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## THE UNHAPPY STATE OF ZONING ADMINISTRATION IN ILLINOIS

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*The question must be asked seriously whether zoning, as it is currently being practiced, is endangering our democratic institutions. . . . Is zoning increasingly becoming the rule of man rather than the rule of law? I would be inclined to answer both questions affirmatively.<sup>1</sup>*

THE RECORD in Illinois supports Walter Blucher's indictment. As things stand today the administration of municipal and county zoning ordinances in Illinois is, with a few exceptions, a reproach to the principle of local self-government. The responsibility for this condition rests not only upon the local lay authorities and their professional planning consultants but also upon the state legislature, the legal profession and the judiciary. The two last named protagonists in the debacle share responsibility because of the indifference of the former and the impatience cum zeal of the latter.

It is the purpose of this essay to describe the unhappy condition of the present state of the law and practice and to propose an unpopular but necessary reform. It may be useful first to place the immediate problem in perspective.

### I

The accelerated urbanization of the United States since World War II has elevated municipal zoning ordinances to an unexpected status in the economic life of this country. Thirty years ago zoning, although formally acknowledged by most states and numerous municipalities as a valid method of public control over private land use, was in fact of little practical concern to major developers of raw land. During the thirties, a few conscientious municipalities carried on occasional skirmishes with individual landowners who sought to obtain a

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<sup>1</sup> Blucher, *Is Zoning Wagging the Dog?* Planning 1955, 96 (American Society of Planning Officials, 1955).

greater financial return from their real estate, but for the most part the few industrial and residential developers who were active in the market could count on a relaxed attitude of local officials toward serious defense of those zoning laws which were on the books.<sup>2</sup> Today, a stiffening civic pride in costly urban and suburban land use plans and burgeoning associations of residential property owners are waging raucous and expensive battles with expanding industry and hungry subdividers over the vanishing supply of undeveloped real estate within commuting distance of the urban center.<sup>3</sup>

This dramatic change in the social and economic significance of zoning has been underscored by the introduction by the professional city planners of startling innovations in the substantive regulatory techniques with which the texts of modern zoning ordinances are interlarded. These recent developments have not escaped the attention of commentators, whether they be planners or lawyers. The cases and texts are full of commentaries on these novel substantive components of modern zoning regulation. Such terms as "amortization of non-conforming uses," "transitional zones," "minimum floor area ratio" and "performance standards" are common jargon in legal disputes and learned articles. Two decades ago they were unknown.<sup>4</sup>

What has failed to attract the scrutiny of legislators, courts or commentators is the primordial administrative system by and through which zoning, with all its newly-acquired muscles, purports to be controlled. Few of the commentators have shown concern over the growing disparity between the sophistication of

<sup>2</sup> During the first decade following the introduction of zoning (at the end of World War I) as a new tool of land use regulation, the optimism of the era was reflected in substantial over-zoning for commercial and industrial uses, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. of Chi. L. Rev. 477, 488-90 (1942). During the depression the odds were against any municipality which stood in the way of a proposed commercial development if the developer chose to take the issue to court. Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. of Chi. L. Rev. 87 (1947).

<sup>3</sup> The growing awareness by industry of the need to take zoning seriously is reflected in the promotional literature released by various industries. Consult, for example, *The Place of the Service Station in the Community*, No. 1522, American Petroleum Institute (1957); *Zoning and Civic Development*, Chamber of Commerce of the United States (1950); Whan, *What Industry Expects from Community Planning*, Planning Advisory Service (American Society of Planning Officials, July, 1957). At the same time the appearance of residential property owners' associations as intervenors in zoning litigation has served to counterbalance the increased sophistication of industry and commerce, e.g., *In re East Maine Township Community Ass'n*, 15 Ill. App.2d 250, 145 N.E.2d 777 (1957); *Deer Park Civic Ass'n v. Chicago*, 347 Ill. App. 346, 106 N.E.2d 823 (1952). If anyone questions the breakthrough of zoning to a place of significance in the American scene, they have not kept up with the best seller lists. See Metalious, *Peyton Place* (1957).

<sup>4</sup> Blucher, *City Planning for Noise Control*, 2 Noise Control No. 4, at 51 (Acoustical Society of America, 1956); Crolly and Norton, *Termination of Nonconforming Uses*, 62 Zoning Bull. 1 (Regional Plan Ass'n, 1952); Haar, *Zoning for Minimum Standards; The Wayne Township Case*, 66 Harv. L. Rev. 1051 (1953); Babcock, *The New Chicago Zoning Ordinance*, 52 Nw. U. L. Rev. 174 (1957); Haar and Rodwin, *Urban Land Policies: United States, United Nations Bull. No. 7* (1953); *Performance Standards in Zoning Ordinances*, Planning Advisory Service (American Society of Planning Officials, July, 1957).

current substantive zoning regulations and the neolithic conditions of local zoning administration, as reflected not only in the techniques for adjusting conflicts but also in the practices of local bodies charged with the duty of resolving those conflicts.<sup>5</sup> It may be useful, therefore, to pause in what appears to be a headlong municipal rush to seize upon the latest substantive devices for land control and reflect upon the simple question: How are we to insure administrative fair play in the resolution of the inevitable and substantial conflicts between private and community ambitions which zoning creates? The occasion for analysis may be peculiarly ripe in Illinois in view of the accumulating evidence of lack of procedural due process at the local level, and the confusion which has arisen in the decisions and among lawyers in that state within the last two years in the field of zoning administration.

## II

Zoning, as an administrative process, does not readily lend itself to customary techniques of critical analysis. This difficulty stems not so much from the comparative youth of zoning as a method of land use control as it does from the peculiarities of the administrative process which underlies zoning law. Zoning administration—as here defined—encompasses those functions of local government which seek (1) to provide for changes in the zoning ordinance to meet changes in the needs of the community, and (2) to reconcile the generalized terms of the local land use plan with the peculiar characteristics of each separately owned parcel of real estate. The inherent conflicts and inevitable need for changes are sought to be mitigated, if not resolved, by the incorporation in the zoning ordinance of techniques for granting dispensation to individuals from the blunt generalities of the ordinance.<sup>6</sup> This aim is reflected in the vesting of discretionary powers in local zoning boards and in local legislatures. The availability of this relief carries with it the implicit risk of discrimination which in most other administrative systems is minimized by a uniform system of practice and by an administrative ethos enforced by a monolithic organization. Zoning administration, to the contrary, is atomistic.<sup>7</sup> The state enabling acts in

<sup>5</sup> The planning profession has been shockingly silent about this disparity between the substantive techniques and the inadequacies of the standards established to insure fair play in the application of those techniques. The lone voice of protest has been that of a lay organization, American Society of Planning Officials, and its officers. See Newsletter, American Society of Planning Officials, Vol. 17, No. 6 (June, 1951), and Vol. 23, No. 6 (June, 1957); Blucher, *op. cit.* supra note 1.

<sup>6</sup> "Should any discrimination develop [in the administration of the zoning ordinance] it can be removed by the administrative action of the board of appeals, for which provision is made both by the enabling act and the ordinance." *Aurora v. Burns*, 319 Ill. 84, 98, 149 N.E. 784, 790 (1925). This article does not consider zoning administration at the level of the official charged with ministerial duties incident to the enforcement of the ordinance or the issuance of permits under the ordinance.

<sup>7</sup> Some may dispute the claim to uniqueness of the system of zoning administration and cite the lack of administrative uniformity of practice and standards apparent in local boards of tax review, local liquor commissions and, indeed, local school boards. It is suggested that in no one of these systems is there found the combination of (a) diversities of local practice,

Illinois authorize each municipality<sup>8</sup> and county<sup>9</sup> to adopt an ordinance and to provide for the administration of that ordinance. The municipality may designate a board of zoning appeals to interpret that ordinance but dispensation from the terms of the ordinance may be granted by the board or by the legislature itself.<sup>10</sup> Changes, however they are labelled, require a public hearing. The enabling act leaves substantial discretion to the local authorities to establish methods of procedure and standards of conduct in the hearings.<sup>11</sup> When this flexibility in administration is added to the manifest necessity for diversity among municipalities in the substantive regulations to meet peculiar local conditions, it is apparent that the result is a multiplicity of local relief-granting practices which have no common mold. In this respect, zoning departs from nearly all other systems of administrative law that pivot around one quasi-judicial body, which in turn derives its power from one legislature. This peculiarity of zoning administration is accentuated by the diversity of methods used to grant administrative relief, commonly referred to as variations, amendments and special uses, each with its own subspecies. The distance between the law of zoning administration and the administration of other substantive governmental regulations reaches its apogee in the multiplicity of paths available, at least in Illinois, to the litigious soul who wishes to challenge the decision of local administrators in court.<sup>12</sup>

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(b) alternative sources of local relief, and (c) alternative methods of judicial review which is present in zoning administration.

<sup>8</sup> Ill. Rev. Stat. (1957) c. 24, §73-1 et seq.

<sup>9</sup> Ill. Rev. Stat. (1957) c. 34, § 152(i) et seq. Hereafter all references are to the statute enabling municipalities unless a distinction exists between the powers granted municipalities and those granted counties.

<sup>10</sup> The city council or board of trustees *may* provide for the appointment of a board of appeals to (a) act upon variations, (b) hear appeals from and review any "order, requirement, decision or determination made by an administrative official," and (c) to "hear and decide all matters referred to it or upon which it is required to pass under such an ordinance." Ill. Rev. Stat. (1957) c. 24 §§73-3, 73-4. The regulations and "the districts created" may be amended by the local legislature but not until a hearing has been held by "some commission or committee." *Id.*, at §73-8. In the case of counties the hearing on amendments must be held by the board of appeals. Ill. Rev. Stat. (1957) c. 34, §152(m).

<sup>11</sup> "(C) In all municipalities, one of the members so appointed shall be named as chairman at the time of his appointment. The appointing authority has the power to remove any member of the board for cause and after public hearing. Vacancies shall be filled for the unexpired term of the member whose place has become vacant. All meetings of the board of appeals shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision, or determination of the board shall immediately be filed in the office of the board and shall be a public record." Ill. Rev. Stat. (1957) c. 24, §73-3.

<sup>12</sup> The complainant may bring suit for injunction, *Regner v. County of McHenry*, 9 Ill.2d 577, 138 N.E.2d 545 (1956); or declaratory judgment, *Jacobson v. City of Evanston*, 10 Ill.2d

It is odd, given this hodgepodge, that only recently has the character of the administration of zoning ordinances attracted serious attention in Illinois. Today, however, a series of recent decisions of the Illinois Supreme Court on zoning procedure has perplexed municipal officials and distressed attorneys for property owners. The current dismay orbits around two questions: (1) What local relief must a property owner seek before he has a right to challenge a zoning ordinance in court? (2) What form of judicial relief must the property owner follow after he has sought and been denied relief by the local authorities?

It is suspected that the attempts by commentators to reconcile and explain the recent decisions of the Illinois Supreme Court on these questions,<sup>13</sup> and recent proposals to resolve the confusion by amendments to state enabling acts,<sup>14</sup> only serve to accelerate the rate of speed with which we are driving into a hopeless administrative cul-de-sac. The trouble with the proposed legislative solutions and the attempts to reconcile the recent decisions of the Illinois Supreme Court rests in their failure to probe the central issue: Is the present system of local zoning administration sound? It is more likely that the answer to the present confusion rests not in reform of appellate procedure nor with more efficient sanctions to enforce decisions at a local level, but with the local system itself. The present debate concerns itself with symptoms, not with the inherent inadequacies of the quasi-judicial administrative process in zoning.

A search for a feasible solution should start with an examination of the sources of local relief from the general terms of the zoning ordinance.

### III

The property owner who believes himself injured by the substantive provisions of a zoning ordinance must first elect from a perplexing array of local relief-granting remedies. A study of any zoning ordinance will disclose not less than two and possibly three sources of relief: the variation, the amendment and, with increasing frequency, the special use.

The variation, properly used, is a method for cushioning the harsh impact of the general language of the ordinance in cases where a unique hardship would result to the property owner because of topographic circumstances or condi-

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61, 139 N.E.2d 205 (1956); or mandamus, *Alco Deree Co. v. City of Chicago*, 2 Ill.2d 350, 118 N.E.2d 20 (1954); or he may go by way of the Administrative Review Act, see *Strohl v. Macon County Zoning Board of Appeals*, 411 Ill. 559, 104 N.E.2d 612 (1952); *Winston v. Zoning Board of Appeals of Peoria County*, 407 Ill. 588, 95 N.E.2d 864 (1951). In each such case the sole issue is the unreasonableness (i.e., unconstitutionality) of the zoning ordinance insofar as it restricts the use of complainant's property.

<sup>13</sup> Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 40 Chi. Bar Rec. 119 (1958); Lawton, Jr., *Procedural Implications of Recent Zoning Decisions*, 40 Chi. Bar Rec. 15 (1958); Black, *Odd Sized Lots vs. Odd Shaped Opinions*, 47 Ill. Bar J. 748 (1959).

<sup>14</sup> See the proposal of Administrative Law Section, Illinois State Bar Association, cited in Fox, *op. cit. supra* note 13, at 124; unpublished Report to Board of Managers of Chicago Bar Association of Special Subcommittee on Zoning Legislation (Sept., 1958).

tions of survey.<sup>15</sup> A requirement that all side yards in R-1 Residential Districts be not less than ten feet in width may make good sense in all but the one lot which is pie-shaped. A front yard setback of thirty feet may be generally enforceable without offending a sense of fair play unless a deep ravine cuts across a particular lot, thereby restricting the customary buildable area. For these rare instances special dispensation can be granted without apparent discrimination against the owner of a more "typical" parcel of land. Unfortunately for the variation its growth in Illinois was distorted at an early age by its indiscriminate employment as a devious and uncandid method for granting special favors to persons who were not faced with circumstances any different than those encountered by their neighbors.<sup>16</sup> During the first decade of zoning in Illinois nearly all zoning ordinances delegated the authority to grant variances to the zoning board of appeals. The variation became for the local board of appeals of easy conscience a neat device for changing the permitted *use* of a parcel of land without appearing to do so. A property owner who desired to use his lot (classified residential) for commercial purposes would apply for a variation. If granted, the zoning map still reflected a residential classification, but on the lot there was, for example, a gas station. The owner was satisfied and the members of the board of appeals could congratulate themselves that they had not engaged in the wicked practice of "spot zoning." The only practical disadvantage to the use variation from the viewpoint of the property owner was that an application for a use variation was expected to designate the precise type of relief sought (a bus terminal, a 50' X 25' single-story delicatessen).<sup>17</sup> This was

<sup>15</sup> The grant of a variation is required to be based upon a finding by the local board of appeals (or local legislature) that there is a "practical difficulty or particular hardship" in the enforcement of the ordinance against a particular parcel of real estate. Ill. Rev. Stat. (1957) c. 24, §73-4. If this basis for a variation is extended to include petitions for *use* variations (e.g., to permit a grocery store on a lot zoned for residential purposes), it is difficult, if not impossible, to demonstrate in what way the "hardship" or "difficulty" is not equally applicable to any other parcel in the neighborhood: "The mere fact that the owner of a particular parcel of property in a certain district, acquired long after it was classified under the zoning ordinance, can make more money out of it if permitted to disregard the ordinance instead of required to comply with it, is neither a difficulty nor a hardship authorizing the board of appeals to permit such owner to disregard the ordinance so far as it interferes with his plans for a more profitable use, and the legislature was without power to authorize an administrative board to grant such permission." *Welton v. Hamilton*, 344 Ill. 82, 95, 176 N.E. 333, 338 (1931). See also, Pomeroy, *Losing the Effectiveness of Zoning through Leakage*, 7 *Planning and Civic Comment*, No. 3 (1941); Bassett, *The Law of Zoning* 120 et seq. (1936). The Supreme Court of Illinois does not, however, question the employment of the variation to effect changes in use, although it does not trouble to explain how such a variation is based upon a "hardship" other than the economic one repudiated in *Welton v. Hamilton*. *Bullock v. City of Evanston*, 5 Ill.2d 22, 123 N.E.2d 840 (1955); *Morgan v. City of Chicago*, 370 Ill. 347, 18 N.E.2d 872 (1939).

<sup>16</sup> Consult, for illustrations, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. of Chi. L. Rev. 447, 492 (1942); *Some Novel Theories about Zoning Variances*, 17 *Newsletter*, No. 4 (American Society of Planning Officials, June, 1951).

<sup>17</sup> Nothing in the Illinois cities and villages zoning enabling act requires the petitioner for a variation to specify the particular use which he wishes to establish on his parcel, but boards and courts have assumed that the variation granting power was limited to instances where the

sufficient for the single-minded owner of a single lot, but it was not adequate for the promoter who could make no promises with respect to the precise character his commercial ambitions might assume. But in the thirties there were few eager promoters and generally the petitioner for local relief was the hard-pressed owner of a single lot who had need of an extra dollar of income at his own residence, or whose lot appeared attractive to a gasoline distributor. This friendly practice by boards of appeal was diverted, if not arrested, by the decision of the Illinois Supreme Court in *Welton v. Hamilton*,<sup>18</sup> which held that the grant of power to boards of appeal to enfranchise variations was an unconstitutional delegation of legislative power without adequate standards (which, considering the carefree practice, it certainly was). This decision, then deplored,<sup>19</sup> later praised,<sup>20</sup> ultimately ignored,<sup>21</sup> was to leave its spore in the multiform character of local methods developed by municipalities to circumscribe it. Most municipalities, determined to continue the use variation as a painless method for changing the ordinance in individual cases, trumped *Welton* by imposing no limitations on the power to grant variations; the power to vary was simply vested in the local legislature after a public hearing by the board of appeals.<sup>22</sup> As long as the grant of relief was "legislative" not "administrative," no constitutional unpleasantness was encountered and the easy-going practice could carry on.

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property owner requested a specific exception to the general restrictions of the ordinance. Hence a request for a variance has always been cast in the form of a petition for authority to do a specified act not otherwise permitted. This contrasts with the consequences of an amendment, discussed in text at note 29 *infra*.

<sup>18</sup> 344 Ill. 82, 176 N.E. 333 (1931).

<sup>19</sup> Freund, Power of Zoning Boards of Appeals to Grant Variations, 20 Nat. Munic. Rev. 537, 538 (1931); Municipal Corporations—Power of Board of Appeals to Vary Application of Zoning Ordinance, 31 Mich. L. Rev. 106, 108 (1932).

<sup>20</sup> Bartholomew, The Zoning of Illinois Municipalities, 17 Ill. Munic. Rev. 221, 232 (1938). The *Welton* decision was reaffirmed in *Speroni v. Board of Appeals of Sterling*, 368 Ill. 568, 15 N.E.2d 302 (1938), but was held inapplicable to variations granted by the local legislature, *Downey v. Grimshaw*, 410 Ill. 21, 101 N.E.2d 275 (1951).

<sup>21</sup> The Illinois Appellate Court upheld the grant of a use variation by a board of appeals in *Baird v. Board of Zoning Appeals of Kankakee*, 347 Ill. App. 158, 106 N.E.2d 343 (1952); and the Supreme Court appears willing to forget *Welton*. See *Lindburg v. Zoning Board of Appeals of Springfield*, 8 Ill.2d 254, 133 N.E.2d 266 (1956), where the Court said it was not necessary to consider the allegation that delegation of power to board of appeals to vary was unconstitutional because the board had, in that case, failed to make findings of fact called for by statute. In 1957, the state legislature evidenced its attitude toward *Welton* by amending the enabling act to provide that in municipalities of over 500,000 population variations could be granted *only* by the board of appeals. Ill. Rev. Stat. (1957) c. 24, §73-4(a).

<sup>22</sup> "Where in specific cases of applications for permits there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of this ordinance, the Board of Appeals shall have power on application to *recommend* to the Board of Trustees variations of or from this ordinance or amendments thereto. Variations from this ordinance shall in all cases be made by ordinance of the Village Board of Trustees." Flossmoor, Ill. Zoning Ord. (1946) Art. XI. (Emphasis added.) For similar language consult Evanston, Ill. Zoning Ord. (1940) Art. IV; Lake County, Ill. Zoning Ord. (1939) §25.

A few Illinois municipalities, determined to restrict the variation to its classical, if forgotten role, followed a different path. They let the power to vary remain with the board of appeals but expressly limited the situations in which a variation could be granted. They denied to the board the power to grant variations for *uses*.<sup>23</sup> These two divergent methods for circumventing the *Welton* case resulted in two sources of variations; one, the council or board of trustees; the other, the board of appeals; and each system was encrusted with a variety of restrictions upon the type of variation either body could grant.<sup>24</sup> As daring municipalities found that the Illinois courts were prepared to ignore the *Welton* decision,<sup>25</sup> they, bit by bit, began to give the board greater leeway in variations.<sup>26</sup> Some, heeding vague restrictions in post-*Welton* amendments to the state enabling act,<sup>27</sup> purported to attach standards designed to control the board's discre-

<sup>23</sup> "Where there are practical difficulties or particular hardship in the way of carrying out the strict letter of this ordinance the Board of Appeals may authorize a variation in the application of the regulations of this ordinance in harmony with their general purpose and intent, and so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done as follows:

"1. To permit a front yard, a side yard, and/or a rear yard, less than that required by this ordinance, but such variation shall not exceed twenty (20) percent of the depth of the front yard, or the depth of the rear yard, or the width of a side yard, as required by this ordinance, except that where the maximum variation of the depth of the front yard as provided by this paragraph requires a building line setback greater than twenty-five (25) percent of the depth of the lot the Board may make a further variation which shall in no case establish a building line setback less than twenty-five (25) percent of the depth of the lot.

"2. To permit a building to exceed the height limit by not more than five (5) percent of the height limit established by this ordinance.

"3. To permit the use of a lot less in area by not more than ten (10) percent of the lot area required by this ordinance.

"4. To permit the use of a lot less in width by not more than fifteen (15) percent of the lot width as required by this ordinance.

"5. To permit a building to occupy a percentage of the lot area greater than that required by this ordinance by an amount not to exceed fifteen (15) percent of the lot occupancy percentage limit established by this ordinance.

"6. To exercise such other powers of variation as are or may be vested in the Board of Appeals by law." Glencoe, Ill. Zoning Ord. (1940) Art. XV, §3.

<sup>24</sup> Thus the anomalous situation developed that the great majority of municipalities which accepted the *Welton* decision as forbidding final action by the board of appeals on variations imposed no limitation on the type of variation which might be granted as long as it was granted by the local legislature, while those few municipalities which dared to continue to vest the power in the board of appeals effectively removed any authority to grant variances for use. See note 23 *supra* and, for examples of later restrictions upon boards of appeal, note 29 *infra*.

<sup>25</sup> See note 21 *supra*.

<sup>26</sup> E.g., Highland Park, Ill. Zoning Ord. (1948) §17-7 et seq.

<sup>27</sup> Soon after the *Welton* decision the Illinois legislature amended the cities and villages enabling act by inserting "particular hardship" in place of "unnecessary hardship" and by requiring a "finding of fact" before a variance could be granted by the board of appeals. Ill. L. (1933) 288, 289. The county enabling act, when adopted in 1935, made use of this post-*Welton* phraseology. Ill. L. (1935) 689. Subsequently, the state legislature provided in the cities and villages enabling act that in cases where the variation was granted by the board, "the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone;



tion, and to vest in the board the power to attach conditions to variations.<sup>28</sup> Thus, a property owner who had a specific change in use in mind might seek a variation from a board of appeals or from a local legislature, with or without conditions, depending upon the practice in the particular municipality in which his property was located. Or he might find that to obtain a change in use from that permitted by the ordinance he had to seek relief under some other label.

In recent years an increasing number of municipalities have insisted that any change in use from that presented by the ordinance must be by way of an amendment to the zoning map.<sup>29</sup> This has not always been due in all instances to a desire to discourage changes by employment of a more candid method. Spot

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and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated." No such findings are prerequisite to the grant of a variation if it is in the form of an ordinance adopted by the "corporate authorities." Ill. Rev. Stat. (1957) c. 24, §§73-4(a) and (b). No such standards or distinction appears in the county enabling act. Ill. Rev. Stat. (1957) c. 24, §152(k)(1). Consult *Kaczorowski v. Elmhurst Chicago Stone Company*, 10 Ill.2d 582, 141 N.E.2d 14 (1957).

<sup>28</sup> "For the purpose of implementing the above rules, the Board shall also, in making its determination whether there are practical difficulties or particular hardships, take into consideration the extent to which the following facts favorable to the applicant have been established by the evidence.

"(1) the particular physical surroundings, shape, or topographical condition of the specific property involved would result in a particular hardship upon the owner, as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out;

"(2) the conditions upon which the petition for a variation is based would not be applicable, generally, to other property within the same zoning classification;

"(3) the purpose of the variation is not based exclusively upon a desire to make more money out of the property;

"(4) the alleged difficulty or hardship has not been created by any person presently having an interest in the property;

"(5) the granting of the variation will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located; and

"(6) the proposed variation will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood.

"The Board of Appeals may impose such conditions and restrictions upon the premises benefited by a variation as may be necessary to comply with the standards set out in this Section 11.7-3 to reduce or minimize the injurious effect of such variation upon other property in the neighborhood, and better to carry out the general intent of this comprehensive amendment." Comprehensive Amendment to Chicago, Ill. Zoning Ord. (1958) Art. 11.7-3. The Supreme Court has acknowledged the validity of conditions attached to the grant of a variation. *Zweifel Mfg. Corp. v. City of Peoria*, 11 Ill.2d 489, 493, 144 N.E.2d 593, 595 (1957); *Bullock v. City of Evanston*, 5 Ill.2d 22, 26, 123 N.E.2d 840, 842 (1955).

<sup>29</sup> The Chicago, Illinois ordinance effectively forbids variations for use. Comprehensive Amendment to Chicago, Ill. Zoning Ord. (1958) Art. 11.7-4; see also *Bensenville, Ill. Zoning Ord. (1957) Art. XVII, §7-4*; *Champaign, Ill. Zoning Ord. (1951) Art. XVI, §3*. The same section of the state enabling act which takes away from the Chicago City Council the power to grant variations also expressly recognizes that the local zoning ordinance may forbid the grant of use variations by the board of appeals. Ill. Rev. Stat. (1957) c. 24, §73-4(a).

zoning was (and is) practiced as an alternative to the grant of variations to take care of the hard-pressed property owner.<sup>30</sup> The use of an amendment in lieu of a variation has not always been bottomed upon a recognition of the basic functional difference between the two, the former designed to recognize changes in the community plan called for in the public interest,<sup>31</sup> the latter intended to alleviate genuine and unique hardship to the owner of a particular lot or lots. One of the most unfortunate developments in Illinois in the law of zoning has been the failure of the courts to point out and insist upon a recognition of the fundamental distinction between the basis for a variation and an amendment. Indeed the Supreme Court, while occasionally acknowledging that an amendment must be justified by the public interest,<sup>32</sup> has also suggested that if the circumstances justify an amendment, a variation would be equally appropriate.<sup>33</sup> If this is so, then the property owner who faces a neighborhood protest to his proposed change in use is a fool if he seeks an amendment where the local ordinance permits a variation. In the case of an amendment a protest by a

<sup>30</sup> Zoning Amendments and Variations, and Neighborhood Decline in Illinois, 48 Nw. U. L. Rev. 470, 474-76 (1953). "Spot zoning," as the term implies, is the reclassification of an isolated parcel to a zone incompatible with the surrounding neighborhood and based upon a desire to favor or discriminate against that parcel without regard to the interests of the community as a whole. Under this definition, in rare instances the reclassification of a small parcel might be based upon a genuine public need and hence not be considered "spot zoning." See 1550 North State Street Bldg. Corp. v. City of Chicago, 15 Ill.2d 408, 418, 155 N.E.2d 97, 103 (1958). For a representative collection of decisions in which this term is discussed, see Yokely, Zoning Law and Practice § 90-95 (1953).

<sup>31</sup> Michigan-Lake Building Corp. v. Hamilton, 340 Ill. 284, 172 N.E. 710 (1930); Kennedy v. City of Evanston, 348 Ill. 426, 181 N.E. 312 (1932); Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950); Kinney v. City of Joliet, 411 Ill. 289, 103 N.E.2d 473 (1952).

<sup>32</sup> "Appellee insists that the fact that a majority of the property owners in and adjoining the district in question want the change is proof of the changing condition of the territory. The power to amend is not arbitrary. It cannot be exercised merely because certain individuals want it done or think it ought to be done. The change must be necessary for the public good." Kennedy v. City of Evanston, 348 Ill. 426, 433, 181 N.E. 312, 314 (1932).

<sup>33</sup> "The point is raised by appellants that the granting of a variation permitted the changing of a district by indirection in the guise of a variation. We do not see the merit in that contention. Section 8 of the Act (Ill. Rev. Stat. [1949] chap. 24, par. 73-8) provides that the districts created by a zoning ordinance may be changed from time to time. If a district can be legally changed, and there is ample authority for same, then we fail to see why the governing bodies do not have the same authority to grant a variation." Downey v. Grimshaw, 410 Ill. 21, 30, 101 N.E.2d 275, 279 (1951) (Emphasis added.) For similar language, see Miller v. Gill, 389 Ill. 394, 59 N.E.2d 671 (1945); Rector v. Board of Appeals of Danville, 342 Ill. App. 51, 95 N.E.2d 99 (1950). The confusion is equally apparent in the appellate court opinions: "This could well be the case where zoning is involved because variations frequently are obtained either by amendment, by proceedings before the proper board, or by a judicial proceeding to determine the validity of the ordinance as to the particular property involved." Warshawsky v. American Automotive Products Co., 12 Ill. App.2d 178, 184, 138 N.E.2d 816, 819 (1956) (Emphasis added.) The Appellate Court also apparently assumes that a board of appeals can adopt amendments: "Where there is a refusal by the Zoning Board of Appeals to rezone or vary the classification upon application made by a property owner, the appeal is allowed upon condition that notice be given as provided by statute." In re East Maine Township Community Ass'n, 15 Ill. App. 250, 256, 145 N.E.2d 777, 780 (1957) (Emphasis added.)

minority of the neighbors can make imperative a favorable vote by two-thirds of all aldermen or trustees,<sup>34</sup> whereas a protest by all the neighbors to a variation could be ignored by a simple majority of the local authorities.<sup>35</sup>

The only clear distinction between amendments and variations was that the former could only be granted by the local legislature.<sup>36</sup> In some instances the practical consequences might be the same whichever relief-granting device were employed, but one change was "administrative" the other "legislative," and the traditional distinction was clear, or so it was assumed.<sup>37</sup>

Thus a disgruntled property owner might seek a variation from the board of appeals, a variation from the city council after a hearing by the board, or an amendment from the council after a hearing by the board or by some "commission or committee," *depending entirely upon local custom*. Neither the courts nor local officials have sensed any distinction between the functions of these methods of relief and there are, therefore, whatever the particular circumstances, almost as many methods for obtaining local relief as there are municipalities and counties in Illinois which have zoning ordinances.

At this point, the professional city planners, apparently not satisfied that the variation and the amendment provided sufficient administrative discretion, introduced the "special use."<sup>38</sup> The "special use" permit, sometimes referred

<sup>34</sup> Ill. Rev. Stat. (1957) c. 24, §73-8.

<sup>35</sup> See *Rector v. Board of Appeals of Danville*, 342 Ill. App. 51, 95 N.E.2d 99 (1950), where the property owner originally filed for an amendment which was protested by that number of neighbors sufficient to invoke the two-thirds rule. The applicant then withdrew its petition for an amendment and asked for a variation which was approved by a three to two vote of the city council.

<sup>36</sup> "The regulations imposed and the districts created under the authority of this article may be amended from time to time by ordinance after the ordinance establishing them has gone into effect, but no such amendment shall be made without a hearing before some commission or committee designated by the corporate authorities. . . ." Ill. Rev. Stat. (1957) c. 24, §73-8. The public hearing required before an amendment can be enacted by the municipal legislature is held not before the board of appeals but before some "commission or committee." *Ibid.* Some municipalities have authorized committees of the local legislature to conduct such hearings; others refer the request for amendment to the local plan commission or the board of appeals or to any agency of doubtful legal status, the zoning commission, which, according to the enabling act, is dissolved upon adoption of a zoning ordinance. Ill. Rev. Stat. (1957) c. 24, §73-2. In the case of county zoning, the hearing on amendments as well as on variations must be held by the board of appeals. Ill. Rev. Stat. (1957) c. 34, §152-m. This variegated practice also contributes to the confusion between the proper functions of an amendment and a variation.

<sup>37</sup> If a property owner were permitted to erect a drug store or drive-in theatre on his property, the practical consequences to his neighbors are probably the same whether he obtained the right by variation or by a reclassification of the property from a residential zone to a business zone. There are, however, differences in the legal consequences which could result in practical distinctions between a variation and an amendment. These are discussed in text at note 63 *infra*.

<sup>38</sup> Approximately twenty-five Illinois cities, villages and counties have incorporated this technique in revised zoning ordinances during the last fifteen years upon the recommendation of professional planning consultants.

to as the "additional use"<sup>39</sup> or "conditional use,"<sup>40</sup> is an amalgamation of the amendment and the variation. A specific use, such as an electric substation or a hospital, may be listed in the text of the zoning ordinance in one or more of the Residential Zones or the Business Zones. Unlike a permitted use, however, a permit can not be issued by the zoning enforcing officer to build this special use until a public hearing has been held by the plan commission, the board of appeals or a committee of the local legislature, and the local legislature has, thereafter, expressly authorized the use. Unlike a variation, those uses entitled to this privilege or special treatment are specified in the text and unlike the variation, the planning basis for the grant is not the hardship a denial may cause the applicant. The special use is said to be a method for anticipating changes in the local land use pattern where "unique" uses (such as public utilities) may, for reasons of public interest, be required in one or more zones, although they are incompatible with the dominant pattern of uses in that zone.<sup>41</sup> Rather than treat such uses as permitted uses, in which case the administrator must issue a permit, the municipality elects to exercise some control over the location and design of the singular use. Although customarily passed upon by the local legislature,<sup>42</sup> the special use differs from an amendment (the permissible subjects of which are not usually identified in the text) in that the municipality, by

<sup>39</sup> Rock Island County, Ill. Zoning Ord. (1955) Art. XVII.

<sup>40</sup> Libertyville, Ill. Zoning Ord. (1953) §III.

<sup>41</sup> "The development and execution of a comprehensive zoning ordinance is based upon the division of the City into districts within which districts the use of land and buildings and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are variations in the nature of special uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts, without consideration in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location. Such variations in the nature of special uses fall into two categories:

"(1) uses either municipally operated, or operated by publicly regulated utilities or uses traditionally affected with a public interest; and

"(2) uses entirely private in character but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities." Comprehensive Amendment to Chicago, Ill. Zoning Ord. (1958) Art. 11.10.

There is no express recognition of the special use in the Illinois zoning enabling acts. The Supreme Court and the appellate courts have appeared to accept this technique as a valid zoning device. See *Illinois Bell Tel. Co. v. Fox*, 402 Ill. 617, 85 N.E.2d 43 (1949); *Baird v. Board of Zoning Appeals of Kankakee*, 347 Ill. App. 158, 106 N.E.2d 343 (1952); *Rosenfeld v. Zoning Board of Appeals of Chicago*, 19 Ill. App.2d 447, 154 N.E.2d 323 (1958); *Moran v. Zoning Board of Appeals of Chicago*, 17 Ill. App. 280, 149 N.E.2d 480 (1958). The Circuit Court of DuPage County has recently upheld a special use provision in the DuPage ordinance against the charge that the device was beyond the scope of power delegated by the county enabling act. *Kotrick v. County of DuPage*, Docket No. 58-1647 (Notice of appeal has been filed.)

<sup>42</sup> Most municipalities which have provided for the "special use," have treated it as a legislative matter requiring a hearing by the plan commission and final action by the city council or board of trustees. Of all the Illinois municipalities which are known to have incorporated this device in their ordinances, only Chicago has provided that the board of appeals, not the local legislature, shall make the final decision. Comprehensive Amendment to Chicago, Ill. Zoning Ord. (1958) Art. 11.10-2.

cataloguing the special uses, acknowledges that the specified uses probably will be required in the future in the designated zones.

It is safe to venture that experience in Illinois suggests that neither local governments nor the courts are clear as to the relation of the special use to either the amendment or the variation.<sup>43</sup> Indeed, there is evidence that the special use technique, originally confined to a few homogeneous items, is rapidly growing to the point where it includes a variety of "troublesome" uses, such as trailer camps, off-street parking areas and indeed gravel pits.<sup>44</sup> The suggestion has been made by the country's leading lawyer-turned-planner that the special use is a convenient catch-all for all those uses which the local authorities or professional planners are unwilling or unable to assign to designated zones.<sup>45</sup> Implicit in this criticism is the overtone of concern that zoning is rapidly becoming a system where little is certain except that the property owner must get permission from some local administrative body before he can do anything.<sup>46</sup> It is notable that some municipalities which have felt impelled to curtail the power of the board of appeals over variations have expanded the list of special uses.<sup>47</sup> The sum of the discretion vested in local bodies has not diminished; only the title by which these special privileges are designated has changed.

If each of these three administrative techniques, each with its own adaptations, is multiplied by the scores of Illinois cities, villages and counties with zoning ordinances, the confused, patternless jumble of zoning administration in Illinois is apparent. The property owner, unhappy over the application of the general terms of the ordinance to his property, has been understandably perplexed over which source of relief, "administrative" or "legislative," he should seek. For three decades his one source of comfort was the knowledge that he

<sup>43</sup> The Chicago ordinance defines the special use as "variations in the nature of special uses" (whatever that means) on the erroneous belief that because the enabling act requires that in cities over 500,000 population only the board of appeals can grant variations, only the board of appeals can grant a special use. The appellate court has identified a special use as a variation, *Baird v. Board of Zoning Appeals of Kankakee*, 347 Ill. App. 158, 106 N.E.2d 343 (1952). Consult Babcock, *op. cit. supra* note 4, at 198 et seq.

<sup>44</sup> E.g., Comprehensive Amendment to Chicago, Ill. Zoning Ord. (1958) Art. 4.4-1; DuPage County Zoning Ord. (1958) §V.A.2; Moline, Ill. Zoning Ord. (1956) §7.2.

<sup>45</sup> Blucher, *op. cit. supra* note 1.

<sup>46</sup> "This desire to maintain control, this desire to act like little gods, this desire to impose unstated conditions upon the use of property is not in accordance with our traditions and is distinctly contrary to accepted legal principles." *Id.*, at 99. Further evidence of this tendency to prostrate and thereby increase the discretionary power of local administrative or legislative bodies is the device of the "floating zone." By this innovation, a district is created in the text but none is designated in the zoning map. The legislature, board or commission reserves the power to create such a district if it approves the particular application. See, for a perceptive discussion as to the dangers of this practice, the dissenting opinion in *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951); Memorandum Opinion in *Carey v. County of Lake*, No. 68174 (Circuit Court of Lake County, May 2, 1959).

<sup>47</sup> Such is the case in the new Chicago ordinance, the DuPage County ordinance, and the proposed Comprehensive Amendment to the Cook County ordinance.

could avoid the uncertain, often distasteful, frequently tedious and repetitive efforts to obtain local relief by going directly to court with a mandamus suit, a bill for injunction or, more recently, a bill for declaratory judgment to ask that the ordinance be declared invalid insofar as his property was concerned.<sup>48</sup> Until November, 1956, this was the easy path followed by many petitioners for relief from zoning ordinances.<sup>49</sup> If one could short-cut the local labyrinth of quasi-judicial relief, the incoherence of local zoning procedure was not very significant.

#### IV

The totally unexpected decision of the Illinois Supreme Court in *Bright v. City of Evanston*<sup>50</sup> removed this farrago at the local level from the academic. In the *Bright* case, the plaintiff owned property which was located in a single-family zone. He wanted to construct a multi-family building. Rather than face the uproar and delay of a local hearing as a prerequisite to a variation or an amendment,<sup>51</sup> he proceeded to file the customary bill for declaratory judgment in the Circuit Court of Cook County on the theory that the ordinance was unreasonable and hence unconstitutional insofar as it applied to his property. The Circuit Court agreed with him and the case went to the Illinois Supreme Court to be argued on the merits. To the surprise of all parties, the Court refused to decide the case on the merits. The plaintiff was directed to exhaust first his administrative remedies.<sup>52</sup> Whatever questions this decision did not answer, however many new sources of uncertainty the opinion raised,<sup>53</sup> the Court did appear

<sup>48</sup> See cases cited in note 12 supra. Any reader who questions this adjectival description of local zoning hearings simply has never experienced the exquisite turmoil of this throwback to the town meeting. It is too frequently a cross between a Jacobin assize and a New England witch trial. The Function of the Public in a Zoning Hearing, 20 Newsletter, No. 12 (American Society of Planning Officials, December, 1954).

<sup>49</sup> In *Phipps v. City of Chicago*, 339 Ill. 315, 171 N.E. 289 (1930), the Illinois Supreme Court ruled that a property owner did not have to apply for local relief before challenging in court the validity of a zoning ordinance as it applied to his property. Cf. *Deynzer v. City of Evanston*, 319 Ill. 226, 149 N.E. 790 (1925); *Park Ridge Fuel and Material Co. v. City of Park Ridge*, 335 Ill. 509, 167 N.E. 119 (1929).

<sup>50</sup> 10 Ill.2d 178, 139 N.E.2d 270 (1956).

<sup>51</sup> Published notice has to be given not less than nor more than forty days before a public hearing. Ill. Rev. Stat. (1957) c. 24, §§73-4, 73-8. Following the hearing, the board or commission, if it does not act finally, makes a recommendation to the local legislature. The legislature then makes a decision at an open meeting which frequently develops into a second "hearing."

<sup>52</sup> "In the case at bar the zoning ordinance has made provision for variation in particular cases by application to the board of appeals, which is empowered to make recommendations to the city council with respect thereto. The plaintiff has not seen fit to apply for such a variation. He does not complain of the zoning ordinance as a whole, but claims only that the classification of his lot for residential rather than commercial uses infringes his constitutional rights. Under such circumstances he should apply in the first instance to the board of appeals, and if unsuccessful there he can seek judicial relief. . . ." *Bright v. City of Evanston*, 10 Ill.2d 178, 186, 139 N.E.2d 270, 274 (1956).

<sup>53</sup> *Babcock*, op. cit. supra note 4, at 177 n.14. The Court ignored *Phipps v. City of Chicago*, 339 Ill. 315, 171 N.E. 289 (1930). Nor did it explain what its decision meant in the light of

to say unequivocally that a property owner had to make some effort to obtain local relief, where available, before he could go to court to challenge the ordinance as it applied to his property. Stripped of all the unnecessary verbiage, that is what the *Bright* decision stands for. Unfortunately, the crazy quilt of local zoning practice appeared to require the Court to go beyond this simple imperative. Rather than bottom its opinion on the unequivocal principle that some effort must first be made to obtain local relief, the Court permitted itself to be trapped into an exercise in judicial semantics. The Court repeatedly stated that the plaintiff must first "exhaust his administrative remedies." Evanston, regrettably, happened to be one of those municipalities which, after *Welton v. Hamilton*, had chosen to vest all final decisions on variations with the City Council.<sup>54</sup> Thus, if this categorizing of the issue as "administrative" was to be taken seriously, either the Illinois Supreme Court was unwilling to say candidly that a property owner must first seek legislative relief before raising a constitutional question in court, or the Court was labeling the action of a municipal legislature, when passing on a variation, as an administrative function.<sup>55</sup> In view of the subsequent decisions of the Court in *Fox v. City of Springfield*<sup>56</sup> and *Stemwedel v. Village of Kenilworth*,<sup>57</sup> the latter hypothesis has to be dismissed. The Court simply elected to employ the reassuring phrase "administrative relief" in a context where it made no sense. This is not the only oddity in this case. Apparently apprehensive about the unexpected barrier it was erecting for the property owner who sought what had been a long recognized method of securing relief, the Court added these reassuring words:

A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair [sic] the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. ed. 303; *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E.

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*Welton v. Hamilton*, 344 Ill. 82, 176 N.E. 333 (1931), which the Court had not expressly overruled. Earlier conflicting decisions by the appellate courts on this issue went unnoticed. See *Illinois Life Insurance Co. v. City of Chicago*, 244 Ill. App. 185 (1927); *Cann v. City of Chicago* 241 Ill. App. 21 (1926). Neither is it clear whether the complainant must affirmatively allege that he sought local relief. Apparently, if the municipality fails to raise the question, the Court will then take jurisdiction. See *Kennedy v. City of Chicago*, 11 Ill.2d 302, 304, 142 N.E.2d 697, 698 (1957).

<sup>54</sup> Evanston, Ill. Zoning Ord. (1940) Art. IV.

<sup>55</sup> If a court wishes to direct a litigant to first exhaust his legislative remedies, who but the most precise would take issue? If a court wishes to label the action of a legislature an "administrative" act, why not? Either would seem preferable to the less-than-candid language employed which contributed to the subsequent confusion, particularly at the level of appellate procedure. See discussion in text in Part V *infra*.

<sup>56</sup> 10 Ill.2d 198, 139 N.E.2d 732 (1957).

<sup>57</sup> 14 Ill.2d 470, 153 N.E.2d 79 (1958), discussed together with *Fox* case in text at notes 71 and 73 *infra*.

427.) Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy.<sup>58</sup>

This reads well but means little in the context of the usual zoning lawsuit. Since *City of Aurora v. Burns*<sup>59</sup> no private litigant has seriously argued that prospective zoning is, in principle, an improper use of the police power. It may be that the Court meant that if a property owner challenged a provision of the *text* rather than the particular mapping of his parcel, he could come into court without first seeking local relief. Thus a property owner might not quarrel with the residential classification of his property but, wanting to operate a day nursery in that zone, he protests the failure to list such a use as permissive in that district,<sup>60</sup> or a residential subdivider might protest the exclusion of residences from all industrial districts.<sup>61</sup> From one point of view either of these issues would be an attack on the ordinance "as a whole."<sup>62</sup>

The Court's use of the reassuring cliché "exhaustion of administrative remedies," even when final action happened to be by the local legislature, and its ambiguous concession to tradition by leaving available a "general" attack without first seeking local relief, invited speculation as to the significance under the *Bright* rule of the distinction between variations, amendments and special uses. Must a property owner, once denied relief by way of variation, then seek relief by way of amendment? If no variations are authorized, must he nevertheless ask for an amendment? The post-*Bright* decisions may have provided *ad hoc* answers of a sort but they do not represent a rational exposition of administrative law. Litigants have learned that it is not necessary to seek a variation if an amendment is refused, on the dubious premise that the consequences are the same and, thus, why require a futile second go-around?<sup>63</sup> Yet the Su-

<sup>58</sup> *Bright v. City of Evanston*, 10 Ill.2d 178, 184-85, 139 N.E.2d 270, 274 (1957).

<sup>59</sup> 319 Ill. 84, 149 N.E. 784 (1925).

<sup>60</sup> *City of Chicago v. Sachs*, 1 Ill.2d 342, 115 N.E.2d 762 (1953).

<sup>61</sup> *People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove*, 16 Ill.2d 183, 157 N.E.2d 33 (1959).

<sup>62</sup> An attack on an alleged discrimination in the text, although immediately of concern only to the owner of a particular parcel, would if successful presumably affect all other parcels similarly classified. Cf. *Catholic Bishop of Chicago v. Kingery*, 371 Ill. 257, 20 N.E.2d 583 (1939); *Ronda Realty Corp. v. Lawton*, 414 Ill. 313, 111 N.E.2d 310 (1953). If such an issue is what the Court means when in the *Bright* case it refers to an attack upon the ordinance "as a whole," it is not clear why this should exempt the plaintiff from first seeking relief at the local level. The plaintiff in such a case could have petitioned the local legislature for an amendment to remove the offending provision or to include the desired use in the text. "The reason for the rule set out in those cases [*Bright* and *Bank of Lyons v. County of Cook*, 13 Ill.2d 493, 150 N.E.2d 97 (1958)] is to give the municipal authorities an opportunity to correct invalid regulation before becoming involved in litigation." *Herman v. Village of Hillside*, 15 Ill.2d 396, 408, 155 N.E.2d 47, 53 (1958). Few of the many Illinois zoning cases have involved a challenge to the provisions of the text of an ordinance. *Babcock, Classification and Segregation Among Zoning Districts*, [1954] Ill. Law Forum 186, 188n. 7.

<sup>63</sup> "Plaintiff filed an application for amendment of the zoning ordinance requesting reclassification, public hearing was had before the board of appeals and the corporate authorities



preme Court has also implied that if the use variance is completely forbidden by local ordinance, a property owner need not first seek an amendment because there is available no local system of administrative relief!<sup>64</sup> Thus in the one case a variation is improperly equated with an amendment, while in another case an amendment, although available, need not be sought if the local ordinance forbids a variation because, it must be surmised, the two procedures are not the same! This litter is the inevitable consequence of judicial attempts to improvise a rational administrative practice in the face of administrative incoherence.

A most significant feature of the post-*Bright* observations by the Supreme Court has been the failure of the Court to present any detailed exposition of what it is trying to do. In *Bank of Lyons v. County of Cook*,<sup>65</sup> both parties urged the Court in their brief to mark a clear path through the *Bright* tanglewood.<sup>66</sup> Through perplexing to some commentators,<sup>67</sup> the *Bank of Lyons* case did nothing more than reaffirm the one certain point in the *Bright* decision: If local relief in the form of a variation is available, it must be tried first. In the *Bank of Lyons* case the property owner, acting upon oral advice of the Secretary of the Cook County Board of Appeals (prior to a hearing) that the Board would not recommend to the County Commissioners that the property be rezoned by amendment for a trailer park, filed a suit for declaratory judgment that the zoning restriction on his property was void.<sup>68</sup> The County, for reasons deemed ade-

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adopted a resolution refusing to amend. The same board of appeals would have had jurisdiction over a variation, and it is unreasonable to assume that it would reverse itself and grant practically the same relief. To insist on the additional useless step would merely give lip service to a technicality and thereby increase costs and delay the administration of justice, which is the very thing we are trying to avoid. The action here taken was a reasonable equivalent within the meaning and spirit of [*Bright v. City of Evanston* and *Bank of Lyons v. County of Cook*].” *Herman v. Village of Hillside*, 15 Ill.2d 396, 408, 155 N.E.2d 47, 53 (1958). The Court’s premise (that the variation would have been refused because an amendment was denied) not only vitiates the different legislative basis for the two (private hardship vs. public interest) but also ignores the practical differences between the two types of relief. An amendment would not contain any restrictions other than those in the text and once rezoned any use permitted in the zone could be established. A variation, however, could restrict the use to that specified in the variation and specific restrictions could be attached by the zoning board or by the trustees. Cf. *Zweifel Mfg. Corp. v. City of Peoria*, 11 Ill.2d 489, 144 N.E.2d 593 (1957).

<sup>64</sup> “This is an appeal by the City of Des Plaines from a declaratory judgment of the Circuit Court of Cook County holding the city’s zoning ordinance void as to the property of the plaintiff, Alvina W. Eckhardt. Since the ordinance prohibits the granting of variations, this case does not fall within the rule set out in *Bright v. City of Evanston*, 10 Ill.2d 178.” *Eckhardt v. City of Des Plaines*, 13 Ill.2d 562, 563, 150 N.E.2d 621, 622 (1958). Of course, the Des Plaines ordinance did provide for amendments. Des Plaines, Ill. Zoning Ord. (1956) §20.1.

<sup>65</sup> 13 Ill.2d 493, 150 N.E.2d 97 (1958).

<sup>66</sup> Brief for Appellant at 42-43; Brief for Appellee at 21 (Docket No. 34,637).

<sup>67</sup> Fox, op. cit. supra note 13; *The Chicago Daily News*, p. 2N, col. 1 (Apr. 10, 1958).

<sup>68</sup> The Court said: “The necessity for making application before the board is not dispensed with because the application may be denied.” *Bank of Lyons v. County of Cook*, 13 Ill.2d 493, 497, 150 N.E.2d 97, 99 (1958). Contrast this statement with the remarks of the Court in *Herman v. Village of Hillside*, 15 Ill.2d 396, 155 N.E.2d 47 (1958), where the Court spoke of the uselessness of seeking a variation after an amendment had been denied.

quate, did not make the obvious argument that the suit was premature on the *Bright* grounds that the plaintiff failed to seek a variation. The Supreme Court, nevertheless, concluded from its own examination of the Cook County ordinance that the ordinance did authorize the Board to grant use variations; therefore, an administrative remedy was available and should have been exhausted. This conclusion probably dismayed the County as much as it upset the plaintiff because for years the unwritten practice of the Cook County Board of Appeals was to ignore the express provision of the Cook County ordinance authorizing use variations and to discourage any petitions for use changes except by way of amendment.<sup>69</sup>

In neither the *Bright* case nor the *Bank of Lyons* case, nor in subsequent opinions, did the Court endeavor to analyze the differences between the various methods of local relief, such as variations, amendments and special uses, and to explain the significance of the *Bright* decision in terms of these various sources of local relief. Consequently, the *Bright* and *Bank of Lyons* cases provide no Rosetta stone by which the multiplicity of local administrative-legislative remedies may be correlated into a logical method of procedure. If the Court chose to innovate with *Bright*, it should have sensed the duty to complete the job with *Bank of Lyons*.

## V

The confusion at the local relief-granting level has its counterpart in the conditions which appear to exist with respect to appellate procedure. Implicit in the *Bright* sequence was the suggestion that "exhaustion of administrative remedies" meant that access to the courts must be by way of the Administrative Review Act.<sup>70</sup> In *Fox v. City of Springfield*,<sup>71</sup> however, the Supreme Court held that once an applicant for a variation had been turned down locally, he could then ignore the Administrative Review Act and file a bill for injunction (or declaratory judgment) to challenge the validity of the zoning ordinance as applied to his property, at least where the record did not indicate whether the action of the board of appeals was final or merely recommendatory to the

<sup>69</sup> The Court did *not* say that it was necessary to seek a variation rather than an amendment but the thrust of the opinion was such that the Court emphasized the availability under the ordinance of relief by variation and did not stress that relief was also available by way of amendment. Subsequent to the *Bank of Lyons* case, the Cook County Board of Appeals departed from its former practice and now holds hearings on use variations, apparently on the questionable assumption that the *Bank of Lyons* case means that a variation, not an amendment, is the required procedure for local relief.

<sup>70</sup> "All final administrative decisions of the board of appeals under this Article shall be subject to judicial review pursuant to the provisions of the 'Administrative Review Act.' . . ." Ill. Rev. Stat. (1957) c. 24, §73-6.01. Previous to this 1949 amendment the enabling act provided for review of local decisions by writ of certiorari. Ill. Rev. Stat. (1947) c. 24, §73-6. The Illinois appellate court still believes administrative review to be the only method by which a decision of a board of appeals may be contested. See note 76 *infra*.

<sup>71</sup> 10 Ill.2d 198, 139 N.E.2d 732 (1957).

municipal legislature.<sup>72</sup> If in fact the local board of appeals did not act finally but only advised the council which took final action, then, the Court noted, there was no "final administrative action," which is a prerequisite to administrative review. This may be orthodoxy but, if so, why not treat the action of the Springfield City Council as a final "administrative" decision which could be the basis for administrative review if, in the *Bright* case, the action of the City Council of Evanston was categorized as an "administrative remedy" which had to be exhausted before recourse could be had to the courts? The Court was not disturbed by this apparent contradiction, and in *Stemwedel v. Village of Kenilworth*<sup>73</sup> the Court reinforced the *Fox* opinion with the following statement:

It is undisputed that the plaintiff sought appropriate relief both before the board of appeals and from the village authorities. Having applied in the first instance for administrative relief he is entitled to maintain the present suit. (See *Bright v. City of Evanston*, 10 Ill.2d 178, 186.) And since it is an original action for independent relief, rather than a proceeding to review the denial of a variation, the provisions of section 2 of the Administrative Review Act, making a proceeding thereunder the exclusive method of 'review,' do not constitute a bar. (*Fox v. City of Springfield*, 10 Ill. 2d 198.)<sup>74</sup>

However, at the appellate court, the *Bright* decision was receiving somewhat different treatment. In *Sheridan Shores, Inc. v. City of Chicago*<sup>75</sup> the First District, on April 17, 1957 (three months after the *Fox* opinion was filed) held that a property owner who was denied a variation by the Council of the City of Chicago, after a recommendation of the Board of Appeals, could not file a bill for declaratory judgment but must appeal by way of administrative review. This was, the court said, the consequence of the *Bright* opinion (which, of course, it was not).<sup>76</sup> Leave to appeal this decision was denied by the Illinois

<sup>72</sup> The City objected to the bill in equity on the ground that it was an improper attempt to obtain judicial review of a decision of the Springfield Zoning Board of Appeals and in conflict with the provisions of the enabling act. The Court noted the prohibition in Section 2 of the Administrative Review Act against "other statutory, equitable or common law mode of review of decisions of administrative agencies" and then said: "Indeed, we do not know from the record before us whether the Springfield zoning board of appeals has been empowered by ordinance to make a variance directly or whether that power has been reserved to the corporate authorities. If the latter be true, then the board acts in a mere advisory capacity, making recommendations to the council, and does not enter a final, reviewable order. Therefore, it is clear that the circuit court proceeding was not one to "review" the 1953 decision of the board; rather, the court was called upon to exercise its traditional role of determining the constitutionality of legislation." *Id.*, at 200 and 733.

<sup>73</sup> 14 Ill.2d 470, 153 N.E.2d 79 (1958).

<sup>74</sup> *Id.*, at 474 and 81.

<sup>75</sup> 13 Ill. App.2d 377, 141 N.E.2d 739 (1957).

<sup>76</sup> "In view of the holding in the *Bright* case, which we regard as clearly applicable to the instant case, plaintiffs are not entitled to a declaratory judgment until they have exhausted their administrative remedies, specifically provided by statute." *Id.*, at 385 and 744. The Supreme Court in the *Bright* case did not discuss what type of judicial "review" was appropriate. Indeed, the Court said: "His action for a declaratory judgment without first

Supreme Court.<sup>77</sup> In October of 1957 the same district of the appellate court found the opportunity to underscore the views expressed in the *Sheridan Shores* case:

Even if it be considered that the complaint in the instant case is of an equitable nature because it seeks injunctive relief and the decree grants it, it does not entitle a court of equity to assume jurisdiction where there is an adequate remedy at law. The zoning statutes and ordinance in the instant case afforded plaintiffs an adequate remedy, and we regard the mandatory provisions of Chapter 110, par. 265, §2, Administrative Review Act, as prohibiting pursuit of any other remedy, except under the zoning statute and the ordinances adopted pursuant thereto.<sup>78</sup>

And in November, 1958, two months after the *Stemwedel* decision was filed, the appellate court held that under the new Chicago Zoning Ordinance the only source of judicial relief from a denial of a variation by the board of appeals was by administrative review.<sup>79</sup>

(Parenthetically, the quixotic character of judicial directives on this subject is further illustrated by the appellate court decisions, on the one hand, which declare, that the proceedings before the board may be informal where the board only recommends but must conform to customary evidentiary standards when the board acts finally,<sup>80</sup> and, on the other hand, the decision of the Illinois Supreme Court that the local legislature does not need to make any finding of fact precedent to grant of a variation where there has been a finding of fact at a hearing by the board of appeals.<sup>81</sup> The sum of these decisions would appear to be that the local legislature need not follow any uniform rules of procedure if the board of appeals held a hearing which hearing can be devoid of customary evidentiary standards as long as the final decision is made by the local legislature!)

Faced with this judicial disarray, the discomfort of attorneys for relief-seeking property owners can be appreciated. These conflicting decisions pro-

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exhausting his administrative remedies will not lie." *Bright v. City of Evanston*, 10 Ill.2d 178, 186, 139 N.E.2d 270, 274 (1956). The decision in *Sheridan Shores* does not mention the decision in *Fox v. City of Springfield*, 10 Ill.2d 198, 139 N.E.2d 732 (1957).

<sup>77</sup> 15 Ill. App.2d vii (1957). This is inexplicable in view of the previous *Fox* decision and fantastic in light of the subsequent *Stemwedel* decision. See text at note 74 supra.

<sup>78</sup> *In re Petition of East Maine Township Community Ass'n.*, 15 Ill. App.2d 250, 257, 145 N.E.2d 777, 781 (1957).

<sup>79</sup> *Believers of Islam, Inc. v. City of Chicago*, 19 Ill. App.2d 480, 154 N.E.2d 311 (1958). One distinction between this case and the *Sheridan Shores* decision is that Article 11.7-1 of the Comprehensive Amendment to the Chicago ordinance makes the decision of the board of appeals final, as required by Section 73-4 of the state enabling act. This distinction only makes the *Sheridan Shores* decision the more shocking in light of *Fox* and *Stemwedel*, neither of which suggested that the right to seek an injunction or a declaratory judgment (after seeking local relief) was based upon the happenstance of post-Welton practices of municipalities.

<sup>80</sup> Compare *Flick v. Gately*, 328 Ill. App. 81, 65 N.E.2d 137 (1946), with *Village of Justice v. Jamieson*, 7 Ill. App.2d 113, 129 N.E.2d 269 (1955).

<sup>81</sup> *Kaczorowski v. Elmhurst Chicago Stone Co.*, 10 Ill.2d 582, 585, 141 N.E.2d 14, 15 (1957).

vide no answers to the nature of judicial review, even where the final action is taken by the local legislature.<sup>82</sup> Even more uncertain is the prospect if the property owner happens to live in a municipality where final power to grant relief rests with the board of appeals. Must he then go only by way of administrative review or may he, like his brothers in Springfield and Kenilworth, file a bill for declaratory judgment?<sup>83</sup> If such a distinction is made, then in one municipality the record is fixed at the board hearing, in another the record on appeal will be made before a court of record. In view of the divergent procedural and evidentiary standards among Illinois boards, the substantive results could turn on this distinction alone. The accident of geography (within the same state) could seriously alter property rights. If one property owner may have a trial de novo while his counterpart in another municipality must appeal on the record made locally, the probability of discrimination is apparent.<sup>84</sup> It is believed that the Court does not intend such capricious results to flow from the happenstance of local differences in procedure. It is expected that the Court will permit a suit de novo to be filed irrespective of whether the local relief was denied by a board or a municipal legislature. It is, however, the nature of this method for resolving administrative disorder that a definitive answer must await another costly lawsuit.

While it may be that the *Fox* and *Stemwedel* decisions mean that a suit in equity will lie if relief has been denied in toto, it appears that administrative review is the only recourse if the relief sought is granted and accepted, but is made subject to conditions which the applicant finds objectionable.<sup>85</sup>

<sup>82</sup> Where final action on variations is by the municipal legislature, *Fox* clearly intimated that the petitioner could *not* take administrative review, and *Stemwedel* said he could seek an injunction but *East Maine Township Community Ass'n and Sheridan Shores* (leave to appeal denied) said the petitioner had to go by way of administrative review.

<sup>83</sup> Neither the *Fox* nor the *Stemwedel* decisions answered this precise question although the language can reasonably be construed to mean that even where the variation is denied finally by the board, an injunction or a declaratory judgment may be sought. There remains the question of the appellate procedure in cases where "appeals" are taken to the board of appeals from the ruling of an administrative officer. Ill. Rev. Stat. (1957) c. 24, §73-4. Most such cases involve a request to the board of appeals to interpret the meaning of a particular provision of the ordinance or to determine whether the appellant's use of the property was lawfully non-conforming or was an illegal use. E.g., *Brotherhood of Railroad Signalmen v. Zoning Board of Appeals of City of Chicago*, 348 Ill. App. 106, 108 N.E.2d 43 (1952); *Flick v. Gately*, 328 Ill. App. 81, 65 N.E.2d 137 (1946). In such a dispute no question is raised as to the "reasonableness" of the ordinance. The only question is whether the administrative official responsible for issuing or denying permits and enforcing the law has correctly interpreted the language of the ordinance.

<sup>84</sup> What one board may admit as proper evidence another may exclude. See note 102 *infra*. This makes little difference if a trial de novo is available; it could be a shattering distinction if the record before the board is conclusive.

<sup>85</sup> "Plaintiffs did not pursue their remedy for review under the Administrative Review Act, but instead accepted the benefits granted to them by the terms of the variations. They now assert [by suit for declaratory judgment] that the portions of the orders which granted the benefit of variations are valid, but the portions imposing the conditions are void. Such a position cannot be sustained. A party who has accepted and retained the advantages of an

No less perplexing than the correct choice of judicial review is the practical consequence of that choice. The Court has expressly forbade a chancellor to "rezone" when he decides that an ordinance in its particular application is invalid: a decision invalidating an ordinance can do no more than leave the property unzoned.<sup>86</sup> Yet if the same litigant had chosen to go by way of administrative review of a decision of a board of appeals to deny a use variance, a reversal of that decision can only mean that the particular use requested must be authorized.<sup>87</sup> This is no academic distinction. If a property owner asks for a declaratory judgment that residential zoning is invalid when he wants to use his parcel for industrial purposes, he may obtain such a judgment only to find that the local legislature has rezoned the property for business (non-manufacturing) use. He is then told to challenge *that* zoning in the trial and appellate courts.<sup>88</sup>

The discussion of appellate procedure so far has assumed that the contest is between the aggrieved property owner who seeks a change and the adamant village authorities. There are instances, however, where the quarrel is between the municipality which has consented to a change and property owners who wish to protest the grant of dispensation to the applicant. The state of the law here, too, is less than clear. Early decisions of the Supreme Court and appellate courts indicated that other property owners could, without proof of special damages, file a suit in equity or for a declaratory judgment against the municipality which had, in their opinion, improperly granted a change in zoning.<sup>89</sup> More recently the Supreme Court has held that protesting property owners must show special damages, because of the revision of the ordinance as distinct from those allegedly suffered by the public at large, before they will be entitled to challenge, by way of administrative review, the action of a zoning board of appeals in granting a variation.<sup>90</sup>

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order cannot be heard to attack the validity or propriety of conditions upon which its right to such advantages was expressly predicated." *Zweifel Mfg. Co. v. City of Peoria*, 11 Ill.2d 489, 493, 144 N.E.2d 593, 595 (1957).

<sup>86</sup> "If a zoning ordinance is improper, a court should not go beyond its power to declare the same void, the effect of which in the instant case would be to leave the property unzoned." *La Salle National Bank v. City of Chicago*, 4 Ill.2d 253, 258, 122 N.E.2d 519, 522 (1954).

<sup>87</sup> Cf. *Strohl v. Macon County Zoning Board*, 411 Ill. 559, 104 N.E.2d 612 (1952).

<sup>88</sup> See discussion of this practice in Babcock, *The Administration of Illinois Zoning Ordinances*, 20 *Journal of American Institute of Planners* 125 (1954). The real possibility of this ploy by municipalities has prompted the writer to frame a challenge to a zoning ordinance in the form of a petition for injunction rather than as a request for a declaratory judgment.

<sup>89</sup> E.g., *Miller v. Gill*, 389 Ill. 394, 59 N.E.2d 671 (1945); *Burkholder v. City of Sterling*, 381 Ill. 564, 46 N.E.2d 45 (1945); *Zadworny v. City of Chicago*, 380 Ill. 470, 44 N.E.2d 426 (1942); *Avery v. Village of La Grange*, 381 Ill. 432, 45 N.E.2d 647 (1942). Some protests have been instituted in the name of property owners' associations rather than by individuals. See *Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346, 106 N.E.2d 823 (1952); *In re East Maine Township Community Ass'n.*, 15 Ill. App.2d 250, 145 N.E.2d 777 (1957).

<sup>90</sup> "The simple allegation of fact that plaintiffs were the owners of land in the vicinity of the property involved does not constitute an allegation that they were injured or damaged by the

One procedural distinction between the earlier cases, which required no allegations of special damages and the later decisions which do, is that in most of the recent cases the contest was in the form of a suit to seek administrative review of a decision of the board of appeals while in the former instances the property owners filed a bill in equity, had a trial de novo, and ignored any proceeding at the local level. This is a dubious basis for a distinction in the rights of objectors to be heard in court. If this procedural difference is the basis for the different results in these cases, then it is another example of the diverse results which obtain depending solely upon the choice of a cause of action to try the identical issue: the reasonableness of a zoning change.

The more plausible explanation for this shift is that the Supreme Court has elected to impose severe limitation upon the right of third parties to contest a zoning change, whatever form of judicial relief they elect.<sup>91</sup> If this is the thrust of these later decisions, the rationale is questionable. It is hard to understand why special damages must be shown if it is alleged that, in the case of an amendment, its adoption was not in the interest of the entire community, or, in the case of a variation, that there was no unique hardship to justify the grant. If, in the case of an amendment, it was adopted to accommodate a private interest, the evil consequences of that legislation will undoubtedly impinge upon the interests of all citizens of the community. When the local authorities have granted the amendment, there is no one left to challenge the change except

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decision sought to be reviewed." *Winston v. Zoning Board of Appeals of Peoria County*, 407 Ill. 588, 594, 95 N.E.2d 864, 869 (1951); *222 East Chestnut Street Corp. v. Board of Appeals of Chicago*, 10 Ill.2d 132, 139 N.E.2d 218 (1956). What that proof must be is not clear. "The degree of damage required to be shown in such cases as this is comparable to that required in injunction suits against a public nuisance . . . and is no way comparable to the proof required in suits *in personam* for monetary damages.

"There is a rank difference in the facts found in the cases relied upon by the majority and those appearing in this record. To find any similarity, one's mental plow must be clear out of focus." *222 East Chestnut Street Corp. v. Board of Appeals of Chicago*, 14 Ill.2d 190, 195-96, 152 N.E.2d 465, 468 (1958) (concurring opinion). Cf. *Moran v. Zoning Board of Appeals of Chicago*, 11 Ill.2d 374, 143 N.E.2d 16 (1957).

<sup>91</sup> In *Garner v. County of DuPage*, 8 Ill.2d 155, 133 N.E.2d 303 (1956), the Supreme Court upheld the dismissal of a suit brought by parties who apparently resided substantial distances from the subject property and had objected to an amendment to the county zoning ordinance which reclassified that property. The Court said: "This case is not the normal one where an owner of land is complaining of restrictions placed upon its use, but is the comparatively rare case in which it is claimed that corporate authorities have wrongfully permitted a use on the property of someone else. Under such circumstances we have held that for a party to have standing in a court of equity to complain about the use of another's property, he has the burden of proving that he has suffered a special damage by reason of such use which differs from that suffered by the general public." *Id.*, at 158 and 304.

In *Kaczorowski v. Elmhurst Chicago Stone Company*, 10 Ill.2d 582, 141 N.E.2d 14 (1957), the Court did not question the propriety of a declaratory judgment action challenging a variation where the plaintiffs were owners of properties located within an area from one-quarter mile to one and one-half miles distant from the subject property. It may be that the Court has in mind some spatial test by which to determine the propriety of third party suits. If so, it is not apparent from the cases.

private property owners and a requirement that they show "special damages" not only evades the central issue at stake in any amendment (i.e., the welfare of the entire community) but means, as a practical matter, that no one except owners of adjacent properties, if they, will be able to contest the action of the authorities!<sup>92</sup>

## VI

Any attempt to digest this potpourri by reference to a rational theory of zoning administration and appellate procedure is useless and, besides, it misses the point. The *Bright* case, the blocks thrown in the way of third party appeals, and the failure to state clearly and consistently the standards by which variances and amendments are to be judged are understandable only if the Illinois Supreme Court's primary goal is recognized: The Court is determined to cut down on the number of zoning cases it must decide.<sup>93</sup>

This premise requires a brief preliminary observation on the character of appeals in zoning litigation. Each property owner who challenges the reasonableness of a zoning restriction upon his property invariably invokes the Fourteenth Amendment and the corresponding provision of the Illinois Constitution. If the property should, he believes, be zoned for business use, the failure of the local legislature to acquiesce allegedly constitutes a taking of his property without due process of law. This issue may be raised in a suit for injunction, declaratory judgment, mandamus or in a proceeding under the Administrative Review Act.<sup>94</sup> A matter of local planning involving a parcel of real estate is thereby elevated to the august level of a constitutional dispute. Inevitably upon request the trial judge certifies that the public interest requires a direct appeal to the Illinois Supreme Court because the constitutionality of a municipal ordinance is involved. On appeal, however, at stake is nothing more than the good sense of zoning a parcel of land in a particular city, village, or county residential and not commercial. The proof for and against goes to the character of the neighborhood, the needs of the community, the value of the land for different uses and a multitude of other factual matters. These facts are argued before

<sup>92</sup> If the acquiescence of owners of immediately adjacent properties in a requested rezoning is not adequate to justify the grant of an amendment, *Dunlap v. Woodstock*, 405 Ill. 410, 91 N.E.2d 434 (1950), *Skryszak v. Village of Mount Prospect*, 13 Ill.2d 329, 334, 148 N.E.2d 721, 723 (1958), why must residents of the community who protest the action of the municipality in granting an amendment show "special damages"? The enabling act has made explicit provision for private suits where a municipality fails to prosecute a violation of its zoning ordinance. Ill. Rev. Stat. (1957) c. 24, §73-9. An amendment may be an illegal act which the municipality does not merely ignore but affirmatively authorizes. See *Michigan-Lake Building Corp. v. Hamilton*, 340 Ill. 284, 172 N.E. 710 (1930). But see *222 East Chestnut Street Corp. v. Board of Appeals of Chicago*, 10 Ill.2d 132, 139 N.E.2d 218 (1956).

<sup>93</sup> *Babcock, The New Chicago Zoning Ordinance*, 52 Nw. U. L. Rev. 174, 175-76 (1957). This argument was candidly made in appellee's oral argument in *Bright v. City of Evanston*, 10 Ill.2d 178, 139 N.E.2d 270 (1956).

<sup>94</sup> See cases cited in note 12 supra. The Supreme Court is not troubled by the raising of constitutional questions in a proceeding before an administrative body. Cf. *Winston v. Zoning Board of Appeals of Peoria County*, 407 Ill. 588, 592, 95 N.E.2d 864, 868 (1951).



the Supreme Court on appeal. The Court does not construe the law; it examines the facts. (It may in its decisions speak of "principles"<sup>95</sup> but there is persuasive evidence that the Court has convenient braces of zoning axioms, one of each pair useful when the Court has concluded that the facts favor the municipality, the other handy when the Court interprets the facts sympathetically to the land owner.<sup>96</sup> This is a bothersome role for an appellate court. Justice Daily has recently protested the use of a "constitutional" label for these disputes:

. . . [T]he only office of the opinion adopted has been to make a factual determination of whether the zoning ordinance, as applied to appellee's property, bears a real and substantial relation to the public health, safety, morals or welfare. To make such a determination requires neither a construction of the constitution, nor a consideration of constitutional rights.

It is true that a zoning ordinance imposing unreasonable restraints upon the use of private property will offend the constitutional guarantees of due process of law, and it is likewise true that a zoning ordinance may be valid in its general aspects yet invalid as applied to a particular piece of property and a particular set of facts. However, the constitutional concepts and interpretations upon which the validity of the zoning ordinance must stand or fall, in either case, are so thoroughly established by the decisions of this court as to be no longer debatable. There is, therefore, in the absence of some new ground for constitutional attack, no need for this court to consider all zoning cases merely to determine if the facts show either a reasonable or an unreasonable restraint. Such factual determinations do not involve the fairly debatable constitutional questions upon which our jurisdiction must be founded.<sup>97</sup>

<sup>95</sup> "The decisions of this court announcing the legal principles which must guide a judicial determination of the validity of both original and amendatory zoning legislation are legion and require little citation in this opinion." *Zilien v. City of Chicago*, 415 Ill. 488, 492, 114 N.E.2d 717, 719 (1953).

<sup>96</sup> The Court believes the facts support the village? Then: "If the restrictions are considered either doubtful or fairly debatable, courts should not substitute their judgment for that of the legislative body. . . ." *Reschke v. Village of Winnetka*, 363 Ill. 478, 485, 2 N.E.2d 718, 721 (1936).

The Court is inclined to view the facts against the village? Then: "Mere conflict in testimony as to the highest and best use of property, the impact of the proposed land use on the areas involved or its effect upon property values, does not make irrebuttable the presumption that an ordinance is valid. A difference of opinion does not render the evidence of one party unbelievable, or require a finding that the reasonableness of an ordinance is debatable." *Bauske v. City of Des Plaines*, 13 Ill.2d 169, 181, 148 N.E.2d 584, 590-91 (1958).

The complaining property owner bought after the zoning ordinance was adopted? The advocate may take his choice of "principles" on the significance of this fact. Contrast *Harmon v. City of Peoria*, 373 Ill. 594, 27 N.E.2d 525 (1940), and *Forbes v. Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932), with *Bolger v. Village of Mount Prospect*, 10 Ill.2d 596, 141 N.E.2d 22 (1957), and *Alco Deree Co. v. City of Chicago*, 2 Ill.2d 350, 118 N.E.2d 20 (1954). A main artery of traffic is a natural dividing line between residential and commercial uses? Contrast *Forbes v. Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932), with *Mundelein Estates, Inc. v. Village of Mundelein*, 409 Ill. 291, 99 N.E. 144 (1951), and see comment on the "rule" of those cases in *Kron v. City of Elmhurst*, 8 Ill.2d 104, 111, 133 N.E.2d 1, 5 (1956). The exclusion of multiple family dwellings from a district in which duplexes are permitted is reasonable as a matter of principle? Contrast *Jacobson v. City of Evanston*, 10 Ill.2d 61, 139 N.E.2d 205 (1956), with *Schneider v. Board of Appeals of Ottawa*, 402 Ill. 536, 84 N.E.2d 428 (1949).

<sup>97</sup> *La Salle National Bank v. County of Cook*, 12 Ill.2d 40, 49, 145 N.E.2d 65, 70 (1957).

As the frequency of zoning cases has increased, the Supreme Court docket appears more and more like that of a state-wide zoning commission. Indeed, one could imagine the Court, frustrated and annoyed, appointing a special commissioner to tour the state, examining sites of these aggravating disputes and reporting back to the Court whether the two score photographs introduced by the plaintiff were, in fact, more persuasive than the testimony of defendant's three real estate brokers as to the character of the five blocks just east of the tracks. This being the nature of the role of the Court, the wonder is not that there was a *Bright* decision but that it was so many years in coming. If the Court insists that complaining property owners first have it out with their townfolk, probably fewer factual disputes will reach the Supreme Court. This is a simple directive. The only reason for the subsequent confusion is because the Court, to achieve this understandable goal, chose to ignore the complexities and essential irresponsibilities of zoning administration, and elected to cast its directive in the traditional language of administrative law. In a unique field where a multitude of administrative and legislative bodies exercise a variety of relief-giving powers, the result was jurisprudential chaos, both at the local and appellate levels.

## VII

If the real thrust of the *Bright* decision is, as suggested above, that zoning decisions, which generally involve questions of fact peculiarly local in character, should be resolved at the local level, the result will be to raise to a new dignity and position of power the local bodies which make these decisions.<sup>98</sup> The unstated premise behind the Court's mandate must be that these municipal agencies have the qualifications and have established those certain and uniform standards necessary to insure a minimum degree of fair play. It is the weakness of this assumption which threatens the soundness of the Court's program.

Local zoning administration as now practiced at the relief-granting level in Illinois contains in its fabric all the elements guaranteed to prevent the development of a fair, orderly administrative system applied uniformly throughout the state. The system itself is divisive, based as it is upon an enabling act which rightly gives substantive free reign to municipalities, but improperly extends that latitude to administrative procedures. Those limitations which are imposed by state law upon local bodies vested with administrative discretion are either so vague as to permit each municipality to place its own construction thereon<sup>99</sup> or, where specific, are so meaningless as to be ignored by the boards of

<sup>98</sup> "In such cases the validity or invalidity depends almost wholly upon a determination of factual matters in which the specialized agency is thought to be more proficient." *Bank of Lyons v. County of Cook*, 13 Ill.2d 493, 495, 150 N.E.2d 97, 98 (1958). The Court has not always held zoning boards in such high regard. See *Behnke v. Board of Trustees of Brookfield*, 366 Ill. 516, 519, 9 N.E.2d 232, 233 (1937).

<sup>99</sup> Each community, in acting upon a request for a variation, may read its own convictions or prejudices into the legislative standard "practical difficulties or particular hardship." *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. of Chi. L. Rev. 477, 492 (1942). The Supreme Court, however, insists upon something more than a parroting

local legislatures.<sup>100</sup> There is no semblance of a uniform method for conducting hearings on petitions for variations or amendments, and the enabling act imposes none.<sup>101</sup> The experience of lawyers who appear before these local bodies attests to the absence of any common evidentiary or procedural standards among the communities which have zoning ordinances.<sup>102</sup>

If diversity in procedural practices and evidentiary standards were the only shortcoming, the *Bright-Bank of Lyons* decisions might be dismissed as another futile *ad hoc* judicial effort to straighten out what essentially is a legislative responsibility. There are, however, intimations that local zoning practice suffers from something more serious than simple failure to establish uniform standards of proof and practice. There is evidence of a lack of an elementary philosophy of administrative ethics customarily deemed essential in any legal system through which substantial property rights must be settled. The oral directive by an employee of the zoning board as to the anticipated *future* action by the administrative body which brought the plaintiff to court prematurely in the *Bank of Lyons* case is a recorded example of an experience undoubtedly shared

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of the statutory "standards." Compare *Lindburg v. Zoning Board of Appeals of Springfield*, 8 Ill.2d 254, 133 N.E.2d 266 (1956), with *Kaczorowski v. Elmhurst Chicago Stone Co.*, 10 Ill.2d 582, 141 N.E.2d 14 (1957). There are no legislative standards for amendments. See note 36 *supra*.

<sup>100</sup> Section 4 of the enabling act requires that in those cases where the variation power is vested in the board of appeals the board must require evidence, *inter alia*, that "(1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone. . . ." Ill. Rev. Stat. (1957) c. 24, §73-4. This standard makes no sense in precisely those instances where a variation might most properly be authorized; e.g., the owner of a pie-shaped residential lot who desires a modification of the sideyard requirements, or the church which desires a modification of off-street parking requirements because it has parking space available on a split-use basis with a commercial enterprise operating only week days and located in the same neighborhood.

<sup>101</sup> See note 11 *supra*. The Illinois appellate court vacillates between criticism of the loose procedure and indifference to it. Contrast *Flick v. Gately*, 328 Ill. App. 81, 65 N.E.2d 137 (1946), with *Village of Justice v. Jamieson*, 7 Ill. App. 113, 129 N.E.2d 269 (1955).

<sup>102</sup> One local board may insist upon a transcribed record of proceedings, another may be content with a pro forma record. Board A may swear all witnesses; Board B may base its findings upon unsworn testimony. One board may take care to reject hearsay evidence. Another board accepts the most speculative testimony. A board in one community may accept as "evidence" unverified petitions of objectors, explained by unsworn statements of attorneys, while another board in a neighboring community will insist that all objectors appear in person. One board may feel that on-the-spot examination of the property is essential to a fair decision, the next may consider such *ex parte* action unfair. This board will accept, indeed welcome, testimony as to the impact of a proposed change upon school conditions; that board will refuse to accept such evidence. While one board insists that a quorum be present for any hearing, a second board, finding itself with a burdensome docket, will delegate one member to conduct a hearing. The diversity among boards with respect to the quantum of the "findings of fact" which they deem a prerequisite to a grant of relief is notorious. In some municipalities the findings are precise and deal with the specific character of the property and its surroundings. Many boards, however, are content to parrot the conclusions set out in the enabling act as a basis for a finding that there exists "practical difficulty or particular hardship." There is, in short, nothing approaching a continuity of administrative practice or standards in the field of zoning law as it is carried on in Illinois.

by other petitioners for zoning changes.<sup>103</sup> The refusal of a zoning board to hear testimony of an expert witness because "we remember him," and the same board's observation at the beginning of a hearing that "we know all about this lot" are not isolated examples of a free-wheeling attitude by local boards.<sup>104</sup> The allegation that employees of the zoning bureau charged with issuing permits had hidden interests in a zoning dispute may be disturbing, but apparently this is a matter the courts cannot consider.<sup>105</sup> The attitude of the chairman of a board that he is an advocate rather than an impartial weigher of facts is not foreign to the experience of petitioners before local boards.<sup>106</sup> The practice of the Cook County Board of Appeals of conditioning recommendations for amendments to the zoning ordinance upon the execution of restrictive covenants by the petitioner is not only unwarranted by any provision of the local ordinance or the statute, but also places the petitioner in the position of consenting to a restriction upon the use of his land under something approaching duress.<sup>107</sup> At the least it is an example of a local administrative tribunal arrogating to itself a role rotally inconsistent with any traditional concept of administrative due process. More disturbing are examples of members of boards of appeal who participate in hearings involving matters in which they have a direct interest.<sup>108</sup> These examples of extralegal administrative procedures give a more persuasive cast to complaints of petitioners before the Supreme Court that local prejudice or open discrimination was the basis for a denial of substantive rights. In more than one case the Illinois courts, granting relief, have noted that an offending Residential classification was hastily enacted *after* the property owner had contracted to sell property long previously zoned for commercial or industrial

<sup>103</sup> *Bank of Lyons v. County of Cook*, 13 Ill.2d 493, 494, 150 N.E.2d 97, 98 (1958).

<sup>104</sup> *Rosenfeld v. Zoning Board of Appeals of Chicago*, 19 Ill. App.2d 447, 452, 154 N.E.2d 323, 326 (1958).

<sup>105</sup> "While the complaint makes charges involving employees of the County Board, no facts of which a court can take legal cognizance are presented. . . . If there is substance to plaintiffs' charges with respect to these employees, it is a matter for the County Board to consider and not for the courts." *Village of Justice v. Jamieson*, 7 Ill. App.2d 113, 118, 129 N.E.2d 269, 271 (1955).

<sup>106</sup> The following allegation appeared in a complaint in one case where the Illinois Supreme Court reversed the action of a local board of appeals: ". . . that the chairman of said Macon County Zoning Board of Appeals thereupon made a speech to the gathering, stating that if this rezoning was permitted that it would open the door for garages, taverns and all sorts of undesirable businesses to be located upon said property; that when certain of the property owners reminded the speaker that the township was dry, he corrected himself. . . ." *Strohl v. Macon County Board of Appeals*, 411 Ill. 559, 104 N.E.2d 612 (1952). Abstract at pp. 6-7 (Docket No. 32215).

<sup>107</sup> For a candid discription of this remarkable practice, see Dallstream and Hunt, *Variations, Exceptions and Special Uses*, [1954] Ill. L. Forum 213.

<sup>108</sup> *222 East Chestnut Street Corp. v. Board of Appeals of Chicago*, 10 Ill.2d 132, 139 N.E.2d 218 (1956). Abstract at pp. 36-39, 108-9 (Docket No. 34074).

uses;<sup>109</sup> and, a fortiori, the refusal to issue a permit for a permitted use because the municipality wanted time to amend the ordinance to forbid the offending (but permitted) use has been declared improper.<sup>110</sup> An amendment which benefited only one parcel and was adopted with no evidence of deliberation was successfully attacked;<sup>111</sup> and an ordinance which excluded parochial day schools while permitting public day schools has been invalidated.<sup>112</sup> Likewise the use of the zoning power, in complete disregard of existing conditions, to prevent construction and thereby insure that contemplated condemnation would be less costly has been held an improper use of the police power.<sup>113</sup>

It is within such an anarchistic system the Court now insists that the property owner first seek relief in matters in which many thousands of dollars are frequently involved. Indeed, if the *Fox* case and the appellate court decisions mean that where the final decision is by the local board of appeals the petitioner can only appeal on the record made before that board, then the property owner may find his substantive rights heavily influenced, if not conclusively determined, by the character of the local practice.<sup>114</sup> It is hard to concede that ultimate determination of conflicting interests may depend upon the fortuity of the village or county in Illinois in which the dispute arose.

Nor is it sufficient to reply that the Illinois courts are available to correct palpable cases of local procedural injustice. This may work in a monolithic ad-

<sup>109</sup> "It is apparent with respect to the zoning act that municipalities have not exercised sound discretion with a view to procuring interpretations on which a fair administration of the law could be based. Instead, cases have often been submitted involving decisions of the zoning authority adopted in haste and under obvious pressure of an immediate and local interest. Such cases challenge the careful scrutiny of the courts in order that the rights of individual citizens may be protected." *American Smelting & Refining Co. v. Chicago*, 347 Ill. App. 32, 40 105 N.E.2d 803, 806-7 (1952). Compare *Joseph Lumber Co. v. City of Chicago*, 402 Ill. 321 83 N.E.2d 592 (1949), with *Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346, 106 N.E.2d 823 (1952). Cf. *Bohan v. Village of Riverside*, 9 Ill.2d 561, 138 N.E.2d 487 (1956) (dissenting opinion); *1550 North State Street Bldg. Corp. v. City of Chicago*, 15 Ill.2d 408 422, 115 N.E.2d 97, 104 (1958).

<sup>110</sup> *Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill. App.2d 555, 149 N.E.2d 344 (1958).

<sup>111</sup> *Michigan-Lake Bldg. Corp. v. Hamilton*, 340 Ill. 284, 172 N.E. 710 (1930).

<sup>112</sup> *Catholic Bishop of Chicago v. Kingery*, 371 Ill. 257, 20 N.E.2d 583 (1939).

<sup>113</sup> *2700 Irving Park Bldg. Corp. v. City of Chicago*, 395 Ill. 138, 69 N.E.2d 827 (1946) (residential zoning in industrial area to discourage construction pending condemnation for public park). For a similar practice see *Galt v. County of Cook*, 405 Ill. 396, 91 N.E.2d 395 (1950) (special setback restriction to prevent construction in contemplation of widening of highway).

<sup>114</sup> There is no dispute that if the appeal is by way of administrative review no new evidence may be heard by the court. Ill. Rev. Stat. (1957) c. 110, §27. *Rock Island Metal Foundry, Inc. v. City of Rock Island*, 414 Ill. 436, 111 N.E.2d 499 (1953). "If the method of procedure followed here [de novo hearing by court] were to be allowed, its effect would be to cause the court to act as a zoning board of appeals. Such a result is not contemplated by either the Administrative Review Act or the County Zoning Act." *Strohl v. Macon County Zoning Board*, 411 Ill. 559, 564-65, 104 N.E.2d 612, 615 (1952). It should be noted that precisely such a result is achieved if the property owner files a bill for declaratory judgment or injunction instead of going by way of administrative review.

ministrative system where judicial directives are focused on one administrative body. The judicial strictures are diffused, if not completely dissipated, however, when the administrative system is composed of scores of autonomous bodies notoriously jealous of their individuality. The almost complete failure of communication among local zoning boards is frequently welded to a local attitude which suggests to the petitioner that a Supreme Court opinion affecting, for example, Park Ridge has no bearing upon the practices in Berwyn.

This is no small nor parochial matter. As urbanization accelerates, the struggle for control over land use becomes one of the most pressing issues of community life. The development by the planners of new techniques for regulating land use under the police power reflects an awareness that old zoning techniques do not and cannot cope with the complexities of present community life. Yet these new techniques, complicated and frequently requiring considerable technical skill and discretion in their administration, place in the hands of the local boards and legislatures more power over the owners of property than the early protagonists of zoning in their fondest dreams ever imagined.<sup>115</sup> The point of concern is that the appearance of bold new techniques has been joined with a determination by the Illinois courts to shuck judicial dominance over the administration of those techniques. The irony lies in the fact that the mantle of authority has been draped over an administrative system which has an aboriginal ethical code, possesses no cohesive body of principles, is multiform in its methods for handling complaints and is composed of constantly proliferating and unconnected units.

It is for these reasons that the *Bright-Bank of Lyons* dogma should be cause for apprehension; not because it leaves some doubt as to the proper steps a litigant must follow, nor because in those cases the Court juggles, with something less than complete artistry, orthodox concepts of administrative law.

## VIII

The prospect is not encouraging. One can foresee the Illinois Supreme Court continuing its case-to-case construction of a quixotic law of zoning administration vacillating between its annoyance that it must pass upon peculiarly local questions of fact without the benefit of either direct knowledge or special skills, and its occasional fear that arbitrariness or prejudice may stalk behind the cloak of sound city planning.

There may be, however, an alternative course which possesses questionable political appeal on first glance but seems to be the only satisfactory answer to the present confusion; namely, the creation of a state-wide zoning commission with two broad areas of authority: (1) The commission should be authorized to establish uniform rules and methods of procedure for all hearings by boards or

<sup>115</sup> "We are now told that the protection of non-conforming uses in the beginning was a strategem of city planners 'prompted by a fear that the courts would hold unconstitutional any zoning ordinance which attempted to eliminate existing non-conforming uses.'" Harbison v. City of Buffalo, 4 N.Y.2d 553, 570, 152 N.E.2d 42, 51 (1958) (dissenting opinion).

local legislatures operating under local zoning ordinances; (2) the commission would hear all appeals from final rulings of local bodies, whether those decisions were made by a board of appeals or a municipal legislature.<sup>116</sup>

The first of these powers would insure that every owner of real estate, wherever it was located, would be judged by similar standards and heard under identical procedures. The imposition of such uniformity would not interfere with the sanctity of local conditions of land use or needs upon which substantive rights would still depend. Not the least of the merits of such a state-wide authority would be a wider dissemination of information among local administrative bodies. Such a commission could provide that glue of participation in a common administrative effort that is totally absent from zoning administration today despite the good intentions of various lay and professional organizations.

The power of such a commission to make law by case-to-case decisions would provide the necessary sanctions to enforce its general rule-making power. Any dispute before a local body would go of right to the commission on the record made before the local agency (under procedural rules established by the commission). The vast majority of the zoning cases which go to court require not a judicial determination of the law but an analysis of the facts in terms of sound planning. The local board or legislature, assuming it has qualified technical counsel, could provide this. It cannot—and frequently has not—combined this skill and knowledge of local conditions and needs with a dispassionate, objective approach to the dispute. The state-wide commission could synthesize both these elements.

The complainant or municipality could still go into the circuit court on the record by way of the Administrative Review Act after the decision of the state commission, but the number of such cases would be substantially reduced and those eventually reaching the Supreme Court would be cut to a trickle. Such a procedure would resolve outside the courts almost every zoning case which has been decided by the Supreme Court since its original decision in *City of Aurora v. Burns*.<sup>117</sup> These are the cases where the sole issue is the reasonableness of the classification of a particular parcel of property on the zoning map.<sup>118</sup> Now

<sup>116</sup> An analogous arrangement exists with respect to local liquor licenses. The Illinois Liquor Control Act establishes a State Liquor Commission which hears and determines appeals from orders of a local commission except in cities and villages having a population of over 200,000 inhabitants, in which case appeal lies to the local license appeal commission. On appeal to the State Liquor Commission, the matter is tried de novo. The decisions of the State Liquor Commission are subject to judicial review pursuant to the provisions of the Administrative Review Act. The State Liquor Commission has authority "to recommend to local commissioners rules and regulations, not inconsistent with the law for the distribution and sale of alcoholic liquors throughout the State." Ill. Rev. Stat. (1957) c. 43, §§108, 153, 154a. In *Massachusetts v. Attorney General*, 336 Mass. 17, 142 N.E.2d 360 (1957).

<sup>117</sup> 319 Ill. 84, 149 N.E. 784 (1925).

<sup>118</sup> For collections of these "typical" cases see Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. of Chi. L. Rev. 87, 88n. 3 (1947); Babcock, *The New Chicago Zoning Ordinance*, 52 Nw. U. L. Rev. 174, 175n. 8 (1957).

treated as constitutional questions, they are nothing but questions of fact best determined, if an appeal from local decision is desired, by a body equipped in staff and experience to deal with the essentially non-legal issue: What, in a given situation, is proper zoning? There would remain as both appropriate and necessary for judicial examination only those matters which raise novel issues of concern to many municipalities and counties. Thus, the commission should have the power to certify a direct appeal to the Supreme Court where the dispute involves a provision of the *text* of the ordinance, the validity or invalidity of which can be resolved apart from the peculiar conditions surrounding a particular parcel, and on which a decision will influence zoning practices throughout the state. The amortization of non-conforming uses without compensation would clearly be such a case.<sup>119</sup> The property of architectural controls would be another.<sup>120</sup> The right of a city to condemn a building only because it was designed and used for non-conforming purposes would be a third.<sup>121</sup> Since 1923 there have been only a few such issues which make judicial scrutiny imperative. The restriction on the expansion of non-conforming uses,<sup>122</sup> the retirement of minimum lot sizes,<sup>123</sup> the device of the special use,<sup>124</sup> the exclusion of residential development from industrial zones,<sup>125</sup> the total exclusion of certain uses from a

<sup>119</sup> This question has not been passed upon by the Illinois Supreme Court. The cities and villages enabling act authorizes provisions for elimination of non-conforming uses. Ill. Rev. Stat. (1957) c. 24, §73-1, and a number of municipalities have made provision therefor. The county enabling act contains no such provision. In 1957 the Governor of Illinois vetoed an amendment to the county enabling act which authorized elimination of non-conforming uses in language substantially similar to that of the cities and villages act on the advice of the Attorney General that such a provision was unconstitutional. Veto Messages of William G. Stratton 68-69 (1957). For a discussion of this issue and a collection of the decisions on amortization of non-conforming uses in other jurisdictions, see *The Cost of Amortizing Non-conforming Uses*, 26 U. of Chi. L. Rev. 442 (1959); *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. of Chi. L. Rev. 477 (1942); Crolly and Norton, *Termination of Non-conforming Uses*, 62 Zoning Bull. 1 (Regional Plan Ass'n, June, 1952).

<sup>120</sup> Cf. *Saveland Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); *Berman v. Parker*, 348 U.S. 26 (1954). The Illinois Supreme Court has made only passing reference to the role of "aesthetics" in zoning. See *Neef v. City of Springfield*, 280 Ill. 275, 280, 43 N.E.2d 947, 950 (1942); *Trust Company of Chicago v. City of Chicago*, 408 Ill. 91, 103, 96 N.E.2d 499, 502 (1951); *Odd Fellows Oakridge Cemetery Ass'n v. Oakridge Cemetery Corp.*, 14 Ill. App.2d 378, 388, 144 N.E.2d 853, 858 (1957).

<sup>121</sup> The authority is granted by the cities and villages enabling act. Ill. Rev. Stat. (1957) c. 24, §73-11. The new Chicago ordinance contains such a provision. *Comprehensive Amendment to Chicago, Ill. Zoning Ord.* (1958), Art. 6.4-9.

<sup>122</sup> *Mercer Lumber Co. v. Village of Glencoe*, 390 Ill. 138, 60 N.E.2d 913 (1945).

<sup>123</sup> *Reitman v. Village of River Forest*, 9 Ill.2d 448, 137 N.E.2d 801 (1956).

<sup>124</sup> See cases cited in note 41 supra.

<sup>125</sup> *Skokie Town House Builders v. Village of Morton Grove*, 16 Ill.2d 183, 157 N.E.2d 33 (1959).



jurisdiction,<sup>126</sup> and the regulation of governmental uses<sup>127</sup> are the only issues which have raised any issue above the ordinary in Illinois zoning law since *City of Aurora v. Burns*. The balance of the decisions could and should be settled by a body possessed of three qualifications: (1) experience in the field, (2) power to establish uniform local standards, and (3) freedom from local pressures. Of these, the Supreme Court can claim only the latter. The establishment of a state-wide system, as tentatively sketched here, would appear to be the most plausible method for achieving an administrative coherence, uniformity and fairness compatible with local control over the substantive features of zoning law.

<sup>126</sup> "It was aptly stated by the trial judge that, in the powers conferred upon municipal authorities, nowhere does the legislature grant to municipalities the power to wholly restrict a lawful business from their boundaries." *Trust Company of Chicago v. Village of Skokie*, 408 Ill. 397, 404, 97 N.E.2d 310, 313 (1951).

<sup>127</sup> *Baltis v. Village of Westchester*, 3 Ill.2d 388, 121 N.E.2d 495 (1954); see *Tower Cabana Club, Inc. v. City of Chicago*, 5 Ill.2d 11, 19, 123 N.E.2d 834, 838 (1955).