JUDICIAL REMEDIAL ACTION IN ZONING CASES: AN EMERGING STANDARD FOR REVIEW

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The administration of zoning laws of the several states has recently come under increasing attack through the court system. To be sure, attacking decisions of administrative bodies is not new to the legal system; however, in the realm of zoning cases, the techniques now being used differ greatly from the standard "abuse of administrative discretion" methods of the past. And, perhaps because of the very nature of these new techniques, courts are more receptive to the arguments of those attacking the administration of zoning laws and ordinances.

The heart of these new techniques appears to be something closely approximating the once discredited substantive due process standard that was used by the Supreme Court of the United States to strike down maximum hour laws,[1] control of discrimination for union activities[2] and minimum wage laws.[3] These cases were all litigated in the early part of this century and have all been long since overruled by the Supreme Court.[4] However, a recent New Jersey decision used the term "substantive due process" to invalidate a zoning ordinance.[5] Most courts that have invalidated zoning ordinances in recent years on constitutional grounds have not invoked the language of substantive due process in those terms, but the decisions seem to tacitly accept that standard.

More important than this technique and others similar to it, how-

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1. Lochner v. New York, 198 U.S. 45 (1905).

2. Adair v. United States, 208 U.S. 161 (1908).

3. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

4. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Bunting v. Oregon, 243 U.S. 426 (1917); *overruling*, respectively, *Adair*; *Adkins*; and *Lochner*.

5. Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970).

ever, is the fact that litigants are successfully using it in courts today to challenge zoning laws. The heart of the matter is that attacking a zoning ordinance on constitutional grounds was essentially rejected, in 1926, by the United States Supreme Court in the landmark case of *Village of Euclid v. Ambler Realty Co.*[6] Since that case was decided, standard judicial reaction to actions brought to challenge zoning ordinances or the acts of administrative zoning bodies pursuant to those ordinances has been the "abuse of discretion" test: whether the administrative body has acted unreasonably, arbitrarily or capriciously.[7] Collateral constitutional attacks on ordinances were ignored under the *Euclid* standard. Concurrent in time with the myriad of civil rights cases in the courts, however, constitutional attacks on zoning ordinances and on actions of administrative bodies have again arisen as they did before the *Euclid* decision. Indeed, lawyers for litigants in zoning cases may have sensed judicial receptivity to constitutional arguments in such cases following successful civil rights litigation. This rationale for the institution of zoning cases on constitutional grounds leads directly into the substantive due process standard for evaluating both zoning ordinances and acts of administrative bodies. Not only is substantive due process the most successful technique (*vide* recent civil rights cases), but it is currently the only technique available, unless and until a court uses constitutional eminent domain as a method for invalidating a zoning ordinance.

To illustrate the technique of substantive due process, as applied to a zoning case, assume a community has passed an ordinance prohibiting a particular use within the city limits. A court could hold that the *prohibition itself* violates due process. In contrast, if the community adopted the ordinance but failed to follow a prescribed procedure in doing so, the prohibition would be invalid, but only until the community readopted the same ordinance properly. The first technique of attack is substantive due process, the second procedural due process. A related procedural due process attack could be used if the ordinance were properly adopted, but the community, in passing upon a proposed use under the ordinance, failed to observe some procedure.

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6. 272 U.S. 365 (1926).

7. *See, e.g.,* Ray Schools-Chicago, Inc. v. City of Chicago, 337 Ill. App. 312, 86 N.E.2d 139 (1949).

The function of the court system, at both trial and appellate levels, in the administration of zoning laws has nearly always been one of review of administrative actions, primarily because of the statutes governing court review of zoning cases. Not only do statutes restrict what a court can review, they also restrict the relief that can be granted. The standard test for judicial review is, as noted previously, whether the administrative body abused its discretion. There is also the peripheral issue affecting court review of whether the litigant has exhausted his administrative remedies before coming to court.[8] This standard test necessarily assumes a limited judicial role: where the only function of the court is to determine whether or not some administrative body has abused the broad discretion given it by a statue or ordinance authorized under a state enabling act, the court will only evaluate the decision of the administrative body insofar as it is reasonable (or unreasonable) on the facts; the court will not ordinarily determine if the decision is wise, fair to the applicant, necessary and so forth. This sort of decision-making is left to the board, and it has been held many times that it is an abuse of discretion for the court to make such a determination.[9]

Yet the standard of substantive due process for testing the validity of a zoning ordinance requires that a court make just such determinations. The door appears wide open for the court system to begin to exert a much more powerful influence in the administration of zoning laws. This note will examine conventional judicial review, both judge-made and statutorily authorized, and the much broader scope of judicial review on constitutional grounds in recent cases.

I. Conventional Judicial Review

A. *Judge-made Doctrine*

The conventional, narrow scope of judicial review in zoning cases, as described above in relation to the "abuse of administrative discretion" test, is based on several doctrines. Perhaps the earliest of these is the principle of the separation of powers between the various branches of government. Since administrative bodies are historically

8. D. Mandelker, Managing Our Urban Environment 942-44 (2d ed. 1971); Note, *Exhaustion of Remedies in Zoning Cases*, 1964 Wash. U.L.Q. 368.

9. *See, e.g.*, cases cited in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

part of the executive branch (although this historical position may today be open to question because of the proliferation of bureaucratic bodies which often seem completely independent of the executive branch which supposedly governs them), the doctrine of separation of powers, together with the principle of checks and balances, dictates that the judicial branch restrain the executive branch only when, in a rough approximation, its actions get completely out of hand.[10] Another, more often articulated, doctrine is that the court system is not properly equipped to conduct independent investigations into the actions of administrative bodies. More specifically, in the area of administrative discretion in zoning, it is often said that the courts should not become "super-zoners"; the legislature has made a judgment, through its zoning ordinance enabling laws, allowing communities to delegate administrative powers to boards of adjustment (or other similar bodies) and the proper exercise of those powers should not be subject to court attack.[11] This sort of rationale applies equally to court actions invalidating acts of administrative bodies because of an abuse of discretion and to court actions which attempt to redress the grievances of a citizen who has been denied relief by administrative bodies. Another doctrine, somewhat peripheral to this limited scope of judicial review, is that of exhaustion of administrative remedies, previously noted. In other words, in general terms, a citizen who has been denied, for example, a building permit, cannot ask a court to order the building commissioner to issue the permit unless and until the citizen has pursued his grievance through all administrative channels.[12]

Each of these doctrines, individually and in combination, has been responsible, along with others less important, for restricting the scope of judicial review of zoning decisions by administrative bodies. It appears from the cases that the same standards are applicable to court review of administrative bodies which have denied variances and to review of constitutional challenges (until recently) to ordinances.[13] While a court may describe the extent of its powers of review in a variance case as determining whether the administrative body abused

10. *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

11. *See* Comment, *Exclusionary Zoning from a Regional Perspective,* 1972 URBAN L. ANN. 239, 243 n.21.

12. *E.g.,* Bright v. City of Evanston, 10 Ill. 2d 178, 139 N.E.2d 270 (1956).

13. *E.g.,* Ray Schools-Chicago, Inc. v. City of Chicago, 337 Ill. App. 312, 86 N.E.2d 139 (1949), where plaintiff made both challenges.

its discretion or in a constitutional challenge case as determining whether the ordinance in question is supportable under the police power and the fifth and fourteenth amendments, the description of the scope of review has remained the same for both: the "code" words, "arbitrary," "unreasonable" and "capricious," seem to have been applied to both kinds of attack. Curiously, courts have until recently regarded most cases which can be loosely labelled as "zoning cases" as the same, although the issues involved may variously be exhaustion of administrative remedy, correct standard for judicial review of administrative agency actions or a direct constitutional challenge to the ordinance itself. Consequently, no matter what form of attack a litigant may take, the rationale for the decision has historically been much the same.

Despite all of the above, however, it can be argued that a court is not necessarily a "super-zoner" and is not usurping a legislative function when the court has before it one citizen who wishes to use his single piece of property in a certain way. While it can be argued that a court has insufficient fact-gathering capabilities and lacks expertise in zoning matters, when the court has only one person before it and can easily through pre-trial orders obtain all the relevant facts from the citizen and from the administrative body, it can and should be able to make as informed and legitimate a judgment as can an administrative body. In *Mangel v. Village of Wilmette*,[14] an Illinois appellate court sanctioned such a technique. A similar approach has been attempted by Michigan courts which have provided what appears to be a unique remedy—they have granted injunctions prohibiting the municipalities from interfering with the proposed use of the land.[15] It is interesting to note that these courts have not rejected—or even discussed—a separation of powers objection to these approaches. Perhaps this reflects a tacit acceptance by courts that administrative or, more pejoratively, bureaucratic, bodies do not come directly under one of the three traditional branches of government, and thus can be much more closely supervised by courts without the charge that the courts are overstepping the bounds of judicial discretion, or "judicially legislating."

Another, perhaps more basic, problem confronting judicial review

14. 115 Ill. App. 2d 383, 253 N.E.2d 9 (1969).

15. Daraban v. Township of Redford, 383 Mich. 497, 176 N.W.2d 598 (1970); Lacy v. City of Warren, 7 Mich. App. 105, 151 N.W.2d 245 (1967).

of zoning cases is that courts are more often than not the last governmental body to which citizens turn when they wish to obtain permission to develop their land in a certain way (and this is nearly always the factual background behind a zoning case, whether the court action is a constitutional attack on the ordinance itself, an attack on the administration of the ordinance in a particular case or merely a request to reverse the action of the zoning body). Generally, under pertinent statutory provisions, one must apply to the local board of adjustment or equivalent body to obtain a variance from the terms of the applicable zoning ordinance. A denial of the variance, if the citizen wishes to contest the decision, usually requires an appeal to another administrative body prior to court review of the action of the initial administrative body. Thus, the court system does not come in contact with the citizen until after his request has been turned down by at least one administrative body. The function of the court system becomes one of review, primarily because of the statutes governing court action in zoning cases, limiting that action to a determination of whether the administrative body abused its discretion —normally a court cannot grant essentially administrative relief. The fact that the court system in the whole process follows chronologically the administrative process almost of necessity dictates review instead of independent fact-finding. This sequence would likely result in mere review of administrative actions even if statutes restricting court action in zoning cases were not in existence.

Other than the Illinois and Michigan courts mentioned previously, few courts have engaged in a comprehensive review of administrative actions in zoning cases or have entertained direct challenges to ordinances in the absence of statutes authorizing a broader scope of judicial activity.

B. *Statutory Authorization for More Comprehensive Review*

A typical state statute permitting a more comprehensive scope of review of administrative decisions relating to zoning is that of Indiana,[16] which permits a trial court to receive into evidence additional factors to supplement the evidence adduced by the administrative authority; thereupon, the trial court may affirm, reverse or modify the order of the administrative body in whole or in part.[17] In

16. IND. ANN. STAT. § 53-788 (Burns Repl. 1964).
17. *Id.*

O'Connor v. Overall Laundry, Inc.,[18] however, an Indiana appellate court held that the trial court may not conduct a trial de novo[19] and completely reconsider the facts and the decision of the administrative authority; since this was not permitted by the terms of the statute.[20] At this point, it is important to distinguish what a court may do. Under such a statute as Indiana's, the court has the power to do more than merely affirm or reverse an administrative decision, considering only the general rule relating to abuse of discretion and the like, discussed *supra*; the court may modify the administrative decision. With respect to remedies, this type of statute is certainly more comprehensive and significantly more conducive to effective judicial review of decisions of administrative authorities. With respect to procedure, however, this type of statute permits only a supplementation of the evidence before the administrative body. One might surmise, in retrospect, that the language of such a statute reflects, perhaps unconsciously, a policy consideration of the legislature that there should be a vestige of the time-sworn doctrine of the separation of powers. The courts of Missouri[21] and Nebraska[22] have made similar decisions under this type of statute.

A more specific holding with respect to what the trial court may do is found in *Appeal of Fred Jones Co.*,[23] where the Oklahoma court held that the trial court may make such orders as the board of adjustment could have made.[24] In *Dooling's Windy Hill v. Zoning Board of Adjustment*,[25] the Pennsylvania Supreme Court even authorized the trial court to grant the applicant a variance.[26] In both of these states, the revelant statutes[27] authorize the trial court to make a final and independent disposition of the proceedings. A federal court in the District of Columbia in *Donovan v. Clarke*[28] held that the power

18. 98 Ind. App. 29, 183 N.E. 134 (1932).
19. *Id.* at 34, 183 N.E. at 139.
20. *Id.*
21. Adams v. Board of Zoning Adjustment, 241 S.W.2d 35 (Mo. App. 1951).
22. Roncka v. Fogarty, 152 Neb. 467, 41 N.W.2d 745 (1950).
23. 203 Okla. 321, 220 P.2d 245 (1950).
24. *Id.* at 324, 220 P.2d at 248.
25. 371 Pa. 290, 89 A.2d 505 (1925).
26. *Id.* at 293, 89 A.2d at 508.
27. OKLA. STAT. ANN. tit. 11, § 408 (1959); PA. STAT. ANN. tit. 53, § 30667 (Purdon 1957).
28. 223 F. Supp. 795 (D.D.C. 1963).

to make a final, independent judgment rather than remanding the case to the administrative body was within the equity powers of the court.[29] Imagine a court doing any of the foregoing without a statute!

This type of approach, however, has a distinct disadvantage: because the trial court has simply reviewed the action of the administrative authority or has adduced additional evidence to supplement the evidence taken by the administrative body, and has not actually conducted a complete, original hearing on the merits of each case, it is not in a good position to make a final, legitimate disposition of a zoning matter. In other words, under statutes which direct the principal emphasis of the trial court to review of administrative decisions, the trial court is restricted in its powers to consider what might be the most relevant evidence because that evidence was fully presented and ruled upon at the administrative level. Further, this procedure smacks of "judicial legislation" with all of the pejorative connotations of that term because the court is using its judicial powers to make a legislative or administrative determination. This charge is particularly unfortunate when a court makes its determination partly on its own record and party on the record before the administrative body—*i.e.*, what the citizen gets is a hybrid determination based on both administrative and judicial techniques.

Perhaps consequently, legislatures of several states have passed statutes permitting a court to make a final determination only after the trial court has made a completely independent investigation and determination of all the issues in a zoning case or has conducted a trial de novo. In *Pincus v. Powers*,[30] the Supreme Court of Pennsylvania authorized a final determination by the trial court after a trial de novo, as did the Appellate Division of the Supreme Court of New York in *Lemir Realty Co. v. Larkin*.[31]

This procedure appears to be more satisfactory since the court has an opportunity to conduct an investigation "untainted" by actions and decisions of other governmental bodies, and such investigation is required under the statutes. Thus, the objections to the first two types of statutes on the basis of separation of powers and judicial legislation are met. The situation becomes essentially one of first impression

29. *Id.* at 797.

30. 376 Pa. 175, 101 A.2d 914 (1954). *See also* Appeal of Rolling Green Golf Club, 374 Pa. 450, 97 A.2d 523 (1953); Appeal of Lindquist, 364 Pa. 561, 73 A.2d 378 (1950).

31. 8 App. Div. 2d 970, 190 N.Y.S.2d 952 (1959).

for the court system: the action of the administrative body is for all practical purposes ignored and the litigation is a repeat, with judicial safeguards, of the procedure in the administrative body.

Despite broad language in the opinions which seemingly permits sweeping remedies and in statutes which authorize comprehensive review, there are recent, strong intimations that the court system will not conduct rezoning, as this is a legislative or administrative prerogative. (At this point, one should note that courts have said frequently that to grant a variance in a particular situation would amount to rezoning—calling granting variances rezoning simply creates a rationale for refusing the requested relief. This, of course, is not intended to imply that there is no difference between the two.[32]) For example, in *Exchange National Bank v. City of Waukegan*,[33] an Illinois appellate court held that a trial court could not rezone.[34] In *Gable v. Village of Hinsdale*,[35] the same court authorized the use requested by the plaintiff, but repeated the statement that courts will not rezone.[36] Apparently disgusted with requests for variances, the court in *Gedmin v. City of Chicago*[37] stated that a trial court will not rezone or unzone, but will only inquire if the proposed use is reasonable.[38] The significance of this last Illinois decision appears to be a recognition of substantially broader judicial review in zoning cases: from a determination of whether or not the administrative body has abused its discretion to a determination if the proposed use is reasonable. Analyzing these cases together, one can conclude that Illinois courts will not adhere to a traditional separation of powers rationale for avoiding court decisions which might be held to usurp administrative functions, but the courts are not willing to exercise what they consider purely administrative or legislative functions.

In considering the concept of comprehensive court review of administrative agency decisions in zoning cases, one must constantly keep in mind the effect on the process of the remedy a litigant uses to

32. An easy case would be where a developer wants a use variance to permit a high-rise office building in a residential zone—no one would argue that granting such a variance would not be rezoning.

33. 85 Ill. App. 2d 461, 229 N.E.2d 562 (1967).

34. *Id.* at 463, 229 N.E.2d at 564.

35. 87 Ill. App. 2d 123, 230 N.E.2d 706 (1967).

36. *Id.* at 128, 230 N.E.2d at 711.

37. 88 Ill. App. 2d 294, 232 N.E.2d 573 (1967).

38. *Id.* at 300, 232 N.E.2d at 579.

get into court in the first place. Rules of evidence, scope of review and other significant aspects of the case may differ if the lawsuit is for a declaratory judgment as to the effect of the ordinance, mandamus, prohibition, injunction or simply attacks the action of the administrative body as arbitrary or capricious. A detailed analysis of the judicial remedies available to a person aggrieved by the action of an administrative body is beyond the scope of this note.[39]

C. *Exhaustion of Administrative Remedies*

A peripheral problem in the administrative review of zoning laws arises when a prospective litigant wishes to make a direct challenge to either a zoning ordinance itself or to the action of an administrative body pursuant to that ordinance. If a litigant goes to court without first applying to the administrative body for relief from the terms of an ordinance, he is almost always met with the defense that he has not exhausted his administrative remedies. For example, a Florida district court of appeals in *Wood v. Twin Lakes Mobile Homes Village, Inc.*[40] held that a litigant must apply for a variance under the ordinance before he can challenge the constitutionality of the ordinance. However, the Florida court qualified this rule in *Mayflower Property, Inc. v. City of Fort Lauderdale*[41] by saying that a litigant need not pursue fruitless administrative remedies prior to a constitutional attack on an ordinance.[42]

The New York courts have allowed direct challenges to zoning ordinances apparently only if the administrative agency could not have granted the requested relief anyway.[43] Whether this means that

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39. For a discussion of the remedies in Illinois see Scott, *Judicial Review of Zoning Decisions in Illinois*, 59 ILL. BAR J. 228, 230 (1970). *See also* Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 68-71, for an analysis of cases from other jurisdictions where the courts have granted administrative-type relief to applicants for variances from zoning ordinances. Similar Massachusetts cases are discussed in Ryckman, *Judicial and Administrative Review in Massachusetts Zoning and Subdivision Control Cases*, 52 MASS. L.Q. 297 (1967); Arkansas cases are discussed in Gitelman, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22 (1969).

40. 123 So. 2d 738 (Fla. App. 1960).

41. 137 So. 2d 849 (Fla. App. 1962).

42. *Id.* at 852.

43. Mandelker, *supra* note 39, at 70-71 n.28.

the outcome depends on what type of relief is requested or what type of relief should have been requested is not clear.[44]

Illinois courts have taken a similar view. *Howard v. Lawton*[45] and *Sulzberger v. County of Peoria*[46] both decided that the litigant need not take "unending administrative steps."[47]

The Pennsylvania legislature passed a comprehensive statute[48] obviating administrative application prior to a challenge to the validity of an ordinance except:

> (1) When the power to grant relief against the challenged provision is lodged in any administrative agency or officer and the application is necessary to a decision upon the appropriate relief. . . .
>
> (2) When an application is necessary to define the controversy and to aid in its proper disposition. An application . . . is not necessary . . . when the challenge is addressed solely to a minimum lot size or maximum density requirement. . . . or site planning or subdivision improvement matters . . . [or] building or land use matters.[49]

From the language of this statute, it would seem that the traditional defense of failure to exhaust administrative remedies will not be favored in zoning cases in Pennsylvania.

These judicial and legislative attitudes lead directly into the new technique of attack through constitutional means on zoning ordinances, for they clear the way through the "thicket" of conventional defenses to direct challenges.

With respect to the possible defense of failure to exhaust administrative remedies in zoning cases, the courts of Florida, New York and Illinois (and Pennsylvania, with the aid of the statute noted

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44. Clearly an administrative agency cannot declare an ordinance unconstitutional, if that is the attack on it. If, however, the attack could have asked for a variance, and in the alternative, asked for a declaration of unconstitutionality, the administrative agency would have jurisdiction because it does have the power to grant a variance; it would simply ignore the constitutional attack. The New York cases do not decide what the challenger must do, but it seems likely that they would not allow a litigant to circumvent administrative procedures merely because he does not allege what he really wants, a variance, but he does allege that the ordinance is unconstitutional.

45. 22 Ill. 2d 331, 175 N.E.2d 556 (1961).

46. 29 Ill. 2d 532, 194 N.E.2d 287 (1963).

47. *See* Scott, *supra* note 39, at 229.

48. PA. STAT. ANN. tit 53, § 10801 (Purdon Supp. 1972).

49. *Id.*

above) are much more receptive to the challenges of individual litigants to zoning ordinances.[50]

With this background of conventional judicial review of zoning, and particularly the standards and applicable defenses that have been used by the courts, one can approach the relatively new technique of direct constitutional attack on ordinances with a much better perspective in observing what a radical change has occurred in court treatment of such challenges during recent years.

II. The Emerging Standard of Review

Consideration of various direct attacks on zoning ordinances must begin with a delineation of the various types of ordinances under attack, as well as the standards and methods of resolution used by courts in reaching their decisions. The ordinances can be generally categorized as follows:

A. *Ordinances Specifically Prohibiting Certain Uses*

Perhaps the clearest statement of the philosophical and practical basis for sustaining an attack upon an ordinance which specifically prohibits a particular use is the dissenting opinion of Justice Hall of the New Jersey Supreme Court in *Vickers v. Township Committee.*[51] The majority opinion in the case sustained an ordinance prohibiting mobile homes in industrial zones, generally on the ground that the ordinance was a valid exercise of the legislative power to provide for the general welfare. In his dissent, however, Justice Hall questioned the rationale of the majority and seemed to state that there should be a place in the community for mobile homes: "There is nothing to indicate that a mobile home park is not a legally and factually appropriate use somewhere in such a scene. To hold that it is not exceeds the bounds of reason."[52] Justice Hall seems to say that if the use is appropriate, it is unreasonable not to provide for it. A similar holding, in Illinois, is found in *Gedmin v. City of Chicago*[53] where the

50. *But see* Note, *Exhaustion of Remedies in Zoning Cases, supra* note 8, at 368.

51. 37 N.J. 232, 252-70, 181 A.2d 129, 140-50 (1962), *appeal dismissed,* 371 U.S. 233 (1963).

52. 37 N.J. at 270, 181 A.2d at 150.

53. 88 Ill. App. 2d 294, 232 N.E.2d 573 (1967).

court said that the only inquiry is whether the proposed use is reasonable.[54]

The test of reasonableness of use thus begins to supplant that of evaluation of administrative action or legislative authority. In Pennsylvania, however, in *National Land & Investment Co. v. Kohn*,[55] a court articulated a more stringent (on administrative agencies) standard: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."[56] The court proceeded to strike down a four-acre minimum lot size per dwelling unit ordinance as unconstitutional. Pennsylvania courts have struck down, as unconstitutional, ordinances prohibiting flashing signs,[57] billboards[58] and quarrying within municipal limits.[59] One might conclude that the Pennsylvania courts do not look kindly upon absolute prohibitions of certain uses.

The technique of injunctions restraining municipalities from enforcing ordinances and permitting the plaintiffs in such cases to proceed with their proposed uses, without interference from the municipalities, has been used by Michigan courts in *Daraban v. Township of Redford*,[60] *House v. City of Bloomfield Hills*[61] and *Lacy v. City of Warren*.[62] Yet, in *Krause v. City of Royal Oak*,[63] a Michigan appellate court reversed a trial court which had enjoined the city from enforcing a zoning ordinance placing plaintiff's property in a single-family use zone because the court found insufficient evidence to rebut the presumption of validity of the ordinance.

It has been argued that when a municipality has totally prohibited certain uses, a court may look to the proposed use of the land to see

54. *Id.* at 300, 232 N.E.2d at 579.

55. 419 Pa. 504, 215 A.2d 597 (1965).

56. *Id.* at 532, 215 A.2d at 612.

57. *In re* Ammon R. Smith Auto Co., 423 Pa. 493, 223 A.2d 683 (1966).

58. Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965).

59. Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967).

60. 383 Mich. 497, 176 N.W.2d 598 (1970).

61. 18 Mich. App. 184, 171 N.W.2d 36 (1969).

62. 7 Mich. App. 105, 151 N.W.2d 245 (1967).

63. 11 Mich. App. 183, 160 N.W.2d 769 (1968).

if that use is the most appropriate, and then allow it.[64] Illinois courts have followed that procedure.[65] However, it is a long way from the standard of reasonableness of use to the standard of substantive due process to test the conflict between zoning ordinances and proposed uses of property. The Appellate Division of New Jersey's Superior Court, however, made that step in *Gabe Collins Realty, Inc. v. City of Margate City*.[66] There the city had zoned certain areas for single-family residence, and the zoning ordinance defined "family" as one or more related persons, or not more than two unrelated persons, occupying an individual dwelling unit. Plaintiffs argued that the classification of family in the ordinance was an arbitrary and unwarranted restriction of their use of their own private property. The New Jersey court held: ". . . as written, the provision impugned is void as an arbitrary and unreasonable restriction upon plaintiffs' right to use or rent their properties, contrary to the constitutional requirements of substantive due process."[67] As noted at the beginning of this paper, this sort of analysis marks a radical departure from the principles of *Village of Euclid v. Ambler Realty Co.*,[68] and a return to the principles enunciated in the substantive due process cases of the early part of this century.

B. *Ordinances Making No Provision for Certain Uses*

A different problem is faced by the landowner when his municipality's zoning ordinances have various zones, but make no provisions at all for certain uses. In *Appeal of Girsh*,[69] the Pennsylvania Supreme Court held the municipality would not be permitted to have a zoning scheme which made no reasonable provision for apartments.[70] The rationale of this case seems to hearken back to the reasoning of Justice Hall in his dissent in the *Vickers*[71] case, discussed

64. *See* note 11 *supra*.

65. *E.g.*, Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); Mangel v. Village of Wilmette, 115 Ill. App. 2d 383, 253 N.E.2d 9 (1969); High Meadows Park, Inc. v. City of Aurora, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969); Gedmin v. City of Chicago, 88 Ill. App. 2d 294, 232 N.E.2d 573 (1967).

66. 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970).

67. *Id.* at 343, 271 A.2d at 431.

68. 272 U.S. 365 (1926).

69. 437 Pa. 237, 263 A.2d 395 (1970).

70. *Id.* at 243, 263 A.2d at 398.

71. 37 N.J. at 252-70, 181 A.2d at 140-50.

supra. If it is reasonable that a community provide for certain uses, it is unreasonable if it does not. This rationale fits neatly into the substantive due process test of the *Gabe Collins*[72] case: it is not only unreasonable not to provide for certain uses, it is also unconstitutional. (It would seem that whether the court decides that not providing for a certain use is unreasonable or denies substantive due process, the result is the same—the community may not do it.)

A related problem occurs when a municipality zones out uses such as apartments in a situation with racial overtones. Such a case is *Park View Heights Corp. v. City of Black Jack,*[73] in which a private developer secured a federal loan to build low-income housing in a previously unincorporated area. The municipality incorporated and promptly passed a zoning ordinance excluding the proposed project from approved uses. The ordinance was challenged on constitutional grounds, but the federal trial court dismissed the case on motion of the defendant, who argued that plaintiffs did not have standing to raise the constitutional question that the purpose and effect of the ordinance were to exclude persons of moderate and/or lower income from the city.[74] The Eighth Circuit Court of Appeals recently reversed the trial court's opinion holding, among other things, that plaintiffs did have standing to raise the constitutional question.[75]

III. Implications of the Emerging Standard of Judicial Review

This new technique of examining zoning decisions (ordinances and their application to specific fact situations) bodes ill to conventional judicial and administrative wisdom in their interaction in the administration of the zoning process. The standard of judicial review appears to have become one in which the court system will have more authority to overturn administrative and legislative determinations, merely because the test has become one of substantive due process. The fact of the matter is that constitutional challenges to such determinations have suddenly become successful. This state of affairs is satisfactory to the individual landowner for he now is able to have a greater chance of using his property as he desires—the courts seem more willing to listen to his arguments. For persons particularly

72. 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970).
73. 335 F. Supp. 899 (E.D. Mo. 1972).
74. *Id.* at 903.
75. 467 F.2d 1208 (8th Cir. 1972).

interested in civil liberties and for persons who dislike or distrust governmental decisions, this new standard will be eminently satisfactory.

But what about conventional planning techniques? What about the majority will which is supposedly represented in legislative and administrative determinations implementing zoning ordinances? It would be an understatement that these forces and influences in community development are greatly affected by this new standard of judicial review. Planning a community would be a practically useless task if a developer can go to court and get the plan thrown out, little by little, on constitutional grounds.

IV. Conclusion

One of the first points that can be made about this new standard for judicial review is that some of the cases have definite racial overtones which may have strongly influenced the courts in making their decisions. Certainly this can be said about the *Park View Heights* case, since there the municipality zoned out a low-income housing project which had already received a federal loan guarantee. However, other cases merely have what may be loosely termed "civil liberties" overtones. Clearly, it is difficult to generalize in any meaningful way about these cases. Whatever the rationale for deciding zoning cases in this manner, it can be clearly seen that this standard for judicial review is a radical departure from judicial practice as it has existed since the *Euclid* case.

To the writer, the principal significance of this new standard is that it subjects administrative and/or legislative determinations to a truly discredited judicial philosophy, substantive due process. As was noted at the beginning of this note, that philosophy was rejected by the Supreme Court of the United States half a century ago. More importantly, this philosophy injects the court system into an arena in which it is ill-equipped to make legitimate judgments. To avoid belaboring the obvious, perhaps the best conclusion to this note would be a quotation from the classic dissenting opinion of Mr. Justice Black in *Adamson v. California*,[76] where the late Justice wrote:

> . . . to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another.

76. 332 U.S. 46, 68 (1947).

> In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to the reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.[77]

Referring once again to the cases of the Supreme Court which rejected substantive due process objections to legislation,[78] it cannot seriously be argued that courts today, in their new standards for judicial review of zoning decisions, are not doing what Justice Black inveighed against in the *Adamson* case. And it cannot seriously be argued that the effect of such judicial reasoning and decisions will not recreate the problems that the substantive due process cases created in the early part of this century.

The real issue here is the role of the judicial system in the whole process. Given the principle of separation of powers embodied in the Constitution of the United States and the very real dangers in an omnipotent judiciary, should not the judicial system return to its earlier position, discussed in this note, of review of administrative and/or legislative determinations in zoning cases? In most cases, the answer appears to be a definite *yes*.[79]

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77. *Id.* at 91-92.

78. *See* note 4 *supra.*

79. Subject, of course, to serious and legitimate civil rights claims which have allegedly been affected by administrative and/or legislative determinations.