ZONING ADMINISTRATION IN
VANCOUVER: TIME FOR A CHANGE?

by

PHILIP THOMAS CHAPMAN
B.A., Simon Fraser University, 1975

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES
School of Community and Regional Planning

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA
October 1982

© Philip Thomas Chapman, 1982
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Community and Regional Planning

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date October 18, 1982.
ABSTRACT

Regulation of land through zoning is inherently controversial as it involves individual rights and freedoms often in conflict with public goals and policy. To ensure the general rules of regulation are not dispensed in an arbitrary and capricious manner, thereby causing undue or unnecessary hardship in specific cases, the zoning board of variance has been established. This board is a quasi-judicial lay tribunal statutorily limited to resolving issues concerning individual cases of hardship, administrative misjudgment or errors of interpretation related to zoning matters.

In recent years concern has been expressed over whether or not the board of variance can appropriately respond to appeals of administrative decisions which are the product of an increasingly dynamic and complex zoning and development process dependent on the discretionally judgment of professional planning staff. Correspondingly, concern has also been expressed that procedures established by these lay boards only inadequately provide for the rights of the individual.

The purpose of this thesis is to document and evaluate the decision-making procedures established by the board of variance. It is hypothesized that the board system of zoning administration, as exemplified by the operation of the existing Vancouver Board of Variance, enables maximization of public benefits accruable through the exercise of discretionally zoning techniques while adequately meeting the equity requirements of a quasi-judicial appeal body. To test this hypothesis, the evolution of zoning in Canada and the United States of America was reviewed and two case study models of zoning administration, the Vancouver Board of Variance and the
Seattle Hearing Examiner, introduced. Examination of their history and operation identified several administrative problems with these systems.

With this background, a model with eight normative criteria of administration was established using selected socio-political and judicial elements of our society. The two case study systems were then compared with the theoretical model and the hypothesis disproven. It was concluded the Vancouver Board of Variance displayed shortcomings resulting from the local zoning process, the lack of required qualifications for Board members, and the informal procedures of the Board. It was further concluded the Seattle Hearing Examiner system, while better meeting the normative criteria, could not be adopted to the Vancouver administrative setting.

It was then suggested the Vancouver Board of Variance could be modified so as to better meet the criteria of the normative model, thereby rectifying the identified shortcomings. A set of recommendations pertaining to these shortcomings was presented and a method of implementation suggested. These recommendations included:

a) eliminating those appeals concerning the use of either land or structures from the Board's jurisdiction;

b) permitting the Planning Department to issue variances in certain cases;

c) modifying the public hearing requirement from mandatory to discretionary in certain circumstances;

d) creating a citizens' advisory committee to provide a policy overview of variance decisions for City Council;
e) permitting wider judicial review of individual variance appeals by incorporating policy statements under the protection of the "Official Development Plan";

f) requiring Board members have qualifications;

g) limiting the term of membership to the Board and requiring attendance of meetings;

h) requiring the Chairman of the Board have a legal background, a judicial temperament and be appointed jointly by the Province and the City;

i) modifying the procedures and operation of the Board so that:
   (i) the appeal form indicates grounds for appeal and advises of requirements for any subsequent judicial appeal,
   (ii) public notice is given all appeals and provision is made to involve local groups,
   (iii) an information pamphlet on the Board is published,
   (iv) information can be exchanged prior to the hearing,
   (v) the powers of the Chairman are specified,
   (vi) ex parte communication is limited, and
   (vii) upon request, reasons in writing are given for decisions of the Board.

It was concluded the recommendations would result in the significant improvement of Board of Variance by:

a) returning policy decisions to the legislature,

b) expediting the handling of variance appeals,

c) increasing the accountability of the Board to the legislature and the judiciary,
d) re-establishing membership qualifications for Board members, and

e) establishing procedures to ensure the Board conducted its
deliberations with fairness, clarity and openness, free from
political interference.
# TABLE OF CONTENTS

## TITLE

### LIBRARY PERMISSION FORM

### ABSTRACT

### TABLE OF CONTENTS

### LIST OF TABLES

### ACKNOWLEDGEMENT

### DEDICATION

## CHAPTER I - INTRODUCTION

### 1.1 PURPOSE

### 1.2 STUDY HYPOTHESIS AND OBJECTIVES

### 1.3 LIMITATIONS

### 1.4 DATA SOURCES

### 1.5 ORGANIZATION

### 1.6 DEFINITIONS

## CHAPTER II - SYSTEMS OF ZONING ADMINISTRATION

### 2.1 RELATIONSHIPS AND INTERDEPENDENCIES

### 2.2 HISTORY OF ZONING

#### 2.2.1 The American Experience

#### 2.2.2 The Canadian Experience

#### 2.2.3 Variances

#### 2.2.4 Summary

- vi -
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3 ZONING ADMINISTRATION - VANCOUVER</td>
<td>29</td>
</tr>
<tr>
<td>2.3.1 History of the Vancouver Board of Variance</td>
<td>30</td>
</tr>
<tr>
<td>2.3.2 Operation of the Vancouver Board of Variance</td>
<td>32</td>
</tr>
<tr>
<td>2.3.2.1 power and jurisdiction</td>
<td>32</td>
</tr>
<tr>
<td>2.3.2.2 existing process</td>
<td>35</td>
</tr>
<tr>
<td>2.3.2.3 procedural details</td>
<td>36</td>
</tr>
<tr>
<td>2.4 ZONING ADMINISTRATION - SEATTLE</td>
<td>43</td>
</tr>
<tr>
<td>2.4.1 History of Seattle Hearing Examiner</td>
<td>44</td>
</tr>
<tr>
<td>2.4.2 Operation of Seattle Hearing Examiner</td>
<td>47</td>
</tr>
<tr>
<td>2.4.2.1 powers and jurisdiction</td>
<td>48</td>
</tr>
<tr>
<td>2.4.2.2 existing process</td>
<td>49</td>
</tr>
<tr>
<td>2.4.2.3 procedural details</td>
<td>51</td>
</tr>
<tr>
<td>2.5 ADVANTAGES AND DISADVANTAGES OF SYSTEMS</td>
<td>58</td>
</tr>
<tr>
<td>2.5.1 Zoning Board of Variance</td>
<td>58</td>
</tr>
<tr>
<td>2.5.2 Hearing Examiner</td>
<td>70</td>
</tr>
<tr>
<td>FOOTNOTES</td>
<td>83</td>
</tr>
</tbody>
</table>

CHAPTER III - A RATIONALE FOR IMPROVEMENT 93

3.1 METHODOLOGY 93

3.2 PRINCIPLES OF GOVERNMENT 94

3.2.1 Parliamentary Government - England 96

3.2.2 Parliamentary Government - Canada 101

3.2.3 Constitutional Government - United States 102

3.3 ADMINISTRATIVE LAW 105

3.3.1 Natural Justice 107

3.3.2 Due Process 110
# LIST OF TABLES

<table>
<thead>
<tr>
<th>TABLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Comparative Requirements of Notice.</td>
</tr>
<tr>
<td>2</td>
<td>Comparison of Components of Decisions.</td>
</tr>
<tr>
<td>3</td>
<td>Information Availability.</td>
</tr>
<tr>
<td>4</td>
<td>Protection Afforded the Rights of the Individual by System.</td>
</tr>
<tr>
<td>5</td>
<td>Stated Objectives of Appeal Mechanism Compared to Existing Systems.</td>
</tr>
<tr>
<td>6</td>
<td>Comparative Powers to Set and Vary Procedures.</td>
</tr>
<tr>
<td>7</td>
<td>Spectrum of Power by Case Type.</td>
</tr>
<tr>
<td>8</td>
<td>Comparison of Optimum Times for Systems to Process Variances.</td>
</tr>
<tr>
<td>9</td>
<td>Seattle Board of Adjustment Decisions.</td>
</tr>
<tr>
<td>10</td>
<td>Yearly Comparison of the Number of Appeals Considered by the Vancouver Board of Variance.</td>
</tr>
<tr>
<td>11</td>
<td>Number of Appeals Considered by the Seattle Hearing Examiner (1979).</td>
</tr>
<tr>
<td>12</td>
<td>Type of Decision Given by the Vancouver Board of Variance - 1979 and 1980.</td>
</tr>
<tr>
<td>13</td>
<td>Classification of Appeals Considered in 1979 and 1980 by the Vancouver Board of Variance.</td>
</tr>
<tr>
<td>14</td>
<td>Relationship Between Appeal Body Decision and Departmental Decision/Recommendations.</td>
</tr>
</tbody>
</table>
ACKNOWLEDGEMENT

I am grateful for the assistance and encouragement received from Dr. V. Setty Pendakur, Professor, School of Community and Regional Planning, University of B.C., and Mr. William T. Lane, General Manager, Greater Vancouver Regional District. I hope they feel the time and effort this thesis required of them was well spent.

I would also like to express my appreciation to Dyan Pringle, Margo Gram, Corrine Angell, Ray Ohrner, and my other friends for their help, advice, and understanding throughout the writing of this thesis. And to David Thomsett and Penny Wohl, my co-workers in the Vancouver Planning Department, who endured so many inconveniences on my behalf.

I am also indebted to Lloyd Gell, Secretary, Vancouver Board of Variance and several members of the Vancouver Planning Department for their cooperation and assistance in providing information and insight into the administration of Zoning in Vancouver. As well, I would like to thank Ms. M. Klockars, Deputy Hearing Examiner, City of Seattle, Mr. Robert Beaty, Deputy Hearing Examiner, King County, and several members of the City of Seattle and King County planning staffs for their assistance in providing similar information and insight into the American systems of administration.

Lastly, I would like to thank Mrs. Barb Waller for so capably typing this thesis.
DEDICATION

For Mona E. Chapman, whose quiet confidence in her children and unstated belief in the value of education for personal development enabled me to complete this work. Her spirit will always be remembered.
CHAPTER I
INTRODUCTION

1.1 PURPOSE

The basis for land use control in North America lies in the exercise of the state's police powers. To safeguard the abuse of these powers by public administrators, Canada has relied on a system of written and unwritten (but judicially recognized) laws, while the United States has relied exclusively on its Constitution and amendments thereof. These principles have enabled local authorities to establish zoning by-laws which attempt to regulate the use to which private property may be put, as well as the quality, quantity, shape and form of development to be permitted those properties within their jurisdiction. Recently the flexibility with which these powers may be applied has been greatly extended under the guise of administrative discretion. This extension has created a unique situation where decisions taken, or not taken, by administrative officials may infringe on specific individuals' rights, and may therefore require some form of statutory safeguard to ensure that these powers are not dispensed in an arbitrary and capricious manner. In Vancouver this mechanism is the board of variance, a quasi-judicial lay tribunal statutorily limited to resolving issues concerning individual cases of undue or unnecessary hardship, administrative misjudgment or errors of interpretation related to zoning matters.

In recent years concern has been expressed over whether or not the boards of variance can appropriately respond to appeals of administrative decisions. These decisions are the product of an increasingly dynamic and complex zoning and development process dependent on the discretionary
judgment of professional planning staff and sophisticated policy statements adopted by local councils. Concern has also been expressed that the informal procedures established by these boards only inadequately provides for the rights of the individual appearing before them. In response, several zoning jurisdictions, primarily in the United States, have initiated reforms enabling their administrative systems to better meet the challenges these concerns present.

The purpose of this thesis is to document and evaluate the decision-making procedures and processes established by the administrative board of variance. This research will employ normative criteria related to an ideal administrative-adjudicative model to assess the effectiveness of the traditional board of variance and the radical hearing examiner system in resolving problems related to discretionary decision-making and equity in administrative systems of zoning. To facilitate this investigation, case studies examining the operation of the Vancouver Board of Variance and the Seattle Hearing Examiner are presented. To further augment the research, a review of the evolution of zoning as a system of land use control and an examination of the socio-political and judicial basis upon which these administrative systems have been established is presented.

1.2 STUDY HYPOTHESIS AND OBJECTIVES

A statement of the research hypothesis assists in developing a scientific approach to the investigation undertaken. The testing of this hypothesis assists in developing the objectivity with which the investigation must be undertaken to establish its credibility. The objectives of the study define its scope and frame of reference.
The hypothesis of this thesis maintains the board of variance system, as exemplified by the operation of the existing Vancouver Board, enables maximization of public benefits accruable through the exercise of discretionary zoning techniques while adequately meeting the equity requirements of a quasi-judicial appeal body.

The research reviews two systems of zoning administration, known as the board of variance and the hearing examiner, with emphasis on the following objectives:

a) to document the origins, evolution, and deviation of the administrative, legislative and judicial structures that regulate the use of land in Canada and the United States,

b) to detail the powers and procedures followed in the operation of the two administrative systems,

c) to evaluate the potential effect decision outcomes of administrative systems have on adopted planning policy,

d) to compare and evaluate the adequacy of the administrative systems in resolving identified operational concerns, utilizing appropriate normative criteria, and

e) to make recommendations regarding potential changes to administrative procedures and processes where such changes, based on a theoretical perspective of relevant socio-political and judicial structures, are pertinent to the improvement of the decision-making process.

1.3 LIMITATIONS

Several limitations of the research restrict the value of this study. For example, the information sources consulted were of necessity
limited. Much of the written material regarding the board of variance, and all of the material regarding the hearing examiner, referred to the American planning and administrative milieux, which may have cast an unintentional Americanization to the study.

Furthermore, no attempt was made to establish a scientific sample or conduct extensive surveys of randomly selected administrators from other jurisdictions. Indeed, most of the sources used are employed or otherwise work in one or the other of the two systems discussed and therefore any disclaimer that professional bias could not have influenced the study cannot be made.

In addition, many of the considerations presented in the study are matters of some subjectivity and concern matters of individual judgment and philosophy. Precise evaluations and conclusions in these cases are therefore difficult.

Finally, application of the recommendations of this study to other jurisdictions may prove to be impossible in some cases, or unadvisable in others. This difficulty stems from the fact that different communities, each according to its own particular development needs, have adopted planning processes of varying levels of sophistication, resulting in administrative procedures which have also varied to account for those localized needs. The degree of atomization of zoning as an administrative system, as well as the variety of possible development stages a community could be in at any particular moment, combine to preclude the blanket application of the recommendations made for the Vancouver system.
1.4 DATA SOURCES

Data employed in this study were obtained from various sources. Most procedural information was obtained by unobtrusive observation of both administrative systems on several occasions. For the hearing examiner system this entailed visiting the City of Seattle.

Extensive information was gathered from meetings with several hearing examiners, the secretaries to the boards of variance for both Vancouver and Seattle, professional planning staff of both jurisdictions, and other knowledgeable and informed sources, regarding the hearing examiner system. Many publications, legal documents, and legislative statutes and by-laws were also consulted and the minutes and case files of various appeals reviewed. In several instances, personal site inspections were made. Lastly, in order to provide a theoretical perspective to the study, a literature review of the political-administrative behaviour and the administrative laws governing the two countries was completed. The concepts gained through this review were used to form the basis of the ensuing analysis.

1.5 ORGANIZATION

This thesis is organized in the following manner:

a) Chapter I - introduces the purpose of the thesis and presents the research hypothesis and study objectives. Research limitations, data sources and definitions are discussed.

b) Chapter II - traces, through literature, the evolution of zoning in Canada and America, and discusses the history and operation of two systems of zoning administration through the
introduction of the Vancouver Board of Variance and the Seattle Hearing Examiner. The chapter concludes with a discussion of the relative strengths and weaknesses of each system, making reference to the case studies.

c) Chapter III - discusses the evaluative methodology chosen and selected aspects of both parliamentary and constitutional government needed to establish a normative model of zoning administration. The development of eight criteria for this model concludes the chapter.

d) Chapter IV - defines the normative criteria through development of process indicators which are then used to comparatively evaluate the administrative systems. Types of appeals considered by these systems are also discussed and conclusions from the analysis stated.

e) Chapter V - presents and discusses a set of recommended changes to bring the Vancouver Board of Variance system closer to the normative model of zoning administration.

1.6 DEFINITIONS

Terminology used in this thesis is a composite of language used in the administration of zoning in various jurisdictions under discussion. As such, general terms are used from England, America and Canada, and specific terms are used from Vancouver and Seattle. Wherever possible, common terminology has been adopted and where this occurs, the Canadian or 'Vancouver' term has been adopted. Where a common term has not been established, meanings have been explained in footnotes. Throughout, the term "appellate" refers to the judiciary, "administrative system" and
"administrative model" to the board of variance and/or the hearing examiner, and "tribunal" to the zoning board of adjustment or variance. Additionally, the term "adjudicator" is used to differentiate between the members of the board of variance or the hearing examiner and the local planning staff.
CHAPTER II
PAST AND PRESENT SYSTEMS OF ZONING ADMINISTRATION

The purpose of this chapter is threefold:

a) to provide a brief history of zoning as a form of land use regulation in Canada and the United States;

b) to describe two different systems of zoning administration through examination of the operation of the City of Vancouver's Board of Variance and the City of Seattle's Office of the Hearing Examiner; and

c) to identify characteristics common to the procedures used by both administrative systems by comparing the relative advantages and disadvantages of each system.

The relationship between planning and zoning and the dependency of both the official development plan and the zoning by-law upon the enforcement actions of an administrative system are also discussed.

2.1 RELATIONSHIPS AND INTER-DEPENDENCIES

In the next section, changes to zoning, a method of administration used by a municipality to control land use, are examined. This knowledge will assist in the analysis of the administrative systems in later chapters but will not explain how the actions of these adjudicators permeates the entire field of planning. The purpose of this section is to explain that relationship and the role of the adjudicator in the planning process.
Superior legislatures have given authority to plan to the local municipalities in much the same way as they have given them authority to create zoning. Although planning and zoning are related, they are quite different in nature. Understanding these differences will help clarify their relationship and their dependency on the administrative system for enforcement.

Planning is the process by which provision is made for the present and future social and economic needs of a community in an orderly fashion. Planning can be seen as a concept of broader significance, one which contemplates development of an overall plan for the entire community. This concept is held to be of a different nature than that of zoning, because it serves as a positive guide in the renewal and expansion processes of land development. As such, it does not rely exclusively on the police powers of the municipality for control.

A plan is generally assumed to be a reflection of community goals. These goals are usually expressed only in generalities, most often as vague policy statements, which, while providing the council with a degree of political flexibility, have the effect of limiting the plan's legal power. It is evident that before a plan can benefit a community, some vehicle which translates broad policy into legislative action is required. One such vehicle is the zoning by-law, a legal document written in a definite and certain manner giving it the legal effect the plan lacks. Implementation of the plan, or of planning policies, is also dependent on the effective enforcement of the regulations contained within the zoning and other regulatory by-laws of the municipality. The role of the administrative system can only be clearly understood knowing that the implementation of planning policy is dependent on the enforce-
ment of the zoning by-law, which is itself dependent on the actions of the board or examiner. These actions will be discussed in latter chapters but at present it will suffice to state these adjudicators can indirectly help or hinder implementation of municipal planning policy through decisions they make on local zoning matters. These decisions have had an increasing potential for negative impact on zoning by-laws and planning policy due to the increasingly complex and technical nature of new zoning techniques. In addition, there is an increasing propensity for new construction to be developed through a negotiation process dependent to a large extent on the discretion of professional planning staff. The history zoning has followed to arrive at its current discretionary state is discussed in the next section.

2.2 HISTORY OF ZONING

While a detailed history of zoning as a means of land use control is beyond the scope of this thesis, it is necessary to examine certain aspects of its historical development in order to understand the operation of existing administrative systems. Zoning has long undergone many small incremental changes, made in response to the immediate practical needs of the moment. It is argued here that these "needs" continue to exist and change, and that the greatest failure of zoning as an administrative technique has been the inability to account for these dynamics through establishment of a set of universal principles of administration. This historical description commences in the United States because it was in that country that Canada's early zoning regulations originated.
2.2.1 The American Experience

Prior to the development of zoning, land use in the U.S. was controlled solely through common laws of nuisance, restrictive covenants, building and fire regulations, all administered by separate and uncoordinated agencies. Failure of these tools to provide adequate protection against obnoxious and incompatible uses of property was due primarily to the individual owners' interest in obtaining the maximum return from his property and by the forced reliance of those individuals suffering the nuisance to petition the court for a remedy of the alleged damages. The desire to change this ineffective method of control was the first step towards imposition of zoning in many North American cities.

The vital second step towards an improved land use control system was removal of the burden of initiation of legal action by the individual alleging that a nuisance was being caused by his neighbour. This power to initiate action was subsequently vested, via delegation from superior legislatures (i.e., the state), to local municipalities under the aegis of the police power to protect public health and safety.

Despite this improvement in regulation, many communities still faced rapid and unsettling changes brought upon by the advent of mass transportation and open immigration policies during the early 1900's. Gradually public interest in land and its development became as important as the private interest had been in the past. Municipalities, interested in maintaining, or increasing, public revenue from private property taxation, and private property owners interested in maintaining neighbourhood amenities, soon saw the value of zoning; a set of comprehensive regulations restricting the use and development of private property.
Zoning became, as one author has noted, "no more than a rational and comprehensive extension of public nuisance law, with the great advantage (over the common law nuisance) of providing all landowners with knowledge before the fact of what they could and could not do with their land."³

According to the above author, the primary objective of early zoning measures was to isolate single family dwelling areas from intrusions by industry or multi-family development; this separation was to provide an environment of stable property values and development certainty. The concept envisioned land use control in a static state and was never intended to control the form or nature of development to take place. An integral part of the traditional concept were the assumptions that desired development would take place without detailed government regulation, and that the location of development could be predetermined by local council. The result was legislation that segregated incompatible land use and established certain general standards regarding the use of land and buildings in each of the newly created zones or districts.⁴

Zoning in America first started in New York City in 1916. The adoption of zoning ordinances divided that city into three districts (residential, commercial and unrestricted use) and imposed height and area (bulk) controls on new buildings located in certain of those districts.⁵ The success of these ordinances resulted in the rapid spread of zoning to other American cities and by 1926 over one-half of the urban population lived in communities that had adopted zoning ordinances similar to New York's. This spread was hastened by the development of two model acts developed by the U.S. Department of Commerce. These acts were the Standard State Zoning Enabling Act (1922 and 1926) and the Standard City Planning Act (1928).
Zoning, however, remained somewhat controversial, and it was not until 1926, when the U.S. Supreme Court, in *Euclid v. Amber Realty*, approved the constitutional validity of zoning protection, that it became firmly established in American Law:

"...Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations,... The ordinance...and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.... A nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.... The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development." 6

From this case it is evident that the court ascribed certain characteristics to zoning. Zoning was perceived as:

a) an exercise of the police power,

b) a legislative act,

c) valid only if asserted for the public welfare,

d) valid only if applied reasonably, and

e) what was reasonable depends on circumstances.

To understand these characteristics one must refer to the American Consitution and in particular to two of its Amendments. These are:
a) the Fifth Amendment, which states that "no person...shall be deprived of...property without due process of law, nor shall private property be taken for public use without just compensation." and

b) the Fourteenth Amendment, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

Inherent to the right to private ownership of land is the right to use land in any manner the owner deems desirable. The only constitutional justification for restricting such activity through a zoning ordinance is the protection of public health, safety, morals or general welfare. This restriction is, however, only valid if the owner of private property is allowed a reasonable use for his property. Should no such reasonable use remain then the ordinance must be held unconstitutional as applied to his property. The Euclid case warrants further examination as it was not only responsible for the legal acceptance of zoning but also because it marked the first substantial change in the function of the zoning ordinance.

In ruling on this case the U.S. Supreme Court recognized that "zoning is a comprehensive plan of land use based on the public power" and as such, comprehensive zoning for the entire city was sanctified. This decision was the first to recognize the so-called "Planning Theory of Zoning". As one expert notes, "subsequent zoning litigation [has] strengthened the zoning process as a tool of planning as contrasted to the theory it is merely a method of controlling nuisance." This planning objective is readily observable in most modern zoning legislation where the preamble of the enabling act
generally states zoning regulations shall be prepared in accordance with a comprehensive plan designed to lessen congestion and provide adequate light and air.

The technique by which the orderly physical growth of the City was to be promoted is known as "districting". The Euclid decision not only recognized districting as a legitimate means of separating and controlling incompatible uses of land but it also recognized the hierarchical model of land use especially in residential development, and therefore in districting. The Court, in considering the case before it, "generalized the living arrangements which then typified apartment development into a legally significant use category which then became subject to independent and less favourable treatment under the umbrella of land use regulations".11 The famous quote "right thing in the wrong place, like a pig in the parlour" indicates the judicial stance taken and at least implicitly indicates that classification of uses were founded on taste and value preferences. The court approved the constitutionality of zoning protection for neighbourhoods from uses which, while not nuisance in the old legal definition, had very similar effects on neighbourhood quality.12

The hierarchical model of districting contains elements of both the nuisance theory of various use types and the "pour over" theory of property values. Simply stated, the first theory meant that all uses other than single family residential constituted a nuisance in an existing area of single family residential, while the second theory meant property zoned for a less use (i.e., commercial, industrial) could be also used for residential purposes. This cumulative effect was obviously
only applicable in a downward direction where the single family dwelling zone appeared at the top of the hierarchy. Diagram 1 will assist in explaining this concept. The notion of districting is so central to understanding the control that zoning provides and the methods by which zoning is administered, that a brief examination of how it has evolved over the years is required.

After World War II the hierarchical model of districting was succeeded by the separate but equal facilities doctrine which saw each district reserved exclusively for those uses deemed appropriate for that district. This doctrine had several advantages: 1) it allowed future municipal growth to be mapped, thereby rigidly designating various uses of land in each section of the community prior to its development, 2) it allowed industry to operate with greater freedom as its neighbours were to be industrial rather than residential, and 3) it allowed possible diversion of "undesirable" residential growth by providing more industrially zoned land than would ever be needed for the community's purposes.

This separate but equal doctrine lost much popularity when massive changes in building technology and design reduced the importance of
recognizing differences between various uses. Beginning in the early 1950's it became more important to identify offensive characteristics of use rather than to prohibit it in a particular district altogether. This marked the beginning of the performance standard as the location determinant and heralded the age of mixed use regulation.

The mixed use concept was first applied to industrial districts where such indicators and standards as noise, odour, smoke, vibration and fire hazard generated determined in which zone that particular business could locate. The result was if a particular business could meet the performance standard of the designated zone then it could locate there (or in any other zone with lower performance standards) regardless of the nature of the intended use.

The spread of the mixed use concept as a regulatory control in other use districts has been very slow. One expert notes, "the hitch, of course, is that we have one set of mores for the industrial pigs and another for the residential parlours. The introduction of multi-family uses into a single-family zone carries social implications which are absent in the treatment of industry." The mixed-up concept has more recently re-appeared under the guise of "vertical zoning" whereby numerous uses such as retail, office-commercial and residential, are stacked in a single building.

Despite some success through adoption of the mixed use concept, those involved in control of land use soon came to realize that allocation of land uses to meet continually shifting patterns of community needs and consumer demands was much more complex and required much more flexibility than existed under the Euclidean system at the same time. As
has been noted: "Experience demonstrated the impossibility of synthesizing the uses of land by a rigid mechanical approach."\textsuperscript{14}

The need to incorporate a further degree of flexibility into zoning's administration resulted in the development of three new types of control devices. These were, 1) bonus zoning, 2) contract or site control zoning, and 3) transfer of development rights. Each is briefly discussed below.

Bonus zoning combines the traditional set of bulk and use regulations with the promise that more liberal standards of control would be made available in exchange for "better" development. Generally, this entails the regulatory authority permitting the developer higher density in exchange for underground parking, larger amounts of open space, greater public amenities, or improved design features. This form of regulation reflected not only new desire for flexibility, but also a new goal of zoning: to promote in a positive manner a preconceived notion of public interest. While this device still relied on a set of standards for administration, it was the progenitor of a negotiated development process based on the discretion of the planning authority. In the United States this device became known as the floating zone.

Exercise of the regulatory power was further eroded with the introduction of contract zoning, a device even more dependent on a negotiation process between civic staff and prospective developers. Contract zoning was developed in response to limitations conventional regulations placed on development of large tracts of land. The concern of the conventional regulations had been to afford the individual property owner protection from negative externalities of new development seeking to locate on
adjacent property. These regulations, however, were not particularly relevant to development of large sites where primary regulatory concerns were not with externalities of the site but with the nature of internal design.

Contract zoning requires an agreement be reached between civic staff and the developer and as noted, "presupposes the development of land prior to such an agreement".\textsuperscript{15} The developer is of course free to develop the land within the confines of regulations pertaining to the zone in which the land is already located should he so choose. However, in doing so available development benefits would be forfeited. It is through this negotiation process that detailed project plans are developed and flexibility in zoning increased. This flexibility is achieved, however, at the cost of uniformity and stability, two cornerstones of the traditional zoning technique. This loss occurs because contract zoning entails tailoring a set of individual regulations to peculiarities of a specific site and to desires of the developer and civic staff. The outcome of this process is a new and unique zoning which has been created through a negotiation process based on the discretion of the planning staff and approved by the local council. In such cases, "unless there are external guidelines to constrain municipal activity, there may perhaps be a tendency for the local authority to impose whatever conditions the traffic will bear."\textsuperscript{16} Contract zoning appears today in various forms. In the United States, it is primarily recognizable as planned unit developments or PUD's, while in Canada it has taken the form of comprehensive developments or CD-1's.

The third device which promotes flexibility in zoning is known as transfer of development rights, or TDR's. This device allows a developer to transfer the right to develop from one site to another in exchange for
providing some public amenity which would otherwise not be available to the community at large. In Canada this device is known by a slightly different name: "transfer of development privilege". While the three administrative devices discussed above explain how greater flexibility was introduced to the American system of zoning, they do not entirely explain how flexibility was introduced into the Canadian zoning. This is the subject of discussion in the next section.

2.2.2 The Canadian Experience

The history of zoning in Canada appears to have closely paralleled developments in the United States. Examination of the literature indicates Canadian zoning was also initially concerned exclusively with the location of development. This concern became the basis for all planning acts developed in Canada in the years following. Regulation of land use in Canada began at the turn of this century when authority was given to impose minimum regulations pertaining to a building's frontage and setback. In addition, minimal discretionary powers related to use of land were also established. A concept of districting was first implemented in Ontario in 1921 and had spread to the Municipality of Point Grey by 1922. Five years after that zoning was formally adopted in Vancouver. Those regulations remained more or less unchanged until the 1950's when concern with the form of development began to shift the emphasis of zoning towards more flexible techniques of control.

This shift marked the beginning of the divergence between the Canadian and American zoning techniques. Each country was to seek different devices to introduce flexibility into what until that time had been basically the same method of control. These similarities were the result of common legislation and parallel evolution of respective
cities. Present differences, however, are not so easily explained as they originate from such basic differences between the two countries as defined by their respective government and legal systems.

As indicated earlier, the American stream of planning implementation produced such flexible control devices as bonus and contract zoning and TDR's. Several of these techniques were also imported to Canada in an attempt to solve traditional zoning system problems. However, these measures were not the only ones implemented. Canadian officials looked to England and imported another flexible device known as development control to help solve local land use control problems.

Development control is a great departure from the American system as it is control of land use by permission rather than regulation. It requires that each proposed use for a particular property be examined on its merits by some planning agency or official, whereas the traditional American method entitled an owner to develop land without approval of any government official as long as certain minimal standards were met. One expert notes that because development control is a system based on decisions of some planning agency or official, and not by by-law it is an administrative rather than legislative control.

These two systems of control serve to illustrate philosophical differences regarding real property rights between Britain and the U.S.A. In America, property rights occupy a more sanctified place than in England, and an individual has the right to develop his own property to its highest and best use. As well, the owner has a right to be protected from negative developments of neighbouring property owners. It can be observed that in America, the right to develop one's own property is considered a right of real property ownership.
On the other hand, property rights in England have developed under the Common Law and with the philosophy that land ownership represents duties to the community as well as rights of development to the owner. An offshoot of this notion is the idea that the public has the right, through the Crown, to take from the owner any increment in land value resulting from an approval given to develop the property to a higher use.\textsuperscript{22}

The statutory intervention by the English legislature in the right to develop land has resulted in the creation of a system of development control dependent on bureaucratic administration and the use of local plans to approve or deny individual proposals. This required authority to be given to administrative staff and is quite the opposite of the American system which places this responsibility on elected officials rather than administrative staff. The result has been that land use control in the United States has become much more politicized\textsuperscript{23} and much less discretionary in its administration than in either Britain or Canada.

In Canada, this form of development control is reflected in those jurisdictions that have adopted a Development Permit (D.P.) system of zoning administration. The D.P. system in Canada originated in Vancouver through a Charter amendment in 1956 which enabled Council to pass by-laws requiring issuance of a development permit prior to the issuance of a building permit. Since then, modified D.P. systems have spread to Alberta, Nova Scotia, New Brunswick, Saskatchewan, Manitoba\textsuperscript{24} and, by amendment to the Municipal Act, R.S.B.C. (1968), other municipalities in British Columbia.\textsuperscript{25}
As a thorough comprehension of the Vancouver Zoning and Development By-Law will assist not only in understanding the Board of Variance's activities but also in how development control is used, a brief explanation is now undertaken.

The Vancouver Zoning and Development By-Law (No. 3575) is actually a rather unique mixture of both American regulatory and British permissive systems of administration. The regulatory aspects appear within the by-law as a system of outright uses applicable in general zones, and in the bulk regulations described in the by-law. This system assures a developer a Development Permit (D.P.) provided that all general specifications laid down in the by-law have been met and the use to which the property is intended fits a list of predetermined or outright uses for that zone. Several more recent American techniques are also reflected in the by-law; bonusing the maximum buildable floor area is used in several apartment zones to encourage such amenities as underground parking, open space, and vertical zoning.

The discretionary nature of the permit system becomes prevalent in the by-law when a use proposed for a zone falls into a conditional rather than an outright use category. While administrative discretion does not play a large role in the issuance of conditional use D.P.'s in certain general zones, in other specific zones this authority has been greatly extended. This is because the legislature has constrained, through definition and condition, the authority of the Director of Planning to relax specific regulations. For example, the discretionary power of the Director is extremely limited in the single family residential zone (RS-1). However, in the specialized medium density apartment zone (RM-3A1), where the regulations have been designed to encourage retention of
existing buildings and good design, the Director may use his discretion in relaxing almost any or all of the bulk requirements. In addition, Vancouver's Council has used its power to delegate even greater discretionary power to its Development Permit Board when considering development under the Downtown (D.D.), West End (W.E.D.) or False Creek (F.C.C.D.D.) official development plans.26

As is evident from this rather brief examination of the Vancouver by-law, Canada's search for a flexible system of zoning has followed a path of increasing discretionary administrative powers. The result in Vancouver has been the establishment of a development permit system of land use control. This system has permitted planning officials to use their professional judgment to vary regulations, either by relaxing certain zoning provisions, or by imposing stricter requirements than set out in the zoning regulations.27 This is done in a highly negotiated bargaining process with the private developer. Noncompliance with the conditions of development determined through this process results in a refusal to issue a D.P., and the right of the applicant to appeal that decision to the Board of Variance.

2.2.3 Variances

The administration of zoning is complicated because general regulations cannot always be applied in a uniform manner without causing undue hardship to individual property owners. Where these situations arise as a result of unusual topographic conditions, peculiarities of the particular site, or unusual demands not evident when the by-law was adopted, relief may be sought through a mechanism called a variance.
A variance has been variously defined as:

a) "a permission granted as relief from some specific and unusual hardship imposed by the strict interpretation of the ordinance."

b) "a mechanism to adjust the application of the general zoning provisions to individual plots of land which have unique topographic, size or shape attributes."

c) "a permit granted by the board of adjustment to allow a departure from zoning law under certain conditions."

The purpose of the variance is to allow a property owner to use his land at the same level of intensity that others located in the same zone are entitled but to which he would not be allowed if the by-law were to be rigorously applied to his property.

The power to grant variances is a statutory one delegated to an administrative board by the senior (provincial or state) legislature. Provision is generally made for the local council to appoint one or more of the members of that board. The statute will generally contain the following elements:

a) variances must be granted only upon appeal,

b) variances are only granted in specific cases,

c) there must be special conditions,

d) the variance granted shall not be contrary to the public interest,

e) literal enforcement of the by-law would result in unnecessary hardship,

f) the spirit or intent of the by-law must be observed, and
g) substantial justice must be done to all parties involved, including the public.

Variances are usually separated into two types: use variances and bulk (or area) variances. A use variance authorizes the use of land that is normally not permissible in the district where the land is situated, whereas, a bulk variance allows the property owner to not conform to particular dimensional regulations normally applicable in that district. Several writers have noted that granting of use variances is generally thought to be more dilatory to the values of zoning than is the granting of a bulk variance. The reason for this concern lies in the recognition that permitting a new use in a district is tantamount to rezoning; a legislative function properly the responsibility of local councils.

To ensure the variance mechanism is not too overly abused and because statutes which delegate unlimited discretion on a board are open to charges of usurpation of legislative power, reasonably ascertainable standards to guide the board in granting variances have been developed. These "standards" are phrases appearing in the by-law such as "practical difficulties" and "unnecessary hardship", terms which, to the layman, do not convey a very exact guide as to their meaning. However, a closer examination indicates these standards have a rather more precise definition than perhaps initially thought. This clarity is generally the result of intervention by the courts in various zoning cases.

It has been noted that "the fundamental requirements for a variance are succinctly stated in the often cited opinion in Otto v. Steinhilber:
"Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighbourhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality." 33

From other case law these conditions have been further interpreted to mean:

a) that the owner could make a greater profit by using the land in a non-conforming way is, by itself, no ground for a variance;
b) the hardship must not be self-created;
c) the exceptional conditions must be peculiar to the particular lot. 34

The standard of "unnecessary hardship" does not have to be proven in cases of bulk variances. Here the test is proving "practical difficulties" and this generally does not require "a showing that without a variance the land cannot yield a reasonable return." 35

Judicially, the practical difficulties test has come to mean that:

a) the difficulties arise from the peculiarities of the site itself (and not from personal problems), and
b) the problem must be unique to the site, or not so widespread so as to be more appropriately remedied by amending the by-law. 36

must be proven before a variance is granted.

As can be seen from the foregoing, variances are used to "take the pinch out of the zoning shoe" 37, as well as to relieve local councils
from the burden of continually amending the zoning by-law, which would not only expose zoning to charges of discrimination and unconstitutional takings of property rights but would require exorbitant amounts of Council's time. In the next sections two different administrative systems used to grant variances are discussed, commencing with a detailed examination of the traditional system as represented by the Vancouver Board of Variance and followed by a similar examination of a new system as represented by the Seattle Hearing Examiner.

2.2.4 Summary

The history of zoning has been one increasingly dependent upon the exercise of administrative discretion. New zoning techniques discussed above have given modern zoning administrators tremendous powers which affect the rights of an individual and the good of the entire community. In the U.S., expansion of discretionary power has been accompanied at judicial insistence, by development of procedural safeguards to limit abuse by staff or laymen involved in the administrative process. Corresponding developments have not occurred in Canada where adoption of a permit system changed the development process from one based on regulation of rights to one based on the negotiation of permission to develop.

With the growth of administrative discretion in both countries the role the variance plays in zoning has also increased in importance. Where once the variance was sought to provide relief from the strict applications of firmly established standards or regulations such is no longer the case. The size and complexity of today's urban developments, in combination with the increasingly discretionary nature of modern zoning, has resulted in the potential for the variance to be used as a device to circumvent the discretionary authority now given to professional
planning staff and, in certain circumstances, the direct wishes of the elected legislative body.\textsuperscript{38} This potential danger exists as denial of development permission is appealable to a lay body of appointed adjudicators known as a board of variance. The need for control of this board forms the basis of this thesis and its operation is described in detail in the next section of this chapter.

A final note about zoning is that it is a process by which government regulates the use of both public and private lands. It is therefore a political process dependent as much upon the personalities of individuals, partisan politics, and petty jealousies\textsuperscript{39} as it is upon legislated planning policy and the discretionary authority of the professional planner. It therefore has no sacred principles of its own, although it is often treated as if it does. Its goals cannot be separated from those goals ascribed to the political process as a whole.\textsuperscript{40} This theme will be further developed in discussing two popular systems of zoning administration and the theory behind them.

2.3 ZONING ADMINISTRATION - VANCOUVER

In this section the Vancouver Board of Variance (VBV) is introduced. For the purposes of this study the Board represents the traditional model of administration in zoning. Discussion commences with an explanation of the system's constitutional genesis and local history. It concludes with an examination of the detailed operating procedures currently used in the Board's deliberations.
2.3.1 History of the Vancouver Board of Variance

In British Columbia a board of variance is a function of local government. Statutorial provision can therefore be found in both the Municipal Act (R.S.C.B., 1960) and the Vancouver Charter (S.B.C. 1953). It is through these documents and the doctrine of parliamentary supremacy, that the Province has delegated its legislative authority to the local council.

Council thus enacted legislation enabling establishment of a Board of Variance in 1960. The by-law (No. 3844) authorized the creation of a quasi-judicial tribunal empowered to make minor adjustments in the strict application of the Zoning and Development By-law (No. 3575). The intent of the legislation is to create an administrative device to deal with various contingencies and local conditions unforeseen at the time of implementation of, or having arisen in the subsequent administration of, the general regulations contained in the Zoning and Development By-law.

The enabling acts find their constitutional basis in Section 92 of the British North America Act (1867), a statute of the British Parliament which separates legislative authority between the federal Parliament and the provincial legislatures. A more detailed examination of this Act will be helpful in understanding how the board came about.

Under Section 92 the provincial legislature receives almost exclusive jurisdiction over matters of local government and much control over the use of lands within the province. Of the various headings contained within this section, 92(8) - "Municipal Institutions in the Province", authorizes the province to establish any number of quasi-municipal bodies required to conduct the specialized functions of local government.
board of variance is considered one such body required for the management of municipal affairs.

Provincial control over matters of land use has followed from judicial interpretations of Sections 92(13) - "Property and Civil Rights in the Provinces" and 92(16) - "Generally all matters of a merely local or private nature in the province". The result of these interpretations has been to give the provincial legislature the power to regulate the use of all lands within the boundary, with the exception of those lands held as federal crown lands or Indian reserves. As will be discussed further in this chapter, division of power is similar to that which occurs in Washington State.

These legal and governmental precepts have allowed the British Columbia legislature to pass the Vancouver City Charter which in turn authorizes the Council by-law, to establish the Board of Variance. This authority is found in section 572(1) of the Charter, which states that Council "shall establish, by by-law, a Board of five members..." whose jurisdiction includes hearing appeals stemming from:

a) decisions on questions of zoning made by any official charged with the enforcement of a zoning by-law,

b) persons alleging that strict enforcement of a zoning by-law regarding siting, size, shape, or design of a building would cause undue or unnecessary hardship arising out of the particularities in the site or special circumstances connected with the development,

c) the continuance of non-conforming uses,

d) need to add to or structurally alter a non-conforming building,
e) need to repair or re-construct a non-conforming building that has been damaged or destroyed by fire to the extent of 60% of its value above its foundations, and
f) a decision made by any board or tribunal authorized by Council to relax the provisions of a zoning by-law.41

This authority does not extend beyond matters related to zoning and therefore limits the overall impact of the Board on the control of land use in the city. A detailed breakdown of the types of cases heard is illustrated by Table 13.

2.3.2 Operation of the Vancouver Board of Variance

The Board of Variance has been delegated both quasi-judicial and administrative powers. The legality of one body having such a duality of power without direction from Section 96 of the B.N.A. Act is tolerated by the courts because the Board's functions are of an administrative nature notwithstanding that it may have been invested with quasi-judicial powers.42 The courts in Canada do not differentiate between "the exercise of a quasi-judicial power" and the exercise of "administrative power in a judicial fashion"43, probably because Board members do not enjoy the same degree of independence as do judges appointed under Section 9644 and because the Board's powers and authority to act must be in accordance with the Zoning and Development By-law.45

2.3.2.1 powers and jurisdiction

The Board acts quasi-judicially when it makes an authoritative and final decision based on the facts ascertained about a specific dispute
related to the enforcement of the provisions of the Zoning and Development By-law. Additionally, the Board is seen to act judicially when it complies with certain procedural directives as specified in both the Charter and its own by-law. These procedures are the legislature's attempt to ensure the Board does not abuse its delegated powers by forcing it to perform with the "minimum standards of a fair procedure". These procedures include providing notice of the hearing (Section 9(1) and the opportunity to be heard (Section 10(1)). When the Board operates in such a manner and makes a decision which may prejudice an individual's rights, it is seen to be acting in a quasi-judicial manner. The procedural details by which the Board operates will be further examined in section 2.3.2.3.

The Board's administrative powers, as defined in Sections 573(1) of the Charter, are to hear and determine appeals:

"(a) made by persons aggrieved by a decision made by any official, board, or tribunal concerning the enforcement or relaxation of any zoning by-law, or

(b) made by persons who allege that enforcement of a zoning by-law will cause undue or unnecessary hardship owing to special circumstances."

provided that the appeal falls within prescribed standards also set out in the Charter.

Those standards require the Board not to allow any appeal solely on the grounds that the land or building could be put to a more profitable use. As well, other conditions must exist before an appeal can be granted:

a) The undue or unnecessary hardship arises from circumstances applying to the applicant's property only;
b) The strict application of the provisions of the by-law would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning by-law; and

c) The allowance of the appeal will not disrupt the official development plan.\(^47\)

The imposition of these conditions on the Board's decision-making, in theory at least, restricts its ability to hear only those so entitled and to grant relief only in those cases where it is consistent with the policies and regulations set out in the Zoning and Development By-law. It would be an abuse of power if the Board were to create new zoning or permit uses that were not permitted uses, or to correct what it may consider and what may be defective planning or zoning. These are matters for Council, as the elected body responsible for regulating land use by the Zoning By-law, to consider.\(^48\)

Administrative power is further defined by the legislative restrictions placed upon how the Board is to render its decisions. These restrictions appear in the Board of Variance By-law, section 13, which states:

"(1) At the conclusion of the hearing, the Board may thereupon render its decision or may adjourn the appeal and render its decision at a subsequent meeting.

(2) The Board may grant or deny the appeal and may reverse or uphold the decision of the Director of Planning or other official charged with the enforcement of the Zoning By-law being appealed against either in whole or in part or may modify such decisions as appears warranted by the facts disclosed at the hearing."
There remains a number of powers prescribed under the Board of Variance By-law and as yet unclassified or undefined. The first of these relates to the duties delegated to the secretary of the Board and which are generally perceived to be of a housekeeping or administrative nature. These powers appear in sections 3, 4, 5, 9 and 12 of the By-law which is attached as Appendix 1.

The second bundle of unclassified powers relates to several procedural matters delegated to the Board itself. The Board has been given the authority, under sections 4, 9(3), and 16 of its By-law, to:

a) determine how an appeal should be filed;
b) determine for which types of cases a notice of public hearing should be given; and
c) establish, subject to the provisions of the By-law, its own procedure.

These powers illustrate an example where legislative and executive (or administrative) powers have been merged through the legislation, making the exact classification of responsibilities exceedingly difficult. It is perhaps sufficient to state these powers are subordinate to the legislature and procedurally do not endanger the legality of the Board's decisions or the continuance of its operation.

2.3.2.2 the existing process

The system of land use regulation currently in place in Vancouver is unique in the province of B.C. In recognition of both the complexity and sophistication with which development is likely to occur in such a confined geographic area as the City of Vancouver, special provisions
were made in the Zoning By-law to allow for the creation of a development permit system. The result has been, over a period of years, a change in administrative techniques from one based largely on fixed regulations to one based on both fixed regulations and the exercise of considerable discretion and negotiation on the part of civic staff. The key participants are the Director of Planning and several advisory boards such as the Development Permit Board, Urban Design Panel and the Heritage Advisory Board. Further comment on the permit system appears elsewhere in this chapter. As in the zoning system used in Seattle and discussed in the next section, the power of approval in land use matters varies between the Director of Planning and the City Council, according to the nature and classification of the action proposed.

2.3.2.3 **procedural details**

The procedural rules governing the Vancouver Board of Variance are established by the province through the Vancouver Charter and by the Board itself through the By-law. Vancouver, unlike Seattle, has not developed such an extensively codified set of procedural rules for each of its civic functions, agencies, or bodies. This difference in administrative approaches is primarily thought to be the result of the intensive judicial scrutiny zoning matters have undergone in Washington courts rather than from any fundamental difference in the function or operation of administrative tribunals in the two countries.

In the typical variance case before the Vancouver Board the following procedural details would apply:
Timing

Any person appealing a decision of a zoning official must file a Notice of Appeal within fifteen days of issue of a development permit or notification of refusal to issue a permit. The Board, however, may extend this limitation in any given case if cause to do so is given by the applicant in writing.

Content of Appeal

All appeals must be filed in writing on a form approved by the Board. This form consists of:

a) an indication of the clause or clauses of the Vancouver Charter under which the appeal is made,
b) a statement of the section(s), subsection(s) or clause(s) of the Zoning and Development By-law desired to be relaxed,
c) a statement of the amount and/or type of relaxation desired,
d) documents and sketch plans for consideration,
e) location of development, and
f) name, address, telephone number of appellant.

Clarification

At the discretion of the Secretary to the Board, the applicant may be requested to provide additional information such as building or site plans, in order to allow for the proper understanding of an appeal. Requests for clarification can only be made by either the Secretary or the Board.

Participation by Non-parties

In Vancouver the hearing is open to the public and testimony is generally allowed from any person whose evidence may assist the Board in
reaching a decision. This person need not be a witness nor, it would appear, even be an interested part (in the legal sense) in the particular matter under appeal. In the absence of any guidelines to assist in determining who to hear, the Board must hear anyone wishing to speak.

Right of Parties

Rights of an individual appealing to the Board are protected through both specific statutory safeguards and the general rules of natural justice. An extensive discussion of natural justice is left until Chapter III, however, two of the major components of natural justice appear in both the Charter and the By-law and are therefore discussed below.

The rules of natural justice require that:

a) notice of the intention to make a decision be given to any person whose rights are to be affected; and

b) the tribunal making the decision must be impartial and free from interest or bias.\textsuperscript{50}

These are the "audi alteram partem" and the "nemo judex in causa sua" rules of procedure; the only ones recognized by English law.

The right to receive notice of the hearing is afforded both the particular "interested" individual and the public at large (if the matter is deemed by the Board to be of sufficient importance). However, while the aggrieved individual's right to a hearing is ensured, it does not imply that all matters which require adjudication are to be held in public. Provision for that is made elsewhere, however it need not have been made at all, at least in the strictest legal sense.\textsuperscript{51} Furthermore, wide discretion is given to the Board to determine the particularities
of the matter. Indeed, the only assurance available that the Board will actually conduct itself in a proper manner is that its failure to do so may result in grounds to quash any decision made on the matter. Exceptions to the court's acceptance of this right to notification may occur where the applicant suffered no loss or if evasion of notice was purposeful. Exact notice requirements are discussed in the heading below.

The second rule of natural justice, the right to an adjudicator who is disinterested and impartial, is reflected in the section of the Charter which prevents appointment to the Board of individuals who are members of the Advisory Planning Commission or who hold municipal office, either appointed or elected.

Further protection of individual rights is reflected in the by-law where permission is given to the individual to seek a reasonable request for adjournment prior to the hearing, and where the Board is given authority to adjourn an appeal where the applicant is not present at the hearing, or fails to proceed with his appeal when called to do so by the Secretary. The origin of this rule is tied to the conviction that the appellant must have sufficient time to prepare the case.

While several of the lesser rules of natural justice are not specifically mentioned in the legislation, their observance by the Board is implied by the nature of the proceedings which are at least partially set out in the statutes. These rules permit the appellant the right to adequately present materials, call and cross-examine witnesses, and to possess knowledge of all information relevant to the appeal. The operative rule in this regard, and there seems to be substantial agreement with this from the courts, is that it is not possible to observe
only some of the rules of natural justice; they must all be observed. This rule seems to apply to judicial proceedings at all levels and as such is applicable to any quasi-judicial tribunal not only the board of variance. 52

Notice Requirements

The Secretary is required to give notice of a public hearing of appeals, the content of which consists of:

a) a statement of the time and place of the hearing,

b) a statement of the legal authority authorizing the hearing, and

c) instructions on who to contact for further information.

This notice must be mailed to the applicant by the Secretary at least five days prior to the hearing date. For those appeals deemed of sufficient importance a public notice must be placed in a newspaper circulating in the City in not less than two consecutive issues, and published between ten and three days prior to the hearing. Posting of the site is not required as it is for major development permit and rezoning applications. In addition, the Secretary is required to notify any official or his representative where the appeal involves a decision pertaining to the enforcement of the zoning by-law. This then permits a wide range of officials from the local area planner to the development permit group leader (the Director of Planning is delegated representative) to be present or supply information to the Board for their consideration.

It is also through the area planner that the views of any citizens' planning committees are usually channelled to the Board. Other types of resident groups, especially those with an interest in a particular neighbourhood or geographic area not related to a local area planning
program, often have difficulty making their views known as there is no formal statutory or informal method of involving them in the appeal process.

**Ex Parte Communications**

While both the by-law and the statute guiding the Board fail to prohibit an interested party from discussing the merits of a case with a Board member prior to the hearing explicitly, the unstated rules of natural justice would necessarily create such a restriction. This restriction does not apply to questions related to procedural matters.

**Record and Content**

The Board's proceedings, while open to the public, are not recorded verbatim or electronically. The official record, and the one which serves as the basis of any appeal to a higher court, consists of:

a) the notice of appeal,

b) all evidence received or considered,

c) a minute of the hearing, and

d) a decision.

**Presiding Officials**

Proceedings before the Board are generally very informal. This is tolerated by the courts because it affords a wide latitude in the manner of presenting the respective views of those before the Board, who for the most part, are just folks unrepresented by legal counsel. The Chairman has, however, in order to be able to move the proceedings along, been accorded certain powers including:

a) the power to administer oaths;
b) the power to regulate the course of the hearing and the conduct of the appellants;
c) the power to determine the meeting's location and time; and
d) the power to poll other members for their decision on an appeal.

Additionally the Board collectively has the power to:

a) rule on which appeals should have public notice given them;
b) request further information of the applicant or a witness or an explanation of the wording or intent of the Zoning and Development By-law;
c) canvass neighbourhood opinion regarding the effects of an appeal;
d) view the site of the appeal either before or after the hearing;
e) grant adjournments;
f) decide an appeal either at the end of the hearing or at a subsequent meeting; and
g) refuse to re-hear an appeal covering identical grounds or principles already ruled on by the Board.

Decision Content

The decision of the majority of the members of the Board present at the hearing constitutes the decision of the Board and must be given in open meeting and recorded in writing by the secretary. Reasons for the decision are usually not written, however, at the time the Chairman polls the Board, individual members may verbally state particular reasons for their decision. The official record of the decision made merely consists of whether the appeal was allowed, disallowed, or allowed subject to such conditions as the Board deemed appropriate in the particular case. This decision record appears at the bottom of the official notice of appeal form.
Format of Hearing

The Board of Variance By-law prescribes the format followed by the Board at the hearing. Proceedings are directed to be informal and evidence is generally taken without administering an oath to the witness. In the typical case before the Board, the secretary "calls the case" by reading aloud the notice of appeal and asking if the appellant is present. The Chairman then asks the appellant if he or she wishes to add to or explain further the reasons for appealing the decision. At this time also, other "friendly" witnesses will be asked to speak, after which the same opportunity to be heard is given to any party in opposition to the appeal. In cases where the appeal is from a decision of an official responsible for the enforcement of the Zoning By-law, the Director of Planning or his representative is also afforded an opportunity for cross-examination and rebuttal. This is followed by a period during which the Board may ask questions of the appellants, other witnesses or staff members present.

The powers of the Vancouver Board and the procedural details of its operation discussed above will form the basis for both the forthcoming comparative analysis with the hearing examiner system currently in use in the City of Seattle and for the comparative evaluation of both these administrative systems as measured against the normative criteria developed in Chapter III. This evaluation will be presented as Chapter IV, but first the intricacies of the Office of the Hearing Examiner must be fully discussed.

2.4 ZONING ADMINISTRATION - SEATTLE

In this section the Seattle Hearing Examiner (SHE) is introduced. This system represents a departure from the previous system of zoning
administration, and is therefore characterized as a radical model of administration. Discussion of this model follows the same format established for the VBV system and commences with a brief history followed by an examination of the procedures used by the Examiner.

2.4.1 History of the Seattle Hearing Examiner

Despite indications of the changing judicial viewpoint on matters of zoning administration, the spread of the hearing examiner system has been relatively slow and restricted primarily to those states whose judiciary have adopted the more stringent rulings. This phenomena should not be construed as lack of enthusiasm for the system itself but from "doubts that local elected officials can delegate such authority to any person or body other than the planning commission." The problem lies in the statutory authority enabling planning as a function of local government. This authority varies between jurisdictions and therefore a review of the relevant Washington State statutes will be useful in illustrating how Seattle's Office of the Hearing Examiner was established.

In the U.S., residual power under the Constitution resides in the states, whereas, in Canada, it lies with the federal government. In both countries, however, local governments exist as creatures of immediately superior legislatures (i.e., the state or province). In the U.S., state governments deal with individual municipalities and counties through charters which, in constitutional home rule states, enable the satisfaction of local needs and wishes.

In Washington, one such "home rule" state, authority over land use planning and regulation has been given to cities and counties by general constitutional and statutory grants of self-government powers, and by
specific grants of authority, in the Revised Code of Washington (RCW) and in the "Planning Enabling Act of the State of Washington."55

Under the statutory provisions relating to cities,56 municipalities are authorized to create planning commissions and boards of variance to assist local elected officials in land use planning and regulation. No planning enabling statute expressly allows for the use of a hearing examiner. The paramount function of the planning commission is to plan: "Every code city, by ordinance, shall direct the (planning department or commissions) to prepare a comprehensive plan."57 The commission, in order to effectuate implementation of the goals and policies developed in the comprehensive plan, is also directed to play a leading role in the development of official regulations or controls. These are typically the zoning by-law and subdivision regulations.

According to one author, "it is then, at the point of applying specific regulations to particular parcels of land or proposed activities, that discontent with the planning commission's role in local land use regulation has generated the request for alternative systems" of administration.58 How then was the Office of the Hearing Examiner established in the City of Seattle, when the prevailing political doctrine states that there must be either express or implied authority in statute enacted by the legislature for every action taken by a local governing body?59 This organizational innovation was enabled because the grant of home rule provides the local legislative body with broad powers limited only by general law. Using these powers, the state constitution was amended to provide that the (local) legislative body may, by resolution, delegate any of its executive or administrative powers, authority of duties not expressly vested in specific officers by the charter, to any officer or employee of the municipality. In 1973, Seattle's City Council

- 45 -
exercised this option thereby creating the Office of the Hearing Examiner.

The approach taken by Seattle Council is illustrative of one of the examiner system's strongest advantages: its flexibility in dealing with a variety of differing administrative functions held under one jurisdiction. Accordingly, the Examiner was first assigned jurisdiction over all zoning matters and then, as the need arose and the success of the operation became evident, more areas of jurisdiction were added to include:

a) Zoning (variances, conditional uses, rezones),
b) Licensing,
c) Discrimination in Employment and Housing,
d) Cable Television (rate regulation),
e) Appeals from decisions of the Superintendent of Buildings,
f) Short Subdivisions (four or fewer lots),
g) Appeals from environmental (SEPA) determinations,
h) Special Review and Historic Districts,
i) Housing Code (minimum standards),
j) Noise Control,
k) Landmark Preservation,
l) Relocation Assistance,
m) Pioneer Square Minimum Maintenance,
n) Grading Ordinance,
o) Seizure of Vehicles pursuant to RCW 69.50.505, and
p) Business and Occupational Tax Determination.60
It should be evident from the above that the Office has become more than just a clearing house of zoning matters. The Examiner serves as an umbrella for the disposition of a wide array of Seattle's administrative functions. However, despite this flexibility, most business is connected with zoning and that emphasis will remain the focus of this thesis. A detailed breakdown of the types of cases heard is illustrated in Table 9.

2.4.2 Operation of the Seattle Hearing Examiner

In Washington, as in Oregon, Maryland, and several other states, intense judicial scrutiny of zoning appeal cases created the demand for procedural reform before land use regulatory bodies. The judgments made had wide implications for those citizens making zoning decisions while serving on the Board of Adjustment, Planning Commission or the City Council as it was generally felt that lay bodies were not qualified to serve as quasi-judges. Members of those lay bodies were "not trained to weigh evidence, conduct a fair and orderly hearing - with due process requirements (including the right of parties to present and rebut evidence, to examining and cross-examine witnesses), or to base their conclusions on a written record supported by substantial evidence" and therefore could only inadequately respond to the dicta as set down in Fasano v. Board of Commissioners of Washington County, 507 p.2d 23 (Oregon 1973), discussed later in this chapter.

The necessity of jurisdictions such as Seattle to incorporate these legal requirements into their administrative adjudications had been the greatest motivator in the adoption of the hearing examiner system. The result has been that the hearing examiner has become the legal instrument for holding fair hearings and preparing a record of facts.
2.4.2.1 powers and jurisdiction

As already noted, the jurisdiction of Seattle's Hearing Examiner has expanded considerably in the six years of its existence. Pertaining to matters of zoning, this office has replaced the Planning Commission and City Council as the hearing body for rezoning and Council Conditional use authorizations. The Commission now acts solely in an advisory capacity, while Council has final decision on rezoning and major subdivision (i.e., more than four lots created) based on the record established by the Hearing Examiner. This record would, of necessity, include the Examiner's recommendation on the particular matter at hand.

The Hearing Officer is the hearing body and final decision-maker on variances and other administrative determinations, which include special exceptions, conditional uses (administrative) and sign variances. In each case the Examiner holds a public hearing and files a written decision which is final unless appealed to the Board of Adjustment (Variance).

This situation of having the Hearing Examiner's decision appealable to a citizen board is the subject of some controversy and has lead one staff report to state that the situation is "an incongruity in today's land use procedures which can be understood only in the perspective of Seattle's history." The crux of the problem appears to be that the Board's hearing is conducted "de novo", and so is essentially like soliciting a second opinion about a disputed matter. A major procedural difference between the Seattle and Vancouver Boards is that decisions, including those in opposition to those of the Hearing Examiner, must be justified (in writing) with new or contrary findings of fact and
conclusions. However, despite this procedural safeguard, there remains discontent on the part of the various departments involved in the process and by the citizens, who must view this procedure as trial by fire—twice. The situation is expected to be resolved by Council when streamlining of the entire permitting process comes under review.

2.4.2.2 existing process

The current system of land use regulation in Seattle is complex, varied, and sophisticated, involving numerous public and private groups, shifting powers (of recommendation or final decision) according to the nature and classification of actions proposed or appealed and a wide array of legislated policy. The procedural rules adopted will be discussed in detail in the next section which follows a generalized overview of the process used.

The Hearing Examiner is involved in three areas directly related to zoning. In each of these areas the procedures followed are similar, however the process itself differs. In the case of special exceptions, variances, administrative conditional uses, and sign variances, initial applications are made with the Department of Community Development. The Director of that Department is then required to submit a written report and recommendation to the Hearing Examiner. Concurrently, the Examiner schedules a public hearing of the request and notice of the application and hearing is mailed at least thirty days before the hearing to persons residing within 300 feet of subject site and to persons or organizations that may have filed a request with the Hearing Examiner to be notified of public hearings affecting property within that specified area. Copies of the application are made available for public viewing at the Examiner's office where the Departmental analysis and recommendation are also available.
available, not less than seven days prior to the hearing. At the hearing, City staff and the applicant and any interested citizen may testify before the Examiner according to well defined procedural rules. An electronic record of the proceedings is made. Within fourteen days of the conclusion of the hearing the Examiner must issue a written decision with findings of fact and conclusion; this decision is final unless appealed to the Board of Adjustment.

In the case of rezones and Council conditional uses only, the procedure followed is the same, however the Examiner merely submits a recommendation to Council for their final decision. While this somewhat softens the impact that the Examiner may have on these zoning matters, it is considered an appropriate safeguard of the legislative power of Council. Any party aggrieved by the Examiner's recommendation may seek further consideration by Council which must then determine if there has been an error of fact or judgment before rendering a final decision. This determination is based upon the record established at the initial hearing. If Council finds the record inadequate or that an error was made, it may remand the proceedings to the Hearing Examiner, or it may enter new findings of fact. If Council determines than an error of judgment or conclusion was made, it may take contrary action provided that it enters new findings and conclusions based on the record which support the new action. While this legislative appeal mechanism exists, Council has rarely over-ruled the recommendation of its Hearing Examiner. Further appeal is afforded the applicant through petition to the court.

In the third type of zoning matter ruled on by the Hearing Examiner, that of errors of interpretation made by the Superintendent of Building
and Zoning Codes, the procedure followed is as described above. However, the appeal mechanism is somewhat different again. In these cases, the written decision of the Examiner is final unless appealed directly to the courts.

2.4.2.3 procedural details

The procedural rules developed by the City of Seattle recognize that decisions on variances and other zoning matters are administrative and quasi-judicial rather than legislative and policy-setting in nature. In recognition of the due process requirements, the rules established attempt to promote fair decisions by providing effective public notice, an opportunity for the public to be heard, and establishing predictable standards of decision-making and procedures. These aspects of the Hearing Examiner process are now examined.

The Fasano case, previously mentioned in this chapter, best illustrates the care and complexity with which Seattle's Hearing Examiner's procedures have been established. That case laid down the guidelines for procedures to be used in both pre-hearing and post-hearing matters as well as the hearing itself. These guidelines include:

a) the entitlement of the applicant to notice of hearing,
b) the opportunity to be heard,
c) the opportunity to present and rebut evidence,
d) an impartial tribunal, free from pre-hearing, "ex parte" contacts from any party to the proceedings,
e) a record of the proceedings,
f) adequate findings executed.
The Washington Supreme Court has been even more strident in this area, stating specifically that "due process standards should govern the conduct of zoning proceedings."\textsuperscript{71}

Aside from the "Rules of General Application\textsuperscript{72} developed to guide the Hearing Examiner, Board of Adjustment, Planning Commission and the City Council, each body also has a detailed set of procedures with which it must comply. While these specific rules are too extensive to be fully discussed here, selected headings which emphasize the uniqueness of the examiner system have been expanded upon below.

In the typical variance case the following applies:

**content of appeal**
An appeal is filed in writing and consists of:
(a) a statement of how the appellant is significantly affected by or interested in the appeal;
(b) a statement containing explicit exceptions and objections with regard to the appealed matter;
(c) the requested relief;
(d) the signature, mailing address, and telephone number of the appellant.

**clarification of appeal**
Clarification of appeal is an interesting power of the Examiner, one which allows any appeal containing a technical error or is vague or ambiguous, to be returned to the appellant for clarification. This request may be made by any party through the Examiner.
intervention and participation by non-parties

It is within the discretion of the Examiner to allow an interested party (who has not filed an appeal) to intervene in an action upon showing a substantial or significant interest in the particular matter. In exercising this discretion, the Examiner must consider whether the intervenor's interests are already adequately represented and whether the intervention will unduly broaden the issues or delay the proceedings.

While the hearing is open to the public, testimony is not generally allowed from persons who are not parties unless called as witnesses. However, the Examiner may, after considering objections of the parties, permit oral and/or written statements by persons who are not parties.

rights of parties

The Administrative Code (Ordinance 102228) gives every party the right of "due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights to a fair hearing".

notice requirements

The Examiner is required to give notice of a public hearing, the content of which is as follows:

a) a statement of the time, place, action proposed and hearing body involved;

b) a statement of the legal authority and jurisdiction under which the hearing is to be held;

c) reference to the particular section of the ordinance;

d) a statement of the time and location at which the Director's Report will be made available to the public.
This notice must be given not less than thirty days prior to the hearing and must be mailed or delivered to the applicant and to all property owners and other residents who live within 300 feet of the site. Additionally, Seattle requires that the site be posted and that notice of the application be published in one of the major daily newspapers and mailed to the news media and other local civic groups.

The Office of the Hearing Examiner goes to great lengths to involve citizen groups in its administrative decisions. The Director of the Department of Community Development must maintain a list of local groups and organizations wishing notification of land use and zoning proceedings. All that is required to obtain this service is for the group to make a written request containing the names and addresses of its officers and directors, a description of the general purpose of the organization and the geographic area served. Currently, the qualified groups and organizations are classified as follows:

a) civic, professional, trade and environmental groups having city wide interests;
b) community and neighbourhood organizations;
c) chambers of commerce and other similar organizations representing business and industry.

The Seattle system does not incorporate some of the more restrictive qualifications for defining "recognized" neighbourhood groups as promoted in the American Law Institute's "A Model Land Development Code". Qualified groups under that Code would, additionally have to:

a) represent more than 50% of the apodults residing within its boundaries;
b) have at least 50 members;
c) have at least 50% of the area of land within its boundaries developed or available for residential use;
d) have full participating membership in the organization open to all registered voters within its boundaries.

The definition of "recognized community or neighbourhood group or organization" is important because recognition enables the group to become a party of record and thus enjoy the rights of full participation at the examiner's hearing and to initiate administrative or judicial appeal of the examiner's decision.77

ex parte communications

Specific provision is made in the ordinance to prohibit any person, agent, employee or representative who has an appeal subject to an adjudicatory hearing from discussing the merits of the case with the Examiner without the presence of all other interested parties78 (i.e., at the hearing or pre-hearing conference). Ex parte communications related to procedural matters are not so restricted.

record and content

In keeping with the courts' demands, all proceedings at the hearing are electronically recorded and become part of the official record. Copies of the recordings are available to the public on request and payment of a fee. In addition, the official record consists of:

a) the written appeal;
b) the Department's (CDC) written response;
c) all evidence received or considered;
d) a statement of all matters officially noticed; and
e) a decision or recommended decision containing the findings and conclusions of the Examiner.79
presiding officials

In order for the Examiner to conduct fair and impartial hearings, avoid delay and maintain order, the Examiner has been accorded the following powers:

a) to administer oaths and affirmations;
b) to issue subpoenas;
c) rule upon offers of proof and receive evidence;
d) to regulate the course of the hearing and the conduct of the parties and their agents;
e) to hold conferences for settlement, simplification of issues or any other proper purpose;
f) to consider and rule upon all procedural and other motions appropriate to the proceeding; and
g) to make and file decisions.

decision content

Any decision, whether recommended or final (administrative) must include the following elements:

a) The nature and background of the proceeding;
b) The parties, agents, and interested persons active in the proceeding;
c) Findings of fact, including not only the findings of the ultimate facts but also the basic or underlying facts supporting the findings. The findings shall be based exclusively on the evidence presented in the hearing and those matters officially noticed, and shall consist of a concise statement of each fact found upon each contested issue of fact;
d) Conclusions of law, referenced whenever practical, to specific provisions of the law and regulations or both, together with reasons and precedents relied upon to support the same. The conclusions shall make reference to the effect of the decision in light of the land use policies and zoning ordinance, as well as the effect of both approval and denial on property in the vicinity, business, or commercial aspects, if relevant, and on the general public;

e) The appropriate rule, order, or relief, so that the decision shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence.  

format of hearing

The "Rules of Practice for Public Hearings", prescribes the format followed in the Examiner's hearing. The hearing is to be informal in nature yet designed so as to allow the evidence and the fact to become most readily and efficiently available to the Examiner. "A public hearing shall include, but need not be limited to, the following elements: a brief introductory statement by the Examiner; a report by the Director which shall include introduction of the official file, reference to visual aids (maps), and a summary of the recommendation of the Department; testimony by the applicant or petitioner; testimony in support; testimony of opposing parties; opportunity for cross-examination and rebuttal; and opportunity for questions by the Examiner.

In Seattle, the Examiner has the discretionary power to set time limits for the oral presentation of each case and to rule on the admissibility of evidence, although from personal observation of both the King County and the City of Seattle, these powers are little used in relatively simple variance cases.
2.5 ADVANTAGES AND DISADVANTAGES OF SYSTEM

Each of the administrative systems discussed previously developed in response to specific regulatory needs of their respective jurisdictions. The systems, however, share a commonality of purpose which encourages a discussion of the relative advantages and disadvantages of each. This discussion is undertaken below.

2.5.1 Zoning Board of Variance

The zoning board of variance's major strength is found in the classic reasons for establishing any administrative tribunal to pre-empt jurisdictions normally dealt with by the courts and its judicial process. These reasons have been explained in the following way:

a) the nature of problems dealt with require some special expertise not normally possessed by the ordinary court,
b) having regard to the demands of the administrative process, the ordinary courts are said to be dilatory and cumbersome, and governed by over-stringent rules of evidence and procedure,
c) the ordinary courts are too expensive, and
d) the ordinary courts would become seriously over-burdened if they were required to exercise the jurisdiction of the tribunal.

The administrative tribunal's major strength then lies in the speed of its procedures, its flexibility and its relative cheapness to operate.

One expert notes several objectives achieved by such an administrative device are common to all systems of law enforcement. He cites avoidance of arbitrary usage of police powers, safeguarding rights of
property owners, and ensuring fair application of specific regulations as the most notable benefits of establishing administrative tribunals.

These objectives alone, however, do not totally explain the popularity of boards of appeal in the field of zoning, for certainly numerous other methods of administration were also available for adoption by the early proponents of zoning. Several unique circumstances in zoning administration, however, promoted the use of these tribunals over any other method.

During early attempts to establish zoning as the premier method of land use control, many of those involved realized the impossibility of drafting general regulations which could be applied with equity to all specific individual situations. This difficulty arose because the cornerstone of zoning lay in the division of a community into use districts governed by general regulation. This practice necessarily imposes similar limitations upon parcels of land which, in fact and in law, are unique. The possibility for inequitable treatment of similarly situated property owners under such regulations became the constitutional basis of arguments against zoning by its many opponents. It was therefore believed that if hardship cases were not disposed of at an administrative level the judicial decisions against zoning legislation would multiply, quickly resulting in destruction of zoning as an instrument of land use control. The board of appeal therefore became "the device developed to avoid constitutional problems raised when broad general regulations imposed hardship due to uniqueness". Its prime function was to keep zoning out of the courts.

Furthermore, concern was also expressed that those cases which did reach the court, did so with a record made before an expert administra-
tive body. This was viewed as desirable as it was feared that zoning language would be misunderstood if it was construed in the same manner as other types of enforcement litigation.\(^{90}\)

Other objectives met by the establishment of these boards were,
1) forestalling potentially numerous and destructive amendments to legislation and hence preserving the integrity of the community plan, and
2) allowing administrators the opportunity to perfect the regulations through exercise of administrative discretion. These objectives clearly belie a mistrust of legislators, as the objectives attempt to bring increased flexibility to an otherwise rigid pattern of Euclidean zoning and preclude legislative\(^{91}\) amendments to the zoning ordinance by substituting discretionary judgment at administrative rather than legislative or judicial levels.

Not all authorities agree that flexibility was one of the early objectives of the tribunals. In one study concerning the Lexington, Kentucky Board it was concluded, "the board was not instituted to achieve flexibility. Variances were not to be granted merely because the proposed use did not involve a substantial departure from the comprehensive plan nor injuriously affect the adjoining land. Unnecessary hardship, not insubstantial harm, is theoretically the touchstone of the board's jurisdiction."\(^{92}\) Regardless of initial intent, there can be little doubt that flexibility has become one of the main characteristics of the modern board of appeal.

The early days of zoning have been summarized in the following manner:
“In short, when zoning was new its most vigorous advocates were aware of its inherent imperfections, its doubtful constitutionality and its imperfectly understood terminology. In spite of these problems, they detected a need for controlling land use which was so urgent as to demand enactment of zoning regulations. The board of zoning appeals was created to interpret, to perfect, and to ensure the validity of zoning. And it was expected to accomplish these things by deciding the hard cases, by articulating new and technical concepts, and by building records which would display zoning in a favourable light when cases reached the courts.”

The use of the board of appeal method of providing administrative relief has been almost universal in those jurisdictions adopting zoning ordinances. This applies to both United States and Canada; and it has only been in much more recent times that other methods of administration have been attempted in some jurisdictions. One curiosity to note is uniformity of powers, operations and jurisdictions of these boards. Several reasons help explain this phenomenon and provide some insight into an area of the board which is often criticised.

The popularity of early boards was primarily based on the assumption that board members would sit as an expert body. Indeed, the by-laws which established the very first board of appeal required that the chairman be an architect or structural engineer having a minimum fifteen years experience and three other of the board members have at least ten years experience in building, architecture and structural engineering. The United States enabling legislation did not possess this requirement, and it was therefore not made part of the standard state zoning enabling model acts which followed from the Department of Commerce model of 1922. The adoption of the model act became the vehicle by which the board became a standard feature of zoning administration and through which it spread to villages, towns and cities all across the country. One author has called this process "plagiarism for the public good".
The reasons why personnel requirements were not repeated in later legislation remain unclear. The result has been that local boards draw on persons from a variety of occupations, the qualification underlying an appointment changed from professional expertise to common sense and knowledge of the local area. In the task of balancing imperfect regulations and existing property interests, the essential quality of membership has become achievement of "a balanced representation of the principal economic and political interests of the community".96

While some change in membership qualification requirements has been identified, one area in which there has been little change from those presented in the Standard Act (1922) is in the board's powers. Those powers include:

a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto,

b) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance,

c) To authorize upon appeal 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.97
Many tribunal system advantages are easily recognizable in earlier discussion of the board's operation. There remains, however, other advantages not yet mentioned that relate specifically to the Vancouver Board and make it somewhat unique. These advantages are discussed below.

The first of these is increased scope of appeal afforded an appellant to this Board. This circumstance has arisen because the Zoning and Development By-law adopted in Vancouver contains numerous district schedules, each consisting of complex regulations and discretionary authorizations that have been tailor-made for application in very precise zones. The discretionary nature of zoning in Vancouver and the extent to which the city itself has been rezoned has resulted in the Board playing a much larger role in the physical development of Vancouver than have other boards in other cities.

The Vancouver Board's relationship to the Planning Department is also somewhat unique. The Department can often be seen to take a rather benevolent bureaucratic role when actions of the Board relate to specific and usually minor variances or when issuing authority does not have the discretion necessary to issue a development permit despite the insubstantial nature of the application. The Department uses the Board to authorize development normally not permitted but to which no true objections arise. The need to formally amend every regulatory inconsistency is thus avoided, and if development conditions change the Board could simply start denying appeals previously granted. This implicit decisional trade-off is quite indicative of a working relationship that has avoided the antagonistic or adversarial role evident with other boards of variance.
A final advantage the Vancouver Board has displayed over the past years is stability. This stability results from a chairman who has held office for many years and who thus has a wealth of personal knowledge of other cases to use as a basis for decision-making. The administrative advantage of this stability is the increased consistency of Board decisions.

Despite the advantages of the tribunal system, adoption of the general board of variance mechanism has not been without criticism. Improperly granted use variances undermine public confidence in the zoning plan, cause urban blight and decay in existing neighbourhoods; prevent sound growth at urban fringes (through land pre-emption); and could cause land acquisition costs for public improvements to be increased. Also, unjustified leniency by the board can all but destroy certain requirements of the ordinance and that variance approval in use cases is tantamount to rezoning. This form of "hidden zoning" can result in increased administrative costs where the board has attached conditions to an undeserved permit and those conditions require periodic inspection to ensure continuing compliance. The inappropriateness of an administrative body using its powers to create zoning has been discussed elsewhere in this thesis.

The board has also been criticized for paying insufficient attention to the legal limitations placed on its powers and operating without sufficient safeguards to adequately assure citizens of equal treatment. In the case of the previously mentions Kentucky board, it was concluded "the Board abused its discretion, in that there were no allegations or evidence of legal hardship in the petitions, no substantial evidence in the minutes to support any finding of hardship, and no findings that
conditions or hardships alleged were not typical or recurrent." 103
These same problems are recognized by another expert, who states: "in my opinion fifty percent of all rulings of zoning board of appeals in the United States are probably illegal usurpations of power." 104

Others seeking to explain the shortcomings of these boards have noted that failure to impose meaningful controls or standards has resulted in inconsistent decision-making, poor definition of relevant issues at the hearing, disregard for the rule of law, and poor separation of legislative and administrative functions of government. 105 As one source states, "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." 106 The board of variance has generally been subject to criticisms characterized under the following headings: separation of functions; accountability; predictability; and equity. These will be further discussed in Chapter III.

The general criticisms of variance tribunals do not necessarily have application when discussing the Vancouver Board of Variance because many refer to American boards, which have more power than the Vancouver Board, and are made in the context of highly cannonized American law. It is thought that fears expressed over delegation of discretionary power to administrators stems from the American distrust of unchecked administrative power. These thoughts are more fully explained in Chapter III, where differences between parliamentary and constitutional governments, and attitudes regarding discreitional administrative power are discussed.

While substantive evidence of wrong doing on the part of the Vancouver Board of Variance will not be presented in this thesis, the
previous examination of that Board's procedures and operation leads the
author to contend that opportunities to abuse either the administrative
system or the zoning process, or both, exist within the current Vancouver
setting. This situation is inappropriate as neither individual nor
public rights are best served when it is only a matter of time before
flagrant abuse draws enough attention to the Board to demand radical
reformation.

What are the disadvantages this administrative system possesses in
relation to the Vancouver setting? These appear to be:

1. **power to rezone**: where ambiguity in the by-law potentially allows
more intensive use of a site than that for which the developer is
applying. The matter becomes an interpretative one and the
granting of an appeal by the Board could be interpreted as permit-
ting a rezoning. This seems particularly inappropriate as it is
possible under Vancouver's existing development control process that
the Planning Department has refused the permit on the direct
recommendatin of Council. This recommendation could be construed as
indicative of what Council, the rightful legislator in zoning
matters, felt is an appropriate type and level of use of the site.

"Rezoning" property also occurs through granting of appeals extend-
ing a non-conforming use. This can occur by extending any time
limit placed on a DP issued originally or through prolonged use by
permitting significant renovation to an existing building or recon-
struction of a fire damaged building that previously housed a non-
conforming use.

2. **loss of confidence in the by-law**: to overrule the decisions of
elected officials (conveyed through the Director of Planning),
professional planning and engineering staff (and their professional non-staff advisory panels), can result in loss of integrity of specific Zoning and Development By-law requirements, and to the professional reputation of the issuing individual or body. On the other hand, the issuing authority, mindful of the possibility that the applicant can appeal a refusal to the Board may give more concessions to the applicant than normally justified. While there is no evidence this is happening in Vancouver presently, a change in the composition of the Board could easily lead to a shift in the perception the Board takes of its role in administering the zoning by-law.

3. **lack of meaningful standards for decision-making:** the increasing scale, complexity, and discretionary nature with which development now occurs in Vancouver increases the probability that major downtown development could be approved on appeal using legislative standards so vague as to be meaningless and so simple as to be inappropriate in their application to that appeal. The existing standards ascribing to control the Board fail to recognize the increasing complexity of the issues facing the Board of Variance. The failure to provide meaningful standards leads to inconsistent decisions, thereby increasing the uncertainty faced by the appellant and opening the Board to charges of discrimination.

4. **failure to give reasons:** existing legislative standards prescribed are irrelevant in certain cases heard by the Board and consequently ignored in those (and other) cases. Under such circumstance the potential to substitute the rule of man for the rule of law is increased greatly, especially when written reasons for decisions are not required.
5. **informality of proceedings:** the informal nature of proceedings before the Board normally precludes judicial appeal except upon claims that the laws of natural justice were not followed or the tribunal exceeded powers given it by the legislature. The courts would not normally substitute their opinion on the substance of a case for that of the tribunal's except where there was clear evidence on record to support this action. The potential for this to happen is limited because a written or electronic record of the proceedings are not kept.

The informality of the Board proceedings may cause issues pertinent to a case to remain unmentioned by the appellant or unsatisfactorily resolved in the minds of the Board members. Furthermore, the informality of the testimony taken at the hearing means decisions are made based on information comprised of a mixture of fact and hearsay and given the scale of some projects heard by the Board and the debilitating impact approval could have on the by-law and the local neighbourhood, it can be expected that decisions based on this type of testimony will increase the probability the Board will err in its decision-making role.

The informality with which the Board approaches its duties is also reflected in the role the Secretary has of escorting members on their site inspection. The Secretary is a City employee and member of the Planning Department who has expertise in the planning field, knowledge of both Council and departmental policy and an inherent bias towards the decisions made by professional staff. The Secretary has the opportunity to discuss with the Board details of each appeal prior to the hearing and were the appellant afforded
the same privilege, the courts would likely find the Board's
decision in the matter voidable because of the ex parte communica-
tions.

6. **no membership qualifications**: while the intent may be to ensure the
Board functions more as an intervenor between the professional
bureaucrat and the political legislator, this seems to be an
inferior method of avoiding charges of bias. The failure to
require the Board be appointed with a member of the legal profession
forces the Board's dependence on city legal staff. This dependence
may lead to a display of bias in favour of the city and is not in
the best interests of the appellant. Furthermore, failure to
require legal presence may increase the likelihood discarding the
rule of law during the proceedings.

The lack of experience or qualification by a board in other fields
such as planning, civil, structural, and transportation engineering
may also mean an increasing shortfall in the ability to realize
public goals through the power the Board has to attach conditions to
the granting of any appeal, and in recognizing when to grant a
proper appeal.

7. **lack of procedures**: no comprehensive procedures to guide Board
activities or those of the appellant have been developed. The
Board fails to make formal provision to notify any neighbourhood
interest group (i.e., ratepayers, property-owners, planning
committee, etc.) operating in the area of the appeal. It is only
through the exercise of discretion that the notification of any
appeal appears in public at all.
Further, the Board, in seeking local views has failed to establish formal practice as to the extent notification should properly take. This leads to the exclusion of possibly valid local concerns by the Board in their decision-making, and the likelihood of an angry and resentful crowd at the hearing.

Another area where the Board displays a harmful lack of procedure is illustrated by examination of the form used to file a petition of appeal. No indication of grounds upon which an appeal would be considered valid are provided and the case to be made before the Board could grant the appeal is not identified. The form encourages the filing of many appeals that are without true grounds for relief and must only encourage the Board to step beyond the bounds of its power to allow the appeal.\textsuperscript{109}

2.5.2 Hearing Examiner

The major strengths of this form of administration are found in what Americans have perceived to be the general shortcomings of zoning and administration by tribunals.

Zoning is no longer regarded as a static state implementation tool. Efforts have been made in two phases to introduce change as an element of the zoning by-law. When zoning was intended to be rigid and inflexible, the administrative devices of special (or conditional) use permits, parcel rezonings and variances were provided to amend the by-law. In more recent years, flexibility has been introduced through such devices as contract and conditional zoning, floating and overlay zoning, planned unit developments and various development incentive or bonus techniques.\textsuperscript{110} In parts of Canada this flexibility has been further extended
with the introduction of a development permit system.

The use of these devices has not been without strong criticism by those involved in planning and development. The inflexibility and procedural difficulty of obtaining one of the administrative devices and the complexity and uncertainty inherent in the newer, flexible techniques has caused numerous problems in zoning administration. These problems are especially evident in the "already built" environment, such as the aging central city where much re-development is taking place and there is a high demand for special permits, parcel rezonings and variances. The attendant results are overly long processing times for these applications and an overburdening of the planning commissions, boards of adjustment and legislative bodies to the detriment of development of long range planning goals and other general policies.\textsuperscript{111}

As the legality of zoning is based on the individual lot, it appears that local councils, commissions and boards have become nothing more than purveyors of the neighbourhood's wishes. This has given rise to the charge of lack of procedural fairness. This premise is suggested by one source in the following way: "The generally arbitrary nature of unplanned zoning has lead most zoning commissions to approve most requests for zoning variations. In the absence of a guiding land-use policy, zoning decisions are generally political in nature."\textsuperscript{112} Another agrees, stating, "Decisions that should be based on planning principles and technical analysis are made, instead, through political bargaining."\textsuperscript{113}

Imposition of more flexible zoning techniques has marked the transition of zoning from a merely permissive or prohibitive state to one where development is dependent on authoritative discretionary power and
an often technically complex negotiation process. These complexities added to the administration process have created a need for capable administrators to interpret by-laws, review development proposals and grant permission for development. Yet, zoning is still largely in the hands of city councils, planning commissions and boards of adjustment (variance) who are not equipped to take full advantage of the complex, flexible zoning techniques available. As one report states:

"The growing body of research on urban problems and the interrelationships between land-use transportation, and the social and economic functioning of a community show that land-use problems are neither simple or capable of intuitive solution. Trusting the solution entirely to the common knowledge of laymen is a course that will more and more fall short of our [planners'] capability in this field" 114

The role of the judiciary must also be considered in explaining the rising popularity of the hearing examiner system in local zoning matters. The judicial system of the United States is organized in a similar fashion to that of Canada; both countries operate federal and state or provincial supreme courts. In 1926 the U.S. Supreme Court first upheld zoning as a valid exercise of the police power and in that decision expressed a deference to local legislative action, making it subject only to constitutional limitations. 115

More recently a new judicial perspective of zoning has been developing at the state level. For example, in the leading case, Fasano v. Board of Commissioners of Washington County, the deference traditionally given to local legislative bodies in considering applications for parcel rezonings, special use permits and variances was denied. The decision states:
"[We] would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life: 'It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative, but administrative, quasi-judicial or judicial in character. To place them in the hands of legislative bodies, whose acts are not judicially reviewable, is to open the door completely to arbitrary government.' Ward v. Village of Skokie, 26 Ill.2d 415, 186 N.E.2d 529, 533 (Illinois 1962)"

Additionally, an Oregon court has held local governments' exercise of regulatory power over land use, if limited to particular pieces of land, is not a legislative or policy-making function. "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority.... [A] determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority." The quasi-judicial nature of many zoning decisions is important in view of the difference between legislative and adjudicatory procedures. The change from legislative to administrative decisions has necessitated a change in standards of decision-making and procedures for zoning administration. These procedures and standards must now meet requirements set for judicial review and clearly apply to hearings held and decisions made by "city and county councils, boards of county commissioners, and planning commissions on applications for parcel rezonings, special use permits and variances."

In another noteworthy case, Fleming v. Tacoma, the decision states: "Whatever their nature or the importance of their categorization for other purposes, zoning decisions...must be arrived at fairly." The court continued, clarifying that "in amending a zoning code or reclass-
ifying land thereunder, the same legislative body, in effect, makes an adjudication between the rights sought by the proponent and those claimed by the opponents.... Although important questions of public policy may permeate a zoning amendment, the decision has far greater impact on one group of citizens than on the public generally.122

The Fasano and Fleming cases were instrumental in establishing five principles in zoning; principles which the existing administrative bodies were to find difficult to live up to. These principles were:

a) zoning decisions other than the original adoption of a zoning ordinance, text amendments of general application or comprehensive large scale rezonings are adjudicatory rather than legislative in nature even though a parcel rezoning is enacted by an amendment to a zoning ordinance,

b) members of a local legislative body who participate in a zoning hearing or decision must be objective, open-minded, impartial and free from entangling influences, prejudice or bias,

c) not only must zoning hearings be conducted fairly but they must also have an "appearance of fairness" to all interested parties,

d) technical rules of evidence generally associated with judicial proceedings are not required in zoning hearings, and

e) due process standards must be observed in zoning determinations.

While the above discussion of zoning's shortcomings and the judicial attention given zoning's administration in certain American jurisdictions has assisted understanding why a change in administrative technique was
required, it has not drawn direct attention to the advantages and disad-
advantages of the hearing examiner system. A discussion of this follows.

The advantages of the hearing examiner system of zoning administra-
tion fall into six topics for discussion. These topics are:

a) procedural fairness,
b) qualified personnel,
c) completeness of record,
d) flexibility,
e) freedom from politics, and
f) efficiency.

Each is briefly discussed:

a) **procedural fairness** - efforts have been made to ensure the
procedures followed comply with due process and fair hearing
requirements as dictated by the Fasano and Fleming cases. The
explicit statements of the rights of the appellant to cross-
examine and rebut evidence also indicate adherence to the rules
of procedural fairness. Procedures laid down attempt to focus
attention on the relevant issues of each appeal. The result
has been to increase public notice, the availability of staff
reports and to increase the time available for testimony at the
hearing.  

b) **qualified personnel** - qualified personnel weigh evidence,
conduct fair hearings, and base decisions on stated facts, and
findings. This process allows the administration to take full
advantage of the complex and flexible techniques of zoning.

The requirement of qualified personnel improves the ability for
public participation, the quality of consideration given issues, and ensures decisions are based on the stated planning principles and goals or objectives of a comprehensive plan, zoning by-law or other official policy.

c) **Completeness of record** - the examiner system provides written findings of fact, conclusions of law and decisions. Proceedings are electronically recorded to ensure a complete record of each appeal is available. This availability is very important in the American setting where the judiciary regularly substitutes its interpretation of substantive issues of a case for those expressed by the legislators or administrators. This activity aside, the completeness of the record is one of the major factors to ensure a hearing was conducted fairly and the decision arrived at rationally.

d) **flexibility** - this flexibility is demonstrated in the ability of the legislature to delegate administrative functions unrelated to zoning and decision-making power to the examiner in certain circumstances. The flexibility of functions means all administrative decisions are accorded equal and uniform treatment, while flexibility in the decision-making power ensures the legislators retain control over decisions rightfully their responsibility. The overall result is a clear distinction between policy formulation and administrative functions. Flexibility can be perceived as encouraging development of legislative policy while divesting council of the often controversial functions of conducting controversial hearings pertaining to individual rezonings, conditional uses and use variances.
e) **freedom from politics** - where Council has retained final decision-making authority, changes to the recommendation of the examiner may have to be supported with new written findings of fact or reasons for differing conclusions. This ensures a rational decision-making process where the legislature and the examiner disagree, the immediate opportunity to obtain a clear interpretation of the meaning of the policy over which the disagreement has taken place. Procedural protection is also afforded the office under the rules governing ex parte communications.

Elimination of politics from land use decisions has never been one of the goals of the new administrative system. Rather, the influence of politics on individual lots and of various parties involved has been reduced through binding the examiner to policies of a comprehensive plan and strict procedural rules. This reduction corresponds to an increased opportunity for a particular political philosophy to shape the policies approved by a council and therefore separates petty politics from day to day administration of zoning.

f) **efficiency** - through the adherence to judicially determined grounds for appeal and precisely defined rules of procedure, the examiner system has made the administration of zoning more efficient. This is because fewer frivolous appeals can be heard by the examiner who conducts a less emotional, more judicial hearing, which produces a complete record open to the scrutiny of the public.
Furthermore, the examiner acts as a screening process, shielding the council from wasting time on administrative matters and allowing it time to develop policy. Finally, the examiner system is seen to shorten administrative processing times and reduce the time constraints often imposed on planning commissions to undertake long-range planning efforts.

A number of other characteristics related exclusively to the Seattle examiner system not yet mentioned require some elaboration. These are discussed below.

Firstly, flexibility is amply demonstrated and greatly exceeds the powers accorded other examiners in other jurisdictions, as demonstrated in Appendix III. Secondly, regarding the articulation and detail devoted to the development of a set of procedural rules as opposed to restricting or specifying qualifications of office, the intent of this administrative reform was to promote procedural fairness rather than to professionalize the decision-making apparatus. Thirdly, the Seattle examiner, while appointed by council, is not part of the council staff and is a completely independent body. Lastly, the examiner resolves non-controversial cases, leaving the Planning Commission time to deal with controversial cases and get on with the job of policy development.

Despite considerable advantages apparent from discussions above and the review of the operation of the examiner system, there has been some very serious doubts expressed over the popularization of this method of administration. These doubts generally revolve around the following topics:

a) intimidating procedures,
b) professional bias,

c) unresponsive,

d) apolitical,

e) dependency on policy, and

f) inefficiency.

Each will be briefly discussed below:

a) **intimidating procedures** - a formalized structure of proceedings ensures all appellants a fair hearing while possibly also leaving the system open to charges the formalities "tend to intimidate persons unfamiliar with or untrustful of, big government".\(^{127}\) It has been noted that to the extent any intimidation actually exists, it is a necessary evil, "for it is this same formalization which lends the system its tremendous appearance of fairness and credibility."\(^{128}\)

b) **professional bias** - the examiner cannot help but display a professional bias in his decisions. This bias would partially stem from professional training, but more importantly, from the adherence to the comprehensive plan and policies, which would tend to lessen the impact of emotional appeals on decision-making.

c) **unresponsive to the public** - whether or not this is a problem will depend on how well the aspirations of each particular segment of a community are expressed in a comprehensive plan and the strength of belief that opposition simply because something is not liked is sufficient justification to deny it. Claims have also been made that the examiner system, because of a daily diet of specialized administrative responsibility,
develops standards which are lower than public expectations. This criticism is to some degree valid for all bureaucracies, playing as it does on the natural conservativism inherent in any administrative function.

A further criticism is that the examiner may be subject to "client capture" - a scenario in which the regulated become the regulator. This must be recognized as a danger of any administrative agency, especially ones where local autonomy and concentrated power co-exist in an environment without strict procedures to guide behaviour.

The examiner system has also been criticized for hiding decision-making. Concern here is over the inappropriateness of merely substituting the decision of one professional administrator (e.g., the planning department) for that of another (e.g., the hearing examiner). Regarding the fairness of the decision, it has been noted that a lay panel, "a jury of peers is not only fundamentally American but is innately more fair."[129]

- apolitical - the examiner system has been criticized as an attempt to displace politics from decision-making by circumventing an individual's right to present his case to the duly elected representatives. The less emotional nature of proceedings would tend to reduce political characterizations ascribed hearings in the past.

- dependency on policy - another shortcoming of the examiner system is its dependency on the legislature's ability and desire to formulate effective comprehensive long-range policy
and articulate community goals. This assumes the legislature can resolve all unanswered questions of equity prior to their consideration by the examiner and there is a political will to address these questions in the first place. This is one of the most persuasive arguments against the examiner system given the multiple levels of jurisdictions often involved in land development and the lack of influence local legislature really has over factors determining questions of equity.

f) inefficiency - the criticism here is that to ensure fairness in the administrative process, the examiner system may actually increase the time needed to process certain types of applications.

In addition to the general shortcomings discussed above the Seattle Examiner system displays several other peculiarities which warrant some notice. These peculiarities are primarily the result of Seattle's rather unusual situation of having both an Examiner and a Board system operating simultaneously.

The major disadvantages of the Examiner-Board combination are that the process takes longer, is less equitable, results in less predictable decision outcomes and encourages strategic game-playing. Ironically, it has also meant the Board of Adjustment has acquired more power than it had prior to the creation of the Office of the Hearing Examiner. The Board now acts as the final appeal body prior to a case going to the courts, whereas previously this activity was the responsibility of the local council. Where the examiner has only powers of recommendation to
Council, over 95% of decisions are accepted. However, where the examiner has final decision, 25 to 40% of the cases are appealed to the Board, about half of them successfully.\textsuperscript{134} This result occurs because the Board rejects its intended appellate role and conducts hearings "de novo" with council's tacit approval.

From discussion of both Canadian and American boards of variance, several administrative shortcomings have been revealed. In the Seattle jurisdiction, advantages of the hearing examiner system of administration appear to address these disadvantages. Although this second system is evidently not without disadvantage itself, speculation suggests importation of the examiner system to the Vancouver setting would relieve disadvantages identified there. To assess how appropriate this approach is, a closer examination of parliamentary and constitutional models of government follows in the next Chapter.


16. C. Adler, 1971, p.120.


38. For example, when Council's opinion is sought by the Director of Planning on the issuance of a conditional use D.P.A., the Director usually follows the advice given (i.e. issue or deny the permit) and that decision can then be appealed to the Board of Variance who could over-rule the decision.


44. A board of variance can be replaced.

45. M. Gram, "Vancouver City Board of Variance" (paper submitted for the requirement of Planning 525, UBC, SCARP) (Vancouver: March 1981).


47. Vancouver Charter, 1956, Sec. 573(2).


49. Municipal Act, (R.S.B.C.), Victoria: Queen's Printer, 1961. The Municipal Act provides for a permit system in other municipalities, however, it is of a slightly different nature than the system used in Vancouver under the Charter. See J. Ince (1977), p.121-123.

51. The Municipal Act does not require variance hearings to be held in public.

52. P. Chapman, "By-law No. 3844: A By-law to Establish Vancouver's Board of Variance", (paper submitted for the requirements of Planning 522, SCARP, UBC) (Vancouver: 1980).


56. In code jurisdictions, Commissions have wider statutory powers; in non-code cities commissions are restricted to research and fact finding.


58. S. Crane, 1977, p.3.


61. S. Cole, "Land Use Administration Task Force Recommendations for Streamlining the Requirements for Variances and other Administrative Determinations Authorized by The Zoning Ordinance and an Evaluation of Alternative
62. A Council condition use is a use listed in the district schedule which may be allowed after notice and a public hearing if it is determined that the use is compatible with the existing uses in the area.


64. City of Seattle, "Zoning Rules" (Seattle: Office of the Hearing Examiner, 1979) (mimeographed)

65. Seattle Board of Variance Secretary, Personal Communication, Interview, June, 1980.

66. City of Seattle, "State Environmental Protection Act", (Seattle: 1979) (mimeographed)

67. Unlike Vancouver, Seattle departmental staff have developed criteria for authorizing variances.

68. These are legislatively approved.


71. D. Lauber, 1975, p.11.


73. These were adopted February 15, 1977.


77. D. Lauber, 1975.

78. City of Seattle, "Hearing Examiner Appeal Rules" (Seattle: Office of the Hearing Examiner, 1979) (mimeographed)


91. At this time, the only other flexibility was through rezoning or special exceptions (i.e., conditional use). Variance became the third method of introducing flexibility to Euclidian zoning.


94. See the Charter of the City of New York, chapter XIV (1920). Relevant extracts are reprinted in Bassett, Zoning, (136), 1940.


98. For example, the commercial schedules developed for West Broadway, West 4th Avenue, and Commercial Drive in Vancouver.


100. J. Dukeminier, Jr., and C. Stapleton.


102. J. Dukeminier, Jr., and C. Stapleton.


107. For example, a Canadian Tire store attempting to locate in a C-1 local commercial zone. The Vancouver Planning Department views this use more correctly located in C-2 zones.

108. For example, the Development Permit Advisory Panel, Heritage Advisory Committee, and the Urban Design Panel.

109. Personal communication.


115. Euclid v. Amber Realty.


124. D. Lauber, 1975, p.22. Decisions on parcel rezoning may have to be given by a certain date as time limits on decision-making can be specified in the ordinance.


127. R. Titus, 1971, p.82.

128. R. Titus, 1971, p.82.

129. R. Titus, 1979, p.79.


CHAPTER III
A RATIONALE FOR IMPROVEMENT

The purpose of this chapter is to discuss the evaluative methodology chosen for this investigation, to examine selected aspects of both parliamentary and constitutional government and administrative models relevant to the investigation; and to select various criteria with which the two case studies in land use administration described in the previous chapter can be comparatively evaluated.

3.1 METHODOLOGY

Evaluation of an adjudicatory process such as the administration of land use regulations is difficult as the measures of success are not necessarily as evident in the decision outcomes of the administering body as they are in other government and private sector activities. In short, the outcomes of these administrative bodies are not measurable in such familiar terms as increased service or productivity. Evaluation is further complicated as explanation of the decision-making process followed can only be incompletely described. The reasons why a particular decision is arrived at remain hidden as no record is made of what these reasons might be, even if these are stated verbally. Fortunately an alternate evaluative technique is available that attempts to evaluate inputs rather than outputs to the decision process. This technique is known as normative assessment and is based on the assumption that a "good" administrative process will produce a "good" decision outcome. The problem then becomes how to define "good".
Normative assessment as an evaluative technique is primarily concerned with the process itself rather than the results of the process. Belief in this approach stems from the notion that if the actions leading up to a decision accurately portray a society's values, the final outcome itself will reflect that society's will. Normative assessment is simply the application of a value system to an established process and set of procedures. The resultant measurement is enabled because there is generally greater agreement on values that determine what processes are acceptable than there is upon the goals or objectives of the regulatory agency\(^1\) in question. This consensus occurs, at least in theory, because societal values are determined by the majority within the society. The following section discusses some of the major derivations between the norms of Anglo-Canadian and American societies as the first step in developing a set of common normative criteria for use in evaluating the two administrative systems used as case studies.

3.2 PRINCIPLES OF GOVERNMENT

The relationship between government and the individual is only understandable from study of the legal system as a whole. Control of the individual is made possible through the rule of law, which Lowe defines as "a statement made in advance with constitutional authority that when certain hypothetical facts occur and an individual conducts himself in a certain way, the community forces shall take certain prescribed action".\(^2\) While this is a somewhat simplified definition it is illustrative of several notions:

a) the mechanism by which the state impartially applies its power;

b) the appeal the rule has to formal political and legal equality; and
c) the dependence on acceptance of the tripartite division of political power for the rule's viability.  

The rule of law creates three distinct categories of governmental power. These powers are legislative, executive and judicial and have the following significant differences:

"1) Legislative power, the statement of rules of law, involves an authoritative decision as to what the rules should be, arrived at on grounds of policy;
2) Judicial power involves an authoritative decision as to what the legal requirements are under rules of law on the facts in the particular case;
3) Executive power involves no power of 'authoritative decision' but is a direction to take a prescribed action in a prescribed factual state."

These precise theoretical differences are, however, less distinct when seen in actual practice where legislative power can be used to prescribe either general or specific rules, and can be delegated to subordinates to make both general rules or regulations and specific legislation. Distinctiveness is further blurred where the judiciary must exercise some choice or discretion on grounds of policy in deciding some matter such as an ambiguity or obscurity in the language of a statute, or where legislative and executive powers have become merged. This inability to precisely define legislative, judicial and administrative powers has raised numerous problems not only in terminology, but also in the classification of various actions taken by both professional and legal administrators. The classification process has had in the past a great deal to do with determining the scope of judicial review available and is further discussed when differences in the American and Anglo-Canadian systems of government are presented later in this chapter.

The distinctiveness of the tripartite classification system is further complicated by an internal division of the administrative power.
This is caused when administrative powers must be exercised judicially. In such cases, administrative power is termed "quasi-judicial". While this contains elements of a judicial decision it differs from judicial decisions in the following way: "the decision is not based solely on a finding of fact and application of law to them as the decision-maker must also have regard to the policies of the scheme being implemented." As Titus notes, the use of the term quasi-judicial is implicit with the confession that all recognized classifications have broken down.

This recognition is important as it enables the powers of government to be kept separate from each other, thereby insuring the continuance of civil liberty. The danger of investing more than one type of power in a single branch of government was first noted by Montesquieu in the 18th century. To Montesquieu, the assurance that government remained servant and not master depended on this separation of power.

With the above understanding of the basis of government, the types of powers and the theory of the importance of maintaining these powers separately, it is now appropriate to discuss a few of the many differences between Anglo-Canadian and American forms of government. This discussion is limited to that which is most relevant to the administrative processes used to control land use in each country. The discussion commences with an examination of several characteristics of the British parliamentary system as this serves as the model upon which much of Canada's present day system of government is based. The discussion then concludes with a brief examination of the American model.

3.2.1 Parliamentary Government - England

The basic tenet of British government is the supremacy of Parliament.
Supremacy has centralized the control of government and means that all laws passed by Parliament are constitutional. This centralization has occurred without the development of constitutional safeguards against the sovereignty of Parliament and has resulted in a system of government where the legislature can in theory change any law at any time merely by a majority vote on the issue. The prohibitive factors in doing so are, of course, the dependency of the members of the legislature on the electorate's satisfaction for re-election and the nullification of the legal forms of the constitution in favour of long established customs and conventions government acceptable behaviour.

A second characteristic of the British form of government is the lack of precise separation of legislative and executive powers. Over the years this convenience has not been maintained and a reliance on the accountability of the executive directly to Parliament through the doctrine of ministerial responsibility has developed. Central to this doctrine is the notion that government must resign if defeated on a vote of confidence in the House of Commons. This, in theory at least, gives Parliament much more control of the executive branch than does the Constitution in the U.S. In practice, however, direct ministerial responsibility of the day-to-day operation of the department has proven unrealistic. Also contributing to the lack of separation of legislative and executive power has been the adoption of a cabinet form of Parliament. In Bagehot's words, the cabinet is "a buckle, a hyphen, a combining committee, for ensuring harmony between the detailed execution of the laws by the civil service and the will of the majority in Parliament".

All of this is not to say the three branches of government do not act as a check on the others' activities, however it must be remembered
the power of Parliament is unfettered.

A third important characteristic of British government is its basis on the rule of law discussed earlier in Chapter II. Not only do actions of the government have to conform to the existing laws, but justification of the actions of officials may also be called for by the judiciary on complaint from a citizen. While Parliament has more recently moved to limit this judicial appeal, there has been no widespread attempt to shield administrators from judicial observation. This has meant that in order to justify actions taken, the administrator has had to rely on specific acts and statutes rather than merely asserting some "exulted official status and inscrutable executive expediency" to explain what was done.

The fourth and final characteristic to be mentioned here relates to the role of the judiciary in the British model of government. Three noticeable trends pertain to this discussion:

a) limited legislative function,
b) limited review of administrative actions, and
c) trust in administrative tribunals of laymen.

In referring to the limited legislative role of the English court, it is evident that the British regard judicially made legislation of an overtly political nature, as an usurpation of the legislative perogative, justifiable only in cases of constitutional emergency. There are, however, other less sensitive areas, inseparable from the system of case law, which require new legislation and it is to these areas the English judiciary has primarily confined itself. While it is common to hear that British judges "do not make law, they only apply it"; or that judges "have nothing to do with policy, but must take it as they find it", ...
this is somewhat misleading. Even English judges must continually decide between conflicting policies and therefore create new law. It is perhaps sufficient to say that the British model assigns distinct provinces to the judiciary and to Parliament and prefers not to see one trespass on the other's jurisdiction. This is in marked contrast to the American judiciary, discussed later in this section.

A second trend to note is the judiciary's limited scope for reviewing administrative actions. As there is no constitutional minimum requirement for review, Parliament has often attempted to exclude judicial review through limiting language in the statute. Furthermore, as administrative decisions do not have to be reasonable under British law, the power to review would seem to be less effective in practice than comparable judicial power in other countries.

Complete judicial review is further restricted because Britain has never adopted a general rule requiring reasons to be given for administrative acts and decisions. Therefore the courts, in considering cases where no reasons for an action are given, will not draw adverse inference from the agency's failure to supply them. This is particularly limiting as it places the onus of proof on the appellant to show that the conduct of the administrative authority was not justified by law, a course which may be precluded by the silence of the authority. Such situations have somewhat improved since the introduction of the Tribunals and Inquiries Act, 1958, which imposed an obligation on the authority to give reasons for decisions when requested. The improvement however, has not signalled the British courts to embark on wide ranging reviews of legislation and it is still uncommon for government tribunals and inquiries to establish a complete written record of its proceedings upon which a full tribunal
review could be launched. In fact judicial review is seldom invoked as non-statutory remedies are only obtainable from the high courts at great expense and have not produced a good record for successful appeals.

In seeking to understand the attitude of the English courts in reviewing administrative authority the supremacy of Parliament and the direct accountability of political heads of departments to a legislature to which they themselves belong must be kept in mind. These doctrines point to Parliament as the appropriate body to review the unfair exercise of administrative authority which was granted initially by Parliament and may be withdrawn at the perogative of that same body.

The final trend discernible in the British judiciary relevant to the administrative functions of government is the propensity of the English to trust in tribunals of laymen to administer the law rather than to rely on the courts of law themselves, as the Americans do. This trust in the "ordinary man" as adjudicator has developed in England and not in America because of the differing constitutional backgrounds and the long tradition of lay magistracy and lay tribunals. As Diplock, Lord of Appeal in Ordinary, notes, the Americans "tend to think that there is no problem to which the best solution cannot be found by trained legal minds using the judicial process and the adversary system" whereas an Englishman "tends to think that there are many problems which are best solved by submitting them to the commonsense judgement of fair-minded laymen using informal procedures". To a large extent the Canadian system of government reflects the combination of these two countries beliefs, not only in regards to judicial review but in the other aspects of government discussed above. A close examination of this premise is contained in the following section.
3.2.2 Parliamentary Government - Canada

The Canadian constitutional model reflects much of the British system. This, of course, comes as no surprise as the Canadian system is the result of an attempt to adopt the British model to the conditions of a federal state. Naturally, there has been several changes, so an examination of the same four points discussed in the British context is useful in highlighting similarities and differences.

Firstly, introduction of a federal character into the constitutional discussion has had the effect of limiting the legal supremacy of the federal Canadian Parliament. This limitation occurs as certain jurisdictions have become the exclusive preserve of the provinces, accorded them by the BNA Act discussed in Chapter II. However, the supremacy of each legislature is assured when each deals within its respective sphere of jurisdiction, and subject to minority rights guarantees in education and language, the legislatures may do anything by majority vote.

The Canadian model also follows the English convention of foregoing the separation of power doctrine in favour of creating a cabinet style government which combines both legislative and executive powers. There has, however, been some improvement in the Canadian system, as the inability of the Canadian legislature to alter the tenure of the judges of the Supreme Court in some way removes part of the judiciary's vulnerability to the whims of the legislature which have a dampening effect on the British judiciary.

Another tenent of the British model which has undergone modification in its adoption to the Canadian setting is the rule of law, which has recognition in the Canadian Constitution. It has been noted: "this
principle has a wider recognition in Canada because a substantial, though limited, judicial review of legislation takes place. Indeed, the Canadian review for constitutionality would seem to fall between the British situation of very limited review strictly conducted, and the American judiciary's review which is extensive in scope and unreserved in its conduct. This difference may be brought upon by the limited number of rights currently guaranteed by the Canadian constitution and because of the few limitations placed on legislative powers in Canada. As a result, the only question the courts can ask of legislation is whether or not it is in violation of the BNA Act which is binding on both provincial and federal legislatures. As has occurred in the United States, the power of judicial review has not been expressly stated in the legislation (i.e., BNA Act or U.S. Constitution) but is something that the courts have assumed to be within their jurisdiction and indeed part of their responsibility.

3.2.3 Constitutional Government - United States

The same four principles of government can also be seen in examining the U.S. Constitution and the form of government developed in that country. Many of the differences that arise appear directly from the philosophical differences of England and America in the 18th century and resulted in the American revolution.

In America no legislature exists without limits placed upon its powers. Indeed, unlike the British and Canadian models where government may regulate almost every aspect of an individual's life, the American Constitution places certain human "rights" beyond the reach of the legislature (i.e., Congress). While not without exception, these
restrictive provisions generally apply to both state and federal governments. The most famous of these restrictions are probably the Fifth Amendment restricting the federal government, and the Fourteenth Amendment restricting the state government from depriving any person of life, liberty, or property, without due process of law. The elevation of these rights beyond the reach of any legislative initiative is said to have resulted in America becoming "a people of Constitutionalists who substitute litigation for legislation and see constitutional questions lurking in every case". This attitude is encouraged because of the American judiciary's vigorous role in the protection of the individual's constitutional rights.

As previously noted in Chapter II, the American system creates a federal character as does the Canadian system. However, the similarity is perhaps best ended there as not only are the powers of government divided differently in the two countries but also the American federal system makes for a deep and rigid division of authority between the national and state governments. The intent of this division is to protect the individual state's integrity and independence vis-a-vis the federal element.

The third principle of government is also treated differently in the American setting. Adoption of Montesquieu's notion of an overwhelming danger in combining types of power in any one branch of government has resulted in the Americans developing a system of government that strictly separates all legislative power to Congress, all executive power to an independently elected president, and all judicial power to a supreme court. This separation of power is maintained by the system of checks and balances for which the American model of government is so famous.
The result is executive power is not exercised by a committee of the legislature responsible to that legislature as in the Parliamentary system, but rather by the Chief Executive or President, aided by such advisors selected outside of Congress as he sees fit.21

The role of the American judiciary in the affairs of government is another area vastly different from the Parliamentary system. While the wider scope of the American court's review has already been noted, it should be stated that unlike their British and, to a lesser extent, Canadian cousins, the American courts show no reluctance at all in overruling the acts of their government. Indeed, it has been said the American judge is less solicitous of the distinction between law and policy than the judge who is subject to the doctrine of parliamentary sovereignty.22 The ability of the judiciary to call into question the constitutionality of any legislation coming before it has meant that the rule of law must also reflect the enforcement of the "higher law" of the constitution against both the legislature and the executive branches of government.23

The independence of the American judiciary, and the success of the checks and balance system of government makes controversial legislation difficult to enact and gives great powers of obstruction to minorities and vested interest groups.24 These factors, combined with the rising expectations placed on government to create legislation to deal with an increasing variety of social and economic situations, forces the American judiciary to take on a legislative role despite the rather devious conflict this causes with the doctrine of the separation of power. Under such conditions, the U.S. courts have often been the "spearhead of social change"25, a role which the courts of parliamentary governments have been reluctant to take up.
A further difference between the Anglo-Canadian and American models of government necessary to understand differing attitudes towards land use control and government administration is the method by which policy is formulated. The fundamental difference here is that under the British system a professional permanent civil service reaches up through the bureaucracy to cover even the highest departmental posts, with the exception only of the ministers themselves, while under the American system much of the civil service is replaced or superseded by political appointees, especially in policy making positions. This is significant in two ways. Firstly, it means that at every election many of those formulating policy may lose public office and secondly, this loss means an interruption in continuity and a loss of expertise not experienced under the British system. In the U.S., policy is generally developed by public officers who are either appointed or elected to office and the policy they create is administered by a permanent civil service. In Britain and Canada on the other hand, policy is developed through a political system that makes use of the expertise of a permanent, professional civil service and expects the personal political biases of individual employees to be subservient to the will of the minister of the day.26

3.3 ADMINISTRATIVE LAW

At this time it is useful to define a few more terms such as administrative law, administrative process, natural justice and due process so that we might better understand the nature of the control of land use. These definitions are presented below.
Firstly, a precise definition of administrative law is difficult. However, the following definition seems appropriate:

"that part of our whole body of law which concerns the transfer of power from the legislatures to subordinate agencies, exercise of that power by the agencies and the review of the exercise of that power by the courts." 27

Of course, by administrative agency a government authority other than a legislative or judicial body is inferred, one which makes rules and decisions which affect the rights of private parties either as individuals or as groups. The methods by which these agencies conduct their rule making, adjudication and other functions is recognized as the administrative process. Agencies which combine such powers of government together are sometimes recognized as distinct organs of government unique from the other three branches. 28

The combination of powers raises certain problems, particularly in reference to the control of the agencies which possess them. As the previous section outlined, the impracticality of expecting a minister to be accountable for the day to day operations of his department has lead to the placing of the agency itself under the indirect scrutiny of the legislature. In the United States, however, this responsibility has fallen to the judiciary. Under such conditions, where decisions taken by persons or groups acting outside the legislature curtail or change rights or freedoms of an individual, there is an important need to protect the individual from arbitrary actions of the agency. Furthermore, there is a need for the establishment of a system whereby the restraints, penalties and policies placed on the individual are sound, understandable, fair and as a result, supported by the individual. Any regulation that has potential to reduce or restrict an individual's rights must exist because of the mutual trust and understanding between the administrative agency
and the public. While it is recognized that in many instances an individual can take the case to court, there should also be some type of system that bridges the gap between those complaints routinely handled by the administrator, and complaints which, because of their magnitude or particular nature, necessitate court action. For the purpose of this thesis such intermediary mechanisms are the board of variance and the hearing examiner. The acceptability of those bodies decisions is based on the fairness with which they are reached. This fairness is ensured by the provision of adequate safeguards of the individual's rights through the doctrine of natural justice and due process. While the insistence of these doctrines in no way interferes with the substance of executive decisions, it is exactly this procedural fairness which makes intensive government tolerable and in the judicial realm, permits the judge to assert his/her authority with confidence. These doctrines are more closely examined in the following section.

3.3.1 Natural Justice

While several elements of natural justice were previously discussed in Chapter II, other information is useful in gaining a full understanding of the importance of this doctrine to the administrative process. The entrenchment of natural justice in the administrative process has not been achieved without numerous changes to the doctrine itself.

The development of the procedural safeguards recognized today as the rules of natural justice occurred during the 19th century in England, where an increasing number of non-judicial institutions were being invested with powers by statute to make decisions affecting the individual. The courts response to this phenomenon was to invoke their common
law power to determine all questions affecting legal rights and to ensure that in the exercise of such powers the institutions conformed to a minimum standard for judicial decisions at common law. This was achieved "by invoking the principles of natural justice which can be traced to the concept of 'jus naturale' and thus to the period of supremacy of the common law". Later in the 19th century, after the English courts accepted the sovereignty of parliament, natural justice emerges as the twin rules of judicial procedure, "nemo judex in sua causa" and "audi alteram partem". This action sat well with the laissez-faire attitude of the day, the attitude of the court being that the justice of the common law shall supply the omission of the legislature.

It is important to note that even at this early stage of administration the courts were busy "adjusting" the doctrine of natural justice and this concept of change is important because by the turn of the century the nature of administration itself had changed so that "it could no longer be regarded as occupying a purely instrumental position within the classical tripartite division of power as required under the traditional model." The result of the courts inability to classify decision types succinctly was a general withdrawal from the insistence of procedural safeguards for administrative decision-making. Two things were inherently admitted by the courts in this action:

1) the notion that the adjudicative model should not automatically apply to administrative decisions as it may produce delays, expense and public or private injury, and

2) the court's function under the traditional model was to not become entangled in issues involving policy choice.
This judicial attitude persevered until the continued growth of social welfare legislation again caused the courts overwhelming difficulty in assigning decisions made by administrators to appropriate classifications. The courts solved this problem by requiring administrative procedures to conform to minimum requirements of judicial procedure only for those administrative aspects which most closely resembled adjudication. Some flexibility was afforded the courts in adopting this approach later as the concept of a "quasi-judicial" function was developed in the 20th century. More recently there is evidence to suggest the courts now feel that the rules of natural justice should apply not only to judicial and quasi-judicial functions, but also to some functions previously thought of as administrative.

This brief history of the development and application of the doctrine of natural justice clearly indicates it to be merely a doctrine of the common law used for the interpretation of statutes. The doctrine is also reflective of the close relationship between the common law and the moral principles of the society. The adoption by the courts of the two rules has been critical to the construction of an entire code of administrative procedural rights to protect the individual from abuse by the administrative process.

The protection afforded by the rules of natural justice is, however, not unlimited. Decisions can still legally be made by biased judges in cases where no one else but that judge can act. In certain institutional decisions, hearings do not have to be conducted in public, staff reports do not have to be disclosed, strict rules of evidence do not have to be observed and written transcripts of the hearing need not be made available to the appellant. These difficulties, however, pale beside the last limitation, which is the failure of the judiciary to require that written
reasons for a decision be given by a tribunal. This occurrence has been referred to as "regrettable since giving reasons is now regarded as one of the essentials of administrative justice."  

3.3.2 Due Process

Due process is the American counterpart of Britain's rules of natural justice - with some major differences. Each, however, has been developed primarily for the same reason, which is to provide procedural safeguards to protect against administrative abuse.

One of the first differences between due process and natural justice is that because due process is afforded protection by the American Constitution, the power of the American judiciary to intervene is not dependent on the wording of the statute. Furthermore, due process more or less automatically imposes certain procedural demands on the American administrator whether or not they are made mandatory by statute. Another difference is that the due process clause has been used by the U.S. courts to establish a virtual judge-made code of administrative procedure. This includes the elimination of all the limitations regarding the rules of natural justice noted in the preceding section and in fact includes the only two principles of natural justice recognized by the Anglo-Canadian courts. The American citizen has the right to an oral hearing which tends to follow courtroom procedures, including the right to be appraised of the case on the other side; to present evidence and argument; to rebut by cross-examination; to have reasoned decisions as well as a transcribed record of the hearing; and to appear with counsel.  

The major shortcoming of the due process clause has been, at least until recently, in its limited applicability. In the past it has been
usual for the American judiciary to restrict use of the due process safeguards to those decisions involving only the individual's rights that were protected by Constitutional guarantees. This limited application to those administrative decisions related to a person's life, liberty or property. Presently this situation has changed and the distinction between "right" and "privileged" is no longer relevant to the question of whether or not fair procedure should be required. It is quite likely that this change in judicial attitude, which required the application of due process procedures to all sorts of socio-economic hearings, has resulted in the major criticism of due process being its untoward slowness. Indeed, it has been noted that "the mills of American administrative justice grind extremely slowly", and even at that, the full adversarial hearing proves workable only because it is not insisted upon in the vast majority of cases.

3.4 DELEGATION AND DISCRETION IN ADMINISTRATION

In societies determined to retain individual values and rights while pursuing common social goals or objectives, the legislature must be provided with the flexibility to adopt the machinery of government to new tasks which may arise. As a result, it is now commonplace within the parliamentary model of government for the administration to be delegated legislative powers to enact general rules of conduct without having to observe the procedural safeguards that the legislature, if it were acting itself, would have to follow. This is not to say, however, delegated power is uncontrolled. The exercise of delegated power must be derived from the authority of a statute or by the relevant Regulations Act, and must not exceed the limits of the power granted by the legislature. Further, while the authority to delegate legislative power is widespread,
it is restricted to particular organs of government and may not amount to an abdication of responsibility by the legislature.

The types of powers delegated by the legislature generally consists of some or all of the following:

a) to grant licences to carry on a designated activity;
b) to expropriate and vest in a licence property or rights of another individual;
c) to regulate the manner in which activities of individuals are carried on, and the extent to which they may be pursued;
d) to control and regulate a variety of financial and economic relationships;
e) to adjust relationships between individuals, and between an individual and the Government;
f) to decide disputes arising out of the application of the legislation or the exercise by the tribunal of its powers;
g) to establish its own procedure and to accept and act on such evidence as it sees fit;
h) to enact rules and regulations in the furtherance of the exercise of its powers; and
i) to advise or make recommendations to a minister or other legislative authority. 41

Any of these powers may be delegated to the executive, the judiciary, local governments, or numerous boards, public office holders or private groups. What is of particular concern to this investigation is, of course, the powers delegated to the Board of Variance, Hearing Examiner and, to a lesser extent, to the local planning department. These powers were discussed in detail in Chapter II.

What is also of importance is the recognition that while regulatory agencies developed under the parliamentary model are either government departments subject to ministerial control and parliamentary responsibility, or are independent tribunals which have no executive function. Such distinctions are not so sharply drawn in the American model. There, executive power is found in bodies having judicial and legislative functions also. This difference explains why Congress is not thought responsible for the scrutiny over delegated legislation in America, as
Parliament is in Britain and Canada. This also explains why the role of the judiciary in the U.S. is of considerably larger scope and jurisdiction in matters pertaining to delegated authority than in Britain and Canada.

It is also important to note that in both models rule making is seen as a "process by which the administrator lays down new prescriptions to govern the future conduct of those subject to his authority" and adjudication is seen as a "process by which the administrator applies either law or policy, or both, to the facts of a particular case." Just as rule making is general in nature and pertains exclusively to the future, adjudication relates to the particular and pertains to the past. Understanding the rulemaking and adjudication functions of the two administrative systems discussed is fundamental to any suggestions for improvement to be made later in this thesis.

3.4.1 Delegation

Delegation can be justified as both a legitimate and desirable activity of government because:

a) the pressure on the legislature's time is great,
b) the subject matter of legislation is often of a technical nature,
c) of the impossibility of foreseeing all contingencies and conditions for which provisions must eventually be made,
d) it avoids the necessity to continually amend legislation in situations of change,
e) it permits the use of experience, and
f) it permits a rapid response to a sudden need for legislative action.
While there are strong reasons to permit the delegation of power, there is also danger that this power may be abused by the recipient administrative agency. To that end, several safeguards limiting this opportunity have been developed and should be understood in the context that the simple remedy for the abuse of delegation is the repeal of the delegating statute. One expert suggests five conditions should exist before a delegation is authorized by the legislature:

a) delegation should be to a trustworthy authority commanding national confidence,

b) the limits within which the delegated power is to be exercised is to be definitely laid down,

c) there should be prior consultation of interests specifically affected,

d) rules and orders made should become public information, and

e) there should be machinery for amending or revoking delegated legislation as required.\textsuperscript{43}

Determination of the validity of subordinate or delegated legislation is properly the responsibility of the judiciary and invalidity is generally determined on the grounds of either procedural or substantive defect. Procedural defect involves claims the agency failed to observe some statutory provision prescribed by the legislature and is of primary interest in this investigation. In both cases the term "ultra vires" may apply, although allegations of defect may be made in terms of "beyond the jurisdiction", "inconsistent with the statute", "unreasonable" or made in "bad faith". It can be seen then that questions of "vires" are really only matters of interpretation in which the judiciary determines the legal extent of the delegated power.\textsuperscript{44} The courts have taken the position
that delegated power was permissible provided that it was properly restricted and the agency's discretion was not so wide as to make it impossible to discern limits to the power conveyed.

While both models of government reflect a general agreement about the necessity of delegating power, the real problem is how this legislation can be reconciled with the process of democratic consultation, scrutiny and control of the resultant administrative actions. This problem is further complicated by the introduction of discretion into the sphere of the administrators jurisdiction. This is the next subject for discussion.

3.4.2 Discretion

While the importance of limiting the abuse of power delegated to the administrative branch is not to be denied, it is also not to be dealt with in detail in this thesis. What is thought to be of more importance to the case at hand is the treatment of the discretionary powers which are also evident in the abuses alleged to originate with the administrators. It was recognized early, even in America, that "large powers and unhampered discretion" were the essence of administration, but that every discretion was capable of unlawful abuse. As is the case with delegation, prevention of abuse of discretionary power is considered a fundamental function of the courts.

Discretion in the context of this research is taken to mean something that is to be done according to rules of reason and justice, not according to private opinion. It is considered to be an authorization to act in a manner which is not arbitrary, vague, or fanciful, but is legal and regular. It may be seen as having the characteristic of a double-edged sword, in that "the exercise of discretion may mean either
beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.\textsuperscript{49} It occurs whenever the effective limits of the power permit an official to make a choice among possible courses of action or inaction.\textsuperscript{50}

The concept of discretion is, however, varied in its treatment under Parliamentary and constitutional models of government. This has been described in the following manner: "...the British conception is that within its legal limits administrative discretion must be free and that the object of policy should be to produce the best solution as it may appear at any particular time...the American conception is that discretion, whether judicial or administrative, should in all possible cases be exercised in accordance with rules and ascertainable in advance, and that the policy to be applied should somehow be fixed or standardized."\textsuperscript{51} The stricter American approach, in theory at least, can be traced to fears of abuse of power in a system where the executive is not directly accountable to the elected legislature, and where so much power is given to "independent" agencies responsible to themselves only. It is perhaps fortunate, then, that in practice each of these attitudes has been heavily qualified with the result that the courts in each country deal with discretionary power in much the same manner. The key to this treatment is the requirement that discretion be exercised reasonably. In America, reasonableness is reflected in the "arbitrary and capricious" clause of the Administrative Procedure Act, while in Britain the courts depend on the common law to determine if the exercise was "unreasonable" or not.\textsuperscript{52}

The similar review of discretion undertaken by each judiciary is to some part enabled because the abuses of power are of a similar nature
regardless of the country of origin. An abuse is generally thought to have occurred when discretion is used:

1) for an improper use,
2) in a manner different from that previously exercised,
3) in an exercise based on erroneous and extraneous considerations,
4) in an exercise which rests on erroneous legal foundations, or
5) fails to consider relevant considerations.

The above discussion clearly indicates why various writers have referred to discretionary authority as "more destructive of freedom than any of man's other inventions" and "a weapon for mayhem or murder". It does not, however, explain why the use of discretion, if it is so dangerous, continues. The reason for this is that counter-balancing the dangers are some significant benefits. These benefits are tied to the notion that just as unfettered discretion is undesirable, so too is an administrative system that is rigidly formal in the application of its rules, findings and decisions. The desirability of creating flexibility in administrative functions and activities is born from the belief that discretionary power is the principal source of creativity in government, as well as serving as a tool for the individualization of justice. The judiciary is willing to permit society these benefits but only where it is satisfied that meaningful standards have been provided by the legislature and the agency exercised its power in a reasonable manner.

Relating the above principles to the two administrative systems that are the main subjects of this examination it can be seen that a certain degree of discretionary power is necessary if the administrator, whether that is a board member or hearing examiner, is to be effective in allowing appeals in the special cases presented. However, it can also be seen
that the more discretionary power given the administrator, the more actions become not only flexible but judicial in their nature. In the field of zoning administration this has sometimes occurred without the safeguards afforded by the judicial system. There are then three issues of critical importance in the exercise of discretion in appellate land use decisions:

1) the criteria used for rendering decisions - ostensibly these are the standards set down by the legislature;

2) the role of precedence - the doctrine requiring a judge in resolving an issue to follow a decision of a previous case; and

3) the provision for or failure to require reasons for the decision to be provided.

While each of these issues is examined in Chapter IV, a few comments of a descriptive nature will preface that discussion.

Regarding the issue of standards, the tribunal system can be seen as more reflective of the Anglo-Canadian view of administration: trust in laymen and pursuit of individual solutions to individual cases. In the case of the Vancouver Board especially, there is little guidance provided by the legislature to assist in defining "undue hardship," which is the prescribed standard to be met before a variance can be granted. On the other hand, the American view of administration has been one of continually shifting emphasis. This shifting has been the result of the Americans' view that legislative standards had become "hardly more than a ceremonial incantation handed down from an earlier Constitutional era." This belief caused the emphasis to shift from the constitutionality of delegated legislation to the procedure required to make delegated legislation constitutional. This shift occurred in two stages, the first with the
adoption of the Administrative Procedure Act of 1946 and the second, resulting from the more recent court decisions of Fasano and Fleming, with the adoption of the hearing examiner system in certain jurisdictions. These changes would seem to be consistent with the Americans' revulsion of all but very limited discretionary administrative power and their embrace of the belief that all adjudication should follow the essentials of courtroom procedures.\(^59\)

The second issue of concern regarding discretionary authority is also illustrative of the different viewpoints regarding the function of administration. In the U.S., critics of the tribunal model claim that without at least some consideration of precedent the pattern of decision-making may become inconsistent and result in a loss of confidence by the public in the administrative system.\(^60\) This argument runs almost exactly counter to the current English view which has the courts adopting a very strict attitude in forbidding "administrators and tribunals from attempting to pursue consistency at the expense of the merits of individual cases".\(^61\) The role of precedence also raises the argument that by rigorously pursuing this doctrine the effectiveness of the appellate body would suffer. This notion will be further considered in Chapter V.

The last issue, the need to provide reasons for decisions is also illustrative of differing attitudes between Anglo-Canadian and American counterparts. The main objection to any requirement to provide reasoned decisions in writing has been because to do so would require the time of the administrator and therefore hamper the expediency for which the tribunal system has been so commended. Increasingly this argument has lost favour in America\(^62\) and to a limited extend even in Canada and England.\(^63\) From the American viewpoint the absence of a requirement to provide reasons may lead to ad-hoc decision-making and therefore raises
serious questions regarding equal protection afforded by the law to an individual. In Canada, while reasoned decisions are not mandatory in most cases, "the courts may be much more ready to hold that there has been an abuse of discretion where the record of a hearing does not reveal any reasons for the decision that has been reached." The trade off between expediency and written decisions is also discussed in later chapters.

The foregoing discussion has attempted to familiarize the reader with the theory and some of the practicalities encountered in the use of delegation and discretion in various administrative systems. It has, however, avoided discussing the political realities that modern administration, particularly in the field of land use, entails. This is the subject of the next section.

3.5 POLITICS - THE FLY IN THE ADMINISTRATIVE OINTMENT

Delegation and discretion in the administrative process have been presented in a simple manner much akin to the theoretical models of administration developed by Freund and Landis. Freund's model, reflective of a laissez-faire role by government, encompassed the notion of the existence of a rational bureaucracy, insulated, non-political and hierarchical in nature, acting in accordance with authoritative statements made by the legislature. On the other hand, Landis' model displays a paradigm of broad delegation, allowing all of government's decision-making powers to be used in a problem solving exercise. In some senses Freund's model reflects much of the American attitude towards administration, based as it is on the belief that delegated authority is only appropriate where there are no controversial issues of policy or opinion.
to be dealt with and the reduction of discretion is the most important point in developing administrative law. Conversely, the Landis model appears more reflective of the British view whereby legislative objectives are loosely defined and solutions are evolved by presumed experts.

Both of these models appear simplistic and fail to accurately portray the actual situation in administering land use controls. This failure relates to the models' exclusion of significant bureaucratic inputs such as expertise, tradition, stability, and the rational exercise of power. It also relates to the propensity of the legislature to avoid unduly confining the administration's conduct by providing adequate legislative standards to be followed. In omitting these factors, the models fail to recognize the value-ridden and highly political environment in which the modern administrator must make many of his decisions.66

While there are elements of applicability in the descriptive administrative models discussed, guidance of human behaviour in the zoning activity is actually derived from the same fundamental assumptions which guide us in other areas of human activity.67 These assumptions recognize the particular political process which provides the milieu and defines the operation of each agency. In our society these assumptions are found in all our lawmaking activities, and indeed, when taken in total, comprise our democratic political structures. They are invoked by such phrases as "rights and freedoms", "equal protection", "rule of law", "natural justice" and "due process".

The goal then of administration of land use regulations is not to vainly "attempt to predict change and eliminate discretion but [to] attempt to assure that, when the private sector proposes change, the discretion to grant or deny it will be exercised openly, honestly, and on
the basis of as thorough an inquiry and as full a participation as possible." It is with this thought in mind that the following normative criteria with which to measure the two administrative systems have been developed.

3.6 NORMATIVE CRITERIA

Normative evaluation requires the development of a set of criteria upon which a comparison of administrative systems can be based. This exercise provides not only a means for the orderly discussion of comparable administrative systems but also provides a yardstick for the measurement of one system's applicability to the other's environment. Implicit in the assessment is the notion of the other system's acceptability to the new environment. Proper assessment must then become much broader in its scope and thus should seek to place the administrative system within the historical and socio-political context in which it is expected to function. The most appropriate method to derive these measurement criteria then is through an examination of the basic values and principles of Canada as a pluralist democracy.

Much has been written about both the democratic values that comprise our political structures and the political-administrative behavior of the organizations and agencies that we have created to carry out our collective will. While the approaches taken and the subjects discussed may vary, there exists several common principles related to the individual's expectation of how an administrative system should act. For example, due to the judiciary nature of the administrative systems used in matters of land use, it is generally believed that every individual should be treated in a fair and just manner in an administrative process that is both open, understandable, and acceptable to the majority of the
society. In addition, it is generally believed this process should be both effective in meeting the objectives of administration and efficient in its use of the resources allocated to it.

Closer examination of these expectations (or values) suggests the following as normative criteria with which to evaluate the suitability of comparable administrative systems to the Vancouver environment:

1. The criterion of equitable treatment

   This concept has undergone a relatively recent expansion of its definition. Equity in our society today is generally thought to mean the fair and just treatment of all interests concerned in a matter. Previously this concept referred only to the treatment of the regulated by the regulator. The administrative trend of recent years appears to be one of encouraging regulatory agencies to broaden the definition of the public interest and to view their decisions less in terms of efficient regulation.

2. The criterion of openness

   Within a representative democracy there is a presumption that administrative processes which affect individual or public rights must be made open to all whose interests may be affected. In this case openness can be defined by the methods and procedures of providing representation for all parties of interest and of permitting those parties access to both staff and information resources in advance of a hearing to decide a matter. The legitimacy of an administrative decision is greatly determined by the degree to which it was made openly and with the effective participation of those affected.
3. **The criterion of clarity**

What is most relevant in defining this criteria is the degree to which the process details discreet procedures and actions to the appellant or other parties in advance and with clarity and precision. Knowledge of how the process works and why certain actions or decisions follow (and are themselves clearly stated and understandable) also contributes to the agency's legitimacy.

4. **The criterion of propriety**

Propriety in this context is taken to connotate accountability, predictability, stability and responsiveness in the undertaking of an administrative determination. Accountability implies the existence of some sort of formal reporting relationship to the legislature. The basis for this relationship is generally thought to be incumbent on the existence of standards provided by the legislature. Predictability relates to these standards and to the consistent application of procedures laid down in following them. One of the results of following such a pattern should be consistent decision-making and this should encourage not only a stable administrative environment but also a sense of security or confidence on the part of both the regulated and the general public. A final element to consider under this criterion is the degree to which the process is sensitive to a range of interests beyond the exclusive needs and requests of the regulated. Inclusion into the process of those affected both directly and indirectly by the regulations has become a matter of increasing public concern.

- 124 -
5. **The criterion of effectiveness**

Effectiveness in this context refers to the degree of success that the process has in achieving its regulatory objectives. This would seem to entail an evaluation of previously stated objectives of the tribunal system. This evaluation is, however, constrained because objectives are not always stated overtly and because the criterion implies the process should produce a measurable result. Aside from this not always being the case, this study is not a comprehensive one as it does not seek to analyze individual decision outcomes. To the extent to which the study is dependent on the discussion of decision outcomes data is based on the subjective views of various actors involved in the two administrative processes and the personal experiences of the author.

6. **The criterion of flexibility**

Flexibility is taken here to mean the systems' adaptability to change, when change refers to either the function, procedure or decision-making ability of the relevant process.

7. **The criterion of efficiency**

The efficiency of the administrative system should be assessable from both administrators' and participants' perspective. It should involve examination of the use of time and resources in achieving a final administrative decision.
8. The criterion of freedom from political interference

Increasingly the regulatory process is perceived to be a political one as it concerns the authoritative allocation of society's resources. It can be argued this occurrence is inappropriate, as it is commonly held those making political decisions must be able to be held accountable by virtue of their position as elected officials. This belief is tied to the notion that political choices are more appropriately reflected in statements of policy which are made by the legislature. Also of interest here is the closely held notion that the decision-maker in an adjudicatory process should be free from political influence by either the legislature or any participant in the process (i.e., the appellant, interested party, or civic staff).

It is, of course, understood that the normative criteria discussed above must now be "translated" into both measurable and comparable statements about the administrative processes under study. This operationalization is made possible by the development of a number of process indicators through which the two administrative systems can be comparatively evaluated. The development of these indicators is to a large degree based on the author's judgement, and therefore may be of limited use in precisely measuring the performance of the administrative bodies. However, it must be remembered that only by subjecting our decision-making bodies to such comparative questioning are the relative advantages and disadvantages of the processes clearly understood.
FOOTNOTES - CHAPTER III


4. F. Laux, 1975, p.3.


18. B. Schwartz and H. Wade, 1972, p.xii.


37. B. Schwartz and H. Wade, 1972, p.244.


40. B. Schwartz and H. Wade, 1972, p.112.


42. B. Schwartz and H. Wade, 1972, p.93.

43. W. Lane, 1975.

44. W. Lane, 1975, Chapter VIII, p.22, for further details on delegation.


47. B. Schwartz and H. Wade, 1972.


50. H. Wilson, 1972.

51. B. Schwartz and H. Wade, 1972, p.106.

52. B. Schwartz and H. Wade, 1972.


55. H. Wilson, 1972, p.122.


57. Vancouver Charter, Section 573(1)b. The Legislature was more helpful in the Municipal Act, (R.S.B.C.), Victoria: Queen's Printer, 1961, See Section 709(1)c.

58. B. Schwartz and H. Wade, 1972, p.86.


60. M. Gram, "The Vancouver City Board of Variance", (paper submitted for the requirement of Planning 525, UBC School of Community and Regional Planning), (Vancouver: March, 1981).


63. The Inquiries Act (1938) provided that reasons should be given when requested in certain circumstances.


CHAPTER IV
SYSTEMS EVALUATION

The purpose of this chapter is to draw some conclusions about the strengths and weaknesses of the two types of administrative systems examined in the previous chapter. It will then examine the suitability of a hearing examiner system for Vancouver. A number of process indicators are developed below to assist in the comparison of the two administrative systems. Indicators having relevance to more than one of the eight normative criteria developed have been arbitrarily assigned places.

4.1 DEFINING PROCESS INDICATORS

While any one of a number of ways could be chosen to operationalize the normative criteria developed, the method used here is to simply translate each criteria into a limited number of questions applicable to both administrative systems. This method of evaluation permits cutting to the heart of the administrative matter, and also tabulates much of the procedural and process information into comparative tables.

The first criterion, that an administrative system of land use control should be equitable in its application, can be evaluated as follows:

a) What procedures exist to ensure all interested parties are represented at the hearing?

b) What procedures exist to ensure all cases are heard in a similar manner?

c) What procedures exist to ensure the impartiality of the adjudicator(s)?
d) What procedures exist to compare, in open session, cases of similar circumstances?

e) Are reasons for decisions given in writing?

The second criterion, **openness**, can be evaluated as follows:

a) Is the hearing conducted in public?
b) Is provision made for all parties to have access to all information in advance of the hearing?
c) Are parties advised of subsequent avenues of judicial appeal and any pertinent requirements thereof?
d) Are records of the proceedings kept?

The third criterion, **clarity**, can similarly be evaluated as follows:

a) Is it clear to the appellant what has to be proven and what evidence is needed before a variance can be granted?
b) Is the hearing conducted in an understandable manner and without undue formality?

The fourth criterion, the **propriety** with which the determination is made, can be examined as follows:

a) Are meaningful standards provided by the legislature and, if provided, are these standards adhered to?
b) What is the effect of not adhering to the legislative standards?
c) Are the rights of the individual adequately protected?

The fifth criterion, administrative **effectiveness**, can be evaluated as follows:
a) To what degree does the administrative system meet the original objectives of zoning tribunals?

b) Does the cost of an appeal deter the appellant from using the administrative system?

c) Does the administrative procedure deter the appellant from pursuing an appeal on procedural grounds to a higher court?

d) Are the decisions of the appeal body rigorously enforced?

The criterion of **flexibility** can be assessed as follows:

a) Is the administrative system adaptable to other administrative responsibilities of the municipality?

b) Does the administrator have the ability to set procedure and vary its application as the situation warrants?

c) Can the degree of decision-making power be varied according to the type of case under consideration?

The seventh criterion, the degree of **efficiency** promoted by the process, can be measured by:

a) Is the decision-making power duplicated elsewhere?

b) What is the average length of time taken to process an appeal?

Lastly, the criterion of **freedom from political interference** can be measured as follows:

a) By what methods are decision-makers appointed to and removed from office?

b) Are administrative decisions reversible by any body other than the judiciary?

c) Are appeals made directly to decision-makers?
d) Are provisions made to eliminate ex parte communications from the proceedings?

4.2 COMPARATIVE EVALUATION USING SELECTED INDICATORS

EQUITABLE TREATMENT

a) What procedures exist to ensure all interested parties are represented at the hearing?

Under both systems of administration any interested or affected party may appeal a zoning question. The Vancouver system, however, does not formally provide for specific contact with broad based community groups. Furthermore, even though the Board has the power to canvass the adjacent neighbours this power is exercised with discretion both in terms of its frequency and geographical extent. The Seattle system, on the other hand, has formal provisions which require the administrator notify all neighbours within 300 feet, post placards near the site, and contact all parties of record, which includes community and other special interest groups. Both systems, of course, require the administrator to notify the appellant and relevant city staff about the hearing. However, each differs in their requirements to advertise in the newspaper a specific appeal. In Seattle, all cases considered are advertised, while in Vancouver public notice is given only "if the appeal is deemed by the Board of sufficient importance." ¹

When the above information is compared (see Table 1) it becomes evident the Seattle system goes to much greater lengths to involve all individuals or groups who may have an interest in a particular matter. Because of such efforts, the Seattle system comes closer to the normative ideal of representing all interests at the hearing than does the Vancouver system.
TABLE 1. COMPARATIVE REQUIREMENTS OF NOTICE

<table>
<thead>
<tr>
<th>Notice</th>
<th>SHE</th>
<th>VBV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertisement in periodical</td>
<td>M</td>
<td>NA</td>
</tr>
<tr>
<td>Advertisement in newspaper</td>
<td>M</td>
<td>D</td>
</tr>
<tr>
<td>Post site</td>
<td>M</td>
<td>NR</td>
</tr>
<tr>
<td>Notify adjacent neighbours</td>
<td>M</td>
<td>D</td>
</tr>
<tr>
<td>Notify community groups</td>
<td>M</td>
<td>D</td>
</tr>
</tbody>
</table>

**Key**

- **M** = Mandatory
- **D** = Discretionary
- **NR** = Not Required
- **NA** = Not Applicable

b) **What procedures exist to ensure all cases are heard in a similar manner?**

Observation of the proceedings of both the VBV and the SHE indicate each consistently follows a similar format regardless of the case in question. The fundamental difference, however, is found in the degree to which the American system codifies (in great detail) the proceedings of the Examiner's hearing. This becomes evident when the SHE wording that establishes the rules governing public hearings is compared to the VBV wording, which merely requires "proceedings at the hearing shall be informal" and permits the Board to "determine its own procedure". To the extent to which the lack of formal provision defining proceedings before the adjudicator hampers the understanding of the expectations the "court" places upon the appellant (and any other party), the Examiner system should be considered as closer to the normative criteria of providing equal treatment to all interests.

c) **What procedures exist to ensure the impartiality of the adjudication?**

Under the VBV system the legislative requirement that no Board member serve on an Advisory Planning Commission or as a municipal
officer, either elected or appointed, attempts to ensure impartiality. The lack of other explicit direction given the VBV regarding its duty to conduct fair and impartial hearings is consistent with the British model of administration and should not be understood taken to mean the Board has licence to act in any manner it chooses. Clearly, it does not, as the courts would intervene if the Board acted with procedural impropriety. This deterrent, however, has not prevented the Secretary of the Board from accompanying the members on their site inspection tour, even though he is an employee of one of the parties involved in a contested matter and the same opportunity to speak to the Board alone is not afforded the other parties. While this does not seem to contribute to the sense of impartiality the Board should convey, what is perhaps of greater importance in establishing this impartiality is the method by which Board membership is actually determined. This is discussed fully in the section on "political interference" which follows later in this chapter.

Regarding the SHE procedures for impartiality, these appear to derive from the belief in the due process of law and from the basic skepticism Americans seem to share that government officials will use their powers in an incorrect manner without explicit guidance or direction. To the extent that explicit notation can determine individual behavior in advance and avoid or prevent wrongful behavior, whether it be done unintentionally or not, the more closely the SHE system reflects the normative model. That, however, does not necessarily mean either the normative model or the hearing examiner system are appropriate for the Vancouver setting. This is discussed further in the concluding section of this chapter.
d) What procedures exist to compare, in open session, cases of similar circumstances?

Under the VBV system no procedures exist to ensure the Board at least considers cases of a similar nature that have gone before it. One attitude seems to illustrate the argument against having the Board consider precedence: "An amateur tribunal surely should not be the victim of it's own mistakes through some Nineteenth Century fetish for precedence and supposed predictability". This lack of provision is found to be consistent with the notion that the main purpose of the Board of Variance is to grant exceptions to the general rule under changing conditions and therefore strict adherence to precedence renders the Board ineffective. It was observed, however, that precedence plays an informal role in the VBV system, as both the Chairman and Secretary have long experience with which to compare matters coming before the Board.

The SHE system presents, as might be expected, an opposite view. Procedures there require the Examiner, in the content of his decision, to reach conclusions of law referenced with reasons and precedents whenever practical. The precedent requirement clearly belies the belief that without such consideration the pattern of decision-making may become inconsistent, with the resultant loss of public confidence. It has been noted that the use of precedence does not rule out flexibility in decision-making because, as no two situations are exactly alike, an adjudicator is not unduely confined by previous decisions.

In observation of the Seattle Examiner system it has been the author's experience that adherence to precedent is little used in
simple variance cases. The provision however to make reference to past cases appears to be a useful means of examining similar cases prior to ruling on a case-at-hand. In view of the inability or unwillingness to provide the adjudicatory body with detailed standards to judge the merits of a case, it seems that some formal recognition of the treatment of past similar cases would be extremely useful in meeting the normative criterion of equitable treatment and in reducing the potential danger that the rule of man replaces the rule of law.

e) Are reasons for decisions given in writing?

The methods followed in composing and communicating an adjudicated decision differ greatly as Table 2 illustrates. Following the

<table>
<thead>
<tr>
<th>SYSTEM</th>
<th>DECISION COMPONENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Statement of Finding</td>
</tr>
<tr>
<td>VBV</td>
<td>Not required</td>
</tr>
<tr>
<td></td>
<td>Oral</td>
</tr>
<tr>
<td>SHE</td>
<td>Required</td>
</tr>
<tr>
<td></td>
<td>Written</td>
</tr>
</tbody>
</table>

VBV system it becomes obvious that greater opportunity exists for the adjudicator to abuse not only the rights of those who come before him, but also to abuse the power given the Board and to erode public confidence in the zoning by-law. Perhaps in recognition of just such problems it has been observed that individual members of
the Vancouver Board will often give a verbal explanation as to their reasoning behind their individual decision. The member is, however, under no obligation to do so and in fact may be better off stating nothing as, if no reasons are offered, no one can challenge them. This procedural defect is well illustrated by Justice Smith of the Supreme Court of Michigan in *Tireman-Joy-Improvement Association v. Chernick*:

"What, in truth was the warrant for the Board's action? We are not told. The Board says we do not have to be told.

"Thus, under the Board's argument, the citizen gets it going and coming. Were the legislative standards followed by the Board? There are no specific standards to be followed. What, then, are the reasons for the Board's finding the broad standard of 'unnecessary hardship' to be satisfied? No one knows. No reasons are given. In other words it boils down to this: there is unnecessary hardship because there is unnecessary hardship, and, because there is unnecessary hardship, the standard (of unnecessary hardship) is satisfied.

"Thus by mumbling an incantation the bureaucrat forecloses effective judicial review. What is there, for example, in the case before us, to review? After all, unnecessary hardship obviously is unnecessary hardship. Such was the factual determination. The legal determination is equally simple: The statute requires merely a case of unnecessary hardship. We found it, says the Board. Q.E.D." 9

It becomes evident that such situations are tolerated in Canada because of the limited recognition of the rules of natural justice and the limited powers of review given our court system. The failure to provide reasons in writing for decisions should be viewed as significantly divergent from the normative criterion. The fact that this situation exists in Vancouver may well just be an anomaly in the zoning world as many local boards in other Canadian jurisdictions

- 140 -
require written reasons to accompany decisions taken. This, however, cannot be verified as part of this work.

OPENNESS

a) **Is the hearing conducted in public?**

In both systems a required hearing is conducted in public\(^{10}\) and, for most types of appeals\(^{11}\) any interested or affected party may initiate the action. This is entirely in keeping with the normative ideal.

b) **Do all parties have access to all information in advance?**

Again, the informal nature of the Board precludes procedural steps such as pre-hearing conferences and informational requests which are more normally found in a legal setting and are within the procedures provided for use by the SHE. Ideally, everyone should have the same opportunity to gather information and to know in advance the case to be proven. The American system is much closer to these ideals than is the Vancouver tribunal system, as Table 3 illustrates.

What is not evident in Table 3, but what is observable in the Vancouver system, is the fact that the appellant is at a distinct disadvantage in knowing information pertaining to the case in advance. Conversation between the Secretary and the Board while on site inspections remains unreported, as does the conversation held prior to the bi-weekly meeting between the Secretary and the Chairman. In both instances the conversations discuss the case at hand without all parties present. Furthermore, unless the appellant is exceedingly knowledgeable about the development permit process he is unlikely to know enough to request copies of minutes of various
staff meetings in which the project was discussed. These factors are not representative of the normative criteria.

**TABLE 3. INFORMATION AVAILABILITY**

<table>
<thead>
<tr>
<th>Information Criteria</th>
<th>Vancouver Board of Variance</th>
<th>Seattle Hearing Examiner</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Pre-hearing conference</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>* Information requests (discovery)</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>* Availability of staff reports, records</td>
<td>Partial</td>
<td>Yes</td>
</tr>
</tbody>
</table>

c) Are parties advised of subsequent avenues of judicial appeal and any pertinent requirements thereof?

Current VBV procedure does not advise appellants of further recourse should their appeal fail. In fact, the failure to provide a detailed written or electronic record of the proceedings and the reasons for a specific decision normally precludes subsequent appeal to the judiciary. Under the existing system judicial appeal information is not made available to the appellant and as a result, even if the Canadian court was willing to substitute its opinion for that of the local boards', it could not. Grounds for judicial appeal remain confined almost entirely to points of law.

Alternatively, the SHE procedures are such that an electronic recording is available for transcription upon request and further legal requirements and actions are detailed as the last items of the Examiner's written decision which is sent to all parties of record.

d) Are records of the proceedings kept?

In both systems permanent records of appeals are kept, the
content of which have already been discussed in Chapter II. As mentioned earlier, the SHE system electronically records all hearings and this record becomes part of the file. As well, the SHE system provides a more complete record of the hearing than does the VBV system and is therefore closer to the normative model as it is better able to recall the procedure and substance of the particular case and provide a better understanding of the decision for reference in the future.

CLARITY

a) Is it clear to the appellant what has to be proven and what evidence is needed before a variance can be granted?

The VBV system makes no specific mention of where the burden of proof lies in any particular proceeding, rather, it is incumbent upon the appellant to realize what has to be proven and who has to prove it. Although it may be apparent to most, it has been the author's observation that several parties appearing before the Board were unaware of what was expected of them and of the case they had to prove. The situation is especially noticeable in cases involving owners of single family dwellings who appear without legal representation appealing a refusal to relax a specific bulk regulation. Such cases are numerous before the Board and the appellant can often be recognized as someone not exceedingly familiar with either the legal system or the zoning regulations and can be frequently identified as being of recent immigrant status.

In the above circumstances, the omission of the burden of proof is unfortunate, as it is difficult to understand how justice can be met with consistency and fairness when decisions must be based on the casual and ill informed comments of an unsophisticated appellant.
who often seems not to know the significance of what has been said or admitted to. While the role of the Board is not adversarial towards the appellant, the candor of the appellant's comments has the potential to either influence detrimentally the final decision, or to encourage the Board to assume the role of a court of petit equity and ignore the rules of law provided it.

In addition, while both systems provide the administrative body the opportunity to clarify the nature of the appeal upon submission, the Seattle system permits any interested party to seek this clarification. This approach is consistent with the American judicial approach, while the Vancouver system only provides for the Secretary and the Board to undertake this task.

With regard to the second part of the question concerning clarity, the evidence needed is determined by the legislative standards provided. Under the Vancouver system, these standards do not appear on the "Notice of Appeal" form, therefore it is the responsibility of the appellant to seek them out or lay the basis of the case without knowing the conditions under which the appeal might be granted. In the Seattle system, information regarding the appeal procedure is much more readily available, appearing in both the City Ordinance and the widely distributed pamphlet "Procedures of the Hearing Examiner". Clearly, the VBV system falls short of the normative criteria by promoting continuation of the "court of petit equity" syndrome and the abuse of the standards provided to guide the discretionary decision-making of the Board.

The Examiner system, on the other hand, makes discreet statements about where the burden of proof lies and the grounds upon - 144 -
which a variance can be granted. This enables those appealing to have prior knowledge of their responsibilities at the hearing. It may also serve to increase the legitimacy of the variance process by illustrating the proper grounds for appeal and reducing the emotionalism often inherent in these hearings. To the extent the clarity of the SHE system accomplishes this purpose it should be considered closer to the ideal situation than is enabled under the VBV system.

b) Is the hearing conducted in an understandable manner and without undue formality?

While both systems follow much the same hearing format, the SHE system makes written notation of its format and thus advises the parties more thoroughly of what is forthcoming at the hearing in advance. In observing both systems the main difference in format concerns the taking of oath. While the VBV has the authority to administer oaths but seldom exercises it, all testimony before the SHE is taken under oath. This element of the process seems to contradict other directions given to the Examiner regarding conducting informal hearings as well as being in opposition to the established normative criteria.

The language used at the hearings is generally dependent on the use of professional jargon and technical definition. Both systems suffer this, and to a degree it can be expected this dependency causes a lack of understanding not only on the part of the appellant or other party, but on the part of Board members themselves who may not clearly understand the staff position. Under the SHE system this dependency is perhaps even increased because of the more judicial nature of the hearing and the potential to inter-mix both
legal and planning jargon. To the extent the VBV procedures and language permit the hearing to be conducted in an understandable and informal manner, this system is considered closer to the normative model presented here.

**PROPRIETY**

a) Are meaningful standards provided by the legislature, and if provided, are these standards adhered to?

The standards provided by Section 573(2) of the Vancouver Charter owe their origins to the period of rigid Euclidean zoning discussed in Chapter II. As such, these standards fail to provide a dynamic framework in which the variance, always a tool of flexibility, would be able to maintain a meaningful role in Vancouver's discretionary system of zoning. The result has been the failure of the variance mechanism to adequately reflect changes that have occurred in building materials and technology and in societal preferences in general over the past 50 years. This happenstance must be viewed with more than a raised eyebrow, especially in light of the legislature's willingness to grant discretionary power to professional planning staff.

The end result has been to create a sophisticated administrative system controlled by an appointed board of laymen who have only narrow antiquated standards provided them with which to provide relief to the appellant. Understandably this situation tempts the Board in many cases to ignore the standards provided it and to rely on its own experiences in reaching a decision. In short, at the professional level discretionary power is harnessed by legislative standards directing staff to take specific actions before arriving...
at a decision. Once taken, this decision is then subject to possible appeal to a lay board which may operate on a set of ad-hoc and unstated standards it has developed on its own. These standards are derived according only to its own predilections, as the standards that have been provided have proven to be either too confining or irrelevant to current appeals for variance. This situation is fostered by the legislature's failure to require the Board to give reasons in writing for its decisions. It is substantiated by statements made by Planning Department staff to the effect that if the VBV adhered to the standards provided, it would have to refuse nearly 90% of the cases coming before it.14

Under the Seattle system the situation is greatly improved. As explained earlier, judicial review plays a much larger role in land use matters in the United States. Recent court rulings in Washington have resulted in the implementation of more detailed procedural requirements and the refinement of the legislative standards pertaining to the hearings and decisions of the Examiner. The relevancy of and adherence to the standards provided seems more assured in the American system. This is because it depends on continual review by both legislative and judicial bodies and because decisions are required to be reasoned and in writing. The Seattle situation therefore appears to be more closely related to the normative criteria than does the Vancouver system.

b) What is the effect of not adhering to the legislative standards provided?

The substantive result of the VBV not adhering to the standards provided is that the VBV not only decides cases it has no business
hearing ('use' cases for example), but it also adopts the role of a policy formulating body for zoning matter. In this role the Board has potential to both generate new policies and damage the confidence in existing policies determined by the legislature. A recent example will clarify the point.

In March 1980, City Council established policy to permit single family development on so-called "thin lots" (lots less than 25 feet in width) located in RS-1 zones but at a reduced floor space ratio and site coverage allowance. These lots are for the most part located on the upper middle-class, large lot westside of Vancouver.

Subsequently, a Development Permit (No. 86254) was issued by the Director of Planning for development of a 17 foot lot at 4517 West 13th Avenue. This decision was appealed to the VBV (Appeal No. 21935) by four separate neighbouring property owners and after consideration the Board decided to allow the appeal, thereby quashing the issuance of the permit. The permit applicants then appealed the Board's decision to the Supreme Court of B.C. (No. A802083; Vancouver Registry) requesting that the Board's decision be set aside.

The example serves to illustrate two points:

(i) conventional political thought and selected normative criteria dictate the legislature as the appropriate policy making body of government as they, unlike the VBV, are directly accountable for their actions through the ballot-box, and
(ii) the VBV can, with impunity, overrule policy established by City Council and can do so without establishing a record to show legislative standards were even discussed or providing reasons why such an appeal was ever granted.

The disadvantage of investing unaccountable bodies with the power to over-rule legislative dictates is compounded in that the VBV not only damages the Council's credibility; it also undermines both the public's and the Council's confidence in Planning Department staff. This in turn brings into question the ability of the Zoning and Development By-law to control development.

This situation is less likely to be tolerated in the American system where the Examiner, because of the necessity to give reasons for decisions, would have to follow established policy unless conditions were such that the appeal met the legislative standards for a variance. In this regard the SHE system is closer to the normative ideal as it has less potential to become a forum for the exertion of political influence. It is, therefore, better able to serve its true purpose - to provide variance in unique physical circumstances. Relegation of emotional appeal from the variance process is thought entirely appropriate, as the local council chamber is the correct place for such an appeal.

c) Are the rights of the individual adequately protected?

Both formal and informal provision for the individual's rights are made in the procedures established for these systems. The extent to which these rights are protected and provided for in the procedures is reflective of the two different forms of government found in the respective countries. Table 4 illustrates these
differences and indicates the extent to which codification is used to ensure the individual's rights are observed in administrative matters in the SHE system. Such care is not evident, at least

TABLE 4. PROTECTION AFFORDED THE RIGHTS OF THE INDIVIDUAL BY SYSTEM

<table>
<thead>
<tr>
<th>Individuals' Right</th>
<th>VBV</th>
<th>SHE</th>
</tr>
</thead>
<tbody>
<tr>
<td>* notice</td>
<td>FP</td>
<td>FP</td>
</tr>
<tr>
<td>* know case in advance</td>
<td>IP</td>
<td>FP</td>
</tr>
<tr>
<td>* present evidence</td>
<td>IP</td>
<td>FP</td>
</tr>
<tr>
<td>* obtain postponement or adjournment</td>
<td>FP</td>
<td>FP</td>
</tr>
<tr>
<td>* cross-examine</td>
<td>IP</td>
<td>FP</td>
</tr>
<tr>
<td>* objection</td>
<td>IP</td>
<td>FP</td>
</tr>
<tr>
<td>* motion</td>
<td>NP</td>
<td>FP</td>
</tr>
<tr>
<td>* argument</td>
<td>IP</td>
<td>FP</td>
</tr>
<tr>
<td>* represented by counsel</td>
<td>FP</td>
<td>FP</td>
</tr>
</tbody>
</table>

**KEY**

FP = Formal Provision Made For Right
IP = Informal Provision Made For Right
NO = No Provision Made For Right

upon first inspection, with the VBV system. However, it is recalled that all the rules of natural justice need not be explicitly mentioned before they have application to a case, then it can be seen that the Canadian judiciary attempts to give the appellant the same protection as the SHE system. The Vancouver system is perhaps less successful in this regard simply because appellants before the Vancouver Board are generally less knowledgeable of their rights prior to the hearing, and because the Board makes less effort to advise them of their rights than does the Seattle Examiner. To the extent that explicit detail can ensure the propriety of the hearing the SHE system is considered closer to the normative model.
EFFECTIVENESS

a) To what degree does the administrative system meet the stated objectives of zoning tribunals?

Table 5 attempts to recall from earlier chapters the stated objectives in providing an appeal mechanism for administrative land use decisions. Examination of this table indicates the VBV system is more effective than the SHE system in providing decisions quickly, avoiding the arbitrary use of police power; and reducing the need to continually amend the zoning by-law. The SHE system, on the other hand, attempts to provide an adjudicator with specific qualifications for the position and has formal provisions for judicial-like procedures designed to protect the rights of the individual. It also includes procedures to ensure a complete record is provided, thereby promoting confidence in the decision itself and the by-law in general.

<table>
<thead>
<tr>
<th>Stated Objective</th>
<th>Existing System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide expertise in technical matter.</td>
<td>Poor</td>
</tr>
<tr>
<td>Provide informal procedures.</td>
<td>Good</td>
</tr>
<tr>
<td>Render decision quickly.</td>
<td>Fair</td>
</tr>
<tr>
<td>Provide decision cheaply.</td>
<td>Good</td>
</tr>
<tr>
<td>Avoid arbitrary use of police power.</td>
<td>Good</td>
</tr>
<tr>
<td>Safeguard rights of property owner.</td>
<td>Fair</td>
</tr>
<tr>
<td>Reduce need for court review if zoning matters.</td>
<td>Fair</td>
</tr>
<tr>
<td>Provide detailed record for court review.</td>
<td>Poor</td>
</tr>
<tr>
<td>Preserve confidence in by-law.</td>
<td>Poor</td>
</tr>
<tr>
<td>Forestall continual amendment of by-law.</td>
<td>Good</td>
</tr>
</tbody>
</table>

TABLE 5. STATED OBJECTIVES OF APPEAL MECHANISM COMPARED TO EXISTING SYSTEMS.
It is evident that when all factors are considered, both systems are capable of providing appeal decisions relatively cheaply. This notion is discussed further as a separate indicator of administrative effectiveness.

b) **Does the cost of an appeal deter the appellant from using the administrative system?**

Neither system should deter the appellant from filing an appeal as the fee charged is a minimal $25 in the VBV case and either $12 or $30, dependent on the type of appeal, under the SHE system.

These figures, however, should be viewed with some caution as neither represent the ultimate cost of appeal to the appellant. A closer approximation of this cost in the Vancouver system can be derived from adding the cost of a development permit (minimum $40), appealing the refused DPA ($25); and, if desired, hiring legal representation. Under the Seattle system a truer cost of appeal is derived by adding the cost of legal services to the filing fee. However, it should be noted that in relatively simple variance cases even in Seattle, appellants still often appear without counsel to represent them. Staff costs in each system, while a component in determining the cost to the appellant, are for the purposes of this investigation considered equal all monetary factors considered.

c) **Does the administrative procedure prevent the appellant from pursuing an appeal on procedural grounds to a higher court?**

While neither system effectively prevents appeal to a superior decision-making level, the VBV limits this appeal by restricting that review to an examination for procedural wrong-doing rather than to the resolution of substantive differences of opinion between the
Director of Planning or Development Permit Board and the Board of Variance. Appeal of the VBV decision is further hampered by the failure to record electronically the hearing and by the Canadian courts' traditional reluctance to substitute its opinion on a substantive matter for that of a so-called expert body. Under the SHE system such restrictions do not occur. Subsequent appeal is facilitated by the electronic recording of the hearing, the requirement of written reasons, and the more reform oriented nature of the American judiciary.

d) Are the decisions of the appeal body rigorously enforced?

Enforcement of the decisions taken by either appeal body falls to personnel in other civic departments. In Vancouver, enforcement is the responsibility of the Permits and Licence Department, while in Seattle this is the Building Department's responsibility. In neither system did investigation indicate enforcement of the appellate decision was any more of a problem than enforcing any other kind of civic regulatory decision. Furthermore, in neither case was enforcement so lax as to threaten the credibility of the decision-making authority.

FLEXIBILITY

a) Is the administrative system adaptable to other administrative responsibilities of the municipality?

Current legislation limits the jurisdiction of the VBV to those functions described earlier. There seems, however, little to prevent the legislature from delegating other areas of its regulatory responsibilities to the Board in much the same manner as the Seattle Council has done with the examiner system.
As membership qualifications to the Board are not specified there is presumably little to prevent Council from adding to the Board's zoning responsibilities and converting the VBV to a wider hearing body for many of its numerous regulatory functions. In taking such action some consolidation of administrative functions may be enabled. The multi-jurisdictional nature of the SHE system has already been detailed elsewhere.

b) Does the administrator have the ability to set procedure and vary its application as the situation warrants?

The flexibility in terms of each system's ability to set and vary procedure is indicated in Table 6. It should be noted that while the Seattle Council provides discreet steps to the flexibility given the Examiner, Vancouver's Council gives the Board virtually free reign in determining its own procedures at the hearing. While there is nothing inherently incorrect with the Vancouver method, the legislature's failure to detail discreet procedural steps permits legal or moral abuse in the Board's deliberations. The Examiner's method is more likely to prevent such abuse and is therefore closer to the normative ideal. Furthermore, within reason, the VBV system has the ability to modify its procedures itself and may do so at its convenience. Table 6 does not account for that possibility.
TABLE 6. COMPARATIVE POWERS TO SET AND VARY PROCEDURES

<table>
<thead>
<tr>
<th>Procedural Step</th>
<th>Administrative System</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VBV</td>
</tr>
<tr>
<td>- Seek clarification of case</td>
<td>Yes</td>
</tr>
<tr>
<td>- Permit testimony from non-parties</td>
<td>Yes</td>
</tr>
<tr>
<td>- Administer oaths</td>
<td>Yes*</td>
</tr>
<tr>
<td>- Issue subpoena</td>
<td>No</td>
</tr>
<tr>
<td>- Rule on relevancy of proof offered</td>
<td>No</td>
</tr>
<tr>
<td>- Receive evidence</td>
<td>Yes</td>
</tr>
<tr>
<td>- Regulate proceedings/conduct</td>
<td>Yes</td>
</tr>
<tr>
<td>- Hold settlement conference</td>
<td>No</td>
</tr>
<tr>
<td>- Set time limits</td>
<td>No</td>
</tr>
<tr>
<td>- Render decision at hearing or adjourn</td>
<td>Yes</td>
</tr>
</tbody>
</table>

* Available but seldom used.
** All testimony must be taken under oath.

c) Can the degree of decision-making power be varied according to the type of case under consideration?

Under the Vancouver system the Board's only role is to act as the final decision-maker for all cases which come before it, regardless of case type. The Seattle system, however, has added another function to its administrative appeal mechanism with the result that the Examiner has become the instrument through which Council holds the majority of its public hearings - even on legislative matters. Table 6 illustrates this dual role quite clearly, with the result that the Examiner hears a much wider range of cases than does the Board.
TABLE 7. SPECTRUM OF POWER BY CASE TYPE

<table>
<thead>
<tr>
<th>POWER</th>
<th>Comprehensive Plan</th>
<th>Zoning Change</th>
<th>Comprehensive Development/Planned Unit Development</th>
<th>Single Property Reclassification</th>
<th>Council Conditional Use</th>
<th>Administrative Conditional Use</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>VBV</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>F</td>
<td>F</td>
<td>F</td>
</tr>
<tr>
<td>SHE</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>F</td>
<td>F</td>
</tr>
</tbody>
</table>

Key: F = Final Decision  
R = Recommendation to Decision-Maker  
n/a = Not Applicable

In comparing the decision-making power of the two systems it should be noted that each has the power to directly grant, grant under condition, or deny appeals of an administrative nature. In cases of a quasi-judicial or legislative nature the Board has no authority, while the Examiner is authorized only to conduct the hearing and make a recommendation to the legislative body in such cases.

EFFICIENCY

a) Is the decision-making power duplicated elsewhere?

The power of VBV is not duplicated elsewhere. Any appeal of a VBV decision is made to the provincial supreme court, based on grounds of procedural rather than substantive defect and therefore cannot truly be considered as a trial "de novo".

- 156 -
This is in contrast to the SHE system where controversial decisions are in effect appealed "de novo" to a board of variance (adjustment) and subsequently appealed to a court of law after that. This situation appears to be an anomaly of the Seattle administration and does not reflect the situation in other jurisdictions using the examiner system where appeals of his decisions may be made to council or the courts directly. The Seattle situation, therefore, falls short of the normative criteria of efficiency and equity as double decision-making and abuse of the system by the appellants, their lawyers and even the board members themselves, is enabled. A somewhat similar type of abuse is evident in the VBV system where the Planning Department has been observed to act quite differently towards an appeal it is favourably disposed to but has lacked the authority to approve without the consent of the Board, than it will towards an appeal it has substantial objections to. While this is perhaps understandable, it does, however, encourage the Board to treat different appellants differently and thus countervenes the behaviour promoted by the normative model presented.

b) What is the average length of time taken to process a simple variance appeal?

Table 8 compares relative lengths of time taken to obtain administrative decisions for variance appeals. For illustrative purposes a system of processing variances using the examiner system but eliminating the further appeal to a board of adjustment (variance) is also presented. In both examiner systems a variance application may be made directly to the appellate body without first having to obtain an administrative staff decision. This is in
# TABLE 8. COMPARISON OF OPTIMUM TIMES FOR SYSTEMS TO PROCESS VARIANCES

<table>
<thead>
<tr>
<th>SYSTEM</th>
<th>VANCOUVER</th>
<th>SEATTLE</th>
<th>EXAMINER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Department decision, Appeal to Board</td>
<td>Notice of application, H.E. decision, Appeal to Board</td>
<td>Notice of application, Dept. decision, Appeal to H.E.</td>
</tr>
<tr>
<td>1. Application received</td>
<td>Days 0</td>
<td>Days 0</td>
<td>Days 0</td>
</tr>
<tr>
<td>2. Time to verify, screen application, publish and mail notice.</td>
<td>X days 14</td>
<td>X days 30</td>
<td>X days 14</td>
</tr>
<tr>
<td>3. Notification/comment period.</td>
<td>X days 1</td>
<td>X days 30</td>
<td>X days 14</td>
</tr>
<tr>
<td>4. Recommendation available</td>
<td>X Yes</td>
<td>X Yes</td>
<td>X</td>
</tr>
<tr>
<td>5. Hearing held</td>
<td>X Yes</td>
<td>X Yes</td>
<td>X</td>
</tr>
<tr>
<td>6. Decision making period</td>
<td>X days 14</td>
<td>X days 14</td>
<td>X days 10</td>
</tr>
<tr>
<td>7. Initial decision rendered SUB TOTAL:</td>
<td>28 days (Dept. decision)</td>
<td>58 days (Examiner decision)</td>
<td>38 days (Dept. decision)</td>
</tr>
<tr>
<td>8. Appeal period</td>
<td>15 days</td>
<td>17 days</td>
<td>14 days</td>
</tr>
<tr>
<td>9. Final decision if not appealed SUB TOTAL:</td>
<td>43 days</td>
<td>75 days</td>
<td>52 days</td>
</tr>
<tr>
<td>10. Appeal hearing scheduled, notice mailed</td>
<td>21 days</td>
<td>21 days</td>
<td>5 days</td>
</tr>
<tr>
<td>11. Notification period</td>
<td>X days 14</td>
<td>X days 14</td>
<td>X days 14</td>
</tr>
<tr>
<td>12. Appeal hearing SUB TOTAL:</td>
<td>64 days</td>
<td>110 days</td>
<td>71 days</td>
</tr>
<tr>
<td>13. Notification</td>
<td>X days 2</td>
<td>X days 2</td>
<td>X days 14</td>
</tr>
<tr>
<td>14. Decision-making period</td>
<td>X days 3</td>
<td>X days 3</td>
<td>X days 14</td>
</tr>
<tr>
<td>15. Final administrative decision if appealed TOTAL:</td>
<td>64 days</td>
<td>110 days</td>
<td>85 days</td>
</tr>
</tbody>
</table>

**KEY:**
- Dept. decision - Planning Department decision
- H.E. - Hearing Examiner
- Board - Board of Variance (Adjustment)
- Notice - Public notice mailed to properties, published in newspapers, etc.

- $X^1$ - In conditional use Development Permit Applications notification may add 14 days minimum to the process.

- $X^2$ - The Board may decide to notify and this may add an additional 14 days minimum to the process.

- $X^3$ - Neither the Vancouver or Seattle Board is required to make decisions at the hearing, a decision may be laid over to a subsequent meeting thereby adding minimum 14 days to process.
contrast to the Vancouver system where a variance cannot be applied for until a decision is taken on a development permit by the Director of Planning or the DP Board.

As can be seen in Table 8, the VBV is the most efficient of the three systems compared in terms of time required to reach a decision. The comparative example, however, uses the simplest of variance cases and assumes only a minimum of staff time in processing the application or appeal. In more complex cases where both the Planning Department and the Board wish to notify and the appeal decision is laid over, the actual processing time for a variance can be stretched to 106 days or longer. This is comparable to Seattle's existing Examiner-Board combination which really provides two separate hearing opportunities.

FREEDOM FROM POLITICAL INTERFERENCE

a) By what methods are decision-makers appointed to and removed from office?

Membership to the VBV is determined by the provincial cabinet, through the Lieutenant-Governor in Council, and the Council. Each legislature appoints two members and the chairman is appointed by a majority of the other members. Each member holds office for a three year term, with re-appointment for an unlimited number of successive terms a possibility. Removal from office is provided for but only to the extent of specifying the replacement be selected in the same manner as was his predecessor. The failure of the legislature to establish in writing the reasons or conditions under which a member could be replaced results in the inability of the Board to establish its independence from either legislature. This is perhaps done
purposefully as a reminder to the Board of its vulnerability to the
displeasure of the local Council or the provincial Cabinet.

The SHE system, on the other hand, is completely independent of
either the local or state legislatures with the exception that
appointment of the examiner is the responsibility of the Council.
However, once appointed the examiner enjoys a degree of independence
much akin to that of a true judicial appointment. Given that arms
length independence is considered desirable, the SHE system then seems
better able to meet the normative criteria than does the VBV system.

b) Are administrative decisions reversible by bodies
other than the judiciary?

Matters which come before the VBV are the subject of limited
judicial review, however no other body, either legislative or
administrative, may alter or set aside its decisions. This differs
from the SHE system quite significantly. Under that system final
decisions of the Examiner are appealable to the Board of Variance.
In cases where the Examiner only recommends a course of action
to the legislature, the recommendation need not be followed as long
as reasons for the divergence are explained in writing. Table 9
indicates the frequency with which the Seattle Board of Adjustment
(Variance) overturned the decisions of the Hearing Examiner. Of
particular interest is the increase in the number of cases in which
the Board overturned the recommendation of the Department and the
decision of the Examiner in the two year period. In addition, other
decisions were also reversed, as two of the four Board decisions
appealed to the Washington Superior Court were quashed during the
same period. Table 9 also indicates that of those cases appealing
### TABLE 9. SEATTLE BOARD OF ADJUSTMENT DECISIONS

<table>
<thead>
<tr>
<th>Board of Adjustment Decision</th>
<th>1977 (%)</th>
<th>1978 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>114 = 100%</td>
<td>115 = 100%</td>
</tr>
<tr>
<td>Agreed with DCD and Examiner</td>
<td>64 (56%)</td>
<td>46 (40%)</td>
</tr>
<tr>
<td>Agreed with Examiner only</td>
<td>17 (15%)</td>
<td>17 (15%)</td>
</tr>
<tr>
<td>Agreed with DCD only</td>
<td>16 (14%)</td>
<td>21 (18%)</td>
</tr>
<tr>
<td>Did not agree with DCD or Examiner</td>
<td>12 (10%)</td>
<td>27 (23%)</td>
</tr>
<tr>
<td>Action dismissed, withdrawn, etc.</td>
<td>5 (4%)</td>
<td>4 (3%)</td>
</tr>
</tbody>
</table>

The decision of the Examiner (approximately 20% of the total cases heard by the examiner) the Board overturned between 29-37% of them. This duality of decision-making is not representative of the normative criteria and seems to indicate either the Seattle Board's unwillingness to remain within the legislative standards provided it, or of the manipulative advantage some participants take of a system incorporating two quasi-judicial hearings.

c) **Are appeals made directly to the decision-makers?**

In both systems it is the decision-maker who holds the hearing and makes the decision about the appeal. However, under the Seattle system the Examiner also has the responsibility of conducting hearings of a legislative nature in which the final decision is taken by the Council. This decision is based on the record established at the Examiner's hearing, and only after consideration of the Examiner's recommendation. This arrangement has caused some concern that the Examiner system provides the politicians a shield behind which to hide when making contentious land use decisions.

- 161 -
d) Are provisions made to eliminate ex parte communications from the proceedings?

Procedures established for or by the VBV make no explicit attempt to limit ex parte communication. Failure to limit this communication has not meant approval for one party to discuss the merits of a case without all other parties present, as this action would be subject to judicial review under the rules of natural justice. On the face of this matter such protection may seem entirely adequate to ensure all parties are treated equally. This in fact has been found not to be so as the Board system permits ex parte communication between the Secretary and the Board as already noted.

On the other hand, the SHE makes a specific attempt to discourage ex parte communication with the Examiner concerning the merits of a case and directs him to disclose for the record any prohibited communication should it occur.\textsuperscript{20} Provision is also made for the Examiner to disqualify himself, and for any party to file an affidavit stating that a fair and impartial hearing is not possible should the personal bias or prejudices of the Examiner be felt to interfere with his judgment.\textsuperscript{21}

While it is realized that the mere inclusion of appropriate wording in the by-law cannot guarantee the elimination of ex parte communications taking place, to the extent that such wording would assist in this elimination, the closer the SHE system is to the normative model.

This concludes the comparative analysis of the procedures established by the two administrative models. The next section - 162 -
discusses the types of cases each system decides upon.

4.3 DECISIONAL PROBLEM INDICATORS

Throughout the previous two chapters many of the traditional shortcomings of the board of variance and the hearing examiner have been discussed but without making specific reference to the types of cases each contends with. Such an examination is now appropriate in order to become familiar with both the types of cases and the degree of decision deviation indicated when comparing final administrative and departmental decisions or recommendations. This study will not enable the assessment of the quality of the decisions taken, however it should provide some explanation for the concerns expressed elsewhere about the operation of these systems.

4.3.1 Limitations

Certain factors operate to reduce the opportunity to provide compatible information with which to directly compare the two administrative systems. These limitations stem from the different operating procedures and statistical data gathering techniques employed by each system. Both time and cost constraints have precluded the establishment of a directly compatible data base for this part of the investigation, however sufficient common information is available to enable some preliminary conclusions to be drawn about the problems the appeal bodies decisions may cause. Wherever appropriate the limitations of the data have been noted.
4.3.2 Decisions Considered

Table 10 illustrates both the type and number of appeals to come before the Vancouver Board in the period 1977-80. During this time the VBV considered 11 appeals from decisions of the Development Permit Board. Although final decisions were not researched for this thesis, it may be speculated that if all these appeals were granted, upwards of 3 million square feet of development deemed inappropriate or of unacceptable quality would have been permitted. This would occur even after a complex series of negotiations involving the City's highest level of professionals including the Director of Planning, the City Engineer, and the Director of Social Planning. Decisions over developments at this scale and with all the attendant physical and environmental impacts do not appropriately fit the intent of the legislated standards which the Board purports to follow. As well, such cases most certainly appear to exceed the scale originally deemed appropriate for consideration by similar boards comprised of members without specific related qualifications.

Other types of significant decisions accorded the Board include relaxation of floor space ratio provisions and permitting development contrary to the permitted uses of a district schedule. These appear in rows 3 and 6 in Table 10. In the first instance many cases can be cited where a relaxation could properly be allowed without causing discomfort to a neighbouring property owner or damage to the by-law. Small relaxations in single family residential zones are an example of where such power might be appropriate. However, with the advent of sophisticated methods of calculating, negotiating, and transferring buildable floor areas on one site and to and from others, any decision made by the Board and involving such techniques would appear increasingly to be
TABLE 10. YEARLY COMPARISON OF THE NUMBER OF APPEALS CONSIDERED BY THE VANCOUVER BOARD OF VARIANCE.

<table>
<thead>
<tr>
<th></th>
<th>1977</th>
<th>1978</th>
<th>1979</th>
<th>1980</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Appeals concerning Director of Planning decisions:</td>
<td>117</td>
<td>127</td>
<td>106</td>
<td>105</td>
<td>455</td>
</tr>
<tr>
<td>2. Appeals concerning Development Permit Board decisions:</td>
<td>5</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>3. Relaxation of floor space ratio provisions:</td>
<td>66</td>
<td>56</td>
<td>47</td>
<td>55</td>
<td>224</td>
</tr>
<tr>
<td>4. Renewal of previous appeals:</td>
<td>44</td>
<td>37</td>
<td>37</td>
<td>33</td>
<td>151</td>
</tr>
<tr>
<td>5. Relaxation of required yards, site area and site frontage requirements:</td>
<td>56</td>
<td>48</td>
<td>34</td>
<td>43</td>
<td>181</td>
</tr>
<tr>
<td>6. Development contrary to the permitted uses of a District Schedule:</td>
<td>7</td>
<td>12</td>
<td>20</td>
<td>20</td>
<td>59</td>
</tr>
<tr>
<td>7. Non-conforming uses:</td>
<td>17</td>
<td>17</td>
<td>18</td>
<td>14</td>
<td>66</td>
</tr>
<tr>
<td>8. Height regulations:</td>
<td>7</td>
<td>4</td>
<td>11</td>
<td>15</td>
<td>37</td>
</tr>
<tr>
<td>9. Additional living accommodation in RS-1 Districts:</td>
<td>15</td>
<td>14</td>
<td>7</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>10. Additions to Multiple Conversion Dwellings:</td>
<td>13</td>
<td>5</td>
<td>6</td>
<td>14</td>
<td>38</td>
</tr>
<tr>
<td>11. Development contrary to parking and loading regulations:</td>
<td>12</td>
<td>28</td>
<td>5</td>
<td>8</td>
<td>53</td>
</tr>
<tr>
<td>12. Second principal building on an &quot;R&quot; site:</td>
<td>6</td>
<td>11</td>
<td>3</td>
<td>8</td>
<td>28</td>
</tr>
<tr>
<td>13. Building lines:</td>
<td>6</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>14. Miscellaneous Appeals:</td>
<td>10</td>
<td>7</td>
<td>6</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td>TOTALS:</td>
<td>381</td>
<td>373</td>
<td>304</td>
<td>328</td>
<td>1,386</td>
</tr>
</tbody>
</table>

Source: After the Secretary to the Board of Variance, Annual Report 1980.
inappropriate in a professional sense as well as inequitable in a legal sense. As noted earlier, increasingly the Board will continue to fall short of what the professional planner might accomplish while at the same time, increasing the Board's capacity to do a disservice to the appellant, as DPB appeals generally cause the top officials to attend the hearing in person. This demonstrates to the Board, in a not overly subtle way, the importance of the particular appeal. However, it is impossible to calculate whether this "display of brass" influences the ultimate decision of the Board. Despite such difficulty it is only realistic to recognize this possibility and to note the inequity which this may cause the appellant. The propensity of the Board to compound this inequity is also evident, as the broad standards provided and the failure to require reasoned decisions only invites abuse of either the individual's rights or the community's will.

The other types of cases of interest in this discussion are those concerning the actual use the land or building. These uses take on three forms:

a) conditional uses,

b) development contrary to permitted uses, and

c) legal uses which do not conform to the zoning by-law.

While the total number of conditional use cases heard by the Board during the study period is not available because of missing data, it is relevant that these type of applications, when combined with relaxations, comprised 20% of the cases heard by the Board in 1979 and 1980. This is significant given recognition that, even when settled on a case by case basis, the decisions themselves have the effect of either establishing new policy or destroying confidence in the existing policy.
The number of cases where the development contemplated is contrary to the permitted uses totalled 59 during the four year period. While this sum is perhaps not significant by itself, the ability to permit uses not otherwise allowed in a zone gives the Board the ability to interfere with established Council policy and thus to damage the integrity of the district schedule or by-law. It seems likely that possession of such power may also encourage appellants to approach the Board members in ex parte discussion.

The total number of cases of non-conforming use to come before the Board was 66 during the period under consideration. This is not a significant portion of the total number of appeals heard. However, the appropriateness of even considering permitting the extension of the life time of non-conforming uses must be called into question, especially given the VBV's tendency to extend these uses. In many other jurisdictions non-conforming uses are forced to convert to conforming ones after allowing the property-owner a minimum period of time in which to amortize his investment. In this manner actual land use is brought into harmony with the official plan or zoning map.

Table 11 illustrates the type and number of appeals handled by the Seattle Hearing Examiner for 1979. Data compatible to that presented in Table 10 is not possible because of the different zoning procedures each jurisdiction follows. To a certain degree this difficulty has been overcome but only at a gross level of information. For example, during 1979 the VBV decided 304 cases (the lowest number of cases of the four year period), while the SHE decided 451 cases and heard but only made recommendations on 55 others. This figure represents the number of cases heard related to zoning matters; the Examiner actually heard some 617 cases in total during 1979.
# TABLE 11. NUMBER OF APPEALS CONSIDERED BY THE SEATTLE HEARING EXAMINER 1979

<table>
<thead>
<tr>
<th>Category</th>
<th>Sub-Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Zoning and Land Use Proceedings</strong></td>
<td></td>
</tr>
<tr>
<td>1. Variances</td>
<td>327</td>
</tr>
<tr>
<td>2. Administrative Conditional Uses</td>
<td>23</td>
</tr>
<tr>
<td>3. Variances and Administrative Conditional Uses</td>
<td>36</td>
</tr>
<tr>
<td>4. Special Exceptions</td>
<td>7</td>
</tr>
<tr>
<td>5. Withdrawals</td>
<td>5</td>
</tr>
<tr>
<td>6. Dismissals</td>
<td>10</td>
</tr>
<tr>
<td><strong>Sub-Total:</strong></td>
<td>408</td>
</tr>
<tr>
<td><strong>Administrative Determinations (No Public Hearing)</strong></td>
<td></td>
</tr>
<tr>
<td>7. Variance Extensions</td>
<td>32</td>
</tr>
<tr>
<td><strong>Sub-Total:</strong></td>
<td>440</td>
</tr>
<tr>
<td><strong>Pike Place Market Historical Commission Appeals</strong></td>
<td></td>
</tr>
<tr>
<td>8. Appeals heard</td>
<td>5</td>
</tr>
<tr>
<td>9. Dismissals</td>
<td>1</td>
</tr>
<tr>
<td><strong>Sub-Total:</strong></td>
<td>446</td>
</tr>
<tr>
<td><strong>Landmark Preservation</strong></td>
<td></td>
</tr>
<tr>
<td>10. Cases heard</td>
<td>1</td>
</tr>
<tr>
<td>11. Pending</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td>506</td>
</tr>
</tbody>
</table>

Table 12 illustrates the type of decision (allow or deny appeal) made by the VBV. The relative consistency of decision-making between planning staff and the Board over the two years illustrated appears to be high if measured in terms of cases allowed or disallowed. Overall, however, the VBV disagrees with the Director of Planning's decision in approximately 57% of the cases heard, while only agreeing with his decisions in 37.3% of the cases heard. Given such a wide discrepancy in the agreement between the Board and the Director it is unclear how the Board makes its decisions. Furthermore, it may be preferable for Council to either adopt policy more in line with the Board's views or provide the Board with more stringent standards and procedures to follow in reaching their decisions. Evidence of the effect on the type of decision made after establishing more stringent standards and procedures is illustrated in Table 14. Here it is evident that decisions of the Examiner agreed with planning staff in 72% of the cases heard. This percentage of agreement becomes even greater (81%) if the cases where the Examiner agreed with the staff decision but altered the conditions is considered. Other results of this Table are discussed after the VBV's 1979 to 1980 decisions (Table 13) are examined in detail.

Firstly, in considering the overall distribution of cases shown in Table 13 it is apparent that approximately one of every three appeals concerns a decision of the Director of Planning. Furthermore, approximately the same proportion of cases involve the actual use of a particular site or building, and appeals of bulk regulations comprise the last one-third of the appeals decided. It is also apparent that the greater proportion (20%) of Director of Planning appeals are related to relaxations and conditional uses. These appeals generally stem from the - 169 -
TABLE 12. TYPE OF DECISION GIVEN BY THE VANCOUVER BOARD OF VARIANCE DURING 1979 AND 1980

<table>
<thead>
<tr>
<th>Decision Type</th>
<th>1979 Total</th>
<th>% of Grand Total 1979</th>
<th>1980 Total</th>
<th>% of Grand Total 1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allowed -- No Conditions</td>
<td>69</td>
<td>22.7%</td>
<td>84</td>
<td>25.6%</td>
</tr>
<tr>
<td>Allowed -- Subject to Conditions</td>
<td>51</td>
<td>16.8%</td>
<td>47</td>
<td>14.3%</td>
</tr>
<tr>
<td>Allowed -- Limited in time but without prejudice to the filing of a further appeal</td>
<td>47</td>
<td>15.4%</td>
<td>46</td>
<td>14.1%</td>
</tr>
<tr>
<td>Allowed -- Limited in time - Final</td>
<td>7</td>
<td>2.3%</td>
<td>3</td>
<td>0.9%</td>
</tr>
<tr>
<td>Allowed -- Subject to a bond, agreement or undertaking</td>
<td>1</td>
<td>0.3%</td>
<td>5</td>
<td>1.5%</td>
</tr>
<tr>
<td>Disallowed</td>
<td>109</td>
<td>35.9%</td>
<td>127</td>
<td>38.7%</td>
</tr>
<tr>
<td>Withdrawn or no action taken</td>
<td>20</td>
<td>6.6%</td>
<td>16</td>
<td>4.9%</td>
</tr>
<tr>
<td><strong>GRAND TOTAL:</strong></td>
<td><strong>304</strong></td>
<td><strong>100.0%</strong></td>
<td><strong>328</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

Source: After the Secretary to the Board of Variance, Vancouver.
### TABLE 13. CLASSIFICATION OF APPEALS CONSIDERED IN 1979 AND 1980 - VANCOUVER BOARD OF VARIANCE

<table>
<thead>
<tr>
<th>NATURE OF APPEAL</th>
<th>1979 Withdrawn or no action taken</th>
<th>Allowed</th>
<th>Dis-Allowed</th>
<th>Total</th>
<th>% of Grand total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Appeals concerning Director of Planning decisions:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Relaxations and conditional uses.</td>
<td>5</td>
<td>2</td>
<td>9</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>b) Board of Variance approval required prior to the issuance of a Development Permit.</td>
<td>0</td>
<td>0</td>
<td>17</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>c) Filed by adjacent property owners.</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>d) Conversions</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Sub-totals</td>
<td>11</td>
<td>5</td>
<td>28</td>
<td>19</td>
<td>9</td>
</tr>
<tr>
<td>2. Appeals concerning Development Permit Board decisions:</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>3. Relaxation of floor space ratio and site coverage provisions:</td>
<td>0</td>
<td>2</td>
<td>12</td>
<td>18</td>
<td>13</td>
</tr>
<tr>
<td>4. Renewal of previous appeals - Living Accomm.</td>
<td>17</td>
<td>14</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Others</td>
<td>20</td>
<td>19</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>37</td>
<td>33</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Relaxation of required yards, setbacks and site areas:</td>
<td>2</td>
<td>1</td>
<td>11</td>
<td>18</td>
<td>14</td>
</tr>
<tr>
<td>6. Development contrary to the permitted uses of a District Schedule:</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>7. Non-conforming uses:</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>8. Height Regulations:</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>9. Additional Living Accomm. in RS-1 Districts:</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>10. Additions to Multiple Conversion Dwellings:</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>11. Development contrary to parking and loading regulations:</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>12. Second principal building on an &quot;R&quot; site:</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>13. Miscellaneous Appeals:</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>TOTALS:</td>
<td>20</td>
<td>16</td>
<td>69</td>
<td>84</td>
<td>52</td>
</tr>
</tbody>
</table>
discretionary powers accorded to the Director and for which no special guidelines have been provided to assist the VBV in their decision-making.

Regarding appeals from the decision of the Director, the Board is disposed to grant, on average, approximately one-third of the relaxation and conditional use cases it hears. These cases are often the subject of discreet Council policy, the validity of which becomes questionable when the Board, on a case by case basis, is undermining the policy with its decisions. Such has been the case with the City's policy to allow residential development on thin lots subject to reduced bulk requirements and consideration of the design on the existing neighbourhood. Since Council adopted this policy, every permit issued by the Director has been appealed by neighbouring property-owners to the VBV, which has quashed the approval, thereby rendering Council's policy wholly ineffective.

The same section of Table 13 also shows that while the Board heard an average of 18 appeals filed by adjacent neighbours it only allowed appeals in 2 cases. This certainly seems to deny the generally held fear that a board of variance acts for the most part as the purveyor of the neighbourhood's wishes. It may instead indicate a strong belief by this Board that a land-owner should be able to do as he pleases with his property regardless of what effect that may have on his neighbours.

The second point to be made is that both the percentage of appeals originating from the Development Permit Board and the percentage of Development Permit Board appeals granted has been very small in the past. In fact, during the 1979-80 term no Development Permit Board appeals were granted at all. These figures, however, belie the important fact that when the VBV is considering such an appeal it may be to permit construc-
tion of a 600,000 square foot office tower which according to the best qualified city officials does not meet the established regulations or discretionary guidelines of development. Again, the legislation provides no special guidelines for the Board and its members have no special qualifications to help in the decision-making. On the other hand, the legislature insists the professional staff have both the qualifications and guidelines placed upon their discretionary authority to act as controls in their decision-making.

The third observation is that the VBV approves more than 50% of the appeals to relax allowable FSR and site coverage requirements. Such behaviour permits one builder to construct a larger square footage than another builder similarly situated unless adequate standards are provided for guidance. The impact in such cases cannot be estimated as figures detailing the zone in which the relaxation took place and the extent of the relaxation granted (i.e., was the FSR allowed to double?) have not been collected for this study. Overall, between 20-28% of all cases heard by the Board concern relaxations of bulk regulations and the Board grants approximately 60% of these appeals.23

A fourth observation relates to the Board's performance in considering the renewal of previous appeals. The Board, in 80% of those cases granted the appeal thereby permitting not only the continuation of illegal living accommodations but also perpetuation of various other types of limited time cases which presumably include contrary and non-conforming use appeals as well. It is apparent that when the Board says "appeal allowed for a limited period of time", it is really saying "appeal allowed indefinitely".

- 173 -
A fifth observation to be made relates to the column of "uses contrary to those normally permitted". Of this category the VBV denied or did not take action on 45% of the appeals filed. This means an average of 11 contrary uses have been permitted to establish each year by the Board. It also means the Board follows its own conscience in deciding these cases, as neither the Charter nor the Board's by-law provide guidance for such cases.

It can also be noted that the Board is favourably disposed towards granting appeals concerning non-conforming uses. During the two year period 32 non-conforming cases were heard and only 6 were denied. This information must also be considered with the fact that of the 25 appeals granted only 7 were for a limited period of time. In granting these appeals the Board passed up the opportunity to increase the uniformity and certainty of the by-law, and in fact allowed 18 new non-conforming uses without providing the opportunity to review the suitability of those uses at some future time. Both of these actions appear to run contrary to good planning principles and to the intent of the zoning by-law.

While direct comparisons of the types of appeals each jurisdiction considers is made difficult because of differing administrative procedures, it is, however, possible to compare in a limited fashion the decisions made by the Board and the Examiner. This data is presented in Table 14.
### TABLE 14. RELATIONSHIP BETWEEN APPEAL BODY DECISION AND DEPARTMENTAL DECISION/RECOMMENDATIONS

<table>
<thead>
<tr>
<th>APPEAL BODY DECISIONS</th>
<th>Vancouver Board</th>
<th>Seattle Examiner</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
<td>Number of Cases</td>
</tr>
<tr>
<td></td>
<td>Percent of Total</td>
<td>Percent of Total</td>
</tr>
<tr>
<td>Upheld DoP/DCD Decision/Recommendations</td>
<td>107</td>
<td>416</td>
</tr>
<tr>
<td>Upheld by altered conditions</td>
<td>N/A</td>
<td>51</td>
</tr>
<tr>
<td>Reversed DoP/DCD Decision/Recommendation</td>
<td>69</td>
<td>91</td>
</tr>
<tr>
<td>Reversed subject to conditions</td>
<td>69</td>
<td>N/A</td>
</tr>
<tr>
<td>Withdrawn, dismissed or missing data</td>
<td>20</td>
<td>21</td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td><strong>269</strong></td>
<td><strong>579</strong></td>
</tr>
</tbody>
</table>

**KEY:**
- DoP = Director of Planning (Vancouver)
- DCD = Department of Community Development (Seattle)
- N/A = Information Not Available

Source: (After LUATF Report No.2.)

Examination of this table indicates there is a large difference in the frequency with which staff decisions are upheld by the respective appeal bodies. In Vancouver, the VBV only upheld the staff decision in 40% of the cases, while in Seattle the SHE agreed with the staff in 72% of the cases. As the types of cases considered by these bodies (compare Tables 10 and 11) and the purposes of administration are similar, the procedures established to guide the appeal process must then account for a large part of the deviation. This suggests that within the Seattle jurisdiction policy development is more advanced and comprehensive than in Vancouver and that the finding and reason requirements imposed on the Examiner by the judiciary has forced a change in the unstated purpose of the hearing. Whereas appeals were often based on emotional pleas stemming from situations having little to do with the standards provided for the granting of a variance, the new procedures tend to remove this
emotional component. Under the new procedures, decision-making is confined to the established standards by requiring reasons for decisions to be given in writing, thereby making emotional pleas inappropriate to a quasi-administrative hearing. This does not necessarily preclude emotional appeals in land use decisions entirely, but it does attempt to remove it from the administrative level and confine it to the legislature where perceived inequalities and personal preferences can be dealt with in a comprehensive manner.

Correspondingly, it is also observed that the Examiner reverses the planning staff's recommendations much less frequently (16%) than does the Board (52%). This may be attributed to the wealth of policy and the exactitude of procedure inherent in the Seattle system or the lack of the same in the Vancouver jurisdiction. Regardless, this difference allows the Board to follow its own conscience freely, often to the detriment of policy or the individual who is expecting to be treated in the same manner as others similarly situated, or both.

It is necessary now to draw some conclusions about the two systems based on the observations presented in sections 4.2 and 4.3. This discussion is followed by a brief assessment of each system's applicability to the Vancouver jurisdiction.

4.4 SUMMARY AND CONCLUSIONS

From the comparison of each administration's procedures it can be concluded that:
a) the formal procedures established in the Examiner system are more likely to ensure the involvement of all interested parties as well as increase the awareness of legal rights and obligations to be met at the hearing if a variance is to be properly granted;

b) the Board needs stricter rules of impartiality if hearings are to meet the requirement they not only be fair but have the appearance of fairness;

c) precedence as a tool to ensure consistency and equity in decision-making does not unduly constrain decision-making flexibility;

d) failure to require reasons for decisions be given in writing and to make an adequate record of the hearing are major sources of encouragement for the Board to ignore the legislative standards provided it and to overturn over 50% of the Planning Department's decisions when appealed;

e) the tolerant attitude of the Canadian public regarding the operation of government and the conservative attitude of the Canadian judiciary has encouraged local legislators to perpetuate the use of standards and procedures which neither best serve modern zoning techniques, recent technological change in the construction industry nor the rights of the individual;

f) it is inappropriate for the Board to contravene existing policy without having to divulge reasons for doing so, or for the Board to establish new policy through consideration of a specific circumstance on a case by case basis; and
g) the Board is too open to the vulgarities of political influence both in the method of determining membership and in limiting ex parte communications.

Additionally, it may be concluded from the examination of the types of cases considered by the appellate bodies that:

h) as the Board lacks a direct accountability to the legislature, it should not hear cases concerning the use of the land or building but should be confined to cases concerning appeals of bulk regulations;

i) the substitution of unqualified opinion for that of qualified opinion is neither the best way to serve the individual's rights or the public's interest and therefore the Board should not hear appeals from the Development Permit Board;

j) the Board hears cases it need not hear as they could more easily and quickly be disposed of at the staff level;

k) the Board's role, as reflected in the frequency of disagreement with staff decisions, is primarily to protect the individual property-owner's rights and therefore only poorly represents a wider range of the public interest; and

l) under the Examiner system emotional appeals are seen more properly as part of the legislative rather than administrative process.

From the conclusions, it is apparent that even without presenting substantive evidence of wrongdoing by the Board, procedurally there are many grounds for concern that this form of administration does not meet the demands generated by an increasingly complex, sophisticated and
discretionary system of zoning. It is also evident from the investigation that the examiner system adequately meets the American judiciary's newly imposed requirements for administrative hearings, and therefore has improved the system of zoning administration used in Seattle. It is, however, evident the Seattle system would not easily be transferable to the Vancouver setting. Transfer is prevented because of several factors, including:

a) a system of zoning based on discretionary authority and development permission rather than regulation;

b) a lack of a sufficient policy base from which an examiner could justify his decisions;

c) a conservative judiciary which does not easily substitute its opinion on substantive planning matters for that of the administrative tribunal's;

d) a strong sense of public trust that lay tribunals and public servants will not misuse the powers given them; and conversely that

e) a lack of belief that adherence to strict legal procedure will prevent the misuse of administrative powers.

The inability to transfer the Seattle Examiner system to the Vancouver setting despite its apparent appropriateness for solving identified administrative problems there, creates a situation where the existing tribunal system itself must be altered to more closely reflect the normative administrative model. This is the subject of discussion in the next chapter.
FOOTNOTES - CHAPTER IV

1. City of Vancouver, Board of Variance By-law, No. 3844, Vancouver: May 1960, Section 9(3).


4. M. Gram, "The Vancouver City Board of Variance" (paper submitted for the requirements of Planning 500, UBC, School of Community and Regional Planning), (Vancouver: March, 1981), p.38.


10. Under the Municipal Act the hearing need not be public.

11. Some appeals pertaining to special districts in Seattle have differing requirements.

12. The appeal form is contained in Appendix II.


15. This refers to lot sizes of 4,800 square feet or larger.


17. All figures are given in Canadian funds calculated at $1.20 = $1.00 (U.S.)

18. See Chapter II, section 2.3.1.

19. Both R. Titus (1971) and the Secretary to Seattle's Board of Adjustment recognize that lawyers sometimes withhold information from the Examiner to present to the Board and that the Board, with Council's approval, ignores its standards in order to act as a Court of Petit Equity.


23. This includes height, yards, setbacks, floor space ratio and site coverage categories.
Previous discussion identified two important findings regarding the administrative systems examined. These findings were, 1) as a system of zoning administration the Vancouver Board of Variance exhibits several major shortcomings in its current operation, and, 2) fundamental differences in the theoretical socio-political framework of the two countries has resulted in development of divergent systems of land use administration and prevents the importation of the Seattle Examiner system to the Vancouver setting as a means to resolve identified shortcomings. The inability to resolve these problems in this manner supports Weaver and Babcock's suggestion there is little hope for the adoption of radical change in land use decision-making and, therefore, more attention should be paid to analyzing and correcting specific known problems of the administrative system already in place.¹

Past attempts to reform zoning administration have been generally aimed in one of two directions - either to "de-politicize" zoning, so professional bureaucrats administer in an objective manner, or to "democratize" the administrative system so it becomes understandable, fair, and open to all legitimate interests.

While many of the problems inherent in administration could be resolved by pursuing solutions along either of these paths, each is not without its own difficulties. Reform has been held up despite a consensus that guidance in land use decision-making ought to be from someone more knowledgeable than an elected politician and more accountable than a political appointee but more sensitive than a hired bureaucrat. This hold-up has resulted in the continuation of zoning on the basis of influence and politics, a situation noted to
suit everyone involved. The inability of reformers to decide whether zoning should be a political or a professional process has also resulted in continued reliance on the lay board.\textsuperscript{2}

The delay in reform, accompanied by the increasing complexity of the zoning process and the ever changing demands of a dynamic society have contributed to the inability to derive the maximum benefits from modern zoning. Any suggestion that the development of stricter or more precise legislative standards or the removal of discretionary authority will solve once and for all the administrative problems discussed in this thesis should be discounted. The problems, as illustrated previously, are no longer so simple as to be solved with solutions which only address single issues or elements of the zoning process. An effective solution to these ills must involve elements from each of the problem areas. Adjustments must be made to the zoning process, to procedures used by the Board, and to the way in which the Board's decisions relate to adopted plans and policies. One solution which adopts this wide ranging approach to the reform of zoning administration as currently practiced in the City of Vancouver is presented below. Following a discussion in which recommendations for change are made, several conclusions are drawn from the study undertaken. The chapter then concludes with a brief discussion on possible directions further investigations in the field of zoning administration could take.

5.1 Administrative Process Reform

The purpose of recommendations made pertaining to the administrative process are to ensure the Board only considers those cases for which appropriate standards have been provided, to ensure provision for adequate
review of the Board's decisions, and to promote expeditious decision-making on the part of the Board. The following recommendations are made with the intention of accomplishing these purposes.

RECOMMENDATION 1:

Eliminate from the Board of Variance's jurisdiction those appeals concerning the use of either land or structures.

This recommendation is considered essential to the improved operation of the Board and may not be as drastic as it first seems. This contention is made because after the faithful application of the legislative standards of hardship, unique circumstance, and preservation of the official plan, it is only the rarest of use cases which can be justified. In order to maintain the sense of equity necessary to a quasi-judicial process, appeal on questions of use should be directed to the legislative branch thereby forcing the property owner or developer to seek amendments to the by-law (rezone) through the local council. This adjustment has the benefit of retaining the policy formulation function for the legislature. Additionally, it relieves the Board of the temptation to embark upon policy setting voyages, grounding it instead to a role of issuing bulk variances in cases where physical or topographical conditions restrict the development of a property to a level comparable to other properties similarly situated. Implementation of this recommendation would require amendment to the Vancouver Charter.

RECOMMENDATION 2:

Reduce the types of cases the Board of Variance hears.

Currently the Board hears several types of cases from appellants who have been required to go through two lengthy administrative processes
(the DP process, then the variance process) to obtain permission to do something which is virtually never denied by the Board or to do something which, as a matter of City policy, is considered highly desirable and otherwise encouraged (e.g., rehabilitation of existing housing stock). Variance appeals in these cases are required because the Zoning and Development By-law has not made specific provision for them and does not have the flexibility to handle the proposal in a discretionary fashion.

It is recommended that appeals for variances to permit development such as over-height fences and over-size decks, where the variance sought is less than 10% in excess of the height or area permitted under the by-law, or relaxation of yard requirements for existing buildings be approved at the department level. This would permit the applicant a variance without requiring the formality of a hearing before the Board. The procedure would thus permit the Planning Department to administer one set of regulations to which an individual is entitled as a right, another set entitled as a privilege, and a third set entitled as an exception. Implementation of this recommendation would be through amendment to the City's Zoning and Development By-law, and would still require that the case be made before the variance was granted.

RECOMMENDATION 3:

Change the public hearing requirement from required to discretionary in certain circumstances.

Variance proceedings are of such similarity, regardless of the nature of the appeal, that the Board is required to expend inordinate amounts of time on cases having little or no significance. While it is commendable to treat appeals for a minor variance in the same manner as appeals for a conditional use, it would be possible to forego the
public hearing requirement for certain types of uncontested appeals as long as effective legislative standards are adopted and adhered to. Changes to the present notification procedures used by the Board would also be required so that neighbourhood notification was a condition of every appeal. This is further discussed later in the chapter. Examples of types of appeals that might not require a public hearing (in all cases) are:

a) relaxations of required yards, site area or site frontage requirements,
b) renewals of previous appeals,
c) non-conforming uses,
d) second principal building on a residential site, and
e) additional living accommodation in a single family (RS-1) district.

While such a discretionary system is open to abuse, it is felt this could be controlled simply by restricting such discretionary hearings to those cases located in single family residential districts should this become a problem. A proper determination of the feasibility of this recommendation, however, cannot be made with the information available from this thesis. Prior to implementing any such modification, it is suggested that research be conducted to determine exactly what proportion of appeals in the suggested categories emanate from the RS-1 district and what, if any, time and/or cost savings would be engendered by such a change.

To some observers, this recommendation may seem excessive in its pursuit of administrative efficiency. Increased efficiency however, is not the only benefit to be derived. It will also be instrumental in
diverting many of the unfounded and highly emotional appeals that currently tempt the Board to step beyond the rule of law to the political legislative arena where they can be more properly be dealt with as a matter of policy. In this manner Council will be able to decide for itself whether or not, and under what condition, a suite may be added to a single family dwelling for example. And once this policy was established there would be no need for the Board to hear such cases, thus circumventing the detrimental situation of having the Board's decision contravening Council policy. Amendments to both the City Charter and the Board of Variance By-law would be required to implement this recommendation.

RECOMMENDATION 4:
Establish a citizens' advisory committee to provide a policy overview of variance decisions for City Council.

Increasingly, the appropriate role of citizen boards in the Vancouver jurisdiction has been perceived by Council to be of an advisory rather than decision-making capacity. To carry this trend further it is recommended later in the chapter that qualifications of Board membership be substantially altered and, concomitant to that change, a citizen advisory group be established to report directly to Council on the policy implications of decisions taken in variance cases. The creation of such a watchdog committee has, it appears, several benefits. Not only could such a committee identify gaps in the City's existing policy framework, it could also provide a sense of accountability currently missing in the relationship between the Council and the Board. At the same time it would permit a revised Board to maintain its arms length independence from the legislative branch.
While it is no longer thought appropriate to use a purely politically appointed and potentially unqualified citizen board as an appeal mechanism for administrative decisions, it is recognized that a citizen overview of variance decisions is needed to review decisions of the administration for consistency with City policy. Presently this function is only informally carried out by Planning Department staff. The exact nature of the activities of this type of committee have been suggested elsewhere. Membership on this advisory committee could be derived from a selection of chairmen of local area planning committees and representatives from the Vancouver Real Estate Board, the local chapters of the Urban Land Institute and Apartment Owners' Association, and the Vancouver Board of Trade. Further adjustments to the composition of this body could be left to the discretion of Council. Implementation would require terms of reference to be drawn up for the new group and adopted by Council. The committee should report directly to Council's Standing Committee on Planning and Development not less than once a year.

**RECOMMENDATION 5:**

Permit wider judicial review of individual variance appeal cases.

Discretionary power, whether in the hands of the contemporary administrator or the caliph of the Arabian Nights, tends by its very nature to be arbitrary unless stringent control is exercised to ensure the discretion conforms with the general tenor and policy established by the Statute and is used for a proper purpose. Various means of increasing control of administrative tribunals have been suggested and include:

a) creating a state (or province) wide agency to which appeals of local variance decisions could be made,
b) detailing more judicial-like procedures and requiring written decisions be given by the board\(^7\), and
c) developing criteria for recurrent types of variance cases to replace the traditional standards provided by the legislature.\(^8\)

Each one of these suggestions represents a different type of possible control mechanism - administrative, judicial, and legislative, and while each has perhaps some merit for other jurisdictions, closer examination will show their difficulties in being adapted to Vancouver. For example, the first suggestion does not account for the uniqueness of the zoning system in Vancouver when compared to the level of sophistication of zoning found in the rest of the province. As well, other provincial boards of variance already cannot consider use cases and therefore generate little demand for a provincial administrative appeal agency.

The second suggestion, while having merit for the particular situation, can only control procedural abuses, and does not address abuses stemming from discretionary policy. In fact, there is even disagreement about how best to obtain this control, with some observers\(^9\) believing the judiciary should replace the doctrine of natural justice with the doctrine of procedural fairness. It appears, however, the Canadian courts have been slow to break away from the traditional approach. One possible reason for this is the fear that adoption of the new doctrine will lead to ad hoc decision-making and the loss of certainty that adherence to the rule of law presently encourages.\(^10\)

The problem then remains, how might the judiciary be encouraged to control administrative discretionary power when to do so appears to undermine the very theoretical basis of our administrative law? One way,
which avoids this problem and may prove effective if implemented, is to incorporate discretionary policy statements into the official development plan, thereby constraining the decision flexibility of the Board by opening up appeal to the judiciary on grounds the Board exceeded its jurisdiction. This change would not permit such a searching review of policy as is available to the American judiciary. It would, however, restrict the decisions of the Board in cases where specific policy is protected by the official plan, by permitting the courts a wider range of review than is currently possible.

An additional advantage afforded this type of judicial review is that it does not require the courts to rule on the merits of a case. It thus avoids the problem of having one unqualified body substituting its opinion for that of another. It also affords the legislature (i.e., the local council) the opportunity to determine which of its policies it does not want exceptions made. Implementation of this recommendation would require Council initiative in determining what existing policy should be protected and where new policy needs to be developed. Additionally, the City Charter may have to be amended to redefine the meaning of "official development plan".

5.2 ADMINISTRATIVE BOARD REFORM

The purpose of the recommendations made pertaining to the composition of the Board and qualifications of its members is to ensure the Board has some concept of its jurisdiction and some claim to relevant expertise so that its decisions are accorded the respect necessary to gain the acceptability of the individual appellant and ultimately of the wider community. For the Board of Variance to accomplish this the following reforms are suggested.
RECOMMENDATION 6:

As a basic consideration of appointment to the Board of Variance, a person possess special knowledge or experience in at least one of the following fields: construction, business and commercial needs, architecture and urban design, urban engineering, or urban planning.

Inherent in this recommendation is the notion that the board of variance, as a kind of "dusty boots" court in which common sense justice is dispensed by one's friends and neighbours, is no longer attainable in a system of zoning administration which is continually increasing in its complexity and sophistication. The recommendation also follows from the premise that it is undesirable to compel a group of non-experts to substitute subjective opinion for that of highly qualified professional planning staff. Primarily this situation occurs where appeals stem from professional disagreements between appellants and staff caused by the flexibility of the zoning controls used in several of the higher zoned districts in Vancouver (e.g., False Creek Comprehensive Development District, Downtown District and West End District).

The intent of the recommendation is to recognize that the current method of Board appointment is a failure as a means to provide the Board with the impartiality an adjudicatory body requires. This occurs despite the fact membership is supposed to represent the majority view or the majority interest of a community. The recommendation is also intended to allow the Board to use its own knowledge of particular circumstance in deciding an appeal. If a board has qualifications or expertise and can demonstrate those qualities, the decisions it reaches might be acceptable to the appellant without the provision of reasons of
explanation. However, where the board merely presumes on its own to have expertise, decisions are more likely to require explanation. Further, the imposition of a qualification requirement should not be considered as unusual. It was most certainly the intent of the earliest zoning administrators that the appeal board be comprised of members with specific knowledge or expertise and this is amply demonstrated in New York City's first Board of Standards. The expertise qualification was lost as zoning controls moved out into the smaller cities and towns of North America where such experts were not so readily available to serve on the local board.

One difficulty of imposing a qualification requirement is the Board could then be criticized for becoming so professional as to become singleminded in its pursuit of regulation. Presumably this criticism would occur at the expense of sacrificing decisional flexibility, procedural fairness, and the possibility of making an emotional appeal available under the current system.

The elimination of emotional appeal from administrative hearings is, however, not viewed as undesirable as long as another outlet for this expression is provided. This is the subject of further discussion in these recommendations. Regarding the potential for singlemindedness inherent in any proposal for professionalization, this possibility is unlikely if the administrative process is open to judicial review. The means of encouraging just such a review has been discussed as part of the first section in this chapter. Another means of reducing the potential for the Board to reflect only one point of view would be to limit appointments to the Board by type of qualification. In this manner the presence of a diversity of qualifications on the Board could at all
times be assured and the possibility of a Board comprised of all planners or all engineers permanently avoided. To implement this recommendation specific qualification details would have to be added to the Vancouver Charter.

**RECOMMENDATION 7:**

Members of the Board of Variance should be appointed for a limited number of years and re-appointment should not be permitted. Members should also have the responsibility of attending meetings.

The purpose of this recommendation is to reduce the potential of the Member to establish personal relationships with the regulated parties or the administrative staff. Limiting the term of membership not only reduces the likelihood of political interference and ex parte behaviour interfering with matters before the Board, it also increases the appearance of fairness with which the Board is viewed. This change could be brought about through Charter amendment and it is suggested membership be limited to six years.

It should go without saying that once Board appointment is accepted, the Member should attend the meetings unless there is good reason. While it is not intended to make membership onerous, some provision is necessary to encourage this attendance even if it is only requiring the Member to seek formal permission of the Chairman for absence. A condition of membership could be attendance unless so excused. A Charter amendment would be required to implement this condition.
RECOMMENDATION 8:
The Chairman of the Board of Variance must have a legal background, demonstrate possession of a judicial temperament, and be appointed jointly by the Province and the City.

To burden the legally unskilled Board members with requirements concerning the strict rules of judicial procedure or the technical rules of evidence would be both cumbersome and impractical. Yet, observation of the Board on numerous occasions indicate the need to take some measure to ensure the rights of the appellant are protected at the hearing. One expert perceives this is a problem with the tribunal system in general and suggests:

"To require adherence to some basic rules of evidence would not seem to inhibit or interfere with the board's discretion. In fact, it would appear that this might better aid the board in reaching valid and fair determinations...." 14

The failure to require that at least one member of the tribunal have legal training is one of the reasons preventing the introduction of procedural reforms to address the identified shortcomings. Requiring legal qualification of the Chairman would seem to be a logical step, as he is the one responsible for conducting the hearing and ensuring justice is not only done, but is seen to be done.

The recommendation that the Chairman have a demonstrated judicial temperament is made in the belief that this quality will improve the degree of impartiality with which the Board is regarded by those before it. The chairman, like a judge, must "stand apart from the tensions of the immediate case and mitigate the enthusiasm of the expert with the community's sense of justice". 15 Several qualities thought to contribute
to the development of this temperament were outlined in an examination of local boards of appeal and bear repeating here:

"1. Fact consciousness - an insistence upon getting the facts, checking their accuracy, and sloughing off the element of conclusion and opinion,

2. A sense of relevance - the capacity to recognize what is relevant to the issue at hand and to cut away irrelevant facts, opinion, and emotions which can cloud the issue,

3. Comprehensiveness - the capacity to see all sides of a problem, all factors that bear upon it, and all possible ways of approaching it,

4. Foresight - the capacity to take the long view, to anticipate remote and collateral consequences,

5. Lingual sophistication - an immunity to being fooled by words and catch phrases; a refusal to accept verbal solutions which merely conceal the problem,

6. Precision and persuasiveness of speech - that mastery of language that involves a) the ability to state exactly what one means... and b) the ability to reach other men with one's own thoughts... and

7. pervading all the rest, and possibly the only one that is really basic, self-discipline in habits and thoroughness, an abhorrence of superficiality and approximation."16

The current method by which the Chairman is appointed usurps the authority of both local and provincial legislatures. Appointment to this most important position should not be left to personal preferences of the other appointees and it is therefore recommended the Chairman be appointed jointly by Council's Standing Committee of Planning and Develop-
ment and by the Lieutenant-Governor in Council. Through this joint appointment better acceptance of the Board's decisions should be enabled.

5.3 ADMINISTRATIVE PROCEDURAL REFORM

The reluctance of the Canadian courts to replace the rules of natural justice with a procedural doctrine akin to that of either due process or the recently developed concept of procedural fairness has left a gap in the judicial control of the administrative process. It seems evident that with the increasing potential for serious consequence to either the individual or the general public stemming from Board decisions, that the activities occurring there should be guided by a set of procedural steps ensuring the fair treatment of all. However, defining what constitutes fairness is difficult: "like defining an elephant, it is not easy to do although fairness in practice has the elephantine quality of being easy to recognize." The purpose of recommendations made in this section is to assist the Board of Variance in that recognition.

RECOMMENDATION 9:

Modify the procedures and operation of the Board of Variance so that:

a) the appeal form used to file an appeal indicates the standards or grounds upon which decision-making is to take place and the requirements and limitations of any further appeal,

b) it is required to give public notice for the hearings of all appeals and to all registered local groups when specific cases having relevance to their interest or jurisdiction are considered,
c) a pamphlet detailing the procedures of the Board of Variance, the format of the hearing and the rights of individual in dealing with the Board is provided,

d) prior to the hearing a party may have the opportunity to examine any information to be presented for the record,

e) the Chairman has the power to conduct a fair and impartial hearing, avoid unnecessary delay and take all necessary action, and to maintain order. These powers should include, but not be limited to:

   (i) seek clarification of the case at hand,
   (ii) permit testimony from non-parties,
   (iii) administer oaths,
   (iv) issue subpoenas,
   (v) rule on the relevancy of proof offered,
   (vi) receive evidence,
   (vii) set time limits, and
   (viii) render decisions at the hearing or a subsequent meeting.

f) rules setting out and limiting ex parte communications between Board members and any interested party are made in writing, and

g) upon the timely request of any party, a decision of the Board of Variance be required to be given in writing and include the following elements:

   (i) findings of fact as based on the evidence presented and the points raised at the hearing,
   (ii) conclusions of law where relevant and the reasons and precedents relied upon, and
(iii) a determination as based on consideration of the record as a whole and supported by the evidence.

Each of these elements is discussed in some detail below.

Appeal Form

This form should be designed to discourage the filing of frivolous appeals. This can be accomplished by directing the appellant to cite not only the section under which the appeal is based, but also the grounds under which relief is sought. Both the jurisdiction of the Board and grounds upon which variances may be granted should be printed clearly on the form. This form should also include information regarding the requirements and limitations stemming from a request for judicial review of the Board of Variance hearing. In this manner the variance appellant clearly knows in advance both the case to be met and the factors limiting subsequent judicial review (i.e., appeal on points of law and rules of natural justice). This enables preparation of the case and the opportunity to request the decision in writing if this is thought to be of assistance should subsequent judicial appeal be contemplated.

Notice

The purpose of procedural reform should not be to limit the role of the decision-maker nor to eliminate political influence from the administrative process for this will prove as elusive as "trying to hold quicksilver in a ski glove". The most effective procedural reforms therefore, are ones which maximize the opportunity for legitimate, informed participation in the process. To that end it is recommended the Board of Variance change its present practice of discretionary notification so that notification is served on all appeals made to the Board. In moving to this mandatory system it should be kept in mind that previous recom-
mendations, if followed, would substantially reduce the number of appeals the Board would receive and therefore allow more time for the notification process. It is recommended that notice be given to all registered property owners and tenants within 300 feet of the site and that a minimum of two placards be placed at or nearby the site. Additionally, the address, nature of all appeals, time, date and location of the hearing, and the name of the person to contact for further information, should be published in a daily newspaper in advance of the hearing. Some or all of these procedures need not, however, apply to appeals in single family residential areas. In these cases notification could be reduced to a smaller number of adjacent properties, a single placard and advertisement in the daily newspaper. These reduced requirements are justifiable because of the relatively confined impacts those variances have when taken individually.

A second change to the notification procedure currently practiced involves making formal provision for the notification of any local community or resident group or organization of appeals located in their area of interest or jurisdiction. A list of such groups should be kept by the Secretary to the Board and the qualification requirements of groups seeking registration should not be so prohibitive as to discourage their participation in the variance process. The intent of this involvement is to publicize the administrative power by exposing its process to as wide a range of the public as possible, thereby ensuring all people with an interest are heard, and that decisions are made with all information available and the full understanding of those involved.

Openness, however, has drawbacks and is certain to cause delay in the development process. With regard to this consideration, it may be
virtually impossible to gain approval of those types of development necessary for the community as a whole, but undesired by any particular neighbourhood. While these are most certainly valid concerns, it is not felt that involvement of these groups would significantly increase processing times, as time savings resulting from other recommended changes would more than compensate for increases here. Furthermore, wider community involvement may lend a more balanced point of view to these hearings as at least some groups do not speak from a special interest point of view but from a broader community perspective. Local area planning committees are an example of such groups that can supply this wider perspective to the neighbour versus neighbour controversy which is often central to the issuance of a variance.

Information Pamphlet

While most Canadians are law abiding citizens, it is thought that they, unlike their American counterparts, are painfully unaware of the exact nature of the rights and priviledges afforded them under administrative law. Under such circumstance, and with the recognition that most appellants before the Board appear without legal representation, it seems advisable to publish in a single widely distributed pamphlet the powers and procedures of the Board, the general format the hearing follows, and the rights of an individual before the tribunal. These last two components are especially important to the unrepresented appellant as ignorance of the first may cause uncertainty and discomfort to the appellant when the case is heard and ignorance of the latter may cause the appellant the appeal. For these reasons it is suggested that the Board of Variance produce a pamphlet containing the above information and modelled after the "Hearing Examiner Appeal Rules" referred to in Chapter II.
Information Disclosure

Improvement in the disclosure of information relevant to an appeal is needed in two areas of the Vancouver system. Firstly, it is noted that the Planning Department lacks any policy direction in making public information contained in the Development Permit file. In the absence of any explicit policy, an informal system of permitting viewing of the plans and various sets of staff meeting minutes has evolved in an ad hoc fashion. Inter-office or inter-departmental memos and other documents of a controversial nature in which professional opinion, personal objections, or confidential financial matters are discussed are generally not released to the public. While security of these latter types of documents may, in some instances, be warranted, the uninitiated appellant or other interested party would generally be unaware of what information is available upon which to base a case, and how or where to obtain it. To state that without access to relevant file information the preparation of an adequate case is made difficult, if not impossible is a moot point. Policy is therefore required to first advise the interested parties of the availability of information, then to determine the exact composition of that information, and to limit reference at the hearing to only that information available to the public.

Other improvements which facilitate the exchange of information between contesting parties in advance of the hearing should also be required as a means of providing for the effective participation of all parties at the hearing. This improvement could be accomplished by requiring contesting parties to submit in advance, papers outlining grounds on which the case will be made, the evidence to be used, and any other materials to be presented at the hearing for the Board's consider-
ation. In this manner, not only does participation become more effective but better decisions are encouraged as more information is presented to the Board.

Powers of the Chairman

Changes to the composition of the Board recommended earlier lend even more weight to the observation that the quality of the Chairman is the most important factor in determining the effectiveness of the tribunal. It has also been noted that where the rights of an individual are at issue, the character or form of the proceedings should not be permitted to subjugate the search for the truth. Under such conditions, the Chairman must not only be qualified but also afforded sufficient powers to conduct a fair and impartial hearing, avoid delay, take all necessary actions and maintain order at the hearing. While it is realized this increased judicialization of power may cause rigidity in the proceedings, it is desirable in that it also improves fairness and equity. It is therefore suggested the list of recommended powers of the Chairman be set out in the Board of Variance By-law and in the information pamphlet.

Ex Parte Communications

Current procedures of the Board have been found inadequate in this regard, as they fail to outline reasons why a member may be disqualified from partaking in a Board decision, or from the Board entirely. They also allow the Secretary to the Board at least two opportunities to speak to Board members about the merits of a particular appeal without the presence of the other parties. As previously stated, in the Vancouver case, the Secretary is a member of the Planning Department staff and therefore should not be presumed to be without bias. Under this condition,
it hardly seems appropriate for the Secretary to accompany the Board on its site inspection tour, or to meet with the Chairman at an informal pre-hearing conference without the presence of all other interested parties.

To remedy these situations it is recommended that conditions for the disqualification of a board member be established and that such rules be based on the "nemo judex in causa sua" rule of natural justice. These rules should form part of the by-law establishing the Board. Regarding ex parte communications with the Board, it is recommended the Secretary's position be made more independent from the department. This could be accomplished by making the Secretary accountable to the Office of the City Manager or to the City Clerk rather than the Director of Planning, or by changing procedures so that a less biased official, such as the secretary to the Planning Commission, accompanies the Board on its inspections. Limitations on the pre-hearing conference between the Secretary and the Chairman should restrict discussion to procedural matters related exclusively to the hearing. Ex parte communication may also originate from parties other than staff who have an interest in a case. For this reason it is also recommended that rules barring such discussion be included in both the By-law and the information pamphlet described above.

Reasoned Decisions in Writing

Without doubt the major fault of Vancouver's present tribunal system is the failure of the enabling legislation to require reasons be given in writing for the decisions made. The benefits of requiring such a condition are covered elsewhere and range from exposing the priorities and values utilized in solving complex problems to affording better
protection to the public interest\textsuperscript{22} and forcing the tribunal to obey the rule of law. A reasons requirement would also permit wider judicial review and thus is thought to promote decisions which are more reasonable and processes which are less arbitrary than would otherwise be likely from an administration not so supervised.

The problems of imposing a reasons requirement should, however, also be of concern. This requirement may well exceed the capabilities of the ordinary Board if membership requirements are not simultaneously upgraded so as to require certain expertise and knowledge of each of its members. In the past, concern over the expected length of time an untrained board would require to reach a reasoned decision acted to hinder introduction of this reform. Another concern has been the question of the board's credibility and whether or not the reasons requirement would lead to the tribunal being viewed merely as a rubber stamp of the administrative staff decisions.

The reform is, however, introduced here for several reasons. Firstly, reasoned decisions are now required of many other boards of variance on both sides of the international boundary and thus makes the Vancouver Board's existing procedure an anomaly amongst other tribunals. Secondly, and more importantly, reasoned decisions should be required because it affords the appellant the opportunity, if desired, to appeal to the judiciary to examine the case for any abuse of the discretionary powers of the administrative branch. The growth of this power has been especially prevalent in the Vancouver jurisdiction and with this requirement it "becomes easier to identify those cases in which the decision must have been based on other considerations".\textsuperscript{23} The third reason is because with the newly required recommendations regarding member quali-
ification and the reduction in the types of appeals heard, the Board should be able to find the time necessary to write down reasons when so requested, which presumably would not be in every case.

If the Board is unable to comply with its new duties, consideration should be given to making the Chairman's position a paid full time one. This suggestion was not included in the recommendations in deference to the current spending restraints in the public sector, and because it is likely that after an initial period of "awkwardness", a Board revised in the manner recommended will have no difficulty in making its decisions reasonable without incurring undue delay to the appellant.

A fourth reason for the introduction of this requirement is that while it may not be the purpose of the Board to rubber stamp the administrative decisions of staff, neither is its purpose to kowtow to the tears or cajoling of a personally made emotional appeal without offering proper grounds for the granting of a variance. As previously mentioned, the proper purpose of a tribunal is to decide the cases by applying rules of law to the facts which they find. It would, however, be naive to assume this type of appeal would simply disappear, for most certainly it would not. They would, almost of their own accord, seek another outlet for expression and this would be City Council, the nearest legislative body. While most would agree this is the appropriate forum for emotional appeal, consideration also has to be given to the possibility Council would be deluged with hundreds of appeals of various and rather minor matters, leaving it no time to deal with its other responsibilities. Should this indeed become the case, concern would certainly be warranted, but not for occupying Council's time with minor matters, but with
Council's failure to deal with such matters in a comprehensive manner within a policy framework. It would be expected that under such conditions Council would establish more policy in areas previously ignored. This would result in fewer and fewer appeals being made directly to Council and thus resolve the potential problem.

A findings requirement has also been recommended as part of the new administrative procedure to give reasons. Its introduction will have numerous benefits for the administrative system and is necessary if the reviewing court is to keep in check abuse of discretionary power. One expert refers to findings as assuring "substantive uniformity of decisions" and encouraging "members to critically consider the evidence before them". Other experts are only slightly less enthusiastic about the benefits, stating the findings requirement "was severe enough to eliminate some of the emotionalism" of variance hearings.

Once again, these benefits are only available at a cost; the increased amount of time taken to reach a decision. While this may raise difficulties with some reformers, it has been noted that to not overcome this problem is to permit the Board of Variance to rule with no practical limits on its discretion. Such a situation seems undesirable given the potential dangers identified earlier as arising from the decisions of the Board. A finding requirement not only facilitates judicial review of a particular case but it also encourages the public to officially adopt and protect a plan for the community. It should be noted that without the findings requirement the courts can only speculate about the reasons for a board's decision, something the Canadian courts have been reluctant to do in the past.
It is also recommended that as part of the reasons requirement every decision be based exclusively on points raised at the hearing. The intent of this condition is not so much to restrict the decision-making power of the Board, but rather to provide the appellant better protection in law than the present procedures offer. This argument is an extension of the belief that decisions ought to be made with information available to all the participants. By imposing this condition, the appellant will know a decision will be arrived at without consideration of uncontested information. Fears that such a condition would limit the Board when it came to using its own personal knowledge are unfounded. The Board could still use this knowledge, however, it would have to advise the appellant of its nature in advance and provide the same opportunity to dispute that point as it had all others. Such consideration should not prove too onerous to the Board and would certainly go far towards ensuring that the appellant felt a fair hearing had been conducted.

Lastly, it is recommended that a reasoned decision requirement incorporate the use of precedence to further assist in the development of consistency in the decision-making process. This recommendation is made in the belief that democratic principles are the proper tools for evaluating any action involving the rights of the individual. Equal protection of the law is one such principle, and it cannot be afforded the appellant without either the development of a reliable body of precedents or the adherence to the standards laid down for the Board by the legislature. Unfortunately, as we have observed, the Vancouver Board, like many others, does neither. The result is very similar to some conclusions made regarding a Kentucky board where:
"After thirty years of Board of Adjustment decisions property owners are as much in the dark about what moves the Board as they were when the Board was organized in 1931." 29

The situation is, of course, perpetuated by the failure to require the Board provide findings of fact or statements of reasons for its decision. Reasoned decisions then, are needed not only so as to permit a somewhat wider judicial review but also to enable the development of that reliable body of precedent upon which the Board may draw to assist in explaining its decisions.

There are numerous arguments against introducing precedence into the variance process. None of them however, would bear much relevance to a Board of Variance revised in the manner recommended here. The prime objection to precedence is to the time it would require for the Board to research materials, even if it had the legal ability to undertake the task. These arguments do not find validity in the recommended system, where the Chairman would have the legal qualifications necessary and could be paid an annual stipend should attention to Board matters be required full time. Other suggested changes would likely result in fewer cases being appealed to the Board and should provide it more time to consider the difficult cases. As well, the Board would only have to give full consideration to cases where the appellant had made such a request in advance.

Others have noted that not all judicial cases require the judge to state his findings, conclusions, or opinions and have used this to excuse the tribunal from similar behaviour. Such argument, however, assumes the Board shares the same independence as the bench, and its members share the same judicial temperament and legal training as a judge. Clearly, such is not the case and, in fact, the two bodies do not even share the
same atmosphere which surrounds the decision-making process. A board of variance only infrequently has before it a case capable of attracting the public's interest and the law profession's scrutiny. These pressures are continual on the bench and serve to reduce any temptation a judge might have to abrogate his duties or the defendant's rights. Little of this pressure is ever felt by the Board or its members. Implementation of this recommendation requires amendment of the Vancouver Charter and explanation in the recommended information pamphlet.

5.4 CONCLUDING REMARKS

The foregoing recommendations have been designed to reflect the Vancouver Board of Variance's increasingly strategic importance in the administration of the local zoning by-law. A failure to rationalize either the process or the procedures under which the Board is to operate has accompanied this rise in importance. The result has been the perpetuation of a board of non-experts, who have been given flexible decision-making powers without any corresponding responsibilities, in an administrative system which fails to articulate the true rules of the zoning game. Under such conditions a set of recommended reforms have been provided which, if followed, would result in:

a) the return of all policy decisions to the City Council or the legislature,

b) the expeditious handling of certain types of appeals by administrative staff,

c) increased accountability of the Board to the legislature through an advisory committee, and to the judiciary through wider powers of review afforded the courts,

d) a qualified Board sitting on appeals, and
e) an appeal procedure which is equitable, open, and understandable to all who participate and free from political interference.

While not solving all the problems, the recommendations made here certainly move the operation of the Board in a far more responsible direction and may even promote the credibility the Board will need to operate for another fifty years.

5.5 FUTURE DIRECTIONS

While the field of zoning administration may hold interest for only a few planners and lawyers, it is an area of growing concern and importance. This is especially true in ageing central cities, where the competition for land, and pressures for its use are often intense. Investigation of the following aspects of the Board of Variance would be helpful in assuring the Board retains its relevancy in the ever changing administrative setting:

a) an analysis of how Canada's new Constitution might effect both the substantive and procedural matters coming before the board of variance,

b) an examination of other regulatory bodies to discover if their procedures have relevance or applicability to the board of variance,

c) a feasibility study to discover if a set of special exception criteria could replace the hardship standard as the basis for issuance of a variance in the City of Vancouver,
d) the need to institute a provincial variance appeal body to replace the judicial appeal currently available in variance cases, and
e) the need to revise board of variance procedures on a province-wide scale and examine the applicability of the recommendations of this thesis to those jurisdictions.

5.6 SUMMARY

It was hypothesized the board of variance is the most appropriate administrative system to maximize public benefits through the exercise of discretionary zoning techniques while adequately meeting the equity requirements of an increasingly meaningful quasi-judicial hearing. To test this hypothesis the study reviewed the evolution of zoning in Canada and the United States, and introduced two case study models of current zoning administration: the Vancouver Board of Variance, and the Seattle Hearing Examiner. Through examination of the history and operation of these models several administrative problems were identified.

In this context, eight characteristics of a normative model of administration were established using selected elements of the socio-political and judicial basis of our society. The two administrative systems were then comparatively evaluated against the theoretical model and the hypothesis, when applied to the Vancouver Board, disproven. Reasons for the failure to prove the hypothesis were discussed and three major conclusions reached:

a) the shortcomings of the Vancouver Board resulted from the established zoning process, the lack of required qualifications of Board members, and the informal procedures of the Board,
b) the Seattle Hearing Examiner system is not adaptive to the
Vancouver administrative setting, and
c) identified shortcomings could be rectified through reform of
the Vancouver Board.

Thereafter, a set of recommendations pertaining to the identified
shortcomings was presented along with a rationale and suggested method of
implementation. It was concluded that significant improvement to the
Vancouver Board of Variance would result from the changes recommended
which included:

a) the return of policy decisions to the legislature,
b) the expeditious handling of variance appeals,
c) the increased accountability of the Board to the legislature
and judiciary,
d) re-establishment of membership qualifications for the Board,
and
e) procedures to ensure the Board conducted its deliberations with
fairness, clarity and openness, free from political inter-
ference.

It was concluded these improvements are likely to promote enough
credibility for the Board to survive another fifty years in zoning
administration.


5. B. Schwartz and H. Wade, Legal Control of Government Administrative Law in Britain and The United States (Oxford: 1972)


Chapman, P., "By-law No. 3844: A By-law to Establish Vancouver's Board of Variance". Paper submitted for the requirements of Planning 522, SCARP, University of B.C., Vancouver, 1980.


City of Vancouver, Board of Variance By-law, No. 3844, Vancouver: May, 1960.
City of Vancouver, The Vancouver Zoning and Development By-law, No. 3575, Vancouver: 1956.


Gram, M., "The Vancouver City Board of Variance". Paper submitted for the requirements of Planning 500, SCARP, University of B.C., Vancouver, March, 1981.


Richards L., "Transfer of Development Potential in the City of Vancouver". Vancouver: Daon Development Corporation, September, 1981. (Mimeographed)


Interviews

Beatty, R. E., Deputy Zoning and Subdivision Examiner, King County, Washington. Interview, June 12, 1980.

Floyd, A.R., Development Permit Group Leader, Planning Department, City of Vancouver, B.C.
Gell, L., Secretary, Vancouver Board of Variance, Planning Department, City of Vancouver, B.C.


Laing, B., Councilman, King County, Washington. Interview June 12, 1980.

Somers, E., Secretary to Board of Adjustment, Department of Community Development, City of Seattle. Interview June 13, 1980.

APPENDIX I

Board of Variance By-Law No. 3844

A By-law to establish a Board, to be known as the Board of Variance and to set out the procedure to be followed by the same.

WHEREAS by Sections 572 and 573 of the Vancouver Charter the Council of the City of Vancouver is empowered to establish a Board of Variance and to set out the procedure to be followed by the Board;

AND WHEREAS the said Council deems it expedient to establish such a Board and to set out the procedure to be followed by it;

NOW THEREFORE THE COUNCIL OF THE CITY OF VANCOUVER in open meeting assembled enacts as follows:

1. A Board, to be known as the Board of Variance is hereby established.

2. In this by-law:

   “Board” means
   Board of Variance;

   “Chairman” means
   the Chairman of the Board of Variance;

   “Charter” means
   the Vancouver Charter, S.B.C. 1953 as amended;

   “Secretary” means
   the Secretary of the Board of Variance.

3. The Secretary appointed by the Board shall be an employee of the City Planning Department and, in addition to recording the decisions of the Board at its meetings, shall:

   (a) Receive notices of appeal and present them to the Board;

   (b) Cause such notices of appeal or of meetings of the Board to be published or served as directed by the Board or its Chairman;

   (c) Notify applicants in writing of the decisions of the Board;

   (d) Have custody of the records of the Board;

   (e) Perform such other duties as are customary to the office of Secretary.

4. An appeal shall be filed with the Secretary in writing on a form approved by the Board, to be obtained from the Secretary, and shall state in a simple manner the grounds of the appeal.
5. The Secretary shall examine the notices of appeal as submitted and may request applicants to furnish such further information including building or site plans as the Secretary may deem necessary for the proper understanding of the nature of the appeal.

6. Any person appealing a decision of an official pursuant to Section 573(1) (a) of the Charter shall file a notice of appeal within fifteen days of the date on which the official's decision was made; provided however that the Board may extend the time for filing such notice of appeal in any given case for cause on the written request of the applicant. For the purposes only of an appeal under this section, the Development Permit Board shall be deemed to be an official charged with the enforcement of a Zoning By-law.

7. Any person appealing a decision of the Director of Planning or the Development Permit Board, as the case may be, which:
   (a) grants or refuses an application for a development permit, or
   (b) grants or refuses an application for the relaxation of the provisions of the Zoning and Development By-law No. 3575

shall file a Notice of Appeal within fifteen days of the date on which the Director of Planning issues a development permit or gives notification of the refusal of the application, as the case may be; provided that the Board may extend the time for filing such Notice of Appeal in any given case for cause on the written request of the applicant.

8. The Chairman shall fix a convenient time and place for the hearing of an appeal of which the Secretary has received notice but the Chairman need not convene the Board more often than once in any two-week period.

9. (1) Notice of the time and place of the hearing of the appeal shall be mailed to the applicant by the Secretary at least five days prior to the hearing by the Board.

   (2) The Secretary shall also give notice of the hearing to the Director of Planning and to such other officials of the City as the Chairman deems proper.

   (3) Public notice of a hearing shall be given if the appeal is deemed by the Board of sufficient importance and such public notice shall be given by publication in a newspaper circulating in the City in not less than two consecutive issues and at a time not more than ten days nor less than three days before the hearing.

10. (1) The Board on being convened at the appointed time and place shall hear applicants and any witnesses or other persons whose evidence may assist the Board in reaching a decision provided however, that where the appeal is from the decision of an official charged with the enforcement of the Zoning By-law the official concerned or his representative shall be afforded an opportunity to be heard.

   (2) Proceedings at the hearing shall be informal and evidence need not be given under oath unless the Chairman so requires.
11. Before reaching a decision on the appeal before it, the Board may require further information, either in corroboration of the statements made by the applicant or other witnesses or in explanation of the wording or intent of the Zoning and Development By-law, or to determine more fully the effect upon neighbouring properties affected by the appeal and may adjourn the hearing from time to time as the Board may deem advisable and may cause notice of the hearing so adjourned to be mailed to such owners of real property as the Board deem to be affected by the appeal, and may view the site either before or after the hearing, provided however that the decision of the Board when given shall be based upon the evidence submitted and in accordance with the limitations imposed upon the Board by Subsection (2) of Section 573 of the Charter.

12. (1) The applicant may request an adjournment of the hearing if he notifies the Secretary of such request prior to the hearing and the Board may grant such adjournment.

(2) In the event of an applicant or his representative failing to appear at the hearing of his appeal and no adjournment having been requested by him, or in the event of the applicant or his representative being present at the hearing and failing to proceed with his appeal when called upon by the Secretary to do so, the appeal may be adjourned by the Board.

(3) The applicant may withdraw his appeal by a written request from him filed with the Secretary at any time prior to the hearing or may withdraw his appeal orally at the hearing at any time prior to the Chairman polling the members of the Board for their decision on the appeal.

(4) The applicant may request the Secretary in writing at any time prior to the hearing to have his appeal proceeded with in his absence and the Board may grant the request and may then conduct the hearing of the appeal without the applicant being present and may hear other interested persons and may decide the appeal.

13. (1) At the conclusion of the hearing, the Board may thereupon render its decision or may adjourn the appeal and render its decision at a subsequent meeting.

(2) The Board may grant or deny the appeal and may reverse or uphold the decision of the Director of Planning or other official charged with the enforcement of the Zoning By-law being appealed against either in whole or in part or may modify such decision as appears warranted by the facts disclosed at the hearing.

14. The Board shall not re-hear an appeal covering the identical grounds or principles upon which the Board had already rendered a decision.

15. Members of the Board shall be entitled to receive payment for their expenses necessarily incurred in the conduct of their official duties on the Board including their transportation to and from their home or office to meetings of the Board or on inspection trips to view sites involved in appeals.

16. Subject to the provisions of this By-law, the Board shall determine its own procedure.
17. This By-law shall come into force and take effect on and after the date of the final passing hereof.

DONE AND PASSED in open Council this 17th day of May, 1960.

(Sgd) A.T. Alsbury, Mayor
(Sgd) D.H. Little, Deputy City Clerk
APPENDIX II

To the Secretary,
Board of Variance,
City Hall, Vancouver, B.C.

Original to be returned to Appellant

CITY OF VANCOUVER

NOTICE OF APPEAL

DISTRICT ZONE:

SITE SIZE:

1. Pursuant to: *Section 573 (1) (a), *Section 573 (1) (b), *Section 573 (1) (c),
   *Section 573 (1) (d), *Section 573 (1) (e) of The Vancouver Charter (See Overleaf)
   *Delete which is not applicable.

I/We hereby enter an Appeal relative to the following Section(s) of the Zoning and Development By-law of the City of Vancouver:

(State Section(s), Sub-Section(s) and Clause(s) of the Zoning and Development By-law which is/are the subject of this Appeal.)

2. Statement of the points upon which this appeal is based:

3. Attached hereto and made part of this Appeal are the following documents and Sketch Plans:

4. This appeal relates to:
   (a) Application for Development Permit No. Dated 19
   (b) Location: Lot Sub-division Block D.L.
   (c) Type of Development:

5. I/We hereby declare that all the above statements and the statements as contained in all of the exhibits transmitted herewith are to the best of my/our belief true and correct in all respects.

Signature of Applicant(s) Date Appeal Filed 19

Postal Address Tel. No.

NOTE: Notice of Appeal must be filed within 15 days of the granting or refusal of a Development Permit or within 15 days of a decision of an official charged with the enforcement of a zoning by-law.

6. This Appeal was given a hearing by the Board of Variance on 19 and was
   +ALLOWED +ALLOWED subject to the following conditions:

   When an appeal is granted, a Development Permit MUST BE OBTAINED by the appellant. If the appeal is granted subject to conditions, they must be complied with before the Development Permit will be issued. The decision of the Board to grant an appeal becomes void unless the Development Permit has been obtained within days from the date hereof.

Signed: Secretary, Board of Variance

-224-
ZONING AND DEVELOPMENT BY-LAW
BOARD OF VARIANCE PROCEDURE

RIGHT OF APPEAL:

SECTION 573, SUBSECTION 1, CLAUSES (a), (b), (c), (d) AND (e)
OF THE VANCOUVER CHARTER

573. (1) The Board shall hear and determine appeals:

(a) By any person aggrieved by a decision on a question of zoning by any official charged with the enforcement of a zoning by-law;

(b) By any person who alleges that the enforcement of a zoning by-law with regard to siting, size, shape or design of a building would cause him undue or unnecessary hardship arising out of peculiarities in the site or special circumstances connected with the development. In any such case the Board may, to the extent necessary to give effect to its determination, exempt the applicant from the applicable provisions of the zoning by-law;

(c) By any person who alleges that due to special circumstances or conditions the provisions of subsection (3) of section 568 will result in undue or unnecessary hardship to him; (see below)

(d) With respect to matters arising under subsections (4) and (5) of section 568; (see below)

(e) By any person aggrieved by a decision by any Board or Tribunal to whom Council has delegated power to relax the provisions of a zoning by-law.

SECTION 568, SUBSECTIONS (3), (4) AND (5)
OF THE VANCOUVER CHARTER

568. (3) A lawful use of premises existing at the time of coming into force of a zoning by-law, although such use is not in accordance with the provisions of the by-law, may be continued; but, if such non-conforming use is discontinued for a period of ninety days, any future use of those premises shall be in conformity with the provisions of the by-law. The Board of Variance shall have power to allow relaxation of this provision.

(4) No additions or structural alterations shall be made to a non-conforming building without

(a) the approval of the Board of Variance, if the non-conformity is in respect of use.

(5) Where a non-conforming building is damaged or destroyed by fire to the extent of sixty percent (60%) or more of its value above its foundations as determined by the City Building Inspector whose decision shall be subject to review by the Board of Variance, it shall not be repaired or reconstructed without the approval of

(a) the Board of Variance if the non-conformity is in respect of use.

FILING OF APPEAL PROCEDURE

The Notice of Appeal Form must be completed by the appellant and filed with the Secretary, eight clear days prior to the meeting of the Board.

The appellant must state clearly on the application form the clause or clauses of the Vancouver Charter under which the appeal is submitted.

The appellant must also state clearly and precisely the Section(s), Subsection(s) or Clause(s) of the Zoning and Development By-law which he wants relaxed, and further state the amount and/or type or relaxation.

Sketch plans showing the relaxation requested must accompany appeals.
<table>
<thead>
<tr>
<th>Jurisdiction and Method of Appointment</th>
<th>Variances</th>
<th>Special Use Permits (Conditional Uses)</th>
<th>Parcel Rezonings</th>
<th>Additional Responsibilities</th>
<th>Appeal of Examiner's Ruling Directed To</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anne Arundel County, Md. Zoning Hearing Officer appointed by County Executive; established 1965</td>
<td>Conducts mandatory public hearings; enters written findings; decides all variances</td>
<td>Conducts mandatory public hearings; enters written findings; decides all special uses</td>
<td>Conducts mandatory public hearings; enters written findings; decides all rezonings</td>
<td></td>
<td>County Board of Appeals</td>
</tr>
<tr>
<td>Montgomery County, Md. Hearing Examiner appointed by District Council; established 1967</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to District Council</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to District Council</td>
<td></td>
<td>County Council</td>
</tr>
<tr>
<td>Prince George's County, Md. Zoning Hearing Examiner appointed by District Council; established 1971</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to District Council</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td></td>
<td>District Council</td>
</tr>
<tr>
<td>Harford County, Md. Zoning Hearing Examiner appointed by County Council; established 1973</td>
<td>Conducts mandatory public hearings; enters written findings; decides all variances</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td></td>
<td>Final decisions of County Council can be appealed directly to circuit court</td>
</tr>
<tr>
<td>Xenia, Ohio Hearing Examiner appointed by City Manager; established 1974</td>
<td>Conducts mandatory public hearings; enters written findings; decides all variances</td>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to County Council</td>
<td>Conducts mandatory public hearing; enters written findings; makes recommendation to County Council</td>
<td></td>
<td>Review commission or board with appellate power</td>
</tr>
<tr>
<td>Tucson, Ariz. Zoning and Subdivision Examiner appointed by City Manager; established 1975</td>
<td>Done by Board of Adjustment</td>
<td>Done by Board of Adjustment</td>
<td>Done by Board of Adjustment</td>
<td></td>
<td>City Council</td>
</tr>
<tr>
<td>King County, Wash. Zoning and Subdivision Examiner appointed by County Council; established 1970</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Variances and special use permits: Board of Appeals Parcel rezonings: County Council</td>
</tr>
</tbody>
</table>
Seattle, Wash.
Hearing Examiner appointed by City Council; established 1974

<table>
<thead>
<tr>
<th>Conducts mandatory public hearings; enters written findings; decides area and sign variances, petitions to revoke sign variances, applications for extension of non-conforming signs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducts mandatory public hearings; enters written findings; decides special exceptions and conditional uses</td>
</tr>
<tr>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to City Council</td>
</tr>
</tbody>
</table>

Tacoma, Wash.
Hearing Examiner appointed by City Manager; established 1975

<table>
<thead>
<tr>
<th>Conducts mandatory public hearings; enters written findings; decides variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducts mandatory public hearings; enters written findings; decides special and temporary uses and conditional uses</td>
</tr>
<tr>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to City Council</td>
</tr>
</tbody>
</table>

Portland, Oreg.
Hearings Officer appointed by City Commissioner with jurisdiction over land-use planning functions; ordinance adopted 1974

<table>
<thead>
<tr>
<th>Conducts mandatory public hearings; enters written findings; decides all variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducts mandatory public hearings; enters written findings; decides all conditional uses</td>
</tr>
<tr>
<td>Conducts mandatory public hearings; enters written findings; makes recommendation to City Council</td>
</tr>
</tbody>
</table>

Eugene, Oreg.
Hearings Official appointed by City Council; draft ordinance 1975

<table>
<thead>
<tr>
<th>Conducts mandatory public hearings; enters written findings; decides all variance applications filed in conjunction with application for conditional use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conducts mandatory public hearings; enters written findings; decides all conditional uses</td>
</tr>
<tr>
<td>Conducts mandatory public hearings; enters written findings; decides all conditional uses</td>
</tr>
</tbody>
</table>

1. The Zoning Adjuster conducts mandatory hearings, enters written findings, and decides variances and conditional uses. The Zoning and Subdivision Examiner can be, and has been, appointed Zoning Adjustor.

2. The Planning Commission's decision may be appealed to the City Council. When the Planning Commission declines to accept an appeal, appeal may be made directly to the City Council.

3. No appointment has been made.

4. An ordinance is being considered.