

Decoding Land Use Discretion

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ABSTRACT: The housing shortage and affordability crisis have elicited calls for a reappraisal of the allocation of zoning power between state and local governments. Although scholars have given significant attention to potential legal reforms, there has been little discussion of the local administration of zoning codes. Over the course of the twentieth century, local governments embraced more flexible approaches to regulating land use, allowing regulations to adjust to changing conditions and demands and local governments to extract benefits from new development. This flexibility relies in part on the exercise of discretion by administrative agencies, most notably zoning boards of appeal. Flexibility and the exercise of discretion are not without costs, particularly in terms of predictability. They also frequently lead zoning boards to ignore relevant legal standards and exceed the scope of their delegated authority.

Recent scholarship has shed new light on the unique attributes of local administrative law. At the same time, scholars of administrative law more generally have explored the merits and contours of increased transparency. This Article draws on this scholarship and explores how deeper consideration of the administrative structure and functioning of local land use law might inform legal reforms.

Presenting an empirical analysis of the twenty-five most populous cities in the United States, it assesses the transparency of zoning administration in these jurisdictions. I argue that increasing the transparency of and public access to information related to variance applications and decisions will improve the predictability and consistency of these decisions. It will also make the need for reform more salient and help target those reforms.

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INTRODUCTION

For many years the most important land use and development decisions in Philadelphia were made by David Auspitz.¹ Auspitz, the owner of a well-regarded delicatessen, also served as chair of the city's Zoning Board of Adjustment.² This administrative agency is tasked with providing property owners relief from the city's zoning ordinance, particularly through granting variances, which provide an exception from the zoning code's restrictions on

1. *Power: King David*, PHILA. MAG. (June 8, 2007, 4:18 PM), <https://www.phillymag.com/news/2007/06/08/power-king-david> [<https://perma.cc/P8F5-8RDC>] (profiling David Auspitz's life, appointment, and tenure as chairman of the Philadelphia Zoning Board of Adjustments).

2. *Id.*

the nature, size, and shape of permitted development.³ According to its website, the Board “conducts its work with the guidance of its rules and regulations,” as one might hope is true of any administrative agency.⁴ When it comes to zoning variances, while the specific language may vary across jurisdictions, the general rule is that they are a form of extraordinary relief to be conferred when rigid application of the zoning ordinance imposes a unique hardship on a particular property owner.⁵

While appearing before Auspitz and the Board of Adjustment, a neighbor who opposed the variance requested by the owner of a nearby building (and worried it would exacerbate that building’s rodent problem) declared: “It’s my understanding that a variance is for hardships.”⁶ Auspitz responded to this correct statement of the law by telling her “[d]on’t go there . . . You’ve been given some bad information. Just stick to rats.”⁷

Herein lies the reality of zoning boards of adjustment in many cities. They wield significant power, far beyond what drafters of the zoning ordinance envisioned. They give scant attention to the relevant legal standards and inordinate attention to whatever concerns—parking, density, possibly rats—the few individuals who show up at a hearing choose to raise. Their membership does not necessarily reflect the technical expertise we might expect from an administrative agency. Their inner workings, the grounds for their decisions, and the effects of these decisions on the fabric of the cities they shape remain obscure. In sum, many zoning boards of appeal lack both fidelity to relevant legal standards and the degree of transparency we might expect given the prominent roles they play in urban development. Yet these boards’ activities have only grown in importance as, in many cities, the failure to modify overly restrictive zoning means that, absent some form of discretionary relief, new development is nearly impossible.⁸

In recent years, motivated by the housing affordability crisis, scholars and policymakers have reevaluated the relationship of state and local governments

3. *Zoning Board of Adjustment*, CITY OF PHILA., <https://www.phila.gov/departments/zoning-board-of-adjustment> [<https://perma.cc/8G3Y-47S4>].

4. *Id.*

5. *See infra* notes 30–32 and accompanying text.

6. *Power: King David*, *supra* note 1.

7. *Id.* In September 2021, fourteen years after the article in Philadelphia Magazine, Philadelphia’s City Council President wrote a letter, with draft legislation, outlining a plan to reform the city’s Zoning Board of Adjustment. Aaron Moselle & Ryan Briggs, *Council President Darrell Clarke to Introduce Overhaul of Philly Zoning Board*, WHYY (Sept. 15, 2021), <https://whyy.org/articles/council-president-darrell-clarke-to-introduce-overhaul-of-philly-zoning-board> [<https://perma.cc/7D2B-NP74>]. The letter criticized both the grant of variances without any showing of hardship and a lack of attention to the concerns of neighbors. *Id.*

8. *See* Moselle & Briggs, *supra* note 7 (discussing the city’s failure to modify zoning, particularly in areas with significant demand for new development); *see also* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 398 (2021) (discussing how the politics of zoning freezes existing uses, particularly single-family homes).

in the realm of land use and zoning.⁹ States have sought to increase housing supply by constraining local government power, preempting specific local regulations, and in some instances rewriting components of local zoning.¹⁰ While changes to the law governing land use development have received significant attention, less attention has been paid to the administration of zoning at the local level.¹¹

At the same time, a small group of local government scholars have focused attention on the long-neglected but distinct attributes of local administrative law.¹² Nestor M. Davidson argues for a “distinctively localist” administrative law, particularly with regards to agency rulemaking.¹³ Maria Ponomarenko contends that substantive reforms to local agency action, including basic requirements of reason giving, may yield more significant benefits than procedural reforms.¹⁴ Noah M. Kazis observes how little we actually know

9. See, e.g., Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 818 (2021) (arguing for state preemption of local zoning to address racial and economic inequality); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 83 (2019) (advocating for “the emerging California model of the [state-mandated] plan as a preemptive intergovernmental compact for development permitting”); John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 828–30 (2019) (describing recalibration of power between state and local governments).

10. See, e.g., Julia Gill & Jenny Schuetz, *In California, Statewide Housing Reforms Brush Against Local Resistance*, BROOKINGS INST. (June 28, 2023), <https://www.brookings.edu/articles/in-california-statewide-housing-reforms-brush-against-local-resistance> [<https://perma.cc/W37C-87LM>] (analyzing recent reforms in California); Karla Georges, *What to Expect in State Legislatures on Zoning Reform in 2023*, AM. PLAN. ASS’N (Jan. 20, 2023), <https://www.planning.org/blog/9263443/what-to-expect-in-state-legislatures-on-zoning-reform-in-2023> [<https://perma.cc/M8LUSPP2>] (summarizing reform efforts in multiple states).

11. Some work has been done, particularly in California. See, e.g., Moira O’Neill, Giulia Galco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENV’T L.J. 1, 8–11 (2019) (examining local permitting processes for new development). Moira O’Neill, Eric Biber, and a number of co-authors have produced multiple reports examining local land use entitlement processes (the process through which a given development receives approval for a building permit) and drawing on a unique dataset, the Comprehensive Assessment of Land Use Entitlements Study. See Moira O’Neill, Eric Biber & Nicholas J. Marantz, *Measuring Local Policy to Advance Fair Housing and Climate Goals Through a Comprehensive Assessment of Land Use Entitlements*, 50 PEPP. L. REV. 505, 511–12 (2023). Researchers at the Urban Institute have recently studied developer-initiated rezonings in Louisville, Kentucky. LYDIA LO & YONAH FREEMARK, *URB. INST., INFLUENCERS, BIAS, AND EQUITY IN REZONING CASES: AN EVALUATION OF DEVELOPER-INITIATED ZONING CHANGES IN LOUISVILLE, KENTUCKY* 1–4 (2022).

12. See Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1529 (2022) (“The literature on ‘administrative law’ is focused almost exclusively on federal administrative agencies, and occasionally the states.”); Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 568 (2017) (“In legal scholarship, administrative law is almost always synonymous with federal administrative law.”); see also Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1862–63 (2013) (examining local administrative rulemaking in context of public health).

13. Davidson, *supra* note 12, at 574, 610–23.

14. Ponomarenko, *supra* note 12, at 1532.

about how local agencies are structured and what effects these design choices may have.¹⁵

This Article argues for deeper consideration of the administrative structure and functioning of local land use law. The exercise of discretion by boards of zoning appeal has long been ignored by scholars, perhaps in part because local governments have long failed to release or even maintain data regarding the work of these boards.¹⁶ In an attempt to start filling this gap in our understanding of land use administration, Part IV provides an empirical analysis of local zoning boards in the twenty-five largest cities with zoning, focusing on the transparency of agency adjudication, the most significant component of land use administration.¹⁷ It examines the treatment of variances and how zoning boards of appeal communicate the substance and scope of their work to the public.

Zoning variances offer a particularly valuable case for studying local administration of a statutory regime. They are intended to serve as a safety valve, allowing minor administrative adjustments to the zoning code in a small number of situations where rigid application would impose substantial hardship on a particular property owner.¹⁸ Yet variances have long departed from this narrow role, enabling local agencies to not only interpret and craft minor exceptions to zoning ordinances but also to reshape those ordinances and the cities they purportedly govern. In doing so, zoning boards of appeal exceed their narrow delegation of power. In many jurisdictions variances have become an integral component of the routine approval process for any new development, including in situations where a legislative change, in the form of a rezoning, would be more appropriate, but for political or other reasons is impossible to obtain. Critics and courts have long noted that this has the potential to undermine the goals of zoning and reduce its consistency and predictability.¹⁹

15. Noah M. Kazis, *The Structure of Land Use Administration*, in A RESEARCH AGENDA FOR US LAND USE AND PLANNING LAW 75, 76 (John J. Infranca & Sarah Schindler eds., 2023) (claiming that scholars view administrative agencies in the land use realm “almost as pass-throughs for more political actors”).

16. See Michael Manville & Taner Osman, *Motivations for Growth Revolts: Discretion and Pretext as Sources of Development Conflict*, 16 CITY & CMTY. 66, 69 (2017) (describing discretion generally as a “black box in the zoning literature”). In part this is because of a lack of available data on the exercise of discretion. Nicholas J. Marantz, *Promoting Housing Affordability by Making Cities Smarter About Land-Use Regulation*, 31 HOUS. POL’Y DEBATE 174, 175 (2021) (“Many local governments collect little (if any) data concerning discretionary entitlements, environmental impact reviews, and development fees.”).

17. Zoning Boards of Appeals do not engage in formal rulemaking but instead exercise delegated authority and discretion over individual cases. Davidson, *supra* note 12, at 589.

18. See *infra* Section I.A (discussing the origins of this standard).

19. Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 10 (1969) (“As departures from the neighborhood pattern accumulate, the basic aims of zoning are increasingly ignored. Zoning’s protective purposes—conservation of property values, provision of adequate light and air, maintenance of public health and safety and the preservation and promotion of the city’s amenities—may be lost in the tide of improper variances created by the boards of appeal.”); C.J.S. Williamson, *Mechanics of Zoning Adjustments*,

Documenting the information shared by these boards as they make decisions on applications for relief and the way these decisions are (or are not) promulgated, I consider the nature and value of transparency in the context of zoning boards of appeal.

Transparency—a concept central within discussions of democratic accountability and administrative law generally—may constrain the exercise of discretion and improve the consistency and predictability of zoning boards of appeal and the zoning ordinances they implement. Requiring boards to make written decisions accessible to the public would facilitate additional public oversight, potentially improving the substance of those decisions, which are rarely subject to judicial review.²⁰ Releasing data regarding the location and type of variance requests and denials could reveal uneven enforcement of the zoning code as well as areas where frequent grants of relief suggest the need for code reform.

This call for transparency relies in part upon the premise that constraining the exercise of discretion would improve land use regulation. Some scholars, in contrast, have championed the exercise of local discretion and dealmaking in the context of land use development. Carol Rose famously criticized what she termed “plan jurisprudence,” an attempt by courts, relying on administrative law doctrines, to closely review piecemeal zoning changes—variances, special permits, and small rezonings—for conformity to a preexisting plan.²¹ Rose contended that this approach relied in part on “advocacy of an outmoded version of local land planning” and that, instead, planning in practice represents more of an ongoing process.²² She argued for treating “piecemeal changes as dispute mediations” and evaluating their fairness “in the light of the local opportunity for participation or departure,” while also encouraging refinements to “heighten the institutional competence of these local decisions.”²³

155 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108 (1931) (“[M]any times it has been found [particularly in rapidly developing Western cities of the early twentieth century] that the individual adjustments are allowed to creep in without a comprehensive survey of the changed conditions that really warrant a zone change.”). More recently, Lydia Lo and Yonah Freemark, examining rezonings in Louisville, Kentucky, observed: “A significant share of new development projects involves a rezoning application and discretionary review process; this suggests that the by-right zoning map and its associated districts function more as optional guidance than as definitive rules related to future development.” LO & FREEMARK, *supra* note 11, at 46.

20. While additional research would be necessary to establish whether publication of decisions does, in fact, improve their substance, the Author’s own prior research suggests some reason to believe it might. See John J. Infranca & Ronnie M. Farr, *Variances: A Canary in the Coal Mine for Zoning Reform?*, 50 PEPP. L. REV. 443, 493–99 (2023) (finding board decisions in Somerville, Massachusetts, which posts all decisions online and requires applicants for a variance to clearly state how they satisfy the relevant legal criteria, were more substantive than decisions in other jurisdictions).

21. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 844–45 (1983).

22. *Id.* at 846; see also *id.* at 874–78 (arguing that plans may not be the product of careful thought and extensive public participation and noting that modern planning theory rejects the idea of a general plan framing an ideal “end-state” and instead views planning as an “ongoing process”).

23. *Id.* at 847. Rose draws on Albert Hirschman’s concepts of “voice” and “exit” and their capacity to discipline local governments. *Id.*

I am less keen on local control and piecemeal changes, particularly in a world where discretionary relief and negotiation are required not just for major developments but for any new development.²⁴ Recent empirical research raises questions regarding whether the community processes, through which many land use deals are brokered, are or can be truly representative.²⁵ In addition, the uncertainty created by discretionary processes, which at times involve additional informal reviews at the community level, often favors repeat players or empowers the loudest, most frequent, and most politically connected voices.²⁶ Zoning, in its administration, can quickly depart from basic rule of law principles. In larger cities the piecemeal review (and denial) of even relatively small new developments can contribute to a cumulative failure to permit adequate new housing supply citywide. Discretionary reviews of individual development projects are unlikely to bring to the mediation table this and other significant community-wide concerns that may still be affected.

Ultimately, I favor reforms like those recently pursued in California that both liberalize zoning by allowing more as-of-right development (without discretionary approval) and cabin local discretion over individual new developments.²⁷ However, even if we accepted Rose's arguments in favor of greater local control and dealmaking, increased transparency would improve

24. What constitutes a major development may be somewhat subjective, but I am thinking here of projects that require legislative relief, such as a rezoning or a planned unit development. For further discussion and explanation of these and other forms of relief see *infra* notes 139–42 and accompanying text.

25. Katherine Levine Einstein, David M. Glick & Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis*, 135 POL. SCI. Q. 281, 298–306 (2020).

26. Cf. Paul Cheshire, *An International Perspective on the U.S. Zoning System*, 25 CITYSCAPE 169, 172 (2023) (arguing that discretionary planning system in Britain increases uncertainty and risk for developers and neighbors and is prone to “lobbying and gaming”).

27. See Infranca, *supra* note 9, at 886–87; Chris Elmendorf, *Recalibrating Local Politics to Increase the Supply of Housing*, 42 REGUL. 38, 40 (2019); see also Moira O'Neill & Ivy Wang, *How Can Procedural Reform Support Fair Share Housing Production? Assessing the Effects of California's Senate Bill 35*, 25 CITYSCAPE 143, 146–49 (2023) (discussing California Senate Bill 35, which limited local discretionary review of affordable multifamily developments); Michael Manville, Paavo Monkkonen, Nolan Gray & Shane Phillips, *Does Discretion Delay Development?*, 89 J. AM. PLAN. ASS'N 336, 339–40 (2023) (describing Los Angeles's Transit-Oriented Communities program); Chelsea Maclean, Daniel R. Golub, Kevin J. Ashe, Will Sterling & Deborah Brundy, *California's 2024 Housing Laws: What You Need to Know*, HOLLAND & KNIGHT (Oct. 31, 2023), <https://www.hklaw.com/en/insights/publications/2023/10/californias-2024-housing-laws-what-you-need-to-know> [<https://perma.cc/NFG4-WB8Q>]; CAL. GOV'T CODE § 65913.4(a)(5) (West 2024) (permitting local governments to impose “objective . . . standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal”); Letter from Rob Bonta, Cal. Att'y Gen., to All Cities and Counties in California 4 (July 17, 2023), <https://oag.ca.gov/system/files/attachments/press-docs/7-17-23%20Letter%20Urgency%20Ordinances%20and%20Ministerial%20Approval%20of%20Housing%20Projects.pdf> [<https://perma.cc/2BEK-TgDB>] (discussing how recently enacted state laws limit local discretion); Karl E. Geier, *A Changed Landscape: Local Agency Discretion and Judicial Deference in Land Use Decisionmaking*, 32 MILLER & STARR REAL EST. NEWSALERT 383, 384–85 (2022) (discussing recent California laws limiting grounds upon which local governments can reject or condition development projects).

the quality of the public participation she champions.²⁸ Transparency would make the substance and broader effects of zoning board decisions more accessible, facilitating public engagement. It could also help expose and ideally prevent the inequitable treatment of particular neighborhoods or developers.

In sum, while substantive or procedural reforms to the variance process are needed, increasing the transparency and availability of variance applications and decisions would more immediately improve the administration of zoning. Greater transparency at both the application and decision stages could have profound effects on the substance of those decisions. By allowing citizens to easily see the reasoning (or lack thereof) behind a grant of relief, it could aid reformers seeking to push zoning boards towards greater accountability. Coupled with access to mapping of the location of variance applications and grants, this would improve the predictability of zoning and highlight areas for reform. Predictability is often identified as one of the benefits of zoning when compared with other methods, such as nuisance law, for determining allowable land uses. But such predictability is undermined by a system in which little or no development is allowed as-of-right, and nearly everything is subject to discretionary review. The problem is only exacerbated when the process and the outcomes of discretionary review remain hidden from public view. State efforts to reform zoning present a unique moment to reconsider discretionary processes within zoning administration, including variances.²⁹ By implementing transparency requirements, states could decode the discretion at the heart of land use administration and enable more thoughtful deliberation over the merits and appropriate limits of this discretion.

This Article proceeds in five parts. Part I examines the zoning variance in theory and practice, tracing how its role has departed over the years from what was originally intended as a rare grant of relief to smooth the rough edges of a zoning ordinance. Part II considers the administrative structure through which variances are granted, the zoning board of appeals. Part III briefly discusses transparency theory, with particular attention to the forms of transparency most likely to improve the operation of zoning boards of appeal. Part IV presents an empirical analysis of how zoning boards in the twenty-five largest U.S. cities share their work with the public. Finally, Part V suggests mechanisms for improving zoning administration. It also sketches potential future avenues for research on the long-neglected area of land use administration.

I. THE VARIANCE, IN THEORY AND PRACTICE

Zoning ordinances draw in broad strokes, dividing a jurisdiction into a limited number of zoning districts within which each individual lot is subject

28. See Rose, *supra* note 21, at 884–87 (discussing benefits of local participation, responsiveness, and decision-making).

29. Cf. Kazis, *supra* note 15, at 78 (“[S]tate reformers seeking to curb local exclusionary zoning must ask what roles should remain for local administration of state standards: i.e., when local administration means faithful local implementation and when it effectively means local control.”).

to identical regulations governing allowable uses and the permitted dimensions of new development.³⁰ Recounting the adoption of a variance provision in New York City's 1916 zoning ordinance—widely recognized as the first comprehensive zoning ordinance—one scholar observed that “the initial rationale for the variance power was to provide a tool to perfect a crude regulatory instrument.”³¹ Variances were seen by early proponents of zoning as a “safety valve” that smoothed the rough edges of the zoning ordinance, eliminating the imposition of unnecessary hardships on particular property owners due to unique attributes of their parcel.³² This Part examines the role that prominent voices in the early zoning movement envisioned for the variance. It then turns to criticisms and empirical studies of the variance process over the century since its introduction.

A. ORIGINS AND ORIGINAL INTENTIONS

In 1926 the U.S. Department of Commerce released a Standard State Zoning Enabling Act, a model act intended to encourage states to embrace zoning and confer upon local governments authority to impose zoning ordinances.³³ The Act provided for an administrative agency, the “board of adjustment,” which would have the power to “make special exceptions to the terms of the [zoning] ordinance in harmony with its general purpose and intent.”³⁴ This included granting:

in specific cases such variance 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.³⁵

30. ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 76–77 (5th ed. 2021).

31. David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENV'T L. 279, 283 (2004) (“The variance was also deemed to be a constitutional necessity to prevent what would otherwise be an inflexible, unreasonable, arbitrary application of zoning ordinances—a safety valve for circumstances not anticipated at the time of zoning ordinance adoption.” (footnotes omitted)); see also Robert A. Williams, Jr., *Euclid's Lochnerian Legacy*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 278, 280–82 (Charles M. Haar & Jerold S. Kayden eds., 1989) (discussing due process concerns).

32. Infranca & Farr, *supra* note 20, at 446, 451–52.

33. See generally A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (U.S. DEP'T OF COM., 1926) [hereinafter U.S. DEP'T OF COM.]; *id.* at iii–iv.

34. *Id.* § 7, at 9. Local governments use a variety of terms to refer to the administrative body with authority to grant exceptions to the zoning ordinances. In addition to a “Board of Adjustment” it is frequently termed a “Zoning Board of Appeals.” These terms will be used interchangeably.

35. *Id.* § 7(3), at 11; see also EDWARD M. BASSETT, *ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS* 121 (1936) (discussing how boards of appeals provided forums for hearing requests for “some amelioration of the strict letter of the law” in cases such as peculiarly shaped lots and variations in street grade).

Early judicial decisions emphasized that variances were an exception to be exercised “sparingly,”³⁶ a description often invoked by commentators.³⁷ They were intended to address unique situations where strict enforcement of the zoning ordinance’s terms might—by imposing an “unnecessary hardship”—raise due process or other concerns.³⁸

New York City’s 1862 building code provided a model for the zoning variance.³⁹ The relevant provision granted the Department of Buildings the power to “modify or vary any of the several provisions of [the] act to meet the requirements of special cases, where the same do not conflict with public safety and the public good, so that substantial justice may be done.”⁴⁰ Edward Bassett, a prominent voice in the early zoning movement and the head of the committee that drafted New York’s original zoning ordinance, compared the variance to “the well-recognized general class of relaxations or mitigations of the strictness of general rules in which broad discretion is so commonly, as in this case, granted the administrator by relating it to considerations of the public interest, public safety and welfare, and substantial justice.”⁴¹ In separate writings Bassett sought to frame the early understanding of the intended scope of the power to grant variances. He contended that the requirement, in most zoning ordinances, that a variance applicant establish “practical difficulty and unnecessary hardship,” served “as a rule of conduct” for the board delegated the authority to administer relief.⁴² In cases where strict application of the resolution posed such difficulty or hardship, “the Board of Appeals should have power to vary the provision, in harmony with its general purpose and intent, so that the public health, safety, and general welfare might be secured

36. See, e.g., *Hammond v. Bd. of Appeal of Bldg. Dep’t of Springfield*, 154 N.E. 82, 83 (Mass. 1926) (“[T]he power of variation is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature, and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others . . .”).

37. See, e.g., Shapiro, *supra* note 19, at 3 (“The variance power, to be consistent with its theoretical objectives and legal limitations, should be exercised sparingly, with particular care to avoid harmful side effects.”); John W. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 281 (1955) (“Probably no other figure of speech has been so overworked as the comparison of the board of appeals to a ‘safety valve,’ designed to prevent some legal explosion.”).

38. 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, 888–89 (2007) (quoting Osborne M. Reynolds, Jr., *The “Unique Circumstances” Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. L. REV. 127, 127 (1999)).

39. See Owens, *supra* note 31, at 282 n.4 and accompanying text (citing EDWARD M. BASSETT, FRANK B. WILLIAMS, ALFRED BETTMAN & ROBERT WHITTEN, *MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES: INCLUDING ZONING, SUBDIVISION REGULATION, AND PROTECTION OF OFFICIAL MAP* 12 (1935)).

40. 1862 N.Y. Laws 591 (cited in Owens, *supra* note 31, at 282 n.4).

41. Owens, *supra* note 31, at 282 n.4 (quoting BASSETT ET AL., *supra* note 39, at 12); see also John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 683–84 (2023) (discussing Bassett’s work and prominence).

42. BASSETT, *supra* note 35, at 134–35.

and substantial justice done.”⁴³ In sum, through the variance process, the zoning board of appeals was granted discretion to relax the rules so as to mitigate “strictness” in “special cases” of exceptional hardship, but not in a manner that undermined the “general purpose and intent” of zoning.

The zoning enabling acts of several states and the Standard State Zoning Enabling Act drafted by the U.S. Department of Commerce all replicated New York’s “rule of practical difficulty and unnecessary hardship.”⁴⁴ While this “rule of conduct” was widely adopted, Bassett observed that “boards of appeals have frequently failed to recognize the binding force of the rule, and quite regardless of its proper scope have issued variance permits in cases where they thought that little or no harm was done thereby or where they thought they were doing substantial justice.”⁴⁵ The courts, he noted, repeatedly reiterated—seemingly with little effect on the boards’ practices—the importance of the rule and pointed out that “the board of appeals, inasmuch as it is not a legislative body, is not at liberty to decide what is best for the individual or for the community.”⁴⁶ Bassett’s concerns regarding the potential abuse of discretion by the zoning board of appeals and its potential to impinge upon legislative functions would become recurring themes in critiques of variances and of the zoning board of appeals, to which we turn in the next Section.⁴⁷

B. PROBLEMATIC PRACTICES AND RECURRING CRITICISMS

The concept of a board of appeals (or board of adjustment) faced criticism from the beginning. Critics worried that the granting of variances undermined both the rule of law and the prized uniformity of zoning⁴⁸ and that boards of appeal were abusing their authority.⁴⁹ The committee that drafted the Standard State Zoning Enabling Act struggled over the provisions establishing a board of adjustment.⁵⁰ One committee member, Lawrence Veiller, suggested granting too much power to a board risked running afoul of “the good American principle of government by law and not a government by men.”⁵¹ Bassett, however, contended that the board of adjustment, rather than itself introducing arbitrariness into the process, could alleviate the potential arbitrariness of a zoning ordinance. A board capable of issuing relief to address exceptional

43. *Id.* at 135.

44. *Id.* at 142.

45. *Id.*

46. *Id.*; see also *id.* at 149 (discussing criticisms that the board invoked the “unnecessary hardship” provision to substitute “its own arbitrary preference” in a broad range of matters).

47. See *infra* Section I.B (reviewing criticisms).

48. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political–Economic Perspective*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP*, *supra* note 31, at 73, 83 (discussing early criticism that boards of adjustment were destroying the integrity of zoning ordinances).

49. See *infra* notes 65–68 and accompanying text.

50. Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, *LAND USE L.*, Feb. 1996, at 3, 5.

51. *Id.*

instances when rigid application of zoning would lead to arbitrary results ensured “the integrity of a zoning plan under the police power,” while avoiding due process and other legal challenges.⁵² “An occasional wrong decision by such a board,” Bassett argued, “is of less importance to the community than the unrelieved arbitrariness of an iron-clad ordinance which first in one particular application and then in another may be criticized by the courts.”⁵³ Variances, then, were not an evil to be avoided, but rather a necessity to be administered judiciously. These early writings reflect the contours of recurring debates over the merits of administrative discretion exercised to alleviate unique hardships and the risks of undermining a regulatory system—zoning—that promises uniformity and consistency.

Basset initially sought to address concerns by emphasizing the narrow scope of the Board’s authority and discretion. Noting that the charter and zoning resolution for the City of New York did not grant the board of appeals discretion over the whole of zoning, he highlighted its relatively narrow power “[t]o vary the literal requirements of the law in individual cases where unnecessary and excessive hardship is caused and the intention of the law is equally accomplished by an alternative method to be prescribed by the Board of Appeals.”⁵⁴ Nonetheless, he acknowledged that observers criticized the Board for invoking “the unnecessary hardship provision” to review a problematically broad range of issues and substitute “its own arbitrary preference.”⁵⁵

Veiller and others soon expressed concerns that newly established zoning boards were abusing their authority.⁵⁶ A New York State Court of Appeals decision by Chief Judge Benjamin Cardozo warned that the variance power is “one easily abused.”⁵⁷ Other courts also expressed hesitation regarding the

52. BASSETT, *supra* note 35, at 167; *see also* Newman F. Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 278 (1926) (“The purpose of a board of appeals or adjustment is ‘to safeguard the rights of individuals by providing a convenient remedy against the arbitrary or unreasonable exercise of the police power.’” (quoting Charles K. Sumner, *The Board of Adjustment as a Corrective in Zoning Practice*, 13 NAT’L MUN. REV. 203, 203 (1924))). Observing that California, Oregon and Washington did not provide for a board of appeals in their respective zoning enabling acts, Bassett critiqued their reliance instead upon spot zoning—the rezoning of a small parcel of property, often owned by a single party—to deal with exceptional situations. BASSETT, *supra* note 35, at 145. Given that these narrow rezonings were done by legislative and not administrative bodies, Bassett observed, they were not subject to judicial review and hence “prone to [result in] irrational spot changes in the zoning maps.” *Id.* Legislative spot zoning is a notoriously vague concept and may be perceived as not very different than the quasi-judicial grant of a variance. *See* Schmidt v. Bd. of Adjustment of Newark, 88 A.2d 607, 615 (1952) (discussing relationship between variance and spot zoning).

53. BASSETT, *supra* note 35, at 167.

54. *See id.* at 148.

55. *Id.* at 148–49. Bassett rejected this criticism, declaring that the New York Board of Appeals has largely “recognized the limitations placed upon it.” *Id.*

56. Knack et al., *supra* note 50, at 6.

57. *People ex rel. Fordham Manor Reformed Church v. Walsh*, 155 N.E. 575, 578 (N.Y. 1927) (finding no evidence of unnecessary hardship and invalidating grant of variance); *see also* Yoram Jerry Cohen, Note, *Area Variance Law in New York: A Uniform Approach*, 7 CARDOZO L. REV. 251,

behavior of zoning boards and their granting of variances. A separate New York court declared that the variance power did not give the board of appeals' members, as they seemed to believe, "the power to do whatever they think is right regardless of the provisions of the statute."⁵⁸ Some courts simply deemed the variance power inherently problematic, finding that by allowing what were perceived as changes to the zoning ordinance it constituted an unconstitutional delegation of the legislative function.⁵⁹ In contrast, those early judicial decisions that deemed the variance power constitutional made clear that a board's decision on a matter within the scope of its power would not be overturned absent an abuse of discretion.⁶⁰ As a result, the question of whether a board acted within the scope of its authority could significantly determine the outcome of a judicial challenge.

For his part, Bassett grew increasingly concerned about abuses over time, writing in 1947:

There is a great deal of well-justified criticism all over the country against zoning because boards of appeals make changes in the guise of variances. For instance, a board of appeals will authorize a permit for a change of a one-family house in a one-family residence district into a two-family house. Such action is equivalent to making an amendment to the zoning ordinance.⁶¹

Empirical studies from the 1920s and 1930s reinforced a view that variances were being granted too freely, consistently finding that over half of applications were granted.⁶²

267–68 (1985) ("New York City's 1916 zoning regulation had allowed the [Board of Standards and Appeals ("BSA")] to use its judgment whenever it believed that there was a sufficient showing of practical difficulties or unnecessary hardship. However, it was widely believed that the absence of enumerated criteria was causing an abuse of the variance power." (footnote omitted)).

58. *People ex rel. Cotton v. Leo*, 180 N.Y.S. 554, 557 (Sup. Ct. 1920), *aff'd as modified*, 184 N.Y.S. 943 (App. Div. 1920).

59. *See, e.g., State ex rel. Nigro v. Kansas City*, 27 S.W.2d 1030, 1032–33 (Mo. 1930); *Welton v. Hamilton*, 176 N.E. 333, 334–36 (Ill. 1931); *Sugar v. N. Balt. Methodist Protestant Church*, 165 A. 703, 706–07 (Md. 1933). The court in *Sugar* suggested that allowing a departure from otherwise generally applicable regulations that served the public welfare, variances amounted to "special legislation for a private interest." *Sugar*, 165 A. at 706.

60. *See, e.g., People ex rel. Healy v. Leo*, 185 N.Y.S. 948, 973 (App. Div. 1920); *see also* BASSETT, *supra* note 35, at 156–57 (noting that courts avoided substituting their discretion for that of experts on board, so long as "the board has complied with all legal requirements of notice and hearing and has exercised fair discretion"). *See generally* Jerry L. Anderson, Aaron E. Brees & Emily C. Reninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 695 (2008) (observing that from the early days of zoning courts have applied a deferential standard to their review of zoning board decisions, treating them akin to administrative agency determinations); Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 56 (2012) (noting deference that most courts apply to land use regulators and how lack of judicial oversight can lead to arbitrary exercise of discretion).

61. Edward M. Bassett, *A Warning as to Unlawful Zoning*, AM. CITY, Jan. 1947, at 119.

62. Repts, *supra* note 37, at 281 ("In Cincinnati from 1926 through 1937, the board of appeals granted 1,493 variances out of 1,940 requests. In Cleveland from 1929 through 1937, 1,289 out

By the mid-twentieth century multiple commentators saw the granting of too many variances as a threat to the integrity of the zoning ordinance and the rule of law.⁶³ They emphasized the failure of boards of appeal to carefully apply relevant legal standards.⁶⁴ Yet, as John Reps, a leading land use scholar of the period, noted in 1955, while many zoning board decisions would not survive scrutiny in the courts, “it is only in flagrant cases of abuse of authority—and then only if the financial stakes are sufficiently large—that decisions are taken to *any* court.”⁶⁵ This point is worth emphasizing. Roughly thirty years after the advent of zoning commentators saw both an abuse of authority through the granting of too many variances and a lack of sufficient judicial review over those decisions.

In addition to worries over the justification for granting particular variances, broader concerns were voiced regarding the administration of zoning ordinances and the lack of transparency in the operation of zoning boards. In the late 1950s, Richard Babcock, one of the most prominent mid-century experts on zoning, criticized “the primordial administrative system by and through which zoning, with all its newly-acquired muscles, purports to be controlled.”⁶⁶ While

of 2,307 variance requests were granted. In Denver from 1925 through 1937 there were 1,516 variance applications, of which 893 were granted. In Philadelphia during the period 1933–1937 the board of adjustment granted 4,000 appeals out of 4,800 cases appearing before the board.”)

63. Lewis B. Beatty, Jr., Note, *Discretionary Powers of Zoning Boards of Adjustment in Pennsylvania*, 97 U. PA. L. REV. 68, 78 (1948) (“[F]ar too many variances are being granted by boards of adjustment, thus defeating the effect of zoning.”); Walter H. Blucher, *Is Zoning Wagging the Dog?*, 1955 PLANNING 96, 96 (“The question must be asked seriously whether zoning, as it is currently being practiced, is endangering our democratic institutions. A second question stemming from the first is: ‘Is zoning increasingly becoming the rule of man rather than the rule of law?’ I would be inclined to answer both questions affirmatively.”).

64. Reps, *supra* note 37, at 287 (“[M]any boards of appeals consistently ignore the fundamental requirement of unique circumstances.”); see also Stephen Sussna, *Zoning Boards: In Theory and in Practice*, 37 LAND ECON. 82, 82 (1961) (“A host of experts on zoning operations in government have bitterly accused Boards of Appeal of being law violators, undoers of zoning and a wide variety of other wrongdoing.”); Thomas B. Donovan, Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 107 (1962) (“[T]he zoning ordinance is being administered without regard to statutory requirements.”); David D. Gregory, Comment, *Administration of Zoning in Maine*, 20 ME. L. REV. 207, 235 (1968) (“[A] board applies a standard of relative harms, [and thus] it never reaches the question of whether the requisites for a variance are present. In short, the board does not make decisions within the framework of existing law or even with reference to it.”); Shapiro, *supra* note 19, at 13 (“A pattern generally prevalent in variance decisions is the distinct absence of specific findings based on legal standards. Instead, boards generally support their variance grants with boilerplate language . . .”).

65. Reps, *supra* note 37, at 294; see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 702 (1973) (arguing that variances are granted at high rates in part because courts struggle to police them); Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1406 (1961) (suggesting that vague variances standards and lack of significant harm to any one individual render legal challenges to variance decisions unlikely, contributing to lack of judicial oversight). Others have suggested that courts may simply wish to avoid hearing zoning cases. Richard F. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 532 (1959) (contending that vague standards for variances and obstacles to third party appeals suggest Illinois Supreme Court seeks to limit the number of zoning cases it hears).

66. Babcock, *supra* note 65, at 510.

zoning codes were growing in sophistication and complexity, the practices of the local entities tasked with administering zoning and resolving conflicts reflected “neolithic conditions.”⁶⁷ A 1969 student note in the *Harvard Law Review* emphasized the lack of transparency in zoning boards of appeal, declaring that “zoning discretion continues to operate sub rosa, without adequate expert advice and without the political attention and control which should attach to policy decisions.”⁶⁸ With little oversight, these boards operated as “vest pocket planning agencies” making “ad hoc policy decisions” and granting frequent departures from the zoning code.⁶⁹

By the middle of the twentieth century, a set of recurring critiques had been voiced by both commentators and courts. These included criticisms of the volume of variances granted and their effects on the uniformity of zoning, assertions that zoning boards were abusing their authority, and concerns that they functioned without adequate public or judicial oversight. The 1960s would see the publication of several empirical studies that confirmed many of these criticisms. A 1962 study by Robert Anderson, examining variances in Syracuse, New York, criticized the Board there for its “vigorous participation in the development of planning policy” and willingness to ignore the legal standard when deemed incompatible with efficient land use.⁷⁰ Another 1962 article by Jesse Dukeminier, Jr. and Clyde Stapleton examined variance applications in Lexington and in Fayette County, Kentucky and found relief granted in cases where there was no “evidence on record that could even come close to satisfying the legal requirements for a variance.”⁷¹ The board granted area variances for eighty-eight percent of the fifty-one requests, but the authors concluded that the legal requirements for a variance were satisfied in only forty percent of the cases.⁷²

Over the following decades additional empirical studies produced similar findings and voiced similar substantive critiques.⁷³ Writing in 2007, Randall Sampson noted:

67. *Id.* at 510–11 (noting “growing disparity between the sophistication of current substantive zoning regulations and the neolithic conditions of local zoning administration, as reflected not only in the techniques for adjusting conflicts but also in the practices of local bodies charged with the duty of resolving those conflicts”).

68. Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 668 (1969).

69. *Id.* at 673; *see also id.* at 670–71 (describing granting of variances and exceptions by zoning boards of adjustment as “ad hoc city planning”).

70. Robert M. Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 384 (1962).

71. Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 285 (1962).

72. *Id.* at 286–87.

73. *See, e.g.*, David P. Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 775 (1977) (reviewing “copious evidence that zoning boards tend to ignore both the law and expert advice”); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 54 (1981) (observing that the unnecessary hardship requirement is rarely followed and variances are frequently granted without “adequate findings”);

Variance-granting boards, unlike planning commissions and other land use boards, historically have been seen as frequently engaging in an abuse of their limited authority, manifested in the granting of an excessive number of variances under circumstances in which a reasonable application of the relevant approval criteria to the facts of individual cases would strongly suggest different outcomes.⁷⁴

Studying the operation of three boards in Colorado, Sampson found they were “generally . . . quite lax in . . . requiring an applicant to substantiate specific claims.”⁷⁵ The failure to even require a party with the burden of proof to present facts supporting their claims renders opaque the basis for any relief ultimately provided. It also provides little guidance to future claimants and little sense of stability for those property owners wishing to rely on the consistency and predictability of zoning and its administration.

Sampson and David Owens separately argued that mid-twentieth-century criticisms of variances are based in part on zoning as it existed during that period.⁷⁶ Owens contended that case law and ordinances have evolved in the intervening decades as “zoning boards of adjustment have become

Joseph H. Bornong & Bradley R. Peyton, *Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083, 1161 (1983) (finding board minutes failed to state grounds for decision or satisfy legal standard); Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENV'T AFFS. L. REV. 307, 361 (1995) (“Designed to provide a constitutional safety valve in the zoning context, the unnecessary hardship variance has a history of malleable and sometimes corrupt use by local reviewing bodies.”); Reynolds, *supra* note 38, at 138 (“[B]oards often do not spell out the reasoning behind their decisions and, in particular, don’t indicate what specific hardship justified a variance that is awarded.”); Mun. Art Soc’y of N.Y., *Zoning Variances and the New York City Board of Standards and Appeals*, 30 COLUM. J. ENV’T L. 193, 197 (2005) (finding ninety-three percent of New York City variance applications decided on the merits are granted); Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 800 (2019) (“The ease with which applicants have been able to convince board members of the presence of an ‘unnecessary hardship,’ and thereby secure a variance from use, height, and area restrictions, has long caused concern among legal and planning commentators.”); Infranca & Farr, *supra* note 20, at 502 (studying Boston, “where a large number of variances are granted with scant attention to the existing legal standard”). See generally Sampson, *supra* note 38, at 896 (reviewing fourteen prior studies of zoning variances, many including multiple jurisdictions, which found grant rates for variances of between thirty and one hundred percent).

74. Sampson, *supra* note 38, at 880. Sampson concluded that the boards he studied “to a sizable degree—do not render decisions consistent with their jurisdiction’s governing legal standard, at least when those decisions result in the granting of a variance.” *Id.* at 905; see also Bryden, *supra* note 73, at 776 (“The minutes of [zoning board of appeals] meetings are frequently skimpy, perhaps reciting conclusory phrases from the statutory criteria, but without meaningful findings of fact or lucid written explanations of the reasons for decisions.”).

75. Sampson, *supra* note 38, at 906; see also Bryden, *supra* note 73, at 775 (“[F]ew boards insist that applicants even allege facts that would constitute legally adequate grounds for relief.”).

76. Owens, *supra* note 31, at 281; see also Sampson, *supra* note 38, at 895 (“[A]s concepts and legal requirements of procedural due process have evolved over the decades, the documented records in quasi-judicial actions generally have improved greatly.”). Sampson describes the records he reviewed in three Denver-area jurisdictions during early 2000s as “informative and relatively comprehensive,” contrasting them with the records in Dukeminier and Stapleton’s study, which lacked “formal findings of fact or conclusions of law.” *Id.* However, as discussed in Part IV, many jurisdictions still provide no findings or legal reasoning.

institutionalized in local government, with the experience and education that often accompanies such.⁷⁷ Yet more recent studies have found similarly high grant rates, a lack of fact finding or legal reasoning, and questionable or nonexistent application of the relevant legal standard.⁷⁸ My own prior study of 177 variance cases in Boston found that of the 154 cases decided on the merits, the relief requested was granted in 137 cases, representing an approval rate of eighty-nine percent, consistent with the high rates found in prior empirical studies.⁷⁹ It noted that “[f]ew, if any, of the 177 variance decisions reviewed discussed the uniqueness or substantiality of the hardship faced by the applicant.”⁸⁰

C. BUT WHY IS THIS A PROBLEM?

There are several reasons why the significant volume of variances granted and the scant attention paid to the relevant legal standards are problematic. In addition to potentially undermining the zoning ordinance by creating unpredictable and numerous exceptions, an overreliance on the discretionary grant of variances can both slow the pace and increase the cost of new development.⁸¹ As they become accepted as part of the routine permitting process, the resort to variances granted inconsistently with the legal standard can lead local governments to ignore the need for more wholesale zoning reform.⁸²

This piecemeal approach poses another danger, however. Overreliance on discretionary approval processes, including variances, can lead to a perception that developers are receiving favored treatment.⁸³ This in turn can spur resistance to new development and encourage efforts to restrict growth.⁸⁴ Studying citizen-led efforts to slow new growth in five Southern California cities, Michael Manville and Taner Osman found that that it was not overly permissive zoning that drove these efforts, but rather that “local officials made

77. Owens, *supra* note 31, at 281.

78. See *supra* notes 70–75.

79. Infranca & Farr, *supra* note 20, at 470.

80. *Id.* at 473.

81. Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index* 7, 39 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26573, 2019), https://www.nber.org/system/files/working_papers/w26573/w26573.pdf [<https://perma.cc/L7R3-99FS>] (“[T]he number of entities needed to approve projects requiring a zoning variance is increasing in the typical place. This makes the process more cumbersome and increases the potential for projects to be vetoed.”).

82. Cf. Beatty, *supra* note 63, at 78–79 (arguing that need for variances can be reduced if boards of adjustment recommend needed amendments to zoning ordinance).

83. See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 547 (2006) (“The liberal use of zoning amendments and variances situate private interests (i.e., developers) as some of the main influences on land use decisions, displacing, or at least diluting, public deliberative processes that might consider the social costs and benefits that underlie particular land use decisions.”).

84. See Manville & Osman, *supra* note 16, at 66, 80–83 (concluding, based on qualitative study of five “ballot box growth revolts” in Southern California, that local discretionary approvals may contribute to citizen initiatives to restrict development).

exceptions to the existing (and often strict) zoning.”⁸⁵ They contend that this bargaining over development, “by creating outcomes that do not conform to existing zoning, can undermine zoning’s transparency and predictability.”⁸⁶ In addition, Manville argues in a separate piece, zoning requirements may be a mere pretext for bargaining, enabling a city to receive concessions in exchange for removing a requirement that lacks any real planning rationale.⁸⁷ “Discretion is the mother of pretext,” he suggests, motivating the imposition of more stringent regulations from which relief might be provided in exchange for concessions.⁸⁸

For all these critiques, however, there is a risk that—unless it is accompanied by reforms that make as-of-right development easier—a push toward greater fidelity to the legal standards might, by making variances more difficult to obtain, stifle needed development.⁸⁹ This is a difficult political question. If variances are harder to obtain it may motivate developers to push for zoning reforms that would allow development to proceed more easily as-of-right (that is without the need for discretionary relief). But as research has revealed, developers may have less political power, even in large cities, than the “growth machine” model suggests.⁹⁰ Accordingly, whether we believe zoning administration and the granting of variances should, in practice, reflect greater fidelity to traditional legal requirements may depend on whether we place greater importance on such fidelity or on addressing the demand for new development. It might also rest on the empirical question, which is beyond the scope of this paper, of whether stricter administration of discretionary relief will prompt legislative reforms (rather than just stymie development).

The next Part moves beyond considering the disconnect between the theory and practice of zoning variances. It situates the administration of zoning variances

85. *Id.* at 67.

86. *Id.* at 68; *see also id.* at 66 (“As land use planning becomes less predictable, citizens become less satisfied with it.”).

87. Michael Manville, *The Pretext Problem: The Pitfalls of Planning While Bargaining*, PLANETIZEN (June 9, 2021, 8:00 AM), <https://www.planetizen.com/features/113615-pretext-problem-pitfall-s-planning-while-bargaining> [<https://perma.cc/D65M-2ELR>] (discussing attempt by Hollywood, California to relieve developer of requirement of three hundred parking spaces in exchange for preservation of “historic” Spaghetti Factory façade).

88. *Id.* (“Discretionary bargaining requires both stringent regulations and a willingness to waive them, which means that in a discretionary regime, the optimal zoning code will have rules that are both onerous and (at least some of the time) unnecessary.”).

89. Memorandum from Victor N. Baltera & Patrick P. Dinardo, Sullivan & Worcester, to Eugene O’Flaherty & Henry C. Luthin, City of Bos. Corp. Couns. 6 (Jan. 13, 2020), <https://www.boston.gov/sites/default/files/file/2020/02/Sullivan%20&%20Worcester%20Memo%20re%20ZBA.pdf> [<https://perma.cc/T74C-DV32>] (concluding, following review of Boston’s zoning board of appeals, that faithful application of variance standards would likely lead to development “grind[ing] to a halt” in Boston).

90. *See* Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229–31, 259 (2014) (finding homevoters are more powerful in urban politics, relative to business and real estate interests, than traditionally believed); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 50–62 (1987) (elaborating “growth machine” theory of land use and development).

within the broader context of administrative law. This perspective suggests new mechanisms for reforming both the oft-criticized variance and the boards of appeal that grant variances.

II. THE ZONING BOARD OF APPEALS, IN THEORY

Legal scholars recently have given increased attention to local administrative agencies. This scholarship suggests the proper role of local agencies must be understood in relation to the distinct attributes of local governance. This Part reviews this scholarship on local administrative law generally, before examining zoning administration specifically.

A. LOCAL ADMINISTRATIVE LAW GENERALLY

As Nestor Davidson has observed, enlisting zoning regulation as one example, “[l]ocal agencies . . . often operate at the edge of a blurry line between governmental action and public participation.”⁹¹ Davidson, sketching the contours of a “distinctly localist administrative jurisprudence,” suggests that reviewing courts should accord varying degrees of deference based upon the formality of a local agency’s processes and procedures.⁹² While some local agencies possess significant technical expertise, others, he contends, serve “more as a mediating body to channel local input and knowledge.”⁹³ Drawing on Carol Rose’s work, Davidson suggests that channeling and mediation are particularly significant in the land use context, where the line between public and private interests can prove particularly blurry.⁹⁴ Local land use institutions “serve to aggregate local information—about local conditions and the local implications of policy—and ensure that intensely personal preferences are considered in the process.”⁹⁵

Recent scholarship raises questions, however, regarding whether the private interests channeled through local land use institutions are sufficiently representative and whether agency decisions are actually informed by whatever local input they do receive.⁹⁶ Political scientists Katherine Einstein, David Glick, and Maxwell Palmer, in a study of community meetings regarding new developments in ninety-seven cities and towns in Massachusetts, found that meeting participants “are more likely [than the broader public] to be older,

91. Davidson, *supra* note 12, at 572.

92. *Id.* at 614–16, 624; *see also* United States v. Mead Corp., 533 U.S. 218, 228, 235–36 (2001) (suggesting level of deference granted to agency may vary based on such factors as “consistency, formality, and relative expertness”). *But see* Ponomarenko, *supra* note 12, at 1583 (arguing that, at the local level, even more robust procedures may not be an adequate substitute for substantive judicial review, given reasons including low rates of participation).

93. Davidson, *supra* note 12, at 573–74. While Davidson considers this local knowledge “still valuable expertise,” it is “of a different sort than the kind of scientific or industry-specific knowledge with which courts credit federal agencies.” *Id.* at 574.

94. *Id.* at 618 (citing Rose, *supra* note 21, at 887–93).

95. *Id.* at 618–19.

96. Einstein et al., *supra* note 25, at 285.

male, longtime residents, voters in local elections, and homeowners.”⁹⁷ Law professor Anika Singh Lemar, in assessing local planning and zoning processes, observes that often “public participation is utterly dysfunctional—and poor people bear the brunt of that dysfunction.”⁹⁸ My own prior work found that the Boston Zoning Board of Appeals routinely approves variances requests supported by the mayor despite vocal opposition from local residents and a neighborhood’s city councilor.⁹⁹ Criticisms of the representativeness of public participation in variance hearings and its effects on decisions have been voiced for decades. Edward Bassett, in critiquing variances as often functioning more like zoning amendments, deemed this particularly problematic given that, while a change to the text of a zoning ordinance is likely to draw significant public participation, “[t]he public hearing on a variance is generally sparsely attended.”¹⁰⁰ Little has changed.

Rather than emphasize the potential role of local agencies in facilitating input, Maria Ponomarenko has focused on requirements related to the substance of agency decisions. She contends that the quality of local agency decision-making might particularly benefit from “basic requirements of reason-giving backed by substantive judicial review.”¹⁰¹ Ponomarenko attributes this benefit in part to the “relative informality” with which local agencies often make decisions, in contrast with “the much more bureaucratized world of federal administration.”¹⁰² She relies in part on “[t]he basic intuition . . . that people make better decisions when they anticipate having to explain their decisions to others.”¹⁰³ This substantive reform, Ponomarenko contends, is likely to yield greater improvements in the quality of decisions than procedural reforms.¹⁰⁴

Frederick Schauer, in a seminal article on the giving of reasons for legal decisions, explicitly identified a zoning authority’s refusal to grant variances as one example of a legal decision that often “stands alone, unsupported by

97. Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 29 (2019).

98. Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1087 (2021).

99. Infranca & Farr, *supra* note 20, at 470–71. Normatively, I believe this deference to the mayor, who represents citywide interests, rather than to neighbors expressing narrower local interests, is a good thing. But at the least it undermines claims that land use institutions channel uniquely local interests and neighborhood preferences. For related discussion of the relative merits of having land use decisions made by a strong mayor rather than individual members of the local legislature see David N. Schleicher & Roderick M. Hills Jr., *Local Legislatures and Delegation*, 102 TEX. L. REV. 495, 525 (2024).

100. Bassett, *supra* note 61, at 119.

101. Ponomarenko, *supra* note 12, at 1532; *see also id.* at 1556–58, 1569 (using “basic requirements of reason-giving backed by substantive judicial review” throughout).

102. *Id.* at 1532.

103. *Id.* at 1557.

104. *Id.* at 1532–33. While her analysis is focused on agency policymaking, rather than adjudication, Ponomarenko’s emphasis on substantive rather than procedural reforms is relevant for the discussion that follows. *See id.* at 1533 (“Although this paper touches at times on agency adjudication, its primary focus is on agency *policymaking*, either through interpretive guidance or binding rules.”).

reasons, justifications or explanations.”¹⁰⁵ As Schauer notes, failing to give reasons in this and other contexts (such as denials of certiorari, jury verdicts, and peremptory strikes) may not be irrational and may be justified “by the efficiencies of saving time.”¹⁰⁶ While perhaps not necessary to ensure rational decisions, Schauer suggests reason giving may provide “a corrective against the potential for the bias built into excess particularity.”¹⁰⁷ Such bias can be difficult to detect in the discretionary grant of relief to individual property owners through the land use approval process.¹⁰⁸ Even if we do not presume there is bias in particular decisions, “an artificial constraint of giving reasons, and therefore of generality” might counteract any potential for improper partiality or its appearance.¹⁰⁹

On Schauer’s account the giving of reasons—“the explicit act of offering a justification or explanation for the result reached”¹¹⁰—reflects “an exercise in generalization.”¹¹¹ Providing the “reason for a decision . . . include[s] that decision within a principle of greater generality than the decision itself.”¹¹² It “transcend[s] the very particularity of” the case in which the reason is provided.¹¹³ By giving a reason, a decision-maker commits themselves “to deciding those cases within the scope of the reason in accordance with the reason.”¹¹⁴

In the case of zoning relief, the general reason or principle behind a decision may be fidelity to the relevant legal standard. Or it might be attentiveness to concerns expressed by neighboring property owners. Or perhaps to the advancement of a pre-defined goal, such as increased housing supply. Any of these reasons might be rational. Providing them publicly, to the extent it commits the board at a general level going forward, would serve to improve the predictability and consistency of zoning administration and, in turn, of the zoning ordinance. Predictability and consistency have long been perceived as important virtues of zoning.¹¹⁵

105. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995). Note that this example only includes a refusal to grant and not a grant of a variance.

106. *Id.*

107. *Id.* at 653.

108. *Cf.* John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693, 1707–08 (2013) (discussing potential for religious discrimination to go undetected in the land use context).

109. Schauer, *supra* note 105, at 653.

110. *Id.* at 636.

111. *Id.* at 635.

112. *Id.* at 641 (emphasis omitted).

113. *Id.*

114. *Id.* at 656; *see also id.* at 649 (“Thus just as making a promise induces reasonable reliance, giving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accordance with that reason.”).

115. *See* Willdel Realty, Inc. v. New Castle Cnty., 281 A.2d 612, 615 (Del. 1971) (“Among the basic objectives of zoning are stability and predictability of permissible land usage.”); *cf.* Miller v. Town of Wenham, 833 F.3d 46, 52 (1st Cir. 2016) (identifying the stabilizing of property uses in specified districts as the aim of zoning ordinances).

Of course, zoning variances and grants of discretionary relief represent an adjustment of zoning in response to unique cases. But even when relief from a specific zoning provision is granted, the decision-maker remains tasked with considering the goals and purposes of the ordinance at a higher level of generality. Consider the language of the Standard State Zoning Enabling Act, which allowed for exceptions, in the form of a variance, from “literal enforcement” of the zoning ordinance to avoid “unnecessary hardship.”¹¹⁶ Such exceptions were deemed necessary to observe “the spirit of the ordinance” and must be “in harmony with its general purpose and intent.”¹¹⁷ Establishing this harmony would seem to require the giving of reasons as to why the relief advances this “general purpose and intent.”¹¹⁸

In addition to reason giving, a requirement of adequate factfinding, if enforced, enables courts to “check abuse of discretion” and “assure that substantive uniformity of decisions authorizing variances is achieved.”¹¹⁹ As one court declared, “[t]he command for specific finding[s] [from the zoning board of appeals] . . . is not a technicality. It promotes the rationality and integrity of decisions[] and enables informed judicial review of their merits.”¹²⁰

Yet, as noted earlier, the small number of variance decisions appealed into the courts suggests that boards, which are often overwhelmed by their caseloads, have little incentive to devote their energy towards improving the substance of their decisions.¹²¹ While substantive requirements matter, closer judicial review of individual decisions may not be the best approach for improving the substance of zoning decisions given that boards often ignore even repeated

116. See U.S. DEP’T OF COM., *supra* note 33, § 7(3), at 11; see also *supra* notes 33–35 and accompanying text (introducing the provision of the Standard State Zoning Enabling Act that allowed for special exceptions).

117. See U.S. DEP’T OF COM., *supra* note 33, § 7, at 9, 11.

118. See *id.* at 9; cf. Schauer, *supra* note 105, at 658 (“[G]iving reasons may be a sign of respect . . . [and] giving reasons is . . . a way of opening a conversation rather than forestalling one.”).

119. William A. Murray, Comment, *Zoning Boards of Adjustment and Variances: California Imposes a Findings Requirement*, 10 URB. L. ANN. 349, 358 (1975).

120. *Van Buren v. S. Bos. New Hous., LLC*, No. 02-5467-A, 2005 WL 332815, at *7 (Mass. Super. Ct. Feb. 4, 2005). Yet, as the same Massachusetts court lamented in the case of Boston, “multiple warnings of the courts through more than [seventy-five] years have not substantially affected the quality of [the Board of Appeal of Boston’s] factfinding.” *Id.* It went on to declare its hope that the Board would “cure the chronic ill of blatantly inadequate factfinding” by obtaining the services of a knowledgeable attorney. *Id.*

121. See *Raskiewicz v. Town of New Bos.*, 754 F.2d 38, 44 (1st Cir. 1985) (“[T]his court has repeatedly said that federal courts do not sit as a super zoning board or a zoning board of appeals.”); see also *Perano v. Twp. of Tilden*, No. 09-00754, 2010 WL 1462367, at *7 (E.D. Pa. Apr. 12, 2010) (“[I]t is clear that federal courts employ this test to avoid converting federal courts into super zoning boards of appeals.”), *aff’d*, 423 Fed. Appx. 234 (3d Cir. 2011); *Pearson v. City of Grand Blanc*, 756 F. Supp. 314, 317 (E.D. Mich. 1991) (“Defendants argue that this is a run-of-the-mill zoning dispute, and urges [sic] this Court to avoid becoming a super zoning board of appeals.”).

reprimands from the courts, and few decisions are ultimately challenged in the courts.¹²²

Making zoning board of appeals decisions more transparent and accessible to the public would enable broader and enhanced public oversight, which in turn can serve to facilitate reform. Local zoning boards, as detailed in Part IV, differ dramatically in the substance and depth of the decisions they issue, but also in how easily they make these decisions available to the public. The transparency (and availability) of these decisions and other information on zoning relief can have significant implications for the salience of the board's work; for understanding the effects of this work on the zoning code and development; and for individuals seeking to engage with the board, either to petition for relief or to speak for or against a neighbor's application.¹²³ Making this information more widely available may also nudge boards towards producing more substantive decisions.

B. ZONING ADMINISTRATION SPECIFICALLY

In order to situate the study of the transparency of specific zoning boards in Part IV, this Section briefly reviews prior research on zoning administration. In the late-1950s, Richard Babcock, one of the most prominent mid-century experts on zoning, argued that critical analysis of the administration of zoning is complicated by the diversity in substantive zoning regulations across municipalities and the variety of sources of relief available (variances, amendments, and special use permits, among others).¹²⁴ Unlike other areas of administrative law, zoning administration does not “pivot around one quasi-judicial body, which in turn derives its power from one legislature.”¹²⁵ Beyond the challenges this creates for studying zoning administration, Babcock voiced a concern that resonates today. As new techniques for regulating land use develop, he argued, administrative bodies exercise “more power over the owners of property than the early protagonists of zoning in their fondest dreams ever imagined.”¹²⁶ Babcock concluded that absent any significant judicial oversight, this created cause for worry.¹²⁷

122. See, e.g., *Van Buren*, 2005 WL 332815, at *7 (“The multiple warnings of the courts through more than [seventy-five] years have not substantially affected the quality of factfinding by the Board of Appeal of Boston.”); *McNeely v. Bd. of Appeal of Bos.*, 261 N.E.2d 336, 343 (Mass. 1970) (“The board did not make the explicit findings which are prerequisite to the granting of a variance and which, *as we have often said*, are not supplied by a bare recital of the statutory conditions essential to the granting of a variance.” (emphasis added)).

123. Cf. ELLICKSON ET AL., *supra* note 30, at 76 (“To discern a municipality’s zoning intentions today . . . one must focus not only on the current [zoning] map, but also on the pattern of amendments the municipality has recently approved.”).

124. Babcock, *supra* note 65, at 512.

125. *Id.*

126. *Id.* at 538. Daniel Mandelker, while noting that the scope of the zoning board of appeals’ powers is not defined, expressed similar concerns, arguing that “it is clear that they were not intended to confer a generalized administrative power to interpret and apply the zoning ordinance on a routine basis.” DANIEL R. MANDELKER, *THE ZONING DILEMMA* 65 (1971).

127. Babcock, *supra* note 65, at 538.

Judicial appeals of zoning decisions are rare, and when they do occur, deference to the zoning board is the norm. This deference, common to judicial review of administrative action, depends in part upon acceptance of the agency's expertise. Debate persists over whether the zoning board should be viewed (and should function) as a body of experts tasked with implementing a highly technical area of law or as a group of average citizens sensitive to particularly local concerns, who seek to broker compromise among neighbors.

Zoning's early proponents emphasized the expertise of the board of appeals, arguing that it was better suited to make decisions than local political actors. Bassett contended that the purpose of the zoning board was "to apply the discretion of *experts* to exceptional instances where permits are desired not strictly conforming to the regulations."¹²⁸ He situated the board within a broader trend "during the last thirty years," "of leaving to an expert administrative body the determination of details in conformity with rules of conduct laid down by the legislature."¹²⁹ Firmly situating the board within the nascent administrative state, he compared it to federal and state legislative delegations of regulatory authority to commissions.¹³⁰ Newman Baker, another prominent voice in the early zoning movement, similarly argued for the advantages of an expert body, "skilled in the building trades" and empowered to "vary the strict letter of the zoning law" in exceptional cases.¹³¹ Flexible administration by a "board of experts," Baker reasoned, protected the ordinance from attacks on its constitutionality and avoided the need for a city council to amend the law to address the concerns of individual owners.¹³²

More recent scholarship casts doubt on whether zoning boards possess legal or other relevant expertise.¹³³ Courts may defer to board decisions due

128. BASSETT, *supra* note 35, at 117 (emphasis added); *see also id.* at 128 ("A board of appeals is presumed to be composed of experts. Consequently, it is not necessary to take proof and base the determination on it. But in its return the board should state the basis of its determination. Proof offered must not be refused." (footnote omitted)).

129. *Id.* at 131; *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS, 23-24, 96 (7th prtg. 1966) ("With the rise of regulation, the need for expertness became dominant . . .").

130. BASSETT, *supra* note 35, at 132. These delegations were a necessity given the intricacy of various areas of law, which "makes it almost impossible for the federal or state legislative body to prescribe exact laws to fit the details of every situation." *Id.*

131. Baker, *supra* note 52, at 280.

132. *Id.*

133. *See* Dukeminier & Stapleton, *supra* note 71, at 337 ("[A] zoning board of adjustment is a lay board, usually composed of persons untrained in law . . ."); Shapiro, *supra* note 19, at 18 ("The crucial shortcoming of the board of appeals is its lack of expertise."); *see also* Sampson, *supra* note 38, at 928 ("[S]uch boards 'are not necessarily chosen either on the basis of expertise in land use planning or of any particular professional qualification to perform a quasi-judicial function.'" (quoting Shapiro, *supra* note 19, at 4)); Anderson, *supra* note 70, at 358 ("The failure to require that members of boards of zoning appeals be trained or experienced in some occupation or discipline related to the regulation of land use has resulted in boards composed of persons drawn from a variety of occupations."). Ponomarenko suggests what expertise boards have may not be most suited to the tasks at hand: "A zoning board might include a mix of developers, lawyers, and community advocates, none of whom are uniquely qualified to determine whether emissions

not to technical expertise, but rather their perception of the board's familiarity with "their community's characteristics and interests."¹³⁴ Accordingly, some have called for ensuring that board members reflect a broader cross-section of citizens, arguing that the board can rely upon professional staff and legal counsel for more technical matters.¹³⁵

In this same vein, Carol Rose argued that the combination of vague variance criteria and the lay status of most boards suggests zoning boards are "less expert administrators than representative groups of concerned but fair-minded citizens, compromising and smoothing conflicts among neighbors."¹³⁶ The consideration of criteria such as "[u]nnecessary hardship," "special circumstances," and "not contrary to the public interest," Rose continued, do not seem to require particular expertise to apply.¹³⁷ As previously noted, however, framing the matters addressed by zoning boards as mere "conflicts among neighbors" fails to account for the cumulative effects these decisions have on the public interest at the citywide level.¹³⁸ Moreover, what constitutes "the public interest" and what interests should be given priority are highly contestable matters. Some degree of technical expertise might aid in making these determinations or measuring to what extent these interests are advanced by a particular decision.

In contrast, others have called for more expertise on boards. Calling for the replacement of lay boards by experts or a single administrator, John Reps argued (years before Rose's article) that "[t]he concept of the board of appeals as a kind of poor man's court where common sense justice is dispensed by one's friends and neighbors no longer has much validity."¹³⁹

This debate over the value, or appropriate form, of expertise runs in parallel with broader arguments over the role of zoning relief and of the zoning board of appeals. While traditional understandings envisioned a group of experts tasked with granting minor exceptions to a comprehensive and technical zoning code, commentators in the late twentieth-century, including Rose, emphasized the value of dealmaking in the zoning process. On this account,

from a proposed autobody shop would pose a health hazard to neighboring residents, or whether a proposed subdivision would threaten local wetlands." Ponomarenko, *supra* note 12, at 1555 (footnotes omitted).

134. Ward v. Scott, 105 A.2d 851, 855 (N.J. 1954); see also Anderson et al., *supra* note 60, at 692 (arguing that a board with backgrounds more representative of the community should be granted greater deference).

135. Anderson et al., *supra* note 60, at 692. Based on a study of the planning commission and board of zoning appeals in 137 of the nation's largest cities, Anderson and his coauthors found that board members are "drawn overwhelmingly from white-collar occupations . . . [and] dominated by a few types of occupations: business owners, developers, attorneys and politicians." *Id.* at 691.

136. Rose, *supra* note 21, at 860.

137. *Id.* at 859.

138. See *supra* notes 25–28 and accompanying text.

139. Reps, *supra* note 37, at 296. Others have called for greater expertise in places where variance applications demand detailed financial information in order to substantiate claims of hardship. Mun. Art Soc'y of N.Y., *supra* note 73, at 202 ("If courts are to defer to the BSA as an expert body, the BSA must have the expertise to deal with the modern variance application.").

which we turn to next, the board of appeals' role was seen not as the resolution of technical legal questions, but rather as gathering community members together to negotiate compromises among neighbors.

Before we proceed, it will be helpful to briefly summarize the various flexibility mechanisms through which local governments can modify or provide relief from a zoning ordinance. In addition to the variance, the two other traditional mechanisms for zoning change are the special exception (also termed a conditional use permit or special permit) and the rezoning or map amendment.¹⁴⁰ A special exception is a use typically identified in the zoning ordinance and allowed in a given district not "as of right," but after the determination by some entity (typically the zoning board of appeals) that specified criteria are satisfied.¹⁴¹ As its alternative name suggests, the board may also impose certain conditions on the use to ensure it is compatible with the surrounding neighborhood. In contrast, a rezoning, which can take the form of an amendment to the zoning map (reclassifying an area into a different zoning district) or an amendment to the zoning text itself (changing what is allowed within a given zoning district and how uses are regulated) is a legislative action, typically enacted by the local legislative body.¹⁴² In addition, since the 1960s additional flexibility devices, such as "floating zone[s]" and "planned unit development[s]," allow for legislative changes to the zoning that are, to some degree, tailored to the desires of a particular property owner (and typically involve larger parcels than those included in an application for a variance or special exception).¹⁴³ These flexibility devices have, in part, given local governments greater ability to negotiate with developers over plans for a particular parcel. Variances and special permits are typically requested by individual property owners, often owners of small residential properties.¹⁴⁴ While rezonings may be initiated by and affect only a single property owner, they are more likely to involve larger parcels.¹⁴⁵ Planned unit developments also typically involve large and frequently mixed-use developments.¹⁴⁶

C. NEGOTIATING COMPROMISE?

The conception of zoning administration as a locus of negotiated compromise suggests one reason why zoning boards often ignore the relevant legal standards. Two commentators succinctly framed the general problem as, perhaps, inevitable:

140. ELLICKSON ET AL., *supra* note 30, at 76.

141. *See id.* at 76, 346.

142. *See id.* at 76–77.

143. *Id.* at 77 (emphases omitted); *see also* Kmiec, *supra* note 73, at 55 ("The [planned unit development] is a technique that allows particular consideration of an entire development project, rather than the application of generalized standards to individual lots.")

144. *See, e.g.*, LO & FREEMARK, *supra* note 11, at 6–8, 16–17.

145. *See, e.g., id.* at 2.

146. *Id.* at 5–6.

The usual three- or four-part formula for assessing the merits of a variance is all but meaningless when applied to most cases that come before a city zoning board. The result is that zoning board members, having no meaningful standard, fall back to acting in light of what they perceive their role to be, that of a board of equity sitting to do rough justice in difficult cases. Frequently, the zoning board sees itself as the protector of citizens against the professionals.¹⁴⁷

One way to understand this shift is that while the legal standard for variances has not changed in most ordinances, the nature of local zoning has, and those changes have altered the function of boards of adjustment. The drafters of zoning codes are often overly optimistic regarding their ability to predict and plan for future development. Moreover, many jurisdictions have made their zoning more restrictive over time.¹⁴⁸ Older urban areas with significant demand for new housing are often particularly restrictive, increasing the need for relief.¹⁴⁹ As zoning generally has become more flexible and local governments seek to negotiate with developers over what can be built (and what concessions can be obtained), zoning boards have become “an increasingly important forum for public debate.”¹⁵⁰ In this capacity they take on a role of mediating and problem-solving, seeking “to negotiate or arbitrate a compromise solution which will serve all interests.”¹⁵¹ The seminal statement of this vision is Rose’s *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*.¹⁵² Rose critiques what she terms “plan jurisprudence,” which emphasizes conformity to preexisting plans and, drawing on administrative law principles, treats piecemeal changes to zoning as “judicial” decisions.¹⁵³ She contends that plan jurisprudence advances an “outmoded version of local land planning” and both fails to solve the problems its seeks to resolve and

147. CLIFFORD L. WEAVER & RICHARD F. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* 161 (1979).

148. Einstein et al., *supra* note 25, at 308–09.

149. LO & FREEMARK, *supra* note 11, at 1–2.

150. Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1068 (1990). Owens, studying zoning boards in North Carolina, found:

While the courts consistently characterized the variance as a narrow tool for relief in extraordinary situations, the variance in practice has been widely used as a device for much broader zoning flexibility. The zoning variance became the means of choice for compromise and quick resolution of individual disputes that arose in the course of zoning implementation. Many zoning boards of adjustment viewed the variance as a useful tool for balancing individual and community needs in a variety of circumstances rather than a device limited to amelioration of significant hardship.

Owens, *supra* note 31, at 295.

151. Eric H. Steele, *Community Participation and the Function of Rules: The Case of Urban Zoning Boards*, 9 LAW & POL’Y 279, 289 (1987); *see also* Sampson, *supra* note 38, at 909 (“The Denver Board, more than any other, searched for accommodation and compromise, rather than focusing on the application of the legal standards and inquiring as to whether such have been met by the applicant.”).

152. *See generally* Rose, *supra* note 21.

153. *Id.* at 844.

creates new ones.¹⁵⁴ “Piecemeal changes are quintessentially local matters” and so their legitimacy must be assessed in reference to local decision-making.¹⁵⁵ Rose proposes an alternative jurisprudence that, rather than focusing upon conformity with a plan, “treats piecemeal changes as dispute mediations, and tests fairness and due consideration in the light of the local opportunity for participation or departure.”¹⁵⁶

In this context the support or opposition of neighbors may be given significant weight, even though the legal standard typically does not call for it to be considered.¹⁵⁷ Some commentators, including economist and zoning expert William Fischel, himself a member of the Hanover, New Hampshire zoning board for many years, defend consideration of local support and opposition, even though outcomes may not always be consistent with the law.¹⁵⁸ There are inevitable tensions, however, particularly when this embrace of dealmaking occurs in the context of a variance request. Variance hearings are often low-attendance affairs and while an individual case may seem minor, cumulatively a high volume of variances can have significant impacts on a community beyond the immediate neighbors. With time, the quiet issuance of variances by “largely anonymous, unelected citizen boards” can dramatically reshape a community without the robust public participation (and consideration of community-wide interests) we might desire.¹⁵⁹

Community support may be obtained by an applicant through informal negotiations and the granting of concessions to neighbors early in the process.¹⁶⁰ This poses risks that more powerful neighborhoods will exert greater control and extract more significant concessions from developers. The result may be significant disparities in the treatment of individual developers and neighborhoods. In some jurisdictions the zoning board might impose conditions upon the recipient of a variance.¹⁶¹ This is problematic to the extent it confers upon the zoning board authority to bargain on behalf of the city in a manner that would be more appropriate for an entity, such as the planning board or local legislature, with a broader purview.

154. *Id.* at 846.

155. *Id.*

156. *Id.* at 847.

157. David L. Kent, *The Presumption in Favor of Granting Zoning Variances*, 34 N.H. BAR J. 29, 29, 32 (1993) (declaring, based on study of five New Hampshire communities, that the level of opposition from neighbors is a key factor determining success of the variance application). *But see* Infranca & Farr, *supra* note 20, at 470–71 (finding the Boston zoning board of appeals routinely approves variance requests despite vocal opposition from local residents).

158. WILLIAM A. FISCHEL, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* 39–41 (2015). *But see* Sampson, *supra* note 38, at 911–12 (finding frequent and inappropriate “delegation of authority” by board members to neighbors of property requesting a variance); *id.* at 912 n.170 (“These cases also suggest that the board placed inordinate weight on the existence of neighbors’ support or opposition, an inappropriate practice according to most commentators and case law.”).

159. Owens, *supra* note 31, at 280.

160. *See* Infranca & Farr, *supra* note 20, at 459.

161. *See id.* at 456.

There is also the potential for deference to neighbors to reflect not local expertise and sensitivity to community concerns, but rather favoritism and insider advantage.¹⁶² This is particularly true if, as empirical evidence suggests, land use hearings are not representative and opportunities for exit from a community are severely constrained.¹⁶³ Unequal access to zoning relief can also adversely affect lower-income and minority property owners, as a recent study of variances in New York City highlighted.¹⁶⁴ A separate study of developer-initiated rezonings in Louisville, Kentucky found an uneven distribution of denials, with rezonings more likely to be rejected in higher-income neighborhoods.¹⁶⁵ Applications that were denied, in addition to having “more speakers in opposition, . . . were for projects in neighborhoods with higher education levels, a higher share of homeowners, and a greater proportion of the population that was non-Hispanic white.”¹⁶⁶

Courts have long expressed concern regarding potential impropriety and favoritism in the exercise of discretion by a zoning board of appeals.¹⁶⁷ Writing in 1927, Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, emphasized the “delicate” and “easily abused” jurisdiction of the board of appeals: “Upon a showing of unnecessary hardship, general rules are suspended for the benefit of individual owners, and special privileges established.”¹⁶⁸ Given the risk of abuse, disclosure, Cardozo argued, was “the antidote to partiality and favor.”¹⁶⁹ In Part IV we look more broadly at the transparency and visibility of zoning board decisions, examining the extent to which boards disclose the substance and effects of these decisions. Prior to presenting that analysis, the next Part explores the broader literature on the nature and merits of transparency.

III. TRANSPARENCY AS NORM AND THORN

This Part draws upon transparency theory to argue for increased attention to a particular form of transparency: the communication of and public access

162. See Babcock, *supra* note 65, at 514 (arguing, based on a study of Illinois, that the variance was enlisted early on “as a devious and uncandid method for granting special favors to persons who were not faced with circumstances any different than those encountered by their neighbors”).

163. Einstein et al., *supra* note 25, at 298–306; Lemar, *supra* note 98, at 1117–19; Vicki Been & Anika Singh Lemar, *The Law’s Effects on Public Participation, in A RESEARCH AGENDA FOR US LAND USE AND PLANNING LAW*, *supra* note 15, at 109, 116.

164. Lauren Ames Fischer, Valerie E. Stahl & Bernadette Baird-Zars, *Unequal Exceptions: Zoning Relief in New York City, 1998–2017*, 42 J. PLAN. EDUC. & RSCH. 162, 171 (2018) (finding that variances were more routinely granted to property owners in wealthier neighborhoods, which the author attributed to stronger sociopolitical networks in such communities).

165. LO & FREEMARK, *supra* note 11, at 2.

166. *Id.* at vi.

167. See, e.g., Sugar v. N. Balt. Methodist Protestant Church, 165 A. 703, 706–07 (Md. 1933) (“Abstractly considered, there is much force in the argument that the board of zoning appeals should have powers of variation and suspension to correct excessive burdens imposed by the enforcement of the regulations in the several districts of a comprehensive zoning system; but, in its concrete result, this rule of expediency to relieve individual hardship is productive of inequality, popular discontent, and inferences or charges of favoritism.”).

168. *People ex rel. Fordham Manor Reformed Church v. Walsh*, 155 N.E. 575, 578 (N.Y. 1927).

169. *Id.*

to the substance and effects of zoning boards of appeals' work. It first reviews discussions to date regarding transparency in the land use law literature. It then turns to the broader literature on the substance, benefits, and potential costs of transparency.

Land use scholars have given some attention to the benefits of greater transparency. Rick Hills and David Schleicher invoke transparency when arguing in favor of a greater emphasis on comprehensive planning and dealmaking at the city rather than the individual lot level.¹⁷⁰ Their focus, however, is not upon making the inner workings of the zoning board of appeals more transparent and improving the communication of board decisions. Rather, they emphasize the transparency of a city's zoning writ large, arguing for a move away from parcel-by-parcel bargaining towards "[d]efining the rights to build ex ante in a comprehensive and binding plan that bars deals [and] makes the land market more transparent, encouraging investment by a larger number of players by reducing information costs."¹⁷¹ Hills and Schleicher's proposal is an ideal, and I have argued in favor of a move in that direction in prior work.¹⁷² My focus here is on a second-best approach that is more easily implemented in the short term and that could, in the long term, facilitate a shift towards some version of Hills and Schleicher's proposals.

Daniel Selmi, in *The Contract Transformation in Land Use Regulation*, critiques the opaqueness of development agreements, through which local governments and developers bargain and even enter binding contracts, which include bespoke modifications to land use regulations.¹⁷³ Such contracting typically involves larger developments that, while they may require relief from the zoning board of appeals, do not constitute the largest share of such boards' work, particularly in lower-density residential neighborhoods. Selmi discusses transparency in relation to public participation, noting the shift from an early emphasis on leaving decisions to experts toward, by the mid-1970s, more public hearings and robust citizen participation.¹⁷⁴ This occurred, he observes, simultaneously with increased public access to information through state public records laws.¹⁷⁵ A more transparent process not only served to check potential

170. See generally Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 123 (2015) (discussing benefits of transparent zoning and costs of custom-tailoring zoning for individual lots); see also *id.* at 130 ("[T]he rights for each neighborhood could still be defined transparently, without customizing the rights for each lot within each neighborhood based on the owner's bargains with the city.").

171. *Id.* at 95; see also *id.* at 131 ("The advantage of transparency is that it allows land-use markets to dispense with the costly machinery of negotiation—the lawyers, consultants, fixers, lobbyists, and accompanying hearings and negotiations—that clog the process by which land is bought and sold.").

172. Infranca, *supra* note 9, at 887; John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1316–17 (2020).

173. See Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593 (2011); see also *id.* at 640–41 (discussing typical negotiation process).

174. *Id.* at 637.

175. *Id.* at 638; see also *id.* at 636 ("As land use regulation evolved to take into account a broader variety of goals, the procedures used by local governments changed to expand opportunities

abuse of power, it also enhanced “the power of citizens to persuade by enabling them to strongly express an informed position to those in power.”¹⁷⁶

Outside the land use context, law professor David Pozen has written extensively on transparency.¹⁷⁷ Pozen defines transparency as “the idea that institutions should be required by law to make information about their activities available to the general public or other outside monitors.”¹⁷⁸ Pozen observes a tendency in much of the literature to view transparency as a “primary virtue worth attaining for its own sake.”¹⁷⁹ In contrast, this Article champions transparency not for its own sake, but rather in service to improved land use decision-making.¹⁸⁰ Admittedly, this claim relies upon a presumption that increased transparency—in the form of improved access to the decisions of zoning boards and the reasoning behind them—will improve the accountability of zoning boards of appeal to the zoning ordinance, the relevant legal standards for relief, and the interests of the general public (rather than just the interests of the owner of a property seeking relief and their neighbors). To the extent that increased reliance on administrative agencies and discretionary relief enables land use regulations that are more flexible and responsive to changing local needs, it inevitably does so at the expense of predictability and order.¹⁸¹ Making the process through which this relief is provided and the basis upon which it is granted more transparent would restore some degree of predictability by allowing individuals to more easily identify where and why relief has been granted. It can also foreground areas where variances are frequently granted, which suggests the zoning ordinance itself should be revised to permit as-of-right forms of development currently allowed through an opaque and ad hoc discretionary process.

for public involvement in land use decisions and to increase transparency in decision-making. These developments promote democratic values, but the shift to contract has important implications for them.”).

176. *Id.* at 638.

177. See David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 326–27 (2020) [hereinafter Pozen, *Seeing Transparency More Clearly*] (contending that scholars, in order to better understand the operation of transparency policies, must look more closely at the contexts in which these policies are implemented); David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 102 (2018) [hereinafter Pozen, *Transparency’s Ideological Drift*] (arguing that transparency has experienced “ideological drift,” assuming a more libertarian and less progressive political valence over time); David E. Pozen & Michael Schudson, *Introduction: Troubling Transparency*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 1, 1–2 (David E. Pozen & Michael Schudson eds., 2018) (introducing volume of essays debating the value of government transparency).

178. Pozen, *Transparency’s Ideological Drift*, *supra* note 177, at 104.

179. *Id.* at 103.

180. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 936 (2006) (“[T]ransparency’s goals require a context-specific definition of transparency, viewed in terms of specific policy objectives, system constraints, and the costs and benefits of open government requirements, rather than an approach that regulates secrecy based on the presumed motivations of officials in the abstract.”); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 623 (2010) [hereinafter Fenster, *Seeing the State*] (“Transparency is a means to achieve the end of a more responsive state that more effectively achieves democratically agreed-upon ends.”).

181. See Rose, *supra* note 21, at 841–44.

Two broad themes in the literature on transparency are particularly relevant to our discussion of local land use administration: First, the relationship between transparency and improved public participation;¹⁸² and second, the role of transparency in enabling the public to hold government actors accountable.¹⁸³ Mark Fenster emphasizes how transparency enables the public to both observe government institutions and hold those institutions accountable.¹⁸⁴ Transparency theory calls for the administrative state to either allow the public to directly view its operations or “to make its work available for the public to review.”¹⁸⁵

Land use regulators hold their meetings in public, pursuant to relevant public meeting laws.¹⁸⁶ However, as Part IV reveals, they often conceal the substance of their final decisions, including their “work,” the reasoning that leads to and justifies particular outcomes. In some instances, this work is not memorialized in a written decision, in others the written decisions are not available absent a formal public records request. Access to such documents serves as a form of transparency, relying “on the concept of a document as a messenger of the inner workings of governmental power as well as its external affairs.”¹⁸⁷ Such access should be available not just to individuals who seek it out, but rather “should be readily available to all in order for the democratic rationality of transparency to work.”¹⁸⁸ In the age of the internet, Ida Koivisto has argued, government agencies should be expected to proactively inform the public of their activities as “the easy accessibility of information in general creates pressures for governments to keep on a par with that general condition.”¹⁸⁹

Transparency is not without costs, particularly for municipal governments eager to enlist private development to further public goods.¹⁹⁰ It might undermine the bargaining position of local governments seeking ad hoc concessions from developers.¹⁹¹ As such, local administrative agencies may

182. See Ann Florini, *Introduction: The Battle over Transparency*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 1, 5 (Ann Florini ed., 2007) (defining transparency as “the degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders”).

183. See Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 *HARV. J.L. & PUB. POL’Y* 103, 108 (2010) (“The essence of accountability lies in the transparency of government actions . . .”).

184. Fenster, *Seeing the State*, *supra* note 180, at 620–21.

185. *Id.* at 621.

186. See Been & Lemar, *supra* note 163, at 110–11 (discussing formal requirements for public participation, including public hearings).

187. IDA KOIVISTO, *THE TRANSPARENCY PARADOX: QUESTIONING AN IDEAL* 123 (2022).

188. *Id.* at 138.

189. *Id.*

190. See Hills & Schleicher, *supra* note 170, at 132 (noting that the “plan transparency” they favor could prevent the local government discovering “potentially useful information” from a developer, including their bottom line, and leaving money on the table that might otherwise benefit the community).

191. Pozen, *Seeing Transparency More Clearly*, *supra* note 177, at 326 (noting commentators who warn that transparency may inhibit deliberation and dealmaking).

be predisposed against transparency.¹⁹² Some developers and land use attorneys may perceive benefits from complexity, to the extent it stymies competition or enables them to derive profit from their expertise in navigating the existing system.

Transparency also may force cash-strapped local governments with small staffs to expend considerable time and resources in more carefully documenting the basis for their decisions and in making those decisions easily accessible to the public. Relatedly, it might pose challenges for zoning boards without sufficient legal expertise to craft reasoned decisions. It might impose delays (and additional costs or uncertainty) upon developers seeking to proceed as quickly as possible with projects. These concerns could be addressed in part by state law imposing transparency requirements only on municipalities above a certain size or that grant above a certain number of variances annually. They might also be eased by the adoption of forms for applications for relief that specify the relevant legal standard and require applicants to detail facts supporting each criterion.¹⁹³ Jurisdictions could also, as some already do, require or encourage applicants to submit draft opinions. These approaches could expedite the drafting and issuance of final opinions.

I would submit that the modest proposals in Part V for improving the recording and sharing of information regarding land use administration could, in many instances, be done with minimal financial outlay or delay. The most significant cost of transparency may be that it will only heighten public opposition to new development generally and to specific projects. As an empirical matter, I doubt this is true. The individuals most opposed to new development, typically nearby neighbors with ample free time and axes perceived to need grinding, already find themselves quite able to learn about projects they do not want in their backyards. Greater transparency would expand the number of people engaged in the process, bringing to the table individuals more concerned with the diffuse benefits of new development in terms of increased housing supply and lower housing costs.

Expectations of transparency are increasingly the norm across government agencies. As Part IV reveals, zoning boards of appeals often fail to satisfy even very basic norms of transparency. Improving the transparency of their decision-making processes and the effects of their decisions would improve public understanding of their work. This, in turn, can improve the quality and breadth of public participation. Even to the extent one believes, consistent with Rose, that zoning boards should make “piecemeal changes” and mediate local disputes, improved transparency is likely to improve “the local opportunity for participation” and the fairness of decisions.¹⁹⁴ As such, the reforms proposed

192. MAX WEBER, *ECONOMY AND SOCIETY* 992 (Guenther Ross & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. Cal. Press 1978) (contending that “*keeping secret* its knowledge and intentions” constitutes a key feature of bureaucracy).

193. See *infra* notes 262–67 and accompanying text (discussing use of such forms in multiple municipalities).

194. Rose, *supra* note 21, at 847.

in Part V should be the norm regardless of one's view of the relative merits of the role that zoning boards of appeal currently play in most land use regimes. Transparency can also be a thorn, improving awareness of the zoning board of appeals work, the inadequacies of current zoning, and the need for more wholesale reform.

IV. THE ZONING BOARD OF APPEALS, IN PRACTICE

Local governments vary widely in the amount and quality of information regarding zoning administration they make publicly available. Only a very small share of the most populous cities in the United States provide publicly available reports with information on variance applications or denials. Many do not even track these numbers internally. Few cities make the actual text of variance decisions available online, and many zoning boards do not even produce written decisions, or if they do, they simply provide a conclusion absent any reasoning or fact finding. This Part summarizes the publicly available information on variances for the twenty-six largest cities in the United States by population.¹⁹⁵ The information summarized here highlights material most relevant to the transparency, and in turn the consistency and predictability, of zoning administration.

A. THE VOLUME OF VARIANCES

For purposes of this Article and prior research, this Author sought information on the volume of zoning variances applications and their disposition in the most populous U.S. cities. Some of this information was publicly available, but much of it was obtained through formal requests. In a few instances available information, such as meeting minutes, was manually reviewed and the numbers calculated.¹⁹⁶ The number of variance applications in the cities reviewed, as depicted in the following table for the years for which data could be obtained, varies dramatically and is not correlated to population or land area.

The most populous city,¹⁹⁷ New York, saw fifty variance applications ruled upon (or withdrawn) in fiscal year 2018 (July 1, 2018 to June 30, 2019), of

195. Houston, Texas, does not have zoning, and so I reviewed the twenty-six most populous cities to include twenty-five cities with zoning.

196. This Section's discussion of the number of variance applications and grants draws in significant part on Infranca & Farr, *supra* note 32, at 468–99. Since cities track dates differently, the numbers listed may represent a city's fiscal or calendar year.

197. Population rankings in this section are drawn from the U.S. Census Bureau's dataset: Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2021 Population: April 1, 2020 to July 1, 2021 (SUB-IP-EST2021-ANNRNC). City and Town Population Totals: 2020–2023, U.S. CENSUS BUREAU (June 25, 2024) [hereinafter U.S. Census Dataset], <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html> [<https://perma.cc/XEH6-CLDK>] (dataset available at <https://perma.cc/qJH3-QPKZ>).

which twenty-six were granted, for a fifty-two percent grant rate.¹⁹⁸ Grant rates for other cities in 2019 and 2020 are listed in the chart below:

Table 1

City (Ranked by Population) ¹⁹⁹	2019			2020		
	Applications	Grants	Grant Rate	Applications	Grants	Grant Rate
New York (1)	34 ²⁰⁰	19 ²⁰¹	56%	–	–	–
Los Angeles (2)	82 ²⁰²	65 ²⁰³	79%	56 ²⁰⁴	44 ²⁰⁵	79%
Chicago (3)	505 ²⁰⁶	357 ²⁰⁷	71%	320 ²⁰⁸	240 ²⁰⁹	75%
Philadelphia (6)	Average of 950 variance applications each year between August 2012 and August 2017. Between 84% and 92% of applications were granted annually during period. ²¹⁰					

198. Letter from Carlo Costanza, Exec. Dir., N.Y.C. Bd. of Standards & Appeals, to Corey Johnson, Speaker, N.Y.C. Council (Sept. 1, 2019), https://www1.nyc.gov/assets/bsa/reports/2019_09_01_report_and_varinces_special_permit.pdf [<https://perma.cc/S7LH-NYR8>]. Twenty applications were withdrawn, three dismissed, and one denied. *Id.*

199. U.S. Census Dataset, *supra* note 197.

200. Letter from Carlo Costanza, Exec. Dir., N.Y.C. Bd. of Standards & Appeals, to Corey Johnson, Speaker, N.Y.C. Council (Sept. 1, 2020), https://www1.nyc.gov/assets/bsa/reports/2020_09_01_report_and_varinces_special_permit.pdf [<https://perma.cc/5SRQ-ABCG>] (providing data for author's calculation of decisions related to BZ 72-21, the variance provision of the New York City Zoning Resolution). One application was denied and fourteen were withdrawn. *Id.* at 3-4.

201. *Id.* at 3.

202. See E-mail from Beatrice Pacheco, Recs. Mgmt. Unit, L.A. City Plan., to Author (July 22, 2022, 4:59 PM) (on file with the *Iowa Law Review*).

203. *Id.*

204. *Id.*

205. *Id.*

206. Chicago uses the term “variation” for the form of relief typically termed a variance. CHI., ILL., ZONING ORDINANCES § 17-13-1107-A (2024). These numbers were calculated based on meeting minutes. Zoning Bd. of Appeals, *Meetings, Calendars and Minutes*, CHI. (2024), <https://www.chicago.gov/city/en/depts/dcd/zoning-board-of-appeals/meetings—calendars-and-minutes.html> [<https://perma.cc/4NAW-PG2T>]. Minutes for each meeting are available on the live site and on file with the *Iowa Law Review*. We also counted 219 Special Use applications during this period. *Id.*

207. Zoning Bd. of Appeals, *supra* note 206.

208. *Id.*

209. *Id.*

210. See PHILA. CITY PLAN. COMM'N, CITY OF PHILADELPHIA ZONING CODE 5 YEAR REPORT: AUGUST 2012–AUGUST 2017 5 (2017), https://www.phila.gov/media/20191121115606/ZoningCode_5Yr_Report.pdf [<https://perma.cc/3XNK-PHK3>] (providing table with number and disposition of requests for variances and other forms of zoning relief from 2008 through 2017). Over these five years, approximately seventy-three percent of the variance requests were for use variances, with the remainder for area or dimensional variances. *Id.* In addition to these variance applications, Philadelphia saw an average of eighty-five special exception applications annually between 2012 and 2017. *Id.* The number of applications “was even higher prior to an overhaul to the city’s zoning code in the early 2010s.” Infranca & Farr, *supra* note 20, at 467; Aaron Moselle & Ryan Briggs, *Council President Darrell Clarke to Introduce Overhaul of Philly Zoning Board*, WHYY (Sept. 15, 2021, 5:55 PM), <https://whyy.org/articles/council-president-darrell-clarke-to-introdu>

City (Ranked by Population) ¹⁹⁹	2019			2020		
	Applications	Grants	Grant Rate	Applications	Grants	Grant Rate
San Antonio (7)	171 ²¹¹	129 ²¹²	75%	135 ²¹³	90 ²¹⁴	67%
San Diego (8)	3 ²¹⁵	3 ²¹⁶	100%	2 ²¹⁷	2 ²¹⁸	100%
Austin (11)	109 ²¹⁹	34 ²²⁰	85% / 31% ²²¹			

ce-overhaul-of-philly-zoning-board [https://perma.cc/5TPJ-J5FM]. Philadelphia does not continue to keep annual records of the total number of variance applications, as was confirmed to us via email. See E-mail from Paul Chrystie, Deputy Dir. for Commc'ns, Dep't of Plan. & Dev., City of Phila., to Ronnie M. Farr (Oct. 26, 2021, 5:00 PM) (on file with the *Iowa Law Review*) ("Zoning Board of Adjustment records are kept by individual case and not in a collective way that would, for example, allow a sorting that would group appeals by approval or denial.").

211. Numbers are for variances and special permits. E-mail from Sandra Garza, Dev. Servs. Dep't, San Antonio, Tex., to Ronnie M. Farr (Oct. 20, 2021, 10:41 PM) (on file with the *Iowa Law Review*) (RE: Response to Public Information Request COSA ORR No: W404873-092021). San Antonio did not disaggregate requests for variances from requests for special exception. *Id.* However, a review of a recent agenda reveals that many applications including requests for both forms of relief and that special exceptions are often granted for matters that in other cities are treated as variances. See *Agenda: Board of Adjustment Meeting*, CITY OF SAN ANTONIO (Aug. 1, 2022, 1:00 PM), https://sanantonio.primgov.com/Portal/Meeting?meetingId=5447&templateName=HTML%20Agenda [https://perma.cc/R7NV-WTCG].

212. E-mail from Sandra Garza to Ronnie M. Farr, *supra* note 211.

213. *Id.*

214. *Id.*

215. E-mail from Stacie L. Maxwell, Legis. Recorder, City of San Diego Dev. Servs. Dep't to Ronnie M. Farr (Sept. 20, 2021, 2:26 PM) (on file with the *Iowa Law Review*) (providing count of applications by year and links to decisions).

216. *Id.*

217. *Id.*

218. *Id.*

219. CITY OF AUSTIN BD. OF ADJUSTMENT, ANNUAL INTERNAL REVIEW 2 (June 30, 2020), https://www.austintexas.gov/edims/document.cfm?id=357193 [https://perma.cc/P9QD-TS UZ] (documenting data from July 1, 2019, to June 30, 2020). Of these, 34 were granted, 6 denied and 69 withdrawn or postponed. *Id.* at 3.

220. *Id.*

221. *Id.* The former number is the percentage of applications granted among those decided on the merits, the latter number is the percentage granted of all applications, including those withdrawn or postponed.

City (Ranked by Population) ¹⁹⁹	2019			2020		
	Applications	Grants	Grant Rate	Applications	Grants	Grant Rate
Charlotte (16)	99 ²²²	65 ²²³	66%	102 ²²⁴	95 ²²⁵	93%
San Francisco (17)	170 ²²⁶	101 ²²⁷	59%	138 ²²⁸	74 ²²⁹	54%
Denver (19)	120 ²³⁰	n/a		110 ²³¹	n/a	
Boston (24)	1,096 ²³²	948 ²³³	86%	639 ²³⁴	512 ²³⁵	80%

Multiple factors contribute to the variation in the volume of variance applications and grants in these cities. In some cities, including New York, most new development conforms with existing zoning and is allowed as-of-

222. This includes administrative deviation requests, which section 4.107 of the Zoning Ordinance authorizes the Zoning Administrator to grant. See CHARLOTTE PLAN., DESIGN & DEV., CITY OF CHARLOTTE ZONING ADMINISTRATION VARIANCE, APPEAL AND ADMINISTRATIVE DEVIATIONS APPLICATION AND PROCEDURES PACKET 2 (2022), <https://www.charlottenc.gov/files/sharedassets/city/v/1/growth-and-development/planning-and-zoning/documents/fy2023-zba-application-packet-v2.pdf> [<https://perma.cc/CLL9-X93U>]. For numbers, see reports at CITY OF CHARLOTTE ZONING ADMIN., *Zoning Board of Adjustment Cases 2011–Present* (2023) [hereinafter City of Charlotte, *Zoning Board of Adjustment Cases*], <https://charlottenc.gov/planning/ZoningAdministration/ZBACases/Pages/Home.aspx> [<https://web.archive.org/web/20230127005737/https://charlottenc.gov/planning/ZoningAdministration/ZBACases/Pages/Home.aspx>]. The Charlotte website does not include data for 2019, but we obtained that data and all decisions on the merits via email. E-mail from Terry Edwards, Zoning Admin. Specialist, City of Charlotte, to Ronnie M. Farr (Oct. 21, 2021, 1:13 PM) (on file with the *Iowa Law Review*). The sixty-five variance grants in 2019 were out of sixty-seven decisions on the merits, with the remainder of applications withdrawn. *Id.* One 2019 decision, which we count as a grant, granted one variance requested and denied the other. Letter from Rick Sanderson & Shad Spencer, Chairperson & Zoning Administrator, Charlotte Zoning Bd. of Adjustment, to Mecklenburg Cnty. Real Est. (Nov. 13, 2019) (on file with the *Iowa Law Review*) (approving a variance in case number 2019-068 for 1658 Sterling Road, Charlotte, NC).

223. E-mail from Terry Edwards to Ronnie M. Farr, *supra* note 222.

224. City of Charlotte, *Zoning Board of Adjustments Cases*, *supra* note 222.

225. *Id.*

226. E-mail from Chan Son, Exec. Sec’y Rec. Request, S.F. Plan., to Ronnie M. Farr (Nov. 1, 2021, 7:51 PM) (on file with the *Iowa Law Review*) (including spreadsheet with variances by filing date).

227. *Id.*

228. *Id.*

229. *Id.*

230. AUSTIN KEITHLER, BD. OF ADJUSTMENT, CITY & CNTY. OF DENV., 2021 YEAR END REPORT 5–6 (2021), <https://www.denvergov.org/files/assets/public/board-of-adjustment-zoning/documents/2021-yr-final.pdf> [<https://perma.cc/C3XT-4DQQ>] (providing bar graph with numbers, but not actual count).

231. *Id.*

232. CITY OF BOS., *Zoning Board of Appeal Decisions*, <https://www.boston.gov/departments/inspectional-services/zoning-board-appeal-decisions> [<https://perma.cc/4RY6-SK7W>].

233. *Id.*

234. *Id.*

235. *Id.*

right, with only ministerial approvals, such as a building permit, required.²³⁶ In others, such as Boston, little if any development is possible without discretionary relief.²³⁷ In Seattle variances or rezonings are not generally required to build a project, even for larger projects of 400 or more units, which can be built as-of-right in designated areas.²³⁸ Seattle's zoning code allows for area variances only, applying a fairly traditional set of criteria, including a showing of "unusual conditions" and "undue hardship or practical difficulties."²³⁹ Seattle does, however, impose a separate design review process conducted by volunteer neighborhood design review boards.²⁴⁰ This process has faced criticism and the Seattle City Council recently commissioned a stakeholder report on design review.²⁴¹ A 2023 state law restricted design review to considering "only clear and objective development regulations governing the exterior design of new development" and limits review to a single public meeting.²⁴² Design review boards may grant relief akin to a variance in the form of "departures" or smaller modifications ("adjustments") to certain code requirements.²⁴³

236. SEAN CAMPION, ANA CHAMPENY, ALEX HEIL & MARIA DOULIS, CITIZENS BUDGET COMM'N, IMPROVING NEW YORK CITY'S LAND USE DECISION-MAKING PROCESS 1 (2022), https://cbcnyc.org/sites/default/files/media/files/REPORT_Land-Use_09062022_o.pdf [<https://perma.cc/W68M-GVFT>].

237. *Id.* at 26 (noting that, in contrast with New York City, "nearly all development in California cities and Boston goes through a discretionary review process").

238. Telephone Interview with A-P Hurd, President, SkipStone (July 8, 2024).

239. SEATTLE, WASH., CODE § 23.40.020(C)(1), (4) (2024). In addition, the Code allows for the attachment of conditions "regarding the location, character and other features of a proposed structure or use." *Id.* § 23.40.020(E).

240. See Andrew Engelson, *Is It Time for Seattle to Do Away with Design Review?*, PUBLICOLA (May 3, 2022), <https://publicola.com/2022/05/03/is-it-time-for-seattle-to-do-away-with-design-review> [<https://perma.cc/E44P-FLSE>].

241. *Id.*; see also SEATTLE DEP'T OF CONSTR. & INSPECTIONS & SEATTLE OFF. OF PLAN. & CMTY. DEV., IN RESPONSE TO COUNCIL'S STATEMENT OF LEGISLATIVE INTENT SDCl-004-A-001, at 1-2 (2023), <https://www.seattle.gov/documents/Departments/SDCI/About/2024SLIMemoFinalCouncilReport.pdf> [<https://perma.cc/9RP2-MHEZ>] (recommending a divergent set of reform goals, including increased predictability and clarity of design guidelines, as well as more flexibility for negotiating individual changes).

242. H.B. 1293, 68th Leg., Reg. Sess. § 1(2) (Wash. 2023) (enacted at WASH. REV. CODE § 36.70A.630(2) (2024)) (providing further detail on what constitutes "clear and objective development regulations"); see also Ryan Packer, *State Legislature Deals a Blow to Seattle's Dysfunctional Design Review Process*, PUBLICOLA (May 12, 2023), <https://publicola.com/2023/05/12/state-legislature-deals-a-blow-to-seattles-dysfunctional-design-review-process> [<https://perma.cc/2Q7Q-4BWA>] (providing analysis of design review in Seattle before the passage of the Growth Management Act and explaining the implications of the Act's passage).

243. SEATTLE, WASH., CODE §§ 23.41.012(B), .018(C)(2) (noting that departures may not be granted in relation to certain requirements including, among others, maximum size of use, residential density limits, parking requirements, and certain regulations governing height and floor area ratio); see also NATHAN TORGELSON & RICO QUIRINDONGO, RESPONSE TO CITY COUNCIL SLI ON DESIGN REVIEW attach. 2, at 1 (2022), https://www.seattle.gov/documents/Departments/SDCI/About/Update_to_City_6-30-2022.pdf [<https://perma.cc/MZ45-DQ77>]. A departure may be granted if it would result in a development that "better meets the intent of adopted [d]esign [g]uidelines." *Id.* attach. 2, at 2; see also SEATTLE, WASH., CODE § 23.41.012(D)(1) (using the same qualifying language).

While there are similarities across cities in the forms of available zoning relief—such as variances, rezonings, special permits or conditional uses, planned unit developments, and development agreements—cities rely on each type of relief to varying degrees. For example, in San Francisco, larger projects rarely seek variances; project-specific rezonings are frequently granted and the state Density Bonus Law, which allows for the modification of local regulations affecting buildings with on-site inclusionary housing, eliminates the need for variances for such projects.²⁴⁴ Further research is needed to consider, among other things, how the use of variances relates to the prevalence of other forms of zoning relief, including rezonings, special permits, and planned unit developments, in the cities studied.²⁴⁵ In addition, the relationship of zoning variances to the age of a jurisdiction’s zoning code and current built environment, existing density, and the presence or absence of indicators of demand, such as rising prices or population growth, merits further study.

B. BOARD COMPOSITION AND THE ROLE OF EXPERTISE

The Zoning Boards of Appeal studied varied between five and twenty-two members (including alternates).²⁴⁶ A few cities divide their boards into panels²⁴⁷ or divisions²⁴⁸ or constitute separate Residential and Commercial Boards.²⁴⁹ A number of boards require professional expertise in specific fields including architecture, planning, engineering, construction, and law.²⁵⁰ Philadelphia,

244. See E-mail from Jim Abrams, Attorney, J. Abrams Law, P.C., to Author (July 10, 2024, 6:59 PM) (answering questions regarding forms of discretionary relief in San Francisco) (on file with the *Iowa Law Review*).

245. In future work, I hope to explore these differences, their relative merits, their institutional or cultural sources, and their effects on development patterns.

246. See generally John J. Infranca, *Appendix*, 110 IOWA L. REV. ONLINE (2025), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2025-04/ILR-110-Infranca-Appendix.pdf> [<https://perma.cc/Z8KB-gWCN>] (giving a table, with sources, providing all information discussed in this Section).

247. CITY OF DALL. BD. OF ADJUSTMENT, WORKING RULES OF PROCEDURE § 3, at 4 (2023), https://dallascityhall.com/government/meetings/DCH%20Documents/zoning-board/BDA_Working_Rules_of_Procedure_Final_04.12.23.pdf [<https://perma.cc/M5CH-7E6N>] (discussing division of board into three panels of five members each).

248. *Board of Zoning Appeals (BZA)*, INDY.GOV, <https://www.indy.gov/activity/board-of-zoning-appeals-bza> [<https://perma.cc/5RWA-RVDM>] (discussing three geographic divisions for board, which hears cases in both the city and Marion County).

249. 2022 *Commercial and Residential Board of Adjustment*, CITY OF FORT WORTH (2024), <https://www.fortworthtexas.gov/departments/citysecretary/events/boa-commercial-and-residential-2022> [<https://perma.cc/4TCX-H85X>].

250. See, e.g., *About*, N.Y.C. BD. STANDARDS & APPEALS (2024), <https://www.nyc.gov/site/bsa/about/about.page> [<https://perma.cc/3MVK-ZB2G>] (requiring a planner, engineer, and architect, each with at least ten years of experience); PHILA., PA., CODE § 3-911 (2021) (requiring “an urban planner, an architect, an attorney with zoning experience, a person with experience in the construction industry, and at least two recognized leaders from community organizations”); *List of Boards & Commissions*, CITY OF FORT WORTH (2024), <https://www.fortworthtexas.gov/government/boards/list-boards-commissions#section-6> [<https://perma.cc/G9PH-KREQ>] (expressing preference for individuals with expertise in “law, property development, building design, or

in addition to requiring certain professional qualifications, imposes a more amorphous requirement that all members of the Zoning Board of Adjustment (“ZBA”) “shall have a demonstrated sensitivity to community concerns regarding development and the protection of the character of Philadelphia’s neighborhoods.”²⁵¹ This requirement would seem to incline against grants of relief for new development, which might be appropriate if ZBA relief is to be granted “sparingly.”²⁵² However, the volume of variances granted in Philadelphia suggests that in practice this requirement has not constrained the board.²⁵³

At least ten cities allow a zoning administrator or hearing officer to grant some or all types of variances.²⁵⁴ These include Los Angeles, Chicago, Phoenix, San Diego, Jacksonville, San Francisco, Seattle, Denver, Washington, D.C., and Portland.²⁵⁵ In some of these cities, including Jacksonville and Washington, D.C., the zoning administrator is limited to granting minor dimensional relief.²⁵⁶ A single administrator, it has been argued, might be “better able to pursue a consistent policy,” although given minimal judicial review of variance decisions, there may also be value in a group decision.²⁵⁷

Boards differ in whether they require a simple majority or a supermajority vote to grant relief. A supermajority vote requirement risks allowing “the policy preferences of a minority of members of the Board [to] dictate the

mortgaging and financing”); COLUMBUS, OHIO, CODE OF ORDINANCES § 3307.03 (2024) (creation of board of zoning adjustment that requires three of five members to be “actively engaged as an architect, attorney, building contractor, professional engineer, real estate broker, or mortgage banker”); *About the Adjustment Committee*, PORTLAND.GOV (2024), <https://www.portland.gov/bds/adjustment-committee/about-adjustment-committee> [<https://web.archive.org/web/20240224153608/https://www.portland.gov/bds/adjustment-committee/about-adjustment-committee>] (requiring that two of seven members work in “either urban design, architecture, or landscape architecture” and that an additional two have experience in “engineering, financing construction, management of buildings, or land development”).

251. PHILA., PA., CODE § 3-911.

252. See *supra* notes 38–39 and accompanying text (discussing presumption that variances should be granted sparingly).

253. See *supra* notes 247–48 and accompanying text.

254. For more information on the different uses of these types of individual decision-makers, see generally *Mun. Art Soc’y of N.Y.*, *supra* note 73, at 197–201; Stuart Meck & Rebecca Retzlaff, *The Zoning Hearing Examiner and Its Use in Idaho Cities and Counties: Improving the Efficiency of the Land Use Permitting Process*, 43 IDAHO L. REV. 409 (2007).

255. In Portland, adjustments, which take the place of a variance, are decided administratively by the staff without a public hearing. A decision can then be appealed to a hearing officer or the adjustment committee. *Adjustment Reviews*, PORTLAND.GOV (2024), <https://www.portland.gov/bds/zoning-land-use/land-use-review-fees-and-types/adjustment-reviews> [<https://perma.cc/6JBQ-3XJY>]. In Nashville, a zoning administrator is limited to granting a reasonable accommodation in compliance with the Fair Housing Act, Americans with Disabilities Act, and Religious Land Use and Institutionalized Persons Act. NASHVILLE, TENN., CODE § 17.40.010(H) (2024).

256. WASH., D.C., MUNICIPAL REGULATIONS § 11.A304 (2016); *Administrative Deviations*, JACKSONVILLE.GOV (2024), <https://www.jacksonville.gov/departments/planning-and-development/current-planning-division/administrative-deviations> [<https://perma.cc/4P8U-QBBF>].

257. Note, *Zoning Variances*, *supra* note 65, at 1408.

outcome.”²⁵⁸ However, given that a board of adjustment’s proper role is providing administrative relief, and not setting policy, a supermajority requirement may make it more difficult to undermine public policies articulated in the zoning ordinance or pursued by elected officials.²⁵⁹ In a sense, the supermajority requirement, by reducing the likelihood that relief is granted, constrains the board’s exercise of discretion. Along these lines, Edward Bassett noted that New York’s original zoning resolution deliberately required a supermajority for the grant of a variance, given that it allowed departure from the strict application of the law.²⁶⁰ At the time New York required a vote of five of seven members of the board, and most early zoning enabling acts, Bassett reported, demanded similar votes of more than a majority.²⁶¹ This procedural requirement may make departures less frequent, improving the consistency and predictability of zoning. Or it might grant too much power to individual board members, allowing bias or policy preferences to determine outcomes. Greater transparency would make it easier to identify both inconsistencies in the grant of relief and cases where improper considerations appear to inform decisions.

C. *TRANSPARENCY AND AVAILABILITY OF INFORMATION ON
VARIANCE APPLICATIONS AND DECISIONS*

This Section details how and to what degree municipalities make information available regarding the number and outcomes of variance applications, the substance of those decisions, and their effects on the zoning code and the built environment. I examine the extent to which the cities studied provide four types of information to the public on variance applications and grants: formal reports on the board’s work, including variance cases; an online map of applications and their disposition; a searchable database of cases; and the actual files for each variance application or the full text of board decisions. Before discussing the extent to which this information is generated and disseminated, I first consider one mechanism through which some cities seek to improve, at the front end, the substance of applications for relief.

As previously noted, critics long have highlighted how decisions by zoning boards of appeal routinely ignore the relevant legal standard or grant variances when the standard is clearly not satisfied.²⁶² Multiple zoning boards now require applicants to use a standard form that specifies each of the criteria (or required findings) for a variance and to state, below each criterion,

258. Infranca & Farr, *supra* note 20, at 478.

259. Adam MacLeod has highlighted the potential for discretionary decisions by land use regulators to “choose among values” in a way that undermines the local legislature’s more democratic determination of community values. MacLeod, *supra* note 60, at 71.

260. BASSETT, *supra* note 35, at 119.

261. *Id.*; see also *id.* at 166 (urging a requirement of more than a “mere majority” for grants of variance).

262. See *supra* Section II.B (analyzing several critiques from commentators of granting zoning variances during the twentieth century).

how specifically it is satisfied.²⁶³ Other cities simply list the criteria and require an applicant to specify how their application satisfies them.²⁶⁴ Still other forms merely explain the criteria²⁶⁵ or provide no substantive guidance.²⁶⁶

263. ZONING BD. OF APPEALS, CITY OF CHI., PROPOSED FINDINGS OF FACT SUBMITTED TO THE ZONING BOARD OF APPEALS 4 (2021), https://www.chicago.gov/content/dam/city/depts/zlup/Administrative_Reviews_and_Approvals/Publications/01_Proposed_FoF_variation_with_Econom_c_Analysis_Form_2021.pdf [<https://perma.cc/W6YJ-9NXB>] (requiring Chicago applicants to make a statement explaining how each required finding is satisfied on proposed finding of facts form); CITY OF PHILA. ZONING BD. OF ADJUSTMENT, APPLICATION FOR APPEAL 1 (2018), <https://www.phila.gov/media/20200211132826/Application-for-Appeal-3.28.18.pdf> [<https://perma.cc/32J2-WBGU>] (providing criteria for Philadelphia applicants and requiring applicants to explain below each criterion how it is satisfied); INSTRUCTIONS FOR COMPLETING THE REQUEST FOR ZONING VARIANCE TO THE SAN ANTONIO BOARD OF ADJUSTMENT, CITY OF SAN ANTONIO TEX. 6 (2018), https://docsonline.sanantonio.gov/FileUploads/dsd/Variance_Application_-_Fillable_Form.pdf [<https://perma.cc/6N32-YVVD>] (requiring San Antonio applicants to include a detailed explanation of how each criterion is satisfied); *see also* CITY OF AUSTIN DEV. SERVS. DEP'T, BOARD OF ADJUSTMENT GENERAL/PARKING VARIANCE APPLICATION 2 (2022), https://www.austintexas.gov/sites/default/files/files/Development_Services/BOA_GeneralParkingVarianceApplication.pdf [<https://perma.cc/WGR4-KBWD>] (Austin); FORT WORTH DEV. SERVS. DEP'T, ZONING BOARD OF ADJUSTMENT: INFORMATION AND GUIDELINES 2 (2024), <https://www.fortworthtexas.gov/files/assets/public/v/g/development-services/documents/resources-applications-forms-videos/b/2024-board-of-adjustment-application-english.pdf> [<https://perma.cc/2HLL-ADUP>] (Fort Worth); *Land Use Petition Forms and Fees*, INDY.GOV, <https://www.indy.gov/activity/land-use-petition-forms-and-fees> [<https://perma.cc/4BL3-JQYY>] (Indianapolis); CHARLOTTE PLAN., *supra* note 222, at 14–16 (Charlotte); *Variance (VAR) from the Planning Code Supplemental*, S.F. PLAN. (Mar. 23, 2023), <https://sfplanning.org/resource/var-supplemental> [<https://perma.cc/B4CE-GSZR>] (San Francisco); SEATTLE DEP'T OF CONSTRUCT. & INSPECTIONS, MASTER USE PERMIT REQUIREMENTS FOR VARIANCES 3–4 (2022), <https://www.seattle.gov/DPD/Publications/CAM/cam210.pdf> [<https://perma.cc/5M26-YJDL>] (Seattle).

264. CITY OF N.Y. BD. OF STANDARDS & APPEALS, INSTRUCTIONS FOR COMPLETING BZ APPLICATION 3 (2014), https://www.nyc.gov/assets/bsa/forms/bz_instructions_february_2014.pdf [<https://perma.cc/SSU7-KXZQ>] (requiring New York City applicants to restate each required finding and offer comprehensive discussion of how it is satisfied); L.A. DEP'T OF CITY PLAN., FINDINGS/SPECIALIZED REQUIREMENTS: ZONE VARIANCE 1 (2015), <https://planning.lacity.gov/o/document/9fc495d3-e0ea-4726-8143-66f2fdb74a8e/Variance.pdf> [<https://perma.cc/7PNU-V2DX>] (requiring Los Angeles applicants to copy each required finding onto separate pages and provide a detailed explanation of how each finding is satisfied); CITY OF PHX. PLAN. & DEV. DEP'T, ZONING PROCESS GUIDE 1 (2021), https://www.phoenix.gov/pddsite/Documents/PZ/pdd_pz_pdf_00267.pdf [<https://perma.cc/4W3R-AXVF>] (requiring Phoenix applicants to include written narrative with “information to substantiate how the request meets the established test[]” for variance); *Adjustment Reviews*, *supra* note 255 (providing link to approval criteria in Portland, Oregon and requiring submission of a narrative that addresses criteria); *see also* JACKSONVILLE, FLA. PLAN. & DEV. DEP'T, APPLICATION FOR ZONING VARIANCE 2–3 (2017), <https://www.jacksonville.gov/getattachment/Departments/Planning-and-Development/Current-Planning-Division/Variance-Application-2021-06.pdf.aspx> [<https://perma.cc/T2D2-VL7A>] (Jacksonville); CITY OF COLUMBUS DEP'T OF BLDG. & ZONING SERVS., BOARD OF ZONING ADJUSTMENT APPLICATION 3–4 (2024), <https://new.columbus.gov/files/sharedassets/city/v/3/building-and-zoning/document-library/board-zoning-adjustment-application-2024.pdf> [<https://perma.cc/6ECX-D9S6>] (Columbus); *Variance*, D.C. OFF. ZONING (2024), <https://dcoz.dc.gov/node/1357471> [<https://perma.cc/66C8-293K>] (Washington, D.C.); NASHVILLE METRO. BD. OF ZONING APPEALS, APPLICATION FOR A VARIANCE REQUEST 3 (2019), <https://filetransfer.nashville.gov/portals/o/sitecontent/Codes/docs/Board%20of%20Zoning%20Appeals/APPLICATION%20FOR%20A%20VARIANCE%20REQUEST.ST.pdf> [<https://perma.cc/KFL5-SD52>] (Nashville); CITY OF OKLA. CITY PLAN. DEP'T, SUBDIVISION

In theory, these forms supply a relatively easy mechanism for ensuring boards consider each criterion, identify the relevant facts, and offer reasons for their decisions. Commentators as early as the 1930s championed the potential of such forms to improve the variance process.²⁶⁷ Advocating adoption of forms for both variance applications and decisions, John Reys asserted in the 1950s that “[t]his single administrative device should reduce confusion, eliminate irrelevant lines of inquiry, and force both the applicant and the board to consider only the essential issues.”²⁶⁸ Unfortunately, no known research exists regarding the relationship, if any, between these forms and the substantive quality of board decisions or the rate of variance grants.

While the use of such forms is relatively widespread across the cities studied, the availability of board decisions and of general information on the volume, nature, and effects of variance applications and grants varies significantly. To the extent that much of modern zoning reflects a “wait and see” approach, or a first offer from the government in expectation of a request for some change or relief by the property owner, the zoning code itself may provide an inaccurate picture of how land is actually regulated.²⁶⁹ Given how a large volume of variances can affect the uniformity and predictability of a zoning ordinance, access to this information would make it easier for citizens to understand how land uses in their neighborhood are actually regulated and for local governments to identify potential revisions to their zoning code.²⁷⁰

& ZONING, APPLICATION FOR BOARD OF ADJUSTMENT 2 (2023), <https://www.okc.gov/home/showpublisheddocument/25432/638138840418330000> [<https://perma.cc/BSS3JM8X>] (Oklahoma City).

265. CITY OF DALL., REQUIRED MATERIAL FOR FILING AN APPEAL TO THE BOARD OF ADJUSTMENT 7, 11 (2023), https://dallascityhall.com/government/meetings/DCH%20Documents/zoning-board/BDA_Instructions_REVISED_06.16.23.pdf [<https://perma.cc/JAL3-LSP6>] (explaining criteria for a variance in Dallas).

266. CITY OF SAN JOSE PLAN., BLDG. & CODE ENF’T, DEVELOPMENT/USE PERMIT APPLICATION 2-4 (2024), <https://www.sanjoseca.gov/home/showpublisheddocument/41005/638247571488470000> [<https://perma.cc/NCL3-P3VW>] (San Jose); CITY OF EL PASO, TEX., PLAN. & INSPECTIONS DEP’T PLAN. DIV., ZONING BOARD OF ADJUSTMENT APPLICATION 1-2 (2024), <https://www.elpasotexas.gov/assets/Documents/CoEP/Planning-and-Inspections/Applications/Zoning-Applications/Zoning-Board-of-Adjustment-Application.pdf> [<https://perma.cc/X7FP-AWDE>] (El Paso); *How to File an Appeal with the Zoning Board*, CITY OF BOS. (Aug. 19, 2021), <https://www.boston.gov/departments/inspectional-services/how-file-appeal-zoning-board> [<https://perma.cc/CAB6-W5LS>] (Boston).

267. Williamson, *supra* note 19, at 118–19 (discussing procedures in Sacramento, California for granting a “Zone Ordinance Variance,” which required applicants for a variance to specifically explain in separate sections of the application how each of three conditions required for grant of a variance were satisfied).

268. Reys, *supra* note 37, at 295 (calling on boards to adopt application forms that focus attention on the specific requirements for a variance and similar forms specifying findings relative to each criterion for recording decisions).

269. See ELLICKSON ET AL., *supra* note 30, at 76 (discussing zoning maps as “first offers” that precede bargaining over permissible development).

270. Reys, *supra* note 37, at 282 (“[S]ince these special permits [including variances] do not appear on the zoning map, it is difficult for the average citizen to know exactly what land use regulations are operative in his neighborhood.”).

1. Annual Reports

A small number of the cities studied produce publicly available reports summarizing their zoning board of appeal's activities. New York's Board of Standards and Appeals published a very brief report for just a few years (ending in 2019–2020) that merely listed the number of variance and special permit cases identified by the relevant code provision and their disposition.²⁷¹ Austin produces a similarly succinct report, which includes a summary of cases heard and their disposition.²⁷² San Francisco produces a fairly detailed report of its Board of Appeals's work each year, but only includes basic information on variances.²⁷³

Dallas releases the most extensive annual report of the cities reviewed. In addition to summarizing the board's work and accomplishments, it includes the number of requests for each type of relief and their disposition and provides a case log with brief information on each case, including the staff recommendation and the board's action.²⁷⁴ The report records the attendance of board members²⁷⁵ and makes recommendations to the city council, although not for specific zoning changes.²⁷⁶ Denver releases a similarly detailed report that includes extensive statistics on the Board of Adjustment's cases, forms of relief requested, and outcomes.²⁷⁷ Philadelphia produced an extensive five-year report in 2017, following the city's 2012 zoning code revision.²⁷⁸ This fifty-seven page report, which focused on the effects of the code revision,

271. See *BSA Reports*, N.Y.C. BD. STANDARDS & APPEALS (2024), <https://www.nyc.gov/site/bsa/applications/bsa-reports.page> [<https://perma.cc/4H5F-7N92>]. These reports are required by New York City Administrative Code section 25-208(a). N.Y.C. ADMIN. CODE § 25-208(a) (2024). They also include the number of pre-application meetings held and information on the length of time from filing of an application to a decision. These reports were adopted in response to advocacy by the Municipal Art Society of New York. Jonathon Sizemore, *City Council to Consider New Oversight Controls on BSA*, CITYLAND (Dec. 14, 2016), <https://www.citylandnyc.org/board-of-standards-and-appeals-legislation> [<https://perma.cc/3KC7-M96W>].

272. See generally CITY OF AUSTIN BD. OF ADJUSTMENT, ANNUAL INTERNAL REVIEW (2021), <https://services.austintexas.gov/edims/document.cfm?id=371280> [<https://perma.cc/Z5QS-GM9N>] (covering July 1, 2020 through June 30, 2021).

273. CITY & CNTY. OF S.F., SAN FRANCISCO BOARD OF APPEALS ANNUAL REPORT FY22 13–15 (2022), <https://sf.gov/sites/default/files/2022-12/BOA%20Annual%20Report%20FY22%20%28adopted%29.pdf> [<https://perma.cc/R698-A5ZQ>].

274. CITY OF DALL., BOARDS AND COMMISSIONS ANNUAL REPORT: BOARD OF ADJUSTMENT 10/01/21–09/30/22, at 14–24 (2023), <https://dallascityhall.com/government/meetings/DC%20Documents/zoning-board/BOA%20Annual%20Report%202021-2022-%20Stamped.pdf> [<https://perma.cc/K7W5-S3A5>].

275. *Id.* at 10.

276. *Id.* at 25.

277. AUSTIN KEITHLER, CITY & CNTY. OF DENV. BD. OF ADJUSTMENT, 2023 YEAR END REPORT 3–20 (2024), <https://www.denvergov.org/files/assets/public/v/1/board-of-adjustment-zoning/documents/2023-yr.pdf> [<https://perma.cc/3AVG-LWWD>].

278. See generally PHILA. CITY PLAN. COMM'N, *supra* note 210.

provided ten years of statistics on zoning applications, appeals, and reviews.²⁷⁹ However, the city has not produced any further reports.²⁸⁰

These reports provide useful information to the public and the city council regarding the volume of variances and, in the case of New York, which code provisions are most often the subject of relief. This may serve to encourage and inform future code revision.²⁸¹ There seems little reason why all cities should not require their zoning board to produce annual reports detailing not only the number of applications for relief and their disposition, but also the code provisions from which relief is sought and the location of the requests. This basic information would, one expects, be quite easy for the board to assemble from applications (particularly if those applications are submitted electronically) and would improve transparency and foster better understanding of the role variances and other forms of relief play in the city's land use administration. As local governments increasingly use Geographic Information Systems ("GIS") to track and share a range of data, some cities have moved toward mapping the location of variance applications, as discussed in the next Section.

2. Mapping

As far back as 1955, commentators encouraged municipalities to map variances and special exceptions in hopes that this might restrain boards by reminding them of the effects of their actions and "indicate[] conditions of general hardship."²⁸² Mapping can provide the public with a clearer understanding of how zoning actually functions and what is permitted in practice by revealing where and how development most frequently departs from the code. A map that depicts the precise location and volume of variances can also make their effects more salient, strengthening and informing calls for code revision.

A few of the cities studied provide maps of requests for zoning relief, some with links to more substantive information on the application and its disposition. Phoenix allows users to select a layer on the city's GIS map that includes "Zoning Adjustments – Public Hearing Item," and each individual item provides a link to the case with a summary of the requested relief, the result, and any stipulations.²⁸³ Philadelphia, Dallas, Nashville, and Boston offer similar maps, with each item including only basic information on the

279. See generally *id.*

280. City staff informed me that the report took significant time to prepare, and there was no effort to produce additional reports. E-mail from Paul Chrystie, *supra* note 210.

281. Owens, *supra* note 31, at 321 ("A detailed annual report to the governing board on variance actions taken would help assure that the board of adjustment is in fact operating within anticipated bounds and would identify areas where ordinance revisions should be considered to minimize the need for future variance petitions.").

282. Reys, *supra* note 37, at 295.

283. *My Community Map*, CITY OF PHX. (2024), <https://www.phoenix.gov/pdd/mycommunitymap> [<https://perma.cc/N6QV-F6ZB>].

substance and status of the appeal.²⁸⁴ In Columbus, Ohio the board of zoning appeals reviews applications for area variances, and the city council reviews use variances.²⁸⁵ The Columbus map provides substantial information and documentation for each case—with particularly extensive documentation for council variances.²⁸⁶

Charlotte, North Carolina shares perhaps the most extensive information through its GIS map.²⁸⁷ One can separately identify administrative deviations, appeals, and variances. More recent cases include information regarding the relief requested, the disposition, and a link directly to the decision letter. Washington, D.C., provides a dashboard that includes a map as well as an overview of zoning cases by type and by recommendation.²⁸⁸ These maps, in addition to revealing where variances have been requested and granted, can, to the extent they link directly to more substantive documentation, offer interested parties an easier mechanism for obtaining information than trying to search for a specific address, case file, or party name.

3. Database of Decisions and Case Files

Finally, and arguably most significantly, I examined whether these jurisdictions make the text of the actual decision on a variance application publicly available online. Not every jurisdiction produces a written decision that includes findings of fact and reasoning. Many simply provide a final determination—fact finding and reasoning, to the extent either are to be found,

284. *OpenMaps*, CITY OF PHILA., <https://openmaps.phila.gov> [<https://perma.cc/A864-M3ZR>] (select layer titled “Zoning and Planning – Zoning Board of Adjustment Appeals”); *Zoning Cases 2.3*, CITY OF DALL., <https://experience.arcgis.com/experience/016541a4704a4577a6d6993bc618ab38> [<https://perma.cc/CGU4-HTZQ>] (select layer “Zoning Cases”). Austin provides a map depicting Board of Adjustment cases but without links to significant substantive information on the nature or substance of the case. *Property Profile*, CITY OF AUSTIN (Aug. 26, 2024), <https://maps.austintexas.gov/GIS/PropertyProfile> [<https://perma.cc/ST5B-6EZV>] (select map layer “Review Cases: Board of Adjustment Cases”); *BZA Tracker*, NASHVILLE.GOV, <https://maps.nashville.gov/BZATracker> [<https://perma.cc/8KCB-M462>] (identifying active, deferred, and complete items and providing for each case a brief description of application, relief sought, and the board’s action); *ZBA Appeal Tracker*, CITY OF BOS. ZONING BD. OF APPEAL, https://experience.arcgis.com/experience/co19bag9a25cb4f33bb6cdd2f69b543d4/page/page_o [<https://perma.cc/MG9F-WV2Q>] (providing the status of appeal and basic information on cases). Indianapolis provides a map of variances but links only the assessor property card and not information on the application or disposition. *Indy Zoning Browser*, INDY.GOV, <https://maps.indy.gov/Zoning> [<https://perma.cc/558V-UAS4>] (select “Zoning Layers: Zoning Variances”). Chicago, as of December 2014, has posted a static map for each board meeting with the locations of all applications for relief. Zoning Bd. of Appeals, *supra* note 206.

285. *Compare* COLUMBUS, OHIO, CODE OF ORDINANCES § 3307.09 (outlining the Board of Zoning Adjustment’s power to grant variances), *with* COLUMBUS, OHIO, CODE OF ORDINANCES § 3307.10 (outlining the city council’s power to grant variances).

286. *Columbus Zoning Map*, CITY OF COLUMBUS, <https://gis.columbus.gov/zoning> [<https://perma.cc/P7JK-8AQ6>] (select layers for proposed and granted BZA and council variances).

287. *Zoning Variance Appeals*, Charlotte, NC, CITY OF CHARLOTTE (2024), <https://charlotte.maps.arcgis.com/apps/webappviewer/index.html> [<https://perma.cc/54VS-DMES>].

288. *DCOZ Case and IZ Dashboard*, D.C. OFF. ZONING (Oct. 29, 2024), <https://dcgis.maps.arcgis.com/apps/dashboards/3f31f565deb944cebac14a34204cfe45> [<https://perma.cc/C74V-QBUZ>].

must be derived from the transcript of the hearing or the board's minutes. Others simply disclose the ultimate determination with no further information.

Portland, Washington, D.C., and Charlotte publish the most extensive information on the substance of individual cases. Portland provides easy access to information on each variance case, posting online individual files that contain extensive decisions in each case.²⁸⁹ The decisions, in addition to carefully discussing the proposed relief, the site and its vicinity, and the applicable zoning, analyze in turn each of the approval criteria and explain if and how they are met. In Washington, D.C., a case records database offers links to extensive material, including the board's summary order, a transcript, video, all exhibits, property information, and a project image.²⁹⁰ In Charlotte, a page entitled "Board of Adjustment Agendas & Decisions" provides PDFs with only the outcomes of decisions; however, a separate map of variances offers access to decision letters with more detail, include findings of fact, staff recommendations and potential conditions, and the board decision.²⁹¹

Los Angeles, Boston, and Austin provide less information but do post substantive decisions for each case. Los Angeles produces weekly reports with a short description of the cases heard and links to additional information on each case, including a detailed determination letter.²⁹² Boston recently started making the board's full opinions available online in a single PDF file that includes all decisions issued on a given date.²⁹³ However, prior research has found these decisions are largely boilerplate and include little in the way of factual findings or legal reasoning; they merely offer conclusory statements of the statutory criteria.²⁹⁴ In Austin, the meeting minutes page for the Board of Adjustment publishes, among other things, formal decision sheets for individual variance applications, which include the substance of the request, the board's decision, and specific findings.²⁹⁵

289. *Public Notices*, CITY OF PORTLAND (2024), <https://www.portland.gov/ppd/zoning-land-use/news/notices> [<https://perma.cc/H5B5-42QZ>] (filter by "Land Use Decision").

290. *Variance: Recently Filed Variance Cases*, D.C. OFF. OF ZONING (2024), <https://dcoz.dc.gov/node/1357471> [<https://perma.cc/JNN5-2E2Q>]. A separate weekly zoning cases report provides basic information on applications for the week and a map. *Weekly Zoning Cases Report*, D.C. OFF. OF ZONING (Mar. 1, 2021), <https://www.arcgis.com/home/item.html?id=71f552a238604d068de3d7bcedfdbf36> [<https://perma.cc/CE7E-AKE8>].

291. *UDO Board of Adjustment Agendas & Decisions*, CITY OF CHARLOTTE (2024), <https://www.charlottenc.gov/City-Government/Initiatives-and-Involvement/Zoning-Board-of-Adjustment> [<https://perma.cc/N82Q-3UST>].

292. *Weekly Completed Cases Report – Council District*, L.A. CITY PLAN. (Dec. 29, 2024), <https://planning.lacity.org/resources/weekly-completed-case-report> [<https://perma.cc/43KG-DJ6N>].

293. *Zoning Board of Appeal Decisions*, CITY OF BOS. (Dec. 20, 2024), <https://www.boston.gov/departments/inspectional-services/zoning-board-appeal-decisions> [<https://perma.cc/4RY6-SK7W>]; see also Infranca & Farr, *supra* note 20, at 468 ("[Boston, among others, was] marked by an incredibly high volume of variances and decisions that seemingly lack any concern with the statutory standard.").

294. Infranca & Farr, *supra* note 20, at 473–83.

295. *Meetings of the Board of Adjustment*, CITY OF AUSTIN (Dec. 16, 2024), https://www.austintexas.gov/cityclerk/boards_commissions/meetings/15_1.htm [<https://perma.cc/MDR6-FHSV>].

Other cities publish some information on each application but no substantive decisions. Oklahoma City provides, in an HTML agenda for each board meeting, links to multiple documents for each individual case, including the staff report, required statutory responses, and the application.²⁹⁶ However, no final decisions could be found. Chicago only posts, in the context of the board minutes, a short summary of each case and its outcome.²⁹⁷ San Antonio's meeting agendas include a link to application packets and the staff report on each case but again do not include the board decision.²⁹⁸ The staff reports in San Antonio do include a recommendation and offer reasoning, but the Board of Adjustment merely issues a notification, without reasoning, to the applicant following the public hearing.²⁹⁹ Dallas likewise posts meeting minutes with extensive discussion of individual cases, staff analysis, and recommendations, but the ultimate decision offers no analysis by the Board.³⁰⁰ In San Jose, the Planning Director's hearing minutes provide a brief description of cases, the relief sought, staff recommendations, and the decisions.³⁰¹

Similarly minimal information is provided in Jacksonville,³⁰² Fort Worth,³⁰³ and Indianapolis.³⁰⁴ In Nashville, the Zoning Appeals Board publishes, for most meetings, an agenda, video, and orders, which are perfunctory and

296. *Current and Upcoming Meetings*, PRIMEGOV: OKLA. CITY (2024), <https://okc.primegov.com/public/portal> [<https://perma.cc/A9GA-P2FL>].

297. Zoning Bd. of Appeals, *supra* note 206 (providing links to minutes for each board meeting).

298. *Current and Upcoming Meetings*, PRIMEGOV: CITY OF SAN ANTONIO (2024), <https://sanantonio.primegov.com/public/portal?fromiframe=1> [<https://perma.cc/C8YY-297B>] (filter by "Zoning Board of Adjustment").

299. However, meeting minutes from February 2015 and earlier, which are available through a separate site, contain the substance of the decision, which was spoken into the record. *DSD Documents Online*, CITY OF SAN ANTONIO (2024), [https://docsonline.sanantonio.gov/DSDDocsOnline/default.aspx?specific=Board%20of%20Adjustment%20\(BOA\)&document=Minutes%20](https://docsonline.sanantonio.gov/DSDDocsOnline/default.aspx?specific=Board%20of%20Adjustment%20(BOA)&document=Minutes%20) [<https://perma.cc/ZN9g-8MD5>].

300. *About the Board of Adjustment*, CITY OF DALL. (Dec. 30, 2024), <https://dallascityhall.com/government/meetings/Pages/zoning-board.aspx> [<https://perma.cc/2MTX-GJNC>].

301. See e.g., Robert Manford, *Planning Director Hearing Action Minutes*, CITY OF SAN JOSE PLAN. COMM'N 2 (Jan. 10, 2024, 9:00 AM), <https://www.sanjoseca.gov/home/showpublisheddocument/108297/638405727453870000> [<https://perma.cc/74PR-KCZZ>].

302. Jacksonville's Planning Commission provides a results agenda for the last meeting, which only includes basic details. See, e.g., Plan. Comm'n, *Planning Commission Results Agenda*, CITY OF JACKSONVILLE 2-8 (Oct. 3, 2024, 1:00 PM), <https://www.jacksonville.gov/departments/planning-and-development/docs/current-planning-division/planning-commission-docs/pc-results-agenda-10-03-24.aspx> [<https://perma.cc/ZH9F-YU2N>]. However other documentation, including "Final Orders, Staff Reports, Meeting Transcripts[,] and previous Results Agendas[,] are available pursuant to a public records request." *Planning Commission*, CITY OF JACKSONVILLE (2024), <https://www.coj.net/departments/planning-and-development/planning-commission.aspx> [<https://perma.cc/7DAL-MQJR>].

303. *Board of Adjustment Cases*, CITY OF FORT WORTH (2024), <https://www.fortworthtexas.gov/departments/development-services/zoning/variances/cases> [<https://perma.cc/M7GN-2APT>] (providing no agendas more recent than 2019 and no information on outcomes).

304. *City of Indianapolis/Marion County Permit, Land Use Petition & Enforcement Case Citizen Access Portal*, INDY.GOV (2023), <https://aca-prod.accela.com/INDY/Default.aspx> [<https://perma.cc/6EPU-PJSP>] (allowing search of variances and other relief but providing only basic summary for each case).

reference the record in the video.³⁰⁵ Columbus provides scanned copies of the applications but no decisions.³⁰⁶ Finally, New York makes case files available only on-site at the board's office for thirty days after a decision, after which they are archived and available for a fee.³⁰⁷

Denver, Colorado recently changed its policy regarding the issuance of decisions. Until recently, the Board of Adjustment provided on its website, soon after each meeting, the outcome of cases in the form of a single-page decision sheet explaining what was decided but not providing any reasoning.³⁰⁸ Once issued, these decision sheets allowed an applicant to proceed with a project.³⁰⁹ The Board's staff subsequently prepared detailed findings of fact supporting the decision.³¹⁰ These were reviewed and approved by the Board at the following meeting.³¹¹ The decisions and files, unlike the brief decision sheet, were not posted to the website but were available to the public upon request.³¹² The Board recently decided to change its policy and will now announce a verbal decision at the hearing and then issue publicly the more detailed written decision, with findings, at its next meeting.³¹³ While this will provide the public with more detail on the reasoning behind a decision, it may delay by a few weeks the approval necessary for an applicant to proceed with a project.³¹⁴ As such, the Board, as of this writing, is considering other mechanisms for issuing an initial response that would allow property owners to proceed prior to the more formal decision.³¹⁵ Denver's deliberations reveal potential tradeoffs between the benefits of more substantive decisions and the

305. See *Zoning Appeals Board Meetings*, NASHVILLE.GOV (2024), <https://www.nashville.gov/departments/codes/boards/zoning-appeals-board/meetings> [<https://perma.cc/2DPB-XZG2>].

306. *Citizen Access Portal*, CITY OF COLUMBUS (2024), <https://ca.columbus.gov/ca> [<https://perma.cc/LWJ4-9EBE>] (searching yields a description of the proposal for relief, the variance sought, staff recommendation, and outcome of the Board decision).

307. *Records Requests*, N.Y.C. BD. STANDARDS & APPEALS (2024), <https://www.nyc.gov/site/bsa/applications/records-requests.page> [<https://perma.cc/H8NM-CTLU>]. Archived cases "can typically be made available for review at the Board's office" or can be requested at a fee of \$50 per case. *Id.*

308. *Recent Decisions*, CITY OF DENV. (Dec. 17, 2024), <https://www.denvergov.org/Governments/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Board-of-Adjustment-for-Zoning/Board-of-Adjustment-Case-Records/Recent-Decisions> [<https://perma.cc/Q2RT-A74V>] (providing outcome but no reasoning).

309. E-mail from Austin E. Keithler, Tech. Dir. for the Bd. of Adjustment for Zoning Appeals, City of Denv., to Author (June 27, 2024, 1:38 PM) (on file with the *Iowa Law Review*) (responding to inquiry regarding zoning administration in Denver).

310. *Id.*

311. *Id.*

312. E-mail from Austin E. Keithler, Tech. Dir. for the Bd. of Adjustment for Zoning Appeals, City of Denv., to Author (June 27, 2024, 4:16 PM) (on file with the *Iowa Law Review*) (responding to inquiry regarding zoning administration in Denver).

313. E-mail from Austin E. Keithler, Tech. Dir. for the Bd. of Adjustment for Zoning Appeals, City of Denv., to Author (Aug. 20, 2024, 2:22 PM) (on file with the *Iowa Law Review*).

314. *Id.*

315. E-mail from Austin E. Keithler, Tech. Dir. for the Bd. of Adjustment for Zoning Appeals, City of Denv., to Author (Aug. 20, 2024, 1:42 PM) (on file with the *Iowa Law Review*).

costs, in terms of delay, of producing such decisions. But, given the Board is already preparing substantive decisions, it would seem relatively easy to make those public, and, if necessary, announce the case disposition prior to the issuance of a formal decision.

Variation across jurisdictions in the materials and information provided results, in part, from variation in the processes, both public and internal, each jurisdiction uses to review cases. There is far greater consistency at the application stage, where many jurisdictions use similar forms requiring information on each statutory criterion, than at the decision stage. While standardized application forms may ensure that the board has before it the information needed to make a reasoned decision based upon the statutory requirements for relief, greater transparency at the decision stage might have an even more profound impact on the substance of decisions. Such transparency, which would allow citizens to see the reasoning behind a grant of relief, might push the board, to the extent it is subject to public pressure, towards greater accountability. Given the limited judicial oversight of zoning administration, this could prove particularly valuable. Combined with an easily accessible and user-friendly map depicting the locations of variance applications and grants, it also may encourage more consistent and predictable administration of the zoning code.

V. TOWARD IMPROVED ADMINISTRATION

Prior commentary has largely focused on substantive or procedural reforms to the variance process and the operation of zoning boards, often drawing on broader themes in administrative law. Owens, reviewing articles and reports from the period of 1960–1990 critical of variances, grouped reform proposals into four major areas: “requiring minimum procedural safeguards,” “improving the quality of the decision-maker,” “revision of the substantive standards for variances,” and “reforming zoning ordinances to reduce the need for variances.”³¹⁶ While all of these have merits, and I have championed the need to reform zoning to reduce the need for variances in prior work,³¹⁷ a more immediate solution, which would facilitate these additional reforms, is increasing the transparency and availability of variance applications and decisions. This is a particularly apt solution at a time when local governments are enlisting technology to improve responsiveness, enhance communication, and further good governance and when individual citizens are more aware of and interested in land use governance.

A. INCREASING TRANSPARENCY, CONSISTENCY, AND PREDICTABILITY

As discussed in Part IV, some local governments have taken significant steps to make variance decisions and their effects easily accessible to the public. This takes various forms: portals with access to individual application materials,

316. Owens, *supra* note 31, at 299–301.

317. Infranca & Farr, *supra* note 20, at 502–03.

staff recommendations, and decisions; reports summarizing the zoning board's decisions, including the number of requests for particular types of relief and the outcomes of cases; and maps showing the location of individual cases. These approaches each advance distinct interests.

Easy access to the actual written decision in each case, or the closest approximation that a municipality provides, serves multiple purposes. First, this form of transparency might prod the zoning board towards more careful consideration of the relevant variance criteria and documentation of how they are satisfied. Second, for those jurisdictions that do not provide substantive decisions or whose decisions are less than thorough, it may elicit efforts to reevaluate the functioning of the zoning board or the role of variances. Third, access to actual decisions (and ideally the relevant case files as well) would clarify what is often an opaque process. This may benefit inexperienced applicants and reduce the likelihood (or simply the perception) that the process favors insiders or, worse, is prone to corruption.

Access to written decisions—assuming they provide substantive fact finding, reasoning, and application of the legal standard—might allow the development of a body of variance precedent.³¹⁸ In addition to encouraging improvements to the consistency and predictability of board decisions, this would help facilitate (and improve) judicial review. Questions have long been raised regarding the value of precedent in the context of variances. Bassett, writing in 1936, remarked:

Each variance must stand on its own feet. No two cases are exactly alike. Accordingly, boards of appeals should not in every case follow an established system of precedents. A decision is not justified because it follows a prior decision on what was apparently the same environment. Courts uphold boards of appeals in discriminating regarding the merits of each case, and do not criticize them because two instances apparently the same are decided differently. In many cases the board of appeals views the premises, and distinctions may presumably be based on that intimate knowledge.³¹⁹

There is an apparent tension in Bassett's remarks. He expresses concern that courts might view as "the same" two cases that are distinguishable based on distinctions apparent to the board. But this suggests that the board itself is following a system of precedent and appropriately drawing distinctions. The

318. See Murray, *supra* note 119, at 358–59 (arguing that requirements of reason giving and fact-finding could create a body of precedents regarding the standard for a variance, benefitting applicants, the zoning board, and the judiciary and rendering variances, and zoning itself, more predictable); see also Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U. L. REV. 470, 480 (1953) ("A major shortcoming of the Board is its failure to spell out its reasoning in arriving at a determination that a 'particular hardship' exists. The resulting difficulty in discerning standards employed in a particular case prevents the growth of precedents applicable to subsequent requests for variations." (footnote omitted)).

319. BASSETT, *supra* note 35, at 127.

problem may simply be that it fails to produce a record that sufficiently documents the relevant distinctions.

A separate concern is that previous variances in an area will be invoked to support a new application, even in cases where there is no unique hardship (and so no valid basis for the grant of a variance under the governing legal standard).³²⁰ To the extent this occurs, however, a more transparent process would raise attention to the accumulation of variances in a neighborhood, strengthening calls for more systemic reform to the zoning code to allow the sort of development routinely permitted via a variance to instead proceed as-of-right. Alternatively, the frequent grant of similar variances in a neighborhood suggests that the use in question would be better treated through a special exception or conditional use process. Recategorizing a use frequently allowed via a variance as, instead, the subject of a special exception, would improve the predictability of the zoning code. The special exception process, in addition to identifying *ex ante* uses allowed in a given neighborhood, if certain conditions are satisfied, provides clearer standards that constrain the discretion of the zoning board of appeals.³²¹

Denver, Colorado provides an example of how greater awareness of the volume and effects of variances within a municipality can prompt reforms to the variance process. Denver significantly revised its variance standards following an October 2022 report that, among other things, examined the types of variances approved in prior years as well as practices in other cities.³²² The report noted that, in 2021, eighty-eight of the 125 variance cases before the Board of Adjustment were for relatively minor relief from setback

320. See *Mun. Art Soc’y of N.Y.*, *supra* note 73, at 203 (“Cross-referencing other local variances should be limited to prevent ‘boot-strapping’ in changing communities. This occurs when an applicant relies on previous variances, either directly or indirectly, to establish grounds for the latest one. If mentioned, other variances must be related to the unique hardship of the applicant.”); see also Sampson, *supra* note 38, at 917 (“Relying upon the existence of other nonconforming properties as a means to justify the granting of a variance accelerates the erosion of the regulation at issue and is inconsistent with the underlying purpose of a variance.”); Bryden, *supra* note 73, at 780 (“[M]any critics say that illegal use variances commonly generate other use variances granted to applicants who cite the earlier dispensations as evidence that the district is not purely residential, until eventually whole neighborhoods change from residential to commercial.”).

321. See, e.g., *Gladden v. D.C. Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. 1995) (“[S]pecial exceptions, unlike variances, are expressly provided for in the Zoning Regulations.” (quoting *First Baptist Church v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981))); see also *id.* (“The Board’s discretion to grant special exceptions is limited to a determination whether the exception sought meets the requirements of the regulation.” (quoting *First Baptist Church*, 432 A.2d at 701)). Brookline, Massachusetts, uses a special permit process to grant forms of dimensional relief other jurisdictions typically allow via a variance. See Infranca & Farr, *supra* note 20, at 490–92 (discussing Brookline Board of Appeals’ authority to grant a special permit allowing departure from setback requirements).

322. CITY OF DENV., MODERNIZING ZONING VARIANCES BACKGROUND REPORT 3, 6–7 (2022), https://denver.prelive.opencities.com/files/assets/public/v/1/community-planning-and-development/documents/zoning/text-amendments/modernizing_zoning_variances_background_report.pdf [<https://perma.cc/ZV3D-TTAB>].

requirements, primarily for one- and two-unit properties.³²³ It found that “current eligibility and approval criteria for administrative adjustments and variances are too limited or rigid to meet the needs of Denver’s homeowners, residents, and developers today” and that existing criteria resulted in “unpredictability” and “added time in process.”³²⁴ In response, the report recommended modifying the criteria for both variances and “administrative adjustments” (smaller changes, such as relief from dimensional requirements, that can be approved by staff).³²⁵ While it did not suggest recategorizing this relief as a special exception, the report recommended more tailored criteria for evaluating variance applications focused not on “unique circumstances” but rather on “preventing *impacts* of proposals.”³²⁶ It also acknowledged the dangers of increased flexibility, observing that many agency staff members “have identified a concern that if too much flexibility is added to the zoning code, then Denver’s thoughtfully written zoning regulations would be weakened.”³²⁷ Accordingly, the report urged that any new variance criteria “be very clear to provide the predictability that both the development community and staff identify as a high priority.”³²⁸

Denver ultimately adopted new criteria that shifts from requiring an applicant to establish the traditional requirement of hardship to instead allowing a variance to be granted upon a showing of specified “Justifying Circumstances.”³²⁹ While still framed as a variance, these new criteria emphasize the justification, or reason, supporting a particular variance and they suggest a more predictable process akin to a special exception. Though the new criteria have only been in place for a year, anecdotal evidence suggests they have provided a clearer mechanism for approving these requests.³³⁰

323. *Id.* at 3–4. Relief was granted in seventy-five percent of these cases. *Id.* In Denver, the Board of Adjustment handles the forms of relief typically addressed by a ZBA: variances, special exceptions (termed “Zoning Permits with Special Exception Review” or “ZPSE”), and appeals of administrative decisions. *Filing a Case*, CITY OF DENV. (2024), <https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Board-of-Adjustment-for-Zoning/Filing-a-Case> [<https://perma.cc/SKM2-J2YP>].

324. CITY OF DENV., *supra* note 322, at 1.

325. *Id.*

326. *Id.* at 7.

327. *Id.* at 8.

328. *Id.*

329. Compare DENV., COLO., ZONING CODE § 12.4.7.5 (2023) (“Review Criteria—Justifying Circumstances”), with DENV., COLO., ZONING CODE § 12.4.7.5 (2022) (“Review Criteria—Showing of Unnecessary Hardship”); see also KEITHLER, *supra* note 277, at 3 (discussing variance modernization project and specific changes). In addition to retaining variances for “‘Unusual Conditions’, ‘Neighborhood Compatibility’, and ‘Nonconforming . . . Uses in Existing Structures,’” the new provision allows for variances for affordable housing and in cases where a permit is issued in error or construction minimally violates relevant regulations. *Id.*

330. E-mail from Keithler, *supra* note 309.

B. IMPROVING REASON GIVING

Not all reasons for an action are equally persuasive. Nor do all statements of the purported reasons for an action reflect a genuine effort to explain how a decision-maker applied general principles to the particulars of a given case and reasoned to their conclusion. As noted earlier, some boards produce lengthy opinions with merely conclusory (often boilerplate) statements declaring the relevant criteria satisfied.³³¹ This might state reasons but does not constitute the sort of thoughtful reasoning discussed earlier as likely to improve the consistency and predictability of decisions.³³² It is not surprising that such perfunctory decisions are often criticized when challenged in court.

A local government (or the state through changes to the zoning enabling act) could require more substantive reasoning. However, framing such a requirement in a manner that precludes conclusory statements could prove difficult. Absent substantive (and frequent) judicial review it is unclear how a requirement of more robust reason giving would be enforced. A combination of the practices cataloged in Part IV provides a better mechanism for improving reason giving. Requiring applicants to submit a form that asks them to explain and document how each legal criteria for relief is satisfied would focus the Board's analysis on the substantive reasons a jurisdiction has identified as the suitable bases for relief. Publication of written decisions (with a requirement that those decisions similarly reflect consideration of each criterion) would subject the board's administration of the zoning code to public oversight. This in turn would enable challenges to inadequate decisions while also encouraging future applicants to situate their own requests for relief within prior precedents, improving consistency and predictability. Mapping these decisions and reporting on their aggregate effects increases their salience and would help flag potential inequities in the treatment of different neighborhoods, applicants, or requests for relief. Finally, the goal of such reforms should be framed not as simply ensuring improved reason giving. In the land use context, while reason giving might improve judicial review, its greatest benefit is advancing the underlying values of consistency, predictability, and fairness at the core of zoning.

C. TRIGGERING ZONING REFORM

Ideally, the frequent granting of particular variances—which suggests they are no longer functioning as a safety valve but rather as a routine component of land use approval—would prompt reforms that allow similar development to proceed as-of-right. Nearly forty years ago, Eric Steele framed the zoning ordinance as a procedural mechanism through which potentially

331. See *supra* text accompanying note 294.

332. See *supra* notes 102–23 and accompanying text.

problematic changes that merit community input may be identified.³³³ The routine granting of relief without significant community participation, he asserted, may create “pressure to amend the zoning ordinance.”³³⁴ Bassett made a similar point in the 1930s, contending that in some instances a board of appeals will issue a series of variances in a given area when, instead, it should refer the matter to the local legislature for a rezoning of the area.³³⁵

As I have written elsewhere, “Steele’s account provides an intriguing defense of the role of variances, but there is no clear evidence that frequent grants lead to changes to underlying zoning rather than more reliance on variances.”³³⁶ This may be because many communities simply do not track data on the volume and substance of variance decisions over time, let alone share them with the public. Increasing the transparency of zoning board decisions by means of maps locating applications for and grants of relief, as well as reports summarizing the forms of relief sought, would strengthen and inform efforts to reform the zoning code to render it more consistent with actual development practice. By making the aggregate effects of board decisions more salient, this is more likely to spur the kinds of changes Steele envisioned.³³⁷

D. ENABLING FUTURE RESEARCH

As efforts to reform zoning continue, researchers and policymakers will benefit from greater attention to zoning administration. Several questions

333. Steele, *supra* note 151, at 296 (“The rules of urban zoning form a set of criteria which identify certain proposed changes as potentially problematic to the community When potentially problematic proposals are identified, the community is notified and offered the chance to come forward and state its concerns.”); *see also* VanderVelde, *supra* note 150, at 1068 (“As a result, zoning ordinances have come to function as trip wires to trigger petitions for variances, an early-warning system to notify the neighborhood of any change that might threaten the status quo.”).

334. Steele, *supra* note 151, at 296.

335. BASSETT, *supra* note 35, at 164–65; *see also* Shapiro, *supra* note 19, at 22 (arguing that a high concentration of variances reveals “conditions of general hardship which do not warrant variance relief, but point to the need for rezoning”); Sampson, *supra* note 38, at 950 (“Recurring efforts to gain relief from the same regulation may indicate an unduly restrictive limitation or an obsolete or neglected provision that does not accord with a community’s modern realities. To the extent that a regulation represents a *systemic* dysfunction, rather than the occasional and isolated infliction of a burden on a few property owners, legislative action to amend, replace, or eliminate the regulation—rather than ad hoc variance efforts—constitutes the proper manner by which to make adjustment.” (citation omitted)); Reynolds, *supra* note 38, at 148 (“Where the general zoning law, through changed circumstances or otherwise, has become inappropriate for the neighborhood, the appeal should be to the legislative body for amendment.”).

336. Infranca & Farr, *supra* note 20, at 454.

337. Some jurisdictions also make videos and transcripts of zoning board meetings available. *See, e.g., Zoning Appeals Board Meetings, supra* note 305 (Nashville). While providing significant transparency (allowing those unable to attend the meeting to see the proceedings), this form of transparency is less likely to facilitate public oversight or readily inform zoning reform efforts.

merit empirical research, and improving the recording and the publication of zoning decisions will help facilitate this research.³³⁸

More needs to be learned about how different municipalities use various forms of zoning relief beyond the variance, including special permits and rezonings, but also mechanisms such as planned unit developments and transferable development rights. The relationship of variances to municipal characteristics, including size and population, density of existing development, age and complexity of the zoning code, and indications of demand for new development also merit further research. Do forms requiring applicants to specify how variance criteria are satisfied improve the quality of variance decisions? Does greater transparency improve the substantive quality of those decisions?

A few cities have recently undertaken reforms worthy of further study. In addition to Denver's reforms discussed above, a set of 2017 reforms to New York City's Board of Standards and Appeals and the city's variance process reflected a commitment to improved transparency. Advocates of the measures declared them an "[i]mportant [w]in for [t]ransparency in [z]oning [v]ariances."³³⁹ Among other changes, the enacted reforms required more detailed written decisions, including an explanation when the Board reached a decision contrary to the recommendations of the Community and Borough Boards.³⁴⁰ They also mandated biannual reports with data including the number of applications and their disposition, a list identifying where variances and special permits had been acted upon, and an interactive city map depicting these locations.³⁴¹ Further research into variance processes and this and other recent changes in specific municipalities can not only improve zoning administration but also inform revisions to zoning ordinances.

338. As Lo and Freemark note in a related context: "[R]esearch on [rezonings] is only in its infancy, in part because of limited transparency around the use and scope of developer-initiated rezoning." LO & FREEMARK, *supra* note 11, at 1.

339. *Important Win for Transparency in Zoning Variances*, MUN. ART SOC'Y N.Y. (May 31, 2017), <https://www.mas.org/news/important-win-for-transparency-in-zoning-variances> [<https://perma.cc/YN64-LJAE>]. The Municipal Art Society, which recommended reforms, voiced familiar criticisms that the grant of variances "effectively resulted in the rezoning of certain communities" and that the Board of Standards and Appeals had usurped power from the City Planning Commission. *Id.*

340. N.Y.C., N.Y., ORDINANCE 083 (May 30, 2017) (noting the name of the ordinance, "A Local Law to amend the New York city charter, in relation to written responses by the board of standards and appeals") (codified at N.Y.C., N.Y., CITY CHARTER, ch. 27 § 668(d) (2024)); N.Y.C., N.Y., ORDINANCE 082 (May 30, 2017) (noting the name of the ordinance, "A Local Law to amend the New York city charter, in relation to community involvement in decisions of the board of standards and appeals") (codified at N.Y.C., N.Y., CITY CHARTER, ch. 27 § 666(g)).

341. N.Y.C., N.Y., ORDINANCE 104 (May 30, 2017) (noting the name of the ordinance, "A Local Law to amend the New York city charter, in relation to requiring the board of standards and appeals to report on variances and special permits") (codified at N.Y.C., N.Y., ADMIN. CODE § 25-208 (2024)); N.Y.C., N.Y., ORDINANCE 105 (May 30, 2017) (noting the name of the ordinance, "A Local Law to amend the New York city charter, in relation to adding zoning variance and special permit information on a map on a city website") (codified at N.Y.C., N.Y., CITY CHARTER, ch. 27 § 668(k)).

CONCLUSION

Nearly half a century ago an important text declared that zoning boards of appeal see themselves as “a board of equity sitting to do rough justice.”³⁴² This suggests a departure from the rule of law that, depending on one’s perspective, may or may not be problematic. Perhaps a loose interpretation of the standards governing variances, coupled with a desire to do justice, enables compromise beneficial to all involved. Or perhaps it leads zoning boards to usurp the legislative function, facilitating favoritism and undermining consistency and predictability. We would be able to better assess the state of zoning administration and its effects if we could more easily peer into the black box of discretion.³⁴³ The steps toward greater transparency outlined in this Article would move us in that direction. Ideally, they would also facilitate broader reforms to zoning that allow more as-of-right development and cabin the exercise of discretion, enabling zoning ordinances to provide property owners a more stable understanding of their rights and those of their neighbors.

342. WEAVER & BABCOCK, *supra* note 147, at 161.

343. See Manville & Osman, *supra* note 16, at 69 (describing discretionary processes as “a black box” in scholarship on zoning).