

EXHAUSTION OF REMEDIES IN ZONING CASES

In the field of planning and zoning law there has been a marked increase in conflict between constitutional rights of the property owner and the public interest in regulating the use of property, which has greatly taxed the present system of zoning administration and has created a need for a more equitable and efficient procedure to resolve these conflicts. This need is graphically demonstrated by the obstacles which the "exhaustion of administrative remedies"¹ rule often places before the landowner who seeks a judicial determination—either by action for injunction or for declaratory judgment²—of the constitutionality of a zoning restriction on his property.³ The purpose of this note is to discuss the exhaustion rule and the difficulties it has caused to the Missouri owner seeking authorization to use his land in a desired manner.

I. THE RULE DEFINED

The general rule, for which the case of *Village of Euclid v. Ambler Realty Co.*⁴ is consistently cited,⁵ is that a complainant attacking specific provisions of a zoning ordinance as applied to his property must exhaust the available

1. For a statement of the exhaustion rule see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1937): "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." This note contrasts the application of the exhaustion rule in Missouri with its application elsewhere.

2. Although the exhaustion rule has generally been held to apply in mandamus actions, the scope of this note excludes mandamus cases "since it is the quite accepted rule that unconstitutionality of a zoning ordinance may not be litigated in a mandamus proceeding." 1 METZENBAUM, ZONING 713-14 (2d ed. 1955) [hereinafter cited as METZENBAUM].

However, the mandamus cases are helpful in demonstrating the fundamental rule and are discussed generally in 1 METZENBAUM 713-16. The exhaustion rule has been modified in Ohio mandamus cases in which the supreme court has held that a relator may bring mandamus even though he has or had an adequate remedy at law when the alternative act would be onerous and expensive, clearly ineffectual and the failure to do such act is not the ground for refusal by the municipal authority to perform its assigned function. *State ex rel. Killeen Realty Co. v. City of East Cleveland*, 169 Ohio St. 375, 160 N.E. 2d 1 (1959); accord, *State ex rel. Thomas v. Ludewig*, 116 Ohio App. 329, 187 N.E.2d 170 (1962), in which a divided court held that the trial court did not abuse its discretion in allowing the writ even though relator had not appealed the denial of an amendment nor applied for other relief provided by the ordinance.

3. Williams, *Planning Law and the Supreme Court: 1*, 13 ZONING DIGEST 57 (1959); "Primarily [planning law] involves four of the most important constitutional doctrines: the due process clause, the equal protection clause, the rule against delegation of legislative power, and the various rules affecting finality of administrative decisions."

4. 272 U.S. 365 (1926).

5. 1 METZENBAUM 708-12. Mr. Metzenbaum was attorney for appellants in the *Euclid* case.

administrative remedies before resorting to the courts.⁶ Conversely, when

6. 1 METZENBAUM 708-09. *E.g.*, *Bright v. City of Evanston*, 10 Ill. 2d 178, 186, 139 N.E.2d 270, 274 (1956); *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290, 296 (Mo. Ct. App. 1941). See *Richmark Realty Co. v. Whittlif*, 226 Md. 273, 173 A.2d 196 (1961), 22 MD. L. REV. 252 (1962).

The scope of this note encompasses primarily the situation in which a zoning ordinance is exerting a restraining influence on the owner's use of his land, and in which the owner is the moving party seeking authorization to use his land in a desired manner. "Most zoning litigation . . . involves proposed substantial investments in and improvements to real estate." *County of Lake v. MacNeal*, 24 Ill. 2d 253, 261, 181 N.E.2d 85, 90 (1962).

Not discussed is the dilemma of the landowner who has no specific use for his property in mind but considers it subject to a restrictive classification. Such an owner will be unable to argue that he has been unreasonably deprived of property and can "have no recourse to the courts until . . . refused a permit, and in order to have such a refusal it would be necessary for the plaintiff to make a formal application therefor." *People ex rel. Builders Supply & Lumber Co. v. Village of Maywood*, 22 Ill. App. 2d 283, 295, 160 N.E.2d 689, 695 (1959). See *Bourke v. Foster*, 343 S.W.2d 208, 211 (Mo. Ct. App. 1960); *Croly, Exhaustion of Administrative Remedies Before Attacking a Zoning Ordinance*, 35 N.Y.S.B.J. 329 (1963). See also notes 16-17 *infra* and accompanying text.

Although the emphasis of this note is on the situation of the owner as a moving party, it is interesting to note that when the owner is in a defensive position, there is an uneven application of the exhaustion rule. The moving party may be challenging the manner in which zoning officials are administering an ordinance. In *Hernreich v. Quinn*, 350 Mo. 770, 168 S.W.2d 1054 (1943), the plaintiffs were attacking the validity of a use permitted on a neighbor's land. The court said:

By appeal to the Board of Adjustment the *Hernreichs* had obtained a permit sanctioning their occupancy and relaxing the "rear yard" provision of the section.

To attack that decision the *Berards* were *bound* to exhaust their remedy by certiorari under Sec. 176 of the ordinance before they could resort to an action at law or in equity (unless they desired to challenge the constitutionality of the ordinance, which, of course they did not, since they were invoking it.) *Id.* at 777, 168 S.W.2d at 1058. (Footnotes omitted.)

See also *Scallet v. Stock*, 363 Mo. 721, 253 S.W.2d 143 (1952).

Another variant situation was presented in *Evans v. Roth*, 356 Mo. 237, 201 S.W.2d 357 (1947), where the exhaustion rule was inapplicable to a plaintiff seeking to enjoin a neighbor's use alleged to violate the zoning ordinance. The use had not been authorized by zoning officials and thus the plaintiffs were not aggrieved by a determination of those officials.

With regard to a third situation Missouri cases have offered an unsatisfactory solution. This is the situation in which zoning officials are seeking to enforce an ordinance against an owner using his land in a manner alleged to violate the ordinance. The question in these cases is whether the owner placed in this defensive position must exhaust remedies before raising a constitutional issue to resist enforcement. In *Glencoe Lime & Cement Co. v. City of St. Louis*, 341 Mo. 689, 108 S.W.2d 143 (1937), the plaintiff-owners sought to enjoin such enforcement, claiming first an immunity under the non-conforming use provision of the ordinance. This theory of the plaintiffs was held to presuppose the constitutionality of the ordinance; therefore, they should have exhausted the administrative remedies provided by the ordinance before raising the issue in court. However, the second theory of the plaintiffs, that the classification imposed by the ordinance was unconstitutional, received more favorable treatment. The court first reasoned that the ordinance itself afforded no remedy for a determination of its constitutionality. Secondly, the court rejected the contention that, because plaintiffs could raise the defense of

the landowner's challenge of unconstitutionality is directed against a zoning

unconstitutionality in city court, where they were charged with the violation, they had an adequate remedy at law, precluding equitable jurisdiction. The court reasoned that:

The ordinances are continuous and plaintiffs' business is continuous, and, under the ordinances, for each wagon load of coal sold and delivered in violation of the restrictive provisions thereof, the plaintiffs each become subject to an action in the municipal courts . . . for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy. *Id.* at 694, 108 S.W.2d at 144.

The court next approached the merits, finding that: "The classification is almost a complete invasion of plaintiffs' said property. It is unreasonable, arbitrary, and within the ban of . . . the Fourteenth Amendment to the Constitution of the United States." *Id.* at 696, 108 S.W.2d at 146. Thus, in separating the constitutional from the immunity theory of recovery and applying the rule only to the latter, the court was more lenient than in the cases cited notes 34-40 *infra*. (In those cases the fact that the constitutional issue could not be raised within the administrative framework did not relieve the owner, in the usual situation in which his affirmative application for authorization has been denied, from compliance with the exhaustion rule.) However, after expanding the entire opinion to achieve this, the court in *Glencoe* cryptically reversed and remanded the cause with directions to enter judgment in conformity with its view that: "The zoning authority is lodged with the legislative body of the city. The courts are without jurisdiction in the matter." *Id.* at 697, 108 S.W.2d at 146. This called for either a clarification or an overruling, which was partially forthcoming in *Mueller v. C. Hoffmeister Undertaking & Livery Co.*, 343 Mo. 430, 434, 121 S.W.2d 775, 777 (1938): "Such expression was not intended to mean, as appears from the opinion, that redress may not be had in the courts when the classification of property by a zoning ordinance is arbitrary, that is, without substantial reason."

Further information is offered by *Landau v. Levin*, 358 Mo. 77, 213 S.W.2d 483 (1948). The precise situation, however, was not that of *Glencoe*. Rather, plaintiffs had successfully enjoined in the court below a neighbor's use which was unauthorized by, and in fact warned to be illegal by, the zoning officials. It is thus the situation presented in *Evans v. Roth*, *supra*. The possible clarification of *Glencoe* comes in the statement by the court that "unless it should appear that the conclusion of the city's legislative body . . . is clearly arbitrary and unreasonable, we cannot substitute our opinion for that of the city's Board." *Id.* at 82, 213 S.W.2d at 485. (Emphasis added.) The possible overruling of the result reached in *Glencoe* comes when the court distinguishes the opinion in *Glencoe* because the appellant's property in the instant case, unlike that in *Glencoe* "is well adapted to the purposes for which it is zoned." *Id.* at 83, 213 S.W.2d at 486. The inference is that the owner in *Glencoe* presented a case of clear arbitrary administration which the court should have had power to adjudicate.

The precise holding in *Landau* was that the appellant-owner had presented no clear constitutional defense to the action—thus the judgment was affirmed. There was no suggestion that the plaintiffs should have exhausted the administrative remedies, which lines it up with *Evans v. Roth*, *supra*. Also, there was no indication that the owner should have exhausted other remedies before raising the constitutional defense. Here he was a defendant in the action before the court, rather than the plaintiff seeking an injunction. Of course, in the latter situation, his position is also essentially defensive so that *Landau* lends some support to the proposition that an owner asserting an affirmative defense should not be forced to exhaust other remedies. Thus the precise result reached in *Glencoe* is of doubtful validity. But the body of the opinion would appear to establish a rejection of the exhaustion rule with regard to constitutional affirmative defenses. It appears to be worthy of citation for that proposition, as indicated by the fact that Steiner, *The Law of Zoning in Missouri Since Euclid v. Ambler Realty Co.*, 24 WASH. U.L.Q. 193,

ordinance as an entirety, recourse to administrative remedies is unnecessary before suit.⁷ The distinction drawn is this: in the former situation the con-

208 (1939), cited *Glencoe* as "another instance where a zoning law, valid in its general scope, was held invalid as applied to a particular parcel."

However, in *Bormann v. City of Richmond Heights*, 213 S.W.2d 249 (Mo. Ct. App. 1948), the plaintiff owner sought to enjoin enforcement on substantially the same theories as did the plaintiffs in *Glencoe*. The court followed the *Glencoe* holding that the rule applies to the theory of non-conforming use immunity but ignored that the court had not extended the rule to the constitutional theory. The court applied the *Glencoe* holding on immunity to both theories, thus further confusing the Missouri case authority. See also *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290 (Mo. Ct. App. 1941), discussed in notes 34-40 *infra* and accompanying text.

The Illinois authority on the application of the rule to a defending owner is somewhat clearer. See *County of Lake v. MacNeal*, 24 Ill. 2d 253, 181 N.E.2d 85 (1962), in which an owner had filed a counterclaim praying that the county be enjoined from enforcing an ordinance.

Although there is authority that the rule of exhaustion of administrative remedies has application whether the validity of a zoning ordinance is raised by a defendant or a moving party . . . there is at the same time the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an invalid ordinance, that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendants from liability, including a defense of the invalidity of the ordinance. *Id.* at 259-60, 181 N.E.2d at 89-90. (Citation of cases omitted.)

See *City of Loves Park v. Woodward Governor Co.*, 14 Ill. 2d 623, 153 N.E.2d 560 (1958).

7. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). The prayer of the bill was for an injunction to restrain enforcement of the zoning ordinance and all attempts to impose or maintain, as to appellee's property, any of the restrictions, limitations or conditions thereunder, on the ground that the ordinance was in derogation of the due process clause of the fourteenth amendment. *Id.* at 384. Although the landowner in pressing the action in this way escaped the harshness of the exhaustion rule, the Court held that the entire ordinance in "its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority," and intimated that this action would have come closer to success had it been based upon a theory of invalidity of a specific provision of the ordinance or upon the effect of the ordinance as specifically applied to appellee's property. *Id.* at 395-97.

The reasoning of the Court centered around its reluctance to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. *Id.* at 397.

Exhaustion of administrative remedies is the corollary of this reasoning. The administrative variance (discussed notes 16-17 *infra* and accompanying text) provides an "escape valve" by which the rigidity of classifications imposed by a legislative body may be mitigated as the ordinance is applied to the unique circumstances presented by each landowner. The courts have been reluctant to rule on the constitutionality of ordinances until the potentialities for accommodation of this "escape valve" have been exhausted. In effect, this suspends constitutional questions in favor of factual considerations such as the character of the neighborhood, property values and needs of the community. See *La Salle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957) (dissenting opinion):

It is true that a zoning ordinance imposing unreasonable restraints upon the use

tion is that constitutional rights are violated because of an unreasonable *enforcement* or *application* against specific real estate; but the latter situation involves the challenge that the *terms* or *provisions* of a zoning ordinance are per se unconstitutional. The second circumstance arises infrequently since the day has passed for seriously contending that zoning ordinances are fundamentally unconstitutional.⁸

The exhaustion of administrative remedies doctrine finds a policy basis in the concept of separation of powers, that is, the necessity of maintaining a proper balance between the powers and functions of administrative agencies and the judiciary.⁹ The people in the municipal government are viewed as most qualified to alter zoning classifications because zoning is by statute the province of local government.¹⁰ This attitude is reinforced by the unwilling-

of private property will offend the constitutional guarantees of due process of law, and it is likewise true that a zoning ordinance may be valid in its general aspects yet invalid as applied to a particular . . . set of facts. However, the constitutional concepts and interpretations upon which the validity of the zoning ordinance must stand or fall, in either case, are so thoroughly established by the decisions of this court as to be no longer debatable. There is, therefore, in the absence of some new ground for constitutional attack, no need for this court to consider all zoning cases to determine if the facts show either a reasonable or an unreasonable restraint. Such factual determinations do not involve the fairly debatable constitutional questions upon which our jurisdiction must be founded. *Id.* at 49, 145 N.E.2d at 70.

8. 1 METZENBAUM 710; Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 523-24 (1959). See note 7 *supra*.

The scope of most present day zoning litigation is illustrated in the case of *Fairmont Inv. Co. v. Woermann*, 357 Mo. 625, 210 S.W.2d 26 (1948), in which the court said:

While there can no longer be any question of the constitutionality in its general scope and purposes of the zoning ordinances of the City of St. Louis . . . yet, when the courts consider the specific question of the applicability of those ordinances to particular property, the constitutionality must depend upon the facts of the particular case under consideration. *Id.* at 630-31, 210 S.W.2d at 29.

In Illinois, no private litigant has seriously argued that prospective zoning is an improper use of the police power since 1925. Babcock, *supra* at 524.

9. Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 40 CHI. B. RECORD 119, 124-26 (1958); Lawton, *Procedural Implications of Recent Zoning Decisions*, 40 CHI. B. RECORD 15, 20 (1958).

The problems engendered by the explosion of the population lends new importance to the accepted rule that the municipalities, through their legislative bodies, should be permitted to establish zoning controls without judicial interference except in the case of arbitrary action, oppression or confiscation. . . . The debatable issue of the use of land, which must be solved by the legislative body, should not be transferred to the courts because an individual, without such control, could turn the property to greater profit. *Hamer v. Town of Ross*, 382 P.2d 375, 385, 31 Cal. Rptr. 335, 345 (1963).

10. "The reason for such a rule is found in the practical difficulty encountered by the city council [legislative body] in foreseeing particular instances of hardship, when general restrictions are initially established for a given area." *Bright v. City of Evanston*, 10 Ill. 2d 178, 185, 139 N.E.2d 270, 274 (1956). The validity of the ordinance as applied to particular property will depend almost entirely on factual matters within the peculiar knowledge of the specialized agencies which should be expected to be most able to determine the propriety and extent of a variance. *Bank of Lyons v. County of Cook*, 13 Ill. 2d 493, 495, 150 N.E.2d 97, 98 (1958). See also note 8 *supra*. There will generally be a

ness of courts to become "state-wide zoning commissions" by deciding a large number of zoning cases.¹¹ The anomalous situation is thereby avoided in which an "ordinance, with all its provisions, good as well as bad, is declared invalid as to a particular parcel of real estate, yet otherwise remains in full force and effect throughout the municipality,"¹² requiring the municipality to enact a new ordinance consistent with the court's decision.¹³

II. WHAT REMEDIES MUST BE EXHAUSTED?

The avenues of relief made available to the aggrieved landowner by zoning ordinances are the variance, the amendment and, with increasing frequency, the special use permit.¹⁴ In addition, state statutes generally provide judicial review of the denial of a variance by an administrative agency.¹⁵

A. Administrative Remedies: The Variance

Although local differences exist, statutes and ordinances which restrict a landowner's use of property usually provide an administrative remedy in the form of a variance. When an owner's request to a ministerial officer (such

presumption in favor of the ordinance even though destructive of private interests since it is a general regulation to promote the general welfare. Therefore, hardship and compatibility of proposed use will be more easily demonstrated than complete invalidity of the ordinance. Lawton, *supra* note 9, at 20.

11. Babcock, *supra* note 8, at 532-34.

12. City of South Bend v. Marckle, 215 Ind. 74, 83, 18 N.E.2d 764, 768 (1939).

13. Lawton, *supra* note 9, at 15. The problem of what kind of relief is to be awarded in a case in which an owner with a specific use in mind challenges the validity of an ordinance has troubled courts. Generally, it has been held that a court may not perform a legislative function by substituting its judgment for that of the local legislature. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963); Reeve v. Village of Glenview, 29 Ill. 2d 611, 195 N.E.2d 188 (1963). Therefore, the result of a decision declaring a zoning ordinance void as to particular property would leave it unzoned and might produce further litigation if the municipality rezones the property for another use classification but still excludes the one proposed. However, in a recent group of cases, the supreme court of Illinois, after reviewing the Illinois law and noting that it had "not manifested an unwavering attitude" toward the problem, modified the general rule in cases where the record discloses a specific use contemplated; in such case a judgment should be framed with reference to the record, declaring the ordinance void only to the extent necessary to permit the proposed use. Illinois Nat'l Bank & Trust Co. v. County of Winnebago, 19 Ill. 2d 487, 167 N.E.2d 401 (1963); Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1963); Nelson v. City of Rockford, 18 Ill. 2d 410, 167 N.E.2d 219 (1963). *Accord*, Hamer v. Town of Ross, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

14. Babcock, *supra* note 8, at 513; Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 340-41 (1962); see, e.g., Sr. LOUIS COUNTY, MO., REV. ORDINANCES §§ 1003.340, 1004.070 (1958).

15. E.g., MO. REV. STAT. § 89.110 (1959); ILL. REV. STAT. ch. 110, §§ 264-79 (1957).

as a public works director, building commissioner or zoning enforcement officer) for a building permit has been refused because the desired use was not in strict conformity with the ordinance, he may appeal for special consideration. The reviewing board (commonly called a zoning board of adjustment or board of zoning appeals) is empowered to review the action of the officer and authorize departure from the restrictions of the ordinance in cases of "practical necessity" or "unnecessary hardship."¹⁶ This application for a variance is the "administrative" remedy which is almost universally required by the exhaustion rule.¹⁷

B. *Legislative Remedies: Amendment or Special Permit*

Exhaustion of administrative remedies alone may not give the aggrieved owner standing in court to contest the validity of the zoning ordinance as applied to his property. The Illinois owner may also be forced to seek legislative relief in the form of an amendment or special permit from a municipal council or equivalent body.¹⁸ There is also some indication that if an owner

16. *E.g.*, Mo. REV. STAT. § 89.090 (1959). See *Glencoe Lime & Cement Co. v. City of St. Louis*, 341 Mo. 689, 108 S.W.2d 143 (1937); *Bormann v. City of Richmond Heights*, 213 S.W.2d 249 (Mo. Ct. App. 1948); *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290 (Mo. Ct. App. 1941). For a discussion of the possible variety of statutory standards for granting variances, see Lawton, *supra* note 9, at 17-18. Intended as an "escape valve" from the strict application of the terms of the ordinance, the grant of a variance seeks to avoid an unfavorable holding on constitutionality. Variances leave the classification unchanged. They are generally of two types: use variances, permitting a business or other activity prohibited in the district; and bulk variances, allowing relief with respect to height, volume, area, setback, yards and parking space. See generally Dukeminier & Stapleton, *supra* note 14, at 273-303; Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 66-71.

A landowner might also ask the board to review the determination of the zoning enforcement official on the theory that if the officer had properly construed the ordinance the permit would not have been denied. Mo. REV. STAT. § 89.090 (1959), *Brown v. Montgomery*, 354 Mo. 1041, 193 S.W.2d 23 (1946); ILL. ANN. STAT. ch. 24, § 11-13-12 (Smith-Hurd 1960) (municipality); ILL. ANN. STAT. ch. 34, § 3156 (Smith-Hurd 1960) (county).

17. See the review of case holdings in 1 METZENBAUM 712-46. For a discussion of contrary cases see *id.* at 746-60. These decisions are dismissed with the words: [T]here may seem to be some decisions upon this point, which appear to maintain an oppugnant rationale.

In most of such, careful study of their facts will undo such first blush impression. *Id.* at 746.

18. An amendment is a reclassification of the zoning district by the legislative body (commonly called the city council) on the petition of the landowner. The result of the amendment is to allow all property owners in the district to benefit from the change of uses allowable in the classification.

The special use (or exception)—an amalgamation of the variance and the amendment—is a device by which the municipality attempts to anticipate future compatible uses, such as a hospital or public utility, by cataloguing exceptions permitted under cer-

first seeks legislative relief and fails, he must still exploit the possibility of a variance before he can get a court hearing.¹⁹

C. *Judicial Review*

When the owner has been denied administrative relief, he may seek—as provided by administrative review statutes—judicial review of the propriety of the local authority's denial. Because courts will not decide constitutional questions unless necessary, the statutory procedure is frequently required to be exhausted before the issue of constitutionality may be raised.²⁰

Administrative review statutes form three general types: the general administrative review act;²¹ the zoning enabling act;²² and the hybrid of the first two types.²³ As a general rule when judicial review is provided by the

tain governing standards. Although no Missouri cases could be found which hold that the landowner is specifically required to seek relief by special use permit, it would appear that such relief is included within the term "legislative relief," for such permits are granted by action of the local legislative body. *E.g.*, ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.340 (1958).

In Illinois "administrative remedy" includes appropriate and available legislative relief permitted by the ordinance. *Brader v. City of Chicago*, 26 Ill. 2d 152, 185 N.E.2d 848 (1962); *Reilly v. City of Chicago*, 22 Ill. 2d 348, 181 N.E.2d 175 (1962). See also *Bright v. City of Evanston*, 10 Ill. 2d 178, 139 N.E.2d 270 (1957) in which plaintiff was required to exhaust his "administrative" remedies when the Evanston zoning ordinance provided that all final decisions on variances were to be made by the city council.

In Missouri there are no decisions holding that one must seek an amendment or special permit before challenging a zoning ordinance. See also 1 METZENBAUM 743-46; *Note, Zoning: Form of Relief in Declaratory Judgement Action*, 49 CALIF. L. REV. 582, 584 n.13 (1961).

19. See *Lawton*, *supra* note 9, at 20. In *Herman v. Village of Hillside*, 15 Ill. 2d 396, 155 N.E.2d 47 (1958) the court held that when the board of zoning appeals had recommended against passage of an amendment, there was no need to apply for a variance prior to seeking judicial relief, because it was unreasonable to assume that the board would reverse itself. It would seem that if the board had recommended the passage of the amendment and the local legislative authority had ruled against it, the owner would have then had to seek a variance. See also *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290 (Mo. Ct. App. 1941).

20. *Babcock*, *supra* note 8, at 526-27; *Meyer, Zoning Procedure: A Suggestion for Revision*, 34 N.Y.S.B.J. 350-51 (1962). One basis for the exhaustion of statutory review procedure is the fiction that it is inconsistent to seek relief under an ordinance and at the same time to attack its validity.

21. *E.g.*, ILL. REV. STAT. ch. 110, §§ 264-79 (1957).

22. *E.g.*, MO. REV. STAT. § 89.110 (1959).

23. See *Meyer*, *supra* note 20, for a discussion of the procedure in New York in which review is accomplished by a special mandamus type "Article 78" proceeding. The Civil Practice Law and Rules provides the underlying procedure subject to modifications by N.Y. GEN. CITY LAW § 82, as amended by N.Y. CIV. PRAC. LAW & R. ch. 310, § 170 (1963); N.Y. TOWN LAW § 267; N.Y. VILLAGE LAW § 179-b, as amended by N.Y. CIV. PRAC. LAW & R. ch. 310, § 475 (1963). See, *e.g.*, *Diocese of Rochester v. Planning Bd.*, 1 N.Y. 2d 508, 136 N.E.2d 827 (1956).

state zoning enabling act, the designated procedure must be exhausted by the complainant²⁴—this is the rule in Missouri.²⁵

In jurisdictions in which review is provided by an administrative review act or a hybrid system, the rule is usually less clear.²⁶ An illustrative situation is Illinois where the board of appeals may be empowered to perform two functions: it may act as a reviewing agency by which it makes final decisions, or as a legislative committee acting in an advisory capacity.²⁷ The judiciary has evolved the rule that action taken by the board which is not final but merely recommendatory to the city council is not reviewable under the Administrative Review Act.²⁸ Due to the divergent functions of local boards throughout the state, ascertaining what avenue of judicial relief should be followed in any jurisdiction is difficult.²⁹

Therefore, the exhaustion rule will require the exhaustion of administrative remedies (and often legislative remedies as well) in almost all cases in which the owner is contesting the application of a zoning ordinance upon his property. The rule will generally require that an appeal be taken from the decision of the administrative body prior to making a collateral attack upon the ordinance.

24. 2 METZENBAUM 840; see generally *id.* at 839-68. See *State v. Superior Court*, 235 Ind. 604, 135 N.E.2d 516 (1956), where the court said:

The Zoning Act of 1947 creates new rights wholly unknown to the common law. The remedies therein prescribed are *exclusive*. In such cases, the requirements of the statute as to the court where the remedy is to be had, and the time and manner of asserting the rights, are mandatory and jurisdictional. *Id.* at 517. (Emphasis added.)

25. In Missouri the Administrative Procedure Act, Mo. REV. STAT. § 536.110 (1959) does not displace the method of review of an order of the board of adjustment as prescribed in Mo. REV. STAT. § 89.110 (1959). *Cohen v. Ennis*, 318 S.W.2d 310, *affirming* 314 S.W.2d 239 (Mo. Ct. App. 1958). See *Bormann v. City of Richmond Heights*, 213 S.W.2d 249 (Mo. Ct. App. 1948); *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290 (Mo. Ct. App. 1941).

26. For discussion of the Illinois procedure, see *Babcock*, *supra* note 8; *Fox*, *supra* note 9; *Lawton*, *supra* note 9. For discussion of the hybrid system in New York, see note 23 *supra* and accompanying text.

27. ILL. REV. STAT. ch. 34, § 152 k.1 (1957) (county boards), by which the board may in one instance act "in a quasi judicial capacity as a reviewing administrative agency, and in the other as a legislative committee acting in an advisory capacity." *Traders Dev. Corp. v. Zoning Bd. of Appeals*, 20 Ill. App. 2d 383, 388-89, 156 N.E.2d 274, 277 (1959); *accord*, *Beaven v. Village of Palatine*, 22 Ill. App. 2d 274, 160 N.E.2d 702 (1959). ILL. ANN. STAT. ch. 24, § 11-13-4 (Smith-Hurd 1960) (municipalities of 500,000 or more) allows only the granting of variances subject to regulation by the corporate authority. ILL. ANN. STAT. ch. 24, § 11-13-5 (Smith-Hurd 1960) provides that either the board or the legislative body may be vested with the variation power, but when possessed by the latter, hearings must be had before the board preliminary to decision on the granting of a variance.

28. *Fox v. City of Springfield*, 10 Ill. 2d 198, 139 N.E.2d 732 (1957).

29. *Babcock*, *supra* note 8, at 528-29.

III. EXHAUSTION OF INADEQUATE REMEDIES REQUIRED

The sweeping application of the exhaustion rule often disregards the long standing equitable principle³⁰ that remedies which are actually inadequate need not be exhausted.

A. *Inadequacy at the Local Level*

The local remedies which the owner must exhaust are often inadequate to provide relief. Traditionally, administrative relief (the variance) might be granted if the owner could prove that the proposed use was beneficial to the community, did not involve a substantial departure from the comprehensive zoning plan, and would not injuriously affect the neighborhood.³¹ But due to the courts' tendency to limit the power of the local administrative boards,³² the owner must at present prove in addition that the land has no reasonable beneficial use without a variance, that the hardship is unique to his lot, and that the hardship is not self-created.³³

The anomalous situation which faces one who must seek a variance conditioned on factors which he cannot demonstrate is well illustrated by *Superior Press Brick Co. v. City of St. Louis*.³⁴ After cessation of fire-clay mining operations on plaintiffs' land the city had enacted a zoning ordinance which placed the land in a residential district.³⁵ Plaintiffs claimed that to make the land reasonably adaptable to the permitted uses, it would be necessary to remove clay pillars which supported the roof of the mine, permitting the surface of the land to settle evenly. An application for a permit to erect a hoist upon the land for the removal of the pillars was refused by the

30. McCLINTOCK, *EQUITY* 103-44 (2d ed. 1948).

31. Dukeminier & Stapleton, *supra* note 14, at 344-45. "Enabling acts generally empower boards to grant variances where there is some 'practical difficulty' or 'unnecessary hardship' and the dispensation will not be contrary to the spirit and intent of the zoning ordinance." *Id.* at 344. See, e.g., MO. REV. STAT. § 89.090 (1959).

32. Dukeminier & Stapleton, *supra* note 14, at 339-50. Power to prevent the inequities resulting from literal enforcement of zoning ordinances has been delegated to the boards in broad language, but the courts have construed these powers so narrowly that the boards which respect the court decisions "can effect only minor adjustments, relieve only the major hardships, and are without power to grant relief which may be construed as an amendment of the regulations." Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 385-86 (1962).

33. Dukeminier & Stapleton, *supra* note 14, at 345. See, e.g., *Wilson v. Douglas*, 297 S.W.2d 588 (Mo. Ct. App. 1957) (requiring showing of unnecessary hardship or practical difficulty); *Miller v. Silver*, 278 App. Div. 962, 105 N.Y.S.2d 475 (1951) (requiring proof of singular disadvantage).

34. 155 S.W.2d 290 (Mo. Ct. App. 1941).

35. ST. LOUIS, MO., REV. CODE art. II, ch. VIII (1936).

Building Commissioner and the Board of Adjustment on the ground that this would violate the zoning ordinance.³⁶

The denial of relief by the board of adjustment was necessitated by its lack of power to grant a variance which would relieve an owner from "substantial compliance" with the ordinance.³⁷ Nevertheless, plaintiffs' action to enjoin city officials from preventing removal of the pillars was unsuccessful because they had not exhausted the statutory remedy of appeal to the circuit court from the denial of the variance.³⁸ It is apparent that when the owner desires to be relieved of substantial compliance he is in effect asking for relief that can only be given by a legislative body. However, in Missouri the basic difference between the variance and legislative powers has been ignored in cases requiring exhaustion of administrative remedies,³⁹ forcing the owner to exhaust the procedure for variance relief which the board of adjustment is powerless to grant.⁴⁰

36. *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290, 292 (Mo. Ct. App. 1941).

37. In reference to the power of the Board of Adjustment, the Missouri Supreme Court has said:

[I]f in a specific case the enforcement of a regulation according to its strict letter would cause unnecessary hardship and the board can by varying or modifying the application of the regulation obviate the hardship and at the same time fully effectuate the spirit and purpose of the ordinance, they are authorized to so vary or modify the application. But the board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they cannot merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance. *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 101, 27 S.W.2d 1030, 1032 (1930).

In Illinois, when "a variation . . . would radically alter the nature of the entire zone. . . the authority of the zoning board of appeals to grant a variation is open to serious question." *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 373, 167 N.E.2d 406, 408 (1960). *Accord*, *Liebling v. Village of Deerfield*, 21 Ill. 2d 196, 171 N.E.2d 585 (1961) (substantial change in zoning plan contemplated).

38. *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290, 296 (Mo. Ct. App. 1941).

39. In non-exhaustion cases, the Missouri courts have made it clear that the board of zoning appeals is "without a vestige of legislative power." *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 101, 27 S.W.2d 1030, 1032 (1930). *Accord*, *State ex rel. Sims v. Eckhardt*, 322 S.W.2d 903 (Mo. 1959); *Himmel v. Leimkuehler*, 329 S.W.2d 264 (Mo. Ct. App. 1959); *State ex rel. Croy v. Raytown*, 289 S.W.2d 153 (Mo. Ct. App. 1956); *State ex rel. Barr v. Fleming*, 259 S.W.2d 417 (Mo. Ct. App. 1953); *Adams v. Board of Zoning Adjustment*, 241 S.W.2d 35 (Mo. Ct. App. 1951).

40. Since the court is limited to granting only that relief which the board could have granted (see note 42 *infra*), it is implicit in the *Superior Press Brick* decision (see text accompanying notes 34-38 *supra*), requiring review of the denial of a variance, that application for a variance was required in the first instance. See also *Bormann v. City of Richmond Heights*, 213 S.W.2d 249 (Mo. Ct. App. 1948) in which a suit to enjoin threatened enforcement of an ordinance by city officials was dismissed because the owner had not exhausted his administrative remedy.

The Illinois courts have not required application for a variance in situations in which

B. *Inadequacy at the Appellate Level*

An owner who has been denied local relief may find that the available appellate review procedure is inadequate.⁴¹ In reviewing the actions of administrative boards, courts are limited to granting only that relief which the boards had power to dispense.⁴² Thus, in those cases in which the owner is required to seek administrative relief which in fact cannot be granted, the same relief must be refused on appeal. Further, because administrative boards have no power to decide constitutional questions, they may refuse to hear evidence on arguments bearing on the owner's constitutional theory, thereby affording the owner no opportunity to establish a record pertaining

it is patent that such relief could not legally be granted. *Liebling v. Village of Deerfield*, 21 Ill. 2d 196, 171 N.E.2d 585 (1961); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); *Herman v. Village of Hillside*, 15 Ill. 2d 396, 155 N.E.2d 47 (1958). Compare *Westfield v. City of Chicago*, 26 Ill. 2d 526, 187 N.E.2d 208 (1963), with *Bormann v. City of Richmond Heights*, *supra*. In *Westfield* the court declared void an ordinance as applied to plaintiff's property without requiring exhaustion of remedies. Its reasons were that: 1) the zoning regulation was part of a very comprehensive urban renewal plan, which, said the court, the local authority would be "most reluctant to change"; and 2) the city had demanded that plaintiff conform to the ordinance and had threatened her with suit if she refused. For a criticism of the application of the "futility" rule in this area and a discussion of the *Bright* doctrine, see 48 MINN. L. REV. 374 (1963). See *Bank of Lyons v. County of Cook*, 13 Ill. 2d 493, 150 N.E.2d 97 (1958) where the plaintiff sought an amendment to the zoning ordinance which would allow him to maintain a trailer park, the secretary of the zoning board of appeals purportedly had informally told him an application for such a use would be fruitless. The court ruled:

[T]he authority to vary exists whenever practical difficulties and particular hardship are caused by the "regulations of this ordinance"

. . . . The necessity for making application before the board is not dispensed with because the application *may be denied*. The rule requiring resort to an administrative agency in the first instance is in the interest of orderly procedure. It cannot be avoided by evidence of an intent to deny the relief sought. *Id.* at 497, 150 N.E.2d at 99. (Emphasis added.)

41. For a discussion pointing out the avenues of review available see notes 21-29 *supra*.

42. See, *e.g.*, MO. REV. STAT. § 89.090 (1959). For cases discussing the power of the court in certiorari proceedings, see *Adams v. Board of Zoning Adjustment*, 241 S.W.2d 35 (Mo. Ct. App. 1951); *Superior Press Brick Co. v. City of St. Louis*, 155 S.W.2d 290 (Mo. Ct. App. 1941); *Berard v. Board of Adjustment*, 138 S.W.2d 731 (Mo. Ct. App. 1940). In *State ex rel. Nigro v. Kansas City*, 325 Mo. 95 27 S.W.2d 1030 (1930), the court held:

The review of a decision of a board of zoning appeals by the circuit court being purely statutory, the court's jurisdiction in such proceeding does not extend beyond that conferred by the statute. . . . The court's authority is plainly limited to correcting illegality. . . . As the board of zoning appeals in this case was wholly without the power to grant the relief sought by respondent, its order denying such relief could not in any respect have been illegal. *Id.* at 101, 27 S.W.2d at 1033.

The Administrative Review Act [ILL. REV. STAT. ch. 110, §§ 264-79 (1957)] limits the Illinois courts in the same manner. See, *e.g.*, *River Forest State Bank & Trust Co. v. Zoning Bd. of Appeals*, 34 Ill. App. 2d 412, 181 N.E.2d 1 (1961).

to his theory for an appeal which will be limited to those issues argued before the board.⁴³

C. *Inadequacy of Zoning Practices*

It has been suggested by some commentators that problems caused by the exhaustion rule are only symptoms of the over-all inadequacy of zoning administration's decision-making apparatus.⁴⁴ Discretionary powers in zoning administration have been said to create a greater risk of discrimination than in most other administrative systems due to a lack of uniform standards.⁴⁵ Arbitrary governmental action preventing any reasonable use of land or imposing severe burdens on its use for no visible reason may arise because authorities have yielded to political pressure or, more often, because of inexperience or ignorance.⁴⁶

IV. THE EXHAUSTION RULE IN ST. LOUIS COUNTY: CURRENT PRACTICES

To illustrate the problems of the exhaustion rule, the case of an owner in St. Louis County who believes that provisions of the zoning ordinance as applied to his land are unconstitutional is considered as a hypothetical example.⁴⁷

It should at once be clear that any attempt to seek immediate judicial relief would be premature.⁴⁸ Thus, the owner is limited to the avenues of local relief provided in the ordinance which in St. Louis County are the

43. [A]n administrative review proceeding is proper to test the disallowance of the requested variation. This, of course, puts in issue only the propriety of the zoning board's action in declining the proposed variation, and plaintiff's record before the zoning board of appeals would not necessarily support constitutional arguments to be made in court. . . . Lawton, *supra* note 9, at 21.

See Howard v. Lawton, 22 Ill. 2d 331, 175 N.E.2d 556 (1961).

44. See citation of authorities in Mandelker, *supra* note 16, at 1 n.1. Speaking of the boards of adjustment, which have borne the brunt of criticism, Cardozo once wrote that "there has been confided to the Board a delicate jurisdiction and one easily abused." People *ex rel.* Fordham M. R. Church v. Walsh, 244 N.Y. 280, 290, 155 N.E. 575, 578 (1927).

45. Babcock, *supra* note 8, at 511; Williams, *Planning Law and the Supreme Court:1*, 13 ZONING DIGEST 57, 62-68 (1961). Mr. Williams further suggests that judicial review of zoning matters should be fostered since there is a great need for the establishment of more specific legal criteria for justifying zoning controls.

46. Anderson, *supra* note 32, at 387; Fox, *supra* note 9, at 126; Williams, *supra* note 45. Not intended as an indictment of local zoning authorities, this note's purpose is to suggest that opportunities for arbitrary action burdensome to an owner exist, while avenues to relief are often unnecessarily lengthy and expensive.

47. As a practical matter, the landowner would usually have a desired use in mind for his land, and would not care whether the basis for allowing such a use was on constitutional or other grounds. His concern is the "free" use of his land, not the method of achieving it. Meyer, *supra* note 20, at 351.

48. See part I *supra*.

amendment,⁴⁹ variance,⁵⁰ and special permit.⁵¹ If relief is sought by variance, the owner must go before the Board of Zoning Adjustment;⁵² if relief is sought through an amendment or special permit, the decision will rest with the County Council.⁵³

In practice far more owners in St. Louis County seek relief by amendment or special permit rather than through the variance procedure.⁵⁴ There appear to be several factors which have caused the relative popularity of the amendment process.⁵⁵ In the first place the Board of Adjustment has been exceedingly careful to limit its power to issue variances in accordance with the strict wording of the ordinance.⁵⁶ On the other hand, the County Council has apparently narrowly interpreted the traditional limitations (such as no "spot zoning") upon its zoning power.⁵⁷ These policies are underlined by the fact that the Zoning Enforcement Officer usually advises owners who

49. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.340 (1958).

50. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1004.070 (1958).

51. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.340 (1958).

52. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1004.070(5) (1958).

53. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.340(1) (1958).

54. The information in this section concerning St. Louis County variance and amendment practices was obtained during the years 1961-1962 by interviewing both county officials and practicing attorneys.

55. However, it does not appear that greater use of the amendment results from a recognition of the basic difference in the relief which may be granted under it vis-à-vis the variance.

56. The "Limitation of Authority" provision reads as follows:

1. Nothing contained in these regulations shall be deemed to authorize the Board to reverse or modify any refusal of a permit or any other order, requirement, decision or determination which conforms to the provisions of the St. Louis County Zoning Code or any Zoning Ordinance passed or enacted by the St. Louis County Council and which, therefore, is not erroneous; nor to authorize the Board to validate, ratify, or legalize any violation of law or any of the regulations of the St. Louis County Zoning Code or any Zoning Ordinance which may be passed or enacted by the St. Louis County Council.

2. The Board shall not amend any of these regulations or the Zoning Map, nor shall such power or authority be vested in the Board.

. . . . ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1004.090 (1958).

Such limitations appear to be even greater than those imposed by statutes or the courts. MO. REV. STAT. § 89.090 (1959). See notes 32-33, 37 *supra*.

It is not suggested that a possible method of alleviating some of the problems in this field would be for the Board of Adjustment to allow variances more freely. If this were done, variances would most probably be subject to invalidation at the instance of neighboring landowners, on the ground that the action was not within the power of the board. See *Scallet v. Stock*, 363 Mo. 721, 253 S.W.2d 143 (1952); *Wilson v. Douglas*, 297 S.W.2d 588 (Mo. Ct. App. 1957); *Berard v. Board of Adjustment*, 138 S.W.2d 731 (Mo. Ct. App. 1940).

57. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.340 (1958) provides for zoning changes and amendments (including special use permits) "whenever the public necessity, convenience, general welfare and good zoning practice require." Such broad standards apparently give the council a good deal of freedom in granting more or less "localized" amendments.

have been refused a building or use permit to seek an amendment prior to seeking a variance.

Another reason for seeking the amendment before the variance is the habit of the Board of Adjustment of asking for (and following) the advice of the Zoning Enforcement Officer.⁵⁸ Thus, in many cases the same officer from whose decision the appeal is taken is in effect deciding the issue on appeal.

The landowner's hesitation to seek variance relief is further enhanced by the fact that the Board of Adjustment does not present a forum well adapted to the raising of constitutional issues. No transcript is made of the proceeding before the Board,⁵⁹ and even when a reporter is obtained, no opportunity is afforded to argue the constitutional questions.⁶⁰

Thus, as a practical matter, the owner's chances of obtaining permission to use his land in the desired manner are greater through application to the legislative branch of the County authority for amendment than by way of administrative remedies.⁶¹ If he should seek initial relief by request for an amendment and is refused, he will find that he has no adequate appeal procedure (he is not permitted to seek review by way of the statutory or common law writ of certiorari, because the refusal of an amendment is purely a legislative decision⁶²) and is further unable to make a collateral attack upon the existing ordinance, because he has not yet exhausted his administrative remedies by applying for a variance.

Thus, the landowner is forced into a dilemma. He is given a greater

58. Interviews disclosed that in many variance cases where advice is sought, the Zoning Enforcement Officer usually writes the decisions and the Board members merely sign them. However, recent boards have shown a greater tendency to think independently.

59. Information obtained by interview discloses that the Board will not object if one of the parties desires to employ a reporter to make a transcript, although no official reporters are provided.

60. See note 43 *supra* and accompanying text. It should also be noted that the Board until recently has very rarely asked the County Counselor's office for legal advice before determination of an appeal. The legal officer rarely hears about a variance file until a writ of certiorari has been filed by the landowner.

For a discussion of the difficulties of raising the constitutional question on appeal from the Board's holding, see notes 42-43 *supra*.

61. This method of providing zoning flexibility (through the amendment process, administered by the County Council which is in turn guided by the very broad standards set out in the zoning ordinances) is obviously lacking in any real check on responsibility, utilization of experienced personnel, or any articulation of the true rules of the "game." Under such a system the need for judicial review is apparent.

62. In State *ex rel. Groy v. City of Raytown*, 289 S.W.2d 153 (Mo. Ct App. 1956), the court held: "[T]he alleged enactment of [or failure to enact] the rezoning ordinance was an act purely legislative in character. Acts which are purely legislative are not reviewable by the common-law writ of certiorari. . . . Such legislative action may not be reviewed in a proceeding brought pursuant to Section 89.010 [Mo. Rev. Stat. (1959)]." *Id.* at 156-57.

chance of local relief if he chooses to seek legislative action but is denied an adequate appeal. On the other hand, he is given a limited chance for local success through administrative remedies, but if he contemplates judicial determination that the ordinance as applied to his land is unconstitutional, he is forced to first go through the ritual of exhausting these remedies plus prosecuting an appeal by statutory certiorari in the circuit court.

CONCLUSION

In seeking to alleviate the burdens caused by the exhaustion rule to the owner attacking the application of a zoning ordinance, two approaches have been suggested: (1) improvement of those remedies which must be exhausted;⁶³ and (2) judicial abandonment of the exhaustion rule where the remedy which must be exhausted is in fact inadequate.⁶⁴ Two proposals for legislation which would improve landowners' remedies have been made. The first is to adopt an omnibus form of zoning procedure in which all available types of relief might be requested and every basis for relief presented.⁶⁵ Such a system would call for a local zoning board with the power to grant in the alternative either legislative or administrative relief. This system would further provide for appellate review of the local board's action and, at the same time, would permit the raising of a constitutional basis for relief.⁶⁶ Supplementing the omnibus form of zoning procedure, there should be a state-wide zoning commission authorized to establish uniform rules of procedure for all hearings by local boards or legislatures, as well as appeals from final rulings.⁶⁷ In this system, uniform rules could be adopted which would minimize the number of arbitrary rulings due to local favoritism or ignorance.

Implicit in the second approach—that of judicial abandonment of the exhaustion rule when the remedy is inadequate—is the necessity for the

63. See Meyer, *supra* note 20.

64. Mandelker, *supra* note 16, at 60, 66 n.5.

65. Meyer, *supra* note 20. Two Illinois attorneys would have the zoning board retain variation powers to allow small classification changes "where the limitations imposed by the ordinance are not in furtherance of the public welfare." Such a board would be required to resort to planning experts and real estate planners to aid in its decisions. The legislative body would utilize its amendment procedure not for individual relief but for overall major classification changes. Fox, *supra* note 9, at 126; Lawton, *supra* note 9, at 22. A zoning board vested with broad variation powers would no doubt limit appeals for judicial relief based on constitutional arguments, but such practice must be within limits or run the risk of undermining the ordinance. Mandelker, *supra* note 16, at 71.

66. Meyer, *supra* note 20, at 351.

67. Babcock, *supra* note 8, at 538-41.

courts to more carefully ascertain in each case if the local zoning authorities have the power to grant the owner any relief, and to take cognizance of the distinction between legislative and administrative relief to prevent requiring exhaustion of the latter when only legislative action can give relief. By adoption of this policy, the courts could provide owners with a much more efficient and economical procedure for resolving zoning disputes.