DELEGATION OF POWER AND FUNCTION IN ZONING ADMINISTRATION

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INTRODUCTION

This article began as an investigation of delegation of power doctrine as it has been applied to the standards used in zoning ordinances. In the face of the decreasing importance of delegation problems, this constitutional prohibition is invoked more than occasionally to invalidate zoning ordinances which either lack standards, or which contain inadequate standards. Enough cases raising the delegation issue continue to be decided to present a prima facie case for investigation.

Yet the issues were found to lie deeper than the language of delegation. Too often, the point is forgotten that an important purpose of the delegation requirement is to prevent the arbitrary exercise of discretionary power. Opportunities for arbitrary decision-making do lie in the administrative phases of zoning. Dispensations from the terms of the ordinance are commonly authorized by the zoning board of adjustment. These take the form of variances for hardship cases, and of exceptions for uses that are permitted in designated districts, subject to prior approval. Adequate standards can help prevent arbitrary decisions by confining the exercise of the board's discretion.[1]

Opportunities for arbitrary decision-making also lie in other than the administrative phases of zoning. Amendments to the ordinance, for example, are subject to attack under the Equal Protection clause. Like the delegation principle, the Equal Protection clause inhibits the

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1. Dissatisfaction with the workability of zoning procedures has focused on the boards of adjustment, and a series of excellent recent studies indicate that the boards act arbitrarily, if not illegally, when granting zoning variances. See Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353 (1962); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); *Comment, Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101 (1962). See also Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955).

For useful general discussions of zoning administration see Craig, *Borogroves and Mome Raths in the Wabe: The Language of Zoning Ordinances*, 46 A.B.A.J. 434 (1960); Crawford, *Special Exceptions Prove to be the Rule*, 26 CONN. B.J. 172 (1952); Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280 (1955); Comment, *Zoning Amendments and Variations, and Neighborhood Decline in Illinois*, 48 NW. U.L. REV. 470 (1953).

arbitrary and achieves this goal either by requiring uniform treatment or by insisting on differentiation according to reasonable classifications. From the perspective of the zoning ordinance, the result in an individual case will be the same. An arbitrary change in use, allowed as a variance under an ordinance without standards, will be struck down as an unconstitutional delegation of legislative power. An amendment, authorizing a change in use for a parcel that cannot reasonably be differentiated from its neighbors, will be struck down as a violation of Equal Protection.

This article, then, focuses on delegation problems in order to explore the control of arbitrary decision-making under zoning ordinances. It will begin with a critique of variances and exceptions, and move on to a consideration of modern techniques that have achieved more flexibility, often by adapting amendment processes. Finally, some insights will be attempted into the underlying framework of zoning administration.

I. Administrative Structure and Administrative Discretion in Zoning

As elsewhere in public administration, the basic problem in zoning is to achieve as clear a differentiation as possible between policy-making and policy-application. On this score the Standard State Zoning Enabling Act,[2] on which a majority of the state statutes are modeled, failed to make tenable distinctions. Policy-making was confided to the governing body of the locality, which was given the authority to adopt the zoning ordinance. Administration was given to the zoning administrator,[3] often the building inspector, who has

2. This act was first proposed in 1922 by the United States Department of Commerce, and was widely used as a model in the adoption of state zoning enabling acts. For the text of a state statute closely following the model act see U.S. Housing and Home Finance Agency, Comparative Digest of Municipal and County Zoning Enabling Statutes vi-viii (1952).

3. Zoning ordinances customarily contain ancillary provisions supplemental to the principal regulations. Ancillary provisions impose additional substantive requirements whose application requires the exercise of some discretion, but they are additional to the principal regulations and do not contemplate their change or modification. These characteristics distinguish the ancillary provisions from the true exceptions or variances. Ancillary provisions should be enforced by the zoning administrator.

For example, an ancillary provision may require that a building front on a public way. People *ex rel.* Schimpff v. Norvell, 38 Ill. 325, 13 N.E.2d 960 (1938), held unconstitutional an ordinance giving the building commissioner the authority to decide whether a building fronted on an "officially approved place." The quoted standard was held too vague. *But cf.* Mitchell v. Morris, 94 Cal. App. 2d 446, 210 P.2d 857 (1949), upholding an ordinance requiring that a building front on a public street or on a private easement determined "to be adequate for the

the power to issue zoning permits. But ambiguity comes in the introduction of two agencies, the plan commission and the board of adjustment, known also as the board of zoning appeals. Both the commission and the board exercise functions that are partly legislative and partly administrative.[4]

The plan commission is to advise on the enactment and amendment of the original ordinance. In theory, zoning amendments are to be made in response to substantial changes in environmental conditions or in other instances in which a policy change is indicated.[5] Instead, amendments have often been employed to take care of limited changes in use, usually confined to one lot, a technique that has disapprovingly been called "spot zoning." Spot zoning for one parcel, vigorously opposed by adjacent neighbors, takes on adversary characteristics that give it a distinctly adjudicative cast.

The agency originally intended to provide a safety valve from the zoning ordinance is the board of adjustment.[6] This board was authorized to grant both variances and exceptions. Confusion about the role of exceptions and variances is endemic to zoning, reflecting the confusion over underlying purposes, and shows little sign of being resolved.[7] The variance is an administratively-authorized departure

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purpose of access." The power to make this determination was lodged in the plan commission.

Another example of an ancillary provision is a requirement that "adequate" off-street parking be required. Held constitutional: Mirschel v. Weissenberger, 277 App. Div. 1039, 100 N.Y.S.2d 452 (1950) (per curiam) (power in board of zoning appeals); Schmitt v. Plonski, 215 N.Y.S.2d 170 (Sup. Ct. 1961) (same). *Contra*, State *ex rel.* Associated Land & Inv. Corp. v. City of Lyndhurst, 168 Ohio St. 289, 154 N.E.2d 435 (1958) (initial decision by building inspector).

4. As originally conceived, the Board of Zoning Appeals was to play a peripheral role in zoning administration. BASSETT, WILLIAMS, BETTMAN & WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES 10-12 (1935). They suggest that the Board should be set up because "from time to time" exceptional instances of practical difficulty would occur.

5. See Pomeroy, *More on Zoning Amendments and the Master Plan*, Nov. 1961 ZONING BULL. 1.

6. The cases have suggested that an escape valve in the form of a variance provision is essential to the constitutionality of the ordinance. State *ex rel.* Landis v. Valz, 117 Fla. 311, 157 So. 651 (1934); Brandon v. Board of Comm'rs, 124 N.J.L. 135, 11 A.2d 304 (Sup. Ct.), *aff'd* 125 N.J.L. 367, 15 A.2d 598 (1940); L. & M. Inv. Co. v. Cutler, 125 Ohio St. 12, 180 N.E. 379 (1932). No cases have held, however, that an ordinance lacking a variance provision would be declared unconstitutional.

7. See American Society of Planning Officials, Planning Advisory Service, Information Report No. 40, Exceptions and Variances in Zoning (1952). This paper avoids the term "conditional use," which has been employed to designate a use requiring the prior approval both of the plan commission and of the govern-

from the terms of the zoning ordinance, granted in cases of unique and individual hardship, in which a strict application of the terms of the ordinance would be unconstitutional. The grant of the variance is meant to avoid an unfavorable holding on constitutionality.

By way of contrast, an exception is a use permitted by the ordinance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched.[8] Exceptions are authorized under conditions which will insure their compatibility with surrounding uses. Typically, a use which is the subject of a special exception demands a large amount of land, may be public or semi-public in character and might often be noxious or offensive. Not all of these characteristics will apply to every excepted use, however. Hospitals in residential districts are one example, because of the extensive area they occupy, and because of potential traffic and other problems which may affect a residential neighborhood. A filling station in a light commercial district is another example because of its potentially noxious effects.[9]

As originally conceived, the administrative structure merely supplied the supporting cast for the zoning ordinance, which sought to legislate policy by dividing the community into districts based on the principle of compatibility. If this organizing device had worked, the ambiguities inherent in the administrative structure might not have become critical. But the division of a community into districts presupposes that generalized differentiations of land use can successfully be applied to a multiplicity of individual ownerships. This expectation has not been realized, largely because an increasingly complex urban environment requires delicate adjustments among competing land uses. These adjustments cannot always be made before the fact.

Functionally, the problem has become more than just the alleviation of hardship in "hard" cases, or the passing out of exceptions for "tough" uses. The problem is one of finding a technique for making a continuing series of adjustments as individual cases arise. Two types of adjustment have proved difficult. At one extreme, the zoning ordinance has not proved adequate to handle changes in use classifications that have to be made for individual lots. Inevitable crudities in a priori classification have multiplied the instances in which use re-

ing body. Instead, all departures from traditional variance or exception procedures are treated in the text as examples of the direct delegation of administrative discretion under the zoning ordinance.

8. Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601, *appeal dismissed*, 364 U.S. 475 (1960), reviews the history of special exception provisions. See also Anderson, The Use of the Special Use, 1959 (unpublished thesis in University of North Carolina Department of City and Regional Planning Library).

9. *Cf.* Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals, 205 Misc. 1083, 132 N.Y.S.2d 148 (Sup. Ct. 1954) (religious uses not offensive).

classifications must be sought for individual parcels. Use changes may be obtained either through the amendment or through the variance-exception process. But any change in use necessarily alters the underlying policy of the zoning ordinance, which attempted to allocate competing uses in the first place.

At the other extreme, conventional zoning ordinances have been difficult to apply to large tracts. In this context, problems of location are difficult. On the outer urban fringe, where little development has taken place, the territorial division of area into districts may be difficult. In addition, traditional lot-and-block restrictions are difficult to apply to integrated developments, which are planned without regard to conventional ownership patterns.

In the face of these administrative problems, the courts have struggled to separate policy-making and policy-application by preventing arbitrary decisions in individual cases.[10] A good example, which is instructive for delegation doctrine, is spot zoning.[11] If a change in use has been accomplished through an amendment of the ordinance, delegation of power objections may not be applicable. But Equal Protection objections may apply. A spot zoning amendment may be granted arbitrarily to one parcel when other parcels similarly situated are not given like treatment. An example would be a filling station which is allowed on one corner of an intersection while the remaining corners continue to be restricted to residential use. In this case, the amendment would fall as arbitrary and discriminatory under the Equal Protection clause. The essence of this constitutional requirement has been written into some zoning statutes which seek to

10. On occasion, the court's reaction to a statutory standard will be influenced by the underlying substantive policy which the standard seeks to implement. For example, judicial hostility to architectural controls will lead a court to invalidate an ordinance on the ground that a delegation to an architectural control committee contains insufficient standards. City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947); State *ex rel.* Magidson v. Henze, 342 S.W.2d 261 (Mo. Ct. App. 1961). *Contra,* Weldon Realty Corp. v. Town Council of the Town of Westfield, No. L-7807-61, Super. Ct. N. J., February 14, 1962; State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied,* 350 U.S. 841 (1955).

On the other hand, judicial sympathy toward ordinances seeking to control and eliminate nonconforming uses will lead to decisions upholding the standards used to give a board of zoning appeals the power to control their expansion. Women's Christian Ass'n of Kansas City v. Brown, 354 Mo. 700, 190 S.W.2d 900 (1945); Fox v. Adams, 134 N.Y.S.2d 534 (Sup. Ct. 1954).

11. An analogy to spot zoning is often suggested in cases dealing with delegation of power problems in variance, exception and related situations. See, *e.g.,* Moriarty v. Pozner, 21 N.J. 199, 121 A.2d 527 (1956); Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952).

insure uniformity by requiring that zoning be carried out "in accordance with a comprehensive plan."[12]

The relationship between the delegation of power doctrine and arbitrary decision-making[13] is clearly apparent in *Gorieb v. Fox*,[14] which upheld the validity of setback ordinances. These ordinances set the distance between the front line of a building and the street. In these ordinances the power to grant variances from the setback requirement was reserved in the city council without standards. Nevertheless, the variance provision was upheld on the ground that it was needed to take care of hardship cases. The Court reserved the right to intervene in cases of actual discrimination.[15] In this manner, the Court opens the door to supervision on a case-by-case basis. Whether this kind of supervision can be adequate in the absence of standards will be left for consideration later, but the analogy to the Equal Protection approach to spot zoning is obvious.

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12. Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV. L. REV. 1154 (1955).

13. Another instructive analogy is afforded by those cases in which the zoning ordinance does not show district lines with sufficient precision, or leaves their determination to an administrative official. In State v. Huntington, 145 Conn. 394, 143 A.2d 444 (1958), the district lines were simply drawn to existing uses and, for this reason, were held not to be in accordance with a comprehensive plan. But the Connecticut court has indicated that ambiguities in description can be resolved if a plan is present. Leveille v. Zoning Bd. of Appeals, 145 Conn. 468, 144 A.2d 45 (1958); Kimberly v. Town of Madison, 127 Conn. 409, 17 A.2d 504 (1941). *Cf. In re* Kensington-Davis Corp., 239 N.Y. 54, 145 N.E. 738 (1924); Taylor v. Moore, 303 Pa. 469, 154 Atl. 799 (1931).

To be compared with the Connecticut cases is Auditorium, Inc. v. Board of Adjustment, 47 Del. 373, 91 A.2d 528 (1952), voiding an ordinance authorizing the zoning officials to establish district lines, but not providing any standards. The point of all these cases is the same. In the absence of a "plan," or in the absence of standards, the opportunities for arbitrary applications of the ordinance are too great. Compare Wasem v. City of Fargo, 49 N.D. 168, 190 N.W. 546 (1922).

14. 274 U.S. 603 (1957). *Accord*, Papaioanu v. Commissioners of Rehobeth, 25 Del. Ch. 327, 20 A.2d 447 (1941): In varying setback, "the Commissioners 'shall maturely consider those matters of public welfare and safety set forth in the preamble' of the ordinance." *Id.* at 336, 20 A.2d at 451. Sundeen v. Rogers, 83 N.H. 253, 141 Atl. 142 (1928) (unnecessary hardship variance provision of setback ordinance upheld); Root v. City of Erie Zoning Bd. of Appeals, 180 Pa. Super. 38, 118 A.2d 297 (1955) (exception allowed if required by topography or existing building development). Compare Colyer v. City of Somerset, 306 Ky. 797, 208 S.W.2d 976 (1947), holding unconstitutional an ordinance which authorized the city council to impose setbacks but which provided no standards. See Fairmont Inv. Co. v. Woermann, 357 Mo. 625, 210 S.W.2d 26 (1948).

15. The *Gorieb* case could be explained on the ground that the exercise of discretion had been reserved to a legislative body, so that no standards were needed. In other cases cited by the Court, however, discretion had been delegated to administrative officials.

II. THE VARIANCE POWER

How have the courts guarded against arbitrary decisions in the exercise of the variance power? As the most conventional escape device in the zoning ordinance, it authorizes the board of adjustment to grant dispensations in cases of hardship that are unique to the individual lot. As applied to dimensional restrictions, the hardship variance makes sense. This type of regulation covers lot widths, lot sizes, yards and height. Modest variations to alleviate hardship created by topographical, size and related features can be authorized without doing violence to underlying policy.[16]

A use variance, however, raises different problems. For one thing, to permit a use variance in order to save the ordinance from unconstitutionality is self-defeating. While a holding of unconstitutionality would lift the zoning restriction from the affected parcel, the grant of a use variance has much the same result. All that is prevented is possible damage to the entire ordinance should the court find the unconstitutional section non-severable, a risk that has not materialized in practice. While an unfavorable constitutional result might also weaken the ordinance in adjacent areas of the municipality, the grant of a use variance for all practical purposes will have the same effect.

More important, the test of "hardship" which is crucial to the variance power has no real meaning as applied to a variance for use.[17]

16. From one point of view, the relaxation of zoning restrictions through the variance process might be analogized to the remission or reduction of a penalty authorized to be imposed by an administrative agency. Even in the absence of standards, the customary judicial attitude has been that "mitigation is an act of grace and that the alleged offender has neither substantive nor procedural rights." 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.05 (1958). The remission approach was adopted by some of those who participated in the drafting of the original zoning enabling acts. BASSETT, *op. cit. supra* note 4, at 12. It is particularly applicable to quantitative dimensional regulations. See the comment in State *ex rel.* Landis v. Valz, 117 Fla. 311, 320, 157 So. 651, 654 (1934), that the exercise of the variance power is " a nonjusticiable subject matter."

17. The history of the zoning variance is instructive. It is modeled after an 1862 New York law which authorized a municipal board to grant variances from the building code. While the draftsmen of the zoning enabling acts realized that the building code context permitted the working out of fairly definite rules for variances, while the zoning context did not, they decided to solve the problem by adopting "the rather vague, elusive, and elastic clause known as the practical difficulty and unnecessary hardship clause." BASSETT, *op. cit. supra* note 4, at 64-5. The expectation was that a more definite formula would develop over time; this has not occurred. Criticism that the use variance would undermine the zoning ordinance was answered by pointing out that variance changes were to be limited to small areas and that a change covering too wide an area would be illegal. *Id.* at 13. This forecast of judicial behavior has turned out to be fairly accurate.

The courts have made it clear that hardship must be peculiar to the lot, and not general to the neighborhood.[18] Except in rare cases of topographical and other oddities, hardship in the use of land can arise only when the zoned use is incompatible with surrounding uses as they have developed in the neighborhood. Yet general neighborhood conditions that justify a use variance can just as easily support a zoning amendment.

In the face of these semantic ambiguities, all of the cases that have passed on the question have upheld the hardship standard against delegation of power attacks.[19] Early unfavorable decisions in Illinois[20]

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18. See Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828 (1946); Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939) (leading case).

19. Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), *appeal dismissed*, 359 U.S. 436 (1959) (commission had recommending power); Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828 (1946) (court relies on "unnecessary hardship" standard); Appeal of Blackstone, 38 Del. 230, 190 Atl. 597 (1937); Tau Alpha Holding Corp. v. Board of Adjustments, 126 Fla. 858, 171 So. 819 (1937); Anderson v. Jester, 206 Iowa 452, 221 N.W. 354 (1928); Selligman v. Western & Southern Life Ins. Co., 277 Ky. 551, 126 S.W.2d 419 (1938); State v. Gunderson, 198 Minn. 51, 268 N.W. 850 (1936); Freeman v. Board of Adjustment, 97 Mont. 342, 34 P.2d 534 (1934); Fortuna v. Zoning Bd. of Adjustment, 95 N.H. 211, 60 A.2d 133 (1948); Phillips v. City of Paterson, 8 N.J. Super. 281, 66 A.2d 65 (L. 1949); Brandon v. Board of Comm'rs, 124 N.J.L. 135, 11 A.2d 598 (1940); Application of Arlington Village Dev. Corp., 204 Misc. 895, 124 N.Y.S.2d 172 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 800, 128 N.Y.S.2d 596 (1954); Crossroads Realty, Inc. v. Gilbert, 109 N.Y.S.2d 59 (1951); Roosevelt Field, Inc. v. Town of North Hempstead, 197 Misc. 621, 95 N.Y.S.2d 126 (Sup. Ct. 1949), *rev'd on other grounds*, 277 App. Div. 889, 98 N.Y.S.2d 350 (1950); Hilton v. Board of Appeals, 18 N.Y.S.2d 213 (Sup. Ct. 1940); L. & M. Inv. Co. v. Cutler, 125 Ohio St. 12, 180 N.E. 379 (1932); Oklahoma City v. Harris, 191 Okla. 125, 126 P.2d 988 (1941); Huebner v. Philadelphia Sav. Fund Soc'y, 127 Pa. Super. 28, 192 Atl. 139 (1937); Root v. City of Erie Zoning Bd. of Appeals, 180 Pa. Super. 88, 118 A.2d 297 (1955); Miller v. Zoning Bd., 2 Bucks 237 (Pa. C.P. 1952); Spencer-Sturla Co. v. City of Memphis, 155 Tenn. 70, 290 S.W. 608 (1927) (ordinance permitting dimensional variances); Thalhofer v. Patri, 240 Wis. 404, 3 N.W.2d 761 (1942). In several of these cases use variances were allowed. *But cf.* Fairmont Inv. Co. v. Woermann, 357 Mo. 625, 210 S.W.2d 26 (1948). Favorable decisions in Ohio and Iowa have been somewhat qualified by unfavorable judicial decisions on exception provisions. And in State *ex rel.* Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955), the Ohio court held unconstitutional an ordinance requiring a board of adjustment permit for filling stations on the ground that it contained no standards. The dissenting opinion argued that the permit authority was subject to the sections of the ordinance authorizing hardship variances.

20. Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931), followed in Speroni v. Board of Appeals, 368 Ill. 568, 15 N.E.2d 302 (1938). *Cf.* City of Watseka v. Blatt, 320 Ill. App. 191, 50 N.E.2d 589 (1943) (invalidating exception provision containing no standards).

and Maryland[21] have been effectively bypassed.[22] While often the hardship standard is barely questioned, reliance may sometimes be placed on language in the ordinance that requires the board to consider not only the hardship to the applicant, but the policy and spirit of the ordinance, the public health, safety and welfare and the dictates of "substantial justice."[23] The trouble here is that these additional factors are the very police power considerations which ought to underlie the enactment of the ordinance in the first place. What the cases seem to say is that in varying an ordinance which has been enacted in aid of the public health, safety and welfare, the board of adjustment must reconsider the public health, safety and welfare.

At the same time, acceptance of the hardship standard is substantially qualified by a large group of cases holding that variance

21. Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 Atl. 703 (1933); Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 Md. 146, 164 Atl. 220, *appeal dismissed*, 290 U.S. 585 (1933); Goldman v. Crowther, 147 Md. 282, 128 Atl. 50 (1925). *But cf.* Tighe v. Osborne, 150 Md. 452, 133 Atl. 465 (1926); Kramer v. Mayor & City Council of Baltimore, 166 Md. 324, 171 Atl. 70 (1934) (upholding reserved power of city council to pass on filling station applications).

22. For the later Illinois cases see Bindburg v. Zoning Bd. of Appeals, 8 Ill. 2d 254, 133 N.E.2d 266 (1956); Downey v. Grimshaw, 410 Ill. 21, 101 N.E.2d 275 (1951); People *ex rel.* Miller v. Gill, 389 Ill. 394, 59 N.E.2d 671 (1945); Papanek v. Rayniak, 23 Ill. App. 2d 183, 161 N.E.2d 694 (1959). *Cf.* Illinois Bell Tele. Co. v. Fox, 402 Ill. 617, 85 N.E.2d 43 (1949) (inferentially upholding exception provision).

The Illinois cases are reviewed in Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. Chi. L. Rev. 509, 515-20 (1959); Dallstream & Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L. F. 213. Statutory adjustments made to overcome the unfavorable decisions on constitutionality would not appear to have changed the basic character of the variance power. See ILL. STAT. ANN. ch. 24, §§ 11-13-4, 11-13-5 (1961).

While approval in the later Maryland cases was at first limited to dimensional variances only, R. B. Constr. Co. v. Jackson, 152 Md. 671, 137 Atl. 278 (1927), this limitation has now been dropped. Loyola Federal Savings & Loan Ass'n v. Buschman, 227 Md. 243, 176 A.2d 355 (1961). And in Montgomery County v. Merlands Clubs, Inc., 202 Md. 279, 96 A.2d 261 (1953), the court upheld an ordinance provision authorizing a special exception for a country club, and couched in the usual language requiring consideration of the general purpose and intent of the ordinance. See also Mayor & City Council of Baltimore v. Seabolt, 210 Md. 199, 123 A.2d 207 (1956), holding that the board may always grant an exception, regardless of the validity of the standards, when the court itself would create an exception by holding the ordinance pro tanto invalid.

23. See Fortuna v. Zoning Bd. of Adjustment, 95 N.H. 211, 60 A.2d 133 (1948); Hilton v. Board of Appeals, 18 N.Y.S.2d 213 (Sup. Ct. 1940); Miller v. Zoning Bd., 2 Bucks 237 (Pa. C.P. 1952). In the *Miller* case the court referred to the police power preamble to the ordinance in order to give content to the variance standard.

provisions do not confer power to grant a change in use.[24] Whether the decision is taken on an ultra vires or on a constitutional point, these cases have made it clear that a use variance would be a usurpation of legislative power which cannot be permitted.[25] Unfortunately, many courts have approved use variances without explicitly considering their validity.[26] Elsewhere, notably in Florida[27] and New

24. Nicolai v. Board of Adjustment, 55 Ariz. 283, 101 P.2d 199 (1940); Bray v. Beyer, 292 Ky. 162, 166 S.W.2d 290 (1942); Adams v. Board of Zoning Adjustment, 241 S.W.2d 35 (Mo. Ct. App. 1951); State *ex rel.* Nigro v. Kansas City, 325 Mo. 95, 27 S.W.2d 1030 (1930); Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946); Livingston v. Peterson, 59 N.D. 104, 228 N.W. 816 (1930); Vandervort v. Sisters of Mercy, 97 Ohio App. 153, 117 N.E.2d 51 (1952); Beveridge v. Harper & Turner Oil Trust, 168 Okla. 609, 35 P.2d 435 (1934); Graves v. Johnson, 75 S.D. 261, 63 N.W.2d 341 (1954); Board of Adjustment v. Levinson, 244 S.W.2d 281 (Tex. Civ. App. 1951); Texas Consol. Theatres, Inc. v. Pittilo, 204 S.W.2d 396 (Tex. Civ. App. 1947); Harrington v. Board of Adjustment, 124 S.W.2d 401 (Tex. Civ. App. 1939); Walton v. Tracy Loan & Trust Co., 97 Utah 249, 92 P.2d 724 (1939) (leading case). *Cf.* Appeal of the Catholic Cemeteries Ass'n, 379 Pa. 516, 109 A.2d 537 (1954). *Contra,* Nelson v. Donaldson, 255 Ala. 76, 50 So. 2d 244 (1951).

25. The court's view of the scope of the variance power will also have an important effect on the nature of the remedies available to the landowner who wants to attack the zoning ordinance. Many courts require exhaustion of the variance procedure before the board of adjustment as a prerequisite to an attack on the constitutionality of the ordinance. 2 YOKLEY, ZONING LAW AND PRACTICE § 193 (1953). But exhaustion is not required if the administrative remedy is inadequate. If the board of adjustment cannot grant a use variance, then any objector attacking the use classification in court ought not to be forced to resort to the board as a prerequisite to his lawsuit. An approach of this kind would have a salutary effect on zoning administration, since it would afford landowners objecting to the use classification a more rational method of attacking the ordinance.

Some courts, in allowing an attack on the constitutionality of the ordinance, have held that exhaustion of the variance procedure was not required under the facts because a use variance would not be allowable. New York cases so holding are collected in note 28, *supra.* To the same effect see Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 157 N.E.2d 406 (1960). Here the owner of a farm, which constituted the major portion of the residential zone in which it was located, wanted to put his land to an industrial use and brought an action attacking the validity of the ordinance. The court held that exhaustion was not required because the variance procedure was not to be used to make major changes in the zoning plan. In this case, a variance would radically alter the nature of the zone. The case was followed in Liebling v. Village of Deerfield, 21 Ill. 2d 196, 171 N.E.2d 585 (1961) (landowner wanted to double intensity of use by cutting lot size requirement by more than half). *Cf.* Board of Adjustment v. Stovall, 218 S.W.2d 286 (Tex. Civ. App. 1949): ordinance provision allowing extension of business zone when it divides a lot held not to authorize a change of use which would affect 82% of lot area.

26. See cases cited in Annot., 168 A.L.R. 13, 63 (1947).

27. In a well-reasoned decision, the Florida court held that if the board of adjustment had the power to grant a use variance, it could nullify the decision

York,[28] the decisions have vacillated. The difficulties involved are well-illustrated by a pair of contrasting Indiana cases. *Antrim v. Hohlt*[29] disapproved a use variance for an apartment house in a resi-

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of the legislative body. Josephson v. Autrey, 96 So. 2d 784 (Fla. 1957). In Kaeslin v. Adams, 97 So. 2d 461 (Fla. 1957), the court handed down a per curiam opinion in which it appeared to depart from the *Josephson* doctrine. A similar point of view also appears in Wood v. Twin Lakes Mobile Homes Village, Inc., 123 So. 2d 738 (Fla. App. 1960) (must apply to board of adjustment before attacking constitutionality of ordinance). Next came the unusual decision in Friedland v. City of Hollywood, 130 So. 2d 306 (Fla. App. 1961), which is discussed in the text *infra*. Here the court quoted the *Josephson* case and held that the city could not use the "variance" power to change the basic use classification. *Josephson* is also followed in Mayflower Property, Inc. v. City of Fort Lauderdale, 137 So. 2d 849 (Fla. App. 1962): Application for variance not required as preliminary to attack on constitutionality of ordinance when applicant would have required change from single-family to multiple-family district.

28. The New York position would appear to be summarized in Bellamy v. Board of Appeals, 223 N.Y.S.2d 1017 (Sup. Ct. 1962), noting that "practical difficulties" justify a dimensional variance, but that "unnecessary hardships" must be the basis of a use variance. In this case a variance had been granted for a one-story shopping center and off-street parking. The court noted that the presence of business uses in the immediate neighborhood furnished a basis for a finding of "unique circumstances of plight." *Id.* at 1021. The court reversed the grant of the variance on other grounds. *But cf.* Coolidge v. Zoning Bd. of Appeals, 62 Mass. 367, 189 N.E.2d 670 (1962) (adjacent commercialized area does not justify use variance allowing office buildings in residential zone).

However another line of New York cases has severely criticized the use variance. The principal decision is Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284 (1935). A variance was requested for a filling station which was to be located partly in an unrestricted district and partly in a business district in which no stations were permitted. The board had granted the variance, basing its finding on conditions in the district, primarily the presence of heavy traffic and trolley lines in the street. The court reversed, in a decision which can be interpreted as holding merely that the board must base its finding only on hardship special and peculiar to the parcel, and not on conditions general to the neighborhood. Legislative action, said the court, is needed to change a restriction considered to be unreasonable on the basis of conditions general to a neighborhood. The administrative body cannot destroy the ordinance through piecemeal exemptions of individual parcels of land.

The case could also be read to preclude any use variance. As the discussion has indicated, a use variance must depend on conditions external to the parcel for which the variance will apply, and the *Levy* case would appear to preclude consideration of these factors. But in People *ex rel.* Arverne Bay Constr. Co. v. Murdock, 271 N.Y. 631, 3 N.E. 2d 457 (1936), the *Levy* case was explained as having turned on an absence of a finding of special hardship applicable to the site. See also Clark v. Board of Zoning Appeals, 301 N.Y. 86, 92 N.E.2d 903 (1950).

In other New York cases the constitutionality of a zoning ordinance has been challenged, and the objection has been made that the rule of exhaustion of administrative remedy through recourse to the board of adjustment has not been satisfied. The court has answered that recourse to the board is not required in

dential area. The court held that to permit so substantial a change through the variance procedure would constitute a usurpation of legislative authority. But in *Nelson v. Board of Zoning Appeals*,[30] the court approved the grant of a variance for an apartment house at virtually the same location. It distinguished *Antrim* on the ground that in *Nelson* the acreage of the plot was smaller, and the apartment house was smaller and not so dominant a feature. Apparently only very large apartment houses are to be avoided in residential areas.[31]

What the courts are clearly struggling to do is to get the policy questions decided at the legislative level.[32] Otherwise, a series of *de facto* use changes by way of the variance power will undermine the ordinance. To the extent that a rational consideration of issues is impossible in a series of individual variance proceedings, the modification of policy will also be arbitrary.

III. The Exception Power

While the variance power is most acceptable as a device to alleviate dimensional hardships, the exception power is almost always used to accomplish use changes without the intervention of a formal amendment by the legislative body.[33] What distinguishes the exception from

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these cases because the board would not be authorized to grant a departure from the general rules regulating use zones. The basis for these decisions is not clear. Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501 (1959) (variance would have covered 127 acres); Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931) (commercial use sought for small parcel zoned residential). *Cf. In re* Mark Block Holding Corp., 141 Misc. 818, 253 N.Y. Supp. 321 (1931) (hardship variance is for slight deviations).

29. 122 Ind. App. 681 108 N.E.2d 197 (1952). This case is something of a puzzle, since it deals with the exception rather than with the variance provision of the ordinance. Nevertheless, it treats the exception provision like a variance and the holding is clearly applicable to the variance clause.

30. 240 Ind. 212, 162 N.E.2d 449 (1959). The supreme court reversed the appellate court's decision, which should be consulted for an instructive essay on the scope of the variance power. 158 N.E.2d 167 (Ind. App. 1959).

31. Compare Bern v. Borough of Fair Lawn, 65 N. J. Super. 435, 168 A.2d 52 (App. Div. 1961): A variance cannot be granted from ordinance provision requiring that car-washing stations be located 1000 feet from public building.

32. A good example is Moriarty v. Pozner, 21 N.J. 199, 121 A.2d 527 (1956). A variance for a shopping center was allowed in an area which was zoned and had been built up as residential, and in which the shopping center would be out of keeping with the neighborhood. The only reason for the variance was that an increase in the tax base was needed, and that the original ordinance had no shopping center provision. The variance was disallowed by the court on the ground that it was a legislative use change which the board of adjustment could not make.

33. When exception provisions, looking very much like variance clauses, have been drawn to permit accessory uses, extend nonconforming uses or accomplish

the variance is the absence of a hardship requirement. Customarily, the ordinance lists as exceptions those uses that the board of adjustment may permit in specified districts under a set of governing standards. These standards may proliferate into several subsections, but they usually resolve into a restatement of one or another aspect of a vaguely-defined general welfare.

Both variance and exception provisions confer an administrative dispensing power. They are cousins under the skin, and the resulting similarities have brought about a good deal of judicial confusion.[34] Sometimes the exception is treated as more and sometimes as less lenient than the variance,[35] while at other times the exception is simply characterized as a device necessary to afford some relaxation in the ordinance provisions.[36] Similarly confused comparisons are drawn between the exception and the amendment, sometimes with adverse results to the power to grant exceptions and sometimes not.[37]

Nevertheless, the fundamental purpose of the exception is to serve

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other less drastic tasks, they have always been sustained. Porporis v. City of Warson Woods, 352 S.W.2d 605 (Mo. 1962) (off-street parking for shopping center); Root v. City of Erie Zoning Bd., 180 Pa. Super. 38, 118 A.2d 297 (1955) (front yard requirements); Boehme Bakery v. City of San Angelo, 185 S.W.2d 601 (Tex. Civ. App. 1945) (extension of nonconforming use; exceptions for use changes distinguished).

34. In some cases the ordinance is less than helpful. Thus in Moody v. City of University Park, 278 S.W.2d 912 (Tex. Civ. App. 1955), the exception provision of the ordinance contained a hardship requirement. The court interpreted this not to mean unique hardship, as required under variance provisions, but to mean future as well as past hardship, and hardship to the public and the applicant which would result from the denial of the exception. In other words, the hardship requirement, as it is understood under variance provisions, was read out of the exception clause.

35. *Compare* Harte v. Zoning Bd. of Review, 80 R.I. 43, 91 A.2d 33 (1952), suggesting that the exception power lies between the broad amendment and the narrow variance provisions, *with* Johnston v. Board of Supervisors, 31 Cal. 2d 66, 187 P.2d 686 (1947), and Thomas v. Board of Standards and Appeals, 263 App. Div. 352, 33 N.Y.S.2d 219 (1942), *rev'd on other grounds*, 290 N.Y. 109, 48 N.E.2d 284 (1943), suggesting that the variance power is broader.

36. *E.g.*, State *ex rel.* Manhein v. Harrison, 164 La. 564, 114 So. 159 (1927). *But cf.* Mayor and City Council of Baltimore v. Seabolt, 210 Md. 199, 123 A.2d 207 (Ct. App. 1956). Here the court is somewhat confused in its terminology, but seems to suggest that an exception ought to be granted to avoid a holding of unconstitutionality.

37. In Vulcan Materials Co. v. Griffith, 215 Ga. 811, 114 S.E.2d 29 (1960), the court analogized the special permit procedure to spot zoning, held that both were legislative acts, and therefore decided that the courts could not interfere with the zoning result. The case takes a self-denying point of view which is remarkable. But in Application of Stofflet & Tillotson, 18 Pa. D. & C.2d 104 (C.P. 1959), the court held invalid as spot zoning, not in accord with a comprehensive plan, an exception provision which authorized a change in use.

in an ancillary role as an allocator of land use. In this it differs from the variance, whose employment in the granting of land use changes has been sharply criticized. Most of the cases have held the use exception constitutional,[38] although the judicial point of view adverse to use variances comes up in cases that interpret the exception power narrowly to avoid a constitutional delegation of power question.[39] And in cases in which use exceptions covered too extensive an area, they were invalidated in opinions which talked either ultra vires or unconstitutionality or a mixture of both.[40]

While superficially the use exception resembles the use variance, the differences in judicial acceptance find an explanation in the suggestion that a use exception is constitutional when it is expressly permitted by the ordinance.[41] The distinction here is between an ungoverned power to make use changes under a variance provision, and a power to allow uses that the ordinance permits in certain districts, subject to specified standards. Since the governing body has located

38. A few cases are *contra*. In State *ex. rel.* Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955), the court may have thought that it was dealing with a use variance. There was a strong dissent, and the case is out of line with other Ohio decisions. In Application of Stofflet & Tillotson, 18 Pa. D. & C.2d 104 (C.P. 1959), the court held that an exception provision authorizing the introduction of a commercial use into a residential area violated the comprehensive plan requirement. It then proceeded on its own motion to authorize the use as a hardship variance.

39. Harte v. Zoning Bd. of Review, 80 R.I. 43, 91 A.2d 33 (1952) (use exception construed narrowly); Harrington v. Board of Adjustment, 124 S.W.2d 401 (Tex. Civ. App. 1939) (ordinance construed to prohibit use exception). *Cf.* Stone v. Cray, 89 N.H. 483, 200 Atl. 517 (1938) (zoning ordinance must set standards for exceptions).

40. Adams v. Zoning Bd. of Review, 86 R.I. 396, 135 A.2d 357 (1957) (garden apartment covering 26 residential lots); Board of Adjustment v. Stovall, 218 S.W.2d 286 (Tex. Civ. App. 1949) (extension of business use which would cover 82% of 18½ acre lot). But see the cases in note 41, *infra*.

In Schoepple v. Township of Woodbridge, 60 N.J. Super. 146, 158 A.2d 338 (App. Div. 1960), a New Jersey "special reasons" variance was granted for a shopping center. The "special reasons" variance is closest to an exception. See the explanation in note 55 *infra*. The request had been granted in part because of a finding that strip commercial zoning, as required by the ordinance, was not adequate for modern commercial uses. The court reversed, finding an invasion of legislative power on the grounds that the board could not use this procedure to compensate "for ordinance deficiencies as pervasive as those found here."

41. Burnham v. Board of Appeals, 333 Mass. 114, 128 N.E.2d 772 (1955); Congregation Adath Jeshurun v. Cheltenham Township, 70 Montg. 345 (Pa. C.P. 1954); Moody v. City of University Park, 278 S.W.2d 912 (Tex. Civ. App. 1955); Driskell v. Board of Adjustment, 195 S.W.2d 594 (Tex. Civ. App. 1946). The Texas cases qualify the earlier case of Harrington v. Board of Adjustment, 124 S.W.2d 401 (Tex. Civ. App. 1939), which had appeared to suggest that a use variance would be unconstitutional. *Cf.* Bishop v. Board of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947).

the areas in which excepted uses may be permitted, the board only exercises a governable discretion when it determines whether the conditions are present under which these uses can be allowed. The next question is whether the standards that have been afforded are adequate.

Provisions governing the grant of exceptions fall into three general categories. Two of these may be dealt with briefly:

A. Nuisance standard.

This kind of standard may be phrased negatively, so that a use will not be allowed as an exception if it emits noise, smoke or dust, or if it is offensive to neighboring properties. One of the functions of the exception is to control the potentially noxious use, so that a standard of this type ought to be sustainable by analogy to common-law nuisance doctrine. Judicial approval of nuisance standards has been overwhelming,[42] and in many instances the fact that a noxious use is being regulated has encouraged the court to uphold the delegation.

B. Lack of any standard.

In all too many instances, ordinances have attempted to regulate the granting of exceptions without setting any standards whatsoever. Either the draftsman has been careless, or has not been con-

42. Upholding a noxious use standard: Walls v. City of Guntersville, 253 Ala. 480, 45 So. 2d 468 (1950); Harden v. City of Raleigh, 192 N.C. 395, 135 S.E. 151 (1926); Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957). *Contra,* Phillips Petroleum Co. v. Anderson, 74 So. 2d 544 (Fla. 1954), where there was evidence that the governing body turned down an application for a filling station because they did not want competition with stations they ran themselves.

Upholding standards requiring that the board give consideration to the effect that the use will have on the neighborhood: Building Comm'r of Medford v. C. & H. Co., 319 Mass. 273, 65 N.E.2d 537 (1946) (dumping of refuse); Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958) (gypsum mining); *cf.* Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949) (general welfare standard applied to excavating operation).

Particularly under the earlier ordinances, and particularly in the case of filling stations, the power to grant use permits might be reserved to the governing body. For this reason, as the discussion in the text indicates *infra,* no standards would be needed. In addition, the courts have held that no standards would be needed because of the dangerous character of the use. In part, the reasoning is that since these uses could be absolutely prohibited without standards, they may also be regulated without standards. For filling station cases see Kramer v. Mayor and City Council of Baltimore, 166 Md. 324, 171 Atl. 70 (Ct. App. 1934); Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939), *appeal dismissed,* 309 U.S. 633 (1940) (leading case); Zelazny v. Town Bd., 101 N.Y.S.2d 178 (Sup. Ct. 1950). See also Fucigna v. Sahn, 15 Misc. 2d 304, 179 N.Y.S.2d 64 (Sup. Ct. 1958).

cerned with the problem of limiting administrative discretion. With little dissent,[43] these ordinances have been held unconstitutional.[44]

On this score, however, a recent Michigan case demands attention. In *Township of Superior v. Reimel Sign Co.*,[45] the township ordinance prohibited advertising signs in agricultural districts except under a temporary permit from the board of adjustment. Although no standards were provided, the ordinance was upheld. In an earlier case, the court had invalidated a permit ordinance for filling stations, under which the board's discretion was equally uncontrolled. Yet the earlier case was distinguished, since there a permit was required for filling stations in a commercial zone, where filling stations were not prohibited. In the *Reimel* case all signs had been prohibited in the agri-

43. Kohnberg v. Murdock, 6 N.Y.2d 937, 161 N.E.2d 217 (1959), a per curiam opinion over a strong dissent. Note should also be taken: 1) of those cases which have found a sufficient limitation on administrative discretion if the ordinance merely locates the excepted use in a designated district, see note 41, *supra*, and 2) of those cases which have dispensed with standards when a noxious use has been involved, see note 42, *supra*.

44. General Outdoor Advertising Co. v. Goodman, 128 Colo. 344, 262 P.2d 261 (1953) (advertising signs); North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956) (filling station); City of Watseka v. Blatt, 320 Ill. App. 191, 50 N.E.2d 589 (1943) (junk yards); Chicago, R. I. & Pac. R.R. v. Liddle, 112 N.W.2d 853 (Iowa 1962) (stockyards); Bultman Mortuary Service, Inc. v. City of New Orleans, 174 La. 360, 140 So. 503 (1932) (funeral parlor); State *ex rel.* Continental Oil Co. v. Waddill, 318 S.W.2d 281 (Mo. 1958) (filling station); Board of Comm'rs v. A. S. Pater Realty Co., 73 N.J. Super. 155, 179 A.2d 169 (Ch. 1962) (advertising sign); Phillips v. Town of Belleville, 135 N.J.L. 271, 52 A.2d 441 (Sup. Ct. 1947) (same); Gordon v. Town of Hempstead, 196 Misc. 954, 93 N.Y.S.2d 250 (Sup. Ct. 1949) (parking lot); Little v. Young, 82 N.Y.S.2d 909 (Sup. Ct. 1948), *aff'd*, 274 App. Div. 1005, 85 N.Y.S.2d 41 (1948), *aff'd*, 299 N.Y. 699, 87 N.E.2d 74 (1949) (ocean front bathhouse and cabana); Bizzell v. Board of Alderman, 192 N.C. 348, 135 S.E. 59 (1926) (filling station); State *ex rel.* Central Outdoor Advertising Co. v. Leonhard, 124 N.E.2d 187 (Ohio C. P. 1953) (advertising signs); Application of Phi Lambda Theta House Ass'n, 400 Pa. 60, 161 A.2d 144 (1960) (fraternity house); Dooling's Windy Hill, Inc. v. Zoning Bd. of Adjustment, 371 Pa. 290, 89 A.2d 505 (1952) (hotel); Marrone v. Zoning Bd. of Adjustment, 43 Del. 166 (Pa. C.P. 1956) (restaurant); Kleinman v. Zoning Bd. of Appeals, 6 Pa. D. & C.2d 659 (C.P. 1955) (dry cleaning establishment); Miller v. Zoning Bd., 2 Bucks 237 (Pa. C.P. 1952) (extension of nonconforming use); Schloss Poster Advertising Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939) (advertising signs). *Cf.* Smith v. Board of Appeals, 319 Mass. 341, 65 N.E.E2d 547 (1946) (conversion of single-family home, provided structure not enlarged); Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850 (Sup. Ct. 1945) (similar); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950) (educational institution; 80% of property owners must consent); Davison v. Flanagan, 273 App. Div. 870, 76 N.Y.S.2d 849 (1948) (conversion of single-family home; standards not given by court); State *ex rel.* Synod of Ohio v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942) (dictum) (church).

45. 362 Mich. 481, 107 N.W.2d 808 (1961).

cultural zone. What the court could have had in mind is not clear, since all excepted uses are effectively prohibited by the ordinance until they are allowed by the board.[46]

A third type of standard deserves more detailed treatment:

C. General welfare standards.

Under the typical zoning enabling act, the hardship standard for variances is explicitly contained in the law, but the standards governing the board of adjustment in the granting of exceptions are not spelled out. The act usually provides that exceptions may be granted under terms and conditions to be stated by the ordinance,[47] or in any case in which the purpose and intent of the ordinance will not be violated.[48] Many zoning ordinances merely echo the words of the statute, and authorize the granting of exceptions under a generalized standard which may vaguely be termed as a reference to the general welfare.

In most of the cases the general welfare standard has been upheld. There are several variants. The ordinance may refer simply to the general welfare or to the convenience of the community.[49] In other in-

46. The court may have been confused over the effect of holding the ordinance unconstitutional. In the *Reimel* case, the defendant had painted a sign on a barn without bothering to secure a permit. The court noted that, even if the permit section were unconstitutional for lack of standards, the sign was still prohibited by the provisions of the ordinance regulating uses in agricultural districts. In other cases in which an applicant denied a permit has challenged the standards in the ordinance, the court has assumed that invalidation of the standards has the effect of allowing the excepted use. This result may flow in part from the language of the older zoning ordinances, which enacted prohibitions rather than permissions. All uses not prohibited by the ordinance were permitted. As the only prohibition on the excepted use is in the special permit provision, the invalidation of that provision has the effect of permitting the excepted use since it is not otherwise prohibited by the ordinance.

More modern ordinances draft their use regulations in the form of permissions, and any use not permitted is then prohibited. Therefore, even if the special exception provision is held unconstitutional, it remains prohibited under the use regulations in the ordinance. This appeared to be the situation in the *Reimel* case. However, invalidation of the special exception provision could conceivably lead to invalidation of the entire ordinance on nonseverability grounds.

47. *E.g.*, IOWA CODE ANN. § 414.12(2) (1949); W. VA. CODE ANN. § 525nn(2) (1961). This language appears to be used most commonly.

48. *E.g.*, MASS. ANN. LAWS ch. 40A, § 4 (1961).

49. Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 103 A.2d 535 (1954) (convenience and necessity to be weighed against policy of zoning ordinance); State *ex rel.* Manhein v. Harrison, 164 La. 564, 114 So. 159 (1927); Schmidt v. Board of Adjustment, 9 N. J. 405, 88 A.2d 607 (1952); Tulsa Oil Co. v. Morey, 137 N.J.L. 388, 60 A.2d 302 (Sup. Ct. 1948); Aloe v. Dassler, 278 App. Div. 975, 106 N.Y.S.2d 24 (1951), *aff'd*, 303 N.Y. 878, 105 N.E.2d 104 (1952); Romig v.

stances, the language of some of the enabling acts will be followed, and the exception will have to be in accord with the purpose and intent of the ordinance.[50] The intent of the ordinance is usually expressed, however, in terms of advancing the general welfare of the community.[51] Finally, a multiple standard may be used, combining those listed above or incorporating, in addition, the generalized zoning objectives that are usually included in preambles to zoning enabling acts and zoning ordinances.[52]

The cases that have sustained a general welfare standard against a delegation of power attack have done so with little in the way of critical comment.[53] When a critical appraisal has been attempted,

Weld, 87 N.Y.S.2d 580 (Sup. Ct. 1949); Woodbury v. Zoning Bd. of Review, 78 R.I. 319, 82 A.2d 164 (1951).

The nuisance origins of special exception provisions are reflected in standards directing consideration of the effect of the use on the immediate neighborhood. See note 42 *supra* for cases upholding such a standard as it has been applied to noxious uses. *Accord,* as applied to non-noxious uses, Hopkins v. MacCulloch, 35 Cal. App. 2d 442, 95 P.2d 950 (1939); St. John's Roman Catholic Church v. Town of Darien, 184 A.2d 42 (Conn. 1962); State *ex rel.* Pruzan v. Redman, 374 P.2d 1002 (Wash 1962). In some instances this standard has been coupled with the general welfare standard: Matthews v. Board of Supervisors, 203 Cal. App. 2d 890, 21 Cal. Rptr. 914 (1962); McCord v. Ed Bond & Condon Co., 175 Ga. 667, 165 S.E. 590 (1932); Sellors v. Town of Concord, 329 Mass. 259, 107 N.E.2d 784 (1952); Monforte v. Zoning Bd. of Review, 176 A.2d 726 (R.I. 1962); Barbara Realty Co. v. Zoning Bd. of Review, 87 R.I. 100, 138 A.2d 818 (1958). *Cf.* Lyons v. Zoning Bd. of Adjustment, 38 Del. 275 (Pa. C.P. 1951) (in accord with the public interest).

50. Bishop v. Board of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947); Opinion of the Justices, 321 Mass. 759, 73 N.E.2d 881 (1947) (without damaging public good or intent of ordinance); Perri v. Zoning Bd. of Appeals, 283 App. Div. 818, 128 N.Y.S.2d 774 (1954); Kessel v. Michaelis, 15 Misc. 2d 755, 159 N.Y.S.2d 109 (1956), *aff'd,* 4 App. Div. 2d 884, 167 N.Y.S.2d 1004 (1957), *appeal dismissed,* 4 N.Y.2d 803, 149 N.E.2d 532 (1958); Application of Good Fellowship Ambulance Club, 406 Pa. 465, 178 A.2d 578 (1962); Mandrack v. East Norriton Township, 75 Montg. L. Rep. 473 (Pa. C.P. 1959); Congregation Adath Jeshurun v. Cheltenham Township, 70 Montg. L. Rep. 345 (Pa. C.P. 1954); Momeir v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504 (1943). *Cf.* Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953) (general purpose and intent plus effect on neighborhood).

51. Application of Good Fellowship Ambulance Club, *supra* note 50.

52. Erdman v. Board of Zoning Appeals, 212 Md. 288, 129 A.2d 124 (1957); Oursler v. Board of Zoning Appeals, 204 Md. 397, 104 A.2d 568 (1954); Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892 (1926); State *ex rel.* Ludlow v. Guffey, 306 S.W.2d 552 (Mo. 1957); Kanasy v. Nugent, 206 Misc. 826, 135 N.Y.S.2d 128 (Sup. Ct. 1954), *aff'd,* 286 App. Div. 1038, 145 N.Y.S.2d 638 (1955); Maxwell v. Klaess, 192 Misc. 939, 82 N.Y.S.2d 588 (Sup. Ct.), *appeal dismissed,* 274 App. Div. 943, 85 N.Y.S.2d 330 (1948).

53. Exception provisions usually require that the board attach conditions to the permit which will be protective of neighboring property. The question then arises whether the protective conditions are a requirement to be imposed after the

the results have been far from satisfactory. The point may be made that the exception provision merely allows the board to find the "facts" under which the excepted use can be allowed.[54] Of course, an administrative board may always find facts, all of which is beside the point if the ordinance does not contain standards sufficient to isolate the facts that have to be found. Other courts simply abandon the review function, taking the position that the complexities of zoning administration inhibit the drafting of more definite standards.[55]

Little help is gained from the respectable number of decisions that hold the general welfare standard unconstitutional,[56] for those cases

permit has been authorized, or a standard to be met before the permit can be granted. For a case taking the second point of view see Porporis v. City of Warson Woods, 352 S.W.2d 605 (Mo. 1962) (standards held constitutional). This interpretive question has not been raised as often as would be expected.

54. See Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949) (can determine facts if discretion not unguided); City of Detroit v. S. Loewenstein & Son, 330 Mich. 359, 47 N.W.2d 646 (1951); City of East Lansing v. Smith, 277 Mich. 495, 269 N.W. 573 (1936).

55. Tustin Heights Ass'n v. Board of Supervisors, 170 Cal. App. 2d 619, 339 P.2d 914 (1959); Burnham v. Board of Appeals, 333 Mass. 114, 128 N.E.2d 772 (1955); Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952) (leading case); Thomas v. Board of Standards & Appeals, 263 App. Div. 352, 33 N.Y.S.2d 219 (1942), *rev'd on other grounds*, 290 N.Y. 109, 48 N.E.2d 284 (1943); People *ex rel.* Beinert v. Miller, 188 App. Div. 113, 176 N.Y. Supp. 398 (1919). In National Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961) the court recognized a police power exception to the delegation requirement, based on the impracticalities of specifying standards in advance when the public welfare must be protected. *Ward v. Scott* considered the unique New Jersey "special reasons" variance, which lies between the true variance and true exception but which seems more like an exception because of the absence of a hardship standard. See Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 77-81, 86-94 (1959).

56. Redwood City Co. of Jehovah's Witnesses, Inc. v. City of Menlo Park, 167 Cal. App. 2d 686, 335 P.2d 195 (1959); Keating v. Patterson, 132 Conn. 210, 43 A.2d 659 (1945); Broach v. Young, 100 So. 2d 411 (Fla. 1958) (per curiam); Gaudet v. Economical Super Mkt., Inc., 237 La. 1082, 112 So. 2d 720 (1959); McCauley v. Albert E. Briede & Son, 231 La. 36, 90 So. 2d 78 (1956); Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956) (leading case); Underhill v. Board of Appeals, 17 Misc. 2d 257, 72 N.Y.S.2d 588 (Sup. Ct.), *aff'd*, 273 App. Div. 788, 75 N.Y.S.2d 327 (1947), 297 N.Y. 937, 80 N.E.2d 342 (1948); Bailey v. Zoning Bd. of Review, 179 A.2d 316 (R.I. 1962); Flynn v. Zoning Bd. of Review, 77 R.I. 118, 73 A.2d 808 (1950) (leading case). *Cf.* Andrews v. Board of Supervisors, 200 Va. 637, 107 S.E.2d 445 (1959) (broad special use provision in rural area). In the following cases the courts seem to suggest that a welfare standard would be invalid: Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959); Gilchrest Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224 (Sup. Ct. 1948), *rev'd on other grounds*, 275 App. Div. 962, 90 N.Y.S.2d 740 (1949), 300 N.Y. 619, 90 N.E.2d 485 (1949); Roman Catholic Archbishop v. Baker, 140 Ore. 600, 15 P.2d 391 (1932).

are about as absolute in their rejection as the others are in their acceptance.[57] Furthermore, in most of these jurisdictions there is authority holding valid an exception provision strikingly similar to the provision held invalid in another opinon by the same court.[58] What is of interest is the dominant note in the unfavorable cases that a general welfare standard creates too much opportunity for discrimination and abuse of discretion. This attitude links up with the Equal Protection basis for the delegation of power requirement.

The same comments may be made here as were made about the use variance. When a general welfare standard governs the grant of an exception, the board of adjustment is controlled by the same policy considerations which ought to guide the enactment of the ordinance in the first place. This observation gains support from a group of cases that have upheld ordinances in which a general welfare standard has not been explicitly provided. The decisions conveniently imply a general welfare standard by reading the preamble of the ordinance into the exception provision.[59] The preamble, of course, usually

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57. *E.g.*, Underhill v. Board of Appeals, *supra* note 56. In a few of the unfavorable cases the ordinance uses a single specific rather than a general standard. For example, one ordinance based the grant of an exception for multi-level garages on the impact which the proposed use would have on traffic conditions. Drexel v. City of Miami Beach, 64 So. 2d 317 (Fla. 1953). See also Finn v. Municipal Council, 136 N.J.L. 34, 53 A.2d 790 (Err. & App. 1946), holding invalid an ordinance permitting filling stations in business districts provided they did not create a fire or traffic hazard. A particularized direction of this type would appear more capable of uniform application than a general welfare standard.

58. The Pennsylvania Supreme Court first appeared to hold a general welfare standard invalid in Application of Devereux Foundation, Inc., 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945). At least this was the interpretation put on the case in Miller v. Zoning Bd., 2 Bucks 237 (Pa. C.P. 1952). But *Devereux* now appears to have been overruled in a very muddy opinion. Application of Good Fellowship Ambulance Club, 406 Pa. 465, 178 A.2d 578 (1962). Other courts have vacillated while being even less straightforward. *Compare* Bishop v. Board of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947), *with* Keating v. Patterson, 132 Conn. 210, 43 A.2d 659 (1945) Barbara Realty Co. v. Zoning Bd. of Review, 87 R.I. 100, 138 A.2d 818 (1958) *and* Flynn v. Zoning Bd. of Review, 77 R.I. 118, 73 A.2d 808 (1950).

59. City and County of San Francisco v. Superior Court, 53 Cal. 2d 236, 347 P.2d 294 (1959); Olp v. Town of Brighton, 173 Misc. 1079, 19 N.Y.S.2d 546 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 944, 29 N.Y.S.2d 956 (1941) (general welfare considerations pervade the whole ordinance); Stoll v. Gulf Oil Corp., 155 N.E.2d 83 (Ohio C.P. 1958); *In re* Dawson, 136 Okla. 113, 277 Pac. 226 (1928); Milwaukie Co. of Jehovah's Witnesses, Inc. v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958); *In re* O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957) (relies on interpretation section); Smith v. City of Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956). In the Brookfield case the dissenting opinion argued that a preamble could be consulted to clarify the meaning of a statute, but not to save it from unconstitutionality.

dedicates the ordinance to the general welfare. In some states, this approach violates a rule of statutory interpretation that forbids giving the preamble a substantive effect. But the point is that the preamble was intended to guide legislative action as well. The overriding applicability of the preamble both to legislative and administrative decisions under the ordinance merely highlights the underlying ambiguities in the entire structure.[60]

IV. Adequate Procedures as a Defense to Improper Delegation

In *Gorieb v. Fox*, the United States Supreme Court had suggested that it could always intervene should the dispensing power under the setback ordinance be handled arbitrarily. In like manner Professor Kenneth Davis has stressed the importance of fair procedures as a control over the dangers of inadequate standards, and uses a leading zoning case to make his point.[61] The Davis view has now been adopted to justify, at least in part, the standards contained in the Oregon state building code.[62]

Several of the zoning cases dealing with exception provisions similarly rely on the availability of review procedures to sustain the standards in the ordinance. The reference is not always the same, however. Sometimes it is to the availability of comprehensive fact-finding and hearing procedures leading to the final determination by the board.[63] On other occasions it is a reference to review by a superior administrative body,[64] by the legislative body[65] or most frequently by the courts.[66]

60. In one case the ordinance allowed the plan commission to permit in any district any use "in general keeping with the uses authorized in such district." This provision was sustained. McCloud v. Woodmansee, 165 Ohio St. 271, 135 N.E.2d 316 (1956). Yet the allocation of uses on the basis of compatibility is supposed to be the legislative function of the governing body. Compare the cases in notes 42 and 49 *supra*, in which the board has been authorized to consider the effect of the excepted use on the immediate neighborhood. *Cf.* Consolidated Edison Co. v. Town of Rye, 16 Misc. 2d 284, 182 N.Y.S.2d 688 (Sup. Ct. 1959). *But cf.* State v. Kressler, 50 N.J. Super. 362, 142 A.2d 257 (County Ct. 1958).

61. Davis, Administrative Law Treatise § 2.08 (1958).

62. Warren v. Marion County, 222 Ore. 307, 353 P.2d 257 (1960), criticized in 14 Stan. L. Rev. 372 (1962).

63. Porporis v. City of Warson Woods, 352 S.W.2d 605 (Mo. 1962); Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952) (leading case); Katzin v. McShain, 371 Pa. 251, 89 A.2d 519 (1952); National Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961).

64. In City of Miami Beach v. State *ex rel.* Ross, 141 Fla. 407, 193 So. 543 (1940) the court sustained the validity of the delegation, in part because the action of the city council on an application for a permit was appealable to a board of administration. The case is qualified by North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956), which holds that the standards provided in the zoning ordinance must be adequate.

To the extent that the provision of adequate administrative fact-finding procedures is thought to give protection to the applicant, the cases probably reflect the requirement, usual in administrative law, that administrative decisions be backed by adequate findings of fact. Otherwise, the reliance on adequate review appears to be a reference to the protection afforded by a system of checks and balances, with reliance on the judicial check coming up most frequently.

How court review might function in the absence of standards is indicated by *Larkin Co. v. Schwab*,[67] an early New York case which follows the lead of *Gorieb v. Fox*. In *Larkin* there were no standards in an ordinance requiring permits for the operation of a filling station, and as the authority to grant permits had been conferred on the governing body, the court decided that no standards were necessary. However, noting that the applicant had filed an action in mandamus to compel the council to give him a permit, the court added that his action would lie if the council had acted arbitrarily.

The scope of review in mandamus is thus surprisingly similar to the scope of review usually accorded to board of adjustment decisions. In most states, following the lead of the standard enabling act, board of adjustment decisions are reviewable by statutory certiorari.[68] Al-

65. Olp v. Town of Brighton, 173 Misc. 1079, 19 N.Y.S.2d 546 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 944, 29 N.Y.S.2d 956 (1941); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958), *appeal dismissed*, 359 U.S. 436 (1959). A few states still have statutes under which the board of adjustment's function is recommendatory, and under these provisions the variance or exception is not final without the approval of the governing body. See Cunningham, *supra* note 55, at 73-76. In this event the delegation question may not be presented, on the ground that the governing body's function is legislative and that it retains the final decision. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956). On the other hand, if the governing body's function is characterized as administrative, standards may still be needed at that level. See the discussion in the text, *infra*.

66. Walls v. City of Guntersville, 253 Ala. 480, 45 So. 2d 468 (1950); Economy Wholesale Co. v. Rodgers, 232 Ark. 835, 340 S.W.2d 583 (1960); Holy Sepulchre Cemetery v. Town of Greece, 191 Misc. 241, 79 N.Y.S.2d 683 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 942, 79 N.Y.S.2d 863 (1948); Olp v. Town of Brighton, *supra* note 65; *In re* Dawson, 136 Okla. 113, 277 Pac. 226 (1928); Spencer-Stural Co. v. City of Memphis, 155 Tenn. 70, 290 S.W. 608 (1927) (variance case); Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957).

67. 242 N.Y. 330, 151 N.E. 637 (1926). This case may be said to be based on the general constitutional law principle, that the court will invalidate a vaguely-drafted ordinance only in a case of actual discrimination.

This principle appears often in variance and exception cases. See City of Stockton v. Frisbie & Latta, 93 Cal. App. 277, 270 Pac. 270 (1928); City of Lincoln v. Fross, 119 Neb. 666, 230 N.W. 592 (1930).

68. See COMPARATIVE DIGEST OF MUNICIPAL AND COUNTY ZONING ENABLING STATUTES, *op. cit. supra* note 2, at vi, for the text of a typical zoning enabling act.

though the scope of review might conceivably be broader in a certiorari action, the courts have almost always said that the decision of the board will be upset only if it is arbitrary.

Critics of the Davis position have claimed that reliance on court review to remedy the defects of inadequate delegation is not helpful because, in the absence of standards, the court will have no basis for intervention.[69] However, there are two answers to this contention. The first is that the court can fashion its own standards when reviewing administrative determinations in exception and variance cases. In the *Larkin* case, the court pointed out that mandamus would lie to correct municipal action that was arbitrary either because the council considered factors that it should not consider, or because in any other way it abused its discretion. In an attempt to show that the council had acted arbitrarily, the applicant introduced evidence that his filling station would not have an adverse effect on the neighborhood, that there was no danger from storage and that traffic access was sufficient. The court held that the council had exercised its discretion properly. While the courts will have some leeway when review is as broad as the *Larkin* case suggests, the scope of review certainly is no greater than that afforded under the vague hardship and general welfare standards that are commonly found in zoning ordinances. In any event, the discipline of a common subject matter will force consideration of similar factors in most cases. The factors advanced by the applicant in the *Larkin* case are similar to those considered by boards and courts under the usual variance and exception provisions.

A second point is that the courts usually take a self-denying attitude, even when reviewing board of adjustment determinations in statutory certiorari proceedings, and at least say that they are loath to upset the administrative fact-finding. If this is so, then the courts in practice have little more scope for review when standards are provided, and when there is a statutory appeal by certiorari, than they do when their jurisdiction is invoked in a mandamus proceeding to review a determination made in the absence of standards. These comments reinforce the suggestion made earlier, that the difficulties with zoning administration lie deeper than the language of delegation.

V. Discretionary Administration

Under the more conventional hardship variance and exception provisions, the exercise of administrative discretion is peripheral to the zoning ordinance, which is relied upon to make the determinative allocations of land use. As difficulties have been encountered in

69. 14 Stan. L. Rev. 372 (1962).

applying pre-drawn district regulations to uses that are hard to handle, zoning ordinances have tended to handle the administrative problem by committing the listing fallacy. The ordinance may set up a long list of special uses to be allowed in designated zones under the exception procedure. This device achieves greater flexibility by increasing the number of uses that are subject to administrative dispensation. But the over-listing of special uses is unwieldy, especially as many marginal cases may not be covered through inadvertence.

More recent developments have relegated major land-use decisions to the administrative process, and in this manner have built the discretionary function directly into the zoning ordinance.[70] The point was made earlier that large-tract developments, such as shopping centers and residential subdivisions, are hard to fit into the more conventional lot-and-block mold. Substantive difficulties in dealing with the design and location of large scale developments have forced changes in the administrative structure of the zoning ordinance. These changes have tended to eliminate or to lessen the impact of prezoning, and to convert the traditional dispensing power of the zoning agencies into a more direct administrative control.

The newer kind of discretionary zoning ordinance has implications for planning policy that may eventually be far-reaching. One of its purposes, for example, is to give the zoning authority more leverage over patterns of community growth by requiring the big developers to seek permission anew in every case.[71] At this point, delegation of power objections to discretionary zoning administration will be ex-

70. For reviews of these developments see Craig, *Particularized Zoning: Alterations While You Wait*, 1 PROCEEDINGS OF THE 1960 INSTITUTE ON PLANNING AND ZONING 153 (1961); Green, *Are "Special Use" Procedures in Trouble?*, 12 ZONING DIGEST 73 (1960).

71. Other motives may predominate. An extreme example is presented in Cassell v. Lexington Township Bd. of Appeals, 163 Ohio St. 340, 127 N.E.2d 11 (1955). A rural township divided itself into 36 zones, corresponding with the 36 government survey sections. An ordinance permitted farming, residential, commercial and recreational uses in the zoned area, but did not specify where. An accompanying resolution provided that any permanent structure had to have the permission of the zoning commission and the township trustees. No standards were provided. In this case, the applicant wanted to build homes costing about $10,000 in an area where homes cost from $15,000 to $40,000. He was refused. The court held the ordinance invalid in the absence of a comprehensive plan.

For an adverse reaction to stopgap ordinances in developed communities see Bowman v. Board of Councilmen, 303 Ky. 1, 196 S.W.2d 730 (1946); State *ex rel.* Ohio Oil Co. v. City of Defiance, 99 Ohio App. 398, 133 N.E.2d 392 (1955). And for other cases in which the courts reacted adversely to attempts to abuse the special exception power to protect a rural area see Saddle River Country Day School v. Saddle River, 51 N.J. Super. 589, 144 A.2d 425 (App. Div. 1958), *aff'd*, 29 N.J. 468, 150 A.2d 34 (1959); Appeal of Gage, 47 Del. 36 (Pa. C.P. 1959), *aff'd*, 402 Pa. 244, 167 A.2d 292 (1961).

plored. The general nature of the discretionary zoning ordinance must first be delineated, and this kind of regulation will be found to have the following characteristics:

1) Either the design or the location of major land uses is left to the decision of the administrative agency, following an application by the developer. Sometimes both design and location are subject to administrative decision. In this manner, the basic decisions about land use are left to the agency on the basis of individual applications rather than to the ordinance on the basis of predetermined districts.

2) The exercise of discretionary controls may be confined to the development of large tracts. And if the discretionary provisions are made applicable to smaller areas, they are usually intended for tracts that have not been subdivided in the conventional manner.

3) The method of administration may be mixed. As the more fundamental land-use decisions are brought under administrative control, the policy content of the administrative decision increases. For this reason, the municipality may be reluctant to place these administrative functions with the board of adjustment in the form of the usual special exception. The amendment process may be used, and the decision-making function may be placed with the governing body. In other instances the function may be given to the plan commission, which may make the final determination or which may merely recommend a decision to the city or village council.

A combination of factors makes the use of discretionary administrative controls risky from the constitutional aspect. To the extent that decisions about the use of large tracts are left to administrative decision, the courts may find that a legislative policy question has been unconstitutionally delegated. The difficulties with use variances are instructive at this point. The use of mixed administrative forms also has its risks. When the discretionary power to decide on land uses has been delegated to the plan commission, the ordinance has sometimes been held ultra vires on the ground that the plan commission has been delegated no such power under the zoning enabling act.[72] Under the standard zoning enabling act, which has served as the model in most states, only the board of adjustment has been given the dispensing function.

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72. Coolidge v. Planning Bd., 337 Mass. 648, 151 N.E.2d 51 (1958); Swimming River Golf & Country Club v. Burough of New Shrewsbury, 30 N.J. 132, 152 A.2d 135 (1959); Saddle River Country Day School v. Saddle River, *supra* note 71. *Cf.* Vulcan Materials Co. v. Griffith, 215 Ga. 811, 818-19, 114 S.E.2d 29, 34-35 (1960) (dissenting opinion). *But cf.* Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601, *appeal dismissed*, 364 U.S. 475 (1960); Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957). The New Jersey cases are discussed in Green, *supra* note 70.

Major re-allocations of function have also confused the role of the governing body. An adverse finding on the ultra vires point can be avoided if the governing body makes the decision on an application for development. In this event, however, the delegation question grows more complicated. Some decisions[73] have characterized the governing body's function in this situation as legislative, an approach that avoids the delegation of power issue. This point of view is particularly strong in New York, where even the prescription of some standards does not necessarily foreclose the governing body from considering other factors that are not specified.[74] But in other states the governing body has been held to act administratively when it is given the dispensing power under a zoning ordinance, so that the exercise of its discretion must be bounded by standards just as if it were an administrative body.[75]

Often the cases assume that the constitutional problem is solved by the characterization adopted, no doubt on the basis that legislative decisions are free of the delegation of power objection. These decisions forget the spot zoning and *Gorieb* cases, and their teaching that the underlying test of arbitrary decision-making cuts across both legislative and administrative dispensation in zoning practice.[76]

73. Economy Wholesale Co. v. Rodgers, 232 Ark. 835, 340 S.W.2d 583 (1960); Kotrich v. County of Du Page, *supra* note 72; Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); Marquis v. City of Waterloo, 210 Iowa 439, 228 N.W. 870 (1930); Kramer v. Mayor and City Council of Baltimore, 166 Md. 324, 171 Atl. 70 (1934); Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939), *appeal dismissed*, 309 U.S. 633 (1940); Cohen v. Incorporated Village of Valley Stream, 23 Misc. 2d 1017, 189 N.Y.S.2d 110 (Sup. Ct. 1959); Olp v. Town of Brighton, 173 Misc. 1079, 19 N.Y.S.2d 546 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 944, 29 N.Y.S.2d 956 (1941). This problem has frequently been raised under the more traditional exception provisions.

74. See 4M Club, Inc. v. Andrews, 11 App. Div. 2d 720, 204 N.Y.S.2d 610 (1960). *But cf.* Zelazny v. Town Bd., 101 N.Y.S.2d 178 (Sup. Ct. 1950).

75. Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949); City of Miami Beach v. State *ex rel.* Ross, 141 Fla. 407, 193 So. 543 (1940) (semble); Gaudet v. Economical Super Market, Inc., 237 La. 1082, 112 So. 2d 720 (1959); McCauley v. Albert E. Briede & Son, 231 La. 36, 90 So. 2d 78 (1956); Building Comm'r of Medford v. C. & H. Co., 319 Mass. 273, 65 N.E.2d 537 (1946) (point assumed); Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956); State *ex rel.* Ludlow v. Guffey, 306 S.W.2d 552 (Mo. 1957); City of Winchester v. Glover, 199 Va. 70, 97 S.E.2d 661 (1957) (filling station permit). *Cf.* Johnston v. Board of Supervisors, 31 Cal. 2d 66, 187 P.2d 686 (1947). And see Dallstream & Hunt, *supra* note 22, at 222-27.

76. In Wicker Apartments v. City of Richmond, 199 Va. 263, 99 S.E.2d 656 (1957), the exception provision of the zoning ordinance authorized the board of zoning appeals to permit federal, state or local government buildings in any district. The board was to be guided by the usual general welfare and related standards. In this case the board had authorized a municipal juvenile detention home in a single-family dwelling district. To the objection that the board had

This point is made dramatically in *Friedland v. City of Hollywood.*[77] After the board of adjustment refused to grant a variance for a filling station, the governing body passed an amendment to the ordinance under which the station would be a permitted use. Ordinarily, the court said, a legislative rezoning must be upheld if it can be supported under the fairly debatable rule. But the court recognized the amendment as a legislative substitution for an administrative judgment. They treated the legislative rezoning as a "variance," and threw it out because it made a change in the use classification, a policy decision which they found not allowable under the variance power.

The Florida court is correct in suggesting that zoning amendments are often substitutes for administrative dispensation. It is also correct in suggesting that function is the critical test rather than the characterization given to the agency possessing the deciding power. It lacks imagination only in failing to see that the basic problem is the arbitrary decision, and that a zoning amendment is equally subject to challenge for arbitrariness under the spot zoning approach.

A. Analogies to Discretionary Administration

Discretionary administration is the rule rather than the exception in the English system of land-use planning. Under the English system, the land-use document, called a development plan, is not binding. All development of land requires planning permission from the local authority.[78] When planning permission is requested, the planning authority is directed by statute to exercise its discretion, and to consider the land use plan and "any other material considerations."

How an English-type delegation would fare before the American courts is open to question. An intriguing lead is provided by the Maryland case of *Baltimore County v. Missouri Realty, Inc.,*[79] which passed on an unusual method of zoning administration. An administrative official, the zoning commissioner of Baltimore County, was given the power under special state enabling legislation to make changes in the boundaries of use districts. No standards were pro-

authorized a legislative change in use beyond its powers, the court answered that the property was owned by the city, and that the council could rezone to permit the use of its own property contrary to the terms of the ordinance. Any error in judgment, in a political or any other capacity, would fall on it. But the courts will hold the municipality to its own ordinance if the function for which the amendment is sought is proprietary. In addition, the municipality may not authorize a nuisance. Comment, 39 TEXAS L. REV. 316, 317-22 (1961).

77. 130 So. 2d 306 (Fla. 1961).

78. The English planning control system is described in MANDELKER, GREEN BELTS AND URBAN GROWTH: ENGLISH TOWN AND COUNTRY PLANNING IN ACTION 11-23 (1962).

79. 219 Md. 155, 148 A.2d 424 (1959).

vided, but the boundary change was not to be final without the approval of the county council.[80] This arrangement was affirmed by the court over objections that legislative power had been delegated. Review by the governing body might have obviated the need for standards. But the court, without discussing this point, found sufficient standards in the preamble to the statute, which set out the usual prerequisites to the exercise of the zoning function.

The statute was also affirmed on another basis.[81] At the local level, the court held, the problem is one of vires, not constitutionality. The constitutional doctrine of separation of powers does not apply, and the only question is whether a power has been conferred, be it called legislative or administrative, to make a choice of alternatives. While the vires analysis of the *Baltimore County* case is not conventional, this approach is sound as local government law since many courts do not apply the separation of powers doctrine at the local level.[82] A wide reading of this decision would give to state legislatures the opportunity to fashion zoning administration in any of a variety of ways without inhibition by delegation dogma.

Another interesting line of cases is in point with the possible American reception of the English scheme. They deal with early pre-zoning ordinances which gave to municipal authorities a blanket control over new construction. The prototype for this kind of ordinance was the old fire district regulation, which prohibited the construction of frame buildings in the central business area without a permit. These ordinances were usually upheld.[83] As a next step the ordinance might require, apart from the fire regulations, that a permit

80. In addition, the statute sets up a complicated review procedure. Denials of a boundary change by the zoning commissioner are appealable to a board of appeals, which may reverse him. In this event, the change must also be approved by the county council. In the *Baltimore County* case the court decided that when a zoning change has been granted by the zoning commissioner, and affirmed by the board of appeal, it need not be approved by the county council if the board's action has been affirmed by judicial review. The provisions of the statute are more fully set out in County Council v. Egerton Realty, Inc., 217 Md. 234, 140 A.2d 510 (1958).

81. The court also noted that a change in boundaries would have to be based, like an amendment, on original error or on changed circumstances. It also relied on the available safeguard of judicial review, and on the point that liberal delegations were necessary in administrative law. Besides, it thought, the comprehensive plan would promote stability and prevent changes that were ill-considered. While the court noted that the power to make boundary changes was contained in a special act of the legislature, it indicated that its answer would have been the same even if this power had been redelegated by an ordinance of the governing body.

82. Note, 18 IND. L.J. 146, 147 (1943). What the court says about separation can be applied to delegation of power.

83. *Cf.* City of Monticello v. Bates, 169 Ky. 258, 183 S.W. 555 (1916).

had to be obtained for any non-residential building, with no standards given to guide municipal discretion. Here, at the threshold of the zoning movement, is an administrative analogue in many ways similar to the contemporary English model.

Most of the cases that passed on these early permit ordinances held them unconstitutional,[84] a judicial fact of life that no doubt contributed to the decision to approach zoning on a district basis. Yet there were contrary decisions,[85] and a significant point overlooked in the Maryland litigation over early zoning in Baltimore is the fact that the ordinance, which was eventually upheld, did not contain a true variance provision at all. It was more like the English model, and provided that no building could be erected and no use changed without an administrative permit.[86] While the standards in the ordinance approximated variance standards, the critical point is that the city had not been zoned into districts and that the permit process was to function as a substitute.[87] This history has been forgotten as drafts-

84. *E.g.*, Ingham v. Brooks, 95 Conn. 317, 111 Atl. 209 (1920); Continental Oil Co. v. City of Twin Falls, 49 Idaho 89, 286 Pac. 353 (1930); Board of Trustees v. Bayne, 206 Ky. 68, 266 S.W. 885 (1924) (appears to be fire and health regulation setting up standards governing construction); City of Monticello v. Bates, 169 Ky. 258, 183 S.W. 555 (1916); State *ex rel.* Dickson v. Harrison, 161 La. 218, 108 So. 421 (1926); State *ex rel.* Dickason v. Harris, 158 La. 974, 105 So. 33 (1925); Village of Granville v. Krause, 131 Misc. 752, 228 N.Y. Supp. 204 (Sup. Ct. 1928) (ordinance based on privately-prepared plan); Gulf Refining Co. v. City of Dallas, 10 S.W.2d 151 (Tex. Civ. App. 1928); Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

85. Herring v. Stannus, 169 Ark. 244, 275 S.W. 321 (1924); Marquis v. City of Waterloo, 210 Iowa 439, 228 N.W. 870 (1930); Tighe v. Osborne, 150 Md. 452, 133 Atl. 465 (1926); Tighe v. Osborne, 149 Md. 349, 131 Atl. 801 (1925). The Iowa case upheld a unique statute, apparently still being used, which authorizes restricted residential districts to be set up on petition by residents, and then prohibits any but residential uses in these districts except on a permit from the city council. In a sense, the statute heralds the floating zone technique, now used in fringe residential areas. More probably, it was an attempt to give legislative sanction to the kind of protection customarily afforded by the courts under nuisance law. See Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958).

86. Four days after the Baltimore city zoning ordinance was held unconstitutional, it was amended to remove the "general welfare" standard that had been held insufficient by the court. However, the ordinance retained other standards to guide the issuance of a permit. These were similar to those found in modern variance and exception provisions, and required consideration of the character of the building and of the area in which it was to be located. The amended ordinance was upheld. See the case cited in note 85, *supra*.

87. For other recent cases which look favorably on techniques related to the English model see Barkmann v. Town of Hempstead, 268 App. Div. 785, 49 N.Y.S.2d 262 (1944), *aff'd*, 294 N.Y. 805, 62 N.E.2d 238 (1945) (special permits for keeping pigeons in "undeveloped sections of the town"); Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956). In *Roney*, the applicant

men, faced with the complexities of modern urban development, have once more turned to discretionary forms of administration.

B. Judicial Treatment of Discretionary Administration

Very few courts have yet had an opportunity to pass on the more modern varieties of discretionary administration in zoning ordinances. The courts that have done so have shown an understandable confusion in view of the mixture of function that often occurs, and as a result, the fundamental issue of arbitrary power is sometimes forgotten. Three types of discretionary devices that are in common use have now received some amount of judicial construction.

1. *Sinking Zones*

Hiscox v. Levine,[88] a New York trial court case, deals with a discretionary technique directed toward problems of design. Residential subdivisions have presented design problems under existing regulations. Uniform lot dimension and bulk regulations—the so-called "cookie cutter" approach—have produced monotony and lack of variety in residential building. New techniques of residential development promise to alter these patterns. One innovation, for example, is the building of residential development at somewhat higher densities, combined with areas of common open space.[89] In this manner, average densities are maintained throughout the subdivision, but the resulting open space is more usable, and the whole development generates more interest.

A technique called the planned development district[90] has been devised to handle these and other innovations in residential design.[91]

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wanted to subdivide his land for residential purposes in an industrial district. In this district, permits were required for other than industrial uses, and new subdivisions were to be considered in relation to the master plan. This was held to be a sufficient guide. Compare McCombs v. Larson, 176 Cal. App. 2d 105, 1 Cal. Rptr. 140 (1959). The ordinance required that all lot splits conform to "such policies" as might be established by the plan commission. The court killed the effectiveness of the ordinance on a constructional point, but suggested that the standards were invalid on delegation grounds.

88. 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961).

89. Urban Land Institute, Tech. Bull. No. 40, *New Approaches to Residential Land Development: A Study of Concepts and Innovations* (1961).

90. See Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959).

91. Another point to be made is that planned development district provisions usually cover developments which contemplate the splitting of the project into multiple ownerships. This is true, for example, of residential subdivisions in which the developer intends to convey his houses to the residents as they are built. Multiple ownership of separate parcels complicates the problems of design, to which the planned development district provisions are essentially directed.

One variant of the planned development district is the so-called "sinking zone." Bulk and density regulations are prescribed as usual, but the plan commission or the board of adjustment is given the power to vary these regulations for individual lots, provided average residential densities are maintained throughout the tract. This type of provision is very close to the traditional variance or exception, inasmuch as it provides an upper limit from which the administrative agency is permitted to depart under carefully prescribed circumstances. For this reason, sinking zones ought to present few constitutional problems. Indeed, it would be difficult to classify the sinking zone as an example of discretionary administration were it not for the fact that the range of discretion afforded permits the substantial redesign of large areas, as compared with the relatively limited changes over smaller areas that are permitted by the typical variance provision.[92]

The *Hiscox* case arose under a New York statute. It authorizes a town plan commission, when approving subdivision plats, to make "reasonable changes" in the applicable zoning regulations, provided that average densities are not raised, and provided that the use of adjoining land and the "public welfare" is safeguarded.[93] The court held that the standards used in the ordinance were sufficient, but struck down the application of the ordinance to the particular subdivision in a manner which severely limits its usefulness. Out of 100 acres of land in a one-acre residential zone, 37 were to be donated as a park and the rest was to be changed to half-acre zoning. Because the area covered was so substantial, the court found that the change was "legislative," and thus an encroachment on the authority of the town's governing body.[94]

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92. See the discussion of Schoepple v. Township of Woodbridge, 60 N.J. Super. 146, 158 A.2d 338 (App. Div. 1960), in note 40, *supra*.

93. N.Y. TOWN LAW § 281. The relevant provisions of the statute are as follows: The town board (governing body) is authorized to empower the planning board (plan commission) "simultaneously with the approval" of a plan either to "confirm" the zoning regulations "or to make any reasonable change therein." The owner of the platted land "may submit" a building plan which shall show "maximum density of population" and minimum yard requirements. If approved by the planning board, the building plan shall modify the zoning regulations, "provided that for such land so shown there shall not be a greater average density of population or cover of the land with buildings than is permitted in the district wherein such lands lie." The building plan shall not be approved unless in the judgment of the planning board "the appropriate use of adjoining land is reasonably safeguarded and such plan is consistent with the public welfare." More explicit draftsmanship might have clarified the legislative purpose.

94. Furthermore, when calculating the average density of the district "wherein such lands lie" the court excluded the park, and thus found quite naturally that the change from one-acre to half-acre zoning had increased densities. However,

Of course, use changes under variance and exception provisions have sometimes been overturned on appeal. But when no use change is required, as in the *Hiscox* case, the objection is harder to see. The statute obviously contemplated that adjustments in density might have to be made over a wide area. Indeed, the introduction of variety consistent with the maintenance of average densities is possible only if the developer has a large tract with which to work. The courts have often reacted negatively, however, when land-use decisions about large tracts have been relegated to the administrative process.[95]

2. Floating Exceptions

Some land uses that do not easily fit into the more conventional zone categories are now treated under more flexible administrative techniques not conformable to the usual pattern. Garden apartments are one example. When zoning ordinances were first enacted, apartments were often several-story structures built to the edges of small, standard-sized city lots. High-density coverage, with little or no open space, led to their segregation from single-family residential areas. Garden apartments, by way of contrast, are built at lower densities and may incorporate substantial park areas and other open spaces. These characteristics, combined with the use of low-rise structures and adequate landscaping, make the garden apartment more compatible with single-family residential development.

Existing methods of handling garden apartments and other nonresidential uses with high site values, have not proved adequate. Prezoning might be effective if planning authorities had more compulsive powers to bring about development in places where it was desirable, but prezoning merely confers monopoly value on a limited number of selected sites. Builders for this reason may be unwilling to

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the statute intended that the donation of the park as open space was meant to offset the increase in density in the remaining area. But the statutory language is far from clear.

Under the facts in the *Hiscox* case, densities would appear to have been increased even though the park area is included. But the developer claimed that this was not true.

95. Another potential difficulty with planned development districts is illustrated by Pierson Trapp Co. v. Peak, 340 S.W.2d 456 (Ky. 1960). A developer seeking a change in zoning classification to allow a shopping center had to submit a detailed development plan. The plan had to cover financial feasibility, site adequacy, traffic problems and design. In this case, an amendment for a shopping center had been granted although the developer had not submitted the required plan. Nevertheless, the amendment was upheld. The court found that the ordinance unconstitutionally singled out shopping centers for discriminatory treatment, as developers proposing amendments for other commercial uses would not have to submit a development plan. This objection could be overcome by careful drafting.

buy at inflated prices, and the planning authority has no way to compel a sale at what would be fair terms. If garden apartments and similar uses are permitted as an excepted use in several districts, a fair amount of flexibility in ordering their location may be achieved.[96] But boards of adjustment have not proved amenable to advice-giving by professional planning staffs, so that this approach has its limitations. Besides, if the excepted use is permissible in a wide range of zones, the board of adjustment will have been given the equivalent of the amending power.

Another approach adapts the amendment process in order to involve the plan commission, and presumably the professional advice available from its planning staff. Because it permits, anywhere in the community, a use that is usually handled as an exception, this technique has provisionally been termed a floating exception. An ordinance of this kind was considered in *Rodgers v. Village of Tarrytown*,[97] a leading New York case.

Under this ordinance, multiple dwellings for fifteen or fewer families were permitted anywhere in the village, following an application by the developer and its approval in the form of an amendment to the zoning map. The village plan commission was the approving authority, with the village governing body having the power to overrule the plan commission should it withhold its consent. In this case, for reasons not explained, approval was given both by the plan commission and the governing body. No standards controlled the decision to give or to withhold approval, although a minimum plot size of ten acres was required, and strict standards governing physical design and layout were imposed. For example, only fifteen per cent of the ground area could be covered by buildings. In view of the complexity of the ordinance, the nature of the decision on the application

96. An ordinance of this type was upheld in LaRue v. Township of East Brunswick, 68 N.J. Super. 435, 172 A.2d 691 (App. 1961). An amendment to the zoning ordinance permitted apartments in five of the township's eleven zoning districts. The apartments were allowable by the board of adjustment under a typical set of multiple standards, which required consideration of the suitability of the apartment for the area in which it was to be located, advantage to the community, proximity to community facilities and similar factors. The court rejected the argument that the apartments were a "floating use" on the ground that they were only allowable in certain specified districts. It upheld the ordinance provision as a special exception and found the standards adequate.

97. 302 N.Y. 115, 96 N.E.2d 731 (1951). Approved in Recent Cases, 65 HARV. L. REV. 1467 (1952). Criticized in Recent Cases, 100 U. PA. L. REV. 467 (1951).

Similar procedures have been approved under the Iowa restricted residential district statute. Hirsch v. City of Musactine, 233 Iowa 590, 10 N.W.2d 71 (1943); Marquis v. City of Waterloo, 210 Iowa 439, 228 N.W. 870 (1930). See note 85 *supra*. *Cf.* State *ex rel.* Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929).

for approval is difficult to characterize as legislative or administrative, particularly when the governing body gives its approval in a case in which it is not required.

Over a dissent, the ordinance was upheld by the court of appeals in a decision that reflects the mixture of legislative and administrative processes. Of course, the absence of standards would ordinarily have been fatal had the court treated the decision as administrative. But the majority opinion appeared to treat the decision to allow the project as a legislative amendment to the zoning ordinance, and offered no comment on the departure from the prescribed procedure. The change in use was not spot zoning because it was in accordance with a comprehensive plan. It was not a variance because the variance process was not used. Finally, the ordinance was not invalid on the ground that the boundaries of the multiple-dwelling district were not fixed in advance. Having fixed the specifications for the new district, the village need not fix its boundaries. This last comment is confusing; if the approving action is truly legislative, no "specifications" for the district should have been needed. Similar ordinances have been upheld in Connecticut.[98]

The dissenting opinion held that the procedures provided by the ordinance improperly bypassed the customary variance requirements, and had the effect of allowing a variance in a case in which hardship could not have been proved. In addition, the dissent was worried that the floating character of the district would create uncertanty, since a property owner would have no way of knowing whether a multiple-family dwelling would be located in his district. To this extent, the ordinance was apparently considered to be arbitrary.

Nevertheless, the distinction between locating the multiple-dwelling as an excepted use allowable in enumerated districts, and letting it float until located by administrative or legislative decision is one of degree. Either technique creates uncertainty until the decision to authorize the use has been made. Under the *Tarrytown*-type ordinance the community has zoned in as much detail as can realistically be expected. What is left for decision is the hard-to-handle multiple-dwelling use,

98. Summ v. Zoning Comm'n, 186 A.2d 160 (Conn. 1962); De Meo v. Zoning Comm'n, 148 Conn. 68, 167 A.2d 454 (1961) (apartments); Clark v. Town Council, 145 Conn. 476, 144 A.2d 327 (1958) (shopping center). In the *Clark* case, the development had been allowed under a provision authorizing large-tract developments on approval of the plan commission. In this town, however, the town council sat as the plan commission. The court first found no invalid delegation of legislative power on the ground that the ordinance standards were sufficient. But it then had to meet an argument which appeared to assert that the ordinance improperly authorized use changes by administrative decision. To this objection the court replied that the ordinance merely authorized a legislative change in zone. If this is true, of course, no standards should have been necessary.

which occupies a position secondary to the basic single-family residential use that has already been placed on the zoning map.[99] As the majority opinion noted, a zoning amendment that is arbitrary can always be struck down as spot zoning.[100] Yet the *Tarrytown* case might easily have gone the other way on more conventional grounds.[101]

3. Floating Zones

Hiscox v. Levine[102] disapproved the use of a discretionary zoning technique to vary residential densities over a large tract. *Rodgers v. Village of Tarrytown*[103] approved an even less conventional adaptation of the amendment process, which delegated the decision to locate sizeable multiple-dwelling projects to the plan commission and governing council on a case-by-case basis. Discretionary administrative techniques have been used for even more basic land-use location decisions in communities on the outer fringes of urban areas. In these instances

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99. A transitional case which underlines this point is Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957). When Baltimore County was entirely rezoned, the ordinance created a "reservoir" district in which residential lot sizes approaching one acre were required. Light manufacturing could be located in these districts upon petition to the zoning commissioner, with an appeal to the board of zoning appeals. Typical standards were provided, requiring attention to the effects on surrounding property and the purposes of the master plan.

The majority sustained the ordinance, citing the *Tarrytown* case, but analogizing to the special exception. The dissent relied on those cases, soon to be discussed, which held floating zones invalid in rural areas. But the majority noted that the township in question had been "minutely" zoned.

100. In Larkin v. Schwab, 242 N.Y. 330, 151 N.E. 637 (1926), *supra* note 67, the New York Court of Appeals had suggested that its ability to set aside arbitrary decisions would substitute for the lack of standards to guide administrative discretion under a zoning ordinance.

101. Adams v. Zoning Bd. of Review, 86 R.I. 396, 135 A.2d 357 (1957). Under the ordinance, "group housing" was allowable as an exception in any zone, provided the board of adjustment found that the "public convenience or welfare" was being served and that the objectives of the master plan were advanced. Once the exception was granted, the zoning requirements applicable to "group housing" could be

> varied in a manner that will be in harmony with the character of the neighborhood, and that will insure a standard of open space no lower than permitted by this Ordinance and a lot area per family not more than 20% less than so required by this Ordinance in the zone in which the proposed group housing is to be located.

Passing the objection that the "group housing" provision was ultra vires the enabling act, the court held that the change in use in this case was so extensive that it invaded the legislative power of the governing body. The board of adjustment had authorized a multiple-dwelling use on four acres in a residential zone, and the court found that this change in use was too substantial to be accomplished under the power to grant exceptions.

102. 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961).

103. 302 N.Y. 115, 96 N.E.2d 731 (1951).

the courts have also reacted unfavorably to the discretionary approach, and the mixture of administrative and legislative function has once more proved difficult to justify.

In a suburban area on the outer fringe, where little development has yet occurred, prezoning may prove difficult if not unwise. Apart from possible constitutional objections founded on a prematurity argument,[104] the planning authority may not want to straightjacket an area in which the development pattern cannot yet be ascertained. Residential subdivisions might be allowable anywhere, but nonresidential uses such as shopping centers and industrial parks will require more careful attention. An answer to this problem is the floating zone ordinance. It differs from the floating exception in that the community is not really zoned at all. Only the residual residential use is permitted, and all other basic land-use zones float until they are located following an application by a developer who seeks a nonresidential classification.

So far, the cases that have passed on the floating zone technique have held it either ultra vires or unconstitutional.[105] Perhaps the most instructive opinion is found in the case of *Rockhill v. Chesterfield* Township.[106] A fringe township in New Jersey had passed an ordinance under which agricultural, residential and related uses were permitted as of right. All other uses, except certain uses which were prohibited, were allowable as special uses following a recommendation by the planning commission and approval by the governing body. For example, the ordinance allowed "Light industrial uses and other similar facilities having no adverse effect on surrounding property and deemed desirable to the general economic well-being of the Township." Other clauses allowing special uses were similarly drafted.

The supreme court of New Jersey struck down the ordinance. It first noted that "The constitutional and statutory zoning principle is territorial division according to the character of the lands and structures. . . ."[107] Division of the municipality into districts, uniform

104. While it should be discounted as an absolute bar to the prezoning of undeveloped areas, the case of Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), still poses some problems. Compare Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951). See also Reps, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292 (1952).

105. Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1957) (application to plan commission, which makes recommendation to governing body); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960) (application to governing body); Andrews v. Board of Adjustment, 200 Va. 637, 107 S.E.2d 445 (1959) (application to board of appeals); Town of Hobart v. Collier, 3 Wis. 2d 182, 87 N.W.2d 868 (1958) (application to governing body).

106. 23 N.J. 117, 128 A.2d 473 (1957).

107. *Id.* at 125, 128 A.2d at 478.

treatment of land uses within the districts and the requirement of zoning in accordance with a comprehensive plan have as their purpose the prevention of "arbitrary discrimination at war with the substance of due process and the equal protection of the laws."[108] Referring to the standards that governed the authority to grant special uses, including the standards for light industrial uses quoted above, the court noted that these were:

> . . . terms hardly adequate to channel local administrative discretion but, at all events making for the "piecemeal" and "spot" zoning alien to the constitutional and statutory principle of land use zoning by districts and comprehensive planning for the fulfillment of the declared policy.[109]

The convergence of theory in the *Rockhill* case is enlightening, and other courts that have passed on floating zones have taken substantially the same position.[110] What clearly concerned the New Jersey court was the administrative opportunity to make an arbitrary decision, and they sought an anchor against it both in the physical separation of land uses within the community and in the language of delegation. In terms of function, however, there is little difference between the floating zone and the more conventional special exception. Both provide a means for administratively locating land uses within the framework of the zoning ordinance and the land use map. Although the standards of delegation in special exception provisions are equally vague, the New Jersey court has had no difficulty upholding special exceptions of the usual variety.

What may have been decisive in the *Rockhill* case is the quantitative element. Under the conventional zoning ordinance, all of the basic land uses are physically assigned to districts, and the uses that are subject to administrative location are quantitatively small. But under

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108. *Id.* at 126, 128 A.2d at 478.

109. *Id.* at 127, 128 A.2d at 479.

110. *Cf.* Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957), discussed in note 99, *supra;* Town of Granby v. Landry, 341 Mass. 443, 170 N.E.2d 364 (1960), upholding a zoning ordinance which simply prohibited more than one house trailer on any one parcel of land. The court held that the division of the town into districts was not essential under the zoning enabling act.

For an interesting analysis of the policy-making and policy-applying functions in zoning see State *ex rel.* Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954). The city attempted to rezone a site from business to agriculture to prevent its use for off-street parking. The court threw out the amendment. It noted that the policy of the ordinance is set when it is adopted, and cannot be inquired into when a permit is sought. Zones cannot be changed to block a use that complies with the zonal requirement. The opinion would appear to favor the predetermination of individual uses. *Cf.* Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960) (suggesting that unlimited application of the special exception technique would undermine the ordinance).

the floating zone technique only the technique only the residual agricultural and residential uses are permitted as of right; the commercial and industrial uses float, and quantitatively their geographic impact may be considerable. Once more, an analogy to the big and little apartments of the Indiana variance cases may be helpful.

Floating zones characterize the administrative muddle which has come to be characteristic of present-day zoning. The courts object to a failure to provide a full range of districts, a patternizing thought to be capable of preventing the arbitrary decision in the individual case. But it was this very division into districts that created the administrative problem in the first place. And so the circle does a full turn.

CONCLUSION

If there is any consistency to the decisions on delegation, it is in judicial resistance to any administrative device that leaves the policy decision to the administrator rather than to the ordinance. This tendency explains judicial opposition to the use variance and to floating zones. While the use exception cases which accept vague delegations would not seem to fit this generalization, they can be explained by the fact that the ordinance limits the excepted use to designated districts. The decisions thus echo the common statutory injunction, that zoning must be accomplished "in accordance with a comprehensive plan." A common element in the ordinances thrown out for lack of standards is the absence of a rule sufficiently precise to forestall the arbitrary decision that the comprehensive plan requirement seeks to prevent.

Mere language cannot provide the stabilizing element, however. The usual language of delegation is meaningless, because zoning policy must be expressed by the way in which the ordinance organizes the physical environment. In turn, this process requires a series of decisions about the location of individual uses, and these decisions cannot be translated into abstract language meant to govern administrative decisions. For example, an ordinance might locate a residential district on a map and then leave the placing of garden apartments within that district to the plan commission under standards addressed to community well-being and general welfare. The incongruity of this solution is apparent, because general welfare standards cannot begin to express the details that would have to be taken into account when the plan commission makes a decision about location. Yet any more detailed elaboration of the general welfare standard would be hard to devise. It would have to isolate the factors necessary to the successful location of land uses, and so would give away the fact that the administrative body is really asked to do the job of planning.

As a result, unfavorable judicial decisions on zoning standards

could not be expected to bring about the drafting of more articulate guides. This conclusion is reinforced by an informal survey, conducted by this writer, of communities which had an unfavorable court decision on delegation in recent years.[111] In a few cases more precise standards were drafted. More commonly, the decision was ignored on one ground or another, or the community wrote around it by drafting a substantive provision directed specifically at the problem giving rise to the litigation.

What is immediately striking about the American zoning pattern is that the exercise of administrative discretion under the ordinance was conceived as a tangential rather than as an integral phase in administration. As the ordinance was intended to solve most land-use problems in advance, the use of the dispensing power was considered to be exceptional rather than expected. As a result, too much of a policy load is placed on the ordinance, a burden which has been solved by overconcreteness in drawing districts and in elaborating regulations. A board called upon to grant an exception thus gets little of a guide in the way of general policy from the ordinance, and must rely on the general directions of the variance and exception provisions. But most standards in zoning ordinances re-enact the general purposes of the ordinance and the enabling act, rather than establish criteria for land-use policy.

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111. Inquiries were sent to communities in which there had been an unfavorable decision on zoning standards within the past 15 years. Out of 38 inquiries, 16 replies were received, a fairly representative sample except for the fact that the bulk of the replies came from Pennsylvania or New Jersey. Of these 16 communities, 11 had written around the unfavorable decision. Usually they enacted explicit substantive regulations to take care of the problem giving rise to the decision, but occasionally they enacted more detailed standards which permitted the zoning agency to make the same decision it made in the first instance.

In three instances the unfavorable decision was ignored, either because the administrative problem was thought not to come up often enough to deserve further attention, or because the impact of the decision was dismissed in various ways. *E.g.*, in one instance it was claimed that the issue had not really been litigated because the judge had raised it on his own motion. In the remaining few instances the decision could not be said to have any real impact. For example, one of these cases had invalidated the shopping center regulations of the ordinance, and the community is presently redrafting the entire provision.

On this point, the subsequent zoning history in Chesterfield Township is instructive. In *Rockhill v. Chesterfield Township*, discussed in the text *supra*, the New Jersey court had invalidated a floating zone ordinance under which the township was zoned in its entirety for agricultural and residential uses. Every other use "floated." Subsequently (March 6, 1961), the township was zoned into districts, but the rural-agricultural zone covers at least 99% of the township. Single-family residences are permitted in the rural-agricultural zone. Much of the remaining area is in a single-family residential zone, from which agricultural uses are excluded. Chesterfield Township, Zoning Ordinance, March 6, 1961.

An adaptation of the English planning scheme has greater promise, and has already been attempted by those American ordinances that employ direct discretionary administrative techniques. The English development plan is decidedly more generalized than the American zoning ordinance. Zone designations in cities, for example, only indicate the predominant use in an area, and the plan does not attempt to redefine districts to the lot and block level. Administration of the plan is carried out under policy statements complementary to the plan. These are expressed in general terms, and relate to specific areas under the plan's jurisdiction. An approach could be made to the English scheme by making the land-use element of the master plan directly enforceable through administrative controls. A possible model for this kind of control is the improvement location permit, which is made available in a few states as a plan-implementing device.[112]

Several advantages would flow from such a scheme. The objection under present ordinances to allowing use changes by administrative boards is not so much that land-use designations should not be tailored to individual cases. Rather, the objection is that the change often works at cross-purposes with an ordinance that was supposed to make detailed allocations in the first instance. Giving the administrative function a coordinate place in the administration of the ordinance should lead to a more rational distribution of the policy-making and policy-applying functions. The English plan has the advantage of recognizing the policy element that is a part of any administrative decision. The English system increases the policy content of that decision by generalizing the development plan guides. But the administrative decision gains in relevance because the guides furnished by the plan are based on the physical features of the map, and are mediated as little as possible by words.

More concrete guidance in the application of planning policies can then be provided through the judicial review function. This is the significant clue provided by those cases, whether they deal with amendments or administrative change, that afford a check on decision-making by reserving the right to overturn arbitrary decisions in specific instances. The *Gorieb, Larkin* and *Tarrytown* opinions are in this pattern, and in each case an ordinance without standards was sustained by the court. These courts can set policy for administration through the supervision of individual appeals, and by judicial acceptance or rejection of the reasons advanced in support of zoning changes.

The judicial decisions reveal an underlying uneasiness, which can be taken as an index of administrative malfunction. Experimental innovation along the lines indicated is clearly in order.

112. *E.g.*, IND. STAT. ANN. § 53-753 (1951). The effect of these suggestions would be to dispense with the zoning ordinance entirely.

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