

ZONING FINALITY: RECONCEPTUALIZING RES JUDICATA
DOCTRINE IN LAND USE CASES

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INTRODUCTION

Zoning disputes provide many Americans with their only firsthand exposure to the workings of democratic government. Land use issues trigger participation because neighbors perceive the wrong kind of development as posing a double-barreled threat to the stability of the community in which they have chosen to live and to the economic value of their homes.

The protagonists in zoning disputes—landowners and neighbors—invest time and other resources to persuade the relevant decisionmakers to rule in the protagonists’ favor. When the parties make that investment, should they assume that a decision made today will have some enduring significance? Whether the decision is “final” may play an important role in shaping the parties’ participation and presentations. If a zoning board were free to deny a variance today and to grant the identical variance next week (or next year), there would be less reason for neighbors (and landowner applicants) to spend time and money framing their arguments for today’s decision.

Many of the reasons that underlie *res judicata* doctrine apply to these local land use disputes. In the interest of conserving the resources of all parties—landowners, neighbors, and local decisionmakers—issues should be decided once, not multiple times. There is little reason to think that, were the issues decided multiple times, subsequent determinations would improve on prior ones. This is especially true in the context of land use, where the issues involve primarily questions of fact, and parties have incentives to come forward with all relevant information at the time the first decisionmaker considers the dispute.

If a court, rather than a zoning board, were resolving the dispute, *res judicata* doctrine would circumscribe the power of a subsequent court to depart from the earlier determination. In the first instance, however, zoning disputes are resolved not by the courts, but by local legislatures and administrative bodies. No finality principle comparable to *res judicata* attaches to legislative determinations, no matter which legislative body—Congress, a state legislature, or a local city council—makes those determinations. Unlike most judicial decisions, which resolve discrete disputes over past events, legislatures act prospectively. Finality rules would preclude legislative decisionmakers from considering new facts that cast doubt on the wisdom of past decisions. It should not be surprising, then, that legislatures are typically free of

finality constraints.

In contrast to the well-established principles that apply to judicial and legislative determinations, the applicability of finality principles is unclear when it comes to administrative decisions by the local zoning board, such as the grant or denial of a variance. Courts sometimes treat zoning board decisions as if they were judicial decisions, using *res judicata* language to preclude new applications for relief that the zoning board previously denied. In other cases, courts—often from the same jurisdictions—permit boards to entertain applications virtually identical to previously rejected applications. Although courts sometimes suggest the need to be “flexible” in applying *res judicata* doctrine to zoning disputes, neither courts nor scholars have offered a coherent prescriptive or descriptive account for how that flexibility does or should operate.

This Article has two related objectives: to develop a normative theory explaining how finality principles should apply in the land use context and simultaneously to argue that existing case law, however inarticulately, reflects that normative theory. Part I begins by exploring the distinctive structure of zoning doctrine, which fits imperfectly with traditional categorization of decisions as legislative or judicial. Part II examines more generally the role of finality in legal decisionmaking. Part III demonstrates that, in light of the structure of zoning doctrine, traditional claim preclusion doctrine should have no place in zoning law. This Article argues, by contrast, that issue preclusion doctrine should and does operate to constrain zoning decisionmakers. The Article goes on to demonstrate that this framework explains the results, even if not the language, in the vast majority of zoning cases that raise finality issues.

I. THE STRUCTURE OF LAND USE LAW

The starting point for most current zoning law begins with the Euclidean technique¹ of dividing the municipality into districts, or zones, that separate incompatible uses. One might imagine this system operating mechanically: once the districts are established, all development proceeds as a matter of right. In practice, however, that is not how the zoning system has developed. Instead, zoning and land use issues require the exercise of judgment, not the application of mechanical rules.

A. *The Discretionary Nature of the Land Use Process*

Discretion and judgment play important roles in the zoning process

1. From its inception, land use law’s focus has been on regulation of externalities. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88, 394–95 (1926), the U.S. Supreme Court sustained the practice of zoning by analogizing it to nuisance law and emphasizing the effect that the use of one parcel of land might have on neighboring parcels.

primarily for two reasons. First, in any municipality of significant size, even the most well-intentioned and capable officials will be unable to anticipate the effect of a zoning ordinance on each and every parcel of land.² Some restrictions on use or area may make particular parcels valueless. The compatibility of other uses with surrounding parcels may depend on individualized determinations not easily captured in a code. As a result, zoning ordinances typically have provisions that enable landowners to obtain administrative relief from strict application of the ordinance.³

Second, municipalities generally have incentives to subject most new construction to discretionary review. A regime in which the municipality has power to impose conditions on development approvals enables the municipality to extract benefits from developers that would not be obtainable in a system where development proceeds “as of right.”⁴ For a large project, those benefits might include parkland or infrastructure improvements; for a smaller project, benefits might

2. As the Supreme Court of California explained in *Rubin v. Board of Directors*, 104 P.2d 1041 (Cal. 1940):

A zoning ordinance places limitations upon the use of land within certain areas in accordance with a general policy which has been adopted. But because compliance with the ordinance may present unusual difficulties as to certain property, almost every zoning ordinance includes provisions under which an owner may apply to an administrative board for permission to put his land to a non-conforming use. This procedure . . . provides the opportunity “for amelioration of unnecessary hardships which, owing to special conditions, would result from literal enforcement of the restrictive features of the ordinance.”

Id. at 1043 (quoting *Thayer v. Bd. of Appeals*, 157 A. 273, 275 (Conn. 1931)).

3. See, e.g., VA. CODE ANN. § 15.2-2309 (2011) (authorizing boards of zoning appeals to grant variances and special exceptions to landowners).

4. The U.S. Supreme Court has recognized that the power to impose conditions on development approvals gives municipalities considerable leverage over developers, and it has attempted to constrain municipalities by requiring a “nexus” between the permit condition and the reasons for requiring development approval. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 & n.5 (1987); see also *Dolan v. City of Tigard*, 512 U.S. 374, 386–87 (1994) (explaining and applying the “nexus” requirement announced in *Nollan*). See generally Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004).

To make significant changes to the existing use of their land—changes such as subdividing parcels, initiating major development, or shifting the type or intensity of use—property owners typically must seek one or more discretionary approvals from the jurisdiction’s zoning authority or legislative body. During this process, local governments and property owners often negotiate over the exactions an applicant will accept as conditions for issuance of the necessary planning approval.

Id. at 623 (citations omitted).

include planting trees or improving drainage by reducing impervious surfaces. Discretionary review comes in various forms. A landowner who wants to develop her property in a way not permitted by the zoning ordinance may seek amendment of the ordinance itself, either to permit a new use in the existing district or to include the landowner's parcel in a different district. Amendment of the ordinance, like enactment of the ordinance itself, is generally the province of the municipal legislature, often known as the city council or town board.⁵

Alternatively, a landowner can seek a variance from the local administrative body—typically the zoning board of appeals or board of adjustment—to use the landowner's property in a manner not permitted within the district as currently zoned.⁶ Variances provide a “safety valve” for landowners who can establish that strict application of the ordinance would cause hardship (that is, the landowner could not obtain a reasonable return on the land as zoned), and thus avoid the need for frequent zoning amendments.⁷ Most ordinances require a landowner who seeks a “use” variance to establish, in addition to hardship, that the hardship is unique to the landowner's parcel, and that granting the variance will not have an adverse impact on the surrounding neighborhood.⁸ Less stringent requirements usually apply to applications for “area” variances, which permit the landowner to modify setback requirements or other square footage requirements, but not to use the land in a manner otherwise prohibited by the ordinance.⁹

Ordinances also make provision for special-use permits, sometimes called “conditional-use permits” or “special exceptions.”¹⁰ Although

5. In some jurisdictions, the municipal legislature must refer amendments to a local planning commission or planning board before enacting an amendment. *See, e.g.*, VA. CODE ANN. § 15.2-2285.

6. *See, e.g., id.* § 15.2-2309(2).

7. *See* David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 283–84 (2004) (citations omitted) (noting that variances were designed to limit both constitutional attacks and frequent zoning amendments).

8. *See, e.g.*, N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2011); *see also* 23 AM. JUR. 3D *Proof of Facts* § 13 (2011). The landowner must generally show:

- (1) [T]he 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.

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

9. *See, e.g.*, N.Y. TOWN LAW §§ 267(1)(b), 267-b(3)(b).

10. *See, e.g., id.* § 274-b. For a general discussion of the terminology, *see* 3 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 61:9 (4th ed. 2010).

specially permitted uses explicitly are authorized by the zoning ordinance, the ordinance authorizes an administrative body to impose conditions that minimize the impact of the use on the surrounding community.¹¹ Schools and churches are common specially permitted uses in residential districts. Although these uses are generally compatible with residential neighbors, concerns about traffic patterns, parking, and noise prevent many municipalities from authorizing these uses “as of right”; the special permit process thus enables an administrative body to protect the interests of neighbors.¹²

Municipal land use ordinances typically offer still more opportunities for the exercise of municipal discretion, often requiring subdivision review¹³ or site plan review¹⁴ for significant development projects. The basic point, however, is that the land use process is rife with opportunities for the exercise of judgment by municipal officials.

B. *The Decisionmakers*

Responsibility for zoning approvals is not typically centralized in a single decisionmaker. Zoning amendments tend to be the province of an elected local legislature, members of which often have no legal background. Although a landowner often makes the initial proposal for a zoning amendment, the local legislature generally does not owe the landowner any obligation to consider the amendment or to conduct a hearing. However, if the legislature favors the proposed amendment, the legislature may not enact an amendment without a public hearing.¹⁵

Variations and special-use permits, by contrast, typically fall within the purview of the zoning board of appeals or board of adjustment (the “zoning board” or “board”).¹⁶ Members of the board, generally

11. See, e.g., N.Y. TOWN LAW § 274-b(1)–(2).

12. See, for example, *Creswell v. Baltimore Aviation Service, Inc.*, 264 A.2d 838 (Md. 1970):

[T]he special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, *prima facie*, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding.

Id. at 842 (quoting *Rockville Fuel & Feed Co. v. Bd. of Appeals*, 262 A.2d 499, 502 (Md. 1970) (internal quotation marks omitted)).

13. See, e.g., VA. CODE ANN. § 15.2-2241 (2011).

14. See, e.g., *id.* § 15.2-2246.

15. See, e.g., *id.* § 15.2-2285(C) (requiring public hearing before governing body approves zoning amendment, but not requiring a hearing when governing body decides not to act).

16. See, e.g., *id.* § 15.2-2309 (delineating powers of boards of zoning appeals, including authorization of variances and special exceptions); N.J. STAT. ANN. § 40:55D-70 (West 2011) (conferring similar powers on board of adjustment).

appointed by the local legislature,¹⁷ are required to consider applications for variances and special-use permits, often within a statutorily mandated time frame.¹⁸ The board must conduct public hearings on each application and make decisions based on the record.¹⁹ Even when not required by statute, good practice requires the board to make findings to accompany its decision. Although the functions of the zoning board might be categorized as quasi-judicial, members of the board—like members of the legislature—do not need (and often do not have) legal training.

However, judicial review is available to landowners or neighbors dissatisfied with the decision made by either body. In most states, courts will not overturn a zoning amendment unless the challenger can demonstrate that the amendment violates the Constitution or exceeds the authority state law confers on the local legislature.²⁰ When a zoning board grants or denies a variance or special-use permit, courts review the determination for consistency with applicable statutory or common law standards, but give considerable deference to the board's weighing of statutory considerations.²¹

C. Multiple Applications: The Finality Problem

What consequences flow from an administrative body's determination to deny (or to grant) a landowner's application? Of course, an aggrieved landowner or neighbor can challenge the determination directly in court. But can a landowner simply apply again, hoping for a different result? To what extent is the municipal body's decision final?

17. See, e.g., N.Y. TOWN LAW § 267(2) (McKinney 2011). Virginia has an unusual provision calling for a circuit court to appoint members of local boards of zoning appeals. VA. CODE ANN. § 15.2-2308(A).

18. See, e.g., N.Y. TOWN LAW § 267-a(8) (requiring decision within sixty-two days of public hearing).

19. Cf. *Twin Cnty. Recycling Corp. v. Yevoli*, 688 N.E.2d 501, 502 (N.Y. 1997) (holding that denial of a special-use permit was improper when based on community pressure rather than record evidence).

20. See, e.g., *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 210 P.3d 532, 539 (Idaho 2009) (holding that action by county board of commissioners must be upheld unless the action is inconsistent with statutory mandates). By contrast, a number of state courts scrutinize zoning amendments more carefully. Some treat zoning amendments as "quasi-judicial" actions requiring an evidentiary showing that the amendment is consistent with a plan. See, e.g., *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23, 26, 29 (Or. 1973). In other states, proponents of a zoning amendment must demonstrate that the existing ordinance was the product of mistake, or that a change in circumstances has subsequently occurred. See, e.g., *Clayman v. Prince George's Cnty.*, 292 A.2d 689, 693–94 (Md. 1972).

21. See, e.g., *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 496–97 (Iowa 2008) (applying a substantial evidence standard and holding that when the reasonableness of a board's decision is open to "a fair difference of opinion," the board's decision should be affirmed).

Consider a concrete example. Suppose a zoning ordinance requires houses in a single-family district to be situated on lots of at least one acre. Suppose further that a landowner with a 1.75-acre parcel of land seeks a variance to permit construction of two houses on the property. The zoning board denies the variance. Five months—or five years—later, the landowner seeks a similar variance. What is the effect of the previous variance denial? Must the zoning board deny the new application based on principles of claim or issue preclusion? Even if the zoning board is not *compelled* to deny the new application on preclusion grounds, *may* the board invoke claim or issue preclusion to avoid evaluating the subsequent application without a public hearing²² on the merits?²³

Although cases raising these finality questions occur frequently, neither courts nor academics have provided a coherent framework for analyzing them. Courts recognize the importance of finality and often invoke preclusion principles, but they just as frequently reject the application of preclusion principles to nearly identical situations. While leading treatises discuss the finality problem, they are largely content to collect the cases and discuss them individually.²⁴ Careful analysis of the problem requires an understanding of the role of finality in government decisions more generally, a subject to which this Article now turns.

II. FINALITY IN GOVERNMENTAL DECISIONS

Finality principles distinguish sharply between legislative and judicial decisionmaking. Although the U.S. Constitution precludes a legislature from imposing retroactive criminal penalties,²⁵ legislators enjoy almost complete freedom to ignore or reverse the decisions of their predecessors in civil matters. The federal and state constitutions typically authorize legislation to promote the public welfare, even if that legislation significantly impairs reliance interests. The Takings and

22. See 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 2:3 (4th ed. 2010) ("As a procedural requirement, due process generally requires . . . a 'fair hearing' when governmental bodies adjudicate, or perform the quasi-judicial function of determining the rights of a particular landowner in regard to the use and development of his land under criteria for approval set out in a zoning code.").

23. While courts typically defer to zoning board determinations of land use applications, *Cowan v. Kern*, 363 N.E.2d 305, 310 (N.Y. 1977), courts will not defer to the extent that the board's behavior is arbitrary and capricious. *Anderson v. Bd. of Cnty. Comm'rs*, 217 P.3d 401, 405 (Wyo. 2009) (quoting *Dale v. S & S Builders, LLC*, 188 P.3d 554, 561 (Wyo. 2008)) ("We continue to apply the arbitrary and capricious standard as a 'safety net' designed to 'catch agency action which prejudices a party's substantial rights . . ."). A board determination made without consideration of the merits of the claim certainly would be arbitrary and capricious—unless preclusion principles excused the board from reconsidering the merits.

24. See 4 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING §§ 68:11–68:17 (4th ed. 2009) (discussing results in various categories of cases); 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING §§ 40:49–40:53 (5th ed. 2010) (same).

25. U.S. CONST. art. I, § 10, cl. 1.

Contract Clauses impose modest constraints, at most, on legislative power to change policy.²⁶

In the legislative context, democracy requires the subordination of finality to flexibility. A democratic system permits proponents of a particular policy to introduce new data to persuade legislators and voters, and permits those decisionmakers to change course based on either the new data or a different evaluation of old data. As a result, today's decisions about how to provide health care and how to regulate financial markets do not preclude subsequent Congresses or state legislatures from repealing or amending the laws.

By contrast, when judicial decisions are at issue, finality principles often close the door to judicial reconsideration of previously decided matters. When two parties have obtained judicial resolution of their dispute, claim preclusion and issue preclusion principles bind both the parties and a subsequent court to that resolution, even if the court believes the prior court's decision was incorrect on the facts or the law.²⁷

Why should finality be more critical when judicial decisions are at stake than when the decisions are legislative? And where do zoning decisions fit within that framework? Answering those questions requires an understanding of the reasons for finality principles generally.

A. *The Foundations of Preclusion Doctrine*

Preclusion doctrine rests on a combination of efficiency and fairness concerns. First, precluding relitigation of previously decided issues conserves judicial resources.²⁸ Permitting relitigation either

26. The Takings Clause in the Fifth Amendment prohibits the taking of private property for public use without just compensation, and therefore potentially makes it more expensive for the government to change decisions that adversely affect private property rights. *See generally* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 210–14 (2004) (noting that the Takings Clause protects primarily against legal change). But the Takings Clause rarely operates to invalidate state and local land use regulation, unless the regulation deprives a landowner of all economic use of its land. *See, e.g.,* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

The Contracts Clause in Article I of the Constitution also makes it more expensive for legislatures to change course, by requiring them to abide by their contracts. The Supreme Court, however, has rarely invoked the Contracts Clause to invalidate state legislation. *But see* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 32 (1977).

27. Claim and issue preclusion are not the only principles that recognize the importance of finality in judicial decisions. *Stare decisis* often leads courts to abide by past decisions with which they disagree. The *stare decisis* command, however, is a relatively weaker mandate than claim and issue preclusion. Although adherence to precedent is the general rule, American courts universally accept the principle that courts should, at least sometimes, be free to overrule past precedent.

28. *See* RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 11 (1982) (“Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. . . . The law of *res judicata* reduces these burdens . . .”). Similarly, the Supreme Court has observed that *res judicata* “has

would require more judges, or would require that a fixed corps of judges devote less attention to new issues not previously subject to litigation. Moreover, because subsequent judges are, as a class, no more likely to reach an accurate outcome than prior judges, the additional resources expended on relitigation would not generate commensurate benefits.²⁹

Second, precluding relitigation improves the quality of decisionmaking by increasing the incentive for litigating parties to advance all of their arguments and to marshal all of their evidence at once.³⁰ In most jurisdictions, preclusion doctrine prevents parties from splitting claims in ways that allow them to “save” arguments and evidence for a subsequent proceeding, should they lose the first time around.³¹

Third, from a fairness perspective, preclusion protects a successful litigant from having to expend time and resources defending against duplicative litigation.³² By denying litigants a second bite at the apple, preclusion doctrine advances a policy of repose.³³

Each of these rationales for preclusion doctrine could also be applied in the context of legislation. If legislators could not revisit past decisions, they could devote more time to new issues. Lobbyists would have more incentive to come forward in the first instance if legislators were bound by their initial decisions. Citizens who once prevailed in the legislative process would be relieved from the fear that legislators would later succumb to pressure by those who had previously lost in the process.

There are, however, critical differences between the judicial and legislative processes that explain why preclusion doctrines generally do not apply to legislation. Perhaps the most important is that legislation typically applies prospectively while litigation operates retrospectively.³⁴ Legislative decisions involve prediction about the

the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328–29 (1971)).

29. *See* RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 10 (“[F]inality attaches not because the courts are infallible but because they are inevitably fallible.”).

30. *Cf. id.* at 8–10 (noting that strict rules of finality are more appropriate in a legal regime that permits and encourages parties to raise all of their legal claims in a single proceeding).

31. *Cf. id.* § 24 cmt. a (“The law of res judicata now reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.”).

32. *See Isaac v. Truck Serv., Inc.*, 752 A.2d 509, 513 (Conn. 2000) (identifying one policy of res judicata as “provid[ing] repose by preventing a person from being harassed by vexatious litigation”).

33. RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 11 (“[The law of res judicata] holds that at some point arguable questions of right and wrong for practical purposes simply cannot be argued any more. It compels repose.”).

34. Note also that preclusion in litigation only binds parties to the litigation; preclusion in the legislative arena would bind everyone, including those who originally had little reason to

effects particular decisions will produce in the future, while litigation focuses on concrete events that occurred in the past. All of the information about past events is, at least theoretically, available when a court makes its decision. The same is not true of prospective legislative decisions. As time passes, new information will emerge that confirms or undermines the predictions on which the legislative decision was premised.³⁵ A rule precluding reconsideration of the decision would disable legislatures from incorporating that information into policy decisions.

More generally, rules precluding relitigation of disputes pose little threat to democratic decisionmaking because legislatures remain free to overturn any policies embodied in a past judgment. By contrast, a rule precluding repeal or modification of existing legislation would impose intolerable constraints on the power of subsequent legislatures to implement policy choices preferred by contemporary constituents.³⁶

Two related doctrines embody the prohibition against duplicative litigation. Claim preclusion doctrine (often referred to by its more traditional label, *res judicata*) provides that a judgment in favor of either party to a litigation extinguishes all of the claims the plaintiff could have advanced against the defendant arising out of the same set of transactions that gave rise to the claim the plaintiff actually advanced.³⁷ The basic principle is that parties with an opportunity to present an entire controversy within a single proceeding must do so.³⁸ A final judgment precludes a party from bringing a subsequent proceeding, even if the party seeks to advance new theories, present new evidence, or obtain different remedies.³⁹

Issue preclusion doctrine (traditionally known as collateral estoppel) operates both more broadly and more narrowly than claim preclusion doctrine. When a party has unsuccessfully litigated an issue in a proceeding, issue preclusion prevents relitigation of that issue, even in a subsequent proceeding on an unrelated claim.⁴⁰ On the other hand, the

worry about the legislation's impact and therefore little incentive to participate in the legislative process.

35. Cf. Kenneth Culp Davis, *Res Judicata in Administrative Law*, 25 TEX. L. REV. 199, 204 (1947) (noting that in areas where "lively problems of law" arise, decisionmakers should "not be barred from using trial-and-error methods" of resolving legal questions).

36. Cf. Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 647 (1988) (noting that "in a democratic system, legislatures are generally free to reverse" policy choices).

37. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (providing that claim preclusion doctrine extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose").

38. *Id.* § 24 cmt. a ("The law of *res judicata* now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so.").

39. *Id.* § 25.

40. *Id.* § 27 ("When an issue of fact or law is actually litigated and determined by a valid

doctrine applies only to claims actually litigated and necessarily determined. Issue preclusion does not apply to an issue or theory a party could have raised in a prior proceeding, but did not.⁴¹

While the application of preclusion principles to judicial decisions has a long pedigree, it is equally well-established that preclusion principles do not apply to legislative decisions. It is less clear how these principles apply to zoning determinations and other decisions that do not fit neatly into the “legislative” and “judicial” categories.

B. *Application to Administrative Proceedings*

With the advent and growth of administrative agencies, courts and scholars grappled over whether preclusion principles should apply to administrative decisions that shared some, but not all, of the hallmarks associated with court judgments.⁴² But it has long since been clear that preclusion principles are ill-suited to agency rulemaking decisions.⁴³ But even when agencies act in a more adjudicative mode, agency decisions do not provide all of the trappings familiar to adversarial judicial proceedings. For instance, agencies need not follow the rules of evidence.⁴⁴ There is often no formal transcript of the proceedings.⁴⁵ Moreover, statutes rigidly limit the issues agencies may decide, and non-lawyers often make agency decisions.

Nevertheless, agency decisionmaking would be crippled if finality

and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

41. *Id.* § 27 cmt. e (“A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action.”). Similarly, the judgment will not be conclusive when the issue was not recognized by the parties as important, or not recognized by the fact-finder as necessary to the first judgment. *See id.* § 27 cmt. j.

42. Historically, courts refused to give administrative decisions res judicata effect because administrative agencies are instruments of executive, not judicial, power. *See, e.g., Pearson v. Williams*, 202 U.S. 281, 284–85 (1906). However, in light of the proliferation of administrative hearings during the late twentieth century, the Supreme Court held that “[w]hen an administrative agency [acts] in a judicial capacity and resolves disputed issues of fact . . . which the parties have had an adequate opportunity to litigate,” there is “neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.” *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). For a scholarly discussion of preclusion principles as applied to administrative decisions, see generally Davis, *supra* note 35; Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 FLA. L. REV. 422 (1983).

43. Among the reasons for the mismatch between preclusion and rulemaking is the absence of identified parties in most rulemaking contexts. *See* Davis, *supra* note 35, at 230 & n.132.

44. *See, e.g., MASS. GEN. LAWS ANN.* ch. 30A, § 11(2) (West 2010).

45. In some states, statutes require zoning boards to provide a verbatim recording of proceedings. *See, e.g., N.J. STAT. ANN.* § 40:55D-10(f) (West 2011). In other states, transcripts are unnecessary unless requested by a party willing to pay for those transcripts. *See, e.g., MASS. GEN. LAWS ANN.* ch. 30A, § 11(6).

principles did not apply at all.⁴⁶ If protagonists in administrative proceedings were given unlimited freedom to bring the same claims repeatedly, the system would be burdened by the same unfairness and inefficiencies that preclusion rules are designed to avoid. Indeed, the failure to apply those principles to administrative determinations would generate perverse results: in order to obtain the benefits of finality, the *prevailing* party would have an incentive to seek judicial review of a favorable determination.⁴⁷ Applying preclusion doctrine to administrative determinations eliminates that incentive. It should not be surprising, then, that at least since the Supreme Court's 1966 decision in *United States v. Utah Construction & Mining Co.*,⁴⁸ it has been clear that res judicata principles extend to administrative determinations.

Preclusion doctrine, however, attaches only to administrative determinations that are adjudicative, not to determinations that are legislative or managerial.⁴⁹ This distinction is justified by the same reasons that bar application of preclusion doctrine to legislative determinations. Rulemaking determinations tend to focus on prediction and policy rather than on evaluation of events that have already occurred.⁵⁰ Moreover, rulemaking determinations bind parties whose individual interests are so small that they cannot be expected to participate in the rulemaking process.

No talismanic factor determines when an administrative determination is sufficiently adjudicative to permit application of preclusion principles. The more an agency's action resembles a trial court's determination, the stronger the case for classifying the action as adjudicative.⁵¹ When legal principles bind the agency to make a decision on a legal claim, preclusion principles typically will apply, so

46. RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. b ("The importance of bringing a legal controversy to [sic] conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.").

47. Court judgments are, of course, entitled to res judicata effect. Therefore, were administrative determinations given no preclusive effect, the prevailing party in an administrative proceeding, if concerned about subsequent efforts to relitigate, would have an incentive to seek judicial review of the administrative determination to obtain the res judicata effect afforded to court judgments.

48. 384 U.S. 394, 422–23 (1966).

49. RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. b.

50. Indeed, Professor Davis argued that courts sometimes focus too much effort on labeling administrative determinations as "legislative" or "adjudicative." He suggested, instead, that courts should focus more on whether the reasons for preventing relitigation are present. Thus, he argued that ratemaking decisions should not be given preclusive effect because "[a] rate desirable for one period of time may be undesirable for another period," regardless of whether the ratemaking proceeding is deemed legislative or judicial. Davis, *supra* note 35, at 231. Conversely, "a second adjudication of static facts is undesirable in absence of some special reason for permitting it." *Id.* at 232.

51. See 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.3, at 1132 (Aspen Publishers 5th ed. 2010) ("The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does.").

long as the agency's procedural process provides adequate safeguards to ensure that the parties to be bound have had a fair hearing on their claim.⁵²

Many zoning determinations fit squarely within the adjudicative framework. When a zoning board considers a variance or special permit application, or interprets a local zoning ordinance, an applicant is entitled to a final determination of his claim, usually within a statutorily mandated time period.⁵³ In making that determination, the zoning board must apply settled legal principles to the facts presented by the applicant.⁵⁴ Moreover, the board must afford notice to interested parties (usually neighbors who own land within a specified distance from the applicant's parcel) and must conduct a public hearing at which all parties have an opportunity to present and rebut evidence.⁵⁵

Preclusion doctrines therefore would appear to apply to requests for review by a zoning board. A system that allows an unsuccessful party to reapply for the same relief month after month, requiring adversaries to show up each month to oppose the relief and the board to decide each repeated application anew, would be intolerable. It should not be surprising, then, that courts find preclusion principles relevant to these applications.

52. The *Restatement* treats an administrative determination as adjudicative only if the agency determines a matter that "includes a legal claim, that is, an assertion by one party against another cast in terms of entitlement under substantive law to particular relief." RESTATEMENT (SECOND) OF JUDGMENTS § 83 cmt. b. The comment goes on to provide that "[a] petition for a benefit from the government is not a legal claim unless the agency is obliged to grant the petition upon a showing of the existence of conditions specified by law." *Id.* Once the determination is deemed to be adjudicative, *res judicata* principles apply only if adequate procedural safeguards, such as the provision of adequate notice to the parties to be bound, the right to present and rebut evidence and argument, and the ultimate rendering of a final decision, accompany the determination. *Id.* § 83(2).

53. See, e.g., N.J. STAT. ANN. § 40:55D-73 (West 2011) (imposing a 120-day period within which the board must render decisions).

54. See generally, e.g., *id.* § 40:55D-70 (providing that no variance shall be granted "without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance").

55. In an early, influential case, the New Jersey Supreme Court catalogued the foundation for applying preclusion doctrine in zoning cases, focusing specifically on the creation of the record:

To fail to accord the findings of a board of adjustment, especially where the proceedings are formal and adversary, as is the case here, the effect of *res judicata* would be most inconsistent with this goal. In addition, the function of boards of adjustment, in deciding an application made under N.J.S.A. 40:55-39(c), is essentially factfinding, as opposed to policymaking. The party seeking the variance must present evidence sufficient to allow the board to act. Other interested parties may be heard. The board is not entitled to act on facts not part of the record.

Russell v. Bd. of Adjustment, 155 A.2d 83, 87 (N.J. 1959) (citations omitted).

By contrast, when a landowner seeks a zoning amendment from a municipal legislature, the legislature need not act on the landowner's request, and certainly need not do so within a specified time frame. Although the legislature must act within the statutory authority conferred by the state zoning enabling act, the legislature faces no other significant legal constraints on its ultimate decision. Policy, not law, is the legislature's primary concern. Neither a decision to amend the ordinance, nor a decision not to amend, has the hallmarks of an adjudicative determination. As a result, preclusion doctrines should not—and do not—apply to zoning amendments.⁵⁶

C. *Limits to Preclusion Doctrine*

Neither claim nor issue preclusion doctrine provides ironclad protection against relitigation of claims,⁵⁷ regardless of whether the first determination was made by a court or by an administrative body. Four qualifications are particularly relevant in the context of zoning determinations.

First, because both claim and issue preclusion are common law doctrines, both must yield to a statutory command permitting relitigation. Preclusion principles do not require or even allow adherence to the first determination where a legislature has identified justifications—such as public policy—to permit a second litigation.⁵⁸ For instance, the Supreme Court has invoked a federal statute to hold that a state agency proceeding that rejected an age-discrimination claim

56. See *Price v. City of Georgetown*, 375 S.E.2d 335, 337 (S.C. Ct. App. 1988) (“[T]he doctrine of *res judicata* is generally held to be nonapplicable to a change of zone case because changing a zone is a legislative act of the zoning authority . . .”). In a number of states, however, courts have expressed suspicion of piecemeal zoning changes, not so much because of finality concerns, but rather because they fear that those changes may be the product of political influence. As a result, in those states, a municipality may only amend its zoning ordinance if it demonstrates that there has been a change in circumstances or that the original ordinance was the product of mistake. The “change-mistake rule” is most closely associated with Maryland, but constrains municipal power to depart from precedent in other states, as well. See, e.g., *Clayman v. Prince George’s Cnty.*, 292 A.2d 689, 693–94 (Md. 1972); *Bd. of Alderman v. Conerly*, 509 So. 2d 877, 883 (Miss. 1987); *Albuquerque Commons P’ship v. City Council*, 184 P.3d 411, 419 (N.M. 2008).

Other states treat zoning amendments as quasi-judicial and require the party seeking the amendment to establish a need for it. The leading case is *Fasano v. Board of County Commissioners*, 507 P.2d 23, 29 (Or. 1973). See also *Bd. of Cnty. Comm’rs v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *Cooper v. Bd. of Cnty. Comm’rs*, 614 P.2d 947, 950–51 (Idaho 1980). This quasi-judicial treatment, however, is motivated not by finality concerns, but by concerns about the “almost irresistible pressures that can be asserted by private economic interests on local government.” *Fasano*, 507 P.2d at 30.

57. Exceptions to claim preclusion and issue preclusion doctrine are collected in the *Restatement (Second) of Judgments*. RESTATEMENT (SECOND) OF JUDGMENTS §§ 26, 28.

58. See *id.* § 20(1)(c) (providing that a judgment for a defendant does not bar another action by a plaintiff “[w]hen by statute or rule of court the judgment does not operate as a bar to another action on the same claim”).

does not bar a plaintiff from bringing the same claim in a subsequent federal court proceeding.⁵⁹

Second, if the initial forum provides that its determination should not have preclusive effect, the plaintiff is not precluded from seeking relief in a second forum, even if no statute supplants preclusion doctrine. For instance, when a forum dismisses a plaintiff's claim "without prejudice," the dismissal does not bar a subsequent suit.⁶⁰ That is, if the first forum concludes that the case has not yet been explored sufficiently to preclude a subsequent action, the court may so indicate, leaving a second forum free to hear the case.

Third, claim preclusion does not apply when a formal barrier prevented the plaintiff from presenting the entire claim in the first forum. In that circumstance, preclusion doctrine does not interfere with the plaintiff's ability to raise in a second forum those aspects of the claim that the first forum could not adjudicate.⁶¹ Suppose, for instance, that an employee brings a negligence action against his employer, contending that the alleged negligence occurred outside the scope of his employment. Suppose further that the court concludes that the negligence occurred within the scope of the employment and dismisses the suit, asserting that the employee's exclusive remedy is workers' compensation. The court's dismissal in these circumstances does not bar the employee from subsequently seeking workers' compensation, because such relief was not available in the first forum.⁶²

The fourth limitation is of paramount importance in many land use cases: a judgment does not bar a claim arising from facts that occur after the judgment is rendered.⁶³ Suppose, for example, that pursuant to a judgment of divorce, a court awards custody to the child's mother, rejecting the father's claim that the mother is unsuitable. If the mother later engages in behavior that makes her unsuitable, the prior award does not bar the court from awarding custody to the father.⁶⁴

59. See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106, 110–11 (1991). The Court relied on a statute tying the time for filing federal court claims to the date of filing a prior claim with a state agency. *Id.* at 111 (citations omitted). The Court read the statute to express a Congressional intention that plaintiffs be afforded a forum in federal court even after an unsuccessful proceeding before a state agency. *Id.*

60. RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b).

61. *Id.* § 26(1)(c); see also *id.* § 26 cmt. c.

62. The same issue would arise in the land use context if a zoning board were confronted with a variance application from a landowner whose site plan had been rejected by a planning board for failure to comply with the zoning ordinance. Because the planning board lacked authority to grant a variance, the planning board's determination would not preclude the zoning board from considering a variance application.

63. *Id.* § 24 cmt. f ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.").

64. *Id.* § 24 cmt. f, illus. 11.

III. PRECLUSION DOCTRINE IN LAND USE CASES

Preclusion doctrine presents a difficult fit in zoning and land use cases. On the one hand, finality is an important value in land use law, as it is in other areas of law. Without some form of preclusion, neighborhood residents and zoning boards face the prospect of devoting resources to duplicative applications by persistent landowners. On the other hand, facts relevant to a variance or special permit decision may change—sometimes significantly—with the passage of time. Strict application of preclusion doctrines threatens to freeze the use of land over time, despite changes in market conditions and neighborhood character.

Many courts deal with this conflict by indicating that a zoning determination is entitled to res judicata effect unless circumstances have changed since the determination was made.⁶⁵ That formulation, however, is not helpful in understanding the doctrine because circumstances have *always* changed. The passage of time inevitably brings changes, some more perceptible than others. If these judicial pronouncements were taken literally, res judicata principles would be irrelevant in all zoning cases.

Most courts do not, however, conclude that *any* change in circumstances prevents application of preclusion doctrine, nor do they conduct independent examinations to determine whether the changes have been significant. Instead, most courts, as a matter of practice, conclude that conditions have changed if—and only if—the zoning board decides they have changed.⁶⁶ As a result, the zoning board is nearly always successful when it invokes preclusion doctrine in a land use dispute. Conversely, preclusion claims advanced by neighbors and landowners almost inevitably fail.⁶⁷

At first glance, this result appears somewhat perverse and inconsistent with traditional preclusion doctrine, which generally holds

65. See, e.g., *Bentley v. Valco, Inc.*, 741 P.2d 1266, 1268 (Colo. App. 1987) (“A zoning authority can reverse itself if there has been a substantial change in the facts or circumstances subsequent to the earlier hearing . . .”).

66. Sometimes courts make this point explicitly. In an early New Jersey Supreme Court case, the court held that whether the changed conditions “requirement has been met is for the board, in the first instance, to determine. This finding, as any other made by the board, will be overturned on review only if it is shown to be unreasonable, arbitrary, or capricious.” *Russell v. Bd. of Adjustment*, 155 A.2d 83, 88 (N.J. 1959) (citations omitted); see also *Freeman v. Town of Ithaca Zoning Bd. of Appeals*, 403 N.Y.S.2d 142, 143 (App. Div. 1978) (“[I]t is for the board to determine whether or not changed facts or circumstances are presented . . .”).

67. A narrow exception applies when the board refuses to consider whether conditions have changed. Compare *Marks v. Zoning Bd. of Review*, 203 A.2d 761, 763 (R.I. 1964) (invalidating grant of variance, but noting that whether change of conditions has occurred “is, in the first instance, for the board to determine”), with *Marks v. Zoning Bd. of Review*, 232 A.2d 382, 383–84 (R.I. 1967) (quashing a grant of variance to same landowner despite the board’s determination that, based on the evidence, circumstances had changed).

all parties equally bound by the result of a prior proceeding. Properly understood, however, prevailing judicial practice is quite consistent with preclusion principles. Claim preclusion doctrine does not bar subsequent claims when the earlier tribunal did not consider, and could not have considered, the impact of post-determination occurrences.⁶⁸ Issue preclusion doctrine, however, makes the first determination binding with respect to all issues actually and necessarily determined by the first tribunal.⁶⁹ That is, the initial decision finally determines that the landowner was, or was not, entitled to a variance or a permit as the facts existed at the time of the application. At the time of the initial decision, however, the board cannot determine if facts will subsequently arise that will make the decision obsolete.

Whether circumstances have changed since the zoning board's initial decision is not a matter for a subsequent court to decide *de novo*. Instead, on that issue, as on other fact issues in zoning cases, courts can and should defer to the determination of the zoning board. As a result, when a zoning board invokes *res judicata* to refuse to hear a subsequent application by a landowner or a neighbor, a combination of issue preclusion doctrine and principles of deference to administrative determinations dictates judicial affirmance of the administrative determination. By contrast, when a board seeks to revisit a prior determination over the objection of a landowner or neighbor, preclusion doctrine does not stand in the way. Even though the prior decision was entitled to issue preclusion effect, the board's subsequent decision that circumstances have changed since the initial determination overcomes the effect of preclusion.

This Part explores the various fact situations in which preclusion claims arise, demonstrating in each case that, with narrow exceptions, claim preclusion doctrine is and should be irrelevant, and that courts consistently (if somewhat inartfully) serve finality interests by combining issue preclusion doctrine with principles of deference to local zoning board determinations.

A. *Preclusion Claims by Applicant Landowners*

Landowners applying for variances, special permits, or other administrative relief rarely have occasion to invoke preclusion doctrine. In some ways, a landowner-applicant resembles a plaintiff in ordinary civil litigation. If a civil plaintiff brings an action and loses, preclusion doctrine is of no use to the plaintiff. If the plaintiff wins, and the

68. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (“Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.”).

69. *Id.* § 27.

defendant immediately pays, the plaintiff also has no reason to rely on preclusion doctrine.⁷⁰ Thus, preclusion doctrine is only useful to the plaintiff as a means of obtaining relief from a recalcitrant defendant.⁷¹ Similarly, if a zoning board denies the landowner's initial application, the landowner has no reason to invoke preclusion principles. And if the zoning board grants the landowner's application, the landowner has no need to invoke preclusion principles; grant of the variance allows the landowner to develop in accordance with the application. Nevertheless, three situations arise in which landowner-applicants invoke preclusion doctrine.

1. Time-Limited Variances and Special Permits

To take into account the possibility of changed circumstances, some state statutes⁷² and many local ordinances⁷³ limit the duration of variances and special permits; if a landowner does not act on the approval within a specified period of time, the approval expires, and the landowner must reapply. Even when the ordinance itself does not limit the duration of variances or special permits, the zoning board, when approving an application, may impose conditions on the grant. For example, the board might require the landowner to start (or complete) construction by a particular date, or to reapply after a certain time period even if construction is complete. When the landowner reapplies with an identical application and is rejected, may the landowner invoke *res judicata* principles to object to the board's denial of the subsequent application?

In this situation, the landowner's preclusion claim should not, and generally does not, succeed. *8131 Roosevelt Corp. v. Zoning Board of Adjustment*⁷⁴ illustrates the problem. The zoning board initially granted

70. In fact, preclusion doctrine may be of more value to the losing defendant, because it bars the plaintiff from seeking additional relief. *See id.* § 18 cmt. b.

71. *See id.* § 18 cmt. c (noting the value of preclusion doctrine in assisting plaintiffs seeking to execute on a judgment); *see also id.* § 18 cmt. d (discussing the value of preclusion, under the Full Faith and Credit Clause, in obtaining enforcement in sister states).

72. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 40A, § 10 (West 2010) (limiting duration of variances to one year).

73. *See, e.g.,* *Twigg v. Town of Kennebunk*, 662 A.2d 914, 915 (Me. 1995) (discussing a local ordinance that provides for expiration of variance within six months if construction has not begun); *Omnivest v. Stewartstown Borough Zoning Hearing Bd.*, 641 A.2d 648, 649 (Pa. Commw. Ct. 1994) (discussing a local ordinance that provides for expiration of variance when a successful applicant does not obtain a building permit or use certificate within six months).

74. 794 A.2d 963 (Pa. Commw. Ct. 2002). Similarly, in *Twigg*, a prior landowner was granted two identical area variances to build a single-family dwelling, both of which expired due to his failure to record the variances and begin construction within the required time. 662 A.2d at 915. The subsequent landowner purchased the property in a foreclosure sale and applied for an identical variance after the prior variance expired one month into his ownership. *Id.* The board denied his application, finding that the landowner failed to prove that the land could not yield a reasonable return without the variance, even though the board necessarily determined this issue in the affirmative in the first two applications. *See id.* Nevertheless, the Supreme

the landowner a two-year variance to use his property as an adult cabaret. When the variance expired, the board denied an application for an identical variance,⁷⁵ concluding that the landowner had not proven lack of adverse impact on the neighborhood, despite the board's contrary determination in the first application.⁷⁶ The board relied in part on complaints by abutting neighbors.⁷⁷ In upholding the board's determination, the Commonwealth Court of Pennsylvania rejected the landowner's claim that *res judicata* bound the board to its previous decision.⁷⁸ The court reiterated that the grant of a temporary variance did not purport to determine whether the elements of a variance had been met permanently; rather, each determination was limited to the specific two-year period and was subject to re-evaluation upon reapplication.⁷⁹

By limiting the initial variance to a two-year period, the zoning board in *8131 Roosevelt* essentially signaled that it was reserving judgment on whether a variance would be appropriate in the future. The situation is the same where a prior adjudication expressly authorizes splitting of a claim. In that scenario, claim preclusion doctrine does not extinguish the portion of the claim reserved for future decision.⁸⁰ Similarly, claim preclusion doctrine always yields to a legislative determination that the doctrine should not apply. In each of these instances, the rationales for the doctrine are inapplicable. An authoritative decisionmaker—either the prior court or the legislature—has determined that the facts and issues before the second decisionmaker will be sufficiently different to permit a new evaluation of the parties' claims.⁸¹ The second tribunal will not, therefore, be

Judicial Court of Maine not only declined to apply claim preclusion to the reconsideration of the application, but also failed to apply issue preclusion to the "reasonable return" determination that the only beneficial use of the land was for residential purposes. *See id.* at 918–19.

75. *8131 Roosevelt*, 794 A.2d at 965. The property previously had been used as a go-go dance club. *Id.*

76. *Id.* at 965–66.

77. *Id.* at 966. The board also determined that the landowner did not prove unnecessary hardship, but did not further elaborate on that finding. *Id.*

78. *Id.* at 969. Arguably, the ability of the zoning board to reconsider the variance application was more explicable in *8131 Roosevelt*, in which the variance was unambiguously temporary, *see id.* at 969, than in *Omnivest*, where the validity of the variance could be affected only by a failure to record or begin construction within a given time period. *See* 641 A.2d at 649. In both instances, however, the court deferred to the board's determination to reconsider the application.

79. *8131 Roosevelt*, 794 A.2d at 969; *see also Twigg*, 662 A.2d at 915; *Maurice Callahan & Sons, Inc. v. Bd. of Appeals*, 565 N.E.2d 813, 815–16 (Mass. App. Ct. 1991); *Lopes v. Bd. of Appeals*, 543 N.E.2d 421, 422 (Mass. App. Ct. 1989); *Hunters Brook Realty Corp. v. Zoning Bd. of Appeals*, 436 N.E.2d 978, 983–84 (Mass. App. Ct. 1982); *Citrus Trust v. Bd. of Zoning Appeals*, No. 54231, 1989 WL 4130, at *3 (Ohio Ct. App. Jan. 19, 1989); *Omnivest*, 641 A.2d at 652.

80. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982); *see also id.* § 26 cmt. b.

81. *See Lopes*, 543 N.E.2d at 422 (construing a Massachusetts statute that provided for

duplicating the work of the first. Moreover, when the facts before the second tribunal are different, that tribunal does not disrespect the work of its predecessor when it reaches a different conclusion.

The zoning board in *8131 Roosevelt*, by placing time limits on the grant of the variance, explicitly permitted, and even required, that the landowner's claim be split into separate pieces—the board determined the first piece, whether a time-limited variance should be issued, and reserved the rest for future decision. Because claim preclusion doctrine is inapplicable, the grant of the time-limited variance does not preclude the landowner from seeking a subsequent identical variance upon expiration of the first. On the other hand, it also does not preclude the board from denying the new variance or permit application.

In contrast, the temporary nature of a variance will not necessarily prevent the operation of issue preclusion doctrine. While a board can reasonably decide that circumstances might change over the ensuing two years, reserving for itself the power to make a different decision that takes into account facts that subsequently unfold, a board cannot reasonably decide that its decision would be different two years hence on precisely the same facts. As a result, the board's current decision will bind the board in the future so long as the facts do not change.⁸² If, for instance, grant of a variance requires the board to make a finding that the land is no longer suitable for permitted uses within the district, issue preclusion doctrine would require a subsequent board to adhere to that determination in the absence of evidence of changed circumstances.⁸³ But issue preclusion doctrine does not prevent a subsequent zoning board from denying a variance based on circumstances not before the earlier board. As discussed above, courts typically defer to board determinations as to whether facts have materially changed since its earlier decision. Thus, in *8131 Roosevelt*, the court upheld the zoning board's determination that the neighbors' experience with the cabaret

lapse of variance after one year and noting that “[t]he application of claim or issue preclusion principles in the event of a lapsed variance would undermine the purpose of the lapse provision: to force the applicant to justify the variance he seeks unassisted by the earlier proceedings”); *Hunters Brook Realty Corp.*, 436 N.E.2d at 983–84 (invoking the same statute to reject preclusion argument).

82. Whether the board should be free to depart from its initial determination based on newly discovered facts, that is, facts in existence at the time of that determination but not brought to the board's attention, remains an open question. Courts typically defer to board decisions characterizing newly discovered evidence as changed circumstances. *See infra* Subsection III.C.3.

83. *Cf. Stop & Shop Supermarket Co. v. Bd. of Adjustment*, 744 A.2d 1169, 1179–80 (N.J. 2000) (holding that the board could not contradict its earlier findings that residential development of a residentially-zoned portion of the property was inappropriate; the court's ultimate holding was that a supermarket chain did not need a new variance because its operation was covered by a prior variance granted to permit use of residentially-zoned land by a luxury department store).

was a relevant factor that was not before the board when it approved the initial variance.

In sum, neither claim preclusion doctrine nor issue preclusion doctrine requires a zoning board to grant a variance merely because the board had previously granted a time-limited variance to the same landowner. Issue preclusion doctrine may limit the board's power to reconsider discrete issues, but in light of the deference courts typically accord to board determinations, the limits imposed by issue preclusion doctrine rarely will operate as a significant constraint.

2. Variances and Special Permits Not Subject to Time Limitations

Although the practice of placing time limits on variances and special permits has become common, it is not universal. When a landowner applies for a variance or special permit, and a zoning board approves the application without imposing any time constraints, it is reasonable to infer that the landowner will rely on the grant in a tangible way. Once the landowner starts to develop the land in reliance on the variance, vested-rights doctrine prevents the municipality from revoking the variance.⁸⁴ But even if the landowner has not yet started development, most ordinances confer no power on the zoning board to undo a variance or special permit once granted. As a result, the landowner will not have to rely on preclusion doctrine.

*Tohr Industries v. Zoning Board of Appeals*⁸⁵ is illustrative. The landowner's predecessor had obtained a variance in 1954 to construct a building for business use in a residential district. More than thirty years later, when the landowner sought to build a retail store on the site, the building commissioner objected and, on the commissioner's petition, the zoning board revoked the variance. The New York Court of Appeals, however, reinstated the variance, observing that the prior board had not imposed any conditions on the variance, and concluding that the local ordinance did not confer power on the board to revoke a variance unless the landowner breached or violated a condition the board had previously imposed.

3. Collateral Consequences of Determinations Favorable to the Landowner

Because a zoning board rarely has power to revoke a variance once granted, courts do not have to face a straightforward claim preclusion problem where the board faces two successive claims of entitlement to a

84. For a general discussion of the vested rights doctrine, see Brian K. Steinwascher, Note, *Statutory Development Rights: Why Implementing Vested Rights Through Statute Serves the Interests of the Developer and Government Alike*, 32 *CARDOZO L. REV.* 265, 275-77 (2010).

85. 549 N.E.2d 142 (N.Y. 1989).

variance.⁸⁶ Instead, preclusion claims typically revolve around the effect of an earlier resolution of a discrete legal issue that would be determinative in a subsequent application. In this situation, courts apply issue preclusion principles and bind the board to its earlier determination—but only if prior resolution of the disputed issue leaves no discretion for the subsequent board.

For instance, if neighbors challenge a determination that a building permit was properly issued, and the zoning board dismisses the challenge as untimely, the same board cannot later entertain a challenge to a certificate of occupancy subsequently issued for the use authorized by the building permit.⁸⁷ Or, if in a referral to determine whether a landowner's lots comply with the zoning ordinance, the zoning board interprets the ordinance to permit the landowner to include street beds in calculating the size of individual lots (obviating the need for an area variance), the board cannot later reject the landowner's application that the street beds be included in calculating the total area of his lots for subdivision purposes.⁸⁸ In each case, the board's determination of a contested legal issue becomes binding on the board even if the context of the claim is somewhat different.

B. *Preclusion Claims by Neighbors*

In an ordinary civil action for negligence or breach of contract, the defendant must appear in court to protect her interest. Appearance requires the expenditure of time and money (often including fees for legal representation). If the defendant proves successful in the litigation, claim preclusion doctrine protects the defendant against the possibility that the plaintiff will try again.

86. On its face, *Barber v. Weber*, 715 N.W.2d 683 (Wis. Ct. App. 2006), presents the most analogous situation. After landowners sought a determination that the zoning ordinance permitted their proposed use of the property, thus obviating the need for a conditional-use permit, the neighbors sought no judicial review. *Id.* at 685. Instead, three months after landowners began construction, the neighbors filed a separate action for an adjudication that the proposed use of the property violated the zoning ordinance. *Id.* The neighbors did not make the zoning board a party to the litigation. *See id.* The court dismissed their claim, relying on claim preclusion doctrine. *Id.* at 689. *Barber* is not, however, a case that pitted the landowners against the zoning board; it is clear that the zoning board would have supported the landowners' position. As a practical matter, therefore, the case resembles those discussed *infra* in Section III.C, in which the board invokes preclusion principles.

87. *See Palm Mgmt. Corp. v. Goldstein*, 815 N.Y.S.2d 670, 674 (App. Div. 2006). Although the court in *Palm Management* used claim preclusion language, the challenge to the certificate of occupancy could not have been raised in the prior proceeding, because the certificate had not yet been issued at that time. The second challenge does not, therefore, fit neatly into the claim preclusion category. Moreover, it is not at all clear that the court would have reached the same result if the earlier board had dismissed the challenge to the building permit without considering the timeliness of the first challenge. Issue preclusion, by contrast, prevented the board from raising a ground—timeliness—that explicitly had been foreclosed by its decision in the prior proceeding.

88. *See Waylonis v. Baum*, 723 N.Y.S.2d 55, 57 (App. Div. 2001).

In many ways, the neighbors who oppose a landowner's application for a variance or special permit resemble the defendant in civil litigation. The forum is different (a zoning board rather than a court of general jurisdiction), and the format of the proceedings may be different,⁸⁹ but the neighbors' objectives and options are similar to those of the defendant: in order to protect their interests, they must spend time and energy defending their position. One might expect, therefore, that if the neighbors prevail before the board, preclusion doctrine would protect them against subsequent variance and special permit applications by the same landowner.

For a variety of reasons, claim preclusion doctrine does not—and should not—provide significant protection to neighbors. First, permitting a zoning board to consider a second application, even after a prior denial, has more potential to generate efficiency gains than typically will be the case in ordinary civil litigation. Second, it would cripple the decisionmaking process in land use cases to require a plaintiff to raise all legal theories and requests for relief in a single proceeding. Third, because a landowner unhappy with a board decision always can seek legislative relief in the form of a zoning amendment, the reliance interest of victorious neighbors is not nearly as strong as it would be in ordinary civil litigation. This Section explores these problems and demonstrates how they have led courts to reject claim preclusion arguments advanced by neighbors.

1. The Probability and Promise of Improved Decisionmaking

Consider ordinary civil litigation—for instance, a claim for breach of contract or for wrongful death. If the plaintiff brings an action against the defendant and loses after a jury trial, why should the plaintiff be precluded from suing again, using the evidence the plaintiff gathered during the first action? The answer starts with litigation cost, both to decisionmakers and to the winning parties. Of course, permitting any litigation entails some cost, and we do not preclude a party from bringing a first action, because a judicial resolution generates social benefits that would be unavailable if the court refused to entertain the initial dispute. However, a cost-benefit analysis yields a much different result for a second, duplicative action: the costs associated with subsequent suits generate marginal, if any, likelihood of achieving “better” results.⁹⁰ Because wrongful death and breach of contract are claims in which the merits are based on past events, all of the relevant

89. Zoning boards typically are authorized to establish their own procedural guidelines for application hearings as to, *inter alia*, the presentation of evidence, use of expert witnesses, and presence of a stenographer. 23 AM. JUR. 3D *Proof of Facts* § 5 (1993).

90. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 10 (1982) (“[F]inality attaches not because the courts are infallible but because they are inevitably fallible.”).

facts are at least theoretically available at the time of the first litigation. In time, lawyers and parties may uncover more information about the circumstances of the wrongful death or the contract breach, but the tendency of evidence at the first trial to degrade over time serves as a counterweight to the benefits of newly discovered evidence. Moreover, if the prospect of newly discovered evidence supports a second trial, why not a third? Logic provides no evident stopping point.

The initial decision in a wrongful death action or a breach of contract action has serious consequences for both the plaintiff and the defendant: the winning party will be significantly better off than the losing party. But so long as the system provides each party with a fair opportunity to present its case, the social consequences of the decision are less clear. Although putting money in the plaintiff's pocket will undoubtedly generate external effects different from those that would arise if the money stayed in the defendant's pocket, there is no *a priori* reason to believe that one decision rather than the other will generate significant efficiency gains.

There are, of course, exceptions to these general propositions. Sometimes, facts that arise after a tribunal renders its initial judgment will improve significantly the quality of an ultimate decision. And sometimes, the effects of a judgment are not merely distributional. Child custody cases illustrate both propositions. A custodial parent's neglect after a court has rendered an initial custody determination sheds considerable light on the wisdom of the determination. The effects of the custody determination will be felt not only by the child, but also potentially by society at large. It should not be surprising, then, that claim preclusion doctrine does not prevent a court from revisiting custody determinations based on facts that arise after the initial custody determination.⁹¹

With that background, consider a variance or special permit denial by a zoning board. The passage of time generates more information about the effect that new construction will have on the existing neighborhood. Suppose, for instance, that after the zoning board denied a use variance to permit multifamily construction, the local legislative body rezoned land in an abutting single-family district to permit multifamily construction. The rezoning might affect the returns the landowner would be able to obtain by building single-family homes and might also reduce the external effect of multifamily construction on neighboring sites. Applying claim preclusion doctrine to bar the landowner from seeking a new variance would freeze the parcel into a

91. *See, e.g.,* Lynch v. Horton, 692 S.E.2d 34, 37, 39 (Ga. Ct. App. 2010) (holding that mother's forgery of a court order justified trial court in shifting custody from mother, who had prevailed in earlier custody determination, to father).

use that could well become inefficient.⁹² It should not be surprising, therefore, that courts seize upon changed circumstances like these in rejecting claim preclusion arguments advanced by neighbors.⁹³

2. Efficient Claim Presentation

Claim preclusion doctrine prevents plaintiffs from splitting claims and raising them in separate proceedings.⁹⁴ Suppose the defendant borrows the plaintiff's car, promising to return it. If the defendant fails to return the car, the plaintiff might be able to proceed against the defendant on multiple theories (conversion and breach of contract), and might be entitled to more than one remedy (money damages or injunctive relief).⁹⁵ But if the plaintiff brings one action and loses, she cannot then bring another action advancing a different theory or seeking a different relief.⁹⁶ The assumption behind these rules is that adjudication will generate better results, while imposing fewer burdens on parties and decisionmakers, if all potential remedies and theories for recovery are explored in a single proceeding. With land use applications, however, the efficiency calculus is somewhat different.

a. No Preclusion of Different Applications

If the prohibition on splitting of claims were applied in the context of zoning and land use, a landowner seeking to develop a parcel of land would have to request from a zoning board all of the alternative forms of relief the landowner might want, and all of the theories for obtaining that relief within the board's authoritative power. If the landowner omitted a theory or a remedy, claim preclusion doctrine would bar the landowner from seeking that remedy later. For instance, if a landowner sought a variance from setback requirements to permit construction of a residence, and the zoning board denied the variance, the landowner would be precluded from subsequently seeking a smaller variance from

92. *Cf.* *Springsteel v. Town of W. Orange*, 373 A.2d 415, 418 (N.J. Super. Ct. App. Div. 1977) ("To hold differently would offend public policy by countenancing a restraint upon the future exercise of municipal action in the absence of sound reason . . .").

93. *See, e.g.,* *Laurel Beach Ass'n v. Zoning Bd. of Appeals*, 785 A.2d 1169, 1177 (Conn. App. Ct. 2001) (holding that a material change in zoning regulations prevents application of res judicata doctrine to bar subsequent application); *Filanowski v. Zoning Bd. of Adjustment*, 266 A.2d 670, 672 (Pa. 1970) (holding that a prior variance denial does not bind zoning board where rezoning neighboring land to permit apartments created new hardship to landowner).

94. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24–25.

95. *See id.* § 24 cmt. b, illus. 3 & § 25 cmt. f (noting that parties may not bring successive actions for different remedies arising out of same transaction or connected series of transactions).

96. *Id.* § 24 cmt. c ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, . . . or would call for different measures of liability or different kinds of relief.").

the same setback requirements, because the landowner could have presented both requests in the same proceeding.

Thus, in the zoning context, unlike the civil litigation context, a prohibition on splitting of claims would lead to inefficient decisionmaking. A landowner might be willing to build one of a dozen homes, each of which would require a variance, but the landowner has no intention of building all twelve. A rule prohibiting seriatim applications would require the landowner to present, and the board to evaluate, twelve separate plans, even though the landowner would never develop more than one.⁹⁷ Moreover, the rule would stifle the give-and-take that often accompanies a board's denial of relief; the public hearing process often educates the landowner about community and zoning board objections and enables the landowner to present a new application that better accommodates those concerns.⁹⁸

When a litigant seeking relief cannot join claims in a single proceeding, ordinary claim preclusion policies do not apply. The comments to section 24 of the *Restatement (Second) of Judgments*⁹⁹

97. The forms provided by municipalities to zoning applicants rarely give applicants the option to present alternative proposals. Applicants merely fill out the blank spaces on a form designed to describe a single zoning request. For example, a zoning application in Barnstable, Massachusetts provides in relevant part:

Existing Level of Development of the Property - Number of Buildings: _____
 Present Use(s): _____ Gross Floor Area: _____ sq. ft.
 Proposed Gross Floor Area to be Added: _____ sq. ft., Altered: _____ sq. ft.

Application for a Variance, TOWN OF BARNSTABLE, 2, <http://www.town.barnstable.ma.us/ZoningBoard/ZBA%20Variance%20Application.pdf> (last visited May 12, 2011).

Similarly, a zoning application in West Hempfield Township, Lancaster, Pennsylvania provides in relevant part:

Proposed use and/or structures _____
 Yards proposed: Front _____ ft. Rear _____ ft. Side _____ ft.
 Lot area _____ acres/sq. ft. Impervious coverage proposed _____ %
 Proposed structure: Width _____ Depth _____ Height _____

Zoning Permit Application, WEST HEMPFIELD TWP., 1, http://www.twp.west-hempfield.pa.us/westhempfield/lib/westhempfield/zoning_application.pdf (last visited May 12, 2011).

In addition, if landowners were required to present all plans at once and each plan were deemed a separate application, landowners might be required to pay multiple fees, which are not inconsiderable. For example, in Wayland, Massachusetts, the residential application fee is \$150 and the non-residential fee is \$225. *Zoning Board of Appeals Checklist*, TOWN OF WAYLAND, 2, http://www.wayland.ma.us/Pages/WaylandMA_ZBA/ZONINGCHECKLSTrev.pdf (last visited May 12, 2011). In Cheshire, Connecticut, the residential application fee is \$175 and the nonresidential fee is \$300. *Planning & Zoning Application Fee Schedule*, TOWN OF CHESHIRE, <http://www.cheshirect.org/planningzoning/pzapplicationfees.html> (last visited May 12, 2011).

98. See Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 319 (2001/2002) (noting that public hearings generate a "'give and take' of ideas among interested parties [and] the ability to float compromise proposals").

99. Section 24 provides, in relevant part, "[T]he claim extinguished includes *all rights of*

explain that equating “claim” with “transaction” is justified *only* when the litigants have sufficient procedural means by which to fully develop the claim in one action without being confined to a single type of relief.¹⁰⁰ The modern judicial system provides such means: federal and state rules of civil procedure specifically state that a litigant may request different types of relief in one pleading.¹⁰¹ Zoning processes, which limit landowners to one type of relief per application, do not.

Courts universally recognize this problem, but they do so implicitly. Typically, courts pay homage to the principle that *res judicata* doctrine applies to zoning determinations, but then carve out an exception for changed applications—an exception that could easily swallow the rule. The result is that neighbors may not rely on claim preclusion doctrine to prevent a zoning board from hearing a separate application for development on the same parcel. *Hilltop Terrace Homeowner’s Ass’n v. Island County*¹⁰² is illustrative. Seven months after the board of county commissioners denied a conditional-use permit to a cell phone provider seeking to build a tower in a rural residential zone, the board approved a new proposal for the same site, concluding that it was not bound by *res judicata* principles.¹⁰³ In rejecting the neighbors’ challenge to the approval, the Washington Supreme Court agreed with the board, emphasizing that the second application “substituted a fundamentally different kind of structure, completely rerouted the access road to the site, significantly increased setbacks, and changed the number and kind of antennae.”¹⁰⁴ Although the court indicated that *res judicata* principles apply to zoning applications, the court’s conclusion that “a second application may be considered if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself”¹⁰⁵ undermines its argument that claim preclusion principles apply. After all, in *Hilltop Terrace* itself, both proposals were for cell phone towers, and every feature of the approved application could have been placed before the board at the time of the

the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose.” RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (emphasis added).

100. *Id.* § 24 cmt. a (“A modern procedural system does furnish such means. It permits the presentation in the action of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief and without regard to historical forms of action or distinctions between law and equity.”).

101. FED. R. CIV. P. 8(a)(3) (stating that a pleading must contain “a demand for the relief sought, which may include relief in the alternative or different types of relief”). States have adopted similar wording in their pleading rules. *See, e.g.*, MASS. R. CIV. P. 8(a) (“Relief in the alternative or of several different types may be demanded.”); ME. R. CIV. P. 8(a) (same); OHIO R. CIV. P. 8(a) (same).

102. 891 P.2d 29 (Wash. 1995).

103. *Id.* at 33.

104. *Id.* at 35.

105. *Id.*

first application.

Similarly, in *Gunn v. Board of County Commissioners*,¹⁰⁶ a zoning board denied a landowner's initial application to construct a softball field on premises operated as a private country club.¹⁰⁷ The landowner submitted a second application two years later, having interchanged the proposed locations for home plate and the outfield.¹⁰⁸ The zoning board granted a special permit, stating that the change reduced the noise and inconvenience to the neighboring homes.¹⁰⁹ The Third District Court of Appeal of Florida rejected the neighbor's claim of res judicata and held that the zoning ruling two years prior was not binding where a substantial change of circumstances occurred between the two applications.¹¹⁰ The court went on to explain that the authority to decide whether such a change had taken place "lies primarily within the discretion of the zoning authority itself,"¹¹¹ and that by granting the second application, the board implicitly concluded that the repositioning of the field was a "meaningful alteration" of the previously rejected proposal.¹¹²

As a Massachusetts appeals court recognized in *Ranney v. Board of Appeals*,¹¹³ giving a local permit-granting authority flexibility to consider multiple applications "offers the possibility of land use solutions sufficiently acceptable to the contending parties to keep the matter out of the courts."¹¹⁴ That is, the developer may learn from a previous denial of a variance or special permit and develop a plan more acceptable to neighbors. The application of claim preclusion doctrine would foreclose that option.

Courts have not ignored finality considerations in rejecting neighbors' arguments that claim preclusion doctrine bars a landowner's second application where the board denied the same landowner's initial application. Rather, courts have often concluded that those concerns can

106. 481 So. 2d 95 (Fla. 3d Dist. Ct. App. 1986).

107. *Id.* at 96.

108. *Id.*

109. *Id.*

110. *Id.* (citing *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 651–54 (Fla. 3d Dist. Ct. App. 1982)).

111. *Id.* (citing *City of Miami Beach v. Prevatt*, 97 So. 2d 473, 477 (Fla. 1957)).

112. *Id.* Other cases concluding that neighbors may not invoke res judicata doctrine to overturn a board's grant of an application significantly different from a previously denied application include *Rocchi v. Zoning Board of Appeals*, 248 A.2d 922, 925 (Conn. 1968) (special exception applications), *Hunt v. Board of Zoning Appeals*, 812 N.Y.S.2d 581, 582 (App. Div. 2006) (variance applications), *Riina v. Baum*, 754 N.Y.S.2d 644, 645 (App. Div. 2002) (same), *Peterson v. City Council*, 574 P.2d 326, 331 (Or. Ct. App. 1978) (same), and *Wolfe v. Forbes*, 217 S.E.2d 899, 902 (W. Va. 1975) (same). *Cf.* *Anderson v. Bd. of Cnty. Comm'rs*, 217 P.3d 401, 408 (Wyo. 2009) (upholding grant of permit after previous denial without discussing res judicata or claim preclusion doctrine).

113. 414 N.E.2d 373 (Mass. App. Ct. 1981).

114. *Id.* at 376. The court noted, tongue-in-cheek, that "[t]he instant case illustrates that this advantage may be more theoretical than real." *Id.*

best be addressed by deference to the zoning board; if the board decides the new application is sufficiently different to warrant reconsideration, the court should not second-guess that decision. As the New Jersey Supreme Court explained in sustaining the board's decision to grant a variance after a previous denial of a somewhat different variance, "the question is not whether a reviewing court would have reached a different conclusion if it had initially decided the matter, but whether the Planning Board was arbitrary, capricious, or unreasonable in concluding that [the] second application was sufficiently different to justify considering it on the merits."¹¹⁵

b. No Preclusion of the Same Application when
Applicant Produces New Information

A fundamental concept of claim preclusion doctrine is that a court cannot rehear a claim simply because it incorrectly decided the initial action.¹¹⁶ Claim preclusion doctrine operates on the premise that, when faced with the same information, there is little reason to assume that a second decisionmaker will reach a better conclusion than the first. But suppose one or both of the parties offers more information to the second decisionmaker—that premise would no longer hold. Nevertheless, even if a litigant explains that the first determination was in error due to a litigant's failure to fully educate the court about the important facts of the case, claim preclusion instructs that all related arguments, issues and evidence that could have been raised at the time of the initial claim are thereafter relinquished.¹¹⁷

115. *Bressman v. Gash*, 621 A.2d 476, 481 (N.J. 1993) (citation omitted) (relying on its prior decision in *Russell v. Board of Adjustment*, 155 A.2d 83 (N.J. 1959)). For other cases holding that neighbors may not invoke res judicata or claim preclusion principles based on deference to a board's determination that the previous and subsequent applications were materially different, see *Ranney*, 414 N.E.2d at 376 (citing *Rocchi v. Zoning Bd. of Appeals*, 248 A.2d 922, 925 (1968)) ("Whether the plans . . . have changed sufficiently to justify a reapplication . . . is principally for the local board to determine."), *Freeman v. Town of Ithaca Zoning Board of Appeals*, 403 N.Y.S.2d 142, 143 (App. Div. 1978) (quoting *Ellsworth Realty Co. v. Kramer*, 49 N.Y.S.2d 512, 513 (App. Div. 1944)) ("[I]t is for the board to determine whether or not changed facts or circumstances are presented and, in so doing, it may give weight even 'to slight differences which are not easily discernible.'"), and *Fiorilla v. Zoning Board of Appeals*, 129 A.2d 619, 621 (Conn. 1957).

116. See *Bressman*, 621 A.2d at 481; see also *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (citations omitted) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 125 F.3d 18, 22 (1st Cir. 1997) ("But the point of [res judicata] is that the first determination is binding not because it is right but because it is first—and was reached after a full and fair opportunity between the parties to litigate the issue.").

117. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the

The prohibition on raising new arguments and evidence is based on the perverse incentives a contrary rule would generate. If a party could obtain reconsideration by offering new evidence, then each party would have an incentive to withhold some evidence from the first proceeding, hoping to prevail anyway but knowing that the withheld evidence could help obtain a second chance at a favorable judgment. Precluding a rehearing in such instances creates appropriate incentives to come forward with all evidence and minimizes the chance a party will “discover” new evidence between the first and second proceedings.

Although these same considerations are present in zoning and land use cases, courts seem to directly contravene these principles. To avoid the problem of “run[ning] afoul of the edicts of the doctrine of *res judicata*,”¹¹⁸ the courts classify the landowner’s submission of new evidence as a material change in circumstances, even if that evidence could have been presented at the time of the first proceeding. Consider *Winchester v. W.A. Foote Memorial Hospital, Inc.*¹¹⁹ The local zoning ordinance permitted construction of a helicopter landing pad as an accessory use to a hospital if the hospital obtained a conditional-use permit. At the initial public hearing on the hospital’s permit application, neighbors complained about noise and suggested alternative sites, leading the planning commission to deny the permit. Two months later, the commission granted the hospital’s second, virtually identical application for a conditional-use permit. When neighbors challenged the grant, the Michigan Court of Appeals rejected the challenge, holding that the commission was justified in reversing its first decision. The court noted that the initial rejection was based on the commission’s conclusion that a better site was available, but that the hospital’s introduction of additional evidence served to establish that there were, in fact, no better sites.¹²⁰

defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”). Comment a to section 24 of the *Restatement* explains the rationale for precluding claims which might have been litigated:

[Without such application], the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant’s identical act or connected acts forming a single life-situation. . . .

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff

Id. § 24 cmt. a.

118. *McDonald’s Corp. v. Twp. of Canton*, 441 N.W.2d 37, 41 (Mich. Ct. App. 1989).

119. 396 N.W.2d 456 (Mich. Ct. App. 1986).

120. *Id.* at 461; *see also* *Vine v. Zoning Bd. of Appeals*, 927 A.2d 958, 963–64 (Conn. App. Ct. 2007) (citing *Laurel Beach Ass’n v. Zoning Bd. of Appeals*, 785 A.2d 1169, 1174–75 (Conn. App. Ct. 2001)) (holding that a board can reverse its decision based on information it did not have upon denying initial application); *Bradley v. Inland Wetlands Agency*, 609 A.2d 1043, 1045 (Conn. App. Ct. 1992) (holding the same). Other courts have indicated in dictum that

Perhaps the disparity between the treatment of new information in zoning cases and in ordinary civil litigation is motivated by the longterm inefficient use of land that would be generated by “erroneous” decisions in zoning cases.¹²¹ Perhaps courts believe that zoning law provides other mechanisms to incentivize landowners to bring forth all pertinent information in the initial application. For instance, so long as the zoning board has discretion to conclude that new information is not significant enough to constitute a “material change in circumstances,” and can refuse to consider it, parties will still have incentives to produce all information upon the first application. And in some jurisdictions, time limits on reapplication will create a disincentive for withholding information.¹²² Whatever the reasons for the disparity, however, judicial treatment of new information in zoning cases is inconsistent with the tenets of claim preclusion doctrine.

3. The Availability of Legislative Relief and the Reliance Interest of Neighbors

Preclusion doctrine rests in part on protecting the reliance interests of parties who have invested time and energy in successfully litigating a claim or defense. Neighbors who prevail before a zoning board could advance the same reliance arguments. The problem with the reliance argument in the zoning context is that no matter what happens before the zoning board, the local legislature is almost always free to change the ordinance to permit the landowner’s proposed use. Otherwise, a

emergence of new information would entitle a board to entertain a second application. *See, e.g., Ranney v. Bd. of Appeals*, 414 N.E.2d 373, 377 (Mass. App. Ct. 1981) (“To the extent that the board thought itself in error about underlying assumptions concerning the proposal, this constituted a change of circumstances which permitted the board to entertain a second application for zoning relief.”); *McDonald’s Corp.*, 441 N.W.2d at 40–41 (concluding that new information submitted to the board in response to concerns expressed by the board in the original denial constituted change of circumstances).

121. In *Winchester*, for instance, had the court determined that claim preclusion barred the zoning board from reconsidering the hospital’s application, the zoning board’s error would have perpetuated a long-lasting inefficiency in the hospital’s distance from and accessibility to an offsite emergency helicopter launch pad. *See* 396 N.W.2d at 460–63.

122. *See State ex rel. DeZeeuw v. Manitowoc Cnty. Bd. of Adjustment*, No. 91-0914, 478 N.W.2d 596, 1991 WL 285894, at *2 (Wis. Ct. App. Nov. 20, 1991) (unpublished table decision) (per curiam) (citing local ordinance precluding applicant from bringing appeal to board based on same facts for a period of one year after initial rejection). In *Winchester*, by contrast, the Michigan court concluded that the local ordinance’s one-year bar on resubmission does not apply when the applicant brings new information before the commission. 396 N.W.2d at 460–62. Other courts have held that waiting periods like the one involved in *Manitowoc* and *Winchester* do not bar reapplication when landowner makes changes to the application, suggesting that the bar would apply when landowner brings the *same* application. *See, e.g., Ranney*, 414 N.E.2d at 376 (“It has always been supposed that if an application disclosed a project materially different from the one first introduced,” the statutory bar would not apply); *Peterson v. City Council*, 574 P.2d 326, 331 (Or. Ct. App. 1978) (concluding that when second variance application was substantially different from prior application, ban on reapplication does not apply).

single administrative proceeding would forever prevent the municipality from changing land use policy. As a result, the neighbors do not have rights that “vest” once they prevail before the zoning board, undermining any assertions of a reliance interest.¹²³

A number of states impose judicial review on “legislative” determinations to rezone land. A few require the legislature to establish that the previous classification was a mistake or that there has been a significant change in circumstances that warrants a new classification. Others constrain the legislature by labeling the rezoning decision “quasi-judicial” and therefore subject to constraints not ordinarily imposed on legislative decisions. Even states that provide for judicial review of rezoning decisions, however, give the local legislature broad discretion to depart from its prior decisions. Consider *Coral Reef Nurseries, Inc. v. Babcock Co.*¹²⁴ A year and a half after denying the landowner’s application to rezone its property to permit residential use, the board of county commissioners approved a similar rezoning request. Although Florida’s Third District Court of Appeal indicated that administrative res judicata should apply to rezoning decisions, the court rejected the neighbors’ contention that the doctrine precluded the challenged rezoning. The court held that the applicability of res judicata doctrine is primarily within the administrative body’s province, and its determination “may only be overturned upon a showing of a complete absence of any justification therefor.”¹²⁵

4. Issue Preclusion

The preceding Subparts demonstrate that, despite judicial pronouncements about the applicability of claim preclusion or res judicata principles to zoning determinations, claim preclusion doctrine provides neighbors with virtually no protection. Public policy sensibly entitles zoning boards to consider changed applications and changed circumstances, leaving claim preclusion doctrine as a toothless constraint on zoning boards. We now turn briefly to issue preclusion principles. Issue preclusion binds a decisionmaker to honor a prior determination of an issue actually litigated and necessarily determined in a prior proceeding. These limitations make it difficult for neighbors to invoke issue preclusion doctrine.

To obtain a variance, a landowner generally must establish several factors;¹²⁶ the absence of any factor precludes grant of the variance. As

123. See *Bentley v. Valco, Inc.*, 741 P.2d 1266, 1269 (Colo. App. 1987) (citations omitted) (noting that authority of zoning board to reverse itself would be subject to vested rights limitation, but holding that adjacent landowners cannot acquire vested rights).

124. 410 So. 2d 648 (Fla. 3d Dist. Ct. App. 1982).

125. *Id.* at 655.

126. See, e.g., *supra* note 8.

a result, an express finding that one of the factors is missing is rarely necessary to the board's determination, because the board's denial could rest on the absence of any one of the factors. *Russell v. Board of Adjustment*¹²⁷ exemplifies the problem. In denying the landowner a variance, the board concluded that the landowner had failed to prove that the variance could be granted without detriment to the public or impairment of the zoning plan and ordinance. A court sustained the board's denial, also concluding that any hardship suffered by the landowner was self-created. A month after the judicial decision, the landowner applied for a new variance, and the neighbors contended that issue preclusion bound the board to the determination that any hardship was self-created.¹²⁸ The New Jersey Supreme Court rejected the issue preclusion defense on the ground that a finding of self-created hardship, even if binding, would not in itself bar relief on a new application.¹²⁹

Without deciding the issue, the court raised a more general question of greater importance: if the decisionmaker in the first proceeding has two or more grounds for a decision, is either ground binding in a subsequent case presenting a different claim?¹³⁰ The *Restatement (Second) of Judgments* squarely answers that question: No.¹³¹ The reasoning offered in the *Restatement* is particularly important in the zoning setting: if each alternative ground were given issue preclusive effect, the losing party would have incentives to appeal the determination simply to protect himself against application of preclusion doctrine.¹³² In the zoning context, in other words, application of issue preclusion to a determination of "no hardship" would require a landowner who might otherwise apply for a new and less significant variance to first challenge the initial variance denial in court; failure to do so would preclude any subsequent application. This concern about encouraging litigation undoubtedly explains judicial reluctance to allow neighbors to invoke issue preclusion doctrine.¹³³

127. 155 A.2d 83 (N.J. 1959).

128. *Id.* at 88.

129. The court held that "[a] decision on self-created hardship, without more, is not conclusive on the determinative issue of undue hardship." *Id.* at 89 (citation omitted).

130. *Id.*

131. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982) ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.").

132. *Id.*

133. *Cf. Laurel Beach Ass'n v. Zoning Bd. of Appeals*, 785 A.2d 1169, 1176 (Conn. App. Ct. 2001) (noting that a determinative issue in a second proceeding was not key to prior determination); *Petrillo v. Zoning Bd. of Appeals*, 841 N.E.2d 266, 272 (Mass. App. Ct. 2006) (noting that a determinative issue in a second proceeding was neither essential to the decision of, nor actually litigated in, a prior proceeding).

5. Interpretations

Applications for variances, special permits, and subdivisions all require the zoning board or other administrative body to apply an ordinance's legal standards to a set of facts that include the composition of the existing neighborhood and the details of the landowner's application. Because the facts change with subsequent applications, preclusion doctrines are of little assistance to neighbors. The situation is different when a landowner seeks an interpretation of the zoning ordinance. The board's decision on an interpretation is not generally subject to the same kind of change, and neighbors may, therefore, prevent the board from issuing a subsequent and contrary interpretation to the same landowner.

*Cosby v. Board of Zoning Appeals*¹³⁴ furnishes an example. As part of a landowner's application for a special exception, the planning commission sought an opinion about whether a proposed rock crusher would be a nonconforming use. The Board of Zoning Appeals concluded that it would be nonconforming, and a court affirmed. On those facts, the court concluded that no changed circumstances could exist and that a subsequent board (and subsequent court) was bound by *res judicata* doctrine.

C. *Preclusion Claims by Zoning Boards of Appeals*

The preceding Section established that claim preclusion doctrine does not bind a zoning board to its prior determinations on applications for variances and special permits; courts almost universally permit zoning boards to entertain repeat applications. This subordination of finality concerns reflects several realities about the land use process. A second determination may generate long-term efficiency gains where changes in the proposed land use or the neighborhood's circumstances suggest that the first determination was "wrong." Requiring landowners to apply for multiple and inconsistent forms of relief upon an initial application would be both costly and inefficient. Moreover, the availability of legislative relief for a disappointed landowner limits the reliance interests of victorious neighbors. These realities lead courts to acquiesce in zoning board decisions to rehear previously decided applications.

Suppose, however, a zoning board invokes preclusion doctrine to avoid hearing a new application from a landowner whose earlier application for a variance or a special permit was unsuccessful. If claim preclusion doctrine does not bar reconsideration of an application, should due process of law require the board to decide each new application on the merits? The nearly universal judicial answer is no.

134. 7 Va. Cir. 253 (1985).

That answer makes practical sense. In many cases, circumstances have not changed significantly since the board denied the landowner's first application, the two applications are substantially similar (or nearly identical), and any new evidence or arguments advanced by the landowner easily could have been anticipated at the time of the first application. In these circumstances, requiring a new hearing on the merits would generate no efficiency gains to compensate for the efficiency and fairness concerns that lie behind finality doctrines.

On each of these issues—the significance of any change in external circumstances, the similarity of the two applications, and the relevance of new evidence (and its availability at the time of the first hearing)—the zoning board has more experience and more expertise than a reviewing court. Just as courts typically defer to other zoning board decisions within areas of board expertise,¹³⁵ courts defer to board determinations that denial of a landowner's prior application precludes a different decision on a subsequent application. As in other areas of land use law, however, deference does not mean abdication. Courts do engage in a form of rational basis review. Most critically, preclusion principles do not permit a board to deny a subsequent application without hearing the applicant's claim that circumstances have changed since the prior application. The cases can best be understood as a combination of issue preclusion and deference principles: issue preclusion principles bind the applicant to the board's prior determination with respect to issues actually litigated and necessarily determined, while deference principles limit the willingness of courts to second-guess the board's decision that there were no changes in the circumstances or the application to make the current issue different from the one resolved in the prior proceeding.

1. Change of Circumstances Cases

Suppose a zoning board denies a variance to a landowner who wants to erect a multiple-unit apartment building on a parcel of land zoned for a single-family dwelling. One year later, the same landowner reapplies for the same use variance, citing changes in the neighborhood including the construction of an apartment complex two blocks away. According to the landowner, this change has had such a significant impact on the character of the community that his claim of unnecessary hardship is much stronger and warrants reconsideration. If the zoning board disagrees and summarily denies the second application, will a court overturn the board's determination?

A court generally does not exercise its independent judgment to

135. *See, e.g.,* Retail Prop. Trust v. Bd. of Zoning Appeals, 774 N.E.2d 727, 731 (N.Y. 2002) (noting that deference to the board is appropriate on a “fact-specific choice of the kind that local boards are uniquely suited to make”).

determine whether a landowner's repeat application is different enough to warrant reconsideration.¹³⁶ Instead, courts defer to the zoning board's determination that no material facts have changed. In reaching this outcome, courts, often implicitly, employ a two-step process. First, the court applies issue preclusion to all issues fully litigated and necessarily decided in the initial application. Second, the court defers to the zoning board's determination that the two applications are so similar as to bar reconsideration of the subsequent application.

Deference to the zoning board's assessment of changed circumstances is so well-established that many of the opinions upholding a zoning board's invocation of *res judicata* do not even discuss the facts of the two applications; rather, they summarily assert that the board was within its discretion to find no material changes had occurred.¹³⁷ Courts recognize that just as the board is in the best position to determine that a new application is sufficiently different to warrant reconsideration,¹³⁸ it is also in the best position to decide that changed facts are not significant enough to constitute a material change.

This practice is consistent with the goal of efficient decisionmaking in land use applications. There is nothing to be gained from requiring the zoning board to reconsider an application based on the occurrence of an inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial. Returning to the hypothetical, the construction of an apartment complex two blocks away from the subject site indisputably altered the total mix of information available to the zoning board. Nevertheless, the board was best situated, practically, to determine whether the change would influence its decision in any way. As a result, a court would uphold the board's exercise of discretion to deny the second variance application without a full rehearing on the merits.¹³⁹

136. See, e.g., *Barlow v. Planning Bd.*, 832 N.E.2d 1161, 1167 (Mass. App. Ct. 2005) (alteration in original) (quoting *Davis v. Zoning Bd.*, 754 N.E.2d 101, 106 (Mass. App. Ct. 2001)) (internal quotation marks omitted) ("Even if the record reveals that a desired special permit could lawfully be granted by the board because the applicant's evidence satisfied the statutory and regulatory criteria, the board retains discretionary authority to deny the permit . . . , so long as that denial is not based upon a legally untenable or arbitrary and capricious ground.").

137. See, e.g., *Miller v. Booth*, 702 So. 2d 290, 291 (Fla. 3d Dist. Ct. App. 1997) ("In the instant case, we find that the Board of County Commissioners acted within its discretion when it determined that a substantial change in circumstances had not occurred"); *Hasam Realty Corp. v. Dade Cnty.*, 486 So. 2d 9, 9 (Fla. 3d Dist. Ct. App. 1986) ("[T]he commission could properly have found, in its discretion, that there were no significant differences as to the vital issues of density, traffic, and the like, between the instant application and one which had been previously rejected"); *Pettit v. Bd. of Appeals*, 554 N.Y.S.2d 723, 724 (App. Div. 1990) (citations omitted) ("At bar, the Board's finding that there were 'no material differences' between [the landowner's] proposed application and [the previous landowner's] prior application . . . 'was clearly not arbitrary' or an abuse of discretion").

138. See *supra* Subsection III.B.2.a.

139. Similarly, in *Calapai v. Zoning Board of Appeals*, 871 N.Y.S.2d 288 (App. Div. 2008), the zoning board had granted the landowner a variance to temporarily convert her garage

The principle that courts defer to zoning board determinations that conditions have not changed is subject to two qualifications. First, the zoning board must hold a hearing to determine whether material changes have occurred.¹⁴⁰ Second, when the board's conclusion that circumstances have not changed is arbitrary, courts may intervene to require a rehearing.

First, consider the board's procedural obligation. Statutes generally require a zoning board to hold a hearing on an application for a variance or a special permit.¹⁴¹ Once a board holds a hearing and makes a decision, issue preclusion prevents relitigation of the issues actually and necessarily decided. But issue preclusion doctrine always affords a litigant a hearing to argue that particular issues were not actually or necessarily decided. When a landowner applicant argues that circumstances have changed since the prior decision, the landowner is effectively arguing that the issues in the second proceeding were not actually or necessarily determined in the first hearing. The applicant is right if circumstances have changed, but wrong if circumstances have not changed. The board, therefore, must hold a hearing on that critical issue: whether circumstances have changed.¹⁴²

Thus, in *Kreisberg v. Scheyer*,¹⁴³ the court refused to defer to the arbitrary action of the zoning board in rejecting a landowner's petition for an area variance solely on the grounds that twenty years prior, a

into a bedroom for her paraplegic son, with the condition that she restore the property to its original use as a garage if a change in circumstances should occur. *Id.* at 289. After her son's death, the board granted her a three-year extension of the variance, renewable at the board's discretion, but refused to abrogate the restriction entirely as the landowner requested. *Id.* at 289–90. In upholding the board's determination that no material change of circumstances had occurred to warrant consideration of the landowner's petition, the New York appellate court reasoned that the only change in circumstance—her son's death—was not unanticipated and was taken into consideration by the board in its previous decision. *Id.* at 290.

140. See *Rhema Christian Ctr. v. D.C. Bd. of Zoning Adjustment*, 515 A.2d 189, 194 (D.C. 1986) (“[S]ummary disposition is not an option unless the second application is identical to the first and no change of circumstances is alleged.”); *Stoneback v. Zoning Hearing Bd.*, 699 A.2d 824, 827 (Pa. Commw. Ct. 1997) (“Generally, the Board is required to provide an applicant an opportunity to present evidence of an alleged substantial change in conditions or circumstances related to the land itself before determining whether *res judicata* is applicable.”).

141. See, e.g., VA. CODE ANN. § 15.2-2310 (2011) (requiring hearing on applications for special exceptions and variances).

142. Of course, if a landowner-applicant does not attempt to show a change in circumstances, the zoning board is within its discretion to summarily deny the second application without a hearing. See *Burger King Corp. v. Metro. Dade Cnty.*, 349 So. 2d 210, 211–12 (Fla. 3d Dist. Ct. App. 1977) (upholding a zoning board's rejection of Burger King's variance application to use professional office space as a restaurant on the ground of *res judicata*, where the board previously rejected a predecessor-in-interest's similar application and Burger King did not attempt to show changed circumstances); *Metro. Dade Cnty. Bd. of Cnty. Comm'rs v. Rockmatt Corp.*, 231 So. 2d 41, 44 (Fla. 3d Dist. Ct. App. 1970) (upholding the zoning board's invocation of *res judicata* where the landowner did not attempt to show a change in circumstances since the denial of the landowner's similar application one year prior for a special exception to enlarge a building and a variance to operate a nightclub).

143. 808 N.Y.S.2d 889 (Sup. Ct. 2006).

different landowner had submitted a variance application with dissimilar setback proposals and size dimensions.¹⁴⁴ The court remanded the application, requiring the zoning board to hold a hearing on whether circumstances had changed between the two applications.

The second limitation on a board's application of res judicata doctrine is substantive rather than procedural. Courts will not defer to an "arbitrary and capricious" zoning board determination that circumstances have not changed.¹⁴⁵ *Moore v. Town of Islip Zoning Board of Appeals*¹⁴⁶ illustrates the point. The zoning board refused to hear a landowner's application for an area variance based on a prior owner's failed area variance application approximately twenty years earlier, stating that no change of circumstances had occurred. Although the trial court upheld the zoning board's determination, a New York appellate court reversed, emphasizing the time gap between the two applications.¹⁴⁷ The court held that it was arbitrary and capricious to find that the character and conditions in the neighborhood had not materially changed since the initial application.¹⁴⁸

2. Change of Application Cases

Suppose that a zoning board rejects a landowner's application for a variance to build a twenty-unit apartment complex with a parking lot on the east side of the property, adjacent to a daycare center. In rejecting the proposal, the board states that the location of the parking lot presents an unacceptable safety hazard for the children in the daycare center. Of what effect is the board's denial if the landowner reapplies for a variance to erect a ten-unit complex with a parking lot in the same location? Would the board be entitled to reject the application without considering the merits anew?

The answer is and should be yes. Issue preclusion allows a zoning board to dismiss a subsequent application that does not address a defect relied upon by the board in denying the prior application. In the given hypothetical, the landowner changed the lot density, but failed to

144. *Id.* at 890–92.

145. *See, e.g., Anderson v. Bd. of Cnty. Comm'rs*, 217 P.3d 401, 405 (Wyo. 2009) ("We continue to apply the arbitrary and capricious standard as a 'safety net' designed to 'catch agency action which prejudices a party's substantial rights'").

There is no precise formula for what a court will deem arbitrary and capricious behavior in the land use context, but case law suggests that it is only in the most extreme circumstances that the courts will interfere with the discretion of the zoning board and overturn a board's determination of res judicata. Courts are more likely to deem the zoning board's refusal to hear a landowner's application arbitrary when the denial is based on a previous application that was brought (1) by a different landowner, (2) decades earlier, (3) with different proposed details in the application.

146. 813 N.Y.S.2d 542 (App. Div. 2006).

147. *Id.* at 543.

148. *Id.*

alleviate the board's objection to the hazardous location of the parking lot. Therefore, issue preclusion would permit the board to reject the subsequent application as not materially different from the prior application.¹⁴⁹

On the other hand, if a subsequent application does not raise the issue that led the board to deny the initial application, the board cannot rely on issue preclusion to reject the new application. As already noted,¹⁵⁰ efficiency concerns mandate that an applicant not be required to offer, in a single application, every possible alternative development plan when the landowner wants to develop only one of those plans. As a result, the process of applying for special permits, site plan approval, and even variances, necessarily involves a dialogue between the landowner and the administrative body in which each side educates the other about its concerns. If denial of one application precluded a landowner from subsequently submitting an application that resolved the issue that led to the first denial, the landowner would never be able to respond to the reasons articulated by the board for rejecting the earlier application. For that reason, prior board determinations are entitled only to issue preclusion, not claim preclusion effect.

Courts will defer to the zoning board's determination that its articulated reasons for rejecting the initial application are dispositive in the subsequent request for relief. That is, if the board concludes that changes in the new application do not address the reasons for the earlier rejection, then the board can invoke preclusion doctrine to decline full consideration of the new application. As with any matter of issue preclusion, the board at least must afford the applicant landowner a hearing to determine whether the subsequent application is sufficiently different to warrant reconsideration.¹⁵¹

The following scenarios illustrate the point. First, consider an easy case. Suppose that a zoning board denies a use variance application on the ground that the landowner failed to show the land could not generate a reasonable return as presently zoned.¹⁵² Issue preclusion binds the

149. Indeed, issue preclusion doctrine might not merely *allow*, but rather *require*, the board to deny the subsequent application, because the board actually and necessarily determined that the parking lot created an unacceptable safety hazard. On the other hand, the board might conclude that with only ten units, the risks associated with the parking lot are more tolerable than with twenty units.

150. *See supra* Subsection III.B.2.

151. If the zoning board determines that a subsequent application is significantly different, the board can no longer rely on issue preclusion to reject the application and is required to consider the application on the merits. *Cf. Hurley v. Zoning Bd. of Appeals*, 893 N.Y.S.2d 277, 278–79 (App. Div. 2010).

152. The most commonly embraced test for a use variance was set forth in the seminal case of *Otto v. Steinhilber*, 24 N.E.2d 851 (N.Y. 1939). The landowner:

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

board to this determination, even if a subsequent application changes the requested use entirely, because the initial determination established that the subject parcel did not meet one of the essential elements to qualify for a use variance.¹⁵³

Now suppose that a zoning board rejects a subdivision application to convert a parcel of land into eighteen single-family lots due to the inadequacy of the access road in the plan.¹⁵⁴ Four years later, the landowner reapplies to the zoning board having increased the density from eighteen to twenty-five lots and enlarged the open space area, but still requesting to use the same access road that the board had previously rejected.¹⁵⁵ Even though the application has undoubtedly changed in several aspects since the board's initial denial, the landowner has failed to obviate the board's objections to the access road. The changes are not material in light of the reasons for the board's initial denial. The previously rejected application is thus dispositive, and the board need not consider the subsequent application on the merits.

In contrast, if a new application is materially different *and* the defects that led to the initial denial are cured or irrelevant to the subsequent application, the zoning board cannot invoke issue preclusion to refuse to consider the application.¹⁵⁶ *Grasso v. Zoning Board of Appeals*¹⁵⁷ is instructive. The landowner applied for a zoning permit and coastal site plan approval to install a concrete support in his shoreline property to prevent erosion. The board denied the application, citing the landowner's lack of compliance with certain statutory and regulatory provisions. Two years later, the landowner submitted a second application that he claimed addressed the defects of his first application. In remanding the matter to the zoning board, the Connecticut Appellate Court held that the board was required to hold a hearing to consider whether the application in fact corrected the initial application's

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.

Id. at 853 (emphasis added).

153. *Cf. id.*

154. These facts are those of *Davidson v. Kitsap County*, 937 P.2d 1309, 1311–12 (Wash. Ct. App. 1997).

155. *Id.* at 1312.

156. For example, in *Josato, Inc. v. Wright*, 733 N.Y.S.2d 214 (App. Div. 2001), the Appellate Division of the Supreme Court of New York found *res judicata* inapplicable and required the zoning board to consider the merits of the landowner's use variance application where the previous petition was made by a different applicant, involved different proposals for constructing houses on the property, and was prior to the amendment of the Town Law. *Id.* at 215.

157. 794 A.2d 1016 (Conn. App. Ct. 2002).

deficiencies.¹⁵⁸ If the defects were addressed, the zoning board would be required to consider the application on its merits.

3. Identical Applications/New Evidence Cases

Suppose that a landowner, having been previously denied a use variance, reapplies for an identical variance, arguing that she has gathered additional evidence to support her claim of unique hardship to her parcel of land. As discussed earlier,¹⁵⁹ a court would likely permit a zoning board to consider the landowner's repeat application, characterizing the new evidence as a "material change in circumstances." However, would a court also uphold a zoning board's decision to summarily refuse to hear the new evidence?

The answer is yes. When a zoning board declines to hear new evidence, courts invariably defer to the board's determination (provided, of course, that the board abided by proper procedures).¹⁶⁰ This is consistent with ordinary issue preclusion principles, which bar an unsuccessful litigant from making a duplicative request for relief—to the extent the issue has been fully and necessarily determined—on the sole basis of additional evidence.

Even when a zoning board permits submission of additional evidence, the board is still within its discretion to find that the new information does not constitute a material change in circumstance to overcome issue preclusion. Consider *Jensen v. Zoning Board of Appeals*.¹⁶¹ Two years after the zoning board denied a landowner's request for an area variance to build a single-family residence on his lot, the landowner reapplied for an identical variance. The landowner presented evidence in the second hearing that the value of the lot with the variance increased threefold.¹⁶² The New York appellate court upheld the zoning board's rejection of the second application, asserting that only "the quality of his proof, not . . . the facts themselves[,] had

158. *Id.* at 1027–28 (citation omitted) (internal quotation marks omitted) ("The fact that a prior site plan did not comply does not allow the zoning commission to turn down one which does.").

159. *See supra* Subsection III.B.2.b.

160. For instance, *Palmieri Cove Associates v. New Haven Zoning Board of Appeals*, No. CV054013158S, 2008 WL 2930238 (Conn. Super. Ct. July 3, 2008), illustrates the deference courts accord to board determinations. A landowner submitted a duplicative use variance application to utilize his property as a slip marina, after having been rejected one year earlier. The landowner attempted to submit new evidence in the form of an affidavit from the previous landowner "that it was never her intention to abandon the use of the property as a marina." *Id.* at *1 (internal quotation marks omitted). The board refused to consider the new information, invoking *res judicata* as to the previously rejected application. The Superior Court of Connecticut upheld the board's rejection of the new evidence, deferring to the board's determination that no material change of circumstances had occurred. *Id.* at *3.

161. 515 N.Y.S.2d 283 (App. Div. 1987).

162. *Id.* at 284–85.

changed.”¹⁶³

This case stands in some contrast to those that uphold zoning board decisions to reconsider identical applications based solely on the introduction of new information.¹⁶⁴ In both instances, however, courts defer to the zoning board’s determination about whether to reconsider its decision in light of additional information.¹⁶⁵ This deference reflects the informational advantages enjoyed by the zoning board—both with respect to the factors that led to its prior determination and with respect to the longterm inefficiencies that would be generated by an “incorrect” zoning board decision.

Recall that zoning boards may not summarily reject a new application that is materially different from the initial relief requested or that cures defects which led to the initial denial. This is because the give-and-take process between a landowner and a zoning board is significantly more efficient than requiring an applicant to bring forth all possible requests for relief in the initial application. In contrast, a zoning board may summarily reject an identical application in which the only purported “change” is additional evidence, because there are no efficiency advantages in permitting a landowner to submit the same application multiple times, altered only by different supporting evidence.

D. *The Impact of Statutes and Judicial Decisions on the Power to Reconsider*

The focus of this Article so far has been on the res judicata effect a board decision has on the same board in a subsequent proceeding. But local land use boards are creatures of statute, and statutes have the capacity to override the principles that would otherwise apply. Moreover, board decisions are subject to judicial review, and one might surmise that a judicial decision affirming (or reversing) a board decision would have res judicata consequences different from those that would

163. *Id.* at 285.

164. *See supra* Subsection III.B.2.b.

165. Notably, in *Jensen*, the landowner unsuccessfully had appealed the board’s original denial of the identical application. Thus, the landowner had the opportunity to diligently bring forth all of his evidence not only at the initial zoning board hearing, but also at the judicial proceeding, in which he likely had the assistance of legal counsel. The court refused to require the zoning board to consider the new evidence to be a material change of circumstance where the landowner failed to avail himself of multiple opportunities to show the augmented value of the property with a variance. 515 N.Y.S.2d at 284–85.

The case is harder when an initial variance application is not appealed, and there is no judicial proceeding or legal counsel to impress upon the landowner the importance of thoroughly presenting all relevant evidence in existence at the time. It is more likely, in such a scenario, that the landowner imprudently failed to gather all significant evidence under the mistaken assumption that he could reapply later and assemble more persuasive information. Nevertheless, a zoning board still is entitled to invoke the doctrine of issue preclusion and reject a landowner’s duplicative application based solely on new evidence.

flow from the board decision itself. This Subsection explores those issues.

1. Statutory Directives

Because *res judicata* is a common law doctrine, its command must yield to statutory directives that limit or expand the doctrine's scope. No states appear to have enacted statutes that explicitly address the *res judicata* effect of zoning board determinations, but a number of statutes and ordinances prohibit reconsideration of an application for a specified period of time. A broad reading of these statutes implicitly would limit the scope of *res judicata* doctrine.

The Massachusetts statute illustrates this problem. The statute provides, in essence, that once an application has been disapproved, the permit-granting authority shall not approve the application within two years unless a supermajority finds that there has been a material change in circumstances *and* all but one member of the planning board consents.¹⁶⁶ This statute raises two potential conflicts with *res judicata* doctrine. First, suppose a landowner alters his application for a special permit or variance and submits the amended application before the end of the two-year period. Does the statute preclude application of *res judicata* doctrine because the statute provides the exclusive remedy for reapplications during the two-year period? Second, suppose a landowner resubmits her original application more than two years after the board denied that application. Does the statute implicitly require the board to consider the resubmitted application on the merits, preventing any application of *res judicata* doctrine after the expiration of the two-year period? Other statutes and ordinances raise similar issues.¹⁶⁷

166. The relevant portion of the statute provides:

No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

MASS. GEN. LAWS ANN. ch. 40A, § 16 (West 2010).

167. See, e.g., CONN. GEN. STAT. ANN. § 8-6 (West 2010). For cases construing ordinances that specify time limits for reapplication, see, for example, *Rhema Christian Center v. District of Columbia Board of Zoning Adjustment*, 515 A.2d 189, 195-96 (D.C. 1986), and *Moulton v. Board of Zoning Appeals*, 555 N.W.2d 39, 45-46 (Neb. 1996).

The authority is clear on the first issue. Even if a statute purports to bar reapplication for a specified period, courts do not construe the bar to prevent reconsideration when the applicant can show either that the application itself is different or that the circumstances surrounding the application have changed. For instance, in *Ranney v. Board of Appeals*, a Massachusetts appeals court held that the statutory ban did not bar a new special permit application materially different from an application rejected by the same board less than a month earlier.¹⁶⁸ The court explicitly indicated that courts should defer to a board's determination that the circumstances surrounding the new application are materially different from those at issue in the first application.¹⁶⁹

The second, more difficult issue is whether a time-limited ban on reapplications effectively requires boards to reconsider reapplications on the merits once the statutory time period has expired, implicitly displacing preclusion doctrine. Start with the premise that a statute like the Massachusetts statute must have been designed to have *some* application. Issue preclusion doctrine would (even absent the statute) prevent a board from considering identical applications before expiration of the statutory ban. The statute does not purport to prevent a board from considering different applications or changed circumstances, either before or after the expiration of the ban. One might argue, therefore, that for the statute to have any effect, the statute should be read to *require* a board to consider, on the merits, an application identical to one already rejected, so long as the second application is made after expiration of the statutory time period.

Although the case law is sparse, at least one court has held that a board must consider a nearly identical application after expiration of the statutory time period. In *Moulton v. Board of Zoning Appeals*,¹⁷⁰ the Nebraska Supreme Court held that a provision in the Lincoln Municipal Code prohibiting applications for “substantially similar variance[s] . . . within one year” prevented the board from invoking res judicata after expiration of the one year period.¹⁷¹

Other courts have suggested the opposite conclusion—that res judicata doctrine continues to apply despite enactment of a statutory time limit.¹⁷² The concern that prompts statutory time limits is

168. 414 N.E.2d 373, 374–75 (Mass. App. Ct. 1981). Other cases reaching similar conclusions in other states include *Winchester v. W.A. Foote Memorial Hospital, Inc.*, 396 N.W.2d 456, 462 (Mich. Ct. App. 1986), and *Peterson v. City Council*, 574 P.2d 326, 330–31 (Or. Ct. App. 1978).

169. *Ranney*, 414 N.E.2d at 376.

170. 555 N.W.2d 39 (Neb. 1996).

171. *Id.* at 45–46. Of course, it is clear that a board would be entitled to consider an application anew after expiration of the period. See *State ex rel. DeZeeuw v. Manitowoc Cnty. Bd. of Adjustment*, No. 91-0914, 478 N.W.2d 596, 1991 WL 285894, at *2 (Wis. Ct. App. Nov. 20, 1991) (per curiam).

172. *Rhema Christian Ctr.*, 515 A.2d at 196; *Coral Reef Nurseries, Inc. v. Babcock Co.*,

undoubtedly the same one that underlies judicial development of preclusion doctrine: protecting zoning boards against repetitious applications while preserving flexibility to adapt to circumstances that change over time. Indeed, some statutes make that clear by providing only that no board “shall be required” to hear a new application within the statutory period, impliedly giving a board the discretion to apply res judicata doctrine.¹⁷³ *Moulton*, then, may be an outlier; most courts appear unlikely to treat these statutes as undermining ordinary res judicata principles.

Other statutory provisions regulate “rehearings” of an application without making it clear how, if at all, a rehearing is different from a new, but substantially similar, application. These statutes, which often make no reference to the time frame for a rehearing, typically have no impact on preclusion doctrine. For instance, New York statutes authorize a zoning board to rehear an application upon a unanimous vote of the board.¹⁷⁴ Statutes like this one, which impose procedural hurdles before a board may rehear an application, do not undermine preclusion doctrine except in the limited circumstances where the applicant surmounts those high procedural hurdles.

2. Prior Judicial Decisions

How does judicial review of a prior board decision affect the application of preclusion principles? Unlike a prior unreviewed board determination, a judicial decision carries with it an important aspect of claim preclusion doctrine: the determination bars not only relitigation of the issue actually and necessarily determined in the first judicial proceeding (the usual issue preclusion effect), but also relitigation of all claims and issues the aggrieved party could have raised in that earlier proceeding.

*Freddolino v. Village of Warwick Zoning Board of Appeals*¹⁷⁵ illustrates the point. The landowner sought an area variance from a zoning requirement limiting total development coverage to forty percent

410 So. 2d 648, 653 (Fla. 3d Dist. Ct. App. 1982); *Marks v. Zoning Bd. of Review*, 203 A.2d 761, 763–64 (R.I. 1964). Note, however, that only in *Marks* was the court’s conclusion necessary to the resolution of the case. *See id.* at 764. In *Coral Reef*, the court’s ultimate conclusion was that the board was entitled to entertain a subsequent application, 410 So. 2d at 655, and in *Rhema* the court refrained from “imposing [its] own construction of the regulation” pending an interpretation from the board. 515 A.2d at 196.

173. *See Root v. Zoning Bd. of Appeals*, 565 A.2d 14, 16 (Conn. Super. Ct. 1989) (citation omitted).

174. N.Y. TOWN LAW § 267-a(12) (McKinney 2011); N.Y. VILLAGE LAW § 7-712-a(12) (McKinney 2011). New York courts, however, have construed the statute to require presentation of new facts. *Freddolino v. Vill. of Warwick Zoning Bd. of Appeals*, 596 N.Y.S.2d 490, 492 (App. Div. 1993); *see also* N.H. REV. STAT. ANN. § 677:2 (2011) (authorizing rehearing within thirty days if, in the board’s opinion, “good reason therefor is stated in the motion”).

175. 596 N.Y.S.2d 490 (App. Div. 1993).

of the total square footage of the landowner's parcel. When the zoning board denied the variance, the landowner sought judicial review, contending that the denial was arbitrary and capricious. Four months after the court dismissed the landowner's petition, he applied for the same variance, introducing expert testimony to support a claim of hardship. When the board again denied the variance, concluding that the landowner had not demonstrated any change in circumstances, the applicant again sought judicial review, this time adding constitutional claims to the claim that the denial was arbitrary and capricious.¹⁷⁶ In dismissing the constitutional claims, the court observed that those claims could have been raised in the initial proceeding, and that res judicata principles precluded the landowner from raising them in the second proceeding.¹⁷⁷

If the landowner in *Freddolino* had not sought judicial review of the board's first denial, issue preclusion principles would not have barred the landowner from advancing the constitutional attack after the second denial. The zoning board itself would not have been equipped to consider the constitutional challenge, and from the standpoint of judicial economy, there would be little reason to require the landowner to bring a judicial challenge to the initial determination when the landowner still hoped that the board would approve some version of the project once educated by supplementary materials. After the board's rejection of a subsequent application, therefore, he would have been entitled to bring the constitutional claim. But because the landowner actually challenged the first determination in court, the judicial economy calculus was significantly different; there was every reason for the court to insist that the landowner raise all judicially cognizable claims in the same proceeding—the usual claim preclusion rule.

On the other hand, a judicial decision upholding a variance or special permit denial does not preclude the zoning board from granting a landowner's subsequent application when either the circumstances or the substance of the landowner's application have changed.¹⁷⁸ In this

176. *Id.* at 491–92. The landowner argued that the forty percent limit was unconstitutional on its face and as applied. *Id.* at 492.

177. *Id.* at 492–93. The court acknowledged that as a matter of New York procedure, the landowner would have had to convert the challenge to the board's action to a declaratory judgment proceeding in order to raise the constitutional claim, but observed that there was no impediment to such a conversion. *Id.* at 492.

178. Indeed, in *In re Clute v. Town of Wilton Zoning Board of Appeals*, 611 N.Y.S.2d 710 (App. Div. 1994), the court went one step further. In *Clute*, a court earlier had overturned a zoning board's *grant* of an area variance because the board had not properly weighed the statutory factors. *Id.* at 711. The court held that the judicial determination did not prevent a successor-in-interest, who purchased the parcel from the initial applicant, from seeking the same area variance the court had overturned already, provided that the applicant produced "additional evidence other than that submitted on the prior application to avoid the preclusive effect of [the court's] prior decision . . ." *Id.* at 712.

respect, the judicial decision, like a prior board decision, has only issue preclusive effect; if the board decides that the subsequent application should be granted because the new application raises issues it had not considered on the first application, the board is free to do so. For instance, in *Filanowski v. Zoning Board of Adjustment*,¹⁷⁹ the Pennsylvania Supreme Court upheld the grant of a variance to build an apartment complex in a single-family district despite the same board's denial of a variance, affirmed by a court, several years earlier. The court noted that since the prior variance denial, the city had rezoned abutting land to permit apartments—a change of circumstance that entitled the board to consider the application, unconstrained by its prior decision.

And in *Bressman v. Gash*,¹⁸⁰ the New Jersey Supreme Court upheld a variance grant, in the face of a prior judicial decision adverse to the landowner, where the landowner's application, rather than circumstances, had changed. In *Bressman*, the zoning board had initially granted the landowner a variance from the ordinance's rear setback requirement. While neighbors challenged the grant, the landowner built the house in reliance on the variance, only to have the Appellate Division reverse the trial court's decision upholding the variance. The landowner then exchanged some land with a neighbor to increase the distance between his house and the rear lot line, reducing the magnitude of the variance he needed. When the town planning board approved the landowner's newly submitted variance application,¹⁸¹ the neighbors sought judicial review, invoking *res judicata* doctrine. The New Jersey Supreme Court held that the planning board had not acted arbitrarily in concluding that differences between the two applications justified consideration of the second application on the merits.

To summarize, then, the effect of a prior judicial decision on a landowner's variance or special permit application is identical to the effect of a board decision, with one significant exception: if a party seeks judicial review of a board decision, an adverse judicial decision bars the party from advancing, on a subsequent application, any claims that the party could have raised in the initial litigation. It is *only* to that extent that a judicial decision has any claim preclusive effect on a subsequent application.

E. *Ohio Exceptionalism*

Alone among the states, the Ohio courts appear inclined to apply traditional claim preclusion doctrine to variance and special permit

179. 266 A.2d 670 (Pa. 1970).

180. 621 A.2d 476 (N.J. 1993).

181. Because the landowner needed minor subdivision approval with respect to the exchange of land, the Board of Adjustment had transferred the variance application to the planning board. *Id.* at 480.

determinations by zoning boards. In *Grava v. Parkman Township*,¹⁸² a 4-3 majority of the Ohio Supreme Court overruled precedent by holding that claim preclusion doctrine prevented a landowner who previously had been denied a variance from later seeking to establish that the landowner's use was a pre-existing nonconforming use that did not require a variance. Because the board itself had applied claim preclusion principles to bar the landowner's subsequent application, the court could have applied principles of deference to reach the same result.¹⁸³ But the court went out of its way to emphasize the need to provide parties with an incentive to raise all issues at one time in order to conserve judicial and quasi-judicial time and resources.¹⁸⁴ As a result, the court barred the landowner's claim, even though the issue raised by the landowner in the second proceeding (whether the use was a nonconforming use) was different from the issue in the first proceeding (whether the landowner was entitled to a variance).¹⁸⁵ Although the result is entirely consistent with traditional claim preclusion doctrine, it is inconsistent with issue preclusion doctrine and with the approach followed in other states.

In two subsequent cases, the Ohio appellate courts have invoked *Grava* to permit neighbors to overturn variance grants when the board previously had denied variances to the same landowners. In *Rossow v. City of Ravenna*¹⁸⁶ and *Dinks II Co. v. Chagrin Falls Village Council*,¹⁸⁷ Ohio appellate courts emphasized that “[a]n appellate court applies a *de novo* standard of review on a determination of whether an action is barred by *res judicata*,”¹⁸⁸ and concluded that, even though the second application differed from the first in a number of particulars, *res judicata* doctrine required invalidation of the board's grant of the second variance.¹⁸⁹ These cases are very much at odds with the approach

182. 653 N.E.2d 226 (Ohio 1995).

183. Indeed, an earlier Ohio Supreme Court decision, *Set Products, Inc. v. Bainbridge Township Board of Zoning Appeals*, 510 N.E.2d 373 (Ohio 1987), appeared to take this approach, holding that a board's determination that circumstances had not changed “will not be questioned, absent a showing that the decision was arbitrary, unreasonable or constituted an abuse of discretion.” *Id.* at 377. Although the *Grava* court cited the Ohio Supreme Court's decision, *see Grava*, 653 N.E.2d at 228, nowhere did it suggest comparable deference to board determinations.

184. *See Grava*, 653 N.E.2d at 230.

185. *Id.* at 228; *see also* *Bohach v. Advery*, No. 00 CA 265, 2002 Ohio App. LEXIS 3425, at *2-4, *18-19 (Ohio Ct. App. June 18, 2002) (applying the same approach on facts nearly identical to those in *Grava*).

186. No. 2001-P-0036, 2002 Ohio App. LEXIS 1498 (Ohio Ct. App. Mar. 29, 2002).

187. No. 84939, 2005 Ohio App. LEXIS 2213 (Ohio Ct. App. May 12, 2005).

188. *Rossow*, 2002 Ohio App. LEXIS 1498, at *6; *see also Dinks II*, 2005 Ohio App. LEXIS 2213, at *12 (“The applicability of *res judicata* is a question of law that is subject to *de novo* review.”).

189. In *Rossow*, the second application eliminated a request for a rear yard variance and modified the request for side yard setbacks. 2002 Ohio App. LEXIS 1498, at *8. In *Dinks II*, the second application made provision for offsite employee parking. 2005 Ohio App. LEXIS 2213,

prevalent in other states.¹⁹⁰

CONCLUSION

In the zoning context, as in other contexts, balancing flexibility and finality presents significant challenges. General statements that zoning board decisions are entitled to res judicata effect unless circumstances have changed obfuscate the generally coherent pattern that courts follow in evaluating preclusion claims. A close analysis of land use cases and policy establishes that claim preclusion has no place in zoning doctrine; rather, a combination of issue preclusion and judicial deference protects boards and neighbors against landowners seeking to take multiple bites out of the same apple.

at *18.

190. One Ohio appellate court has recognized that strict application of res judicata doctrine would leave a landowner “forever barred from requesting a variance after having a variance once denied despite one’s best effort to change one’s proposal to ameliorate the concerns of the applicable board.” *Davis v. Coventry Twp. Bd. of Zoning Appeals*, No. 20085, 2001 Ohio App. LEXIS 513, at *7 (Ohio Ct. App. Feb. 14, 2001). In *Davis*, the court held that a board could not invoke res judicata to deny landowner a variance different in several respects from the variance the board had previously denied. The court distinguished *Grava*, noting that in that case, only the landowner’s theory of relief, not the substance of landowner’s application, had changed. *Id.* at *6–7.

In one important respect, however, the court’s approach in *Davis* is consistent with that taken in *Grava* and applied in other Ohio cases. The court treated the preclusion issue as a pure question of law, with no deference to the decision of the zoning board. *Id.* at *4. The principle that courts should review de novo res judicata claims is inconsistent with the approach taken outside of Ohio.