handwritten or maybe even a desktop computer motion that pulls together the information in support of where the motion wants to go.

It is very important to realize that the motion can only be justified on the basis of facts and information generated or presented at the hearing. It can't be based upon a board member saying, "In addition to what I heard at this hearing, I walked by that property the other day and spoke to one of the neighbors, and here is what they told me." That's information outside of the record -- ex parte information -- and that is not allowed by the courts and by constitutional due process to be legitimate legal supporting reasons in support of the motion.

Schwab: Let's go to the next slide. And Stephen, anything to add to that?

Sizemore: But getting back to what we were talking about earlier, in my experience the decision is usually made at the end of the hearing with the board discussing the evidence presented and using the staff report essentially as a template to make conclusions about each of the required criteria, and then findings of fact that support them.

But another decision making process that Dick mentioned is basically to lay it over to the next meeting, which maybe your hearing is followed by some discussion of the evidence, and individual board members state their opinions about what conclusions are backed by what findings of fact. And having a chair conduct a straw vote or maybe just sum up the consensus points. And then the board adjourns and directs the staff with the board's attorney, if it has one, to draft a resolution with those findings of fact and the required conclusions that reflect that

consensus, and then present that to the board at the next meeting for adoption or modification. That's a nice, clean way of doing it.

But the first method Dick mentioned, it does have some disadvantages. It has the advantage of a quick decision made in front of all the involved parties. But it can't be too demanding. If there are a lot of complicated issues involved, if the evidence presented is not well focused on the relevant issues or there is no staff report at all that gives any kind of guidance to the board, or if there is a staff report and new evidence presented at the hearing that is not anticipated by the staff report or addressed by that staff report.

The second method -- postponing the final decision to the next meeting -- that has again the advantage of not putting the board members on the spot to come up with a complete and clearly stated findings of fact and conclusions. But it can lead to inappropriate over-reliance on the staff, with the board perhaps finishing the hearing, deciding, "Well, we're going to approve this," but they don't really state the reasons or the facts that back up those reasons. And they just expect the staff to come up with the language justifying the decision. And that's not fair to the staff, who will often feel pressured to invent findings and conclusions that are needed, but were never actually made. And it may not hold up in court if the court ends up comparing the minutes of the hearing and more discussion with the actual adopted resolution, which may have a lot more findings in it than was evident from the hearing or from the board discussion.

Also, as Dick mentioned, it may take too long to comply with any kind of statutory deadlines for decisions. And it has the further disadvantage of potentially surprising some of the involved parties who may have been at the hearing, but not able to attend the follow-up meeting, particularly if the decisions or the findings end up being something slightly different than what they thought they heard at the hearing.

Schwab: Good. Next slide.

Torma: Thanks Jim. This concludes part two. In part three, we are examining Conditional and Special Uses. Part three will begin in one minute. [30 seconds of music]

Our program will begin again shortly. [30 seconds of music]

Welcome back. Conditional and Special Uses, which is part three of our program, begins on Slide 34. Jim, we are ready to continue the program.

Conditional and Special Uses: Zoning Clinic 2006

Schwab: This program is going to examine how communities assign conditions in the zoning process and what constitutes a condition. We'll provide insight into how your zoning codes should be written to assure the smooth operation of the zoning board of adjustment and the planning commission.

Next slide. Let's meet our panel of national experts. Gail Easley, FAICP, is President of the Gail Easley Company in Crystal River, Florida, which specializes in land development regulations for local governments and model regulations for state agencies. Hello, Gail.

Easley: Hi, Jim.

Schwab: Karin A Franklin, AICP, is the Director of Planning and Community Development for the City of Iowa City Planning Department. Welcome, Karin.

Franklin: Glad to be here, Jim.

Schwab: Craig Richardson is a planner and attorney and Vice-President and Principal with Clarion Associates, a planning consulting firm with offices in Chapel Hill, North Carolina and Denver, Colorado. Craig, we are pleased to have you join us today.

Richardson: Thank you, Jim.

Schwab: Okay, next slide. We are going to discuss a series of terms and concepts today that can be very confusing. Different states use different terminology for different categories of zoning decisions. So let's begin by looking at a typology of these terms: conditional uses, use variances, special conditions, special uses. Craig, please provide us with a context.

Richardson: Certainly, Jim. I'll start with conditional uses. Conditional uses are generally uses that are compatible with permanent uses in the zone district in which they're located, but because of certain circumstances, usually require special review because of their location, design,

configuration, density, intensity of use. In that review process, they usually require the imposition of certain conditions to ensure their appropriateness or compatibility within the zone district, and compatibility with the permitted uses in the district.

Generally speaking—not always—the review boards under the state legislation that review conditional uses is a board of adjustment or the planning commission. Sometimes it can be done administratively by a professional staff, depending on the state.

The other thing that's really important to keep in mind is really that usually conditional use standards and procedures are in a zoning ordinance, and they are applied through either specific standards or general standards. When general standards are used, a lot of times they are applied on an ad hoc basis. And for that reason, given the recent federal court decision, in particular, the *Dolan* decision, it's very important when you impose a condition on conditional use that you ensure there's a reasonable relationship between the impact that use will have on the district and the condition that you impose on the conditional use.

Next slide, please. The next term that we're going to talk about today are use variances. Use variances are granted, and they permit a change of a permitted use in a zone district. This is traditionally done through a rezoning process. But in some states, it's allowed through what is called a "use variance process." I'll say that that is atypical. It's not usual that that's done. There are a number of states that prohibit use variances. This review is done usually by review board—the board of adjustment, sometimes the planning commission, and very occasionally it's done administratively. Again, conditions are applied, usually on an ad hoc basis, because most of the enabling statutes give very little guidance in terms of the standards or criteria to use in applying a use variance. Again, because of the ad hoc nature of this review process, it's very important to remember that there should be a reasonable relationship between any conditions imposed on a use variance and the impact that use will have in the zoning district it's located.

Next slide, please. Final terms that we're going to talk about today are special uses or special conditions. And this is a term that you need to be very careful about. Look very closely at your state enabling legislation and follow the guidance of your enabling legislation. In home rule states—places like Florida—it really doesn't matter because the local government has the authority to both define what a special use would be as well as to determine who reviews it and

what the standards would be. Some states, on the other hand, in defining special use as use that's generally compatible with the permitted uses in the particular district, but they require the individual review of their location, design, configuration, etc. Generally the difference in some of these states between the special use and the conditional use is that the conditional use is reviewed by a review board like the board of adjustment, and the special use is reviewed professionally by the staff. Other states, however, have little distinction between special uses and conditional uses, so you need to be careful and look specifically at your enabling legislation.

I'll conclude by again emphasizing the fact that imposing conditions is very, very important to ensure that there is a reasonable relationship between any kind of condition imposed and the impact that the special use will have in the district.

Schwab: Next slide—Karin, what are the key concepts that we want our audience to understand about these terms? And how do they relate to the duties of the zoning board of appeals or the planning commission?

Franklin: Well, first of all, we need to be aware of the source for the authority, either the planning commission or the board of appeals or the board of adjustment has to assign conditions. And the first place to look, as Craig has noted, is in your state enabling legislation. A state may grant the right to either body to impose conditions in approving conditional uses, conditional zoning, or special exceptions. Depending on the state, guidance in the legislation may be broad, indicating only that conditions may be imposed, or it may be more specific, giving guidance as to the nexus required or to the type of condition. Or it may be silent on it, too—it may just grant the authority to impose conditions, but not speak to it any further.

Also there should be authority in the local zoning ordinance, which prescribes when and what conditions or standards may be assigned. It's in the local zoning code that there should be enough specificity to avoid any hint of arbitrary decision making in assigning conditions. And we'll talk a little bit later about specific conditions or standards that might be imposed.

With all these different terms, it can be helpful to consider a hierarchy of uses that are typically found in zoning ordinances. The basic uses are those permitted by right. For example, let's take a lower density, single-family zone. Detached single-family houses are permitted by right. You only need get a building permit, which is granted at the staff level. However, duplexes

may be a provisional use in this zone. As long as you follow the special provisions, such as “duplexes can only be located on a corner lot,” you also just get a building permit.

But a use like a day care center, as an example, may be allowed only as a conditional use or a special exception. There may be requirements, such as outdoor play space, access to a certain hierarchy of street—say, a collector street or an arterial—or it may require architectural compatibility with the neighborhood. These uses require a higher level of scrutiny with review by either a planning commission or a board of appeals or adjustment, with the judgment and the public involvement that typically is associated with those two bodies. During the board or commission scrutiny, conditions can be assigned to enable that the day care center, in our example, to work at the particular location being considered.

The highest level of scrutiny is for variances. And that’s why they’re kind of outside the box. And these are circumstances in which one property owner may wish to vary certain requirements of the code. These go before the board of appeals and can be either use or dimensional variances, again depending upon state law. The circumstances giving rise to a variance must meet the test of uniqueness and hardship. They should not be something of the property owner’s own making. The granting of the variance should not be contrary to the public interest. And often, conditions are imposed to address this question of public interest in allowing this use to work in the particular location.

Schwab: Let’s go to the next slide, and let’s go back to Craig. How clear is the statutory language on these points? Is the guidance in them satisfactory?

Richardson: It depends on the individual state. So as Karin has indicated, and I mentioned earlier, it’s very important to look at and consider your state enabling legislation. Some states—for example, those with home rule powers like Florida—grant broad authorization to adopt land use regulations. In these circumstances, the local governments establish the parameters for the review of these types of permits, both the standards and who reviews. And the local government dictates how it’s going to be handled in their local development codes.

Other states provide very general authorization with little definition. And again, since the local governments have the authorization, they also have significant latitude in establishing standards for review. In other states, there is this general authorization, but it’s very specific in

terms of who does the review. And then other states are specific, and set out specific review procedures as well as review criteria. And in these situations, obviously it's critical to follow the statutory directive of the state legislation.

One final point—I will re-emphasize it—I mentioned it earlier—and that is the importance of establishing this reasonable relationship between any conditions imposed and the impact of the development, vis-à-vis the condition that is imposed. The state legislation usually doesn't address this issue, but it's very important in drafting your local development codes to address the issue, and also very important in imposing conditions to take that into consideration.

Schwab: Good. Next slide. Craig, what about the specifics in the local ordinances? What makes a good local ordinance in describing how a special exception or conditional use should work?

Richardson: Well, two or three things, I think, Jim. One is procedures—you need clear and understandable procedures, explaining who reviews the conditional use and how the use is to be reviewed. Secondly is review standards—they need to be clearly written and understandable. And we're going to talk later and get into much more detail about specific review standards. And then finally, the conditions—and I mentioned this earlier—but it's very important to ensure that these conditions imposed are reasonably related to the impact that's being created. And a lot of development codes that we draft, we like to include specific provisions stating that the restrictions and conditions imposed must be related both in type and amount to the impact that the proposed development would have on the public and surrounding development. And then we also like to include language that requires the specific conditions to be written into the development permit itself.

Schwab: Next slide. Gail, do you have anything to add to all of that?

Easley: Well, as you've already heard, some of the ordinances may be very general, and others very detailed. And both situations result in an occasional problem. For example, if the conditions that are set forth in the ordinance are too specific, it's really going to be difficult to assign the appropriate condition that's going to meet the individual circumstances.

It also happens that when the development commences, the circumstances that we find in the field give rise to the need to modify the conditions somewhat. Again, if the standards that have to be followed from the ordinance are too specific, there is no room for the flexibility needed to make those minor modifications, again, to meet individual circumstances.

On the other hand, I often see ordinances that have very few, or even no standards for conditional uses, even no list of specific uses that could be permissible if the standards are applied. This situation often leads to treating similar situations with different standards. That's an extreme case of that ad hoc basis that Craig was describing. Let's look at the next slide.

Schwab: Gail, we've discussed variances before, but please remind us what the difference is between a standard variance and the conditional use, special exception, or special use. What are the basic rules for granting these variances?

Easley: Well, let me call that first situation a "dimensional variance" and the second situation a "conditional use." In the first situation, the variance provides a relief valve. This is necessary for situations where applying the standards in the zoning ordinance to an individual piece of property that has unique circumstances will result in the inability of that property owner to make reasonable use of his property. This is a situation that we call a "hardship." So this variance is related directly to the property. Variances of this type are typically dimensional. As Karin mentioned earlier, they should not be caused by actions of the property owners. Sometimes the ordinance calls this a self-imposed situation. And the hardship shouldn't refer to economic considerations or the preferences of the property owner. And finally, it's important that the variance, if it's granted, should be the minimum that's needed to allow reasonable use of the property.

Let's look at the next slide and talk about the second situation, and that is conditional uses. This is related to using the property, rather than the dimensional standards for developing the property. The use itself may be permissible if we can assign some conditions during the approval process that address the characteristics of the use that might result in impacts greater than those associated with the rest of the uses that are permissible by right. The idea here is that the conditions—that is, the additional standards—would limit or mitigate the impacts to a level that's consistent with the impact from those uses that are allowed by right. It's important to note

that there is no need to show hardship in a conditional use situation, unlike the dimensional variances that I described first.

Schwab: Let's go to the next slide. When do zoning boards of appeal get involved in granting these conditional uses, Gail?

Easley: Well, as you've heard on other parts of this discussion, the answer varies by state. Most states—but certainly not all of them—have enabling legislation that sets forth the responsibilities assigned to the zoning board of appeals, which as people probably know, has different names across the country, and the responsibilities assigned to the planning commission.

A planning commission may be responsible for the matters that are related to use and site design, such as conditional uses described in the zoning ordinance. However, it's also common to assign the zoning board of appeals not only the variance process, but also the conditional use process. I think the idea there is that the conditional use is a departure from the “regular” or “by right” uses and standards that are laid out in the zoning ordinance. For example, Florida and Georgia do not have enabling legislation for the zoning board of appeals. So the local governments there have wide latitude in determining how these various situations will be handled. As you heard before—and we can't emphasize enough—it's important to review the legislation in your state as well as your local ordinances to be sure you understand the roles and responsibilities for the zoning board of appeals and for the planning commission.

Schwab: Okay, next slide. Karin, in Iowa, you've made some changes in how you handle use variances. Could you tell us about these changes and why you made them?

Franklin: Sure. In Iowa City, we used to have very limited conditional uses and relied on the variance process for both use and dimensional variations. We found that the board of adjustment was granting at least dimensional variances with somewhat of abandon. So when we adopted a new code a few years ago, we distinguished between use and dimensional variances and instituted the concept of special exceptions, which is very similar to conditional uses, for a number of dimensional variations and for uses that are appropriate in a given zone, but require a higher level of scrutiny than a use by right. Use variances themselves are extremely rare, as they should be. In fact, in our current local zoning code, use variances are explicitly prohibited.

Our board considers special exceptions for variations in dimensional requirements such as setbacks for reductions in parking requirements and as I indicated earlier for the location of certain uses in given zones. These are all specified in our zoning code, which is developed by the planning commission. So if you want to pursue a special exception as a property owner, it must be explicit in the zoning code that you can pursue that special exception for the particular thing that you're after. Otherwise, you still have to go through the variance process.

But the planning commission is the group that legislatively sets what the special exceptions are going to be, prescribes those issues to be addressed by the conditions that the board then would assign in a particular instance. And these things can be like pedestrian access or neighborhood compatibility. The commission therefore outlines the broad strokes of issues to be considered legislatively. The board then looks at the specific conditions for a given project or a given site in a quasi-judicial forum.

Schwab: Next slide. In some places, use variances aren't even allowed. Gail, could you explain why?

Easley: Well, most states do not authorize the use variance. And I think it's important that if a property owner wants to make use of his property in a way that is not permissible in the zoning district, the proper path to follow is rezoning. And you heard Craig speak about this. I think even in those cases where the use variance is permissible, the preferred route is to rezone the property if the property owner wants to make a different use. Certainly this is more straightforward, and I don't think we should be making exceptions to our zoning ordinance with the grant of a use variance.

Schwab: Gail, in your book, you discuss the types of conditions that may be set. As we move to the next slide, could you tell us what are some of the typical conditions for on site?

Easley: Certainly. Now remember that Karin mentioned that review standards might be broad in the code or in the ordinance, but specific as you apply it to a particular property. So if we're looking at onsite conditions, they're intended to ensure compatibility with adjacent development. One of the more common design conditions that I see is a height limitation. We know that a building that is significantly taller than neighboring buildings can have some negative impacts, such as shadowing, loss of privacy, perceived crowding and aesthetic

concerns. A condition that's assigned to limit the height or to require a transition in heights from one building to the next will mitigate these concerns.

Other typical site design features are setbacks of the building to provide consistency in building placement with neighboring buildings, as well as appearance and other aspects of urban design. There are a number of other compatibility standards that should be considered: the amount and location of landscaping; a big problem is the location of dumpsters; and the location of sheds or outdoor storage areas. Fences—both the height and the design of fences should be considered, as well as the height of the fence and the direction that the finished side will face. Lighting is a particular problem, both the intensity as well as the location of the outdoor lighting. And then finally signs are another site design feature where conditions may be assigned to either the size of the sign or the placement of the sign. All of these again are intended to address compatibility of the use with its neighbors.

Schwab: Okay, next slide. Karin, what about offsite conditions? Can you tell us about those?

Franklin: Certainly. Some of the offsite conditions we look at regularly are traffic-related. If the project is going to have an impact on traffic congestion or circulation in the immediate area, we might require an acceleration or deceleration lane. And this is to handle the new traffic that's coming from the project under consideration, entering or exiting in a particularly heavy thoroughfare. We might also limit access points to a site, and that happens particularly on arterial streets.

One of the other things that is looked at with some frequency is whether there needs to be additional signalization, either vehicular traffic signal or pedestrian walk light. And these items can be exacted or conditions imposed as part of the whole approval process. And it's related to that nexus issue that Craig raised, that the circumstances that are being created by the particular project warrant these conditions.

If I might add a couple to Gail's list—hours of operation are a standard that has been used; looking at the use of amplified outdoor speakers in certain situations; and traffic circulation onsite, particularly when we're looking at mixed use projects—all of these things are conditions that have been used in various circumstances.

Schwab: Okay, well, this ends our program. And on behalf of the American Planning Association and the Lincoln Institute of Land Policy, I want to thank our panelists for their excellent insights and their fine advice. It's been a stimulating hour. And I also want to thank our staff as well as Armando Carbonell and Judith Martin of the Lincoln Institute for their assistance in content development. This is Jim Schwab, and I thank you all for joining us today. Go out and keep up the planning. Thank you.