

ZONING BOARDS OF ADJUSTMENT AND VARIANCES: CALIFORNIA IMPOSES A FINDINGS REQUIREMENT

Until recently, the issue whether a local zoning board was required to make findings and give reasons when granting a variance¹ remained unresolved by the California courts. Although substantial evidence must support the award of a variance to insure that legislative standards have been satisfied,² there had been no judicial determination whether the board must always set forth findings nor an explication of the relationship between the evidence and findings and between the findings and the ultimate board decision. In *Topanga Association for a Scenic Community v. County of Los Angeles*³ the Supreme Court of California held that local zoning boards are required to make findings supported by reasons when granting a variance. The court reversed the lower court decision upholding a denial of a writ of administrative mandamus to require a county board of supervisors to vacate an order awarding a variance.⁴ The variance had been recommended by the zoning board, granted

1. In theory a variance is a permit granted by the board of adjustment to allow a departure from the zoning law under certain conditions. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 280-81 (1955) [hereinafter cited as Reps]. It "is not a matter of right" but rather "a special privilege with the burden of proof resting upon the applicant." Bowden, *Article XXVIII—Opening the Door to Open Space Control*, 1 PACIFIC L.J. 461, 505 (1970) [hereinafter cited as Bowden]. "If a variance is granted, it is [only] to bring the disadvantaged property up to . . . [the] reasonable use enjoyed by other neighboring property." D. HAGMAN, J. LARSON & G. MARTIN, CALIFORNIA ZONING PRACTICE 269 (1969) [hereinafter cited as HAGMAN]. The public interest is protected by standards that prohibit the granting of a variance inconsistent with the purpose and intent of the zoning legislation. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 14.38 (1968) [hereinafter cited as ANDERSON].

2. See, e.g., *Siller v. Board of Supervisors*, 58 Cal. 2d 479, 375 P.2d 41, 25 Cal. Rptr. 73 (1962); *Bradbeer v. England*, 104 Cal. App. 2d 704, 232 P.2d 308 (Dist. Ct. App. 1951).

3. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

4. *Id.* at 510, 522 P.2d at 14, 113 Cal. Rptr. at 838.

by the county regional planning commission, and upheld by the county board of supervisors.⁵

Plaintiffs challenged the variance on the ground that it was not supported by sufficient evidence. Prior to determining the propriety of the variance, the court announced guidelines for judicial review of a challenged variance. Findings are to be set forth, regardless of whether such findings are required by the local ordinance.⁶ Before sustaining the grant of a variance, a reviewing court must determine from the board record that substantial evidence supports the findings and that the findings in turn support the decision, resolving reasonable doubts in favor of the board.⁷ Applying these guidelines, the court concluded that the findings were insufficient to satisfy the legislative requirements for a variance and reversed and remanded with directions to issue the requested relief.⁸

Until 1966 no California appellate court had ever reversed a local zoning board decision awarding a variance.⁹ Two reasons for this

5. The variance had been granted for the establishment of a mobile home park on 28 acres of property that had been zoned for light agriculture and single-family residences with a minimum lot size of one acre. Plaintiff was a nonprofit organization of taxpayers and real property owners in Topanga Canyon, where the mobile home park was to be situated, and opposed the variance from the beginning of the local action. *Id.*

6. A local ordinance required findings by the zoning board. *Id.* at 514 n.11, 522 P.2d at 16 n.11, 113 Cal. Rptr. at 840 n.11.

7. *Id.* at 514, 522 P.2d at 16, 113 Cal. Rptr. at 840. The court noted that in some land use cases a court might apply a different standard of review—that of conducting an independent determination of the evidence. It was held in *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974), that when a local administrative agency renders a decision that substantially affects a “fundamental vested right” and a challenge is made as to whether the findings are supported by the evidence, the court must make an independent review of the evidence. Petitioners did not assert that this standard was applicable in *Topanga*, and the court indicated that it did not find any “fundamental vested right” affected. 11 Cal. 3d at 510 n.1, 522 P.2d at 14 n.1, 113 Cal. Rptr. at 837 n.1; see note 1 *supra*. Professor Hagman believes that the *Strumsky* decision has “profound implications” for local land use decisions and litigation. Hagman, *Judicial Review of Local Land-Use Decisions in California*, 26 LAND USE L. & ZONING DIGEST No. 5, at 8 (1974). See also Disco, *The Implications of Strumsky and Topanga for Judicial Review of Zoning Decisions*, 50 CALIF. S.B.J. 26 (1975).

8. 11 Cal. 3d at 518-22, 522 P.2d at 19-22, 113 Cal. Rptr. at 843-46.

9. HAGMAN, *supra* note 1, at 264; Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A.L. REV. 179, 182 n.27, 196. (1958). Gaylord reported that the only case known to him in which a variance had been set aside was *Beloin v. Blankenhorn*, No. 560,288 (Super. Ct., County of Los Angeles, 1951).

result were the presumption of validity accorded the board's decision and the limited scope of judicial review over zoning board decision-making. The courts readily presumed that the administrative¹⁰ board, in granting a variance, made appropriate findings based upon substantial evidence.¹¹ The effectiveness of judicial review was hampered by the failure to require that the board issue the findings and reasons that supported its decision.¹² Given the presumption of

10. A variance is an administrative matter. *Johnston v. City of Claremont*, 49 Cal. 2d 826, 838, 323 P.2d 71, 78 (1958). A variance is a quasi-judicial rather than a legislative matter. *Allen v. Humboldt County Bd. of Supervisors*, 241 Cal. App. 2d 158, 163, 50 Cal. Rptr. 444, 448 (Dist. Ct. App. 1966). See generally 3 ANDERSON, *supra* note 1, § 14.67; HAGMAN, *supra* note 1, § 7.19.

11. Bowden, *supra* note 1, at 507. The presumption was that an "official duty ha[d] been regularly performed." *Miller v. Planning Comm'n*, 138 Cal. App. 2d 598, 602, 292 P.2d 278, 281 (Dist. Ct. App. 1956). See also *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 89, 351 P.2d 765, 767, 4 Cal. Rptr. 493, 495 (1960). The presumption was based on § 1963(15) of the Civil Procedure Code, now CAL. EVID. CODE § 664 (Deering 1966).

12. Thus, in effect, the presumption was virtually irrebuttable, and courts upheld the administrative action despite an empty or meager record of the board proceedings. Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A.L. Rev. 937, 948 (1965) [hereinafter cited as Comment, *Judicial Control over Zoning Boards of Appeal*]. See *Bartholomae Oil Corp. v. Seagar*, 35 Cal. App. 2d 77, 94 P.2d 614 (Dist. Ct. App. 1939), upholding a setback variance despite the city council's failure to put findings in its record when a local ordinance called for a "complete report" to be made. The court inferred from the variance approval itself that findings had been made and declined to impose a requirement of formal findings. See also *Charles L. Harney, Inc. v. Board of Permit Appeals*, 195 Cal. App. 2d 442, 15 Cal. Rptr. 870 (Dist. Ct. App. 1961), in which the court declared that had findings been made they would be reviewable, but that the presumption of validity arises whether or not there is a record of the administrative proceedings.

Another court said that the "granting [of a variance] . . . is fully within the discretion of the . . . board, and that . . . decision is not reviewable by the courts unless there is illegality in the proceedings." *Phil Anthony Homes, Inc. v. City of Anaheim*, 175 Cal. App. 2d 268, 272, 346 P.2d 231, 234 (Dist. Ct. App. 1959). In one case a court upheld a provision in a local ordinance that the decision of the board was final as "perfectly proper." *Steiger v. Board of Supervisors*, 143 Cal. App. 2d 352, 357, 300 P.2d 210, 214 (Dist. Ct. App. 1956). But cf. *Niskian v. City of Long Beach*, 103 Cal. App. 2d 749, 752, 230 P.2d 156, 158 (Dist. Ct. App. 1951), in which the court, in reviewing the proceedings of a city council denial of a permit to move a structure over city streets, stated: "In proceedings of this kind, quasi-judicial in nature, witnesses should be sworn and examined, and a record made, upon which reviewing courts may be enabled to determine whether substantial evidence was or was not considered by the quasi-judicial body. The proceedings should be conducted in a quasi-judicial manner at least."

validity and the limited scope of review, it became nearly impossible to successfully challenge a variance award. Even when administrative findings were made, the courts held that the board need only state ultimate facts as a condition to granting a variance.¹³ Board decisions could be reversed only for fraud or abuse of discretion¹⁴ and evidence of abuse of discretion had to be "clear and convincing."¹⁵ When a record was submitted to the court, it was reviewed according to the substantial evidence test,¹⁶ but the presumption of validity restricted the court's application of the test.¹⁷ The situation was not significantly different with respect to administrative denials of variances.¹⁸

In 1966, however, a California district court of appeal reversed a variance award by a city board of permit appeals, using the substantial evidence test to determine whether the board record evidenced

13. *See, e.g.*, *Kappadahl v. Alcan Pac. Co.*, 222 Cal. App. 2d 626, 35 Cal. Rptr. 354 (Dist. Ct. App. 1963); *Ames v. City of Pasadena*, 167 Cal. App. 2d 510, 334 P.2d 653 (Dist. Ct. App. 1959). The "ultimate facts" doctrine meant that the board could merely repeat the legislative standards of the ordinance and declare that they had been met. HAGMAN, *supra* note 1, at 288; Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 107 & n.44 (1962) [hereinafter cited as Comment, *Zoning*].

14. *See, e.g.*, *Phil Anthony Homes, Inc. v. City of Anaheim*, 175 Cal. App. 2d 268, 346 P.2d 231 (Dist. Ct. App. 1959); *Flagstad v. City of San Mateo*, 156 Cal. App. 2d 138, 318 P.2d 825 (Dist. Ct. App. 1957).

15. *See, e.g.*, *Siller v. Board of Supervisors*, 58 Cal. 2d 479, 375 P.2d 41, 25 Cal. Rptr. 73 (1962); *Ames v. City of Pasadena*, 167 Cal. App. 2d 510, 334 P.2d 653 (Dist. Ct. App. 1959).

16. *See* cases cited note 2 and accompanying text *supra*.

17. Under the substantial evidence rule, the court decides questions of law but limits itself to the test of reasonableness in reviewing *findings of fact*. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958) [hereinafter cited as DAVIS].

The California situation led one writer to the conclusion that "the thinner the record the more likely the zoning board's action will be sustained." Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 949. "[T]here is no case so lacking in the necessary factual requisites that a variance might not be granted." Gaylord, *supra* note 9, at 196. Variances have been relatively easy to obtain in California.

Because the law regarding variances is fairly often applied less stringently than is required by statutory and ordinance provisions, an attorney who advises a client not to seek a variance on the ground that the legal standards would not be met is possibly denying his client a variance that would be granted. On the other hand, . . . an unhappy client who opposed his neighbor's variance would seldom be advised to take the matter to court. The prospect of a successful court challenge was virtually nonexistent. HAGMAN, *supra* note 1, at 264.

18. *See* HAGMAN, *supra* note 1, at 287; Bowden, *supra* note 1, at 507. *See, e.g.*, *City of San Marino v. Roman Catholic Archbishop*, 180 Cal. App. 2d 657, 4 Cal. Rptr. 547 (Dist. Ct. App. 1960).

compliance with the legislative requirements.¹⁹ Less than a year later, the Supreme Court of California reversed the grant of a variance for the first time.²⁰ Since both cases dealt with a chartered city and local law requiring that findings be made, subsequent cases cited these as distinguishing factors.²¹ Thus, until the *Topanga* decision, no general requirement existed in California that findings and reasons be made by the board.²² With the *Topanga* decision, how-

19. *Cow Hollow Improvement Club v. Board of Permit Appeals*, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (Dist. Ct. App. 1966).

20. *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967). The board that granted the variance "purported to comply with the planning code by setting forth its findings with respect to all five code conditions." *Id.* at 772, 427 P.2d at 813, 59 Cal. Rptr. at 149. The trial court, relying on prior case law, had "deemed itself powerless" to upset the administrative decision. *Id.* The *Broadway* court held that:

The presumption that an agency's rulings rest upon the necessary findings and that such findings are supported by substantial evidence . . . does not apply to agencies which must expressly state their findings and must set forth the relevant supportive facts. . . .

[T]he variance order may be sustained only if the board's findings suffice to establish compliance with all of the statutory criteria and are supported by substantial evidence in the record.

Id. at 773, 427 P.2d at 814, 59 Cal. Rptr. at 150. Both the *Broadway* and *Topanga* opinions were written by Justice Tobriner.

21. A chartered city is not governed by state statutory standards for issuing a variance. See CAL. GOV'T CODE § 65803 (Deering 1974). Language in the *Broadway* opinion indicated judicial reliance on the local zoning ordinance's requirement that findings be made. 66 Cal. 2d at 772, 427 P.2d at 814, 59 Cal. Rptr. at 150.

22. Decisions between *Broadway* and *Topanga* resulted in different methods for applying the substantial evidence test. *Broadway* was followed when a chartered city or other political subdivision required findings to be made with respect to zoning decisions. See *Stoddard v. Edelman*, 4 Cal. App. 3d 544, 84 Cal. Rptr. 443 (Dist. Ct. App. 1970) (chartered city); *Robison v. City of Oakland*, 268 Cal. App. 2d 269, 74 Cal. Rptr. 17 (Dist. Ct. App. 1968) (chartered city); *Tush v. Board of Supervisors*, 262 Cal. App. 2d 279, 68 Cal. Rptr. 505 (Dist. Ct. App. 1968) (county); *Moss v. Board of Zoning Adjustment*, 262 Cal. App. 2d 1, 68 Cal. Rptr. 320 (Dist. Ct. App. 1968) (chartered city). If there was no specific requirement, the courts distinguished *Broadway*. See, e.g., *Delta Rent-a-Car Sys., Inc. v. City of Beverly Hills*, 1 Cal. App. 3d 781, 787-88, 82 Cal. Rptr. 318, 323 (Dist. Ct. App. 1969). See also HAGMAN, *supra* note 1, at 290; *Bowden*, *supra* note 1, at 509. If findings were made but were not required by the ordinance, there was an indication that a court would apply *Broadway*. See *Hamilton v. Board of Supervisors*, 269 Cal. App. 2d 64, 75 Cal. Rptr. 106 (Dist. Ct. App. 1969). See also HAGMAN, *supra* note 1, at 471; *Bowden*, *supra* note 1, at 508.

ever, California adopted the majority view that variances be supported by findings.²³

Generally, under the majority view, the findings and record of the board are subject to judicial review to determine "whether the board acted within its jurisdiction, whether the standards imposed by statute or ordinance were respected, whether the procedural rights of the litigants were observed, and whether the board was chargeable with any abuse of discretion."²⁴ In some instances, it has been held that a board is powerless to deal with variances unless it can make findings of fact.²⁵ The courts in a few states, however, have declined to impose a findings requirement absent statutory provision.²⁶

Various methods are employed to impose a findings requirement. In *Topanga* the court based its conclusion on an interpretation of a California statute providing for administrative mandamus that structures the procedure for judicial review of adjudicatory decisions

23. See, e.g., *Ward v. Zoning Bd. of Appeals*, 153 Conn. 141, 215 A.2d 104 (1965); *Mavrantonis v. Board of Adjustment*, 258 A.2d 908 (Del. 1969); *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470 (D.C. App. 1972); *Kaczorowski v. Elmhurst Chicago Stone Co.*, 10 Ill. 2d 582, 141 N.E.2d 14 (1957); *Kunz v. Waterman*, 283 N.E.2d 371 (Ind. 1972); *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d 434 (Me. 1970); *Kennerly v. Mayor & City Council*, 247 Md. 601, 233 A.2d 800 (1967); *Prusik v. Board of Appeal*, 262 Mass. 451, 160 N.E. 312 (1928); *Gougeon v. Board of Adjustment*, 52 N.J. 212, 245 A.2d 7 (1968); *Collins v. Behan*, 285 N.Y. 187, 33 N.E.2d 86 (1941); *Van Meter v. H.F. Wilcox Oil & Gas Co.*, 170 Okla. 604, 41 P.2d 904 (1935); *Robinson v. Town Council*, 60 R.I. 422, 199 A. 308 (1938); *Burkhardt v. Board of Zoning Appeals*, 192 Va. 606, 66 S.E.2d 565 (1951); *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 291 N.W. 745 (1940). See 3 ANDERSON, *supra* note 1, § 16.41; 8A E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 25.272 (3d ed. 1965); C. RHYNE, *MUNICIPAL LAW* § 32-22 (1957); 2 E. YOKLEY, *ZONING LAW AND PRACTICE* § 15-17 (3d ed. 1965).

24. 3 ANDERSON, *supra* note 1, § 16.41, at 241.

25. See, e.g., *Metzger v. City of San Antonio*, 384 S.W.2d 901 (Tex. Civ. App. 1964); *L.M. Pike & Son, Inc. v. Town of Waterford*, 130 Vt. 432, 296 A.2d 262 (1972).

26. See, e.g., *Deardoff v. Board of Adjustment of the Planning & Zoning Comm'n*, 254 Iowa 380, 118 N.W.2d 78 (1962); *Creten v. Board of County Comm'rs*, 204 Kan. 782, 466 P.2d 263 (1970). For a discussion of the situation in Kansas see Note, *Judicial Review of Special Use Permits in Kansas*, 11 WASHBURN L.J. 440, 447 (1972). Illustrative of the uncertain situation in California after *Broadway*, the author reads the decision as imposing a findings requirement. *Id.* at 447 n.49.

rendered by administrative agencies.²⁷ The court inferred that the legislature intended the administrative decision to be supported by findings because of the statutory focus²⁸ on the "relationships between evidence and findings and between findings and ultimate action."²⁹

The methods by which courts require that findings be made by a local zoning board fall into two categories: (1) application of a

27. CAL. CIV. PRO. CODE § 1094.5 (Deering 1973). Use of the statute is a proper method for seeking review of a variance. *Allen v. Humboldt County Bd. of Supervisors*, 220 Cal. App. 2d 877, 882, 34 Cal. Rptr. 232, 235 (Dist. Ct. App. 1963). This remedy can be distinguished from a writ of mandamus, which is not proper. *Rubin v. Board of Directors*, 16 Cal. 2d 119, 104 P.2d 1041 (1940). On the scope of remedy, the *Allen* court declared:

Although the Administrative Procedure Act provides for the use of the writ of mandate to review the proceedings of certain administrative agencies . . . , the remedy of administrative mandamus and the procedure relative to it prescribed by . . . section 1094.5 are not limited to agencies enumerated in the Administrative Procedure Act or those adopting the procedures of the act, but are applicable to any administrative agency . . . both statewide and local

220 Cal. App. 2d at 882, 34 Cal. Rptr. at 235. See generally 3 ANDERSON, *supra* note 1, § 22.01. In *Topanga* the court discussed the applicability of § 1094.5. 11 Cal. 3d at 514 n.12, 522 P.2d at 17 n.12, 113 Cal. Rptr. at 841 n.12.

28. In particular, the court placed heavy emphasis on subsections (b) and (c) of § 1094.5.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, . . . abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

CAL. CIV. PRO. CODE § 1094.5 (Deering 1973).

29. 11 Cal. 3d at 515, 522 P.2d at 17, 113 Cal. Rptr. at 841. Cf. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), in which a question arose whether the word "found" in a local ordinance required specific written findings. In its discussion the court referred to an earlier case, *Schumm v. Board of Supervisors*, 140 Cal. App. 2d 874, 295 P.2d 934 (Dist. Ct. App. 1956), which held that written findings were not required. The *Mammoth* court concluded that the *Broadway* decision may have undermined the effect of *Schumm* and that the meaning is a question of legislative intent. 8 Cal. 3d at 270, 502 P.2d at 1064-65, 104 Cal. Rptr. at 776-77.

The *Topanga* court went on to give several policy arguments to support its conclusion. See notes 38-49 and accompanying text *infra*. It is worth noting that the requirements concerning administrative findings stem primarily from judge-made law. 2 DAVIS, *supra* note 17, § 16.01.

legislative findings requirement, or (2) imposition of such a requirement by judicial authority. When a statutory requirement is found, it is usually embodied in the state zoning enabling act as a procedural requirement³⁰ or in provisions setting variance standards,³¹ rather than within the state administrative procedure act. When the requirement is judicially imposed, the courts have declared it to be either an essential ingredient to performance of the judicial function³² or a requirement of procedural due process.³³ While controversy exists over which basis is stronger for judicial imposition of the requirement,³⁴ findings are necessary for meaningful judicial

30. See, e.g., ILL. ANN. STAT. ch. 24, § 11-13-11 (Smith-Hurd 1962); 3 ANDERSON, *supra* note 1, §§ 16.27, 16.41. See also Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 947-48.

31. See, e.g., VT. STAT. ANN. tit. 24, § 4468 (1975).

32. See, e.g., *Zieky v. Town Plan & Zoning Comm'n*, 151 Conn. 265, 196 A.2d 758 (1963). It is not always an easy task for a court to impose a findings requirement. One court resorted to a 60-year-old case for support. See *Stoll v. Gulf Oil Corp.*, 79 Ohio L. Abs. 145, 155 N.E.2d 83 (Hamilton County C.P. 1958).

33. See, e.g., *A. Dicillo & Sons, Inc. v. Chester Zoning Bd. of Appeals*, 44 Ohio Op. 44, 59 Ohio L. Abs. 513, 98 N.E.2d 352 (Geauga County C.P. 1950). The court stated that it was a fundamental principle of due process that administrative agencies amplify their decisions with findings of fact and legal conclusions and that boards of zoning appeals are similarly obligated. *Id.* at 47, 59 Ohio L. Abs. at 518, 98 N.E.2d at 356. See also *Morris v. City of Catlettsburg*, 437 S.W.2d 753 (Ky. Ct. App. 1969).

The *Dicillo* case may also be read as being in the category of an essential ingredient to the performance of judicial duty, since the court looked to the Ohio Appellate Procedure Act which required the board to produce a record including findings of fact so that the material could be reviewed by the court in the proper role of appellate review. 44 Ohio Op. at 48, 59 Ohio L. Abs. at 519, 98 N.E.2d at 356.

34. At one time the United States Supreme Court adopted a due process view concerning findings by administrative agencies, but Professor Davis notes that the Court has moved away from that position and he supports such a departure. 2 DAVIS, *supra* note 17, at §§ 16.01, 16.04. The basis for Davis' view is that at times courts can make decisions without findings, so it does not follow that administrative agencies should be subjected to a findings requirement on constitutional due process grounds. He suggests that most statutory requirements are merely codifications of judge-made law and that the requirement is based upon practical reasons aimed at promoting orderly functioning of the process of review.

Some writers advance strong arguments for the due process view, especially for imposing the requirement on zoning administrative boards because of the informality of the procedure, the nature of their membership (lacking the expertise of federal administrators and the law conditioning of judges) and the lack of public or judicial scrutiny over their actions. Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Ky. L.J. 273,

review.³⁵

The standard test for review is whether the administrative body abused its discretion.³⁶ The scope of the inquiry is defined in terms of "substantial evidence," "rational basis," or some other nebulous phrase. These notions do not function effectively in reviewing zoning decisions such as variances³⁷ because the substantial evidence

332-33 (1962) [hereinafter cited as Dukeminier]. The authors circumvent Professor Davis' objection by relying on state constitutions, which state courts may interpret to require more extensive procedural guarantees.

For a recent California decision that held that findings were constitutionally required under due process see *In re Sturm*, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974). The case dealt with informal proceedings of a parole board and the petitioner claimed absence of written findings was unfair.

35. The courts have become rather insistent that zoning boards state the grounds for their action so that in the event of review the court might have no doubt as to the boards' reasons for their decisions. 2 YOKLEY, *supra* note 23, § 15-47.

36. "[W]here the only function of the court is to determine whether or not some administrative body has abused the broad discretion given it by a statute or ordinance authorized under a state enabling act, the court will only evaluate the decision of the administrative body insofar as it is reasonable (or unreasonable) on the facts . . ." Note, *Judicial Remedial Action in Zoning Cases: An Emerging Standard for Review*, 1973 URBAN L. ANN. 191, 193. The standard has been described as based on (1) the doctrine of separation of powers, as administrative bodies are historically part of the executive branch; (2) the court's inability to conduct independent investigation into the actions of administrative bodies; and (3) the doctrine of the exhaustion of administrative remedies. *Id.* at 193-94.

37. Two problems that emerged in zoning administration of variances were abuse of discretion by the zoning board and the limited scope of judicial review of such abuse. What developed was at odds with the theoretical function of the zoning board in the administration of variances. See note 1 *supra*. "The variance procedure was not designed for the purpose of giving planning flexibility but for the purpose of alleviating unique hardship." Dukeminier, *supra* note 34, at 341.

Studies of local boards have disclosed that variances were often granted liberally and in disregard of legislative standards. See, e.g., *id.* at 291; Reps, *supra* note 1, at 294; Comment, *Zoning*, *supra* note 13, at 107. The board was supposed to be a "safety valve" in zoning administration when granting variances, but it came to be known as a "leaky boiler." Reps, *supra* note 1, at 281. The authors of one study of a zoning board disclosed several reasons for the problems that developed: issues were not sharply drawn; legal standards were not followed; findings of fact were not made; and duties and responsibilities were misinterpreted. Dukeminier, *supra* note 34, at 322-37. Lack of controls over the board, particularly judicial, were identified as a primary cause of this result. Variances often went unchallenged, and even applicants who were denied a variance seldom appealed. This result at the administrative level, plus the presumption of the validity of the decision, further limited judicial control. *Id.* at 277; Comment, *Judicial Review of Zoning Administration*, 22 CLEV. ST. L. REV. 349, 354, 356 (1973); Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 949.

and rational basis tests assume that the reviewing court is supplied with a record of the board's action. Zoning boards of adjustment often proceed informally, however, and records of their action are frequently incomplete.³⁸ Also, because "[t]he courts have recognized that the standards for granting variances must necessarily remain general since the variance is designed to meet situations that, by definition, cannot be defined and resolved in advance of the ordinance,"³⁹ the vagueness of legislative standards has created opportunity for misuse. The remedy has been tightened procedural requirements, rather than redefined standards for variances.⁴⁰

One such procedural requirement is that the board make findings and give reasons to support its decisions so that a reviewing court can check abuse of discretion.⁴¹ Findings have also been advocated to assure that substantive uniformity of decisions authorizing variances is achieved. A findings requirement encourages board members

38. See 3 ANDERSON, *supra* note 1, §§ 16.01, 16.27; Dukeminier, *supra* note 34, at 331; Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 949. One court held that a prima facie case of arbitrariness on the part of the board was established because no record was made, and no findings or reasons were given. *Zylka v. City of Crystal*, 283 Minn. 192, 167 N.W.2d 45 (1969).

39. Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 671 (1969). See also Comment, *Judicial Review of Zoning Administration*, *supra* note 37, at 352; Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 937.

40. See, e.g., MODEL LAND DEV. CODE § 2-304 (Proposed Official Draft No. 1, 1974).

41. Some writers saw this as the first step in solving the problem. E.g., Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 952. See 3 ANDERSON, *supra* note 1, § 16.41; Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 13-14 (1969). See generally Bowden, *supra* note 1, at 509; Note, *Judicial Review of Special Use Permits*, *supra* note 26, at 447.

Generally, the findings required of the board are more comprehensive than those required of trial courts, and judicial recognition of strong practical reasons for administrative findings is universal. 2 DAVIS, *supra* note 17, § 16.01. The practical reasons as seen by Professor Davis, are "facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction." *Id.* § 16.05. See *Robey v. Schwab*, 307 F.2d 198, 202 (D.C. Cir. 1962); *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir. 1938). See generally 3 ANDERSON, *supra* note 1, § 16.41, at 245.

to critically consider the evidence before them.⁴² Such a requirement could also lead to development of a reliable body of precedents, by both the zoning board and the judiciary, concerning the interpretation of the legislative standards for a variance.⁴³

Another purpose that has been advanced for the findings requirement is the preservation of the local comprehensive land use plan. To be consistent with its theoretical objectives and legal limitations, variance power should be exercised sparingly.⁴⁴ Arguably, excessive grants of variances erode the comprehensive land use plan and foster citizen apathy.⁴⁵ The findings requirement is to alleviate this problem by facilitating judicial review, thus encouraging citizen vigilance in protecting the comprehensive land use plan. Without findings the court must search the record of the board and speculate as to the reasons for the decision.⁴⁶ If the board does make findings, the

42. See, e.g., Dukeminier, *supra* note 34, at 330-35; Note, *Judicial Review of Special Use Permits*, *supra* note 26, at 448. See also 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 467-68 (1965) [hereinafter cited as COOPER] (application in administrative law generally). It has been asserted that when there are identical board statements in decisions with widely dissimilar factual situations unsupported by factual findings, there is sufficient showing of abuse of discretion. Comment, *Zoning*, *supra* note 13, at 108.

43. Dukeminier, *supra* note 34, at 331. Creators of the variance "expected that a system of judge-made rules would emerge to eliminate . . . vagueness" of standards. Note, *Administrative Discretion in Zoning*, *supra* note 39, at 671. These precedents would then be applied at the administrative level to achieve uniformity in the decisionmaking process.

44. Arnebergh, *The Functions and Duties of a Board of Zoning Adjustment*, in 1 *INSTITUTE ON PLANNING & ZONING PROCEEDINGS* 109, 118 (1961); Ford, *Guidelines for Judicial Review in Zoning Variance Cases*, 58 *MASS. L.Q.* 15 (1973); Shapiro, *supra* note 41, at 3. The desired result of a findings requirement would be the fulfillment of one of the board's purposes, that of a "safety valve." See note 37 *supra*.

45. See Comment, *Zoning*, *supra* note 13, at 107; Note, *Administrative Discretion in Zoning*, *supra* note 39, at 682; Note, *Variance Administration in Indiana—Problems and Remedies*, 48 *IND. L.J.* 240, 241 (1972-73); Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 942. The *Topanga* court gave emphasis to this view. 11 *Cal. 3d* at 517-18, 522 P.2d at 19, 113 *Cal. Rptr.* at 843. The court thought the proper judicial role was to prevent subversion of the "zoning scheme" by the granting of excessive variances. For an interesting comment on citizen apathy see Gaylord, *supra* note 9, at 196.

46. Professor Anderson believes that without findings a court must speculate as to the credibility of the evidence in the record and determine a basis for the decision—tasks that are "assigned to the board." 3 *ANDERSON*, *supra* note 1, § 16.41, at 242. See, e.g., *Zieky v. Town Plan & Zoning Comm'n*, 151 *Conn.* 265, 268, 196 A.2d 758, 760 (1963). See also *SEC v. Chenery Corp.*, 318 *U.S.* 80, 94 (1943).

parties will be able to determine whether and on what basis review should be sought. Moreover, findings enable a court to pursue its function by determining: (1) whether testimony at the hearing affords substantial support for the findings of "basic facts"⁴⁷ by the agency; (2) whether the "basic facts" found to be supported by substantial evidence reasonably support the inferences of "ultimate facts"⁴⁸ by the agency; and (3) whether the agency correctly applied the law to the "ultimate facts" reasonably inferred by it from "basic facts."⁴⁹

The problems of administrative zoning discretion and limited judicial review have evoked additional recommendations for reform ranging from other procedural modifications to a new approach to zoning regulation.⁵⁰ A state board of zoning review has been advanced as a remedy by several writers.⁵¹ Theoretically, this agency would serve as an intermediate step between the local boards and the judiciary. The objective of the state review board would be to foster uniformity of board processes, both in board procedures and the application of legislative standards.⁵² One substantive recommendation is to remove the power to grant "use"⁵³ variances from the board. This variance, in contrast to an "area" variance, is seen as being most destructive of zoning purposes,⁵⁴ particularly when

47. Basic facts are those on which the ultimate facts rest. They are more detailed than ultimate facts but less detailed than a summary of the evidence. See generally 2 DAVIS, *supra* note 17, § 16.06.

48. Ultimate facts are usually expressed in the language of a statutory standard. As defined by the Supreme Court, it "is a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937).

49. 2 COOPER, *supra* note 42, at 466.

50. See Dukeminier, *supra* note 34, at 350, calling for a new approach to zoning regulation.

51. See Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 538-39 (1959); Bryden, *Zoning: Rigid, Flexible or Fluid?* 44 J. URBAN L. 287, 301 (1967); Comment, *Judicial Review of Zoning Administration*, *supra* note 37, at 351, 357-58.

52. For a detailed discussion of the concept of a state review board see Comment, *Judicial Review of Zoning Administration*, *supra* note 37, at 357-58.

53. A "use" variance is one which permits a use of land other than that prescribed by the zoning regulations. 2 ANDERSON, *supra* note 1, § 14.06. An "area" variance is one which does not involve a use which is prohibited by the zoning ordinance but does involve matters such as setbacks, lot-size, yard requirements, etc. *Id.* § 14.07.

54. Dukeminier, *supra* note 34, at 281; see 2 ANDERSON, *supra* note 1, § 14.07. See also Bryden, *supra* note 51, at 321.

effective judicial controls are lacking. A use variance was at issue in *Topanga*, but California now prohibits such variances by statute.⁵⁵ This approach is one way to prevent serious departures from the comprehensive plan. Other proposals favor additional procedural requirements to correct the informality of board hearings.⁵⁶ Such requirements would include stricter evidentiary rules, presence of legal experts and court reporters, and precise rules for the hearing process. In practice, the boards of the smaller municipalities might be financially and functionally burdened under such a scheme.⁵⁷ Moreover, while the state review board is an innovative proposal, the states have not moved to adopt it. Rather, the trend has been to impose a findings requirement, as in *Topanga*, and other procedural modifications⁵⁸ designed to clarify the role of the board and the judiciary by facilitating judicial review.⁵⁹

55. See CAL. GOV'T CODE § 65906 (Deering 1974), as amended, (Supp. 1975).

56. See, e.g., Repts, *supra* note 1, at 295; 16 SYRACUSE L. REV. 568 (1965). The proposed ALI code embodies this approach. The section dealing with administrative hearings details procedural guidelines for notice, right of appearance, testimony and production of evidence, direct and cross-examination of witnesses, recording of hearings, demeanor of board members, and findings. MODEL LAND DEV. CODE § 2-304, *supra* note 40. The proposed code specifies that each material finding shall be supported by substantial evidence. *Id.* § 2-304(12). The drafters' notes after the section indicate that the Code provisions emphasize formal procedures that are judicial in nature.

57. The board, especially in the smaller municipality, is made up of non-legal and non-land use experts. See note 34 *supra*.

58. The ALI drafters did not recommend that a state review board be formed. The proposed code would merge all land use controls under one ordinance to be administered by a "Land Development Agency" at the local level. See MODEL LAND DEV. CODE, *supra* note 40, art. 2.

In 1968, Pennsylvania enacted a new Municipalities Planning Code in an attempt to solve problems of zoning procedures and judicial review. The changes, however, proved ineffective and the Code was amended in 1972 by revising the article on procedures. Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029 (1972). After reviewing the legislative changes, Professor Krasnowiecki concludes that the new procedures are an improvement, but that any significant impact on the character of land use controls can only be achieved by substantive changes. He would have local governments explicitly state their policies and standards concerning land use controls and would consider the creation of an "expert" reviewing agency at the state or regional level. *Id.* at 1156.

59. The *Topanga* court did not expressly decide whether the local zoning board would also be required to issue findings when it denies an application for a variance. Some states have given different meaning to the findings requirement, depending upon whether the variance was approved or denied. 3 ANDERSON, *supra* note 1, § 16.42. The state most often cited is Massachusetts because

Whether the findings now required under *Topanga* are adequate and whether to reverse or to remand when they are incomplete are problems that remain for resolution by the California judiciary.⁶⁰ The inquiry must go further if the court is dealing with a denied variance, for then it also must decide whether to order that the variance be granted.⁶¹ In addition, while findings may address all the issues, they still may be merely conclusory and incomplete. The

of *Ferrante v. Board of Appeals*, 345 Mass. 158, 186 N.E.2d 471 (1962), and *Cefalo v. Board of Appeal*, 332 Mass. 178, 124 N.E.2d 247 (1955). Judge Ford states that this result arises out of the rule that "[a] court is not required to make detailed findings of fact as ground for negative findings" and that the two cases are often mis-cited and should not be read to mean that findings are not necessary when a variance is denied. Rather, they do not need to be detailed. Ford, *supra* note 44, at 21-24.

Since the *Topanga* court relied on the administrative mandamus statute as a basis for imposing the findings requirement, it is probable that when a variance is denied, the zoning board will need to make findings.

60. In dealing with these questions, the experience of other jurisdictions would be helpful. On this problem generally see 3 ANDERSON, *supra* note 1, §§ 16.41, 16.42, and cases cited therein.

"A very large portion of the cases remanded for better findings are an inevitable result of the system of a limited judicial review. . . . Judicial decisions on inadequacy of administrative findings are thus one of the principal tools by which courts impose their limited control of administrative development of law and policy." 2 DAVIS, *supra* note 17, § 16.01, at 436. The "General Test" for judging the adequacy of findings is that if the findings do not allow the three steps of the function of review, *see* text at note 49 *supra*, they are not adequate. 2 COOPER, *supra* note 42, at 472. On application the courts: (1) require that the findings include the basic facts, (2) require that the findings be sufficiently complete to make it clear that the agency considered all the relevant statutory factors, (3) refuse to accept findings cast in terms that are too conclusory, (4) remand findings that are too indefinite to permit the court to fulfill its appellate functions, and (5) refuse to accept as "findings" statements that merely summarize the evidence. *Id.* at 474.

61. *See* note 59 *supra*. Whether a court should order the grant of a variance that has been denied raises questions involving separation of powers and usurpation of board functions. Judge Ford suggests a "but-for" test in deciding whether to order a variance to be granted. Thus, a court could order a variance granted when extraordinary circumstances are present that "compel the conclusion that but for [an] error of law, or arbitrary and capricious action, the variance would or should have been granted." Ford, *supra* note 44, at 24.

For a discussion of suggested guidelines advanced for Massachusetts courts with respect to the record to be prepared by the zoning board and with respect to the scope and manner of review in variance cases *see id.* at 26-28. An added feature of the Massachusetts situation is *de novo* fact finding by the trial court in variance cases. This is one way to attack the presumption of the validity of the board's action that is not generally employed in other states in variance cases. *See* 3 ANDERSON, *supra* note 1, § 16.41. *See also* note 7 *supra*.

Topanga court indicated that such findings are inadequate,⁶² and this conclusion is the majority view.⁶³

The *Topanga* decision is significant to the extent that the principal effect of the findings requirement will be to facilitate meaningful judicial review of variance cases.⁶⁴ The findings requirement should produce logical and legally accurate board decisions that will provide a clear basis for review, apprise parties whether an appeal is appropriate, and demonstrate to the public that administrative decision-making is careful, reasoned and equitable. It remains an open question whether the decision will have any real impact on the overall quality of variance decisionmaking, since variance decisions are not often appealed.⁶⁵ While the findings requirement will provide a basis for judicial control over the administrative process, such control will be academic unless a variance application is opposed. Only when an administrative variance decision is appealed would the policies of the findings requirement be adequately effectuated. Thus it is evident that while the judiciary can ameliorate some abuses of administrative discretion, effective control can be provided only by the political and legislative processes.

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62. 11 Cal. 3d at 517 n.16, 522 P.2d at 18 n.16, 113 Cal. Rptr. at 842 n.16.

63. 3 ANDERSON, *supra* note 1, § 16.44.

64. The findings requirement has been recommended by legal writers in California. *See, e.g.*, Comment, *Judicial Control over Zoning Boards of Appeal*, *supra* note 12, at 952. *See also* Comment, *Zoning*, *supra* note 13, at 107. The problem of the lack of judicial control over variances was of particular concern to a joint committee of the California legislature dealing with open space control. For a discussion by a staff member of that committee see Bowden, *supra* note 1.

Topanga has been followed in other areas of land use control in California involving administrative decisions by local agencies. *See* Woodland Hills Residents Ass'n, Inc. v. City Council, 44 Cal. App. 3d 825, 833-39, 118 Cal. Rptr. 856, 860-64 (Dist. Ct. App. 1975) (approval of a tract map of a proposed subdivision by advisory agency, planning commission and city council).

The *Topanga* decision should also be greatly appreciated by the drafters of the proposed ALI code who hope to encourage greater judicial responsibility in review of administrative land use decisions. The drafters noted that "[t]he requirements of the SZEA [Standard Zoning Enabling Act] for a record, findings and decision are rudimentary in character. The courts are no longer willing to tolerate a decision on a mimeographed form containing findings and conclusions good for any occasion." MODEL LAND DEV. CODE, *supra* note 40, at 95.

65. *See* Repts, *supra* note 1, at 294; Shapiro, *supra* note 41, at 16; Note, *Variance Administration in Indiana*, *supra* note 45, at 247 n.44; Comment, *Zoning*, *supra* note 13, at 101.

