

Difficulties Standard for Area Variances

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I. INTRODUCTION

Zoning variances have played a vital role in avoiding possibly adverse constitutional rulings by adding a modicum of flexibility to zoning law since zoning was first introduced in the United States barely one hundred years ago. Zoning variances operate similarly to waivers or variances granted administratively in other areas of the law, when strict application of a general rule would be contrary to the goals of the regulatory scheme or unjust in the circumstances of a particular case. When the first zoning statutes were developed, the original proponents thought providing for variances was essential to prevent strict enforcement of restrictions on specified uses within a zoning district being overturned as an unconstitutional taking of private property. As early state and federal cases consistently upheld the

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constitutionality of zoning, the administration of zoning variances came to focus most directly on relieving hardship and preventing injustice.

Over time, two distinct types of variances emerged in the development of zoning law: “use variances” that allowed the use of a specific tract of land that was otherwise prohibited within the surrounding zoning district; and “area variances” (sometimes called dimensional or nonuse variances), that only relaxed a technical zoning requirement governing development of a specific site for a project that was an authorized use of the land. Notwithstanding the distinctively different purposes served by these two types of zoning variances, two-thirds of U.S. states, including Iowa, apply the same strict requirements for granting them both. This essay posits that applying identical standards to justify zoning officials granting area variances and granting use variances is irrational and hampers sensible land development, and argues for reforming zoning law, either judicially or legislatively, to create a “practical difficulties” standard to govern the granting of area variances. A path to needed judicial reform is presented in this essay along with a draft statutory amendment to accomplish this reform legislatively in Iowa.

II. BACKGROUND

U.S. zoning law is not based on an ancient body of Anglo-American law, nor is it even an American innovation. The idea of separating differing uses of land into discrete districts, with uniform regulations restricting the specific uses of land within each separate district, had its roots in German land law. The concept of zoning migrated to the United States around the turn of the 20th century. New York City adopted the first comprehensive zoning system in the United States in 1916, partly in response to a tragic 1911 fire in the city’s garment district in which 146 workers died, 129 of them women.¹ In his book, *The Zoning Game*, zoning guru Richard F. Babcock noted that zoning law started slowly in the United States, but rapidly gained popularity in the “Roaring Twenties,” along with the Stutz Bearcat, the speakeasy, F. Scott Fitzgerald, and the Lindy Hop. Babcock observed that among these Twenties phenomena only zoning law has stood the test of time in American culture.²

Much of the increased national attention to zoning law in the 1920s can be attributed to two strong influences—an official push in support of zoning by Iowa’s native son, Herbert Hoover, and a landmark United States Supreme Court case. Before Hoover was elected President in 1928, he served for several years as U.S. Secretary of Commerce under President Warren G. Harding. In 1922,³ four years before the United States Supreme Court blessed zoning as

1. RICHARD F. BABCOCK, *The Zoning Game: Municipal Practices and Policies* (1966).

2. *Id.* at 3.

3. Coincidentally, 1922 was also the year the landmark “takings” case, *Pennsylvania Coal Co. v. Mahon*, was decided. In this case, Justice Holmes tackled what he later described as the petty larceny of the police power and ruled that a state regulation that excessively diminished the value

a constitutionally permissible method of land use regulation in *Village of Euclid v. Amber Realty Co.*,⁴ Hoover's Commerce Department sought to promote the embryonic zoning movement by drafting, disseminating and promoting an early version of what we would now call a model law or a uniform state act. Hoover's initiative was entitled the "Standard State Zoning Enabling Act" ("SSZEA").⁵ The SSZEA was widely circulated by the Commerce Department as draft legislation recommended by the Commerce Department to be adopted by states to guide the expansion of zoning in the United States.⁶ By the time the landmark *Euclid* case was decided in 1926, forty three states had adopted some version of the SSZEA as the framework for their state statutes enabling local governments to engage in zoning.⁷

In 1924, Iowa became one of the first states to enact the SSZEA.⁸ Most of the original language of this Standard Act is still found in Chapter 414 of the Iowa Code authorizing City Zoning, and in Chapter 335 authorizing County Zoning. Counties were not authorized to engage in zoning until 1950, much later than cities.⁹ Iowa Code Chapter 335 nevertheless closely tracks the

of private property without providing just compensation was an unconstitutional taking under the Fourteenth Amendment. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922).

4. *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 389–90 (1926).

5. The SSZEA is no longer in print as a U.S. Government document. It can be found, reproduced in full online. DEPT. OF COMMERCE, ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (1926), <http://nvlpubs.nist.gov/nistpubs/Legacy/BH/nbs-buildinghousing5a.pdf> (last visited Oct. 14, 2017). See also ARDEN H. RATHKOPF, DAREN A. RATHKOPF & EDWARD H. ZIEGLER, JR., 5 RATHKOPF'S THE LAW OF ZONING AND PLANNING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS: (RECOMMENDED BY THE U.S. DEPARTMENT OF COMMERCE, 1926) app. A (4th ed. 2005) (2017 Supp.).

6. In 1928, six years after promulgating the SSZEA, the Commerce Department released a second model law, the Standard City Planning Enabling Act, which was not adopted nearly as widely as the SSZEA. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AMERICAN PLANNING ASS'N, <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Oct. 14, 2017). The timing of these two Standard Acts puzzled land use planning scholars because it was generally agreed at the time that comprehensive planning should come before enacting a zoning ordinance or amending an existing zoning ordinance. Indeed, over time, the wisdom of basing zoning regulations, and particularly changes in zoning regulations, on a legally-adopted comprehensive plan has become well accepted in land-use planning law. Courts concerned that piecemeal amendments of the zoning code would create undesirable "spot zoning" came to insist that any rezoning amendment must be consistent with the operative comprehensive plan. Iowa did not adopt the SPZEA, but over time did enact some of its planning principles. See A. Dan Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69, 82–83 n.44 (1975).

7. See, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 227–40 (Daniel R. Mandelker et al. eds, 7th ed. 2008).

8. See dates of enactment postscript to Iowa Code ch. 414 (2017).

9. IOWA CODE § 335 (1950); IOWA CODE § 414 (1924).

SSZEA, except for special provisions insulating specified agricultural activities from county regulation.¹⁰

Zoning pioneers recognized very early that by requiring uniformity among uses allowed within a specific district, zoning created a somewhat monolithic rigidity in the use of regulated land.¹¹ In response, the SSZEA provided several mechanisms specifically intended to introduce some flexibility into zoning—validating non-conforming uses, rezoning via amendment of the zoning code, approval of special exceptions, and granting of variances. Whereas rezoning is a legislative function performed by the local city council or county board of supervisors, approving special exceptions and granting variances are quasi-judicial actions taken by an administrative agency, typically called the board of adjustment or the board of zoning appeals.

From the very beginning of U.S. zoning law, a board of citizen volunteers appointed by the local government was given administrative discretion to grant variances. Variance were authorized in cases where strict enforcement of the zoning regulations was contrary to the public interest because: (1) it imposed an “unnecessary hardship” on the affected property owner; (2) it was contrary to the spirit of the zoning ordinance; or (3) it was simply unjust. As noted earlier providing this discretion to grant variances was sometimes explained as a constitutional safety valve that allowed zoning authorities to avoid defending contested “takings” claims that courts might vindicate to the detriment of the entire zoning system.¹² One example of this worry was found in the original Virginia zoning enabling statute, which prior to 2009, specifically authorized granting a variance for cases involving “undue hardship *approaching confiscation*.”¹³

Iowa Code sections 414.7 and 335.10 require cities and counties to create boards of adjustment with five citizen members.¹⁴ Code sections 414.12 and 335.15 prescribe identical powers to be exercised by city and county boards of adjustment to interpret, implement, and enforce zoning

10. See IOWA CODE § 335.2 (2016) (exempting from county zoning all “land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used”).

11. See DANIEL R. MANDELKER, *LAND USE LAW* 529–40 (7th ed. 2016); ALLAN D. VESTAL, *IOWA LAND USE AND ZONING LAW* 172 (Iowa Law School CLE Book 1979).

12. See *generally* *Nectow v. Cambridge*, 277 U.S. 183, 185 (1928) (where, in the second zoning case to reach the U.S. Supreme Court, an entire city-zoning ordinance was struck down because its application to 100 feet of a single property owner’s lot was found without justification within the police power); see also *Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 676 N.W.2d 401, 411–12 (Wis. 2004).

13. VA. CODE ANN. § 15.2-2309 (2008) (emphasis added).

14. IOWA CODE § 414.7 (2016); IOWA CODE § 335.10 (2016).

ordinances. Although adopted twenty-six years apart, both of these Iowa Code sections were taken from section 7 of the SSZEA.¹⁵

As the relevant provisions from the SSZEA adopted in Iowa demonstrate, special exceptions and variances represent two quite different approaches to land use regulation. Special exceptions are pre-planned adjustments, intended to carry out the legislative design of the zoning system, while variances can often act to disrupt the legislative design. To be considered for approval as a special exception, a land use must first be expressly provided for within the zoning district for which it is sought.¹⁶ When this requirement is met, the proposed land use may be approved, but only if the board of adjustment affirmatively finds it to be fully compatible with the local neighborhood for which it is requested. Typically this decision is based on applying a short list of criteria stipulated in the local zoning ordinance.¹⁷ In contrast, by granting a variance the board of adjustment authorizes a landowner to make a use of the land that is otherwise forbidden within the relevant zoning district. Under the relevant statute, variances are to be approved only on a convincing showing by the land owner that he/she would experience an “unnecessary hardship,” if the variance is not granted.¹⁸

Throughout much of the history of U.S. zoning law, variance litigation almost always involved granting relief from the strict restrictions on forbidden land uses that zoning regulations imposed within a specific district, hence the term “use variance.” It is worth noting that the SSZEA did not distinguish between use variances and area variances, so neither did most of the state zoning statutes and court decisions based on the SSZEA. As zoning law matured during the middle one-third of the twentieth century, zoning scholars began to express alarm that boards of adjustment were much too eager to grant requests for use variances,¹⁹ allowing many conflicting uses of land that were not otherwise authorized within the zoning district.²⁰ Zoning treatises of the time expressed grave concerns that the ease with which use

15. County zoning was not authorized in Iowa until 1950. Compare IOWA CODE § 414.7 (2016) and IOWA CODE § 335.10 (2016), with *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, *supra* note 6.

16. See *Vogelaar v. Polk Cty. Zoning Bd. of Adjustment*, 188 N.W.2d 860, 862 (Iowa 1971).

17. IOWA CODE §§ 335.10(2), 414.7(2) (2017).

18. IOWA CODE § 335.15(3) (2017) (detailing the board of adjustment’s powers at a county level to grant variances); IOWA CODE § 414.12(3) (2017) (detailing the board of adjustment’s powers at a city level to grant variances).

19. E.g., Jesse Dukeminier Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 291–303 (1962).

20. E.g., Joseph H. Bornong & Bradley R. Peyton, Contemporary Studies Project, *Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083, 1215 (1983) (reporting a 90% rate of variance approval by Iowa counties surveyed between 1980–1982).

variances were obtained threatened the basic integrity of the zoning system.²¹ These scholarly works routinely opened their discussion of variance law with an admonition something like this: “The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.”²² At this point in time, the widespread concern about unjustified grants of variances was focused exclusively on use variances; area variances were rarely sought and even more infrequently litigated.

Eventually, state courts around the country responded to this concern from land use officials and scholars, and they began to heighten their scrutiny of grants of use variances. These efforts reached a turning point in 1939 in *Otto v. Steinhilber*, when New York’s highest court strictly construed the “unnecessary hardship” requirement in New York’s zoning enabling act by imposing a three-pronged set of requirements for the grant of a variance.²³ The three-pronged test required that:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed [in the zoning district]; (2) [] the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood . . . and (3) [] the use to be authorized by the variance will not alter the essential character of the locality.²⁴

The New York Court of Appeals further held in the *Otto* case that all three of these new requirements must be met before a variance could be granted.²⁵ Over the next several decades, most state supreme courts around the nation, including Iowa’s, adopted New York’s restrictive interpretation of the “unnecessary hardship” requirement,²⁶ and the rate at which use variances were approved slowed down markedly.²⁷ Today, a number of states no longer

21. See e.g., BABCOCK, *supra* note 1, at 155–56 (1966); SARA C. BRONIN & DWIGHT H. MERRIAM, 2 RATHKOPF THE LAW OF ZONING AND PLANNING § 23 (4th ed. 2005).

22. *Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986) (en banc). See BRONIN & RATHKOPF, *supra* note 21, § 37.06. See Lea S. VanderVelde, *Local Knowledge, Legal Knowledge and Zoning Law*, 75 IOWA L. REV. 1057, 1069 (1990). Professor VanderVelde’s article reported in detail on her personal experience as a member of the Iowa City Zoning Board of Adjustment. A second article also based on this experience focused more heavily on the problem of unequal treatment by citizen boards deciding variance requests under vague standards. See Lea S. VanderVelde, *Legal Pluralism and Equal Treatment in the Context of Zoning Variances*, 33 J. LEGAL PLURALISM AND UNOFFICIAL L. 91 (1993).

23. *Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939). The *Otto* case involved the grant of a use variance, and the court made no mention of the possibility that a lesser requirement might be appropriate for an area variance. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78, 81–83 (Iowa 1962) (Court reversed grant of variances for lot size, set-back reduction, and excess building height on the ground that the “unnecessary hardship” standard was not met.)

27. After a flood of law review commentary on zoning variances from the 1950s through the 1970s, scholarly discussions of variances in the legal literature during the past several decades,

even authorize any form of use variance in their municipal zoning codes, thereby limiting organic development of their variance law to regulation of area variances.²⁸ State law in Iowa clearly still allows use variances, but zoning ordinances in a few Iowa cities now expressly forbid them, authorizing only area variances.²⁹

For nearly forty years after section 414.12 was enacted, the Iowa Supreme Court dealt with numerous cases involving the granting and denial of variances on more or less “ad hoc” bases that focused primarily on vague language in the provision other than the “unnecessary hardship” requirement. These early decisions sought to apply standards like “public interest,” “substantial justice,” and “the spirit of the ordinance,” which resulted in most use variances granted by city and county officials being upheld.³⁰ Finally, in 1962 the Iowa Supreme Court tightened Iowa variance law dramatically. In *Deardorf v. Board of Adjustment of the Planning and Zoning Commission of the City of Fort Dodge*, the Court agreed with many other state courts that, to maintain the integrity of the zoning system, variances should be granted only “sparingly.”³¹ In this spirit, the *Deardorf* Court quoted *Otto* approvingly and adopted *verbatim* New York’s three-pronged test for applying the “unnecessary hardship” requirement.³² Interestingly, *Deardorf* actually involved a dispute over the granting of several area variances, and not a use variance, as was the case in *Otto*.³³

The area variances at issue in the *Deardorf* case concerned the lot size, set back requirements and building height limits for the lot at issue, which had been proposed for the construction of an apartment building.³⁴ No use variance was needed because the lot on which the apartment building was to be build was already properly zoned for multi-family development. When the Fort Dodge Board granted all of the variances sought, neighbors objected and continued to appeal all the way to the Iowa Supreme Court. After embracing the *Otto* standards, the Court found that none of the three prongs of the New

except for occasional student Notes or Comments, have been few and far between. New York zoning law is an exception to this observation. The Syracuse Law Review publishes an annual update of New York law, including a specific section entitled Zoning and Land Use Law, which regularly tracks judicial and legislative modifications of New York zoning laws, including variances.

28. See, e.g., GAIL GUDDER, 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 58.4 (listing 14 states that restrict or no longer allow use variances).

29. For example, the Iowa City zoning code provides: “Under no circumstance may the board grant a variance that would allow a land use, other than those specifically allowed in the zoning district in which the subject property is located.” IOWA CITY, IA., CODE § 14-4B-2B (2017).

30. See e.g., Zimmerman v. O’Meara, 245 N.W. 715, 717 (Iowa 1932); Anderson v. Jester, 221 N.W. 354, 356 (Iowa 1928).

31. *Deardorf v. Bd. of Adjustment* 118 N.W.2d 78, 83 (Iowa 1962).

32. *Id.* at 81.

33. *Id.* at 79.

34. *Id.*

York test were met and reversed the city board's grant of the variances.³⁵ The Court's opinion also suggested obliquely that for any Iowa variance grant to survive judicial review, all three prongs of the requirements adopted in the *Deardorf* case must be met, as was true under *Otto*.³⁶ Subsequent Iowa cases have consistently endorsed this strict interpretation of the "unnecessary hardship" requirement.³⁷

Thus, at the very outset of its adoption of a strict interpretation of the "unnecessary hardship" standard, the Iowa Supreme Court missed a golden opportunity to consider whether grants of area variances should be reviewed under less demanding standards. Ten years later, the Iowa Supreme Court expressly recognized the essential difference between use variances and area variances, but decided to continue to apply the same strict interpretation of the "unnecessary hardship" standard to both types of variances.³⁸ Another decade later, the Court reaffirmed its application of the "unnecessary hardship" standard to area variances in *Graziano v. Bd. of Adjustment*.³⁹ Today, although nearly one-third of U.S. states have abandoned the strict "unnecessary hardship" test for area variances, and apply some version of a "practical difficulty" test, Iowa continues to apply a strict "unnecessary hardship" requirement to both use and area variances.⁴⁰

III. THE CENTRAL PROBLEM POSED BY REQUESTS FOR AREA VARIANCES IN IOWA

In modern zoning law, as use variances became ever more difficult to obtain, the number of requests for area variances increased greatly. An area variance is clearly different in nature and effect than a use variance, and it imposes a much less serious threat to the integrity of a local zoning scheme. Use variances pose the danger of bringing about harmful changes in the character of a neighborhood, but area variances typically focus on the relaxation of specific technical requirements on how an authorized use may be positioned and developed on the owner's land. Common area variances concern such requirements as minimum lot size, per cent of lot coverage by improvements, set-back distances, back-yard depth, side yard widths, height

35. *Id.* at 84.

36. *Id.* at 82.

37. *See generally* *Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537 (Iowa 1984) (confirming that proof of hardship is the essence of a variance, and that landowner requesting a variance must prove presence of all three prongs of the "unnecessary hardship" requirement).

38. *See* *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972) (reinforcing the position that variances should be granted "with great caution or in exceptional instances only" (quoting *Deardorf*, 118 N.W.2d at 83)).

39. *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233 (Iowa 1982).

40. *See* *Greenawalt v. City of Davenport*, 335 N.W.2d 537, 541 (1984) (no variance from fence height requirement); *City of Des Moines v. Ruble*, 193 N.W.2d 497, 499 (Iowa 1972) (no variance from lot-size requirement).

of structures, and building bulk or density.⁴¹ Most often, area variances are sought with respect to development of property zoned for single-family use, but they may also be sought for waiver of such requirements as off-street parking for multi-family zones, specified hours of operation for commercial business, and performance standards for industrial zones.⁴²

A vexing problem arises in Iowa and a number of other jurisdictions where the authority of a board of adjustment to grant an area variance is still governed by the classic SSZEA's "unnecessary hardship" standard.⁴³ The strict three-prong "unnecessary hardship" test applied by Iowa courts and courts in many other states may make perfect sense when courts seek to limit grants of use variances to truly extraordinary cases, but it does not work at all well when applied to grants of area variances. The big stumbling block for granting area variances under the customary "unnecessary hardship" standard is the first prong of the three-part test— inability to make any reasonable use of the land or failure of the land as zoned to produce a reasonable return.⁴⁴ The second and third prongs of the prevalent three-part test (uniqueness and no change in the character of the neighborhood) usually present few problems when applied to a request for an area variance.

The key problem lies in the fact that in almost all cases where area variances are sought, it is verifiably not true that, if the variance is not granted, there is no reasonable use that can be made of the land or that it is economically impossible for the land to yield a reasonable return. This is because in the typical area variance case, if the variance is not granted, the land at issue can almost always be put to some reasonable use and produce a reasonable return. The case for an area variance is usually based on the claim that, an area variance is needed so that the proposed development will be better adapted to the specific tract of land, the project will be significantly less expensive, or perhaps it will be made more environmentally sensitive or aesthetically pleasing to neighbors. In short, while the owner of the project will not face an "unnecessary hardship" as currently defined, if the area variance is not granted, he or she will definitely face serious practical difficulties in proceeding with the project as proposed, unless an area variance is granted. Thus, the conventional strict interpretation of the first prong of the "unnecessary hardship" requirement means that even the most modest request for an area variance, fully supported by neighbors, and meeting the standards in every other way, must be denied by the board of adjustment, or

41. See Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?*, 39 URB. LAW. 877, 882 (2007).

42. Compare *Baker v. Bd. of Adjustment*, 671 N.W.2d 405, 407 (Iowa 2003), with *Deardorf*, 118 N.W.2d at 79, and *Cyclone Sand & Gravel Co. v. Zoning Bd. of Adjustment*, 351 N.W.2d 778, 780 (Iowa 1984).

43. See *Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 542 (Iowa 1984).

44. *Deardorf*, 118 N.W.2d at 83–84.

if granted and challenged by neighbors, it must inevitably be reversed by a reviewing court for failure to meet the first prong of the prevailing “unnecessary hardship” requirement.

IV. REFORM IDEAS

A. ONE RISKY OPTION: RECLASSIFYING AREA VARIANCES AS SPECIAL EXCEPTIONS TO AVOID THE “UNNECESSARY HARDSHIP” STANDARD

A few Iowa municipalities have sought to escape the “unnecessary hardship” requirement by reclassifying area variances as “special exceptions” in their local zoning ordinances,⁴⁵ and then expressly adopting what amounts to a “practical difficulties” standard for granting this unconventional special exception.⁴⁶ The frustration that has triggered this attempt to avoid the “unnecessary hardship” requirement is easy to understand, but I think this “work around” is a questionable approach. While Iowa Code sections 414.12 and 335.15 do not provide any express guidance as to what types of uses can be allowed as special exceptions, most city and county ordinances include a set of sensible standards designed to assure that approving the requested special exception will not harm neighboring properties and is consistent with the spirit of the local zoning ordinance.⁴⁷ Typically, these standards are much easier to satisfy than the “unnecessary hardship” requirement for variances. Thus, area variances recast as special exceptions become relatively easy to obtain.

The problem I have with recasting area variances as a new species of special exceptions is that it ignores the fundamentally different purposes these two land use devices are intended to serve in implementing zoning. As the relevant provisions from the SSZEA adopted in Iowa demonstrate, special

45. See, e.g., DES MOINES, IA. CODE § 134-64 (2017). The Des Moines ordinance provides that:
The board of adjustment shall have the power and duty to:

...

(4) Permit the exceptions in this subsection to the district regulations set forth in this chapter:

a. Exceptions to any setback, area, length, width, height, yard, size or projection limitation or to the minimum required number of off-street parking or loading spaces; provided such an exception may be granted only where:

1. (a) Such exception does not exceed 50 per cent of the particular limitation or number in question; or

(b) Such exception is from a yard requirement to permit an addition to an existing legal nonconforming building and such addition extends no further into the required yard than the existing building.

DES MOINES, IA. CODE § 134-64 (2017).

46. *Id.* See also CUMMING, IA. CODE § 170.41(2)(E) (2017) (“Practical Difficulties”).

47. See, e.g., IOWA CITY, IA., CODE § 14-4B-3 (2017) (listing seven criteria for the approval of a special exception).

exceptions and variances are intended to operate as quite different types of land use regulations. This is particularly true with respect to area variances, which are typically minor tweaks to various technical requirements for the siting and development of legally authorized land uses. Special exceptions bear a much closer kinship to use variances in that they approve a specific use that is not allowed as a matter of right, but may be permitted if the board determines it is compatible with the surrounding neighborhood. The contrast between special exceptions and area variances becomes apparent when it is remembered that area variances are typically minor tweaks to various technical requirements for the siting and development of legally authorized land uses

Over the years, the Iowa Supreme Court has had numerous occasions to examine the difference between special exceptions, governed by subsection 2 of sections 414.12 and 335.15, and variances, governed by subsection 3 of those sections. The Iowa Supreme Court has consistently explained that special exceptions are land uses that require express authorizations in a zoning ordinance, and they are intended to allow specified uses of land that the legislative body has determined may be compatible with the primary land uses allowed in a zoning district and are potentially beneficial to the community.⁴⁸ Such pre-authorized land uses, however, still require formal review and approval by the board of adjustment to confirm that, as proposed and sited, they will pose no significant threat to the surrounding neighborhood and will be consistent with the other primary uses authorized for the particular district. Special exceptions that are commonly provided in city zoning ordinances across the country include allowing schools, churches, senior centers, group homes, and private preschools in low-density, single-family residence zones. In Iowa, specific exceptions in city zoning ordinances have included a shelter house, a mortuary, and a nursing home.⁴⁹ Iowa's county zoning ordinances that allow auction barns, sanitary landfills and sand and gravel extraction operations as special exceptions in rural areas.⁵⁰ Again, these special exceptions are approved only when the zoning ordinance contemplates them and the board of adjustment determines that all the ordinance requirements are met, and their proposed location will not be injurious with respect to the neighborhood around them.

The Iowa Supreme Court's interpretation of Iowa Code sections 414.12 and 335.15 is consistent with state courts' rulings around the country regarding the roles of special exceptions and variances in zoning

48. See generally *Cyclone Sand & Gravel Co. v. Zoning Bd. of Adjustment*, 351 N.W.2d 778 (Iowa 1984); *Buchholz v. Bd. of Adjustment*, 199 N.W.2d 73 (Iowa 1972).

49. *Bontrager Auto Serv., Inc. v. Iowa City Bd. Of Adjustment*, 748 N.W.2d 483 (Iowa 2008) (shelter house); *Johnson v. Bd. Of Adjustment, City of W. Des Moines*, 293 N.W.2d 873 (Iowa 1976) (mortuary); *Depue v. City of Clinton*, 160 N.W.2d 860 (Iowa 1968) (nursing home).

50. *W&G McKinney Farms L.P. v. Dallas Cty. Bd. of Adjustment*, 674 N.W.2d 99 (Iowa 2004) (sand and gravel extraction); *Buchholz*, 199 N.W.2d at 73 (landfill).

administration,⁵¹ and with the consensus understanding among land use scholars about the fundamental differences between special exceptions and variances.

Proponents of reclassifying area variances as special exceptions would no doubt argue that, under the Iowa Constitution, Home Rule for cities and counties allows local governments to experiment with new or hybrid forms of land use regulations, so long as such changes are not expressly forbidden by state statutes.⁵² It is unlikely, in my opinion, that an Iowa court would find the Home Rule authorization alone sufficient to justify this practice. For a city or county ordinance to be valid under Home Rule in Iowa, however, it cannot be inconsistent with state law.⁵³ As explained above, reclassifying a traditional area variance as a special exception flied directly in the face of the separate grants of powers in Iowa Code sections 414.12 and 335.15.⁵⁴ Such an initiative would also conflict with a long line of Iowa Supreme Court decisions, which clearly contemplate distinctly different regulatory roles in zoning for special exceptions and variances

Abraham Lincoln once famously asked during his law practice career: “How many legs does a dog have if you call his tail a leg? Four, because calling a tail a leg does not make it a leg.”⁵⁵ Iowa local governments can call an area variance a special exception, but it should still remain a variance in the eyes of the law, subject to the “unnecessary hardship” standard enforced by the Iowa Supreme Court. If and when attempts to bypass the “unnecessary hardship” requirement for variances by reclassifying them as special exceptions is exposed to serious legal scrutiny, I predict Iowa courts will invalidate local zoning ordinances that deliberately blur this well-established line.

51. *Vogelaar v. Polk Cty. Zoning Bd. of Adjustment*, 188 N.W.2d 860, 862 (Iowa 1971).

52. One modern treatise on zoning law make the following claim: “It is clear that the zoning pioneers did not intend the “special exception” to be anything more than a supplement to the basic technique of “pre-zoning” a municipality into a number of different use and density districts.” Two cases are cited to provide an explanation of how special exceptions are intended to work. *Rockhill v. Twp. Of Chesterfield*, 128 A.2d 473 (N.J. 1957); *Tullo v. Twp. of Millburn*, 149 A.2d 620, 624–25 (N.J. App. Div. 1959) (“[C]ertain uses, considered by the local legislative body to be essential or desirable for the welfare of the community [could be] entirely appropriate and not essentially incompatible with the basic uses in [certain zoning districts], but not at every or any location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint . . .”).

53. See IOWA CONST., art. III, § 38A. Also possibly coming into play would be the Iowa Supreme Court’s interpretation of certain statutory language as intending to “preempt” local regulatory authority in a field. See *Goodell v. Humboldt Cty.*, 575 N.W.2d 486 (Iowa 1998) (holding that a statute conferring nuisance immunity on certain farming practices preempts county regulation of feedlots).

54. See IOWA CODE §§ 331.301, 304 (2017) (forbidding such conflicts if “irreconcilable” with state statutes).

55. Justin Warren, *The One Finance Book You Must Read*, EIGENMAGIC (Jan. 4, 2009), <http://www.eigenmagic.com/2009/01/04/one-finance-book-you-must-read>.

B. JUDICIALLY REDEFINING “UNNECESSARY HARDSHIP” AS APPLIED TO
AREA VARIANCES

One option for Iowa municipalities and counties intent on escaping the “unnecessary hardship” requirement for area variances is to persuade the Iowa Supreme Court to adopt a more forgiving interpretation of the relevant zoning statute. The alternative “practical difficulties” standard for considering area variances originated in the zoning codes of a few states that deviated from the SSZEA in their provisions governing variances. The relevant statutes in those states provided that variances could be granted to relieve “unnecessary hardships or practical difficulties.” Most courts interpreting this dual standard sensibly divined that the legislature must have intended for boards of adjustment and courts to apply the “unnecessary hardship” phrase to use variances and the “practical difficulties” language to area variances.⁵⁶ Consequently, the “no reasonable return” prong of the “unnecessary hardship” test was dropped from the analysis applied to area variances, and they were required only to demonstrate practical difficulties to support the grant of a variance.⁵⁷

Even without the benefit of express “practical difficulties” statutory language, courts in a handful of other states focused on the substantial differences between use variances and area variances, abandoned the rigorous interpretation of the “unnecessary hardship” requirement for area variances, and adopted a new “practical difficulties” standard as the proper test for area variances. New York, where the strict three-pronged test followed by Iowa for implementing the “unnecessary hardship” standard for reviewing variances originated,⁵⁸ has an interesting judicial history in its dealing with use and area variances. In a series of decisions over two decades, and initially without the benefit of statutory reform, New York courts developed separate “practical difficulties” and “significant economic injury” tests for area variances.⁵⁹ Confusion over when and how to apply these judicially-created tests ultimately led the New York Legislature to amend its zoning statute in 1992 to adopt a new five-factor test for the granting of area variances.⁶⁰

56. See *Krummenacher v. City of Minnetonka*, 783 N.W. 2d 721, 729 (Minn. 2010) (applying “the ‘practical difficulties’ standard . . . to review of county decisions to grant area variances, while the ‘undue hardship’ standard applies to all municipal decisions to grant variances.” (citing *In re Stadsvold*, 754 N.W.2d 323, 327–28, n.2 (Minn. 2008))); *Cromwell v. Ward*, 651 A.2d 424, 428–29 (Md. Ct. Spec. App. 1995) (explaining the difference between “variances” and “exceptions” and the relevant substantive standards to apply for each).

57. See generally *Krummenacher*, 783 N.W. 2d 721; *Ward*, 651 A.2d 424. In both cases, the first prong of the reasonable return test was dropped from the analysis applied to area variances.

58. *Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939).

59. See 2 ANDERSON, NEW YORK ZONING LAW AND PRACTICE, § 23.34, at 208–209 (3d ed. 2000).

60. N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2013). The five factors to be considered under the New York amendment are whether: (1) an undesirable detriment to nearby properties would result; (2) other feasible methods to achieve the desired result without a variance exist; (3) “the requested area variance is substantial”; (4) an adverse impact on the surrounding

Minnesota zoning law governing area variances went through a similar evolution, though in a much shorter time frame. Prior to 2010, the Minnesota enabling act provision authorizing variances employed both the “undue hardship” and “practical difficulties” standards to guide the board’s decisions⁶¹ and Minnesota case law interpreting this statute was inconsistent in directing boards of adjustment on how to apply these seemingly conflicting directives. In 2010, the Supreme Court of Minnesota ruled in *Krummenacher v. City of Minnetonka*⁶² that boards should apply only the “practical difficulties” standard when considering applications for area variances.⁶³ The Court noted that the plain meaning of the “unnecessary hardship” language in the zoning enabling act required a more searching analysis by the board that what was needed under the “practical difficulties” test, which was more appropriate for area variances.⁶⁴ The next year, the Minnesota legislature revised the zoning enabling act provision governing variances to make clear that different standards were to be applied to use and area variances, with area variances granted under a “practical difficulties” standard.⁶⁵

Ohio established factors to implement the “practical difficulties” standard for area variances through case law in 1986. In *Duncan v. Village of Middlefield*,⁶⁶ the Ohio Supreme Court adopted a “practical difficulties” standard for area variances and then proceeded to promulgate seven factors to be weighed in determining whether the area variance should be granted.

neighborhood would result; and (5) the need was self-created. Although the new statute did not use the term “practical difficulties” expressly, legal commentators subsequently agreed that the new legislation was intended to codify the “practical difficulties” test developed by New York’s courts. *Id.*

61. MINN. STAT. ANN. § 394.27 (West 2005) (current version at MINN. STAT. § 394.27 (2011)).

62. *Krummenacher*, 783 N.W.2d 721 (Minn. 2010).

63. In the same opinion, the Court rejected a line of cases that had interpreted the “unnecessary hardship” standard to be satisfied if a use variance could be granted in a “reasonable manner.” *Id.* at 730.

64. *Id.* at 728.

65. See MINN. STAT. § 394.27(7) (2011) (“Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control.”). In 2012, the Minnesota Court of Appeals held that the change in the treatment of area variances in the code sections governing cities and counties did not affect a separate shoreline zoning statute and its treatment of variances. See *Mutsch v. Cty. of Hubbard*, Nos. A11-25, A11-726, 2012 WL 1470152 (Minn. Ct. App. Apr. 30, 2012).

66. *Duncan v. Vill. of Middlefield*, 491 N.E.2d 692, 695 (Ohio 1986). The seven factors set forth by the court were: (1) Whether there can be any beneficial use of the property without the variance; (2) Whether the variance is substantial; (3) Whether adjoining properties would suffer substantial detriment; (4) Whether granting the variance would adversely affect the delivery of government services; (5) Whether the property owner purchased the property with knowledge of the zoning restriction; (6) Whether the property owner’s predicament feasibly can be obviated through some other method; and (7) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. *Id.*

Later cases held that meeting all of these seven factors was not necessary, because they were only “suggestive” and not mandatory.⁶⁷

The Wisconsin Supreme Court’s decision in *Ziervogel v. Washington County Board of Adjustment*⁶⁸ provides perhaps the best example of a well-considered relaxation of the unnecessary hardship requirement for area variances without the benefit of reform legislation. Wisconsin’s zoning enabling statute is based on the SSZEA, and has virtually the same statutory language authorizing variances as the Iowa Code.⁶⁹ Like Iowa, Wisconsin courts had previously adopted the three-prong *Otto* test for the granting of a variance, the first prong of which was proof that the landowner could make no reasonable use of or receive no reasonable return from the property involved without the grant of the variance.⁷⁰ In *Ziervogel*,⁷¹ the Wisconsin Supreme Court began by observing that zoning variances serve a number of important purposes:

to prevent otherwise inflexible zoning codes from precipitating regulatory takings; to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases; and, most broadly, to allow a means of obtaining relief from the strict enforcement of zoning restrictions where individual injustices might occasionally occur.⁷²

The court then ruled that applying the same narrow interpretation of the unnecessary hardship requirement to area variances as to use variances unduly restricted the discretion intended to be accorded to the Board of Adjustment in making variance decisions. In doing so, it emphasized the phrase in the enabling statute “so that the spirit of the ordinance shall be observed and substantial justice done.”⁷³

In its decision, the Wisconsin Supreme Court heavily emphasized the difference between use variances and area variances. The court argued that the law should treat use and area variances differently because they “threaten

67. See *Trent v. German Twp. Bd. of Zoning Appeals*, 759 N.E.2d 421, 429 (Ohio 2001).

68. *Ziervogel v. Washington Cty. Bd. of Adjustment*, 676 N.W.2d 401, 408–11 (Wis. 2004).

69. WIS. STAT. ANN. § 59.694 (West 2017).

70. *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78, 81 (Iowa 1962).

71. *Ziervogel*, 676 N.W.2d 401.

72. *Id.* at 406. In addition, the procedure serves other important purposes: “to prevent otherwise inflexible zoning codes from precipitating regulatory takings; to provide a procedure by which the public interest . . . can be balanced against the private interests of property owners . . . and . . . to allow a means of obtaining relief from the strict enforcement of zoning restrictions where individual injustices might occasionally occur.” *Id.* Further, “the variance functions as an ‘escape valve,’ so that when regulations that apply to all are unnecessarily burdensome to a few because of certain unique circumstances, relief from the mandates of the ordinance is provided.” (quoting E.C. YOKLEY, 1 ZONING LAW & PRACTICE § 20-1, INTRODUCTION (LexisNexis Matthew Bender 2017)).

73. *Ziervogel*, 676 N.W. 2d at 406 (quoting WIS. STAT. § 59.694(7)(c) (2004)).

the integrity of zoning ordinances in qualitatively different ways, and generally to a different extent.”⁷⁴ The court explained, “[w]hile area variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback, and so forth, use variances permit wholesale deviation from the way in which land in the zone is used.”⁷⁵ Thus, the court reasoned that “courts [should] approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance.”⁷⁶ The court ultimately held that new meaning of unnecessary hardship as applied to area variances was: “whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.”⁷⁷ Although not explicitly embracing a practical difficulties standard, the court’s use of the terms “unreasonably prevent” and “unnecessarily burdensome” carry forward much the same commitment to leniency as do statutes in other states expressly adopting a practical difficulties standard.⁷⁸

Similarly, courts in California,⁷⁹ Missouri,⁸⁰ New Hampshire,⁸¹ and Pennsylvania⁸² have either adopted a practical difficulties standard for area variances or ruled that the no reasonable return requirement of the “unnecessary hardship” standard should not be applied to them.⁸³ All states that judicially substituted the practical difficulty standard for the’ no

74. *Id.* at 408.

75. *Id.*

76. *Id.* (quoting 3 KENNETH H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING* 580 (4th ed. 1996)).

77. *Id.* (quoting *Snyder v. Waukesha Cty. Zoning Bd. of Adjustment*, 247 N.W.2d 98, 98 (Wis. 1976)).

78. The force of the reform worked by the *Ziervogel* case was underlined by the fact that the Washington County ordinance in question had expressly incorporated the “no reasonable use” requirement into the authorization to grant variances. The Wisconsin Supreme Court ruled that this home-rule based provision was invalid because it was in conflict with the state’s enabling act for county zoning as interpreted in the *Ziervogel* decision. *Id.* at 411–12. For a similar example of judicial creativity in recognizing the difference between use and area variances, and applying a less strict “unnecessary hardship” test, see *Hertzberg v. Zoning Bd. of Adjustment*, 721 A.2d 43 (Pa. 1998).

79. See generally *Walnut Acres Neighborhood Ass’n v. City of L.A.*, 185 Cal. Rptr. 3d 871 (Cal. Ct. App. 2015) (outlining the state’s standard for area variances).

80. See generally *Baumer v. City of Jennings*, 247 S.W.3d 105 (Mo. Ct. App. E.D. 2008) (denying ten-foot variance from set-back requirement).

81. See generally *Vigeant v. Town of Hudson*, 867 A.2d 459 (N.H. 2005) (affirming variance for 10-foot encroachment into wetlands area); *Boccia v. City of Portsmouth*, 855 A.2d 516 (N.H. 2004) (first prong of “unnecessary hardship” test does not apply to area variances).

82. See generally *Hertzberg*, 721 A. 2d 43 (denying dimensional variance for shelter for homeless women).

83. Pennsylvania courts, for example, have also applied a “de minimis” standard to compliance with setback and side yard requirements. See generally *E. Allegheny Cmty. Council v. Zoning Bd. of Adjustment*, 563 A.2d 945 (Pa. Commw. Ct. 1989) (applying such a standard).

reasonable use or return” prong of the New York test still require the applicant for an area variance to satisfy the other two prongs—uniqueness of the problem causing practical difficulties and not altering the essential character of the neighborhood—and appear to place serious emphasis on them.⁸⁴

As early as 1972, the Iowa Supreme Court expressly noted the significant difference between use variances and area variances, but declined the opportunity to apply a less strict version of the unnecessary hardship standard to the area variances at issue in the case.⁸⁵ Considering that the landmark *Deardorf* case concerned area variances, and that the Iowa Supreme Court has consistently applied the strict unnecessary hardship requirement to both use variances and area variances, it may not be easy to persuade the court to change course and judicially adopt a practical difficulties standard for area variances, as at least eight other state supreme courts have done. If the court were to be open to considering such a judicial reform, it is hard to imagine more persuasive arguments and reasoning than what were stated by the Wisconsin court in the *Ziervogel* case.

C. LEGISLATIVE REFORM

The idea to reform the legislation authorizing variances to substitute a less rigorous requirement for granting area variances than unnecessary hardship is not a new one. As far back as the American Law Institute’s proposed Model Land Development Code, published in 1976, a consensus of land use law specialists favored imposing a lower standard for granting area variances than for granting use variances. Section 2-202 of the ALI’s Model Code, published in 1976, proposed substituting a “practical difficulties” standard for the “unnecessary hardship” requirement for granting area variances.⁸⁶ More recently, the Model Statutes for Planning and Management of Change, published by the American Planning Association (APA) in 2002, also called for lesser justification to grant area variances.⁸⁷

The APA model legislation forbids use variances and states that zoning ordinance provisions authorizing area variances should:

- (3) provide that the variance requested is required by exceptional or unique hardship because of (a) exceptional narrowness, shallowness, or shape of a specific piece of property; or (b) exceptional topographic conditions or physical features

84. See generally *Cromwell v. Ward*, 651 A.2d 424 (Md. 1995) (applying the New York standard). No area variance was allowed because the lot at issue was not unique and the owner’s problems were primarily self-created. *Id.* at 430.

85. See generally *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497 (Iowa 1972) (deciding to overturn the grant of area variances for lot width and area).

86. MODEL LAND DEVELOPMENT CODE § 2.202 (AM. LAW. INST. 1976).

87. See generally GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002).

uniquely affecting a specific piece of property; (4) require a showing that there are no other reasonable alternatives to enjoy a legally permitted beneficial use of the property if the variance is not granted.⁸⁸

A number of states have recognized the problem created by subjecting use variances and area variances to the same strict requirement, and have adopted legislation lowering the standard for granting area variances.⁸⁹

As noted earlier, New York and Minnesota codified judicial reform in new statutes, Colorado, Maine, Delaware, and Indiana all serve as good examples of states that have engaged in legislative reform. In 1979, Colorado amended its state zoning code governing the grant of variances. The “undue hardship” standard was retained, but the authority to approve a variance request was added, if “the strict application of any regulation enacted under this [act] would result in peculiar and exceptional practical difficulties to . . . the owner of such property.”⁹⁰

In 1997, Maine adopted a statute that spelled out in detail what is required to meet the “practical difficulties” test for area variances adopted by the legislature.⁹¹ Six new requirements were included in the amended statute.⁹²

Delaware amended its zoning code governing variances in 2000 to add the language “or exceptional practical difficulties to the owner of the property”⁹³ A 2011 amendment to Indiana’s zoning code provides that “variances from the development standards (such as height, bulk, or area)” may be approved if “the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.”⁹⁴

Like judicial reforms of variance law, most state statutes adopting a “practical difficulties” test for area variances make clear that it is only the first prong of the “unnecessary hardship” test that is being eliminated, with

88. See § 10-503 Variances, *id.* at 10-53.

89. See JULIAN CONRAD JUERGENSMAYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 5.15.

90. COLO. REV. STAT. ANN. § 30-28-118 (West 2017).

91. ME. REV. STAT. ANN. tit. 30 § 4353-4-C (2017).

92. *Id.* The statute provides that a variance may be granted with a showing of practical difficulty and when any of the following conditions are present: “A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood; B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties; C. The practical difficulty is not the result of action taken by the petitioner or a prior owner; D. No other feasible alternative to a variance is available to the petitioner; E. The granting of a variance will not unreasonably adversely affect the natural environment; and F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.” *Id.*

93. DEL. CODE ANN. tit. 9, § 1313(a)(3) (West 2017).

94. IND. CODE § 36-7-4-918.5(a), (a)(3) (2011).

“practical difficulties” being substituted for the “no reasonable use or return” requirement. The other two prongs of the traditional three-part test (uniqueness of the problem and no alteration of the basic character of the neighborhood) are typically retained, though sometimes the requirements are phrased a little differently.⁹⁵ In interpreting these new provisions, several state courts have read in a “financial hardship” requirement, limiting grants of area variances to cases where the property owner proved that it was not economically feasible to go forward with the proposed project without an area variance.⁹⁶ Many of these amended statutes also authorize the board to establish limiting conditions on the grant of an area variance.⁹⁷

Reforming zoning statutes to provide a less demanding standard for granting area variances is not a new idea in Iowa. In 2010 and 2011, bills were introduced in the Iowa General Assembly to amend sections 414.12 and 335.15 to make clear that area variances should be judged by a “practical difficulties” standard and not by the strict interpretation of the “unnecessary hardship” requirement regularly applied by the Iowa Supreme Court.⁹⁸ Unfortunately, these reform bills were not paragons of legislative drafting and did not make it out of the relevant legislative committees. They have not been reintroduced in recent years.

V. PROPOSED REFORM OF THE IOWA ZONING CODE

In thinking about how best to reform Iowa’s “unnecessary hardship” requirement for area variances to adopt a “practical difficulties” standard, I have concluded that legislative reform is the best option. I seriously considered redrafting and reintroducing the bills that failed in the General Assembly several years ago. I also considered advocating a separate statute, like those adopted in Maine and Minnesota, which lays out in detail the effect of a new “practical difficulties” standard for area variances. However, it seems to me that a direct and effective reform of Iowa law can be accomplished simply by adding the words “in use” after the word “variance” in Iowa Code sections 414.12(3) and 335.15(3), and creating a new subsection (4) to sections 414.12 and 335.15. The new subsection would clearly set forth the “practical difficulties” standard to apply to area variances. The drafter’s notes

95. See COLO. REV. STAT. ANN. § 30-28-118; DEL. CODE ANN. tit. 9, § 1313(a)(3); IND. CODE § 36-7-4-918.5(a).

96. See S.S.B. 1175, 86th Gen. Assemb., Reg. Sess. (Iowa 2015) (attempting to codify the practical difficulty standard rather than the financial hardship standard).

97. The Minnesota amendment that added the “practical difficulties” standard expressly required any conditions imposed on a variance “must be directly related to and must bear a rough proportionality to the impact created by the variance.” Minn. Stat. Ann. § 462.357 (West 2017). This is no doubt an attempt to avoid a possible federal “takings” claim under *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

98. See H.F. 357, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). All three of the bills filed in 2010 and 2011 simply substituted the term “practical difficulties” for the term “unnecessary hardship.” IOWA CODE ANN. § 414.12(3) (West 2017).

explaining the new subsection should make clear that requests for area variances are to be reviewed under a “practical difficulties” standard that is different from the “unnecessary hardship” standard stated in subsection 3 of the existing law. Here is the new subsection I propose to add to both Iowa Code sections 413.12 and 335.15:

(3) To authorize upon appeal in specific cases such variance in use from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(4) To authorize on appeal in specific cases such variance from the terms of the ordinance with respect to area, dimensional or other numerical limitations as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in practical difficulties to the property owner in making a beneficial use of the property allowed by the zoning ordinance, and so that the spirit of the ordinance shall be observed and substantial justice done. Area, dimensional or other numerical limitations subject to variances include, but are not limited to, requirements for minimum lot size, setbacks, yard widths, height, bulk, sidewalks, fencing, signage, and off-street parking. To receive the requested area, dimensional or other numerical variance the property owner must prove that the practical difficulties faced are unique to the property at issue and not self-created, and must also demonstrate that granting the variance will not significantly alter the essential character of the surrounding neighborhood.

EXPLANATION

Under current Iowa zoning law, as consistently interpreted by the Iowa Supreme Court, neither a City nor County Board of Adjustment is authorized to grant a variance unless the landowner requesting the variance can satisfy all three parts of a three-part test to prove literal enforcement of the zoning ordinance will result in “unnecessary hardship.” The first part of this test is most difficult to satisfy because it requires proof that, without the variance, the landowner cannot make a reasonable use of the land or cannot earn a reasonable return from it. This requirement may be justified to limit the grant of use variances to truly exceptional cases, but it makes little sense when dealing with a request for an area variance, which typically involves a small adjustment in the technical requirements for siting an improvement and poses little risk of harm to neighboring properties.

This reform retains the strict “unnecessary hardship” requirement for use variances, but changes it for area variances. A landowner seeking an area variance to engage in a use of land allowed under the applicable zoning ordinance needs to prove only that “practical difficulties” are faced in complying with the technical area or dimensional zoning requirements governing the land. If this initial burden is met, the Board may grant the area variance if it determines that the “practical difficulties” faced are unique to the property at issue and not self-created, and that granting the variance will not harm the immediate neighborhood. The intended result of this reform is to make area variances easier to obtain, when granting them complies with the spirit of the zoning ordinance and accomplishes substantial justice.

Another alternative would be to just eliminate subsection 3 entirely, and replace it with the new subsection focused exclusively on area variances, thereby totally eliminating use variances in Iowa. Roughly one-third of other states have eliminated the authority of boards of adjustment to grant use variances, so Iowa would just be following this trend to limit variance grants to area variances.⁹⁹ It was noted earlier that some Iowa municipal ordinances already ban use variances, so eliminating them from the enabling legislation would not be a radical step, but would be a more drastic step than simply adopting a new section creating different rules for granting area variances.

Some states limit the “practical difficulties” standard to area variances requested for single-family residences, but I would not recommend such a restriction. There may be good reasons for such limitations in other states, but for Iowa it is not hard to imagine cases beyond single-family zones where the granting of an area variance on a practical difficulty standard may be justified.¹⁰⁰ Another element included in some states’ “practical difficulty” reform was the requirement that an applicant for an area variance demonstrate “financial hardship.” I do not believe such a requirement is necessary in Iowa’s administration of area variances. Focusing on financial hardship also creates the possibility of resurrecting the “no reasonable use or return” prong of Iowa’s existing strict variance law.

The reader may also note that I deliberately did not include the term “density” in the enumeration of the types of technical requirements for which an area variance may be granted on the basis of practical difficulties. In too many cases, the term density may be difficult to define—it is frequently used

99. See GUDDER, *supra* note 28.

100. See generally *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78 (Iowa 1962) (three different area variances sought to construct an apartment building); *Build-A-Rama, Inc v. Peck*, 475 N.W.2d 225 (Iowa Ct. App. 1991) (granting variance for operation of an auction house in a rural residential zone enjoined because commercial uses other than regular auctions were repeatedly being conducted on the site).

to distinguish between single-family structures, duplexes and multi-family structures—so I am concerned that granting an area variance relating to density limits may be a back door way to accomplish the same result as granting a use variance, and therefore decided against the inclusion of density. Some state courts have agreed with this reservation regarding density requirements.¹⁰¹ For much the same reasons I also did not include required on-site parking places as a matter subject to adjustment via an area variance. On-site parking is most commonly an issue in dealing with multi-family housing and could serve as a place holder for what realistically should be considered as a use variance.

Finally, I did not include in my proposal statutory reform for any express limitation on the size of an area variance, like the 50 percent limit the Des Moines Ordinance imposes on certain area variances treated as special exceptions. I am not adamantly opposed to such restriction, but I am not convinced they are necessary or wise. I think the Wisconsin Supreme Court, in its *Ziervogel* opinion, makes a valid point in emphasizing that the relevant portions of the zoning statute contemplates Boards of Adjustment having some degree of discretion in carrying out their duties. Limitations like those in the Des Moines Ordinance tie the hands of the Board of Adjustment in the rare case where granting an area variance larger than the percentage limit is clearly justified by the peculiar facts of the case, and would cause no cognizable harm to neighbors or to the integrity of the local zoning system.¹⁰²

I intend to submit my zoning reform proposal to the Iowa State Bar Association's Section on Real Property Law, for possible inclusion in the Bar's Legislative Package for 2018. The fact that the four largest states bordering Iowa—Minnesota, Missouri, Wisconsin, and Illinois—already apply some version the “practical difficulties” standard to the granting of area variances¹⁰³ should help persuade both the Iowa Bar and the General Assembly that it is time for Iowa to modernize its zoning law and make the approval of justified area variances much less difficult.

101. See *Mavrantonis v. Bd. Of Adjustment*, 258 A.2d 908 (Del. Super. Ct. 1969); *O'Neill v. Zoning Bd. of Adjustment*, 254 A.2d 12 (Pa. 1969).

102. If there is serious interest in imposing limits on area variances, take a look at the Champaign, Illinois Zoning Ordinance §§ 37-736 and 37-740 that distinguishes between minor and major area variances, and prescribes different percentage limitations for a range of different types of area variances. CHAMPAIGN, IL., CODE, §§ 37-736, 37-740. See ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, *PROPERTY LAW: POWER, GOVERNANCE AND THE COMMON GOOD* 288–91 (West Pub. 2012).

103. MINN. STAT. ANN. § 394.27 (West 2017); MO. ANN. STAT. § 89.090 (West 2017); WIS. STAT. ANN. § 59.694 (West 2017). The Illinois law on area variances is a little unclear, but it appears Illinois courts will apply the “practical difficulties” standard to area variances when the appropriate language appears in local governments' zoning ordinances authorizing granting area variances, see GLEN ELLYN, IL., VILL. CODE, § 10-10-12.