ALTERNATIVE SOLUTIONS TO THE JUDICIAL DOCTRINE OF STRICT COMPLIANCE WITH STATUTORY PROCEDURES FOR THE ADOPTION OF LOCAL LAND USE REGULATIONS

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I. INTRODUCTION

This article concerns the procedural problems faced by municipalities that attempt to adopt local land use regulations. Concern for procedural due process and citizen involvement has led state legislatures to prescribe detailed, complex procedures for municipalities to follow in the adoption of local regulations. These procedures may prescribe the identity of the local governmental bodies included in the zoning enactment process (and responsibilities),[1] the type of notice that the municipality must give to interested parties,[2] the nature of hearings before the planning commission and the legislative body,[3] the timing of legislative adoption,[4] and the necessary post-adoption procedure, such as recordation and publication.[5] Courts consider some of these procedures fundamental, and require strict compliance with their requirements;[6] they find other provisions worth only minimal compliance.

The imposition and strict enforcement of complex statutory procedures for zoning enactments may serve the competing interests of different types of property owners. The owner-developer usually will have a vested interest in the property's existing zoning classification (or the lack of one) when a proposed zoning enactment would impose greater restrictions on future uses of property. The owner-developer has an interest in learning that a zoning enactment has been proposed,

1. *See infra* text accompanying notes 95-102.
2. *See infra* text accompanying notes 103-37.
3. *See infra* text accompanying notes 138-48.
4. *See infra* text accompanying notes 149-52.
5. *See infra* text accompanying notes 153-57.
6. *See infra* text accompanying notes 104-06.

knowing the nature and extent of the zoning enactment, and having an opportunity to debate the merits of the proposal before the planning commission, the legislative body, or both. The owner-nondeveloper may have the same interests, but they normally come into play when a proposed zoning enactment would relax development restrictions.[7]

The judicial doctrine of strict compliance with statutory procedural requirements provides a successful legal strategy for owner-developers who intend to violate applicable local zoning ordinances. Taken together, the individually-reasonable procedures constitute a long course of low hurdles that a municipality seldom clears without error.[8] After owner-developers successfully challenge zoning ordinances on grounds of improper adoption procedures, they can proceed with development free of local land use and development controls. Therefore, owner-developers use procedural challenges to the adoption process as a defense to a municipal prosecution of a zoning violation, a basis for seeking an injunction against prospective enforcement action, a basis for requesting a writ of mandamus to issue a zoning permit when restrictive amendments have been adopted improperly, or a basis for requesting a declaratory judgment that a zoning ordinance is totally invalid.

This article first examines the approach of the Supreme Court of Vermont to procedural challenges to zoning enactments. The court's decisions have had a negative impact on local planning and zoning efforts in Vermont, as evidenced by its invalidation of seven municipal zoning bylaws or subdivision ordinances because of procedural deficiencies in the adoption process.[9] Similarly, lower Vermont courts have invalidated zoning bylaws in at least six municipalities for procedural deficiencies.[10] Furthermore, an independent evaluation of the adoption process in a sampling of thirty-six municipalities indicates that only eight had adopted comprehensive plans properly, and that only one had successfully followed, with appropriate documentation, the required process when adopting its zoning bylaw. The article next compares the approach of Vermont courts with that of courts nationwide, and assesses the extent of the negative impact of the judicial doctrine of strict compliance on planning and zoning efforts throughout the country. This is followed by an examination of the judicial doctrines and statutes that some states have developed to limit the vulnera-

7. *See, e.g.*, text accompanying note 155 (manner of post-adoption recordation).

8. *See infra* text accompanying notes 70-74.

9. *See infra* text accompanying notes 40-55.

10. *See infra* text accompanying note 63.

bility of zoning ordinances to attacks based upon improper adoption. The article concludes with an evaluation of these judicial and legislative remedies for their possible application in jurisdictions that require strict compliance with statutory procedural adoption requirements.[11]

II. VERMONT APPROACH

The current approach of Vermont courts toward procedural deficiencies in the adoption, amendment and repeal of comprehensive municipal plans and municipal zoning and subdivision bylaws has evolved through a series of Vermont Supreme Court decisions beginning in 1957. These decisions, reviewed in this section, establish the rationale for the strict statutory compliance requirement, and indicate the extent to which courts have applied this standard in Vermont.

Vermont courts acknowledge that the state delegates power to municipalities to adopt regulations.[12] Municipalities are "created for the purpose of performing such governmental functions as the states might devolve upon [them, and their] . . . sovereignty is restricted to specific governmental functions confided to [them] by the legislature."[13] Accordingly, the Vermont Supreme Court has stated that the "power of a municipality to accomplish zoning exists by virtue of authority delegated from the state, and may be exercised only in accordance with that delegation, subject to any terms and conditions imposed by the state."[14] The Court recognized that "the restrictions of zoning ordinances authorized by statute are in derogation of . . . common law [property rights] and should be strictly construed."[15] The court recently has reiterated this underlying basis of zoning law.[16]

In earlier challenges to the validity of particular zoning bylaws, the court inquired whether the bylaw complied generally with the appro-

11. *See infra* text accompanying notes 71-72.

12. *See, e.g.*, State v. Sanguinetti, 141 Vt. 349, 353, 449 A.2d 922, 925 (1982) (state authorizes municipalities to regulate zoning subject to the terms and conditions of the statute).

13. Thompson v. Smith, 119 Vt. 488, 498, 129 A.2d 638, 645 (1957).

14. *Sanguinetti*, 141 Vt. at 353, 449 A.2d at 925.

15. *In re* Willey, 120 Vt. 359, 365, 140 A.2d 11, 14 (1958).

16. *See, e.g.*, Town of Westford v. Kilburn, 131 Vt. 120, 126, 300 A.2d 523, 527 (1973) (struck portion of statute failing to comply with enabling act); Town of Milton v. LeClaire, 129 Vt. 495, 498, 282 A.2d 834, 836 (1971) (vote meeting requirements strictly construed). The court reiterated this standard in Kalakowski v. Town of Clarendon, 139 Vt. 519, 522, 431 A.2d 478, 479-80 (1981).

priate state statutes.[17] Then, in 1970, a majority of the court stated that "*strict* compliance . . . is the rule if a municipality is to have the right to exercise zoning authority."[18] The court continues to require strict compliance with the enabling statute.[19] The Vermont legislature recently superceded this judicial doctrine of strict compliance with a statutory revision that specifically requires courts to uphold the bylaw "if there has been substantial compliance with the procedural requirements" of the statute.[20]

When reviewing zoning regulations for strict compliance with the enabling statute, the court has stated that municipalities must comply with provisions of the enabling statute.[21] In *Richter*, a majority of the court required strict compliance with *procedural* requirements of the enabling statute.[22] The court had set forth the necessity for compli-

17. *See, e.g., Kilburn*, 131 Vt. at 122, 300 A.2d at 524. For example, in *Thompson* the court stated that a municipality must "pursu[e] correctly the authority conferred upon it by the enabling legislation." 119 Vt. at 499, 129 A.2d at 645. In *Town of Charlotte v. Richter*, the court required that there be "[s]ubstantial compliance with . . . requirements imposed in the enabling act." 128 Vt. 270, 271, 262 A.2d 444, 445 (1970).

18. Corcoran v. Village of Bennington, 128 Vt. 482, 493, 266 A.2d 457, 465 (1970) (emphasis added). Although the court cites *Richter* as precedent for requiring strict compliance, it appears that the court significantly increased the degree of compliance required for a zoning bylaw to be held valid. In the prior case of National Advertising Co. v. Cooley, 126 Vt. 263, 227 A.2d 406 (1967), Chief Justice Holden in dissent first set forth the standard of strict compliance. *Id.* at 273, 227 A.2d at 412 (Holden, C.J. dissenting).

19. *See, e.g.*, Galanes v. Town of Battleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978); Town of Waterford v. Pike Industries, Inc., 135 Vt. 193, 195-96, 373 A.2d 528, 530 (1977); *LeClaire*, 149 Vt. at 498, 282 A.2d at 836. The court made this clear in *Kalakowski*, 139 Vt. at 522, 431 A.2d at 479-80. In a subsequent decision that involved a tax statute, the court required substantial compliance, but specifically distinguished that case from *Kalakowski* because "zoning ordinances are in derogation of common law property rights." Rooney Vermont Associates v. Town of Pownal, 140 Vt. 150, 154, 346 A.2d 733, 735 (1981). The use of the term "substantial compliance" in a zoning case decided four months before *Kalakowski* appears to involve an unfortunate choice of terminology that was clarified in *Kalakowski*. Walker v. Town of Dorset, 139 Vt. 227, 231-32, 424 A.2d 1078, 1080 (1981). Note, however, that in Town of Mendon v. Ezzo, 129 Vt. 351, 278 A.2d 726 (1971), a case involving interim zoning regulation, strict compliance was not required: "[A]s a temporary expedient of limited duration, [the adoption of a temporary zoning plan] is not to be held to the same procedural strictures required of the adoption of the final plan." *Id.* at 357, 278 A.2d at 729.

20. VT. STAT. ANN. tit. 24, § 4494(a) (Supp. 1984). The legislature adopted this provision in 1982; the Supreme Court of Vermont has not yet construed it. Therefore, its impact on the direction of prior precedent requiring strict compliance is uncertain.

21. *See* Flanders Lumber & Bldg. Supply Co. v. Town of Milton, 128 Vt. 38, 46, 258 A.2d 804, 809 (1969).

22. *Richter*, 128 Vt. at 271, 262 A.2d at 445. Procedural compliance had been

ance with procedural requirements in *Thompson* by stating that "the selectmen [must] have prepared and adopted . . . a plan pursuant to the statutory procedure required. . . ."[23] Thus, the court remanded the *Richter* case for specific findings of fact concerning procedural compliance with the enabling act.[24] Subsequent decisions have continued to require specific procedural compliance.[25]

When a municipality has failed to comply strictly with statutorily required procedures for the adoption, amendment or repeal of a zoning bylaw, the court has found the bylaw to be void.[26] Chief Justice Holden, in dissent, set forth one rationale for voiding bylaws, explaining that an "ordinance . . . not constituted according to the mandatory directives of the [enabling legislation] . . . [a]mounts to an unwarranted assumption of zoning power which the town is not entitled to exercise."[27] In challenges to the validity of zoning ordinances, the challenger can overcome the presumption that the ordinance is valid[28] "upon the introduction of evidence tending to show lack of strict compliance with statutory procedures."[29]

In most of the zoning cases heard by the Vermont Supreme Court, parties have stipulated to the facts of the case, facts which generally show a lack of strict compliance with statutory procedures.[30] When, however, the municipality attempts to enforce a zoning ordinance, it bears the "burden of procuring a finding, based on sufficient evidence,

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specified by Chief Justice Holden in his dissent in *National Advertising Co.*, 126 Vt. at 273, 227 A.2d at 412 (Holden, C.J., dissenting).

23. *Thompson*, 119 Vt. at 500, 129 A.2d at 646.

24. *Richter*, 128 Vt. at 271-72, 262 A.2d at 445.

25. *See, e.g., Kalakowski*, 139 Vt. at 522, 431 A.2d 479-80; *LeClaire*, 129 Vt. at 499, 282 A.2d at 836.

26. *See, e.g., LeClaire*, 129 Vt. at 499-500, 282 A.2d at 836 (invalid adoption); *National Advertising Co.*, 126 Vt. at 266-67, 227 A.2d at 408 (invalid repeal).

27. *National Advertising Co.* 126 Vt. at 273, 227 A.2d at 412 (Holden, C.J., dissenting).

28. *See, Richter*, 128 Vt. at 271, 262 A.2d at 445. Note that a certificate of a municipal clerk is presumptive evidence of facts stated with regard to adoption procedures. VT. STAT. ANN. tit. 24, § 4474 (1975).

29. *Pike Industries, Inc.*, 135 Vt. at 196, 373 A.2d at 530. *Accord* Town of Shelburne v. Kaelin, 138 Vt. 247, 249, 415 A.2d 194, 196 (1980); Kalakowski v. John A. Russell Corp., 137 Vt. 219, 226, 401 A.2d 906, 910 (1979).

30. *See, e.g., Corcoran*, 128 Vt. at 484, 266 A.2d at 460 (factual issues resolved by a commissioner); *Kalakowski*, 139 Vt. at 521-23, 431 A.2d at 479-80 (parties agreed that there was no public hearing).

that the ordinance was valid."[31]

Despite the tendency of the Vermont Supreme Court to invalidate zoning ordinances for deficiencies in the adoption process, the court has suggested alternatives that would prevent invalidation. In *Thompson*, the court implied that curative legislation enacted by the Vermont General Assembly might have been sufficient to "cure, delete and render innocuous whatever legal infirmities that might have attended the enactment of the ordinance."[32] Nevertheless, such curative legislation, although adopted by the legislature,[33] was not required to save the zoning ordinance in *Thompson*. Applying the doctrine of severability, the court eliminated the invalid portion of the zoning ordinance.[34] The court then found " [e]ach and every statutory prerequisite of the enactment of the protective zoning ordinance had been accomplished to give the ordinance the force of law. . . ."[35] Thus, severability might preserve the validity of an ordinance, given an appropriate factual pattern.

Finally, the court may have left open the possibility that insubstantial procedural errors do not require invalidation. In *Town of Milton v. LeClaire*, the town contended that in the absence of prejudice to the appellant, the alleged procedural errors were not substantial enough to warrant the invalidation of the ordinance.[36] Rather than rule out such a defense, the court determined that the defect may have been prejudicial and restated the need for strict compliance.[37] A defense of insubstantial error also was raised in the *Kalakowski* case.[38] While the court appeared not to rule out such a defense, it held the defense inapplicable because the parties agreed that the errors were "substantial."[39]

The Vermont Supreme Court has decided nine cases involving challenges to the validity of municipal zoning or subdivision regulations

31. *Waterford*, 135 Vt. at 195, 373 A.2d at 530.

32. *Thompson*, 119 Vt. at 506, 129 A.2d at 649. Such curative legislation has been recongized as effective in curing procedural defects in other municipal endeavors. *See, e.g.*, Richford Sav. Bank & Trust v. Thomas, 111 Vt. 393, 17 A.2d 239 (1941) (tax assessment).

33. 1955 Vt. Acts No. 341.

34. *Thompson*, 119 Vt. at 504, 129 A.2d at 646.

35. *Id.*

36. *LeClaire*, 129 Vt. at 498, 282 A.2d at 836.

37. *Id.* at 499, 282 A.2d at 836.

38. *Kalakowski*, 139 Vt. at 524, 431 A.2d at 480-81.

39. *Id.* at 524, 431 A.2d at 481.

based on the municipality's failure to comply strictly with statutory procedural requirements.[40] In seven of these cases, parties representing development interests had initiated the procedural challenges. In five of these cases, the challenges were raised as defenses to a municipal enforcement action[41] or a citizen petition to enjoin construction;[42] the other cases were actions to compel a municipality to issue zoning permits.[43] In one case, the challenger raised the strict compliance issue in opposition to a change in zoning designations from residential to commercial.[44] In the remaining case, it was unclear which party raised the issue, or whether the court raised it on its own initiative.[45]

In each of these cases, however, the court found procedural deficiencies, such as: 1) Referral of a bylaw to a party not included within the statutory procedures;[46] 2) lack of public hearings;[47] 3) insufficient time between public notice and municipal action;[48] 4) no appointment of a zoning commission;[49] 5) lack of preliminary and final reports submitted from a zoning commission to the municipal legislative body;[50] and 6) insufficient warnings prior to adoption.[51] In all but two of these cases, the court held invalid the adoption, amendment or repeal of the

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40. *See Kalakowski*, 139 Vt. at 519, 431 A.2d at 478; *Pike Industries, Inc.*, 135 Vt. at 193, 373 A.2d at 528; *LeClaire*, 129 Vt. at 495, 282 A.2d at 834; *Ezzo*, 129 Vt. at 351, 278 A.2d at 726; *Corcoran*, 128 Vt. at 482, 266 A.2d at 457; *Richter*, 128 Vt. at 270, 262 A.2d at 444; *Flanders*, 128 Vt. at 38, 258 A.2d at 804; *National Advertising Co.*, 126 Vt. at 263, 227 A.2d at 406; *Thompson*, 119 Vt. at 488, 129 A.2d at 638.

41. *See Pike Industries, Inc.*, 135 Vt. at 193, 373 A.2d at 528; *LeClaire*, 129 Vt. at 495, 282 A.2d at 834; *Ezzo*, 129 Vt. at 351, 278 A.2d at 726; *Richter*, 128 Vt. at 270, 262 A.2d at 444.

42. *See Thompson*, 119 Vt. at 488, 129 A.2d at 638.

43. *See Corcoran*, 128 Vt. at 482, 266 A.2d at 457; *Flanders*, 128 Vt. at 38, 258 A.2d at 804.

44. *See Kalakowski*, 139 Vt. at 519, 431 A.2d at 478.

45. *National Advertising Co.*, 126 Vt. at 263, 227 A.2d at 406.

46. *See Thompson*, 119 Vt. at 500, 129 A.2d at 646.

47. *See Kalakowski*, 139 Vt. at 522-23, 431 A.2d at 480; *Corcoran*, 128 Vt. at 493, 266 A.2d at 465; *Richter*, 128 Vt. at 271, 262 A.2d at 445; National Advertising Co., 126 Vt. at 266, 227 A.2d at 407-408.

48. *See Corcoran*, 128 Vt. at 493, 266 A.2d at 465; *Richter*, 128 Vt. at 271, 262 A.2d at 445; *Flanders*, 128 Vt. at 42, 258 A.2d at 807.

49. *Corcoran*, 128 Vt. at 492-93, 266 A.2d at 465; *Richter*, 128 Vt. at 271, 262 A.2d at 445.

50. *Corcoran*, 128 Vt. at 492-93, 266 A.2d at 465.

51. *LeClaire*, 129 Vt. at 498, 282 A.2d at 835 (no title, date of selectmen's approval, or notification that a copy was posted); *Ezzo*, 129 Vt. at 356, 278 A.2d at 729 (no brief summary of principal provisions nor reference to where one could examine copies.

municipal ordinance.[52] The development interests prevailed in five of the seven cases when they raised the issue of procedural deficiencies,[53] losing only in the cases involving severability[54] and interim regulations.[55]

The rationale for requiring strict compliance with statutory procedural requirements has two bases. First, the supreme court has observed that zoning regulations are in derogation of common law property rights.[56] The court has implied that when doubt exists about the validity of a regulation that restricts the use of land, the courts should resolve the issue in favor of the land owner.[57] Second, the court has stressed that the statutory requirements help ensure procedural due process. Specifically, the requirements for public hearings on proposed land use regulations seek the involvement of local government and citizens.[58] They also provide an opportunity for interested parties to express their approval of or objection to the proposed regulations;[59] the hearings permit officials to become aware of citizen sentiment and prompt officials to consider making appropriate revisions.[60] The notice requirements also are intended to inform voters of proposed regulations and allow them an opportunity for study and consideration.[61] Voters should be able to rely upon the accuracy of any public notice, thereby precluding further changes without subsequent notice and public hearing. The court has implied that such notice requirements, along with strict compliance, are necessary to ensure procedural due process.[62]

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52. In *Thompson*, the court used the doctrine of severability to save the regulations by severing the portion of the ordinance that had been improperly adopted. *See supra* notes 36-39 and accompanying text. In *Ezzo*, the only case involving interim regulations, the court found substantial compliance sufficient. *See infra* note 55.

53. *See Pike Industries*, 135 Vt. at 193, 373 A.2d at 528; *LeClaire*, 129 Vt. at 495, 282 A.2d at 834; *Corcoran*, 128 Vt. at 482, 266 A.2d at 457; *Richter*, 128 Vt. at 270, 262 A.2d at 444; *Flanders*, 128 Vt. at 38, 258 A.2d at 804.

54. *See Thompson*, 119 Vt. at 488, 129 A.2d at 638.

55. *See Ezzo*, 129 Vt. at 351, 278 A.2d at 726.

56. *See supra* text accompanying notes 12-17.

57. *See In re* Willey, 120 Vt. at 365, 140 A.2d at 14.

58. Kalakowski, 139 Vt. at 523, 431 A.2d at 480.

59. *National Advertising Co.*, 126 Vt. at 273, 227 A.2d at 412 (Holden, C.J., dissenting).

60. *Kalakowski*, 139 Vt. at 523, 431 A.2d at 480-81; *Ezzo*, 129 Vt. at 357-58, 278 A.2d at 729-30.

61. *LeClaire*, 129 Vt. at 496-97, 282 A.2d at 835.

62. *Ezzo*, 129 Vt. at 358, 278 A.2d at 730. The court has invalidated zoning ordi-

Although the Vermont Supreme Court invalidated zoning and subdivision regulations in only seven cases, those decisions, along with guidelines established in related cases, have had a significant impact on municipal land use controls in Vermont, reaching far beyond the boundaries of those seven municipalities. Lower Vermont courts have followed the Vermont Supreme Court's precedent and invalidated zoning regulations in at least six municipalities throughout the state.[63] District Environmental Commissions, in deciding cases under Vermont's Land Use and Development Law[64] have refused to consider the provisions of local municipal plans[65] in at least two cases.[66] Municipalities also have been affected in more subtle and indirect ways. Towns sometimes have chosen not to enforce their local regulations rather than have the entire ordinance invalidated when a defendant challenges the procedures followed in its adoption.[67] Other towns have converted permanent regulations to interim regulations to maintain their effectiveness temporarily when procedural adoption deficiencies have become evident.[68] Efforts to ensure compliance with statutory procedural requirements have caused municipalities to retain legal

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nances based on procedural deficiencies up to twelve years after the process complained of. *See National Advertising Co.*, 126 Vt. at 264-65, 227 A.2d at 406-07. *See also infra* note 179 (examples of invalidation ranging from 10-45 years).

63. WINDHAM REGIONAL PLANNING & DEVELOPMENT COMMISSION, MEMORANDUM TO VERMONT SENATE ENERGY AND NATIONAL RESOURCES COMMITTEE 2 (January 19, 1982).

64. VT. STAT. ANN. tit. 10, ch. 151 (1984).

65. Required under VT. STAT. ANN. tit. 10, § 6086 (a) (10) (1984).

66. *See* District Environmental Commission 3, Application 3W0246—Hawk Mountain Corporation, Nov. 16, 1978, pp. 23-26 (procedural deficiency was the insertion by the Pittsfield Board of Selectmen of two words into the town plan prior to its adoption, without resubmission of this plan to the Pittsfield Planning Commission); District Environmental Commission 1, Application 1R0291—Pike Industries, Inc. and Kenneth & Thelma Kellogg, May 15, 1978, pp. 5-8, 10 (procedural deficiencies included: 1) Copies of proposed town plan sent to adjacent municipalities and government agencies less than 15 days prior to planning commission's public hearing, and 2) selectmen's public hearing was held more than 90 days following submission of the proposed plan by the planning commission.).

67. Stephen Fitch, former Town Manager of Putney, Vermont. Telephone interview Apr. 17, 1984.

68. This is a temporary solution, however, as interim regulations may be valid for a maximum of three years VT. STAT. ANN. 24, § 4410(a) & (f) (Supp. 1984). It is unclear whether municipalities may convert to interim regulations if they previously had interim regulations for a three-year period. Moreover, the restrictions under interim regulations may be less restrictive than they would be under permanent regulations. For example, the interim regulations classify proposals for uses not permitted by the bylaw

counsel to supervise the process, and to be overly cautious in complying with statutory procedures.[69] The legal costs associated with the adoption or amendment of municipal land use controls may make small, fiscally-conservative Vermont communities more reluctant to initiate such efforts.

The actual invalidation of a municipal comprehensive plan or zoning bylaw undermines the community's efforts at local land planning. Following invalidation, development may proceed unrestrained by local planning restrictions, at least until the community properly adopts new regulations. Also, invalidation frustrates the will of the majority of the municipality's residents that had voted to approve local regulations. Subsequent public disillusionment with the entire process might stall the re-adoption of local land use regulations.

The statutory procedural requirements for adoption, amendment or repeal of local comprehensive plans and zoning and subdivision bylaws are lengthy and complex.[70] Part of the language of the statute may be unclear or ambiguous, which may make its provisions difficult to interpret. Thus, strict compliance becomes a highly problematical goal. A further problem is inadvertent errors by part-time, untrained municipal officials who do not realize the importance of strict compliance with statutory procedures, and, therefore, do not carefully follow the statutory procedures or document each step they take.

An informal survey conducted by the Vermont Natural Resources Council (V.N.R.C.)[71] revealed the extent of the problem of strict compliance with statutory procedural requirements. Of the thirty-six communities where the V.N.R.C. reviewed compliance of communities with statutory procedural requirements for the adoption of local land use controls, they found seventeen had some degree of procedural deficiency.[72] These inadvertent procedural errors, difficult to avoid or

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as conditional uses, *id.* § 4410(d), rather than as a use variance under permanent regulations, theoretically precluded. *Id.* § 4473.

69. For example, publishing an entire ordinance in a newspaper to preclude later claims that a "brief summary" was inadequate. *See* VT. STAT. ANN. tit. 24, § 4447 (Supp. 1984).

70. *Id.* §§ 4384-87, 4403-04.

71. Results of the 1978 survey conducted by the Vermont Natural Resources Council. Interview with Darby Bradley, legal counsel to the VNRC, October 18, 1983.

72. This survey studied adoption procedures for comprehensive plans and zoning bylaws in 36 communities. With regard to the adoption of comprehensive plans, eight communities (22%) had documented evidence showing compliance with statutory procedures. Two of the communities followed procedures that might be defective, depend-

remedy, expose municipal land use regulations to future legal challenges on the basis of a minor technical deficiency in the adoption process. Another problem that became evident through the V.N.R.C. study is that municipalities often fail to maintain adequate records to document the procedures they actually followed.[73] Thus, even when municipalities have complied fully with the statutory procedural requirements, they cannot prove they did so. Statutory provisions that give the municipality the benefit of a rebuttable presumption that it properly followed the statutory procedures, however, have alleviated this problem somewhat.[74]

III. NATIONWIDE APPROACH

A. *Fundamental Considerations*

The attitude of the Vermont courts toward technical, procedural deficiencies in the adoption or amendment of zoning ordinances is not unique. Courts throughout the country often have shown a similar judicial distaste for a municipality's failure to follow statutory procedures. This part of the article examines the background for this strict judicial attitude and surveys the types of procedural deficiencies that

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ing upon a court's interpretation of the statutory requirements. With regard to the adoption of zoning bylaws, only 11 of the 36 communities surveyed had adopted zoning bylaws. One community (9%) had documented evidence showing compliance with statutory procedures while six (55%) either had documented evidence showing noncompliance (four) or had zoning bylaws based on invalid town plans (two). One Community (9%) followed procedures that might be defective, depending upon a court's interpretation of the statutory requirements. Noted defects included inadequate public notice (lack of summary, less than 15 days notice, failure to notify adjoining towns), failure to notify planning commission of selectmen's hearing, changes made after final selectmen's hearing, failure of selectmen to hold a public hearing, and improper adoption (failure to adopt, adoption prior to public notice and hearing, adoption before or after the 60 day period prescribed by statute).

73. With regard to the adoption of comprehensive plans, 16 communities (44%) had no records that one could examine to determine procedural compliance. With regard to the adoption of zoning bylaws, three communities (27%) had no records that one could examine to determine procedural compliance.

74. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4474 (Supp. 1984); IND. CODE ANN. § 36-7-4-1020 (Burns 1981). *See also* City of Alamogordo v. McGee, 64 N.M. 253, 327 P.2d 321 (1958). Despite the 1974 legislation, one authority was aware of no municipality in Vermont that had provided a clerk's certificate regarding the procedures used in the adoption of town plans or zoning bylaws, until compliance by the Windham Regional Planning and Development Commission in 1981. Interview with William Mitchell, Chief of Technical Assistance, Department of Housing and Community Affairs, Vermont Agency of Economic Development and Community Affairs (Apr. 6, 1984).

have resulted in the invalidation of zoning ordinances throughout the country.

1. Presumption of Validity

In general, courts accord zoning ordinances of local legislative bodies an initial presumption of validity.[75] Courts extend this presumption to the procedural manner by which the municipality adopted the zoning ordinance, if the appropriate officers have signed the ordinance, and the clerk of the legislative body has certified it.[76] This presumption disappears, however, if a plaintiff provides evidence indicating a failure to follow statutory procedures properly.

2. Basis for Judicial Review

The review of procedural deficiencies in the adoption of a zoning ordinance becomes especially important when considering the degree of procedural noncompliance that courts will tolerate before invalidating the ordinance. Courts view procedural requirements as one method of discouraging an arbitrary exercise of power.[77] The Supreme Judicial Court of Massachusetts has set forth two additional reasons for the primacy of procedural compliance. The first is based on the theory of delegation of power: "It is implicit that a delegated power can be exercised only to the extent to which a delegation has been made, and to the extent that the conditions attached to the grant of power have been fulfilled."[78] The second rationale is that an exercise of zoning authority in a manner inconsistent with the provisions of an enabling act is ultra vires.[79]

Another often-stated reason for close judicial scrutiny of adoption procedures is that of an individual's right to procedural due process.

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75. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

76. *See* Smith v. Juillerat, 161 Ohio St. 424, 428, 119 N.E.2d 611, 613 (1954). *See also* City of Alamogordo v. McGee, 64 N.M. 253, 259, 327 P.2d 321, 325 (1958) (prepassage requirements regarding public hearing of notice thereof are presumed met in view of presumption of validity as to ordinance and due performance of duty by public officials).

77. *See, e.g.*, Tonroy v. Lubbock, 242 S.W.2d 816, 819 (Tex. Civ. App. 1951).

78. 1 RATHKOPH, THE LAW OF ZONING AND PLANNING § 10.01 (4th Ed. 1984) (citing Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 517, 275 N.E.2d 525 (1971)).

79. *See* Town of Canton v. Bruno, 361 Mass. 598, 602-04, 282 N.E.2d 87, 90-91 (1972). *See also* Hartunian v. Matteson, 109 R.I. 509, 515-16, 288 A.2d 485, 489 (1972) (zoning ordinance expanding or abridging rights granted by enabling act is ultra vires).

Courts have stated that inadequate statutory procedures or a failure to comply with appropriate statutory procedures will constitute a denial of due process of law.[80] The applicability of substantive due process standards to the adoption of zoning ordinances has been questioned, as ordinance adoption represents a legislative function. Courts have not been reluctant to apply procedural due process standards, however, and there is a growing tendency to view some types of zoning activity as administrative or quasi-judicial.[81]

3. Applicable Procedural Requirements

The minimal procedures required for the adoption of local zoning ordinances usually are set forth in state enabling legislation. As noted below, courts consider these statutory guidelines to be the minimal standards the enacting body must meet. Local charters or zoning ordinances may specify additional procedural guidelines. Some courts have held that procedures provided for in a local charter will supercede conflicting procedures provided by statute,[82] while other courts reach the opposite result.[83] Some courts have held that procedural requirements established by local ordinances are mandatory prerequisites,[84] while other courts have held such requirements are discretionary.[85] Constitutional provisions and preemptive state law, however, would limit any such local ordinance provision.[86] In some states that have

80. *See, e.g.*, Hart v. Bayless Inv. & Trading Co., 86 Ariz. 379, 388, 346 P.2d 1101, 1108 (1959); Gilbert v. Stockton Port Dist., 7 Cal. 2d 384, 391, 60 P.2d 847, 850 (1936); Bell v. Studdard, 220 Ga. 756, 758-59, 141 S.E.2d 536, 539 (1965); American Oil Corp. v. City of Chicago, 29 Ill. App. 3d 988, 990-93, 331 N.E.2d 67, 69-71 (1975).

81. *See* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976); Kahn, *In Accordance With A Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L. Q. 1011 (1979).

82. Adler v. City Council of City of Culver City, 184 Cal. App. 2d 763, 768 n. 1, 7 Cal. Rptr. 805, 808 n. 1 (1960); Thompson v. City of Miami, 167 So. 2d 841, 843 (Fla. 1964).

83. *See, e.g.*, Kubik v. City of Chicopee, 535 Mass. 514, 516, 233 N.E.2d 219, 221 (1967); Swinehart v. Borough of Pottstown, 1 Pa. D & C 3d 405, *aff'd*, 27 Pa. Comm'w. 174, 365 A.2d 909 (1976).

84. *See* South Jonesboro Civic Ass'n v. Thornton, 248 Ga. 65, 66-67, 281 S.E.2d 507, 508-09 (1981); Paliotto v. Town of Islip, 31 Misc. 2d 447, 453-54, 224 N.Y.S.2d 466, 475-76 (Sup. Ct. 1962) *rev'd on other grounds*, 122 A.D.2d 930, 256 N.Y.S.2d 58 (1964); Lee v. Simpson, 44 N.C. App. 611, 612, 261 S.E.2d 295, 295-96 (1980).

85. *See* Durand v. Superintendent of Pub. Bldgs., 354 Mass. 74, 235 N.E.2d 550, 551-52 (1968); Pumo v. Borough of Norristown, 404 Pa. 475, 172 A.2d 828, 829 (1961).

86. Bayless v. Limber, 26 Cal. App. 3d 463, 468, 102 Cal. Rptr. 647, 649 (1972).

enacted constitutional "home rule" provisions, local procedural requirements may supercede conflicting statutory requirements.[87]

When reviewing procedural errors in the adoption of a local zoning ordinance, a court must make two determinations. First, the court must decide whether the procedures violated by the municipality are mandatory or directory. While courts generally consider procedural requirements to be mandatory, they may view procedures that are imposed by local regulations or charter (as contrasted with those specifically imposed by statute) as discretionary. Statutory language also may be unclear regarding whether a specific procedure is required by the statute or only recommended. Courts may find that although a statute only recommends a specific provision, nevertheless, due process requires it. The second and more crucial determination, however, is the degree of compliance that the court will require of the municipality.

4. Standard of Review

Courts differ widely in the latitude they allow municipalities in their efforts to comply with mandatory statutory procedures. Not all procedural defects or irregularities will result in the invalidation of the challenged zoning ordinances. At one end of the spectrum, some state courts require strict compliance with mandatory statutory procedural requirements; any deviation will invalidate the zoning ordinance. As noted above, some courts base this attitude on procedural due process considerations, others on the derogation of common law property rights by zoning requirements.[88] On the other hand, some courts only require substantial compliance with mandatory statutory procedural requirements. A review of state court decisions indicates that twenty-three states usually require strict compliance,[89] while eight states re-

See also San Pedro North, Ltd. v. City of San Antonio, 562 S.W.2d 260, 262 (Tex. Civ. App. 1968), *cert. denied*, 439 U.S. 1004, *reh'g. den.*, 439 U.S. 1135 (1979) (a city may not add a step to a statutory zoning procedure).

87. Casper v. Hetlage, 359 S.W.2d 781, 790 (Mo. 1962).

88. Specht v. City of Page, 128 Ariz. 593, 597, 627 P.2d 1091, 1095 (Ct. App. 1981); Carl M. Freeman Assocs., Inc. v. Green, 447 A.2d 1179, 1182 (Del. 1982).

89. *See* Summit Properties, Inc. v. Wilson, 26 Ariz. App. 550, 550 P.2d 104 (1976); Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); Steiner, Inc. v. Town Plan. and Zoning Comm'n, 149 Conn. 74, 175 A.2d 559 (1961); Carl M. Freeman Assos., Inc. v. Green, 447 A.2d 1179 (Del. 1982); City of Hollywood v. Pettersen, 178 So. 2d 919 (Fla. Dist. Ct. App. 1965); South Jonesboro Civic Assocs., Inc. v. Thornton, 248 Ga. 65, 281 S.E.2d 507 (1981); Citizens for Better Gov't v. County of Valley, 95 Idaho 320, 508 P.2d 550 (1973); Carson v. McDowell, 203 Kan. 40, 452 P.2d 828 (1969);

quire only substantial compliance.[90]

What precisely constitutes "substantial" compliance with statutory requirements is not always clear. One court suggested that conformity with the spirit of the statutory procedures will be sufficient to hold the adoption valid.[91] Other courts considered prejudice to the plaintiff to determine whether a defect was substantial. Finally, some states may require strict compliance with one element of the statutory procedures, such as notice,[92] but require only substantial compliance with other procedures, such as entrance of an ordinance into the town ordinance book.[93] One court has held that failure to comply with procedural requirements that are "ministerial" will not invalidate the proceedings.[94]

Regardless of the standard of review utilized by the reviewing court, the enormous potential for error in zoning enactments becomes apparent through a review of technical procedural deficiencies that have been used to invalidate zoning ordinances. The next sections examine

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Creative Displays, Inc. v. City of Florence, 602 S.W.2d 682 (Ky. 1980); Mills v. City of Baton Rouge, 210 La. 830, 28 So. 2d 447 (1946); Montgomery v. Board of County Comm'rs, 256 Md. 597, 261 A.2d 447 (1970); Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972); State ex rel. Freeze v. City of Cape Girardeau, 523 S.W.2d 123 (Mo. Ct. App. 1975); Board of Comm'rs v. McNally, 168 Neb. 23, 95 N.W.2d 153 (1959); Mulligan v. City of New Brunswick, 83 N.J. Super. 185, 199 A.2d 82 (1964); Village of Williston Park v. Israel, 191 Misc. 6, 76 N.Y.S.2d 605 (1948), *aff'd*, 276 A.D. 968, 94 N.Y.S.2d 921, *aff'd*, 301 N.Y. 713, 95 N.E.2d 208 (1950); George v. Town of Edenton, 31 N.C. App. 648, 230 S.E.2d 695 (1976), *rev'd*, 294 N.C. 679, 242 S.E.2d 877 (1978); Bruscino Development, Inc. v. Cummings, 118 Ohio App. 199, 193 N.E.2d 736 (1962); Voight v. Saunders, 206 Okla. 318, 243 P.2d 654 (1952); Mazeika v. American Oil Co., 383 Pa. 191, 118 A.2d 142 (1955); Corcoran v. Village of Bennington, 128 Vt. 482, 266 A.2d 457 (1970); Shelton v. City of Bellevue, 73 Wash. 2d 28, 435 P.2d 949 (1968); Schoeller v. Board of County Comm'rs. 568 P.2d 869 (Wyo. 1977).

90. *See* Lynnwood Property Owners v. Lands Described in Complaint, 359 So.2d 357 (Ala. 1978); Orth v. Board of County Comm'rs, 158 Colo. 540, 408 P.2d 974 (1965); Speilman v. County of Rock Island, 103 Ill. App. 3d 514, 431 N.E.2d 770 (1982); Town of Canton v. Bruno, 361 Mass. 598, 282 N.E.2d 87 (1972); Itasca County v. Rodenz, 268 N.W.2d 423 (Minn. 1978); V.M. Stevens, Inc. v. Town of South Hempton, 114 N.H. 118, 316 A.2d 179 (1974), *modified*, 338 A.2d 110 (1975); Nesbit v. City of Albuquerque, 91 N.M. 455, 575 P.2d 1340 (1977); Charlestown Homeowners Ass'n, Inc. v. LaCoke, 507 S.W.2d 876 (Tex. Civ. App. 1974).

91. *See* Jarvis Acres, Inc. v. Zoning Comm'n, 163 Conn. 41, 45-48, 301 A.2d 244, 246-48 (1972).

92. Village of Island Park v. J.E.B. Associates, Inc., 21 Misc. 2d 249, 252, 190 N.Y.S.2d 77, 81 (Sup. Ct. 1959).

93. Northern Operating Corp. v. Town of Ramapo, 26 N.Y.2d 404, 409-10, 311 N.Y.S.2d 286, 290-91, 259 N.E.2d 723, 726-27 (1970).

94. Board of City Comm'rs v. Berner, 5 Kan. App.2d 104, 108-09, 613 P.2d 676, 681 (1980).

errors in the areas of actors, notice, public hearings, adoption, and post-adoption activities.

B. *Actors*

The Standard State Zoning Enabling Act (SZEA)[95] required the appointment of a municipal zoning commission[96] to receive and review any proposal for an initial zoning ordinance prior to its enactment by the legislative body. Although the zoning commission's report is advisory only, courts generally have deemed mandatory the statutory requirement that the commission be formed and utilized.[97] Courts have held that failure to comply invalidates the resulting initial zoning ordinance.[98]

State enabling acts sometimes require the legislative body to refer a proposed zoning ordinance or amendment to the municipal planning commission for its review and recommendation. Courts view this procedure as mandatory,[99] and failure to refer will invalidate the resulting ordinance or amendment.[100]

Some courts, recognizing the potential extra-municipal impact of local zoning ordinances, have given regional or state agencies a limited power of review over local zoning activities.[101] Courts also have held that communities must comply with these requirements.[102]

C. *Notice*

Federal and state due process and equal protection clauses require

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95. STANDARD STATE ZONING ENABLING ACT, recommended by the U.S. Dept. of Commerce in 1926, *reprinted in* 5 RATHKOPF, THE LAW OF ZONING AND PLANNING 765 (4th ed. 1984).

96. STANDARD STATE ZONING ENABLING ACT § 6 (1958).

97 *See, e.g.*, Connell v. Brunswick, 5 A.D.2d 932, 172 N.Y.S.2d 266 (3d Dep't 1958).

98 *See* Talbert v. Planning Comm'n, 230 So. 2d 920, 925 (La. App. 1970); Missouri *ex rel* Kramer v. Schwartz, 336 Mo. 932, 940, 82 S.W.2d 63, 67 (1935).

99. *See* Smart v. Lloyd, 370 S.W.2d 245, 248 (Tex. Civ. App. 1963).

100. *See* Johnson v. Board of County Comm'rs, 34 Colo. App. 14, 19, 523 P.2d 159, 162 (1974), *aff'd sub. nom.* Colorado Leisure Products v. Johnson, 187 Colo. 443, 532 P 2d 742 (1975). *See also* Town of Canton v. Bruno, 36 Mass. 598, 282 N.E.2d 87, 92 (1972).

101. *See, e.g.*, N.Y. GEN. MUN. LAW § 239-m (Consol. 1982).

102. Village of Farmingdale v. Inglis, 29 Misc. 2d 727, 727-28, 219 N.Y.S.2d 380, 381-82 (Sup. Ct. 1961), *modified on other grounds and aff'd*, 17 A.D. 2d 655, 230 N Y.S.2d 863 (1962).

the community to give notice to affected landowners of pending zoning enactments.[103] When the provisions of a state enabling statute or a municipal ordinance fail to prescribe notice provisions that meet due process requirements, courts have held them invalid.[104] Even when only substantial compliance with statutory requirements is required and the case does not involve prejudice, some courts have held that notice requirements are of such fundamental constitutional importance that municipalities must strictly comply. A court may demand notice that is greater than that required by an enabling statute if either: 1) A local ordinance contains stricter provisions;[105] or 2) personal service is possible.[106] Constructive rather than actual notice normally is sufficient.[107]

Following the lead of the SZEA,[108] many state statutes require notice fifteen days prior to a public hearing. Courts generally construe the timing requirement as mandatory, and have required strict compliance, even where there was a lack of prejudice.[109] Moreover, courts have held that this prescribed notice period must constitute "clear days," those including neither the day of publication of notice nor the day of the hearing.[110] A one-day discrepancy in the statutory notice period often has been sufficient to invalidate a zoning enactment,[111] although one court refused, on the basis of equity, to reach a similar

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103. *See* F.P. Plaza, Inc. v. Waite, 230 Ga. 161, 163-65, 196 S.E.2d 141, 144, *cert. denied*, 414 U.S. 825 (1973); Bell v. Studdard, 220 Ga. 756, 759-60, S.E.2d 536, 539 (1965); Nesbit v. City of Albuquerque, 91 N.M. 455, 458, 575 P.2d 1340, 1343 (1977).

104. *See, e.g.*, Gilbert v. Stockton Port Dist., 7 Cal. 2d 384, 387, 60 P.2d 847, 850 (1936).

105. South Jonesboro Civic Ass'n v. Thorton, 248 Ga. 65, 66, 281 S.E.2d 507, 508-09 (1981); *cf.* Kelly v. Philadelphia, 382 Pa. 439, 448, 115 A.2d 238, 245 (1955).

106. *See* American Oil Corp. v. City of Chicago, 29 Ill. App. 3d 988, 991, 331 N.E.2d 67, 70 (1975).

107. *See* Annot., 96 A.L.R.2d 449 (1964).

108. STANDARD STATE ZONING ENABLING ACT, *supra* note 96, at § 6.

109. *See* George v. Town of Edenton, 31 N.C. App. 648, 650, 230 S.E.2d 695, 697 (1970); Kelly v. City of Philadelphia, 328 Pa. 459, 465, 115 A.2d 238, 245 (1955).

110. *See, e.g.*, Treat v. Plan. and Zon. Comm'n, 145 Conn. 136, 139, 139 A.2d 601, 603 (1958); Alderman v. West Haven, 124 Conn. 391, 396-97, 200 A. 330, 332 (1938); Carson v. McDowell, 203 Kan. 40, 42, 452 P.2d 828, 829-30 (1969).

111. *See, e.g.*, Builders Dev. Co. v. City of Opelika, 360 So. 2d 962, 964-65 (Ala. 1978); Alderman v. Town of West Haven, 124 Conn. at 396-97, 200 A at 332; Save the Bay Committee, Inc. v. Mayor of Savannah, 227 Ga. 436, 438, 181 S.E.2d 351, 360 (1871); Breaux v. Oberlin, 247 So. 2d 195, 197 (La. App. 1971); Pyramid Corp. v. DeSoto County Bd. of Supervisors, 366 F. Supp. 1299, 1302 (D. Miss. 1973).

result.[112]

Publication of notice in a newspaper, rather than personal service, meets due process requirements in some cases,[113] although some enabling acts or local ordinances also may require mailing. Publication must be by a specific legal notice rather than through a general news story.[114] Courts generally hold that failure to publish a hearing notice properly will invalidate a zoning enactment.[115] If statutes provide for the posting of the property that is the subject of a zoning enactment, failure to post properly also will result in the invalidation of the enactment;[116] this includes cases in which the posted sign was smaller than that prescribed by statute[117] or the posting was not close enough to the subject property.[118]

Another notice concern is determining the identity of the parties entitled to receive notice. In addition to property owners that may be affected significantly by a zoning enactment, enabling statutes may require that notice be sent to additional parties. These additional parties may include adjoining municipalities and regional or state agencies.[119] Failure to provide appropriate notice to adjoining towns[120] or regional planning commissions[121] has resulted in the invalidation of zoning enactments.

A final problem with notice concerns the sufficiency of the notice

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112. Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 518, 275 N.E.2d 525, 530 (1971).

113. *See* Wanamaker v. City Counsel, 200 Cal. App. 2d 453, 458, 19 Cal. Rptr. (1962); F.P. Plaza, Inc. v. Waite, 230 Ga. 161, 168, 196 S.E.2d 141, 144, *cert. denied*, 414 U.S. 825 (1973); Helms v. City of Charlotte, 255 N.C. 647, 651, 122 S.E.2d 817, 821 (1961)

114. Hart v. Bayless Inv. and Trading Co., 86 Ariz. 379, 346 P.2d 1101, 1108 (1959); Gendron v. Borough of Naugatuck, 21 Conn. Sup. 86, 144 A.2d 818, 823 (1958).

115. Johnson & Wales College v. DiPrete, 448 A.2d 1271, 1277-78 (R.I. 1982).

116. *See* Maher v. Town Plan. and Zoning Comm'n, 154 Conn. 420, 426-27, 226 A.2d 397, 400 (1967); Wright v. Zoning Bd. of Appeals, 174 Conn. 488, 489, 391 A.2d 146, 147-48 (1978); Baker v. Montgomery County Council, 241 Md. 178, 181, 215 A.2d 831, 834 (1966).

117. *See* Sirota v. Kaye Homes, 208 Ga. 113, 114, 65 S.E.2d 597, 598 (1951).

118. *See* Tolman v. Salt Lake County, 20 Utah 2d 310, 316-18, 437 P.2d 442, 447-48 (1968).

119. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4403(c) (1984).

120. Bohan v. Town of Southhampton, 227 N.Y.S.2d 712, 716 (Sup. Ct. 1962).

121. Simmons v. Zoning Comm'n, 35 Conn. Sup. 246, 249, 407 A.2d 191, 194 (1979).

itself. The United States Supreme Court has held that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[122] In addition, the "notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance."[123] In the context of a zoning enactment, notice must "reasonably [apprise] those for whom it was intended of the nature of the pending proposal to the extent that they can determine they should be present at the hearing."[124] The notice "should be sufficiently specific to warn the recipient that he may be affected by the contemplated action *and a notice deficient in this respect is no notice at all.*"[125] Furthermore, the notice must be comprehensible to lay persons.[126] It is against these standards that courts measure the legal sufficiency of a notice.

Notices must convey three types of information: 1) The identity of the land affected by the proposed regulation; 2) the kind and quantity of the restriction under consideration; and 3) the time and place of the hearing.[127] When it is not possible to identify, from the text of the notice, the identity of the land to be affected, the zoning enactment is void.[128] Notices that do not state clearly the nature of the proposed enactment may be insufficient.[129] Notices that omit information on the hearing itself[130] or either have failed to state the place[131] or time[132] of

122. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

123. *Id.*

124. Midway Protective League v. City of Dallas, 552 S.W.2d 170, 175 (Tex. Civ. App. 1977).

125. *Id.* (emphasis added).

126. Vizzi v. Town of Islip, 71 Misc. 2d 483, 485, 336 N.Y.S.2d 520, 523 (1972).

127. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.14 (2d ed. 1976).

128. *See, e.g.*, Chase v. City of Glen Cove, 41 Misc. 2d 889, 993-94, 246 N.Y.S.2d 975, 980-81 (1964). *But see*, Chess v. Pima County, 126 Ariz. 233, 234, 613 P.2d 1289, 1290 (Ariz. App. 1980) ("Notice of a public hearing is adequate if it affords an opportunity to any person, by the exercise of reasonable diligence, to determine if his property would be affected and to what extent.").

129. *See, e.g.*, Holly Dev., Inc. v. Board of County Comm'rs, 140 Colo. 95, 102, 342 P.2d 1032, 1036 (1959); Southside Civic Ass'n v. Guaranty Sav. Assurance Co., 329 So.2d 767, 771 (La. App. 1976).

130. *See, e.g.*, Keating Int'l Corp. v. Township of Orlon, 51 Mich. App. 122, 124, 214 N.W.2d 551, 553 (1974); *In re* Kurren's Appeal 417 Pa. 623, 626, 208 A.2d 853, 856 (1965).

131. *See, e.g.*, Jennings v. Suggs, 180 Ga. 140, 141, 178 S.E.282, 283 (1935).

the hearing also may be insufficient. Although some enabling statutes permit brief summaries of the proposed action to suffice as a public notice,[133] the utilization of such summaries can lead to an invalidation.[134] In cases where the sufficiency of the notice is questionable, courts will resolve doubts against the validity of the enactment,[135] but will overlook insignificant errors or omissions.[136] Moreover, a municipality can cure an insufficient notice by republication of proper notice within the statutory time period before the hearing.[137]

D. *Hearing*

A hearing before the municipal legislative body prior to acting on a zoning proposal serves three principal purposes: 1) To inform decisionmakers of public opinion on policy issues; 2) to acquaint them with specific facts concerning affected property; and 3) to give owners an opportunity to protest decisions concerning their land.[138] An enabling statute or a local ordinance that does not require a hearing may be held unconstitutional.[139] Failure of the legislative body to hold an appropriate hearing usually will render the enactment void.[140]

Courts tend to view public hearings that precede zoning enactments

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132. Penlay v. Lake Harbin Civic Ass'n, 230 Ga. 631, 636, 198 S.E.2d 503, 508 (1973).

133. *See supra* note 69.

134. *See, e.g.*, Wolf v. Shrewsbury, 182 N.J. Super. 289, 292, 440 A.2d 1150, 1154 (App. Div. 1981); Seyer v. Clark, 17 Ohio Ops. 2d 447, 449-50, 87 Ohio L. Ab. 108, 110-11, 175 N.E.2d 881, 883-84 (C.P. 1961).

135. *See* Paliotto v. Islip, 31 Misc. 2d 447, 454, 224 N.Y.S.2d 466, 476, (1962), *rev'd on other grounds*, 22 App. Div. 2d 930, 256 N.Y.S.2d 58 (1964), *appeal dismissed*, 16 N.Y.2d 871, 264 N.Y.S.2d 108, 211 N.E.2d 527 (1965).

136. Olsen v. City of Hopkins, 149 N.W.2d 394, 401 (Minn. 1967).

137. Johnson v. Griffiths, 141 N.E.2d 774, 777-78 (Ohio App. 1955), *appeal dismissed*, 164 Ohio St. 393, 58 Ohio Op. 188, 131 N.E.2d 397 (1955).

138. Kahn, *supra* note 82, at 1041, *citing* ANDERSON, *supra* note 129 at § 4.11; *see also* Schaus v. Town Board of Clifton Park, 83 Misc. 2d 726, 372 N.Y.S.2d 952, 955 (1975).

139. *See* Masters v. Pruce, 290 Ala. 56, 63-65, 274 So.2d 33, 39-41 (1973); Dahman v. City of Ballwin, 483 S.W.2d 605, 608 (Mo. App. 1972).

140 *See, e.g.*, Bowen v. Story County Bd. of Supervisors, 209 N.W.2d 569, 571-72 (Iowa 1973); Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167, 170 (Ky. 1962); Baltimore v. Mano Swartz, Inc., 268 Md. 79, 84, 299 A.2d 828, 833 (1973); Grady v. City of St. Albans, 297 S.E.2d 424, 426 (W. Va. 1982). *See also* Reeves v. Bd. of County Comm'rs 226 Kan. 397, 602 P.2d 93 (1979) (failure of township zoning board to hold a public hearing on a proposed amendment to zoning regulations invalidated subsequent approval of the amendment).

as legislative in nature[141] and approve hearings conducted in an informal manner.[142] In reviewing the conduct of public hearings, courts generally look to the basic fairness of the proceeding to determine whether the legislative body heard and gave fair consideration to each speaker.[143]

One particular problem with regard to hearings is whether revisions in the proposed zoning regulation necessitate a second hearing. Minor changes in the proposed regulation normally will not require a second hearing;[144] substantial changes, however, will require a second hearing.[145] While it is difficult to define what constitutes a substantive change, one commentator has suggested that a new hearing will be required when a revision no longer comes within the scope of the original notice.[146] Even substantial changes may not require a new hearing, however, if they were made as a result of comments submitted at the first public hearing.[147] A second hearing also may not be required when the initial notice related to a comprehensive revision of zoning regulations, if substantial revisions reasonably could be anticipated.[148]

E. *Adoption*

In considering the procedural validity of final legislative approval, this article does not examine many of the technical requirements of voting, such as quorums, disqualifications and form. Those requirements usually are set out in statutes or ordinances that are not limited

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141. *See, e.g.*, 1 R. ANDERSON, *supra* note 129, at § 4.07 (1976).

142. *See, e.g.*, Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 692-94 (Iowa 1980). *Cf.* Hyson v. Montgomery Court Council, 242 Md. 55, 67, 217 A.2d 578, 585-86 (1965) (requiring opportunity for cross-examination of witnesses).

143. 7 ROHAN, ZONING AND LAND USE CONTROLS § 50.03[2](b) (1981).

144. McGee v. Cocoa, 168 So.2d 766, 768-69 (Fla. App. 1964); Carlsmith, Carlsmith, Etc. v. CPB Properties, 645 P.2d 873, 879-80 (Ha. 1982); St. Bede's Episcopal Church v. City of Santa Fe, 85 N.M. 109, 111, 509 P.2d 876, 878-79 (1973); Herdeman v. City of Muskego, 116 Wis. 2d 687, 343 N.W.2d 814 (Wis. App. 1983).

145. *See, e.g.*, Village of Island Park v. J.E.B. Assoc., 21 Misc. 2d 249, 251-52, 190 N.Y.S.2d 77, 80-81 (Sup. Ct. 1959); Heaton v. City of Charlotte, 277 N.C. 506, 518, 178 S.E.2d 352, 359-60 (1970).

146. R. ANDERSON, *supra* note 126, at § 4.15.

147. *See, e.g.*, Neuger v. Zoning Bd., 145 Conn. 625, 627, 145 A.2d 738, 741 (1958). *Cf.* Summit Properties, Inc. v. Wilson, 26 Ariz. App. 550, 555, 550 P.2d 104, 108-09 (1976).

148. *See, e.g.*, Hewitt v. County Comm'rs, 220 Md. 48, 52, 151 A.2d 144, 148-49 (1959); Desloge v. County of St. Louis, 431 S.W.2d 126, 131 (Mo. 1968).

to zoning matters.[149] Problems have arisen, however, with regard to the timing of legislative action. In one case, the court held invalid approval of a zoning proposal five years after the hearing,[150] whereas a delay of two months was not fatal in another case.[151] Approval occurring beyond the time period specified by a local ordinance also may be invalid.[152]

F. *Post-Adoption*

Many statutes require that the text and maps of any zoning enactments be entered into the official minutes of the legislative body. This requirement ensures that citizens will be able to locate an accurate version of the regulation as adopted. Failure to enter an ordinance[153] or a map[154] into the minutes has resulted in invalidation. When the omissions have been viewed as insignificant and there was not uncertainty about the text or map that had been adopted, the enactment was not invalidated.[155]

Many enabling statutes also require the publication or posting of the text and map of a zoning enactment, or both. Failure to meet these requirements can result in the invalidation of the zoning enactment.[156] In other instances, a delayed publication merely delays the effective

149. Note, however, that many statutes provide for approval by an extraordinary majority when protest petitions have been filed.

150. *See* Gricus v. Superintendent & Inspector of Bldgs., 345 Mass. 687, 691, 189 N.E.2d 209, 211 (1963).

151. *See* Taylor v. Shetzen, 212 Ga. 101, 102, 90 S.E.2d 572, 573 (1955).

152. Forestview Homeowners Ass'n v. County of Cook, 18 Ill. App. 3d 230, 238, 390 N.E.2d 763, 770-71 (1974).

153. Addis v. Smith, 226 Ga. 894, 895, 178 S.E.2d 191, 191 (1970); City of Waycross v. Boatright, 104 Ga. App. 685, 687-88, 122 S.E.2d 475, 477 (1961); Keeney v. Village of Le Roy, 22 A.D.2d 159, 162, 254 N.Y.S.2d 445, 448 (1964).

154. *See, e.g.*, Soron Realty Co. v. Town of Geddes, 23 A.D.2d 165, 259 N.Y.S.2d 559 (1965); Keeney v. Village of Le Roy, 22 A.D.2d 159, 254 N.Y.S.2d 445 (1964).

155. *See, e.g.*, Northern Operating Corp. v. Town of Ramapo, 26 N.Y.2d 404, 406, 311 N.Y.S.2d 286, 290, 259 N.E.2d 723, 725-26 (1973); Schroppel v. Spector, 43 Misc. 2d 290, 293, 251 N.Y.S.2d 233, 236 (1963); Quick v. Town of Owego, 11 A.D.2d 285, 286-87, 203 N.Y.S.2d 427, 428-29 (3d Dep't. 1960), *aff'd*, 8 N.Y.S.2d 1144, 209 N.Y.S.2d 828, 171 N.E.2d 903, *modified*, 9 N.Y.2d 649, 212 N.Y.S.2d 65, 173 N.E.2d 43 (1961); Frost v. Village of Hilshire Village, 403 S.W.2d 836, 838-39 (Tex. Civ. App. 1966). *But see* Ballard v. Smith, 234 Miss. 531, 537-38, 107 So.2d 580, 582 (1958) (failure of the mayor and clerk to sign and attest the minutes of the Board of Aldermen invalidated zoning amendments).

156. Dean v. West, 189 Neb. 518, 524-25, 203 N.W.2d 504, 508 (1973); Benigno v. Cohallen, 40 N.Y.2d 880, 389 N.Y.S.2d 346, 357 N.E.2d 1001 (1976).

date, but does not invalidate the enactment in its entirety.[157]

IV. JUDICIAL SOLUTIONS

When a court considers an enactment that does not comply with the required statutory procedures, there are several alternative courses of action the court may choose to take, other than to invalidate the zoning ordinance.

A. *Statutory Construction*

Initially, a court may decide to apply new construction or alternative reading to an existing statutory provision. A court's reinterpretation of statutory language may bring an adoption procedure into compliance with statutory mandates, even though the court previously would have found it to be in violation.[158]

B. *Standing*

A court also may erect a threshold barrier to bringing a procedural challenge by imposing a strong standing requirement.[159] A Texas court, for example, held that only a property owner entitled to notice of a change in zone may complain about the inadequacy of notice before a zoning ordinance is adopted.[160]

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157. Carthage v. Walters, 375 So.2d 228, 229-30 (Miss. 1979).

158. *See, e.g.*, Sullivan v. Faria, 112 R.I. 132, 135-38, 308 A.2d 473, 475-76 (1973) (Rhode Island Supreme Court upheld a zoning ordinance amendment and reversed the trial court in holding that a statutory notice provision required publication in each of three weeks rather than for a twenty-one day period, thereby overruling Rhode Island Home Builders, Inc. v. Budlong Rose Co., 77 R.I. 147, 74 A.2d 237 (1950)); Milton v. LeClaire, 129 Vt. 495, 496-97, 181 A.2d 834, 835 (1975) (Supreme Court of Vermont held that jointly mailing notice to married voters satisfied the statutory requirement that notice be mailed to each voter on the checklist of the municipality).

159. *See, e.g.*, Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, 450 So.2d 204, 208 (Fla. 1984) ("Only those persons who already have a legally recognizable right which is adversely affected have standing to challenge a land use decision on the ground that it fails to conform with the comprehensive plan."); Brand v. Wilson, 252 Ga. 416, 417, 314 S.E.2d 192, 194 (1984) ("A citizen must have a substantial interest, which must suffer substantial damage by reason of the contsted zoning change."); Wilgus v. City of Murfreesboro, 532 S.W.2d 50, 53 (Tenn. App. 1975); Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 303, 410 P.2d 764, 766 (1966) (plaintiffs suffered no disadvantage).

160. *See* Wells v. City of Killeen, 524 S.W.2d 735, 737-38 (Tex. Civ. App. 1975).

C. *Prejudice*

An area in which there is wide disagreement among courts concerns the necessity of finding prejudice to the complaining party. A court sometimes raises this issue in an attempt to determine whether a procedural deficiency in the adoption process constituted a substantial deviation from the required procedures. A finding of no prejudice demonstrates that a procedural deficiency is insubstantial, and the ordinance is found to be valid.[161] Other courts simply have held that plaintiffs whose rights have not been affected adversely by procedural deficiencies should not be permitted to object to the validity of the zoning ordinance,[162] even if there have been substantial procedural deficiencies.[163] Instances where courts have found no prejudice include a delay in the performance of specified acts[164] and the printing of an illegible map.[165] Other courts, however, have held that prejudice is not a prerequisite finding for the invalidation of a zoning ordinance.[166] Courts have used this approach when the procedural deficiency involved notice requirements.[167] In addition, courts have utilized a balancing test, weighing prejudice to the plaintiff against reliance costs incurred by others, to decide if the alleged prejudice warrants the invalidation of a zoning ordinance.[168]

D. *Waiver*

Another judicial solution closely related to prejudice is waiver of rights by the plaintiff. Again, courts are divided on this doctrine. De-

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161. Mid-County Manor, Inc. v. Haverford Twp. Bd. of Comm'rs, 22 Pa. Commw. 149, 155, 348 A.2d 472, 475 (1975).

162. *See, e.g.*, Brechner v. Incorporated Village of Lake Success, 25 Misc. 2d 920, 921-22, 208 N.Y.S.2d 365, 368-69 (1960); Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 303, 410 P.2d 764, 766 (1966).

163. *See* Desloge v. County of St. Louis, 431 S.W.2d 126, 131 (Mo. 1968).

164. *See* Hopping v. Cobb County Fair Ass'n, 222 Ga. 704, 706, 152 S.E.2d 356, 357 (1966).

165. *See* Olsen v. City of Hopkins, 149 N.W.2d 394, 401 (Minn. 1967).

166. *See* George v. Town of Edenton, 31 N.C. App. 648, 230 S.E.2d 695 (1976); Kelley v. City of Philadelphia, 382 Pa. 459, 15 A.2d 238 (1955).

167. Hart v. Bayless Inv. and Trading Co., 86 Ariz. 379, 388, 346 P.2d 1101, 1108 (1959); George v. Town of Edenton, 31 N.C. App. 648, 651, 230 S.E.2d 695, 697 (1976); Kelley v. City of Philadelphia, 382 Pa. 459, 473-74, 115 A.2d 238, 245 (1955).

168. *See, e.g.*, Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 518, 275 N.E.2d 525, 529-30 (1971); Midway Protective League v. City of Dallas, 552 S.W.2d 170, 173 (Tex. Civ. App. 1977).

fendants raise waiver most frequently when plaintiffs complain of a municipality's failure to comply with statutory notice requirements. The alleged noncompliance may relate either to a failure to notify all parties entitled to receive notice, or to notice that has content deficiencies. A number of courts have held that when a plaintiff had received actual notice or had appeared at a public hearing and made his concerns known, or both, the plaintiff had waived his right to receive statutory notice.[169] Courts also may find waiver when a plaintiff did not object to a lack of a quorum at a public hearing,[170] or failed to object to the authenticity of written documents when introduced into evidence.[171] Other courts, however, have held that plaintiff's appearance at a hearing does not constitute a waiver of notice,[172] even if the plaintiff is represented by legal counsel.[173]

E. *Estoppel*

Estoppel, both legal and equitable, is another alternative to a court's invalidation of a zoning ordinance. A Rhode Island court, applying legal estoppel, held that by seeking a variance the plaintiff had admitted the legality of the ordinance and therefore was estopped from claiming that the ordinance was invalid after the municipality denied the variance application.[174] Other courts have used equitable estoppel to avoid invalidating zoning ordinances. This doctrine requires a court

169. *See* Hilton v. Board of Supervisors, 7 Cal. App. 3d 708, 715, 86 Cal. Rptr. 754, 758-59 (1970); Pitman v. City of Medford, 312 Mass. 618, 622-23, 45 N.E.2d 973, 976-77 (1942); Hansen v. City of Norfolk, 201 Neb. 352, 356, 267 N.W.2d 537, 540 (1978); St. Bede's Episcopal Church, 85 N.M. 109, 509 P.2d 876, 877-79 (1973); Tulsa Rock Co. v. Board of County Comm'ns, 531 P.2d 351, 357 (Okla. 1974); Wilgus v. City of Murfreesboro, 532 S.W.2d 50, 53 (Tenn. App. 1975); Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 303, 410 P.2d 764, 766 (1966).

170. *See* Croaf v. Evans, 130 Ariz. 353, 356-58, 636 P.2d 131, 134-36 (Ariz. Ct. App. 1981).

171. *See* Agan v. Farris, 247 Ga. 236, 237, 275 S.E.2d 321, 322 (1981).

172. *See* Atiyeh v. Village of North Hills, 91 Misc. 2d 365, 366-68, 398 N.Y.S.2d 105, 106-07 (1977); R.I. Home Builders, Inc. v. Budlong Rose Co., 77 R.I. 147, 151, 74 A.2d 237, 238-39 (1950).

173. Bal Harbour Village v. Florida, *ex rel.* Giblin 299 So.2d 611, 617 (Fla. App. 1974), *cert. denied*, 311 So.2d 670 (Fla. 1975).

174. Sweck v. Zoning Bd. of Review, 77 R.I. 8, 10-11, 72 A.2d 679, 680 (1950). *See also* Farnsworth v. Town of Windsor, 24 Conn. Sup. 431, 437, 193 A.2d 604, 607 (1963) (prior application for variances estops plaintiff from claiming zoning regulations are invalid). *But see* Bar Harbour Village v. Florida *ex rel.* Giblin, 299 So.2d 611, 617 (Fla. Dist. Ct. App. 1974).

to consider vested interests[175] and the expenditure of money on the basis of zoning enactments. Although time delays were factors in the decisions, courts have found the expenditure of sums ranging from $20,000[176] to $600,000[177] sufficient to preclude procedural challenges.[178]

F. *Laches*

A final doctrine courts use to avoid invalidating zoning ordinances is laches, which courts apply when there has been a lengthy delay between the zoning enactment and the subsequent procedural challenge. Courts have held that delays of anywhere from ten to forty-five years may preclude the plaintiff's claim of procedural noncompliance.[179]

A reluctance to consider such delayed action may stem from the community's general reliance on the validity of the ordinance or from problems of proof presented by difficulties in obtaining satisfactory evidence years after the fact. While a court may not favor time delays, a court's computation of the time of delay might begin at the point when a plaintiff becomes aware of a possible cause of action, rather than at the actual date of the zoning enactment.[180]

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175. *See* People v. Mullstein, 54 Misc. 2d 493, 499-500, 283 N.Y.S.2d 353, 359-60 (1967), *aff'd*, App. Term Sup. Ct. (unreported), *aff'd*, 23 N.Y.2d 900, 298 N.Y.S.2d 306, 246 N.E.2d 159 (1969).

176. *See* Villager v. City of Henry, 47 Ill. App. 3d 565, 568, 362 N.E.2d 120, 122 (Ill. App. Ct. 1977).

177. *See* Capps v. City of Raleigh, 35 N.C. App. 290, 299, 241 S.E.2d 527, 532 (1978).

178. *See also* Walker v. City of Biloxi, 229 Miss. 890, 895, 92 So.2d 227, 229 (1957) (laches applied where city population had more than doubled and 7100 permits, reflecting millions of dollars in expenditures, had been issued under the challenged ordinance).

179. City of Creston v. Center Milk Prods. Co., 243 Iowa 611, 615, 51 N.W.2d 463, 465 (1952) (21 years); Edel Filer Twp., 49 Mich. App. 210, 213-14, 211 N.W.2d 54, 548-49 (1973) (18 years); Walker v. City of Biloxi, 229 Miss. 890, 895, 92 So.2d 227, 229 (1957) (17 years); Taylor v. Schlemmer, 353 Mo. 687, 695, 183 S.W.2d 913, 916 (1944) (14 years); Struyk v. Samuel Braen's Sons, 17 N.J. Super. 1, 9-10, 85 A.2d 279, 282-83 (Sup. Ct. App. Div. 1951) (10 years), *aff'd*, 9 N.J. 294, 88 A.2d 201 (1952); People v. Millerstein, 54 Misc. 2d 493, 500, 283 N.Y.S.2d 353, 360 (1967) (45 years), *aff'd*, 23 N.Y.2d 900, 298 N.Y.S.2d 306, 246 N.E.2d 159 (1969). *Cf.* Pilgrim v. City of Winona, 256 N.W.2d 266, 270 (Minn. 1977).

180. Nesbit v. City of Albuquerque, 91 N.M. 455, 459-60, 575 P.2d 1340, 1344-45 (1977).

V. LEGISLATIVE SOLUTIONS

If a municipality has failed to comply with statutory procedures for the adoption of a zoning ordinance, the municipal or state legislative bodies may avoid judicial invalidation of the ordinance through various actions.

A. *Curative Legislation*

Some states permit a municipality to reach a solution by passing a subsequent validating statute that cures the defects in a specific zoning enactment.[181] The effectiveness of such curative legislation, however, may be limited. Courts have held that validating statutes will cure the defective ordinance only from the effective date of the validating act.[182] One court held that a validating act passed between the decision of the trial court to invalidate an ordinance and the subsequent appeal mooted the procedural challenge, but noted that the validating act itself had not deprived the plaintiff of procedural due process or vested rights.[183]

In some cases, courts have rejected the suggested validating effect of curative legislation because of a lack of evidence showing that the municipality passed the legislation expressly to cure a defect,[184] or because the validating act also failed to provide fair and meaningful notice.[185] A Connecticut court held that a zoning action remained void because the alleged curative legislation did not incorporate all of the procedural defects in the adoption process.[186] Other courts have held that curative legislation either is ineffective to cure specific types of procedural defects[187] or procedural defects in general.[188] Those decisions indicate,

181. *See, e.g.*, Frost v. Village of Hilshire Village, 403 S.W.2d 836, 839 (Tex. 1966).

182. *See* Town of Coeymans v. Malparus, 100 Misc. 2d 589, 592, 419 N.Y.S.2d 833, 835-36 (1979).

183. *See* County Council v. Carl M. Freeman, Assoc., 281 Md. 70, 78-80, 376 A.2d 860, 865 (1977).

184. Pilgrim v. City of Winona, 256 N.W.2d 266, 270-71 (Minn. 1977); City of Santa Fe v. Armijo, 96 N.M. 663, 665-66, 634 P.2d 685, 687-88 (N.M. 1981).

185. V. M. Stevens, Inc. v. Town of South Hampton, 114 N.H. 118, 122, 316 A.2d 179, 182 (1974).

186. *See* Alderman v. Town of West Haven, 124 Conn. 391, 399, 200 A. 330, 333 (1938).

187. *See, e.g.*, Village of Island Park v. J.E.B. Assocs., 21 Misc. 2d 249, 252, 190 N.Y.S.2d 77, 81 (Sup. Ct. 1959); Coffee City v. Thompson, 535 S.W.2d 758, 766-67 (Tex. Civ. App. 1976).

188. Calawa v. Town of Litchfield, 112 N.H. 263, 266, 296 A.2d 124, 125 (1972);

however, that curative legislation could validate a defective adoption procedure under the right conditions.

B. *Statute of Limitations*

A second legislative remedy is the statutory limitation of action. Statutes of limitations are the legislative correlative to the equitable doctrine of laches.[189] Statutes of limitations are a common legislative mechanism for limiting the time frame within which the plaintiff must bring his complaint. Colorado has a statute of limitations that specifically deals with the adoption of municipal charters.[190] Statutes of limitations that specifically apply to the adoption of zoning ordinances are found in California,[191] Delaware,[192] Massachusetts,[193] North Carolina,[194] Vermont,[195] and Wisconsin.[196]

Some states have general statute of limitations provisions that may apply in challenges to the validity of a zoning enactment. For example, Pennsylvania had a specific thirty-day statute of limitations for challenging the procedural validity of a zoning enactment,[197] but repealed it in 1978.[198] The thirty-day appeal period, however, has been retained under the general provisions of the judicial code,[199] and relates to procedural defects in the enactment of municipal ordinances, resolutions and maps in general.

The Massachusetts provisions appear unique. First, a plaintiff filing a challenge to the adoption procedure must, within seven days of the commencement of such action, file a copy of the petition with the municipal clerk.[200] Second, a companion statutory provision[201] requires a

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Olson v. Town of Litchfield, 112 N. H. 261, 262, 296 A.2d 470, 471 (1972); Drown v. Town of Hudson, 112 N.H. 386, 388, 296 A.2d 897, 898 (1972).

189. *See* Order of R.R. Tels. v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

190. COLO. REV. STAT. § 31-2-218 (1977) (45 days) (applied in City of Aurora v. Aurora Firefighters' Protective Ass'n, 193 Colo. 437, 566 P.2d 1356 (1977)).

191. CAL. GOV'T CODE § 65009(b) (West Supp. 1984).

192. DEL. CODE ANN. tit. 10, § 8126(a) (1974) (60 days).

193. MASS. ANN. LAWS ch. 40A, § 5 (Mitchie/Law. Co-op. 1983) (120 days).

194. N.C. GEN. STAT. § 160A-364.1 (1982) (9 months).

195. VT. STAT. ANN. tit. 24, 4494(b) (1984) (1 year).

196. WIS. STAT. ANN. § 893.73(a) (West Supp. 1983) (180 days).

197. PA. STAT. ANN. tit. 53, § 11003 (Purdon 1972) (30 days).

198. Judiciary Act Repealer Act, 1978 Pa. Laws 202, No. 53, § 2(a) [1421].

199. PA. STAT. ANN. tit. 42, § 5571(c)(5) (Purdon 1981) (30 days).

200. MASS. ANN. LAWS ch. 40A, § 5 (Mitchie/Law. Co-op. 1983).

municipality to submit any zoning enactment to the state attorney general for review and approval. The statute requires the municipal clerk to submit "adequate proof that all of the procedural requirements for the adoption of such bylaw have been complied with."[202]

Statutes of limitations also may apply to only one portion of the adoption process. In Vermont, a defect in the form or substance of public notice cannot be the basis for an invalidation of an enactment unless the error is materially misleading, is the result of a deliberate or intentional act, or if the notice fails to include one of the required elements.[203] South Carolina provides a two-year statute of limitations for challenges based on the adequacy of notice in cases where there was substantial compliance with the statutory requirements.[204]

VI. RECOMMENDATIONS

The most compelling rationale for the judicial requirement of strict compliance with statutory procedures is that of protecting the property interests of the individual property owner. Local land use regulations may have one of two effects on property owners. On one hand, the imposition of new or revised zoning regulations may significantly reduce the potential use, and therefore, market value of the individual's property. In determining the validity of the imposition of zoning restrictions under a municipality's police power, the courts generally have not looked at the extent of loss in market value, but rather at whether any reasonable use for the property remains. Thus, the imposition of zoning restrictions often may result in substantial, uncompensated losses in land value. On the other hand, another property owner, having invested a substantial sum in the construction of a home in a quiet, residential neighborhood, may experience a loss in the value of the land for his purposes if zoning restrictions are relaxed and extensive, nonresidential uses are allowed on adjacent property.[205]

The potential impact of zoning restrictions upon the property interests of individual property owners, and upon the general character of the community, makes it imperative that communities adequately in-

201. MASS. ANN. LAWS ch. 40, § 32 (Michie/Law. Co-op. 1983).

202. *Id.*

203. VT. STAT. ANN. tit. 24, § 4447(c) (1984).

204. S.C. CODE ANN. §§ 5-23-40, 6-7-730 (Law. Co-op. Supp. 1983) (time period commences with the date of the public hearing, not the date of adoption).

205. *See* Kahn, *supra* note 82, at 1020-23.

form their citizens of the nature of proposed zoning enactments, and afford them an adequate opportunity to voice their views to the local legislative body. Therefore, it seems appropriate that state statutes provide mandatory procedural provisions that will ensure full notice to citizens of the nature of proposed zoning enactments. Further, the extent and complexity of procedural requirements for zoning enactments are then justifiable.

If the required procedures are to be meaningful, they must be enforced strictly. A judicial requirement for strict compliance provides a bright line test for evaluating challenged procedures. The knowledge that courts will require strict compliance also will encourage municipal officials to follow the required procedural provisions scrupulously. This, of course, results in the basic dilemma underlying this article—the difficulty laypeople have in precisely and properly following each and every procedural requirement, and the consequent potential for judicial invalidation of zoning enactments. While a procedural error in the process of adopting a zoning enactment should give rise to a cause of action to challenge the validity of the enactment, such an error should *not* automatically result in the invalidation of the enactment. Once such a remedy becomes possible, the court should examine the facts in each case to determine whether an invalidation either would be equitable or in the public interest. The most appropriate resolution of this dilemma lies in the areas of judicial and legislative limitations on challenges based upon procedural deficiencies, rather than in the procedures themselves.

Perhaps the most promising judicial approach to ordinance invalidation is that which requires the complained of action to prejudice the plaintiff. Courts should require the plaintiff to make two showings to prove prejudice. First, the procedural deficiency should have resulted in actual harm to the plaintiff. Thus, if there is a deficiency in the notice provided, but the plaintiff was aware of the nature of the zoning enactment and the details of a public hearing, the plaintiff is not harmed by the insufficient notice, regardless of whether he actually attended the subsequent hearing. Harmless error should not be a basis for invalidating a zoning enactment. Second, the plaintiff should be required to have suffered personally from the claimed procedural deficiency. Thus, if a plaintiff owns land that is unaffected by a zoning enactment, he should not be permitted to challenge the validity of that enactment. Similarly, a plaintiff that acquires a tract of land subsequent to the challenged enactment should be deemed to have accepted the results of such enactment. To permit subsequent purchasers to

protest the validity of prior zoning enactments invites the practice of seeking procedural deficiencies to serve as a basis for a challenge of an enactment's validity. Courts should consider purchasers to have waived the right to challenge the procedural sufficiency of prior zoning enactments.

The legislative alternative of a statute of limitations for procedural challenges serves two important goals. First, a limited right to challenge the procedures of a zoning enactment will result in a certainty that a court will not invalidate the enactment on the basis of procedural deficiencies in its adoption after a stated period of time.[206] This permits reliance upon the validity of the enactment and helps to avoid the equitable problems encountered when property owners have made substantial investments in property on the basis of the adopted zoning restrictions. Second, a specific statute of limitations will require potential plaintiffs to act speedily to assert their alleged procedural rights. This permits a resolution of factual questions while the basis for such a resolution is still available through written documentation or witness' recollection, or both.[207] To achieve the objective of certainty, the time period must run from the date of enactment, not from the discovery date of the deficiency. The use of the discovery date does not result in the desired certainty of validity.

The length of the statutory time period is a matter for legislative discretion, but should provide a time period within which a reasonably prudent property owner could discover a procedural deficiency. Legislative provisions should ensure that there is publication of the zoning enactment and that procedural challenges be brought within a specified time period. The statute should not limit challenges when a plaintiff can show fraud or intentional misrepresentation in the adoption process.

Evaluation of the appropriateness of the judicial and legislative solutions recommended in this article requires an inquiry into whether these solutions are consistent with the two principal purposes for strict

206. A policy of finality is one of the underlying bases for a statute of limitations. Investment Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys., 551 F.2d 1270, 1282 (D.C. 1977).

207. "These (statutes of limitations) . . . protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. 111, 117 (1979).

statutory procedures in the adoption of municipal plans and bylaws: Limiting ultra vires actions, and ensuring procedural due process.

Neither the judicial nor the legislative remedies adversely affect the ultra vires basis. The judicial remedies address either the status of the plaintiff or the timing of his action, rather than the legal status of the plan or bylaw. A court may dismiss a particular plaintiff's action for lack of standing or for prejudice, or on the basis of waiver. estoppel or laches. Nevertheless, a proper plaintiff, filing a timely action, may succeed in having an improper adoption process voided as being ultra vires. Neither does the legislative remedy of a statute of limitation legitimize the validity of the enactment. The ultra vires basis for a finding of invalidity would still exist for a timely action.

Similarly, the procedural due process considerations do not preclude either of these remedies. The judicial remedies of standing and prejudice arise in cases where the plaintiff has not suffered a property loss; hence, due process considerations are not implicated. In a waiver case the plaintiff has himself surrendered the exercise of his due process rights; his deprivation thus is self-imposed. The doctrines of estoppel and laches recognize the due process rights of the plaintiff, but resolve the dispute, after weighing the competing interests, in favor of the municipality and those with a vested interest in the plan or bylaw's validity. Statutes of limitation also involve the balancing of competing interests.[208] Questions raised concerning the constitutional validity, on procedural due process grounds, of statutes of limitation have been addressed favorably by the United States Supreme Court.[209]

In a case involving due process challenges to procedures for administrative rule making,[210] Justice Powell expressed concern about the constitutionality of the thirty-day time limit for bringing an action under the Clean Air Act.[211] This concern apparently was resolved when Congress increased the time period from thirty to sixty days.[212] In

208. "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time. . . ." *Id.* at 117

209. Wheeler v. Jackson, 137 U.S. 245, 255 (1890) (legislature may prescribe a limitation for bringing actions that is reasonable under the circumstances). *See also* Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190, 197 (1922).

210. Adamo Wrecking Co. v. United States, 434 U.S. 275, 289-90 (Powell, J., concurring).

211. 42 U.S.C. § 1857h-5(b) (1970 Supp. V.).

212. Clean Air Act Amendments of 1977, § 305(b) of Pub. L. 95-95, 91 Stat. 776, codified at 42 U.S.C. § 7405 (1982).

another case subsequent to this amendment,[213] Justice Powell appears to have accepted the legitimacy of the sixty-day statute of limitation; his concern was focused solely on the adequacy of the notice provisions of the statute.[214] While it is difficult to assert with certainty what might be the minimum time period required by due process to initiate a challenge to the procedural validity of a zoning enactment, there have been no reported court cases concerning the due process validity of the statutes of limitation cited above.[215]

VII. CONCLUSION

This article is intended to illustrate the uncertain legal status of local zoning enactments in municipalities throughout the country. This uncertainty has resulted from the conflict between the statutory requirements needed to protect the procedural due process rights of developers and property owners, and the inability of local municipal officials to understand and comply fully with these complex statutory procedural requirements. The consequent uncertain legal validity of zoning enactments that may have been procedurally deficient in their adoption represents an unreliable form of local land use control and an unacceptable basis for future private investment in land development.

State courts and legislatures must adopt new approaches in this area to achieve a reasonable balance between the conflicting interests of the parties involved. Courts should protect the interests of developers and property owners by requiring strict compliance with statutory notice requirements in the enactment process. The courts should limit the availability of this legal recourse, however, by restricting it to those parties who can demonstrate a significant personal prejudice resulting from improper adoption procedures. State legislatures should limit the exposure of municipal zoning enactments to procedural challenges by adopting reasonable statutes of limitation for zoning challenges. When state legislatures find it inappropriate to limit procedural challenges in some reasonable manner, they should provide for a final, timely review of the procedures followed in a zoning enactment. Such a review, carried out by an impartial third party,[216] at least will provide a forum for a determination of the status of the zoning enactment.

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213. Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980).

214. *Id.* at 594-95 (Powell, J., concurring).

215. *See supra* text accompanying notes 190-204.

216. *See supra* text accompanying notes 200-02.

NOTES