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Hardship and the Granting of Zoning Variances: A New Test in Light of *Rousseau v. Zoning Board of Appeals*, 17 Neb. App. 469, 764 N.W.2d 130 (2009)

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Note*

Hardship and the Granting of Zoning Variances: A New Test in Light of *Rousseau v. Zoning Board of Appeals*, 17 Neb. App. 469, 764 N.W.2d 130 (2009)

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* Scott Schroetlin, Nebraska Wesleyan University, 2006; University of Nebraska College of Law, J.D. expected, May 2011. I would like to thank and commend my colleagues at the *Nebraska Law Review* for their hard work and commitment in continually putting out our publication. A special thank you as well to my family and friends and, of course, Roland and Rolene.

I. INTRODUCTION

A void exists in the laws of Nebraska with respect to guidance for what constitutes sufficient hardship in granting a zoning variance. This void was clearly demonstrated in *Rousseau v. Zoning Board of Appeals of Omaha*.[1] An examination of this lack of guidance in light of the policy of deference to zoning boards that has dominated variance decisions is necessary to understand why there has been so little guidance up to the present. The Nebraska Supreme Court has alluded to the reasons for such deference, stating that "[r]eview overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the [zoning board], thereby nullifying the benefits of legislative delegation to a specialized body."[2] Despite this policy of deference, a balance must be reached for deciding whether sufficient hardship does exist, as too much deference to the zoning boards can lead to detrimental consequences.[3]

In *Rousseau*, the Nebraska Court of Appeals upheld variances for a front yard setback, a side yard setback, and a reduction in parking spaces around a proposed residential building, ruling that there was no abuse of discretion or error of law where the district court upheld the zoning board's decision granting the variances.[4] Elena Kerwin, the party seeking the zoning variance in *Rousseau*, sought to construct a building on a narrow lot in a residential neighborhood in Omaha, Nebraska, and variances were required for her to be able to build as she desired.[5] The court of appeals looked to the established rules on variances that stemmed from previous Nebraska Supreme Court cases, and as there was no violation of any of those rules, the granting of the variances was affirmed.[6]

Regarding hardship for zoning variances, the Nebraska Supreme Court has articulated only three rules in its decisions.[7] In Part II, this Note will examine the history of the Nebraska Supreme Court decisions concerning hardship, laying the foundation for the rules that have thus far guided the issuing of zoning variances. The lack of guidance created by these existing rules is demonstrated in *Rousseau*, which provides an example of how the court of appeals is essentially limited to deferring to the decision of the zoning board. Part III analyzes how a policy of deference potentially impacts zoning and how, in order to give sufficient guidance to zoning boards and limit the potential for adverse consequences that can arise from too much deference,

1. 17 Neb. App. 469, 764 N.W.2d 130 (2009).
2. Bowman v. City of York, 240 Neb. 201, 210, 482 N.W.2d 537, 544 (1992).
3. *See infra* section III.A.
4. *Rousseau*, 17 Neb. App. at 479, 764 N.W.2d at 137.
5. *Id.* at 470, 764 N.W.2d at 131–32.
6. *Id.* at 477–79, 764 N.W.2d at 136–37.
7. *See infra* section II.A.

a new standard should be adopted that will preserve the flexibility necessary for zoning boards to function as intended.

Rousseau, along with the past decisions of the Nebraska Supreme Court, shows that current tests are insufficient for zoning boards of appeals to determine whether sufficient hardship exists to grant a variance. Thus, the deferential approach on appeal of decisions granting variances can easily lead to problems of corruption and violation of the spirit of the zoning ordinances. This Note therefore suggests a new test for zoning boards with respect to determining hardship for granting variances—a test that will follow from the previous decisions set forth by the Nebraska Supreme Court and protect the interests of individuals, neighborhoods, and communities.

II. BACKGROUND

A. A History of Hardship

1. Frank v. Russell

In Nebraska, the foundation for what constitutes sufficient hardship to issue a variance was laid in *Frank v. Russell*.[8] In *Frank*, a couple planned to construct a residential building on a corner lot they had purchased in Scottsbluff, Nebraska.[9] After discovery of a city ordinance that did not allow construction at the desired distances from the property lines, however, the city engineer halted preparation for construction.[10] The couple appealed to the board of adjustment for the city of Scottsbluff, and after a hearing, the board approved the original plans.[11] The neighbors of the couple appealed the decision to the district court.[12]

In district court, the appellants argued that a provision in the city ordinance that required that the setback of the building be equal to or greater than the average of the other residences on the block was controlling.[13] In response, the couple argued that a provision pertaining to corner lots controlled, which would have allowed them to build even closer to the property line.[14] Instead of deciding which provision con-

8. 160 Neb. 354, 70 N.W.2d 306 (1955).
9. *Id.* at 355, 70 N.W.2d at 308.
10. *Id.* at 355, 70 N.W.2d at 308.
11. *Id.* at 355–56, 70 N.W.2d at 308.
12. *Id.* at 356, 70 N.W.2d at 308.
13. *Id.* at 357, 70 N.W.2d at 309 (noting that the average of the block was forty feet, and the couple intended to build at twenty-seven feet).
14. *Id.* at 357–58, 70 N.W.2d at 309 (as near as twenty feet). In large part, the clash arose because the couple's building would be constructed on a corner. This caused tension because the front would not face the same direction as the appellants' residence—instead it would face the intersecting street—creating a situation where both provisions were potentially applicable, but conflicting. *Id.* at 356–58, 70 N.W.2d at 309.

trolled, the district court granted a variance for the construction of the building with a twenty-seven foot setback, based upon a different provision of the ordinance which allowed "minor variations" where there were "practical difficulties or unnecessary hardships."[15] The district court also denied an injunction to prevent construction of the building,[16] and the two cases were appealed to the Nebraska Supreme Court.

The state supreme court reversed, finding the decision to grant a variance "unreasonable and arbitrary."[17] The court further stated that allowing the variance would create a thirteen foot encroachment, which was not a minor variation, that it was "destructive . . . of the spirit of the ordinance" in violating the uniformity of the other residences, that it obliterated the "symmetry of the block front," and that it disrupted the view of the other residences on the block.[18] The Nebraska Supreme Court did recognize there would be hardship to the couple in denying them the opportunity to build as they had planned and requiring them to tear down what they had started to build.[19] The court focused specifically, however, on the fact that the couple had created their own hardship with knowledge of what the ordinance prohibited, stating: "It would certainly be unreasonable to allow one to create his own hardship and difficulty and take advantage of it to the prejudice of innocent parties."[20] The court also seemed to lay down a rule to govern the granting of variances:

> It appears that the rule respecting the right of a board of adjustment, such as the one here, to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that it may not be granted: Unless the denial would constitute an unnecessary and unjust invasion of the right of property; if the grant relates to a condition or situation special and peculiar to the applicant; if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily if the applicant purchased his premises after enactment of the ordinance.[21]

Ultimately, the court decided that the provision requiring a forty foot setback applied.[22]

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15. *Id.* at 359, 70 N.W.2d at 310.
16. *Id.* at 355, 70 N.W.2d at 308.
17. *Id.* at 361, 70 N.W.2d at 311.
18. *Id.* at 360–61, 70 N.W.2d at 310–11.
19. *Id.* at 361, 70 N.W.2d at 311.
20. *Id.* at 361, 70 N.W.2d at 311.
21. *Id.* at 362–63, 70 N.W.2d at 312.
22. *Id.* at 366, 70 N.W.2d at 313.

2. *Eastroads, L.L.C. v. Omaha Zoning Board of Appeals*

In *Eastroads, L.L.C. v. Omaha Zoning Board of Appeals*,[23] the Nebraska Supreme Court clarified the rule on granting variances laid down in *Frank*. In *Eastroads*, a company requested an area variance to an ordinance.[24] The zoning board of appeals granted the variance due to the odd shape of the parcel of land, a rubble fill in the middle of the parcel that prevented building on that spot, and a state-owned right-of-way, all of which created practical difficulties to development.[25] After an appeal and remand,[26] the board of appeals again granted a variance, pointing out that the building would still meet the normal requirements of the ordinance for building setbacks.[27] The district court again affirmed the board's decision, finding that the granting of the variance "was not illegal, arbitrary, or capricious,"[28] based on the rubble fill, the state right-of-way, and the irregular shape of the property.[29] On appeal, following the decision in *Frank*, the court of appeals found that the granting of the variance was illegal, as the difficulties were self-created in knowingly purchasing property with the rubble fill that created practical difficulties.[30]

The Nebraska Supreme Court, however, pointed out that the Court of Appeals did not consider the right-of-way created by the state after the purchase of the property,[31] and this "significant factor"[32] was not self-created. The court used this to distinguish the case from *Frank*, where the only difficulty was in having to tear down the building that was placed on the land in violation of the ordinance.[33] The court also pointed out that the court of appeals incorrectly relied upon the "rule" in *Frank*,[34] which stated that a variance would not ordinarily be granted "if the applicant purchased his premises after enactment of the ordinance."[35] The court characterized this "rule" as merely dicta, and thus the fact that the land was purchased after the restrictions were in place would not prevent the granting of a variance, although it could be taken into consideration by the board in its decision.[36]

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23. 261 Neb. 969, 628 N.W.2d 677 (2001).
24. *Id.* at 970–71, 628 N.W.2d at 679 (noting that the ordinance required a thirty foot buffer of landscaped vegetation between the lots and the residential lots adjacent).
25. *Id.* at 971, 628 N.W.2d at 679.
26. *Id.* at 972, 628 N.W.2d at 680.
27. *Id.* at 972–73, 628 N.W.2d at 680.
28. *Id.* at 973, 628 N.W.2d at 680–81.
29. *Id.* at 973–74, 628 N.W.2d at 681.
30. *Id.* at 977, 628 N.W.2d at 683.
31. *Id.* at 977, 628 N.W.2d at 683.
32. *Id.* at 978, 628 N.W.2d at 684.
33. *Id.* at 978, 628 N.W.2d at 684.
34. *Id.* at 978, 628 N.W.2d at 684.
35. Frank v. Russell, 160 Neb. 354, 363, 70 N.W.2d 306, 312 (1955).
36. *Eastroads*, 261 Neb. at 978–79, 628 N.W.2d at 684.

Therefore, following the standard of review for district courts in reviewing board of appeals' decisions, the court found that there was no abuse of discretion or error of law made by the district court, and it accordingly reversed the decision by the court of appeals.[37] The *Frank* rule had consequently been clarified in that hardship created by the party is not sufficient hardship to issue a variance.

3. *Alumni Control Board v. City of Lincoln*

Shortly after the Nebraska Supreme Court's decision in *Frank*, the court further shaped Nebraska zoning law by proclaiming another rule regarding the issuance of variances. In *Alumni Control Board v. City of Lincoln*,[38] a fraternity requested a variance that would allow it to construct a larger building than was allowed by the city zoning code and the school's housing code and that would allow it to vary off-street parking requirements.[39] The requested variance was denied by the building inspector and on subsequent appeals by the zoning board of appeals, the city council, and the district court.[40] The Nebraska Supreme Court affirmed the denial.[41] The court pointed out that the requirements imposed by the code were reasonable, granting the variances would "be in derogation of the spirit and intent and general plan of the zoning ordinance," and that there was opposition to the variance at the hearing by the owners of some of the adjacent property.[42] Ultimately, the court concluded that the "mere fact that the plaintiff would like to have a fraternity house of larger dimensions does not establish practical difficulty in complying with the ordinance."[43][44]

4. *Bowman v. City of York*

The Nebraska Supreme Court added its latest rule regarding the hardship necessary to grant a variance in *Bowman v. City of York*.[45] In *Bowman*, a company applied for a variance that would allow it to build the rear wall of a warehouse within one foot of the property line that divided its property from the residential property of the Bow-

37. *Id.* at 979, 628 N.W.2d at 684.
38. 179 Neb. 194, 137 N.W.2d 800 (1965).
39. *Id.* at 194, 137 N.W.2d at 801.
40. *Id.* at 194, 137 N.W.2d at 801.
41. *Id.* at 200, 137 N.W.2d at 804.
42. *Id.* at 198, 137 N.W.2d at 803.
43. *Id.* at 198, 137 N.W.2d at 803.
44. The requested variance for parking was also denied, as at 1280 feet from the property it would be greater than the maximum distance of 1200 feet allowed by the code, and thus denying the variance would not be seen as unreasonable or arbitrary. *Id.* at 199, 137 N.W.2d at 803.
45. 240 Neb. 201, 482 N.W.2d 537 (1992).

mans, whereas the zoning code required a fifteen foot setback.[46] The city board of adjustment granted the variance, and the Bowmans appealed.[47][48] The district court reversed the granting of the variance,[49] and an appeal was made to the Nebraska Supreme Court.

The state supreme court articulated the rules that would govern the scope of review, both for the district court's review of the board's decision and for the appellate court's review of the district court's decision.[50] The court recognized the high degree of deference that has governed review of the granting of variances, stating:

> [Local zoning boards] provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary. Review overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the agency, thereby nullifying the benefits of legislative delegation to a specialized body.[51]

With respect to such deference, the court announced the scope of review for a district court reviewing a board of appeals' decision granting a variance, stating that "a district court may disturb a decision of such a board only if . . . the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong."[52] Following this, the court also determined the scope of review for appellate reviews of district court decisions, declaring that "the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law."[53]

In determining the legality of the variance, the court applied the relevant statute governing the issuance of variances in cities and villages: section 19-910 of the *Revised Statutes of Nebraska*.[54] The court

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46. *Id.* at 203–04, 482 N.W.2d at 540.
47. *Id.* at 206, 482 N.W.2d at 541.
48. While on appeal, the company, York Cold Storage, began constructing the warehouse notwithstanding the appeal, as they felt it would increase their profits. *Id.* at 206–07, 482 N.W.2d at 541–42. However, the court determined that this reliance was not in good faith, as the company knew a week before commencing construction that the order was being appealed, and thus this reliance would not prevent an adverse ruling. *Id.* at 216, 482 N.W.2d at 547.
49. *Id.* at 203, 482 N.W.2d at 540.
50. *Id.* at 210–11, 482 N.W.2d at 542–43.
51. *Id.* at 210, 482 N.W.2d at 544 (quoting Bentley v. Chastain, 249 S.E.2d 38, 40 (Ga. 1978)).
52. *Id.* at 210–11, 482 N.W.2d at 544 (citing Mossman v. City of Columbus, 234 Neb. 78, 449 N.W.2d 214 (1989); Frank v. Russell, 160 Neb. 354, 70 N.W.2d 306 (1955)).
53. *Id.* at 211, 482 N.W.2d at 544.
54. The statute provides, in relevant part, that boards can grant variances only if strict application "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner." NEB. REV. STAT. § 19-

found that the application of the code would not produce undue hardship.[55] The court also held that the company's sole stated hardship, wanting to increase profits, did not constitute sufficient hardship to justify granting a variance, stating that "it does not provide a basis for riding roughshod over the rights of others by obtaining a variance from zoning regulations with which the rest of the community must live."[56]

From the preceding cases three rules have been laid down by the Nebraska Supreme Court in relation to what constitutes sufficient hardship for the granting of a variance. First, there is not sufficient hardship when the party seeking the variance created their own hardship.[57] Second, wanting to build a larger building does not alone constitute sufficient hardship.[58] Finally, wanting to increase profits does not alone constitute sufficient hardship.[59] These rules laid the foundation for the state of the law leading into *Rousseau*.

B. *Rousseau v. Zoning Board of Appeals of Omaha*

1. *Facts and Procedural History*

In 2005, Elena Kerwin purchased a vacant lot in Dundee, an area located within Omaha, Nebraska.[60] Kerwin made plans to build a four-story, four-unit condominium in a "federal" style similar to buildings found in cities such as Chicago and New York.[61] After working with a city planner and redesigning the plans several times in attempts to conform to the city zoning code, Kerwin decided a variance would be required in order for her construct the building in the desired fashion.[62] Kerwin thus appealed to the zoning board, seeking variances for the front yard setback, the side yard setback, and the off-street parking requirement.[63] The front yard setback variance would change from thirty-five feet to twenty feet; the side yard setback variance from twelve feet to ten feet; and the parking variance from one and one-half stalls per unit in the building to one stall per unit, in total, from six to four stalls.[64] The board granted the three requested

910(1)(c) (Reissue 1987). Undue hardship, in turn, is defined as "demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice." *Id.* § 19-910(2)(d).

55. *Bowman*, 240 Neb. at 213, 482 N.W.2d at 545.
56. *Id.* at 213, 482 N.W.2d at 545.
57. *See supra* subsections II.A.1–2.
58. *See supra* subsection II.A.3.
59. *See supra* subsection II.A.4.
60. *Rousseau v. Zoning Bd. of Appeals*, 17 Neb. App. 469, 470, 764 N.W.2d 130, 131 (2009).
61. *Id.* at 470, 764 N.W.2d at 131–32.
62. *Id.* at 470, 764 N.W.2d at 132.
63. *Id.* at 470, 764 N.W.2d at 132.
64. *Id.* at 470–71, 764 N.W.2d at 132.

variances.[65] The appellant, Mark Rousseau, who owned the property adjacent to Kerwin's lot, then filed a complaint in the district court seeking a reversal of the granted variances.[66] After a trial, the district court found that no variance was actually required for the front yard setback,[67] following a zoning code section that allowed an exception to the thirty-five foot setback by taking the mean setback of all the buildings on the block face.[68] The court then upheld the zoning board's granting of the variances with regard to the side yard setback and the parking requirement, finding that the density of the neighborhood created a hardship justifying the variances.[69]

2. *Court of Appeals Opinion*

The Nebraska Court of Appeals affirmed the district court's decision. Beginning with the front yard setback, the court recognized that the district court applied the wrong exception from the Omaha zoning code, having used the exception that would apply if there were no adjacent buildings within one hundred feet on either side of the building to be built.[70] As there were buildings on both sides, the correct exception instead took the average setback of the two adjacent buildings, and that average would apply as the minimum front setback.[71] Although the court did not have precise measurements, the evidence indicated that the setbacks of the two adjacent buildings were very near fifteen feet and twenty-five feet.[72] At an average of twenty feet—the same distance as the proposed setback of Kerwin's building—the court found that either no variance was required or, if other measurements admitted into evidence were used, a minimal variance of less than two inches would be required.[73] The decision pertaining to the front yard setback was affirmed.[74]

The more significant issue in the case was whether the hardship justified the granting of variances for the side yard setback and the off-street parking requirement. At trial in front of the district court, Kerwin had provided testimony from the former Omaha planning director, Robert Peters, who testified that the Dundee area was developed to be a high-density neighborhood for worker housing around the

65. *Id.* at 471, 764 N.W.2d at 132.
66. *Id.* at 471, 764 N.W.2d at 132.
67. *Id.* at 471–72, 764 N.W.2d at 132.
68. *Id.* at 474, 764 N.W.2d at 134 (noting that the district court applied OMAHA, NEB., MUN. CODE, ch. 55, art. XVI, § 55-782(c)(3) (1980), which, as pointed out by the Nebraska Court of Appeals, was the incorrect subsection to apply).
69. *Id.* at 472, 764 N.W.2d at 132.
70. *Id.* at 474, 764 N.W.2d at 134.
71. *Id.* at 473, 764 N.W.2d at 134.
72. *Id.* at 474–75, 764 N.W.2d at 134.
73. *Id.* at 475, 764 N.W.2d at 134.
74. *Id.* at 479, 764 N.W.2d at 137.

turn of the twentieth century. He testified further that the modern zoning regulations were drafted to control growth in suburban areas,[75] providing for larger front and side yards. Because the district court had accepted this characterization of the issue as one of density, the appellate court deferred to that characterization.[76] The Nebraska Court of Appeals dismissed arguments made by Rousseau that the hardship had to be equivalent to a taking,[77] that no hardship existed if the land was purchased after the ordinance was enacted,[78] and that there was no hardship if Rousseau's own property value would be impaired.[79] In so doing, the court addressed the question of whether the hardship caused by the "density of an already existing, land-poor development conflict[ing] with a strict application of area requirements" was sufficient to justify the granting of the variance.[80] The appellate court pointed out the only three "hard and fast rules"[81] that have been set down in Nebraska cases. As this situation was not affected by those rules, the court was required to pay homage to the deference granted to the zoning board of appeals.[82] Thus, the granting of the variances was affirmed, because there was no abuse of discretion or error of law in the district court's decision.[83]

C. Statutory Guidance

In Nebraska, there are four different statutes that govern the issuing of variances, corresponding to the different communities where the variance is sought.[84] Variances in cities of the first[85] and second[86] class and in villages[87] are governed by section 19-910 of the *Revised Statutes of Nebraska*. Under this statute, the board of adjustment has

75. *Id.* at 476, 764 N.W.2d at 135.
76. *Id.* at 476, 764 N.W.2d at 135.
77. *Id.* at 477, 764 N.W.2d at 136 (citing several Nebraska Supreme Court cases that approved variances when the hardship did not constitute a taking).
78. *Id.* at 477–78, 764 N.W.2d at 136 (following the holding of *Eastroads*, where the variance would only be improper if the party requesting the variance created their own hardship).
79. *Id.* at 478, 764 N.W.2d at 136 (noting that where the district court did not accord weight to Rousseau's testimony that the variance would impair his property value, the Nebraska Court of Appeals would not substitute its own findings).
80. *Id.* at 478, 764 N.W.2d at 136.
81. *Id.* at 478, 764 N.W.2d at 137; *see supra* section II.A.
82. *Rousseau*, 17 Neb. App. at 478–79, 764 N.W.2d at 137.
83. *Id.* at 479, 764 N.W.2d at 137.
84. Thomas Sattler, Comment, *Variances and Parcel Rezoning: Relief from Restrictive Zoning in Nebraska*, 60 NEB. L. REV. 81, 89–96 (1981).
85. Cities of the first class are those having more than 5000 but not more than 100,000 inhabitants. NEB. REV. STAT. § 16-101 (Reissue 2007).
86. Generally, cities of the second class are those with more than 800 but not more than 5000 inhabitants. *Id.* § 17-101.
87. Generally, villages have not less than 100 and not more than 800 inhabitants. *Id.* § 17-201.

the power to grant a variance when strict application of the ordinance "would result in peculiar and exceptional practical difficulties . . . or exceptional and undue hardships."[88] Such variances would be authorized by the board of adjustment only if it finds that:

> (a) The strict application of the zoning regulation would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit, or caprice.[89]

In counties the controlling statute for issuing variances is section 23-168.03 of the *Revised Statutes of Nebraska*. The requirements of this statute are the same as those for cities of the first and second class and for villages, in that the board of adjustment has the power to grant a variance when strict application of the ordinance "would result in peculiar and exceptional practical difficulties . . . or exceptional and undue hardships."[90]

Variances in cities of the primary class[91] are governed under section 15-1106 of the *Revised Statutes of Nebraska*. Following this statute, the boards of zoning appeals may grant variances "to the extent necessary to permit the owner a reasonable use of his or her land in those specific instances when there are peculiar, exceptional, and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned."[92] Whether the circumstances fall within the "peculiar, exceptional, and unusual circumstances" provided for in the statute seems to be left to the discretion of the board of zoning appeals.[93]

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88. *Id.* § 19-910(1)(c). Section 19-910(1)(c) authorizes the granting of variances:

> when by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property.

Id.

89. *Id.* § 19-910(2).
90. *Id.* § 23-168.03(c); *see supra* note 89 and accompanying text.
91. Cities of the primary class are those with more than 100,000 but not more than 300,000 inhabitants. NEB. REV. STAT. § 15-101 (Reissue 2007).
92. *Id.* § 15-1106.
93. Sattler, *supra* note 84, at 91.

Variances in cities of the metropolitan class,[94] such as Omaha in *Rousseau*, are governed by section 14-411 of the *Revised Statutes of Nebraska*. By this standard, the board of appeals may grant a variance when "there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance."[95] Although the statute itself contains no specific guidance as to what would constitute "unnecessary hardships," one commentator[96] argues that the Supreme Court of Nebraska did set out the relevant considerations in *Peterson v. Vasak*.[97] In *Peterson*, the court stated that such hardship occurs when:

> the use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property; or that there is convincing proof that it is impossible to use the property for a conforming purpose; or that there are factors sufficient to constitute such a hardship that would in effect deprive the owner of his property without compensation. An unnecessary hardship exists when all the relevant factors taken together convince that the plight of the location concerned is unique in that it cannot be put to a conforming use because of the limitations imposed upon the property by reason of its classification in a specific zone.[98]

Despite this purported "definition" of hardship, Nebraska courts have not explicitly followed the considerations set out in *Peterson*, and so, as of the deciding of *Rousseau*, there was no judicial definition as to what constituted sufficient hardship in the granting of a variance.

III. ANALYSIS

Variances, which are basically exemptions for a specific piece of property from the limitations required by zoning ordinances, are normally granted when strict adherence to the limitations of the ordinance would result in "unnecessary hardship" to the owner.[99] They "provide flexibility in a zoning ordinance . . . [by allowing] a board of zoning appeals [to] permit a use, or simply an intensity of use, that is impermissible under the current zone."[100] In other words, as pointed out by the Nebraska Supreme Court, the purpose of a variance is to allow "the amelioration of the rigors of necessarily general regulations

94. Metropolitan class cities have 300,000 or more inhabitants. NEB. REV. STAT. § 14-101 (Reissue 2007).
95. *Id.* § 14-411.
96. Sattler, *supra* note 84, at 96.
97. 162 Neb. 498, 76 N.W.2d 420 (1956).
98. *Id.* at 508, 76 N.W.2d at 426 (citing 58 AM. JUR. *Zoning* § 203 (1948); C. R. McCorkle, Annotation, *Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto*, 168 A.L.R. 13 (1947)).
99. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1396 (1961).
100. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 918 (2007).

by eliminating the necessity of a slavish adherence to the precise letter of the limitations where in a given case little or no good on the one side and undue hardship on the other would result from a literal enforcement" as well as "to prevent the ordinance against attack on the ground of unreasonable interference with private rights."[101] From this it can be seen that the goal of granting a variance is to strike a balance between the public good—which is purportedly advanced by the passing and application of a zoning ordinance "so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done"[102]—and private rights, which allow the owner to determine how their own land is to be utilized.

A. Deference

As can be observed from the Nebraska cases, deference to the local zoning board is a very significant consideration in judicial review of the granting of variances.[103] This deference allows for the zoning boards to use their more intimate knowledge and familiarity with the community to make decisions in the best interest of the individuals, as well as other members of the community, more effectively than a removed judicial body. Courts are typically conscious of the fact that local zoning boards are in a better position to make such decisions, and consequently courts are normally hesitant to "substitut[e] their judgment for that of a community's elected representatives."[104] However, too much deference to local zoning boards creates problems that can outweigh the benefits obtained by taking advantage of local knowledge and expertise.

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101. *Peterson*, 162 Neb. at 508, 76 N.W.2d at 426–27 (citing Lee v. Bd. of Adjustment, 37 S.E.2d 128 (N.C. 1946); C. R. McCorkle, Annotation, *Construction and Application of Provisions for Variations of Zoning Regulations and Special Exceptions Thereto*, 168 A.L.R. 13 (1947)).

102. NEB. REV. STAT. § 14-411 (Reissue 2007).

103. *See*, *e.g.*, *supra* note 51 and accompanying text; *supra* note 83 and accompanying text. *See generally* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 727–37 (2008) (discussing historical and modern judicial deference in relation to zoning); 3 EDWARD H. ZIEGLER, JR., ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 62:35 (4th ed. 2009) (noting a presumption of validity in favor of the zoning board of appeals).

104. Ostrow, *supra* note 103, at 731; *see also* Burnham v. Planning & Zoning Comm'n, 455 A.2d 339, 341 (Conn. 1983) ("We have said on many occasions that courts cannot substitute their judgment for the wide and liberal discretion vested in local zoning authorities when they have acted within their prescribed legislative powers."); Leslie v. City of Toledo, 423 N.E.2d 123, 125 (Ohio 1981) ("No appellate court, under the guise of judicial review, should nullify the zoning code, which has been written and adopted by the members of a city council, the duly-elected representatives of the people.").

When so much deference is given to the local zoning board—overturning their decision, for example, only when "the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong,"[105]—there is insufficient guidance to prevent the board from potentially taking advantage of this power. This in turn can have a tendency to add to "the highly discretionary, inconsistent, and often corrupt system of land use regulation that prevails throughout the country."[106] The relatively small size of the zoning board lends itself to being especially susceptible to corruption or domination by a few individuals who disproportionately can affect zoning.[107] Added to this problem is the fact that local zoning officials often lack training or zoning planning experience,[108] and thus they should not reasonably be expected to consistently make decisions that are in the best interest of the community. From the foregoing problems, it can be seen that a policy of deference in all facets of zoning, but particularly with regard to variances,[109] can lead to problems that will often outweigh any benefit that is received from that deference.

B. Developing the New Standard

In order to combat the problems potentially raised by a policy of deference in granting variances, a more concrete, objective standard should be followed.[110] As one commentator put it, in providing gui-

105. Bowman v. City of York, 240 Neb. 201, 210–11, 482 N.W.2d 537, 544 (1992).
106. Ostrow, *supra* note 103, at 725–26 (citations omitted).
107. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 855 (1983) ("[S]heer corruption, made possible in smaller representative bodies because a limited number of persons have influence which must be bought. Another possibility is domination by a few who are perceived by others as the powerful. The decisions of these few can affect many within the community . . . . Finally . . . the factional domination created by a popular 'passion'—sometimes a sudden whim, sometimes a longstanding prejudice—that carries a majority before it.") (citations omitted).
108. ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 308 (Erwin Chemerinsky et al. eds., 3d ed. 2005) ("[Zoning officials] range from citizen volunteers with no training or expertise in administration or land use, to persons chosen more for their political connections than for their expertise or wisdom, to professionals."); Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 440 (2006) (noting that zoning officials "are not planning or technical experts").
109. BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION § 2:3 (Patrick Fong ed., 12th ed. 2009) ("Perhaps no other zoning flexibility technique has received as much criticism as the variance.").
110. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1162 (1985) (arguing that plans, which are "notoriously vague[,] . . . provide no genuine standards for individual [zoning] decisions"); *see also* Ostrow, *supra* note 103, at 737 ("Judicial deference to this process—in which decisions are made in the absence of procedural safeguards, by untrained zoning officials, on a subjective and highly discretionary basis—cannot be considered reasonable.").

dance with respect to decisions on variances, "the optimum standard should be one sufficiently tough so that the fabric of local zoning remains intact, yet realistic and fair enough so that zoning boards do not have to ignore the law to reach equitable variance decisions."[111] These considerations are equally important to variances in Nebraska; any review should similarly have the goal of being stringent enough to honor the goals of the local zoning ordinances, yet flexible enough to allow variances in the interest of fairness and equity.

In Nebraska, the zoning boards themselves are given guidance by the relevant statutes based upon the size of the community,[112] as well as by locally adopted ordinances. These statutes, however, fail to define sufficient hardship in granting variances. The district courts, in their review of the zoning boards' decisions concerning the granting of variances, are limited by the standard of review to disturbing those decisions only when "the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong."[113] From the rulings of the Nebraska Supreme Court—where hardship does not exist only when the party seeking the variance created their own hardship,[114] wanted only to build a larger building,[115] or wanted only to produce increased profits[116]—it can be seen that deference to the zoning boards would cause the majority of variance decisions to be affirmed by the courts on appeal, especially if the party seeking the variance is able to articulate a reason other than those denounced by the Nebraska Supreme Court. This is due to the fact that the rules regarding hardship are, in a sense, "negative." That is, they articulate certain rules about what "sufficient hardship" is not, but do not give guidance as to what "sufficient hardship" is. These "negative" rules are thus inadequate to achieve the goals previously expressed in honoring the spirit, intent, purpose, and general plan of the zoning ordinance.

To come up with a hardship standard that is sufficient to protect the interests of the zoning ordinance and not allow deference to control to the detriment of the greater good, certain considerations must be taken into account to give guidance as to what hardship is, not just what it is not. The Nebraska Supreme Court attempted to articulate what it felt constituted sufficient hardship in relation to section 14-411,[117] but that definition has not been followed. Looking outside of

111. Ann Martindale, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 713 (1988).
112. *See supra* section II.C.
113. Bowman v. City of York, 240 Neb. 201, 210–11, 482 N.W.2d 537, 544 (1992).
114. *See supra* subsections II.A.1–2.
115. *See supra* subsection II.A.3.
116. *See supra* subsection II.A.4.
117. NEB. REV. STAT. § 14-411 (Reissue 2007); *see supra* note 98 and accompanying text. The majority of states have differentiated between use variances and area

Nebraska, the case that is most often cited[118] for defining the elements of hardship, *Otto v. Steinhilber*,[119] stated that to have hardship necessary to grant a variance, a court must find:

> (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 neighborhood 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.[120]

The application of this hardship test, whose elements the majority of states have adopted and in some cases have expanded upon,[121] has been criticized as being too strict, as it only allows for variances when "strict compliance with the zoning result[s] in no reasonable use that could be made of the property," and the variance is thus "used as a constitutional safety valve to avoid what might otherwise be unlawful takings."[122] Accordingly, in looking to formulate a new test that gives sufficient flexibility to allow fairness and equity for the landowner—although wanting to be stricter than the almost complete deference in use now—it is more advantageous for the overall balance of interests not to be as strict as the test of *Otto*.

One commentator has argued that, after first making sure that the hardship is significant, three requirements must be taken into account in considering hardship for zoning variances, including (1) "the hardship is related to the property" and not the personal circumstances of the person seeking the variance; (2) the hardship is unique to the petitioner (since if it affected more people in the area, an amendment to the ordinance would be proper instead of an individual variance); and (3) the question of whether the hardship was created by the petitioner should be considered as a factor in determining whether

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variances, often with different requirements between the two necessary to suffice for hardship—typically the showing of hardship for a use variance is more stringent than for an area variance. However, eighteen states, including Nebraska, do not distinguish between use variances and area variances legislatively or judicially. 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 13:8 (5th ed. 2009).

118. BLAESSER, *supra* note 109, at 169.

119. 24 N.E.2d 851 (N.Y. 1939).

120. *Id.* at 853 (citation omitted). This test has subsequently been codified in New York. N.Y. GEN. CITY LAW § 81-b(3)(b)(i)–(iv) (McKinney 2003); N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2004); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 1996).

121. BLAESSER, *supra* note 109, § 2:12.

122. David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L., 279, 288–89 (2004) (citations omitted). Despite this stringent definition of unnecessary hardship, at least nineteen states use a similarly stringent definition, including Alabama, Arizona, California, Connecticut, Delaware, Florida, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Rhode Island, Tennessee, and Wisconsin. 3 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING §§ 20.09, 20.16, 20.17 (4th ed. 1996).

a variance is warranted.[123] This proposed test coincides fairly well with the previous Nebraska decisions. For example, that the hardship is related to the property, not the personal circumstances of the petitioner, is a broader requirement that would encompass the rule from *Bowman*—that wanting to increase profits of the petitioner is not sufficient to constitute hardship.[124] The proposed test, however, also differs somewhat from the previous Nebraska Supreme Court decision in *Eastroads*, which held that a petitioner cannot create their own hardship,[125] whereas the proposed test would only take that factor into consideration.[126] Thus, in order to follow the precedent already laid down by the court, a new guideline would still disqualify those who create their own hardships from receiving a variance.[127]

The Supreme Court of New Hampshire, also dissatisfied with the stringent test it had previously followed, adopted a new test in *Simplex Technologies, Inc., v. Town of Newington*.[128] The newly adopted test allowed for the granting of a variance due to hardship when:

> (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others."[129]

The test of *Simplex Technologies* focuses more on how the proposed variance will affect the neighborhood and community around the landowner than simply on the petitioner himself. This characteristic makes the test particularly attractive when attempting to maintain the desired balance between the public good and the private rights of the landowner. Although the New Hampshire test does not coincide exactly with the three rules the Supreme Court of Nebraska has adopted, it complements those rules by requiring the zoning board to look beyond the petitioner and their own hardship to see how the suggested variance would affect the others of the community.

From examining the foregoing discussion, it follows that a new test for "hardship" should be adopted that would take into account the goals of the variance—striking a balance between the public good and the private rights of the individual to not be overly burdened by the

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123. Owens, *supra* note 122, at 318–19.
124. *See supra* subsection II.A.4.
125. *See supra* subsection II.A.2.
126. Owens, *supra* note 122, at 319.
127. For a collection of cases also disqualifying those who create their own hardships, see Richard Gutekunst, *The Self-Inflicted Hardship Rule in Pennsylvania Variance Law*, 27 VILL. L. REV. 156 (1982), and Osborne M. Reynolds, Jr., *The Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?*, 20 URB. LAW. 1 (1988).
128. 766 A.2d 713 (N.H. 2001).
129. *Id.* at 717.

necessarily general zoning ordinance—as well as the deference that has always been important to the courts[130] and the previous rules adopted by the Supreme Court of Nebraska.

C. Proposed New Standard

Taking the foregoing considerations into account, a new standard governing "hardship" for zoning variances in Nebraska can be proposed. To begin with, in looking to the petitioner, the stated hardship must be unique to that petitioner, since if it affected a larger group of people, an amendment to the zoning ordinance would be more appropriate than continuously granting variances.[131] Also, the stated hardship should be related to the property and not to the personal circumstances of the party seeking the variance, since the "variance runs with the land rather than being a personal right, so such a limitation is warranted."[132] As this requirement would cover one of the rules adopted by the Nebraska Supreme Court (i.e., that wanting to increase profits does not constitute sufficient hardship), the only other rules for the individual originating with the decisions of the Supreme Court of Nebraska are that wanting to build a bigger building does not alone constitute sufficient hardship, and the individual cannot create their own hardship. These rules would be necessarily incorporated into the new standard.

The new standard will also look for guidance to the rules adopted by the Supreme Court of New Hampshire in *Simplex Technologies* in order to ensure that the best interests of the neighborhood and community at large are specifically taken into consideration. Thus, the final three considerations of the new standard are that the zoning restriction interferes with the party's reasonable use of the property in considering the unique setting of the property in the surrounding area, that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property in question, and that the proposed variance would not injure the rights of others.

Pulling all of this together, the proposed new standard can be articulated as the following: (1) the stated hardship must be unique to the petitioner; (2) the hardship must be related to the property and not to the personal circumstances of the petitioner; (3) a desire to construct a larger building alone does not constitute a sufficient hardship; (4) the petitioner cannot create their own hardship; (5) the petitioner's

130. *See supra* section III.A.

131. For a collection and analysis of cases requiring uniqueness to the petitioner, see Osborne M. Reynolds, Jr., *The "Unique Circumstances" Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127 (1999).

132. Owens, *supra* note 122, at 318.

reasonable use of the property, considering the unique setting of the property in the surrounding area, must be the subject of interference; (6) no fair and substantial relationship may exist between the general purposes of the zoning ordinance and the specific restriction on the property; and (7) the proposed variance may not injure the rights of others.

This proposed hardship standard is superior to the previous policy of extreme deference to zoning boards in that it provides more specific rules to guide the board in its decision, requiring it to make certain findings considering the effects on the individual seeking the variance and on the community surrounding the property at issue. However, the standard is also broad enough to allow the board the flexibility to deal with necessarily general zoning ordinances that could otherwise unfairly restrict some individual landowners. The new standard for hardship could thus be applied to the relevant statutes that guide the issuing of variances. Following such a standard would allow reviewing courts to continue to defer to boards as they have in the past,[133] allowing for the benefits of such a policy, such as local expertise, while avoiding the detriments that have given variances a bad name.[134]

D. Application to *Rousseau*

Although one can only speculate as to what the zoning board of appeals in *Rousseau* would have found when considering the factors of the proposed new standard, a brief application would help illustrate how the new standard would apply in such a situation.

The hardship was unique to petitioner Kerwin's property, as she was attempting to build upon an empty lot, whereas the surrounding lots all had existing buildings which were not affected by the zoning ordinance.[135] Similarly, the hardship was also related to the property and not the personal circumstances of Kerwin.[136] This was shown through testimony that pointed out how the Dundee area was developed into small lots for high density housing, but the current zoning was drafted to control suburban growth.[137] Practically any building that was proposed to be built on the lot would face similar hardship. Although the next two considerations—that wanting to build a bigger building alone is not sufficient for hardship and that a petitioner cannot create their own hardship—could possibly be argued against Kerwin (particularly because it was her intended design that led to the violation, which calls into question whether she created her own hard-

133. *See supra* note 103 and accompanying text.
134. *See supra* section III.A.
135. Rousseau v. Zoning Bd. of Appeals, 17 Neb. App. 469, 470, 764 N.W.2d 130, 131 (2009).
136. *Id.* at 472, 764 N.W.2d at 132.
137. *Id.* at 476, 764 N.W.2d at 135.

ship), the Court of Appeals in *Rousseau* specifically pointed out these two pre-existing rules, and yet it still allowed the variance,[138] once again following a policy of deference.[139]

Whether the zoning restriction interfered with Kerwin's reasonable use of the property was not addressed, although one could easily see how she would argue that it did; she wanted to build what she saw as an aesthetically pleasing building. The party opposing the variance could argue that there were other reasonable uses the lot could have been put to, and thus her reasonable use was not the subject of interference. This would be a good example of where the local expertise of the zoning board would come into play, allowing the board to hear the arguments and decide what really was reasonable.

According to expert testimony received, no substantial relationship existed any longer between the purposes of the zoning ordinance and the restriction on the property.[140] This consideration overlaps in this case with the relationship of the hardship to the property—that the land at one point was zoned for high density, small lots, but the ordinance in the present is designed more for controlling suburban development. Finally, whether the variance would injure the rights of others was only briefly mentioned in the opinion, where, although the neighbor said the proposed building would impair his property value, the trial court did not give any weight to that argument.[141] One can only speculate whether the board, following the proposed new standard, would have given more weight to his testimony. This goes to show how the proposed standard would give more guidance to the zoning boards in granting variances, and thus the courts would not have to worry that granting deference to the boards would have a detrimental impact on neighborhoods and communities.

IV. CONCLUSION

The preceding discussion traces how the Nebraska Supreme Court has slowly developed rules pertaining to sufficient hardship for the granting of a variance. Despite the policy of deference that has directed the decisions in this area, more guidance is needed to protect against the dangers of unfettered deference to zoning boards. This Note looked at how adopting a new standard with more strict guidelines can protect against those dangers, while still allowing for sufficient flexibility in zoning variances to ensure the rights of the landowner when faced with the necessarily general zoning ordinance.

138. *Id.* at 478, 764 N.W.2d at 136–37.
139. *Id.* at 479, 764 N.W.2d at 137.
140. *Id.* at 476, 764 N.W.2d at 135.
141. *Id.* at 478, 764 N.W.2d at 136.

Land use planning is an integral aspect of organized society, particularly when it comes to people interacting not only with land, but with others around them in their neighborhoods and communities. In order to foster good relations between individuals and their communities, while still providing for the efficient use of land and protecting the rights of landowners to seek to use their property as they wish, a fair balance must be sought. By giving more guidance to zoning boards in issuing variances, that balance can more readily be attained in this area of land use planning, thus granting more protection to property owners and community members.