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# Circling the Squares of Euclidean Zoning: Zoning Predestination and Planning Free Will

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## EFFECTS OF FASANO ON LOCAL LAND USE DECISION-MAKING

### CIRCLING THE SQUARES OF EUCLIDEAN ZONING: ZONING PREDESTINATION AND PLANNING FREE WILL

BY JAMES BROSS\*

*Thanks to the Oregon Supreme Court, my days are filled with excitement. I nearly missed my chance when the county amended the zoning code to allow a duplex next to me; the court halted that blight fast. Now the county has followed the court's lead and approved a conditional use for a 500 bed hospital and methadone clinic next door. Talk about your compatibility.<sup>1</sup>*

*Imaginary Happy Homeowner*

However unlikely it may be that this paeon has been uttered, such is the stuff of traditional land use control logic. The Oregon appellate cases which pursue that logic have been neatly summarized and categorized in recent writings.<sup>2</sup> Despite their apparent "inconsistency"<sup>3</sup> those cases are not aberrations among the run of land use decisions; the Oregon appellate courts, like other courts, have been groping from a system for reviewing local zoning decisions. Past decisions had locked the court into a process of review in which formal mechanisms of change were limited to "adjusting individual injuries where the regulation bears too heavily and helping to locate exceptional uses \* \* \*."<sup>4</sup>

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1. In *Roseta v. County of Washington*, 254 Ore. 161, 458 P.2d 405 (1969), the Oregon Supreme Court struck down a zoning code amendment from "single family residential" to "duplex residential." The court held such amendments to be spot zoning and to lack the usual legislative presumption of validity. On the same day, Justice O'Connell handed down *Archdiocese of Portland v. County of Washington*, 254 Ore. 77, 458 P.2d 682 (1969); *Roseta* was found inapplicable to such compatible conditional uses as auditoriums, colleges and hospitals. *Id.* at 84, 458 P.2d at 685. Hereinafter, the two decisions will be treated as a single statement of policy and cited as *Roseta/Archdiocese*.

2. Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILL. L.J. 358 (1974).

3. *Id.*

4. Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregu-*

Now the Oregon Supreme Court has spoken new words on land use in *Fasano v. Washington County*<sup>5</sup> and *Baker v. City of Milwaukie*.<sup>6</sup> The procedural and substantive techniques for dealing with those cases are treated in subsequent articles in this series. This introductory article will examine the context of those new words on land use. Although the apparent thrust of *Fasano/Baker* is to revise the treatment of land use problems under judicial review, a continuation of the prior judicial mind set will cause new words to reproduce the same logic. The source of the old logic and its specific manifestations in early decisions will be examined so that the *Fasano/Baker* cases can be checked for evidence of relapse.

The *Fasano/Baker* pairing overtly deals with three basic areas:

1. The controlling and underlying process of land use regulation is to be the generalized process of planning rather than the specific tool of zoning;<sup>7</sup>
2. Because the zoning of particular parcels of land must now be viewed in its relationship to the controlling plan, the nature of individual decisions on particular parcels is re-

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lation v. Administrative Discretion, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES* 5 (N. Marcus & M. Groves, ed. 1970); see also D. MANDELKER, *THE ZONING DILEMMA* 72-74, 84-86 (1971).

5. 264 Ore. 574, 507 P.2d 23 (1973). *Fasano*, a neighboring landowner and attorney, challenged the county decision to grant a floating zone permit for a trailer park in *Fasano's* single-family neighborhood. Justice Howell concluded that the floating zone decision was one of a class of "quasi-judicial" decisions applying general policy to particular parcels of land. Such quasi-judicial decisions are administrative applications of the general policy found in the comprehensive plan and must be carried out in compliance with the comprehensive plan. Finally, Justice Howell listed procedural rules to govern quasi-judicial hearings. See subsequent articles in this symposium for elaboration of those rules.

6. 75 Adv. Sh. 1068, 533 P.2d 772 (Ore. 1975). Justice Howell wrote that "[u]pon passage of a comprehensive plan a city assumes a responsibility to affectuate that plan and conform prior conflicting zoning ordinances to it." *Id.* at 1081, 533 P.2d at 779. *Baker* clarified *Fasano* in two respects. It affirmed that differences between city zoning enabling legislation in ORE. REV. STAT. § 227.010 *et seq.* and county zoning enabling legislation in ORE. REV. STAT. § 215.010 *et seq.* were not relevant to the policy establishing the comprehensive plan as the "controlling land planning instrument." Further, *Baker* imposed an affirmative duty to make implementation comply with plans while *Fasano* required such compliance in ruling on cases brought to the government by a landowner seeking permits.

7. *Fasano*, 264 Ore. at 582, 507 P.2d at 27; *Baker*, 75 Adv. Sh. at 1081, 533 P.2d at 779.

examined and relabelled as "administrative/quasi-judicial" rather than legislative;<sup>8</sup>

3. As a result of the relabelling of the decisions on particular parcels, appropriate procedures for quasi-judicial hearings must be created.<sup>9</sup>

That prior decision makers should have assumed that they were dealing with zoning rather than planning is not surprising. Despite attempts in commentaries to assert the existence of a generalized phenomenon called "land use planning and control,"<sup>10</sup> a score-keeper who read only judicial decisions would find scarce evidence of anything other than "zoning." The Atlantic and Pacific reports in the last three years contain over 500 zoning cases, while in the same period they report fewer than a dozen cases reviewing such well established controls as subdivision regulations. Those in the judiciary who dealt with the issue of land use strictly in terms of zoning as it appears in the traditional zoning forms of action have been hard put to see common elements in problems before them.<sup>11</sup> To assert the primacy of the planning process over zoning and to conceptualize about the general problem of making decisions to implement plans required affirmative action to seek out information which would not come to appellate judges in the usual run of cases.<sup>12</sup>

Professor Jan Krasnowiecki has given workable descriptions of both the zoning and planning views:

The theory behind the [current zoning] system is that the members of a community can sit down one fine day and determine not only the general nature of its future development but also every detail to such a precise extent that very little need be left to the discretion of an on-going administrative process. The idea \* \* \* rests on the assumption that it has a clear vision of an end state for

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8. *Fasano*, 264 Ore. at 580-81, 507 P.2d at 26-27.

9. *Id.* at 586-88, 507 P.2d at 29-30.

10. See, e.g., J. DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* (2d ed. 1969); *PRINCIPLES AND PRACTICE OF URBAN PLANNING* (W. Goodman & E. Freund ed. 1968); N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* (1974).

11. Justice O'Connell's difficulties in handling *Roseta/Archdiocese* are an example of the quandaries posed by treating zoning forms of action such as amendments or conditional uses as different issues rather than two names for the same issue. See MANDELKER, *supra* note 4.

12. This affirmative action included a request that counsel in *Fasano* reargue certain specific issues, including the role of the comprehensive plan.

itself \* \* \*. [I]t subscribes to a static end state concept of land use control.<sup>13</sup>

\* \* \* \*

[L]and use control should be viewed as a dynamic, on-going process \* \* \*.<sup>14</sup>

\* \* \* \*

Land use and development is subject matter that demands controls which are capable of relating sensitively to the variables in each individual instance and which recognize that the variables are themselves in the process of continuing change. In order to reflect this characteristic of the subject matter, local governments should be authorized to employ the administrative function as widely as its nature demands.<sup>15</sup>

Pre-*Fasano* cases may be expected to display the "static end state concept" which typifies zoning. Indeed, the pre-*Fasano* mind set may be a consequence of this very "static end state concept." To the extent that *Fasano/Baker* embodies change, it may be expected to move toward facilitating a "dynamic, on-going process [employing] the administrative function \* \* \* widely."

#### THE STATIC END STATE IN OREGON DECISIONS

##### A. *Inherent Obstacles to Change in the Zoning System*

Although earlier Oregon decisions make frequent use of the word "plan," it formed part of the phrase "comprehensive zoning plan"<sup>16</sup> which the court considered the standard of stability. Supported, as it is in cases,<sup>17</sup> by citation to enabling legislation's "comprehensive plan,"<sup>18</sup> the phrase might be read as evidence that *Fasano/Baker* offers no innovation. While *Fasano/Baker* indeed may offer no innovation, it is evident that "comprehensive zoning

13. Krasnowiecki, *supra* note 4, at 4.

14. *Id.* at 10.

15. *Id.* at 7-8.

16. *See, e.g. Roseta*, 254 Ore. at 164-69, 458 P.2d at 407-09; *Archdiocese*, 254 Ore. at 83-84, 458 P.2d at 685; *Smith v. County of Washington*, 241 Ore. 380, 384, 406 P.2d 545, 547 (1965). This phrase also appeared in the early case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379 (1926).

17. *Smith*, 241 Ore. at 383-84, 406 P.2d at 547.

18. ORE. REV. STAT. § 227.240 (1973) has, since its passage in 1919, urged cities to give reasonable consideration in zoning to, among other things, "a well-considered plan." ORE. REV. STAT. § 215.050 (1973) requires counties to adopt comprehensive plans; since adoption of ORE. REV. STAT. 215.010 *et seq.* as enabling legislation in 1947, counties have been told to zone "in accordance with a comprehensive plan."

plan" embodies the "static end state" rather than the "dynamic on-going process."

Rather than acting as a separate standard against which zoning can be judged, the "comprehensive zoning plan" is found in the zoning; it is a "gestalt" abstracted from the zoning ordinance and tested against the actual pattern of development.<sup>19</sup> The "comprehensive zoning plan" does not make a "continuous on-going contribution"; it merely responds to physical changes in the environment thrust upon it by such outside forces as the Highway Department.<sup>20</sup> An amending ordinance which is not a response to such outside forces of change is a "deviation."<sup>21</sup>

Krasnowiecki has given a starting point to predict the consequences of this static end state: it "is a system that is called upon to react to constantly changing circumstances with a machinery that was designed to handle a static world."<sup>22</sup> Thus the system will contain an inherent tension between the reality of constant change and inadequate legal mechanisms for responding to such change. Two ills could flow from this tension. Either necessary change will be thwarted because of systematic bias toward stasis, or floods of unreviewed and possibly abusive change will rush through a system unequipped to evaluate change.

Evidence substantiates the existence of both ills.<sup>23</sup> More significant for an examination of judicial mind set is a pattern of decisions based upon a belief that one or the other extreme is typical of the local system. Like most persons dealing with a language-based system, judges respond to the concepts in law in terms of some picture of the usual instance of the concept.<sup>24</sup> It is

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19. *Smith*, 241 Ore. at 384, 406 P.2d at 547.

20. *Id.* It is a striking commentary on the narrow scope of land use control available under zoning that highways should be considered an alien impact on land use control rather than an essential tool for implementation of plans.

21. *Archdiocese*, 254 Ore. at 83, 458 P.2d at 685.

22. Krasnowiecki, *supra* note 4, at 4.

23. See R. BABCOCK, *THE ZONING GAME* 50-61 (1966) for a discussion of the public preferences for stability. It is in the setting of exclusionary zoning that courts most often find insufficient change. See, e.g., *Metropolitan Housing Dev. Corp. v. Arlington Heights*, 517 F.2d 409 (7th Cir. 1975). Excess change may be the result of overt corruption. Freilich & Larson, *Conflict of Interest: A Model Statutory Proposal*, 38 U.M.K.C. L. REV. 373, 390-98 (1970). However it is more often the result of systemic indifference. Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955).

24. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, I-¶¶ 109, 115, 137-142 (1968); H.L.A. HART, *THE CONCEPT OF LAW* 121-26 (1961).

not difficult to discern the Oregon Supreme Court's image of the typical zone change proceeding. In that picture, local governments are unwilling or unable to resist pressures for wholesale scrapping of the zoning ordinance, proponents of change are venal or insensitive to broader interests, and neighboring landowners are society's bastion against environmental destruction.<sup>25</sup> Justice O'Connell quotes commentary from an earlier Kentucky opinion:

[T]he common practice of zoning agencies \* \* \* is simply to wait until some property owner finds an opportunity to acquire a financial advantage \* \* \* and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning.<sup>26</sup>

With defenses erected against change within a system already ill-prepared for change, the dismal reception change has received in Oregon appellate opinions should be anticipated.<sup>27</sup>

The direction taken in such earlier cases could be viewed as simply reinforcing and forwarding the policies chosen by the legislative branch in its establishment of the system of "static end state." Indeed, many of the problems experienced with land use regulations in Oregon have been inherent in the system and have occurred with neither facilitation nor discouragement from the judiciary. A brief list of such predictable problems would include:

1. The process is preoccupied with quirks of the zoning system. Instead of asking "what are the goals of our community and how shall we reach them," communities ask "how shall we zone?" In response to that question, the City of Portland has overzoned huge areas within its boundaries for intensive uses such as industrial or high-rise apartment development. Such overzoning was designed to prevent the zoning of precisely enough land for intensive uses from leading to overpricing of land so zoned. In attempting to avoid a

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25. *Fasano*, 264 Ore. at 589-90, 507 P.2d at 30-31 (concurring opinion).

26. *Roseta*, 254 Ore. at 167-68, 458 P.2d at 408-09, citing *Fritts v. City of Ashland*, 348 S.W.2d 712, 714-15 (Ky. 1961). *Fasano* also related the image of the "almost irresistible pressures that can be asserted by private economic interests on local governments"; its discussion, however, is part of a conscious balancing of such fears against the "dangers of making desirable change more difficult." *Fasano*, 264 Ore. at 587-88, 507 P.2d at 30.

27. Sullivan, *supra* note 2, found that of 15 quasi-judicial permits approved by local governments and reviewed by Oregon appellate courts before 1974, 11 were reversed.

zoning problem, the city inadvertently weakened sound residential areas by encouraging speculation on unrealistic possibilities of intensive development; increased property taxes and decreased maintenance have been typical results of such speculation.<sup>28</sup>

2. Goals which cannot be reached by Euclidean zoning may never be considered. The adopted plan of the Northwest District of the City of Portland has as its "Major Goal" that "[t]he Northwest District should serve and house a diverse population close to the center of the City consisting of a mixture of land use which provides a functional, stimulating and livable environment for its users \* \* \*."<sup>29</sup> The goal is so alien to previous systems of regulation that full implementation of the goal requires redrafting of the city code to create a new system of control.<sup>30</sup>

3. Subsystems of the land development process are not likely to be seen as potential devices for implementing plans; rather they will be permitted to operate independently in ways that thwart city goals. In the overzoning problem discussed earlier, property taxation operated to hinder housing stock maintenance. Only in the 1975 Session of the Oregon Legislature was action taken to turn the Property Tax to an implementation tool to facilitate the city goals.<sup>31</sup>

Solutions to problems caused by the prior zoning system frequently demand changes in the prior pattern of zoning. Recovery from overzoning for industrial use and inserting controls designed to meet broader goals than those of conventional zoning involve

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28. PROPOSED DRAFT, MODEL CITIES COMPREHENSIVE PLAN FOR PORTLAND 16-17 (1973).

29. Portland Bureau of Planning, Northwest District Policy Plan I-6 (Adopted July, 1975).

30. "The Council passed a motion instructing the City Planning Commission to immediately proceed on the development of a mixed use zoning proposal for possible application in the Northwest District and other appropriate areas \* \* \*." *Id.* at I-8.

31. The 1975 Session of the Oregon Legislature passed H.B. 2343, ch. 428 [1975] Ore. Laws Adv. Sh., permitting cities to designate areas close to central business districts (effectively limited by the language of the bill to downtown Portland at the present time) in which owners of property may seek 10-year property tax exemption for new high-rise apartment development. It also passed H.B. 2344, ch. 355 [1975] Ore. Laws Adv. Sh., and H.B. 2342 ch. 696 [1975] Ore. Laws Adv. Sh., designed to remove property tax disincentives to maintenance and rehabilitation of single family housing and aging apartment buildings.



alterations in the land use ordinance. Judicial restraints on change obstruct solutions to problems inherent in the zoning system.

*B. Obstacles to Change Superimposed by Judicial Mind Set*

In addition to those facets of the static end state in which courts have followed legislative leads by reinforcing inherent limitations, at least one contribution to the zoning system is uniquely judicial. In attempting to solve the problems of particular cases as they appear before the judiciary, the judicial habit is to seek analogies in prior cases which have attractive similarities to the instant case.<sup>32</sup> If the Krasnowiecki planning view were operative, a court might find analogies to land use problems in prior litigation dealing with administrative implementation of legislative policy; however, such analogies are infrequently used because "the exercise of administrative discretion under the (zoning) ordinance was conceived as a tangential rather than an integral phase."<sup>33</sup>

The analogies actually used in zoning decisions will depend to a large extent on the judicial view of the legal area into which zoning fits—in effect, on the judicial view of the legal language game of which the words of zoning may be a part. Donald Hagman has found that teachers of zoning fall into property or local government law areas.<sup>34</sup> Although courts do not carry the convenient indicia that permit identification of teachers as either property or local government law people, the courts' choice is still between the same two basic areas. Those courts placing zoning into a property context will be inclined to find spoken and unspoken analogies in property doctrines.

Under the static end state concept making use of zoning to preserve districted hierarchies of uses, the related property analogy is temptingly nestled in the consensual systems of land use control known as covenants. At times, the analogy to covenants has been carried out explicitly.<sup>35</sup> Zoning can be said to resemble the mu-

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32. H. BERMAN & W. GREINER, *THE NATURE AND FUNCTION OF THE LAW* 416-19 (3d ed. 1972).

33. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 98.

34. Hagman, *The Teaching of Land-Use Controls and Planning Law in American Law Schools*, 1972 LAND USE CONTROLS ANNUAL 61.

35. *Frankland v. City of Lake Oswego*, 267 Ore. 452, 474-75, 517 P.2d 1042, 1053 (1973). Although a post-*Fasano* case, its *Fasano*-related issues were side-stepped. It dealt with an apartment building constructed on a hill-top in the path

tually enforceable equitable servitudes evidenced by a private developer's common scheme of development<sup>36</sup> or to resemble legal covenants running with the land.<sup>37</sup> In instances of express analogy, a consciousness of the nature of the activity of analogizing retards the drawing of unjustified inferences of comparability. When the analogy is not express, the chance of mistaken comparisons increases.<sup>38</sup>

The temptation to draw analogies from private systems of controls by promise is strengthened by the ease with which specific covenant models can be found for the usual run of zoning problems faced by the judiciary. Among the enticing zoning-covenants counterparts are:

1. The "comprehensive zoning plan" is treated similarly to the common scheme of development. Both are inferred from an original writing, evidenced by patterns of actual development, and give rise to enforceable legal rights in neighboring landowners.<sup>39</sup>

2. The hardship variance to the zoning restrictions and equitable relief from servitudes after a change in circumstances are often treated as part of a similar question: is the value and usefulness of the lot as restricted so unfairly reduced as to justify lifting the zoning or covenant restriction?<sup>40</sup>

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of adjoining landowners' expensive views of Mt. Hood. The apartment's construction was held illegal because it exceeded the height shown in drawings submitted to the City as part of a P.U.D. final development plan approval.

36. "One of the theories underlying a suit by an adjoining landowner \* \* \* [draws] an analogy between rights accruing to a third party beneficiary under contract and the rights of adjoining landowners under a zoning ordinance." *Frankland*, 267 Ore. at 474, 517 P.2d at 1053. *Rodgers v. Reimann*, 227 Ore. 62, 361 P.2d 101 (1961), found the Oregon courts "free to employ \* \* \* as the case may demand" a third party beneficiary theory to support suits by a prior grantee upon a covenant subsequently made by his grantor. *Id.* at 69-70, 361 P.2d at 104-05.

37. "A variant of this approach would analogize a covenant running with land in a deed with a zoning ordinance \* \* \*

[T]he benefits flowing from the enactment of zoning regulations, *in return for the restrictions imposed by them*, accrue not only to the municipality, representing the general public, but also to the abutting property owners.'" *Frankland*, 267 Ore. at 475, 517 P.2d at 1053, quoting *DeBlasiis v. Bartell*, 143 Pa. Super. 485, 491-92, 18 A.2d 478, 481 (1941).

38. O. BOUWSMA, *PHILOSOPHICAL ESSAYS* 187-92 (1969). N. WILLIAMS, *supra* note 10, at ¶2.01 n.5, cites *Fasano* as an example of "implicit rather than articulate" support of a property rights theory of neighbors' interest.

39. *Compare Smith*, 241 Ore. at 383-84, 406 P.2d at 547-48 with *Rodger v. Reimann*, 277 Ore. 62, 361 P.2d 101 (1961).

40. *The Inn, Home for Boys v. City of Portland*, 16 Ore. App. 497, 500, 519 P.2d

3. The treatment of amendments to zoning codes under the so-called Maryland Change or Mistake Doctrine<sup>41</sup> with which the Oregon courts flirted<sup>42</sup> is identical to equitable bases for relief from servitudes. Under that doctrine, amendments applicable to small parcels must be justified by evidence of either a mistake in the original zoning or a change in the neighborhood of the surrounding parcels. Similarly, evidence of mutual mistake<sup>43</sup> or change in the neighborhood<sup>44</sup> may result in relief in equity from consensual private controls.

4. Early zoning ordinances demanded consent of neighbors to changes in zoning;<sup>45</sup> neighbor consent still results in simplified change procedures under some city codes.<sup>46</sup> Such zoning by agreement reemphasizes the similarity of public control and private agreement.

The development of doctrines of public regulation based upon analogies to private regulation may be harmless in many instances; but their pervasive use can be hazardous.<sup>47</sup> The use of the

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390, 392 (1974) quotes the 1969 version of the PORTLAND, ORE., CODE §33.106.010 permitting granting of a variance "as may be necessary to secure an appropriate improvement of a lot \* \* \* that \* \* \* cannot otherwise be appropriately improved without such modifications." *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927), refused to enforce a residential restrictive covenant because "defendant's property is essentially business property, and if he is restrained from using it for the only purpose for which it is now suitable and available, he will be irreparably damaged \* \* \*."

41. See MANDELKER, *supra* note 4, at 89.

42. *Roseta*, 254 Ore. at 166 n.5, 458 P.2d at 408 n.5. The court of appeals decision in *Fasano*, 7 Ore. App. 176, 489 P.2d 693 (1972), assumed that Oregon had adopted the Maryland Change or Mistake Doctrine.

43. 3 AMERICAN LAW OF PROPERTY § 12.86 (1953).

44. *Trustees of Columbia College v. Thacher*, 87 N.Y. 311 (1882), withheld equitable enforcement of a private servitude because "there ha[d] been such an entire change in the character of the neighborhood of the premises." *Id.* at 316.

45. *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 P.2d 391 (1932).

46. The Portland City Code facilitates zoning amendments when there is consent by more than 50% of property owners within the change boundaries and within 150' of the boundary. PORTLAND, ORE., CODE § 33.102.020(2) (1969) *as amended by* PORTLAND, ORE., ORDINANCE 139117 and 139702 (1975).

47. The use of private property models has been pervasive in Oregon zoning cases. Complete delegation to neighbors of control over rezones has been struck down when the delegation occurred without standards to govern neighborhood discretion. *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 P.2d 391 (1932). However, the same delegation might be valid if properly governed by standards. Moreover, the courts have reiterated that the reaction of neighbors is an appropri-

property language game as the context of zoning words may interfere with solution of problems that are more properly part of the local government law language game; "the moves that are part of the one language game (may not) be a part of the other."<sup>48</sup> The public interest in land use regulation by government control may become privatized in the hands of a few adjoining property owners. The issue in cases ceases to be "Have we zoned to achieve the public good" and becomes "Have we protected the rights of neighbors." Landowners are given—without paying for them—zoning rights in neighboring property which "cannot be bargained away" by the local authority which originally passed the zoning restrictions.

Although the neighboring landowner could simply act as agent to protect the public interest,<sup>49</sup> the actual language of Oregon cases indicates that the neighbor's rights may over-rule the public interest. The most telling language in this regard is found in *Smith v. Washington County*:

The only debatable question \* \* \* was whether or not to sacrifice the rights of nearby residential property owners in order to encourage industry, and its attendant payroll. This debate, under the circumstances of the case, was irrelevant. *Whatever the merits of the industry may have been*, this court has held that the rights of

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ate inquiry for judicial evaluation of a zone change. *Perkins v. Marion County*, 252 Ore. 313, 321, 448 P.2d 374, 377 (1969). Opinions are replete with references to the percentages of neighbors supporting or opposing a zone change. See, e.g., *Holt v. Salem*, 192 Ore. 200, 234 P.2d 564 (1951); *Shaffner v. Salem*, 201 Ore. 45, 268 P.2d 599 (1954). The character of neighborhood surroundings is relevant to private equitable restrictions. *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925). It is a recurring consideration in zoning disputes. See, e.g., *Shaffner*, 201 Ore. at 55, 268 P.2d at 603; *Follmer v. Lane County*, 5 Ore. App. 185, 480 P.2d 722 (1971).

48. *Cook, Wittgenstein on Privacy*, 74 THE PHILOSOPHICAL REVIEW 281, 287 (1965).

49. In a recent discussion of standing to challenge quasi-judicial decisions by writ of review, Chief Judge Schwab quoted the briefs of the Northwest Environmental Defense Center:

"The third and seemingly most liberal interpretation [of standing] is that individuals within the community have standing as sort of private attorney generals to assert the communities' interest in the scenic beauties of their community."

*Duddles v. City Council of West Linn*, 75 Adv. Sh. 1652, 1664-65, 535 P.2d 583, 591 (Ore. App. 1975). For a challenge to the need for "private attorney generals" see *Krasnowiecki, Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965).

residential property owners to rely upon the protection of the comprehensive zoning plan cannot be bargained away.<sup>50</sup>

At a time when the issue of exclusionary zoning ordinances is the subject of intensive scrutiny,<sup>51</sup> the reinforcement of a landowner's right to preserve low-density single-family zoning is especially inappropriate. Absent evidence of a change in neighborhood, or a mistake in the original zoning, the language of *Smith* would seem to uphold the neighbor's "right to exclude" low income, high-density housing, "whatever the merits" of low-income housing.

In addition to privatizing the public interest in the substance of zoning, the covenant analogy privatized the remedies for violation of the public interest. *Frankland's* conclusion from its private law analogies was that an appropriate remedy for an illegally constructed apartment building was money damages to adjoining property owners.<sup>52</sup> Although the additional density caused by added stories in an apartment house impacts upon a broader public through increased traffic and similar externalities, the public interest can be quieted by a money payment to a few neighbors.<sup>53</sup> If few enough adjacent owners suffer damages, violation of the public laws can be treated as a minimal overhead item to be recovered easily by the sale of additional units. If the damages in *Frankland* were primarily from obstruction of a scenic vista by a five story structure, why not build a fifty story structure; the obstruction and resulting damages remain constant while the rewards of a massive violation of the law increase dramatically.

#### THE PLANNING/ADMINISTRATIVE PROCESS IN OREGON AFTER *Fasano*

At first glance, *Fasano/Baker* appears to contain several clusters of words suggestive of the process described by Krasnowiecki

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50. *Smith*, 241 Ore. at 387, 406 P.2d at 549 (emphasis added).

51. See, e.g., *Southern Burlington County v. Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975). *Fasano* could be viewed as facilitating exclusionary zoning since the income of the potential trailer park residents could have been considerably lower than the single-family zone residents.

52. *Frankland*, 267 Ore. at 480-83, 517 P.2d at 1056.

53. The *Frankland* case was, in fact, settled by money payment to the plaintiff neighbors. The *Oregonian* (Portland), Aug. 1, 1975, at 34, cols. 3-5. Money to a few neighbors as remedy for a breach of the public law in placing additional stories on an apartment building contrasts with the settlement of a similar issue in New York City; there, additional stories were committed to low income housing for the elderly. In New York, a breach of the public's law was compensated by a public benefit. N.Y. Times, Apr. 13, 1975, § 1, at 35, col. 1.

as an alternate to the "static end state." Among the dominant characteristics found by Krasnowiecki in the planning process are:

1. the legislative function \* \* \* to state as much in the way of rules and standards as is necessary to assure that the administrator will carry out the policy of the legislature;<sup>54</sup>
2. the administrative function employed as widely as its nature demands;<sup>55</sup>
3. the distinction between legislative and administrative functions in terms of regulation \* \* \* and order—a regulation as a rule of standard or general applicability and future effect and an order as an action taken in a particular case;<sup>56</sup>
4. procedural and substantive provisions specially designed<sup>57</sup> and quasi-judicial hearings.<sup>58</sup>

The mere use of judicial words that resonate with sounds remi-

54. Krasnowiecki, *supra* note 4, at 8. *Baker* cites favorably the following interpretation of *Fasano* by the Oregon Attorney General: "The comprehensive plan is thus analogous to legislation granting rule-making power but establishing the purpose for which and the limits within which that power may be exercised." *Baker*, 75 Adv. Sh. at 1073 n.6, 533 P.2d at 775 n.6, quoting 36 Ore. Op. Att'y Gen. 1044, 1046 (1974). Justice Howell gives an example of the manner in which legislative policy may be stated in a plan in *Fasano*, 264 Ore. at 586-87 n.3, 507 P.2d at 29 n.3.

55. Krasnowiecki, *supra* note 4, at 8.

"[W]e read *Fasano* as saying that the scope of judicial review is limited to an examination of the administrative record for the purpose of ascertaining that: (1) the proper procedures were followed; (2) the relevant factors were considered by the agency; and (3) there was reliable, probative and substantial evidence to support the decision of the agency."

*Dickinson v. Clackamas County*, 75 Adv. Sh. 1420, 1421, 533 P.2d 1395, 1396 (Ore. App. 1975).

56. Krasnowiecki, *supra* note 4, at 10. *Fasano*, 264 Ore. at 580-81, 507 P.2d at 26, distinguishes legislative from administrative, quasi-judicial decisions: legislative authority is exercised by "laying down general policies without regard to a specific piece of property" whereas a quasi-judicial decision is a "determination whether the permissible use of a specific piece of property should be changed \* \* \*"

57. Krasnowiecki, *supra* note 4, at 11. In *Green v. City of Eugene*, 75 Adv. Sh. 2821, 2822, 538 P.2d 368, 369 (Ore. App. 1975), Chief Judge Schwab expressed his reluctance to make wholesale adoptions of judicial procedures for quasi-judicial hearings. Such rigid importation of courtroom rules would "amount to a holding that citizens supporting or opposing a requested land use proceed at their own peril unless they retain an attorney." Judge Schwab's concern for whether rigid rules would be appropriate for the broad spectrum of settings in which land use issues arise is in keeping with *Fasano's* claim that it "contains no absolute standards or mechanical tests." 264 Ore. at 588, 507 P.2d at 30.

58. Krasnowiecki, *supra* note 4, at 12.

niscent of the planning/administrative process is no guarantee that the substance of the law has left the static end state. *Roseta/Archdiocese* contained similar resonances<sup>59</sup> but represent the Oregon apotheosis of the static end state. *Fasano/Baker's* resonances are clearly not the same as those in *Roseta/Archdiocese*.<sup>60</sup>

*Fasano* shares with prior cases an impression that decisions made locally are insufficiently resistant to change.<sup>61</sup> Its response to that impression differs from the responses in former cases. Suspicions of abusive change were treated in prior cases indirectly under such titles as "spot zoning,"<sup>62</sup> within the framework of traditional zoning categories such as amendment or conditional use, and without an awareness of adverse consequences of restricting change.<sup>63</sup> In *Fasano*, the potential for abusive change to benefit individual landowners is treated in a single category of quasi-judicial decisions, not under the rubric of several scattered zoning forms of action such as variance or amendment. Restraint on change within that category of quasi-judicial decisions is reached directly as a result of a particular conscious view of the pressures on local governments and through a technique—burdens and standards of proofs—designed explicitly to address the assumed abuses.<sup>64</sup> If it can be demonstrated to the judiciary that the pressures do not exist—perhaps because the State Land Conservation and Development Commission has reinforced the integrity of local processes through its administrative powers—an alteration of the restraint is easily accommodated.<sup>65</sup>

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59. "A council, in passing upon an application for a special use permit, acts as administrative agency." *Archdiocese*, 254 Ore. at 82, 458 P.2d at 684. However, in describing the same council actions, Justice O'Connell speaks of "reviewing the legislative action of a governmental unit engaged in carrying out a land use policy formulated by it." *Id.* at 86, 458 P.2d at 686. *Roseta*, 254 Ore. at 163, 458 P.2d at 406-07, reasserts the language of the enabling act as authority that "[a]ny zoning ordinance adopted by the county must be predicated upon 'a comprehensive plan \* \* \*.'" The court then quotes the phrase "comprehensive zoning plan" from *Smith* as if discussing the same "plan". *Id.* at 166, 458 P.2d at 407. 60. Unlike *Archdiocese*, *Fasano* applies the label "administrative" when speaking of a general category of change decisions applying policy to specific parcels. 264 Ore. at 588, 507 P.2d at 30. *Fasano/Baker* also separate clearly the policy statement of the plan from its implementation through zoning.

61. *Fasano*, 264 Ore. at 588, 507 P.2d at 30. See note 26, *supra*.

62. *Smith*, 241 Ore. at 384, 406 P.2d at 547. *Roseta*, 254 Ore. at 167, 458 P.2d at 409.

63. In fact, courts were suspicious "whatever the merits" of the changes they restricted. See discussion accompanying note 48, *supra*.

64. *Fasano*, 264 Ore. at 587-88, 507 P.2d at 29-30.

65. Since, after all, *Fasano* "contains no absolute standards." *Id.*

Even with the *Fasano* standards intact, there is a broader capacity to address the public's interest in implementing its goals than pre-*Fasano* case law allowed. Where prior case law might require proof of neighborhood change to justify zoning amendment,<sup>66</sup> the issue of need for such amendment becomes critical to achieving the goal.<sup>67</sup> Certainly, the exclusionary zoning problem can be dealt with more successfully under *Fasano* than under the *Smith* holding that change must be proven for amendment, "[w]hatever the merits" of the amendment.<sup>68</sup>

The future of several elements of *Fasano/Baker* will depend on the particulars of state involvement in the local planning process. The content of plans at the local level,<sup>69</sup> the type and degree of conformity demanded between local plans and their implementation,<sup>70</sup> and even the initial review of some local rulings formerly appealed directly to the circuit court<sup>71</sup> will depend to a large extent on the operation of the State Land Conservation and Development Commission (L.C.D.C.).

66. See discussion accompanying note 41, *supra*.

67. "In proving that the change is in conformance with the comprehensive plan \* \* \*, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property." *Fasano* 264 Ore. at 583-84, 507 P.2d at 28. See Sullivan, *supra* note 2, at 368.

68. *Smith*, 241 Ore. at 387, 406 P.2d at 549.

69. ORE. REV. STAT. § 197.015(4) (1973) defines comprehensive plan, and ORE. REV. STAT. § 197.705 *et seq.* (1973) require local governments to prepare and adopt comprehensive plans in accordance with state goals. The Land Conservation and Development Commission (L.C.D.C.) is given the roles of preparing statewide goals and guidelines—which it has done. The goals and guidelines are to be used by state agencies, cities, counties and special districts in preparing, adopting, revising and implementing comprehensive plans.

Comprehensive plans, and any ordinances or regulations implementing the plans, are to comply with the statewide goals by January 1, 1976. Extensions may be granted by the Commission in those situations where satisfactory progress is demonstrated.

70. The L.C.D.C. has prepared a report form to be used by local governments in reporting their compliance with state goals. The content of such reports, the trustworthiness of local governments in filing them out, and the vigor of L.C.D.C. in following up such reports will largely determine the success of state planning involvement.

71. Certain classes of quasi-judicial decisions of government bodies may be appealed by other government bodies to L.C.D.C. to determine the compliance of such decisions with state goals. ORE. REV. STAT. §§ 197.005 *et seq.* (1973).



Despite the contingent nature of any discussion of *Fasano/Baker*, the capacity of the cases' new words to address the problems seen in the static end state can be analyzed. The "meaning" of new words will become settled only when the words have been used in sufficient cases to determine the nature of the language game in which those words are a part.<sup>72</sup> To make projections about possible meanings of those words, scripts for different language games can be created from the legal theories that may explain *Fasano/Baker*.

#### A. *The Administrative Process: A Script with Open Options*

Categorization of decisions in the planning process has troubled the courts. The traditional label of "legislative" for local government actions has been awarded reluctantly by Oregon courts, as much because the courts disliked the presumption supporting legislatively-labelled actions<sup>73</sup> as because the courts found small-town councils unlike state legislative bodies.<sup>74</sup>

The Oregon Supreme Court has made glancing blows in *Roseta*<sup>75</sup> and *Fasano*<sup>76</sup> at placing the "administrative" label on local government decisions, but the quasi-judicial decisions identified by *Fasano* have not been linked irrevocably to the administrative process.<sup>77</sup> Moreover, those decisions of local government which are not identified as quasi-judicial retain the legislative label.<sup>78</sup>

There are, nonetheless, forces which press toward fuller use of the administrative label. Most Oregon discussions of quasi-judicial

72. A. HARARI, PLACE OF NEGLIGENCE IN THE LAW OF TORTS 11-18 (1962); L. WITTGENSTEIN, *supra* note 24, at ¶¶ 11-12, 83.

73. *Smith* and *Roseta's* "spot zoning" analysis was a method of blunting the presumption in support of legislative acts.

74. *Fasano*, 264 Ore. at 580, 507 P.2d at 26.

75. See discussion accompanying note 59, *supra*.

76. *Fasano* uses the phrase "administrative, quasi-judicial" only as part of a quote from a Washington decision. 264 Ore. at 580, 507 P.2d at 26.

77. The courts, having identified the quasi-judicial decisions as a method of avoiding the legislative presumption, would be hesitant to adopt the administrative label that would involve similar supportive presumptions. 2 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.06 (1958). Justice O'Connell's dissenting opinion in *Frankland* urged recognition of the expertise of local administrative rulings. *Frankland* at 483-88, 517 P.2d at 1056-59.

78. *Fasano*, 264 Ore. at 581, 507 P.2d at 27. By way of label symmetry, non-quasi-judicial decisions have also been called "quasi-legislative." *Marggi v. Ruecker*, 75 Adv. Sh. 1225, 1230, 533 P.2d 1372, 1374 (Ore. App. 1975) (dissent).

acts treat them as a category of legal process to be contrasted on an equal footing with legislative acts,<sup>79</sup> much as judicial or administrative acts might be contrasted with legislative acts. In reality, the label "quasi-judicial" usually describes a subcategory of decisions occurring within the administrative process.<sup>80</sup>

The relationship of local government decisions to other aspects of the planning process makes the administrative label inviting. As currently labelled, a state "legislative" act (Comprehensive Planning Coordination Statute)<sup>81</sup> initiates state "administrative" acts (L.C.D.C. goals, guidelines and enforcement) governing local "legislative" acts (comprehensive plan) which guide local "quasi-judicial" acts (specific implementation decisions). The anomaly of local "legislative" acts as subservient to state "administrative" acts can be avoided and placed into a more appropriate setting by relabelling. State "legislative" acts would initiate state "administrative" regulations and orders (L.C.D.C. actions)<sup>82</sup> which govern local "administrative" regulations (plans) which guide local "administrative" orders.

If the full scope of the administrative label is recognized and acted upon, much of *Fasano/Baker's* analysis takes on a new cast. The static end state of the past is easily seen as a specific result of the "extravagant version of the rule of law"<sup>83</sup> which impels lawmakers to confine discretionary power excessively. A more appropriate response to lawmaking is to seek "the optimum breadth for discretionary power";<sup>84</sup> *Fasano/Baker* may open the way for such a balance.

Past attempts to attack the exercise of zoning discretion have followed a venerable path of responses to perceived abuse of discretion—a path demanding clear standards.<sup>85</sup> Given the vagueness of the laundry lists of police power goals found in zoning enabling acts,<sup>86</sup> clearer standards needed to be found elsewhere. The "comprehensive zoning plan" of *Smith* or the court-devised standards of "change-or-mistake" served as a more specific standard to limit the exercise of discretion.

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79. *Id.*

80. Krasnowiecki, *supra* note 4 at 12; K.C. DAVIS, *supra* note 77, § 7.01.

81. ORE. REV. STAT. §§ 197.005 *et seq.* (1973).

82. See discussion, *supra* note 56. K.C. DAVIS, *supra* note 77, § 5.01.

83. K.C. DAVIS, DISCRETIONARY JUSTICE 30-33 (1969).

84. *Id.* at 52.

85. *Id.* at 27-28.

86. ORE. REV. STAT. §§ 215.055, 227.090 (1973).

Although standards may be of assistance in limiting discretion to prevent abuses, clear and complete standards may be impossible when initial enabling legislation is passed.<sup>87</sup> "[A]fter experience provides a foundation," clarification of legislative standards may be possible; however, "the chief hope for confining discretionary power \* \* \* [lies] in much more extensive administrative rule making."<sup>88</sup>

The on-going drafting and enforcement of state goals and guidelines in Oregon can give continuing clarification to the broad state standards. Court and legislatively mandated comprehensive planning can provide localized and more specifically useful standards.

Standards cannot decide all cases; discretion will continue to be exercised. Unless comprehensive planning becomes a continuation of the static end state, the plans will not be so specific as to site and use that all discretion disappears. Furthermore, local plans themselves may need to be amended to deal with local problems; such amendments will lose one layer of standards.<sup>89</sup>

Where discretion cannot be confined by standards, it can be

87. K.C. DAVIS, DISCRETIONARY JUSTICE 15-17 (1969).

88. *Id.* at 55.

89. The procedures for amendment of comprehensive plans will be determined, to some extent, by the courts. The Oregon Court of Appeals has held that plan amendments which dealt with small parcels of land constitute quasi-judicial acts for purposes of *Fasano's* burdens and procedures. *Marggi v. Ruecker*, 75 Adv. Sh. 1225, 533 P.2d 1372 (Ore. App. 1975). Such small-tract-applicable plan amendments do indeed sound like decisions which entail "the application of a general rule or policy to specific individuals \* \* \*." *Fasano*, 264 Ore. at 581, 507 P.2d at 27.

The court of appeals has suggested that such plan amendments be viewed as a single procedure in combination with amendment of zoning to implement the plan amendment. *Tierney v. Duris*, 75 Adv. Sh. 2005, 536 P.2d 435 (Ore. App. 1975).

The difficulty in conceptualizing about such small-tract plan amendments in *Fasano's* terms is that no "general rule or policy" can be easily identified which such amendments might be following. In time, perhaps the L.C.D.C. goals and guidelines will serve such a "general rule" function for plan amendments.

In addition to the conceptual difficulty of applying *Fasano* to such plan amendments, there is a legal issue raised as well. The special rule applicable to small-tract plan amendments must be reconciled with *Baker's* dictum that the "plan is flexible and subject to change when the needs of the community demand. '[U]nlike [a constitution] it is subject to amendatory procedures not significantly different from the course followed in enacting ordinary legislation.'" *Baker*, 75 Adv. Sh. at 1074, 533 P.2d at 775, citing *Haar, The Master Plan: An Imperfect Constitution*, 20 LAW AND CONTEMP. PROB. 353, 375 (1955).

exercised to "achieve a higher quality of justice" by being structured in new ways.<sup>90</sup> Professor Davis has proposed that careful procedures in the exercise of discretion can substitute for fully detailed standards to govern that discretion. In 1963, when Dan Mandelker tried to analyze zoning in light of Professor Davis' suggestion,<sup>91</sup> he found one case using Davis' views, *Warren v. Marion County*,<sup>92</sup> which dealt with state-wide building codes delegated to local government. Since 1963, other jurisdictions have embraced Davis' viewpoint.<sup>93</sup> *Fasano/Baker* could function as an attempt both to maximize standards for discretion, by mandating comprehensive plans, and to implement structures for discretion by requiring fair decision procedures. The actual content of *Fasano/Baker* fits nicely within Davis' description of the guideposts to structuring discretion:

The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure.<sup>94</sup>

Except for a systematic method of recording local precedent in deciding quasi-judicial cases, *Fasano/Baker* and its progeny have addressed all of those instruments. Open plans and policy statements are contained in comprehensive plans. Open rules are mandated for local governments by post-*Fasano* legislation enabling hearing examiners to make quasi-judicial records.<sup>95</sup> Open findings and open reasons have been required by recent opinions.<sup>96</sup> Fair informal procedures are the very essence of *Fasano's* procedural dicta.<sup>97</sup>

The focus of inquiries in future cases under such a view would be a search for fairer decisions, not a preoccupation with the putative property rights of either applicants or neighbors. In deciding those cases, "the purpose is not to maximize the use of the seven

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90. K.C. DAVIS, DISCRETIONARY JUSTICE 97 (1969).

91. Mandelker, *supra* note 33, at 80.

92. 222 Ore. 307, 353 P.2d 257 (1960).

93. See the excellent discussion of Washington cases by Justice Finley in his concurring opinion, *Yakima County Clean Air Auth. v. Glascam Bldrs., Inc.*, 534 P.2d 33, 37-39 (Wash. 1975).

94. K.C. DAVIS, DISCRETIONARY JUSTICE 98 (1969).

95. ORE. REV. STAT. §§ 215.412; 227.170 (1973).

96. See *infra* at notes 111-113.

97. *Supra* note 57.

methods of structuring but to locate the optimum degree of structuring in each respect for each discretionary power."<sup>98</sup>

*B. Constitutional Due Process: A Script with Ties to the Past*

The definition of the interests of parties to litigation and the character of remedies granted to protect those interests will continue to occur in the judiciary, whether the judiciary is interpreting constitutional or statutory standards.<sup>99</sup> The nature of the interests of parties litigating under *Fasano* will depend on the courts' reasons for evaluating those interests.

Chief Judge Schwab of the Oregon Court of Appeals has concluded that the procedural rules of *Fasano* are "based on due process considerations."<sup>100</sup> Judge Schwab reached his conclusion because he could find "no possible statutory basis for that part of *Fasano*" and because the law review article whose analysis the *Fasano* opinion cited and "apparently adopted" relied "on constitutional grounds."<sup>101</sup> If Judge Schwab's conclusion is valid, then the interests of parties must be viewed in terms of the constitutional right to due process.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.<sup>102</sup>

\* \* \* \*

While this court has not attempted to define with exactness the liberty \* \* \* guaranteed, the term has received much consideration and \* \* \* it denotes \* \* \* the right of the individual \* \* \* generally to enjoy those privileges long recognized \* \* \* as essential to the orderly pursuit of happiness by free men.<sup>103</sup>

If the interests protected by due process in quasi-judicial hearings implementing land use plans are of the level "essential to the orderly pursuit of happiness by free men," the burden resting on one who would remove such interests should be heavy indeed. Since it appears, moreover, that both proponents and opponents

98. K.C. DAVIS, *DISCRETIONARY JUSTICE* 99 (1969).

99. *See, e.g., Frankland*, 267 Ore. at 474-77, 517 P.2d at 1052-54; *Duddles*, 75 Adv. Sh. at 1661-69, 535 P.2d at 589-93.

100. *West v. City of Astoria*, 99 Adv. Sh. 924, 938, 524 P.2d 1216, 1223 (Ore. App. 1974).

101. *Id.*

102. *Board of Regents of State Colleges v. Roth*, 408 U.S. 566, 569 (1972).

103. *Id.* at 572, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

of quasi-judicial acts have such interests at stake,<sup>104</sup> it is inevitable that one side or the other at each such proceeding will lose some "privileges \* \* \* essential to the orderly pursuit of happiness by free men." To place the issue in the context of *Fasano*, it is "essential to the happiness of free men" like Louis Fasano that only single family houses like his own be built around him; likewise, it is "essential to the happiness of free men" in A.G.S. Development Company that they be permitted to construct a mobile home park in 32 acres now zoned for single family. To paraphrase a conclusion of the United States Supreme Court, "there might be cases in which" a zone change arose "under such circumstances that interests in liberty would be implicated. But this is not such a case."<sup>105</sup>

If liberty is not at stake in *Fasano*, then property must be under threat.

104. Given that both the county and the landowner were satisfied with the result of the local government decision in *Fasano* while neither were satisfied by its reversal, it is a fair inference that *Fasano* was protecting the rights of the person who was seeking the court's result—the neighboring landowner/opponent. *Auckland v. Board of County Comm'rs*, 75 Adv. Sh. 1992, 1995 536 P.2d 444, 447 (Ore. App. 1975), has granted proponents of zone change the protection of *Fasano* quasi-judicial standards.

105. *Board of Regents of State Colleges v. Roth*, 408 U.S. at 573.

An alternate approach to the problem of "liberty" for due process purposes might begin with the analysis of *Bolling v. Sharpe*, 347 U.S. 497 (1954):

"[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' \* \* \* [b]ut \* \* \* discrimination may be so unjustifiable as to be violative of due process." *Id.* at 499.

*Bolling's* rationale was devised for actions of the federal government to which 14th amendment "equal protection" is not applicable. *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting). However, it is conceivable that state or local governments could commit discrimination "so unjustifiable as to be violative of due process."

The "spot zoning" concept, which such pre-*Fasano* cases as *Smith* and *Roseta* used to void small-area amendments, also had origins in the equal protection idea of fairness. D. MANDELKER, *THE ZONING DILEMMA* 83 (1971); Heyman, *Land Regulation and Comprehensive Planning*, in *THE NEW ZONING*, *supra* note 4, at 26-32. This interest in uniformity of treatment in zoning would be applicable to both opponents and proponents of administrative actions. *Fasano* could then be an extension of the "spot zoning" concept under the new name of "due process" to a broader class of cases than amendment.

Finding such continuity from *Smith* to *Fasano* would further complicate the task of extracting *Fasano's* newness from *Smith's* commitment to the static end state of which "spot zoning" is a specific expression.

The \* \* \* procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.<sup>106</sup>

[P]roperty denotes a broad range of interests that are secured by “existing rules or understandings.” \* \* \* A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.<sup>107</sup>

One class whose “property for due process purposes”<sup>108</sup> is involved in zone changes is the owner of the land proposed for rezoning; at least, Chief Judge Schwab has asserted that “procedurally, the proponent is protected by the *Fasano* quasi-judicial standards.”<sup>109</sup> If the proponent is exercising rights to “security of interests that a person has already acquired” rather than trying to acquire new interest in a more intensive use, what is the nature of the right already acquired? Conceivably, the regular pattern of granting zone changes to accommodate the schemes of property owners is “secured by ‘existing \* \* \* understandings.’” Could the system of abusive changes which the court tried to attack in *Fasano* constitute the property right which gives rise to the protections of *Fasano*? The owner of a parcel which is proposed for rezoning to a less intensive use against the owner’s objection clearly has an already-acquired interest to serve as “procedural property”; however, all of the cases litigated under *Fasano* have involved owners seeking change to greater intensity.

The question of procedural property is also perplexing when

106. Board of Regents of State Colleges v. Roth, 408 U.S. at 576.

107. Perry v. Sinderman, 408 U.S. 593, 601 (1972).

108. The Court’s use of the phrase “property for due process purposes” seems to indicate a significant limitation on the nature of those interests to which the Court grants procedural protections. The Court has not, for example, proceeded to discussion of such interests as welfare income as “property for just compensation purposes” under the taking clause. Thus, “property for due process purposes” (procedural property) may differ from property for taking clause purposes. While the United States Supreme Court may be capable of such delicate mental gymnastics, there is no assurance that other judges will resist an invitation to carry over an identification of an interests in a zoning dispute as procedural property to a further identification of the same interests as substantive property under the taking clause. Thus, the issue of compensable zoning may be creeping into resolution through procedural protections.

109. *Auckland*, 75 Adv. Sh. at 1995, 536 P.2d at 447.

applied to the participants who do not own the parcel subject to change. In cases involving change to greater intensity, the opponents may be protecting the very covenant-like rights to rely on existing zoning which were seen in pre-*Fasano* cases. The rights of opponents could then lead directly back to the thinking from which *Fasano* should have freed us.<sup>110</sup>

The apparent strength of the "property" rights of opponents and the comparative weakness of the "property" rights of proponents could lead to greater protection for the due process of opponents than is given to proponents and a further systematic bias against change. Some evidence of this skewed due process standard already exists. Findings of fact to support grants of change of zone must be sufficient "to aid the court in determining what evidence the council believed, and whether its conclusion was supported by reliable, probative and substantial evidence."<sup>111</sup> For denial of a zone change, findings are sufficient if they "in effect recite that plaintiff failed to sustain his burden of proof."<sup>112</sup> Since the court must take the role of ascertaining whether there is substantial evidence to support the decision of local officials regardless of the result reached by local officials, the findings would need to be "sufficient to aid the court" in any event if the procedural rights of all parties were to be protected.

Further, covenant-like thinking in post-*Fasano* cases could lead to the same difficulties in remedies that existed in pre-*Fasano* cases. In discussing standing to prosecute a writ of review proceeding from the granting of a zone change, Chief Judge Schwab said:

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110. A property-like right in neighboring landowners could also be found through the nuisance analysis which early characterized discussion in court analysis of zoning under the police power. See, e.g., *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). See also, the discussion of externalities in nuisance and zoning in MANDELKER, *supra* note 4, at 23. Although the traditional remedy for nuisance-type claims of property has been injunction, one current case could place the public interest again subject to satisfaction by payment to a few neighboring landowners. *Boomer v. Atlantic Cement*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E. 2d 870 (1970).

111. *South Central Association of Neighbors, Inc., v. Lindsey*, 75 Adv. Sh. 1978, 1982, 535 P.2d 1381, 1384 (Ore. App., 1975).

112. *Auckland*, 75 Adv. Sh. at 1996, 536 P.2d at 447. *Accord, Dickinson*, 75 Adv. Sh. at 1423, 533 P.2d at 1397:

"If the Board had granted a change we might well hold findings of so general a nature as those above to be not sufficiently specific. However, they are sufficient to support orders holding that he who had the burden of proof had not met it."



We continue to believe that contiguous ownership should not be the *sine qua non* of standing; if it were, land developers could effectively insulate some zone-change decisions from judicial review if they were the only contiguous owner.<sup>113</sup>

The same concern still applies if standing is extended only slightly beyond the immediately contiguous owners; so long as the damages payable to buy off those with standing is less than the profit to be realized, "land developers could effectively insulate some zone-change decisions from judicial review." If the right to procedural fairness in quasi-judicial hearings is purely one of constitutional due process, it is arguable that the class of those who possess "procedural property" could be limited enough to permit waiver of the hearing fairness by all members of that class. What justification could those who have no procedural property raise to the lack of due process?

#### CONCLUSION

The need for an approach to land use different from that used in pre-*Fasano* cases is evident. *Fasano* in combination with the result in *Baker* speaks to the major limitations of that earlier system. Whether *Fasano's* full capacity to overcome those limitations is realized will depend on a number of variables including the development of the state administrative procedures by the L.C.D.C., the added credibility that could be given to local activities by vigorous administration of the L.C.D.C. and the capacity of the judiciary to alter its thinking along with its phrases. In the meanwhile, the bar will be vigorously serving clients by taking full advantage of both the new directions contained in *Fasano* and the old ideas that act as a context for *Fasano*; the subsequent materials in this series of articles should be of use to those lawyers whose clients would be served by either argument technique and to those who will deal with those lawyers.

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113. *Duddles*, 75 Adv. Sh. at 1666, 535 P.2d at 592.