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# The Use of Conditions in Land-Use Control

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# ARTICLES

## THE USE OF CONDITIONS IN LAND-USE CONTROL

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> As another break-through toward suburbanization of rural Concord Township, the [board of] supervisors reduced the home site size requirement from three to one acre on [a] 118-acre tract. . . .
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> The supervisors, however, moved cautiously . . . [following] a "control by conditions" policy in downgrading zoning. . . . In agreeing to cut the lot size, the supervisors made their decision contingent on [the builder's] willingness to plant two deciduous trees on each lot, give $200 to the school district for each house built, put the sale price of the homes at not less than $23,500, have a 200-foot frontage for each home, 20-foot roads with rolled gutters through the development and off-street parking plus a T turning area of adequate size.[1]

Taken from a suburban Philadelphia newspaper, this excerpt illustrates the current widespread practice among local government officials of imposing conditions when authorizing a change in land use.[2] This practice, along with such innovations as subdivision regulations,[3] zoning by performance standards,[4] and the use of "floating zones,"[5] represents another attempt to achieve greater flexibility in land-use control than can be achieved by conventional Euclidean zoning.[6] The objective of this Article is to examine what limits have been or should be placed on this use of conditions.[7]

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1. Delaware County (Pa.) Daily Times, April 19, 1960, p. 13.

2. See, *e.g.*, Church v. Town of Islip, 8 App. Div. 2d 962, 190 N.Y.S.2d 927 (1959), *aff'd*, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960).

3. See HAAR, LAND-USE PLANNING 347-408 (1959).

4. See Horack, *Performance Standards in Residential Zoning*, 1952 PLANNING 153; O'Harrow, *Performance Standards in Industrial Zoning*, PLANNING ADVISORY SERVICE BULL. (Am. Soc'y Plan. Off.) 1 (1951).

5. See Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960). See also Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552 (1961).

6. As used here, the term "Euclidean zoning" means zoning by use districts.

7. Little writing has been done on this subject. Most of the treatises on land-use controls devote only a few paragraphs to the questions presented. See, *e.g.*, BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST

Focusing on some of the most important devices in a modern system of land-use control, namely, building permits and certificates of occupancy, variances and exceptions, subdivision map approval, and zoning amendments, the first part of this Article is intended to show what general restrictions have been placed on the imposition of conditions. In the second part an effort is made to indicate certain trends which have appeared in the case law and to point up certain factors upon which the courts seem to rely when deciding given cases.

At the outset it should be mentioned that no attempt is made herein to discuss the validity of conditions imposed on developers of urban renewal or public housing projects because of the vastly different policy considerations involved.[8] Also, court-imposed conditions have been omitted from discussion because they emanate from a different source of power than conditions imposed by a local ordinance or official.[9]

## General Restrictions Governing Imposition of Conditions

### *Conditions Attached to a Building Permit or Certificate of Occupancy*

Local officials charged with the duty of issuing building permits or certificates of occupancy have the authority to refuse to act until the applicant has complied with conditions set forth in the ordinance under which the permit or certificate is to be issued.[10] To be valid, however, these conditions must be within the scope of the police power.[11]

Government officials often try to impose conditions which have not been expressly authorized by ordinance, using what is known as the "privilege" argument.[12] This argument asserts that, since the government has the power

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Twenty Years (hereinafter cited as Bassett, Zoning) 128-29, 184 (1936); Yokley, Zoning Law and Practice § 144 (2d ed. 1953). The treatment which Metzenbaum (Metzenbaum, Law of Zoning 957-76 (2d ed. 1955)) and Rathkopf (1 Rathkopf, The Law of Zoning and Planning 392-95, 755-71 (3d ed. 1957)) give to the subject is more extensive, but is limited to a collection of excerpts from cases which are largely concerned with conditional variances or exceptions. One of the most helpful articles that has considered any aspect of this subject is Reps, *Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions,* 2 Syracuse L. Rev. 54 (1950).

8. For cases dealing with such conditions, see St. Stephen's Club v. Youngstown Metropolitan Housing Authority, 160 Ohio St. 194, 115 N.E.2d 385 (1953); Blumenschein v. Housing Authority, 379 Pa. 566, 109 A.2d 331 (1954). See also Note, *Enforceability of Contracts Between Local Housing Authorities and City Councils,* 50 Yale L.J. 525 (1941); Goldston & Scheuer, *Zoning of Planned Residential Developments,* 73 Harv. L. Rev. 241 (1959).

9. For cases dealing with such conditions, see Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949); Hopkins v. Board of Appeals, 179 Misc. 325, 39 N.Y.S.2d 167 (Sup. Ct. 1942); People *ex rel.* St. Albans-Springfield Corp. v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931); Taft v. Zoning Bd. of Review, 76 R.I. 443, 71 A.2d 886 (1950).

10. See, *e.g.,* City of East Lansing v. Wilson, 332 Mich. 96, 50 N.W.2d 730 (1952).

11. Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952).

12. See Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935).

to withhold permission entirely, it may grant permission in a limited form, as the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions. In the area of issuance of building permits or certificates of occupancy this argument is without force, because it is well established that, if the applicant complies with the standard set forth in the relevant ordinance, the building inspector or similar official has no discretion to withhold a permit.[13] This fact undercuts the major premise of the above argument and makes it difficult for officials to justify importing into the law a condition not clearly contained in it.[14]

Thus, where a building inspector was given authority to issue a certificate of occupancy within ten days after erection of a building if such building complied with the zoning regulations, it was improper for him to issue the permit subject to a condition that the tract on which the proposed building was to be located would in the future be conveyed only as a single unit, when that condition was not specifically stated in the ordinance under which the inspector acted.[15] The zoning board of appeals, in its capacity as an appellate mechanism reviewing decisions of building inspectors,[16] often has an opportunity to attach conditions to the issuance of building permits. But in exercising this function, the board is not free, just as the building inspector and planning commission were not free, to impose conditions not specifically set forth in the controlling ordinance.[17] Hence, it was improper for the board to refuse to issue a building permit until the applicant would agree to comply with a setback condition not required by ordinance,[18] even though it would have been proper to impose such a condition if the board had been dealing with an application for a variance or special exception.[19] Also, where the board reviews the action of a municipal official in revoking

13. See Teglund v. Dodge, 316 Mich. 185, 25 N.W.2d 161 (1946); Leonard Inv. Co. v. Board of Adjustment, 122 N.J.L. 308, 4 A.2d 768 (Sup. Ct. 1939).

14. See Loew v. Falsey, 144 Conn. 67, 127 A.2d 67 (1956).

15. Purtill v. Town Plan & Zoning Comm'n, 146 Conn. 570, 153 A.2d 441 (1959). *Accord,* Ricciardi v. Los Angeles County, 115 Cal. App. 2d 569, 252 P.2d 773 (1953); Reggs Homes, Inc. v. Dickerson, 16 Misc. 2d 732, 179 N.Y.S.2d 771 (Sup. Ct. 1958), *aff'd mem.,* 8 App. Div. 2d 640, 186 N.Y.S.2d 215 (1959).

16. For enumeration of the functions of a typical zoning board of appeals see STANDARD STATE ZONING ENABLING ACT § 7 (drafted and recommended by the United States Department of Commerce in 1926 and subsequently used as a model by many states when they adopted a zoning enabling statute), found in 2 RATHKOPF, *op. cit. supra* note 7, at 877-82.

17. See Abbadessa v. Board of Zoning Appeals, 134 Conn. 28, 54 A.2d 675 (1947); *cf.* Kelley v. Board of Zoning Appeals, 126 Conn. 648, 13 A.2d 675 (1940).

18. Fairmount Inv. Co. v. Woermann, 210 S.W.2d 26 (Mo. 1948).

19. See Wheeler v. Gregg, *supra* note 9; authority cited and text accompanying note 25 *infra*; *but cf.* Vangellow v. City of Rochester, 190 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947) (dictum).

a permit and decides that the revocation was improper, there is authority to the effect that the board has no power to impose any conditions.[20]

Occasionally, however, an enabling act or local ordinance pertaining to issuance of building and construction permits will contain a general phrase authorizing the imposition of "appropriate conditions,"[21] or the act or ordinance may contain extremely broad wording from which a court will imply the power to impose conditions.[22] But, as will be discussed in the following section, regardless of whether a condition is specifically or generally authorized or is imposed under a power implied from broad wording in an enabling act or local ordinance, such condition will be valid only if within the scope of the police power; that is, it will be upheld only if it relates reasonably to the public health, safety, morals or welfare.

*Conditions Attached to a Variance or Exception*[23]

Whereas most state enabling acts dealing with building permits make no mention of any power to impose conditions,[24] the Standard State Zoning Enabling Act specifically authorizes a board of appeals to attach conditions when issuing a variance or exception.[25] However, not all state zoning enabling acts are so explicit. For example, the New York Town Zoning and Planning Law provides:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinances, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.[26]

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20. Appeal of Tool & Mfg. Co., 104 Pitt. L.J. 243 (Pa. C.P. 1954).

21. See, *e.g.*, Kiowa Lumber Co. v. Missouri-Kansas-Texas R.R., 185 Okla. 641, 95 P.2d 592 (1939).

22. See, *e.g.*, County Council v. Lee, 219 Md. 209, 148 A.2d 568 (1959) (alternative ground).

23. For an analysis of the variance procedure see Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961).

24. See, *e.g.*, NEW YORK TOWN LAW § 130(1).

25. Standard State Zoning Enabling Act § 7.

26. NEW YORK TOWN LAW § 267(5). Compare the following provisions of the Pennsylvania County Code:

> Any zoning ordinance of the board of county commissioners may provide that the board of adjustment may, in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the zoning ordinance, make special exceptions to the terms of the zoning regulations in harmony with their general purpose and intent.

PA. STAT. ANN. tit. 16, § 2029(d) (1956).

> Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the regulation, or by reason of exceptional topographical conditions or other extraordinary and

Some New York courts have said that the board of appeals has the "inherent power" to condition the issuance of variances or exceptions,[27] but others, feeling a need to find some statutory basis for the board's action, have pointed to the "spirit of the ordinance" phrase as an implicit authorization for the use of conditions.[28]

Although conditions attached to a variance apparently need not be stated in the local ordinance empowering the board of appeals to act,[29] a number of cases say that only conditions enumerated in the ordinance may be attached to an exception.[30] These decisions seem to emanate from a statement in the New Hampshire case of *Stone v. Cray*[31] that the conditions for granting a special exception could not be varied by the board of appeals. This statement seems to have been based on the theory that if the board could vary the conditions, it would be able to exercise unbridled discretion, and consequently, the ordinance permitting the board to grant exceptions would constitute an improper delegation by the local legislative body.[32] Though the *Stone* dictum supports the proposition that the board may not disregard the standards of decision set forth in the ordinance, it need not be interpreted as prohibiting all conditions except those set forth in the ordinance because, since the decisional standards are generally quite broad (thereby vesting considerable discretion in the board), it would be possible for that body to impose conditions without deviating from these standards.[33] In states having zoning enabling statutes patterned after the New York Town Zoning and Planning Act or the Standard State Zoning Enabling Act, conditions attached to an exception have generally been permitted.[34] In other states which appear to follow the rule prohibiting conditions unless expressed in the ordinance,

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exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this subdivision would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property [the board of adjustment shall be empowered] to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardships . . . .

PA. STAT. ANN. tit. 16, § 2030(b)(3) (1956).

27. *E.g.*, Hopkins v. Board of Appeals, *supra* note 9.

28. *E.g.*, People *ex rel.* Helvetia Realty Co. v. Leo, 183 N.Y. Supp. 37 (Sup. Ct. 1920), *aff'd mem.*, 195 App. Div. 887, 185 N.Y. Supp. 949 (1921), *aff'd mem.*, 231 N.Y. 619, 132 N.E. 912 (1921).

29. Indeed, several cases hold that it is error to have issued a variance without conditions. Youngs v. Zoning Bd. of Appeals, 127 Conn. 715, 17 A.2d 513 (1941); Strauss v. Zoning Bd. of Review, 72 R.I. 107, 48 A.2d 349 (1946).

30. *E.g.*, Service Realty Corp. v. Planning & Zoning Bd. of Appeals, 141 Conn. 632, 109 A.2d 256 (1954).

31. 89 N.H. 483, 200 Atl. 517 (1938).

32. See Service Realty Corp. v. Planning & Zoning Bd. of Appeals, *supra* note 30.

33. See North Plainfield v. Perone, 54 N.J. Super. 1, 148 A.2d 50 (1959), *cert. denied*, 29 N.J. 507, 150 A.2d 292 (1959).

34. See, *e.g.*, Montgomery County v. Mossburg, 228 Md. 555, 180 A.2d 851 (1962).

inconsistencies seem to have developed in the precedents.[35] It may be that if a "special exception" is denominated a "conditional use permit" in the local ordinances, courts will not be troubled by the *Stone* dictum.

As to the scope of conditions which may be imposed without being expressed in the ordinance, Bassett contends:

> [C]onditions are not limited to the scope of the police power. . . . [C]onditions imposed on variance permits are not regulations. They express the protective adaptations necessary to secure the required vote in the board of appeals.[36]

Although his statement was limited to conditions attached to a variance, if it is assumed that conditions not expressed in the ordinance may be attached to an exception, the statement would seem to apply equally well to them because they may also express adaptations necessary to secure the required vote.

The "privilege" theory is often urged in support of Bassett's position that conditions are not limited to the scope of the police power.[37] Because it may be contended that, in granting a variance or exception, the board of appeals is not only granting permission to do something, but is in fact conferring a positive benefit on the applicant by returning to him that part of the fee which the municipality took when it enacted the zoning ordinance restricting the use of the premises in question, it could be argued that since the board has absolute discretion to withhold the benefit, it must also have the right to grant it subject to any condition which it desires to impose. However, even if a more progressive view were taken[38] and it were conceded that the power to impose conditions is not unlimited, it may be contended that the board of appeals would at least have the power to impose any condition which is relevant to the attainment of the objectives involved in the extension of the benefit, even though such condition is beyond the scope of the police power. For instance, since one of the objectives in granting a variance or exception is to achieve some flexibility in land-use control while at the same time minimizing the annoyance and inconvenience to the present land users, the board would be able to attach to a variance permitting construction of a gasoline station in a residential area a condition requiring the applicant to use a colonial design where the surrounding homes are colonial,

35. *Compare* Service Realty Corp. v. Planning & Zoning Bd. of Appeals, *supra* note 30, *with* Mitchell Land Co. v. Planning & Zoning Bd. of Appeals, 140 Conn. 527, 102 A.2d 316 (1953).

36. BASSETT, ZONING 128-29 (1936).

37. For a recent discussion of the use of this argument in contexts other than zoning, see Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

38. *Ibid.*

even though the condition is not generally regarded as related to the health, safety, or welfare of the community.[39]

Perhaps the best answer to these arguments is expressed in the simple proposition that "the use of an administrative device under a basic law certainly cannot go beyond the scope of the law itself."[40] Indeed, if it could go beyond, thereby permitting the board of appeals to accomplish what it could not accomplish under the basic law, state control would be effectively terminated and constitutional problems of the permissible scope of delegation would arise.

*Conditions of the Approval of Subdivision Maps*

Courts have generally handled subdivision map cases in much the same way as they have building permit cases. Hence, there are many decisions stating that if an applicant complies with the standards set forth in the relevant ordinance, the planning commission has no discretion to withhold[41] or condition[42] approval of a proposed map. These decisions may be founded on the questionable assumption that because approval of a subdivision map does not usually effect a change in the permitted pattern of land use[43] (as would a variance or exception), the commission occupies a less important role than other officials who administer a system of land-use controls.[44]

39. The example was taken from BASSETT, ZONING 129 (1936). See generally the discussion of *Aesthetic Conditions*, pp. 134-35 *infra*.

40. Reps, *supra* note 7, at 57.

41. Tuxedo Homes v. Green, 258 Ala. 314, 63 So. 2d 812 (1953); Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954). *Cf.* Magnolia Dev. Co. v. Coles, 10 N.J. 223, 89 A.2d 664 (1952) (mayor and council held to have no discretion to refuse to approve proposed map).

42. Langbein v. Planning Bd., 145 Conn. 674, 146 A.2d 412 (1958); Carter v. City Council, 180 Iowa 227, 163 N.W. 195 (1917); Campau v. Board of Pub. Works, 86 Mich. 372, 49 N.W. 39 (1891).

43. *But see* NEW YORK TOWN LAW § 281.

44. The New York case of *In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. 1931), *aff'd mem.*, 235 App. Div. 627, 255 N.Y. Supp. 853 (1932), illustrates the strict statutory interpretation which the majority of courts use in this area. There, the planning board refused approval of a subdivision map on five grounds: (1) poor location and inadequate marking of monuments; (2) insufficient park area; (3) rights of way insufficient in width; (4) no provision for water supply; and (5) lots of insufficient street frontage. The relevant enabling act gave the board power to require the developer to show a park suitably located for recreational purposes and to provide streets and highways "of sufficient width and suitable location to accommodate the prospective traffic and to afford adequate light, air and access of fire-fighting equipment to buildings, and to be coordinated so as to compose a convenient system." NEW YORK TOWN LAW of 1909, § 149-n. The act further provided that the "land shown on [the map] . . . should be of such a character that it [could] . . . be used for building purposes without danger to health." The court upheld the first three grounds for refusal and affirmed the action of the board, but it refused to imply from the "character of the land" provision the power to require, as conditions precedent to approval of the map, that a water system be installed or that the lots be not less than sixty feet in width. To cope with this literal construction, the New York Legislature then passed a statute which specifically enumerated a large number of requirements which were prerequisites

Only in California are courts willing to imply a power which enables municipalities to impose conditions on the approval of subdivision maps.[45] *Ayres v. City Council*[46] was the first case in which this was done.

Sustaining the validity of four conditions which had been attached to a proposed map, Justice Shenk, for the majority in the *Ayres* case, analyzed the provisions of the California Subdivision Map Act[47] and concluded that:

> Whereas here no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that *conditions are lawful which are not inconsistent with the map act and the ordinances and are reasonably required by the subdivision type and use* as related to the character of local and neighboring planning and traffic conditions.[48]

Besides the restrictions placed by Justice Shenk on conditions attached to approval of a subdivision map, it would seem that such conditions would also be limited by the scope of the police power.[49]

*Conditions Attached to a Zoning Amendment*

Perusal of a typical state zoning enabling act will reveal that there is no express authorization for a local legislative body to attach conditions to a zoning amendment.[50] Neither is there any language which would negate an implication that the local legislature could impose them. Moreover, with reference to the Standard State Zoning Enabling Act, it would seem that if conditions were incorporated into an amending ordinance, the resulting document would constitute a zoning "regulation"[51] as much as an amending ordinance which contained no conditions.

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to approval, but gave the planning board power to waive any of them, "subject to appropriate conditions." The current version of the statute is NEW YORK TOWN LAW § 277.

45. Although striking down a condition attached to approval of a subdivision map on the ground that it was not authorized by the enabling statute, the recent case of Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960), suggests that the Illinois Supreme Court may be willing to imply a power permitting local officials to attach some conditions to approval of a subdivision map.

46. 34 Cal. 2d 31, 207 P.2d 1 (1949). For a detailed analysis of the *Ayres* case see the section entitled *A Disguised Exercise of the Eminent Domain or Taxing Power*, pp. 136-42 *infra*.

47. CAL. BUS. & PROF. CODE §§ 11500-625.

48. 34 Cal. 2d at 37, 207 P.2d at 5. (Emphasis added.)

49. This limitation would seem to be required by the reasoning adverted to in the preceding section regarding variances and exceptions, pp. 112-15 *supra*.

50. See, *e.g.*, NEW YORK TOWN LAW §§ 261-65; PA. STAT. ANN. tit. 53, §§ 14754, 14756 (1957) (applicable to cities of the first class); Standard State Zoning Enabling Act §§ 1-5.

51. See Standard State Zoning Enabling Act § 5.

A second requirement set forth in the standard act is that the regulations "be uniform for each class or kind of building throughout each district."[52] The term "district" creates a problem of interpretation. If it means the area encompassed by the zoning change, then probably most amendments with conditions incorporated therein would meet the test. But if "district" means class of district, then it would not be open to the legislative body to change a residential district to a business district and impose different conditions than had been imposed on other business districts in the municipality.[53] Although the latter interpretation would severely limit the use of conditions, it would not prohibit all of them.

An ordinance with conditions attached could also meet the third requirement that the regulation be "in accordance with a comprehensive plan"[54] since the plan deals in general terms while the conditions have a very specific purpose. Indeed, if a "comprehensive plan" is something other than the existing zoning ordinances,[55] attaching conditions to amendments may help to achieve its long-range objectives. By requiring protective adaptations which cannot be secured by a simple change in use classification, the local legislative body may decrease the public opposition which often arises when there is an attempt to bring the present zoning map more in line with the goals set forth in the comprehensive plan.

Two other arguments may be advanced in support of the position here taken that, absent inconsistent language in the enabling act, a power to attach conditions to a zoning amendment should be implied in the local legislative body. First, adopting this position would help to make the law of zoning more consistent with the law prevailing in many other areas of government regulation.[56] In these areas it has been held that where an agency has discretion whether or not to approve an application, as is the case when a local legislative body is presented with an application to amend a zoning ordinance, that agency has the power to attach conditions on the theory that withholding approval or granting it subject to conditions are simply alternative methods of regulation.[57]

52. Standard State Zoning Enabling Act § 2.

53. Several decisions striking down conditions attached to zoning amendments have adopted this meaning of the uniformity provision. See, *e.g.*, Carole Highlands Citizens Ass'n v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960). It has also been used as a basis for criticizing the decisions sustaining the validity of such conditions. See Crolly & Norton, *Rezoning by Contract With Property Owners*, ZONING BULLETIN: A REVIEW OF CURRENT DECISIONS ON PLANNING AND ZONING, REGIONAL PLAN. ASS'N 2 (Sept. 1959).

54. Standard State Zoning Enabling Act § 3.

55. See Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

56. See the cases collected in Note, *supra* note 37.

57. *Id.* at 1597.

Second, in a state which has patterned its enabling act after a statute like the New York Town Zoning and Planning Act, it may be contended that since the courts have been willing to imply the power in the board of appeals to attach conditions to a variance and since the purpose of imposing conditions on a zoning amendment would seem to be the same as the purpose of imposing conditions on a variance (*i.e.*, to mitigate the inconvenience and annoyance caused to neighboring landowners by a change in the established land use), the courts should be equally willing to imply in the local legislative body the power to impose conditions. A counterargument would be that since the reason for granting a variance is basically different from the reason for amending the zoning ordinance,[58] any similarity in the purpose of permitting imposition of conditions is not really convincing. Perhaps an answer to this counterargument is that though from one point of view the two devices seem quite different, from a broader perspective they seem quite similar in that their basic objective is to achieve an effective system of land-use control. Because of this similarity in objective and because of the similarity in purpose for imposing conditions, the original argument would seem to have considerable force.

Of course, in a jurisdiction which has modeled its state zoning enabling act after the standard act, this argument is somewhat less persuasive because the act specifically confers on the board of appeals the authorization to impose conditions upon the grant of a variance,[59] but the analogy may still be drawn between the reason for imposing conditions on a variance and the reason for imposing conditions on an amendment. In such a jurisdiction, advocates opposing implication of power in the local legislative body to impose conditions might contend that because the power to use conditions was mentioned in regard to variances, it is clear that the legislature was aware of the subject and that since that power is not mentioned in the amendment provisions, the fair inference is that it was specifically excluded. But in support of the contrary position it may be urged that since very broad discretion is vested in the local legislative body, the legislature did not think it necessary to enumerate the specific aspect of that body's power to regulate land use, whereas, since the board of appeals is a subordinate administrative body, it was thought necessary to enumerate the devices it might use.

Unfortunately, most courts do not reach the question whether the zoning enabling act should be construed as authorizing a local legislative body to impose conditions on a change in zoning, because as soon as they encounter

58. They are quite different in that a variance seeks to eliminate a personal hardship resulting from the imposition of the zoning plan in the past, while the amendment seeks to achieve the benefits which will accrue to the whole community by attainment of the land-use pattern suggested for the future by the comprehensive plan.

59. Standard State Zoning Enabling Act § 7.

the word "condition" they declare the accompanying ordinance invalid as "contract zoning."[60] To support their conclusion, they usually cite Bassett, as follows:

> Contracts have no place in a zoning plan. Zoning, if accomplished at all, must be accomplished under the police power. It is a form of regulation for community welfare. Contracts between property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations.
>
> Sometimes local legislatures state that they will make certain zoning changes if property owners file agreements either with one another or with the city. This is wrong, unnecessary, and unfair. The local legislative body is taking advantage of its superior position whenever it tries to force a property owner to enter into a contract in order to have a permit to which he is entitled, or before zoning regulations are made which are justified by well-settled principles. There is no consideration for taking steps in legislation. Its legislation is not and ought not to be for sale.[61]

It is submitted that the meaning of this statement is not clear, especially when viewed in the context of other remarks made by the author in the same book.[62] To rely on the quotation without attempting to analyze it, as the courts have done, seems a wholly inadequate way of disposing of the "conditions" problem and tends only to confuse this area of the law.

What Bassett seems to say is that where a local legislative body bargains away its legislative authority by promising to perform official duties in return for promises from a property owner, the agreement is invalid for three reasons. First, since performing an act which a party is already under a duty to perform cannot constitute consideration,[63] the contract lacks that essential element. Second, even if consideration were not necessary, the contract constitutes an improper delegation of legislative authority.[64] Finally, the legislative body lacks the power to impose conditions requiring the applicant to execute an agreement with the municipality or with another property owner.

If execution of a contract were deemed consideration for the issuance of a *variance*, it would seem, under Bassett's reasoning, that the contract would be invalid on grounds of lack of consideration or improper delegation of authority. Yet if the board had sought to accomplish its objective by the

60. The more important "contract zoning" cases are discussed at pp. 120-28 *infra*.

61. BASSETT, ZONING 184 (1936).

62. *Id.* at 128-29.

63. See Stilk v. Myrick, 2 Camp. 317, 170 Eng. Rep. 1168 (K.B. 1809); RESTATEMENT, CONTRACTS § 76(a) (1932).

64. For several examples of improper delegation in the context of zoning see Olson v. Town of Avon, 143 Conn. 448, 123 A.2d 279 (1956); Ballard v. Roth, 141 Misc. 319, 253 N.Y. Supp. 6 (Sup. Ct. 1931).

imposition of conditions attached to a variance, it is well established that the conditions would be valid if within the scope of the police power.[65] The only apparent reason which justifies a different result in the two cases, other than the difference in form, is that in the former the board presumably refrained from exercising its discretion, while in the latter it exercised its discretion and concluded that conditions were appropriate. It is here contended that the important issue is not the form in which the conditions are imposed (though, as will be discussed later, this factor has some bearing on the outcome), but rather whether or not the board exercised its discretion in reaching a given decision.[66]

The application of this reasoning to the zoning amendment situation suggests that where it can be established that the town council exercised the discretion vested in it by the legislature, the mere fact that a condition is attached to an ordinance should not cause that ordinance to be invalid on the ground of lack of consideration or improper delegation of authority. The only remaining ground which Bassett advances for invalidating conditions attached to an amendment is that the council lacks power to impose such restrictions, but this position was rejected in the preceding subsection.

The first major case to consider the validity of conditions attached to a zoning amendment arose in New Jersey in 1952. The preceding year in a dictum the New Jersey Supreme Court had quoted part of Bassett's statement,[67] and earlier in 1952, in the case of *Zahodiakin Eng'r Corp. v. Zoning Bd. of Adjustment*,[68] it had used the statement to justify striking down a special exception which had been conditioned on the applicant executing and recording a restrictive covenant with the person from whom he was buying the property covered by the exception. Armed with the Bassett quotation and this recent precedent in a related field, the court quickly disposed of the problem presented in *Houston Petroleum Co. v. Automotive Products Credit Ass'n*.[69] In that case it appeared that one Byrnes had executed and recorded an agreement with the officials of Linden, New Jersey. In the agreement Byrnes, for himself, his heirs, his executors and assigns, promised to landscape his property and to keep all buildings a stated distance from the road in consideration of the officials rezoning the premises. On the same day the

65. See the section entitled *Conditions Attached to a Variance of Exception*, pp. 112-15 *supra*.

66. For a case which indicates that courts should not be concerned with the motive and promptings of a local legislative body in enacting a zoning ordinance, see Miner v. City of Yonkers, 19 Misc. 2d 321, 189 N.Y.S.2d 762 (Sup. Ct. 1959), *aff'd mem.*, 9 App. Div. 2d 907, 195 N.Y.S.2d 242 (1959), *appeal denied*, 8 N.Y.2d 784, 168 N.E.2d 128, 201 N.Y.S.2d 242 (1960).

67. Beckmann v. Teaneck Township, 6 N.J. 530, 79 A.2d 301 (1951).

68. 8 N.J. 386, 86 A.2d 127 (1952).

69. 9 N.J. 122, 87 A.2d 319 (1952).

agreement was executed, the zoning ordinance was amended changing Byrnes' property to a light-industry district, but no mention was made in the ordinance of the agreement between the applicant and the city officials. Houston Petroleum Company and Automotive Products Credit Association were subsequent grantees of Byrnes. Automotive Products took steps toward building a filling station on the premises, upon a location which violated the provisions of the restrictive covenant. Houston Petroleum petitioned the court for an injunction to block construction, but was met with the defense that the original agreement was invalid. The court considered the "contract" ultra vires, citing *Zahodiakin* and *Bassett*,[70] and, consequently, held for Automotive. Although *Houston Petroleum* became the first major precedent in the field, the opinion of the case did not clear up the problem whether the term "contract" applied only to written agreements between applicants and municipal officials or to all conditions which were not expressly set forth in the enabling legislation and which were imposed by a local legislative body on applicants for zoning changes, regardless of whether such conditions were actually embodied in a formal written agreement.[71]

The next major development of the law in this area occurred in the case of *Hartnett v. Austin*,[72] which came before the Florida Supreme Court in 1956. The facts of the case reveal that, pursuant to an application by a property owner, the municipality had rezoned an area from residential to commercial to permit development of a shopping center. The ordinance in question stated that it was subject to six conditions including execution of "suitable contracts . . . between the city and the property owner covering [certain] . . . requirements and also providing for control of lights on the premises . . . ."[73] Landowners in the vicinity of the rezoned tract brought

70. *Id.* at 129, 87 A.2d at 322.

71. An extensive article entitled *Zoning by Contract,* by Crolly and Norton, appeared in N.Y.L.J., April 6, 1955, p. 4. The authors generally condemned conditional zoning amendments, but failed to discuss conditional variances, where it would have been necessary to reconcile the "no-contracts" rule with the established principle that conditions may be attached to a variance. Basically, the authors reiterated the reasons which Bassett set forth for condemning conditions or "contracts." However, they suggested one additional argument which seems to warrant separate consideration, though it may actually constitute no more than a subtle reformulation of the rule against improper delegation. They contended that an offer or agreement to comply with particular conditions, by its very nature, prevents the "free and independent exercise of the judgment and discretion of [the] governing body," and that such offers or agreements are therefore contrary to the community desire for a rational development of land-use regulation. This argument may be helpful in reaching a conclusion about the validity of promises made by an applicant to *induce* desired action by the legislative body, but it does not really go to the question whether the municipality should, when it deems it necessary, be able to attach conditions to a change in zoning.

72. 93 So. 2d 86 (Fla. 1956).

73. *Id.* at 88. The "requirements," which were spelled out in the ordinance itself, were construction of a wall not less than 40 feet inside the property line abutting certain streets, and maintenance of the 40-foot strip in the condition prescribed by the

suit seeking, *inter alia*, a determination that the described ordinance was invalid. The court held for the plaintiff landowners, stating that it would have upheld the ordinance if the need for the amendment had been "fairly debatable," but that this rule was not applicable since the change had been made contingent, not on need, but on the applicant fulfilling certain promises.[74] It is interesting to speculate how the court would have handled the case if the municipality could have introduced evidence that there was a great need for the change and that the conditions had been imposed for the protection of neighboring landowners.

The *Hartnett* opinion suggested a new argument against the use of contracts in zoning, specifically, that the zoning ordinance should be a document complete in itself—one whose scope and meaning could be determined without reference to extrinsic agreements.[75] The contention has considerable force, but is directed toward undisclosed agreements rather than against contracts per se. Thus it would not seem to apply if the full agreement between a municipality and a property owner were set forth in the amending ordinance.

Still a further argument for the "no-contract" rule is suggested in *Baylis v. City of Baltimore*,[76] the third major case in this area, where the court stated that "a municipality is not able to make agreements which *inhibit* its police powers."[77] The previously discussed arguments regarding improper delegation and interference with judgment would seem to be embodied in this statement, but it also contains an element of estoppel. It seems to suggest that if a municipality required an applicant for a zoning amendment to execute a contract embodying given conditions, the municipality would not be free to vary the terms of the contract.[78] But if, as has been

city commission at the expense of the property owner. The rest of the six conditions were the furnishing, at the property owner's expense, of adequate police protection within the rezoned areas, submission of plans to the city commission for approval, and limited access to certain abutting streets.

74. *Id.* at 89.

75. *Id.* at 88. The policy against unfair surprise underlies the court's reasoning on this point. This policy is also discussed in the *Vagueness* section, pp. 129-30 *infra*.

76. 219 Md. 164, 148 A.2d 429 (1959). The facts of the case were as follows: the Baltimore City Council had rezoned the applicant's lot from a residential use district to a commercial use district, subject to conditions which were stated in the ordinance requiring, among other things, that a contract be executed and recorded, and that the premises be used only as a funeral home. The adjoining landowners brought suit seeking a declaration that the zoning amendment was invalid and an injunction restraining the applicant from carrying on his undertaking business. The fact that only one property was rezoned and that the permitted use was far more restricted than the other commercial districts suggests that the proper analysis of this case was that it was not in accordance with the comprehensive plan and therefore constituted illegal "spot zoning." But the court de-emphasized this approach and relied on the "no-contract-zoning" rule to invalidate the ordinance.

77. *Id.* at 170, 148 A.2d at 433. (Emphasis added.)

78. For an elaboration of this argument see Crolly & Norton, *supra* note 53.

previously suggested, a condition is part of the zoning regulations, the established rule that a municipal zoning regulation is not a contract and may be changed would seem to be applicable.[79] The problem arises whether the rule is applicable when, besides stating conditions in an ordinance, the local legislative body has the applicant sign a paper in which he agrees to comply with them. Since the enforcement procedure set forth in the zoning ordinances could be used to secure compliance without regard to the presence of the contract,[80] it might well be contended that the existence of the contract is superfluous and thus there is no reason to abandon the established rule, even when a separate written agreement is present.[81]

The most recent case in this area is *Church v. Town of Islip*,[82] decided in New York in 1960. The procedural context of that case was basically the same as that of the *Hartnett*[83] and *Baylis*[84] cases, in that adjoining landowners sought invalidation of a zoning amendment which reclassified only the applicant's property from a residence use to a business use. The ordinance in question stated that the rezoning was to be conditioned upon compliance with four conditions and the execution and recording of restrictive covenants as to maximum area to be occupied by buildings and as to erection of a fence and planting of shrubbery. The special referee who tried the case inspected the premises at the request of counsel for both sides. He concluded that the amendment constituted illegal "spot zoning" and that the imposition of conditions by the town board was illegal "contract zoning."[85]

79. Reichelderfer v. Quinn, 287 U.S. 315 (1932). Furthermore, a municipality may not be estopped to revoke an invalid building permit, Lipsitz v. Porr, 164 Md. 222, 164 Atl. 743 (1933), or to deny the validity of an invalid contract, Williams v. City of Fargo, 63 N.D. 183, 247 N.W. 46 (1933).

80. See, *e.g.*, NEW YORK TOWN LAW § 268 (providing for fines up to $50 and imprisonment up to six months).

81. Maryland cases subsequent to *Baylis* have reaffirmed the prohibition of conditional zoning amendments. See Carole Highlands Citizens Ass'n v. Board of County Comm'rs, *supra* note 53; Rose v. Paape, 221 Md. 369, 157 A.2d 618 (1960). But the case of Pressman v. City of Baltimore, 222 Md. 330, 160 A.2d 379 (1960), suggests a way in which the prohibition may be avoided. In that case the Baltimore Planning Commission, to which a proposed zoning amendment had been referred, agreed to recommend approval of the amendment to the City Council of Baltimore if the applicant agreed to comply with certain conditions. Although not bound by the report of the Planning Commission, the Council approved the amendment with knowledge of the applicant's agreement with the Planning Commission, but without mentioning the agreement or the conditions in the amending ordinance. When the amendment was challenged, it was *upheld* with the court distinguishing *Baylis, Rose,* and *Carole Highlands.* Query, how the Maryland courts would decide a suit by the Planning Commission to enforce the agreement it entered into with the applicant in the *Pressman* case. In this regard see Board of Educ. v. Herzog Constr. Co., 29 Ill. App. 2d 138, 172 N.E.2d 645 (1961).

82. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

83. *Supra* note 72.

84. *Supra* note 76.

85. Church v. Town of Islip, 6 Misc. 2d 810, 813, 160 N.Y.S.2d 45, 48-49 (Sup. Ct. 1956).

On appeal, the Appellate Division of the Supreme Court reversed the referee[86] and upheld the ordinance, taking judicial notice of the growth and development of surrounding counties and "of practical problems presented to local legislative bodies by a deluge of applications for zoning district changes which are prompted by the necessities of such growth . . . ."[87] After stating that the evidence supported such notice and remarking that the practice of imposing conditions seems to have been widespread, the court concluded that the practice was not "contrary to the spirit of zoning ordinances [or] . . . beyond the statutory powers of local legislative bodies,"[88] and, consequently, held for the defendants. Following entry of judgment, the plaintiff appealed, but the court of appeals affirmed the decision of the appellate division.[89]

In the *Baylis* case the court stated that it presumed the original zoning ordinance was intended to be permanent and that any amendment would be sustained only if there were proof of original mistake or change of circumstances.[90] The use of this presumption placed a heavy burden on the municipality to justify its action. In the *Hartnett* case the court used a slightly different standard which seemed to place less burden on the municipality. The officials were required to show only that the need for the amendment was "fairly debatable."[91] Although in *Baylis* and *Hartnett* the proponents of the amendments failed to prove the facts necessary to discharge their burden of proof, if the standard used in either of the two cases had been applied in the *Church* case, on the basis of the judicial notice taken by the appellate division[92] and statements made in the course of the court of appeals opinion,[93] there can be little doubt that there was an adequate showing of changed circumstances. But in the *Church* case the court of appeals started with a different premise, that is, that the municipal action must be accorded the "strongest possible presumption of validity and must stand if there is any factual basis therefor."[94] Perhaps this presumption, coupled with the changing character of the neighborhood, was sufficient to overcome the "spot

86. Church v. Town of Islip, 8 App. Div. 2d 962, 190 N.Y.S.2d 927 (1959).
87. *Id.* at 963, 190 N.Y.S.2d at 929-30.
88. *Id.* at 963, 190 N.Y.S.2d at 930.
89. Church v. Town of Islip, *supra* note 82. The vote of the court was five to two with Justices Froessel and Voorhis dissenting.
90. 219 Md. at 169, 148 A.2d at 432.
91. 93 So. 2d at 89.
92. See text accompanying note 87 *supra.*
93. The court of appeals agreed with the appellate division's findings of fact, and stated: "It is undisputed that Bay Shore Road has become a busy arterial highway . . . . On the issue of arbitrariness, there was reliable testimony that all of Bay Shore Road would be eventually zoned for business and that this trend would not be stopped . . . ." 8 N.Y.2d at 258-59, 168 N.E.2d at 682, 203 N.Y.S.2d at 869.
94. *Ibid.*

zoning" argument which was based on the fact that only the applicant's property was involved in the change of zoning.[95] At any rate, the court had little to say on this point.

There seem to be three aspects to that section of the court of appeals opinion which deals with the conditions issue. First, the court seems to have been willing to imply the power to impose conditions, stating that "since the Town Board could have, presumably, zoned this Bay Shore Road corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation."[96] This statement would seem to be a modification of the "privilege" argument, which so often has been used to justify imposition of conditions.[97] In other areas of administrative law, one factor which courts have considered when determining whether an agency has been given a particular power is how the agency itself has construed its authority.[98] One reason for giving weight to this factor is that the statute is primarily addressed to the administrator, who, because of his expertness in the given field and his continuing responsibility for the administration of the entire statutory scheme, may attach a slightly different meaning to the words than would a court.[99] The court of appeals, in reaching its decision, may well have considered this factor and may have given it considerable weight in view of the fact, noted by the appellate division,[100] that many similarly situated local officials in New York were in the practice of attaching conditions to zoning amendments.

Second, there is a suggestion in the court of appeals opinion that neither the applicants nor the neighboring landowners could challenge the conditions in question.[101] Support for the court's position that the applicants were barred because they had "accepted"[102] the conditions may be found in those cases which hold that where applicants receive benefits accruing from a change in

95. For clear analysis in cases dealing with conditional zoning amendments, the question whether the amendment constitutes "spot zoning" should be carefully distinguished from the question whether the attached conditions are invalid.

It may be that some of the cases which have condemned the use of conditions could equally well have been decided on the basis that the amendment in question was not in accordance with the "comprehensive plan" and consequently constituted "spot zoning." See Hartnett v. Austin, *supra* note 72; Baylis v. City of Baltimore, *supra* note 76. However, this latter basis may not have been used because of the difficult balancing of considerations required to resolve a "spot zoning" problem compared with the ease of applying Bassett's absolute prohibition of "contract zoning."

96. 8 N.Y.2d at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

97. See pp. 110-11, 114 *supra*.

98. See, *e.g.*, American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936).

99. HART & SACKS, THE LEGAL PROCESS 1320-23 (tent. ed. 1958).

100. 8 App. Div. 2d at 963, 190 N.Y.S.2d at 930.

101. 8 N.Y.2d at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

102. It is unclear in the opinion whether the act of acceptance was the receipt of substantial benefits accruing from the change in land use or the mere execution of a formal agreement to comply with the conditions.

land use, they will be bound by their voluntary agreement to accept designated burdens.[103] But that portion of the suggestion which relates to the neighboring landowners is much less tenable. In implying that the neighbors could not contest the conditions because such were designed for their benefit,[104] the court appears to focus only on the effect of the conditions and to disregard the effect of the use reclassification. This approach seems artificial since the actual significance of benefits accruing from imposed conditions can be determined only when such benefits are weighed against the burdens produced by the reclassification to which such conditions were attached. Even if the proposition be accepted that persons should not be able to contest municipal action which is beneficial to them, it should nevertheless be open to them to show, by analyzing the overall effect of a transaction, that it does not in fact constitute a benefit. It should also be open to a person aggrieved by a zoning change[105] to argue that the municipality lacked power to attach conditions to the amendment in question and that if the conditions are invalidated, the amendment should fall because it would be unreasonable to assume that the local legislative body would have approved the amendment without the conditions. In addition to allowing neighboring landowners to use every available argument to protect the value of their property, permitting them to contest conditions would also help to prevent ultra vires action by a municipality,[106] whereas a contrary rule might well encourage such action.

The last phase of the court of appeals opinion represents the first attempt by a court to avoid the "no-contract-zoning" doctrine, while giving weight to the considerations underlying it. After noting that the meaning of "contract zoning" was not clear, the court stated:

> All legislation "by contract" is invalid in the sense that a Legislature cannot bargain away or sell its powers. But we deal here with actualities not phrases. To meet increasing needs of Suffolk County's own population explosion, and at the same time, to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the Town Board imposes conditions. There is nothing unconstitutional about it.[107]

103. *E.g.*, Board of Educ. v. Herzog Constr. Co., *supra* note 81. *But cf.* Purtill v. Town Plan & Zoning Comm'n, 146 Conn. 570, 153 A.2d 441 (1959); Vlahos Realty Co. v. Little Boar's Head Dist., 101 N.H. 460, 146 A.2d 257 (1958). *Compare* Ricciardi v. Los Angeles County, 115 Cal. App. 2d 569, 252 P.2d 773 (1953), *with* Edmonds v. Los Angeles County, 40 Cal. 2d 642, 255 P.2d 772 (1953).

104. This argument had previously been used by a New York Supreme Court in the case of Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals, 205 Misc. 1083, 132 N.Y.S.2d 148 (Sup. Ct. 1954).

105. For a discussion of the rights of persons aggrieved by zoning changes see Foss, *Interested Third Parties in Zoning*, 12 U. FLA. L. REV. 16 (1959).

106. For a case which states that even if the action of a municipality is ultra vires, third parties have no standing to contest such action, see Colt v. Bernard, 279 S.W.2d 527, 531 (Mo. Ct. App. 1955).

107. 8 N.Y.2d at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

This statement seems to suggest that, by imposing conditions, the local legislative body may be trying to protect landowners in the vicinity of the zoning change, rather than bargain away its discretion. The force of this argument would seem to be increased by the court's finding that the record did not indicate an agreement in the sense that the owners made an offer accepted by the board.[108]

In a jurisdiction which uses the previously discussed presumption of permanency or "fairly debatable" standard to assess the validity of a zoning amendment, the *Church* case might be distinguished from the *Baylis* and *Hartnett* cases on the ground that in *Church* there were indications of changed circumstances which were not shown to exist in the other two cases and that consequently it was proper to sustain the conditional amendments in *Church* and to invalidate them in *Baylis* and *Hartnett*. The *Church* case might also be distinguished from the *Houston Petroleum* case on the ground that in the former the conditions were fully set forth in the ordinance while in the latter a clandestine agreement was involved. But aside from these superficial distinctions, the rationale of the *Church* case is fundamentally inconsistent with the rationale of these other cases.

It is submitted that the New York case represents the better approach. Although the court of appeals did not carefully separate its reasons for upholding the conditions, and although it would have been wise to have omitted the remark about the neighboring landowners being unable to contest the action of the town board, the court did reach a rationally justifiable and expedient result by implying a power in the local legislative body to attach conditions to a change in zoning.[109] Moreover, in refraining from applying the

108. *Ibid.*

109. Criticizing the result in the *Church* case, the editors of the ZONING BULLETIN stated:

> The majority decision of the Court . . . appears to us not to be correct. . . . The Court held that a Town Board has the implied power under the zoning enabling act, to resort to so-called "contract rezoning." The Legislature itself has, in effect, construed Section 265 of the Town Law as *not* conferring such power on Town Boards. At the 1956 Session of the New York Legislature a bill was introduced to amend § 265 of the Town Law to empower the Town Board to "* * * make such order, requirements, agreement or conditions as in its opinion ought to be made in the premises, and require the same to be recorded in like manner as a deed to real property." While this bill passed both Houses of the Legislature it was vetoed by Governor Harriman, who said: "This bill would upset the orderly process for zoning regulation. A privately drawn agreement which affects the rights of the community, may readily grant a special privilege and thereby violate the due process clause of the State Constitution. The objections voiced by the State Comptroller, the Association of Towns, the Westchester County Board of Supervisors and the Regional Plan Association require disapproval. The bill is disapproved." The Court in the case under discussion, therefore, found an implied power which our legislature and executive branches by recent actions clearly deemed not to exist.

Crolly & Norton, *Rezoning by Contract With Property Owners*, ZONING BULLETIN: A REVIEW OF CURRENT DECISIONS ON PLANNING AND ZONING, REGIONAL PLAN. ASS'N 2 (Sept. 1959).

"no-contract-zoning" doctrine when presented with a conditions problem and in suggesting that attention be focused on the question whether the local legislative body in fact exercised its discretion when arriving at its decision,[110] the court pointed out a method of analysis which other courts might do well to adopt.[111]

One final comment should be made on the subject of conditions attached to a zoning amendment. It would seem that the reluctance of some courts to uphold such conditions is in part based on a fear that no inherent restrictions could be placed on them.[112] In the *Church* opinion the court of appeals implied that such conditions would have to meet a reasonableness test.[113] But since the scope of zoning regulation is limited by the police power,[114] and since, as has been previously suggested, conditions constitute regulation,[115] it would seem that the scope of permissible conditions should also be limited by that same power. Such a limitation, it has been asserted, would be slightly more restrictive than a standard of reasonableness, in that, even though reasonable, conditions relating solely to aesthetics would not be permissible.[116]

## Factors the Courts Seem To Consider When Defining the Scope of the Police Power

Throughout the first part of this Article it was contended that, whether expressly stated in a statute or imposed by municipal officials under a broad grant of power, a condition attached to a change in land use is valid only if within the scope of the police power. Of course, even if a local official has the power to impose conditions, a given condition may be invalid for other reasons than that it is beyond the scope of that power. For example, courts invalidate conditions if they are superfluous, that is, if they add nothing to

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The position of the governor seems clear, but it is a considerable over-simplification to say that the passing of the bill by both houses clearly indicated that the legislature deemed the implied power not to exist. The passing of the bill could equally well indicate that the legislators desired to make explicit the power which they thought was implied in the original zoning enabling act in an effort to encourage local officials to make greater use of conditions.

110. On the question whether the local legislative body has exercised its discretion, the burden of proof might well be placed on the person seeking to invalidate the municipal action, thereby freeing local officials from *undue* concern over how to prove that they are properly carrying out their duties.

111. Although the issue was not presented by the *Church* case, it would be wise to require that all conditions be set forth in the zoning amendment so that the zoning ordinance may be preserved as an integrated document.

112. See Baylis v. City of Baltimore, *supra* note 76.

113. 8 N.Y.2d at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

114. Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (Sup. Ct. 1938); Yokley, Zoning Law and Practice 15 (2d ed. 1953).

115. See pp. 114-15 *supra*.

116. See Bassett, Zoning 129 (1936).

the legal duty of the applicant;[117] if they conflict with express provisions of the zoning ordinance or state enabling act;[118] or if they are imposed to mitigate the effects of a change in land use made in disregard of the statutory standard for decision.[119]

It is the purpose of this part to try to make more specific what is meant by the phrase "within the police power." The developing case law is examined in an effort to discover what factors the courts consider when deciding given cases. In several instances it is contended that a court has improperly analyzed a problem, and an effort is made to justify a different solution. Unfortunately, many of the opinions dealing with the validity of conditions contain only the statement of a result. Thus it may seem somewhat unrealistic to say that a particular factor influenced the outcome of a case when the court in question made no reference to it, but such a tactic seemed to be required if what appear to be inconsistent decisions were to be reconciled.

*Vagueness*

In the area of land-use controls, to say that action by a municipality is "within the police power" seems to be merely a statement of the result that, on the particular facts presented, the interests of the public outweigh the interests of private landowners affected by the action. Because failure to comply with an imposed condition may cause revocation of a permit[120] or commencement of court proceedings,[121] and because the landowner on whom the condition has been imposed should receive fair warning when he fails to comply, where the meaning of a condition is so unclear that he is deprived of that warning, courts might well strike down that condition on the ground that it is not within the police power since the strong interests of the landowner outweigh the public interest involved. *Pearson v. Shoemaker*[122] represents a decision where considerable weight may have been given to the fair-warning requirement. The facts of the case show that the applicant had been granted permission to build a community recreation center and swimming pool subject to the conditions, among others, that membership be limited to 150 persons and that preference for membership be given to nearby residents. When petitioned to determine the validity of the conditions, the court struck down the preference requirement on the ground that it was vague.[123]

117. See Fey v. Woermann, 360 Mo. 728, 230 S.W.2d 681 (1950).

118. See Gordon v. Zoning Bd., 145 Conn. 597, 145 A.2d 746 (1958); Stiriz v. Stout, 210 N.Y.S.2d 325 (Sup. Ct. 1960). See also Belle-Haven Citizens Ass'n v. Schumann, 201 Va. 36, 109 S.E.2d 139 (1959) (dictum).

119. See Berdan v. City of Paterson, 1 N.J. 199, 62 A.2d 680 (1948).

120. See Guardian Garage v. Dorman, 233 App. Div. 771, 250 N.Y. Supp. 861 (1931).

121. See North Plainfield v. Perone, 54 N.J. Super. 1, 148 A.2d 50 (1959), *cert. denied*, 29 N.J. 507, 150 A.2d 292 (1959).

122. 25 Misc. 2d 591, 202 N.Y.S.2d 779 (Sup. Ct. 1960).

123. *Id.* at 593, 202 N.Y.S.2d at 781.

However, the term "vague" is not always an abbreviation for a statement of the policy against unfair surprise. This is suggested by the case of *Taft v. Zoning Bd. of Review*,[124] where a variance was granted permitting conversion of a storage shed into a house, subject to the condition "that a safeguard, satisfactory to the building inspector, shall be attached to the building in such a manner as to prevent rain or snow from overflowing onto adjacent property."[125] Stating that the condition was too vague, the court modified it, requiring the corners of the shed to be not less than a stated distance from the property line. Perhaps the reason for the decision was a desire on the part of the court to prevent protracted negotiations and required changes in specifications which might result when the local official is not guided by a legislatively prescribed standard.[126]

*Conditions Related to Health and Safety*

If a condition is closely related to promoting public health, it is upheld. Hence, to a permit which authorizes enlargement of an eating establishment, a municipality may validly attach a condition requiring maintenance of toilet facilities for patrons,[127] or to an exception which authorizes operation of a "laundramat," it may attach a condition limiting the number of automatic washing machines in accordance with the capacity of the sewage disposal system.[128] An equally valid condition is one which is closely related to promoting public safety, as where access to property is restricted to improve the flow of traffic.[129] A requirement that a parking lot be covered with a hard surface might be justified as a safety measure in that it will reduce the likelihood of people falling on loose stones.[130] A condition restricting parking on the premises, however, might be invalidated on the ground that it tends to reduce safety by increasing congestion in the streets.[131] The cases seem to make a distinction between parking and storing automobiles so that although a parking restriction is often invalid,[132] a condition prohibiting storage of cars on the outside of a building is upheld.[133]

Requirements that an applicant build a fence[134] or plant trees[135] or

124. 76 R.I. 443, 71 A.2d 886 (1950).
125. *Id.* at 446, 71 A.2d at 888.
126. See Knutson v. State *ex rel.* Seberger, 160 N.E.2d 200, 202 (Ind. 1959).
127. Vlahos Realty Co. v. Little Boar's Head Dist., *supra* note 103.
128. *E.g.*, DeVille Homes v. Michaelis, 201 N.Y.S.2d 129 (Sup. Ct. 1960).
129. *E.g.*, Fifty-Fourth St. Center v. Zoning Bd. of Adjustment, 395 Pa. 338, 150 A.2d 335 (1959); Fiske v. Zoning Bd. of Review, 70 R.I. 426, 40 A.2d 435 (1944).
130. *Cf.* Everson v. Zoning Bd. of Adjustment, 395 Pa. 168, 149 A.2d 63 (1959); Springfield Township v. Flourbowl, 7 Pa. D. & C.2d 28 (C.P. 1956).
131. See Service Realty Corp. v. Planning & Zoning Bd. of Appeals, 141 Conn. 632, 109 A.2d 256 (1954).
132. See *ibid.*
133. See North Plainfield v. Perone, *supra* note 121.
134. See Vlahos Realty Co. v. Little Boar's Head Dist., *supra* note 103.
135. See Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

hedges[136] have also been upheld. It seems more difficult to justify these conditions on the ground that they are related to the public health or safety; however, it may be argued that erection of the fence will serve to keep people off the premises, thereby reducing the risk of injury created by a dangerous activity being conducted thereon.[137] Where the property abuts a major highway, a hedge or fence or thick buffer of trees may so limit access to the road as to promote safety by forcing people to cross only at designated places.[138] It would seem that a row of trees or a hedge might reduce noise, dust, and glare passing from one property to the next and for this reason might be justified as promoting public health or safety.[139]

In some of the cases dealing with shopping centers or eating establishments, the land-use permit has been conditioned on the construction of lighting facilities which will not throw a glare on neighboring property.[140] Besides mitigating the annoyance and inconvenience which the neighbors may have to undergo because of having a business next to their property, such a condition, if there is a road nearby, may have a very direct relation to safety by making it easier for drivers to see. Generally, such conditions have been held to be within the scope of the police power.

Where an analogy may be drawn between a condition and a well-recognized type of land-use control, the condition is usually upheld. Thus courts have sustained the validity of conditions which limit the area on which a building may be constructed,[141] which restrict the height of a building,[142] or which impose a set-back[143] or off-street parking requirement.[144]

*Regulation of Business Operations*

In three recent cases which dealt with coin-operated laundramats,[145] it was argued that if the use permits were not conditioned on the presence of a full-time attendant, there was great danger that neighborhood children

136. See Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

137. Consider the fact situation in Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (1949), where an excavation permit was conditioned, *inter alia*, on the applicant constructing a six-foot, mesh wire fence around the area to be excavated.

138. See Ayres v. City Council, *supra* note 135.

139. See *ibid.*; Everson v. Zoning Bd. of Adjustment, *supra* note 130.

140. See Fifty-Fourth St. Center v. Zoning Bd. of Adjustment, *supra* note 129; Vlahos Realty Co. v. Little Boar's Head Dist., *supra* note 103.

141. See Vasilakis v. City of Haverhill, 339 Mass. 97, 157 N.E.2d 871 (1959); Church v. Town of Islip, *supra* note 136.

142. See Smith v. Zoning Bd. of Review, 54 R.I. 88, 170 Atl. 74 (1934).

143. See Wheeler v. Gregg, *supra* note 137 (sustaining the condition by implication).

144. See McLain v. Planning Comm'n, 156 Cal. App. 2d 161, 319 P.2d 24 (1957).

145. DeVille Homes v. Michaelis, *supra* note 128; State *ex rel.* Superior Corp. v. City of East Cleveland, 81 Ohio L. Abs. 177, 158 N.E.2d 565 (Ct. App. 1959); Van Sciver v. Zoning Bd. of Adjustment, 396 Pa. 646, 152 A.2d 717 (1959).

might crawl into the machines and be injured. Other advocates of conditional permits contended that the presence of an attendant was necessary to prevent these establishments from becoming hangouts for juvenile delinquents. Despite these tenable positions, in two of the three cases the courts invalidated the full-time-attendant condition on the ground that it was not within the scope of the police power.[146] Perhaps these two decisions were based on the unarticulated theory that the concept of land-use control does not include regulation of the day-to-day operation of a business.

But on the basis of cases which have upheld conditions requiring garage and service station operators to make automobile repairs only inside their buildings,[147] or requiring businesses to store automobiles or materials only inside buildings,[148] it could be argued that this day-to-day operation concept is without merit. A counterargument would seem to be that telling a businessman which portion of his property he may use to conduct a given activity is more closely akin to the standard conception of land-use control than telling him to use additional men to operate his business. However, it should be noted that the counterargument implicitly concedes that the enumerated conditions affect business operations, and it makes the distinction turn on another factor, *i.e.*, the degree to which the condition differs from the standard conception of land-use regulation. Thus, although the enumerated decisions do not show that the business-operation concept is without merit, they do suggest that it is not sufficient to inquire whether the condition pertains to operations, but that it is also necessary to show that the effect is different from that of the standard types of land-use controls.

This two-step approach may be used to explain the result in the case of *Houlden's Appeal*,[149] where the Croatian Fraternal Union of America was granted a permit to erect a one-story building addition subject to the condition that the printing presses which were to be installed in the addition should be "used only for the printing of the official organ or publication of the . . . Union . . . or other paper or pamphlets of said union, and that no commercial printing be done on the premises."[150] The court's decision sustaining the validity of the condition seems justified because, though the condition certainly affected the daily operations in restricting the type of matter which could be printed, the effect was only that produced by application of the well-recognized zoning distinction between commercial and noncommercial uses.

146. DeVille Homes v. Michaelis, *supra* note 128; Van Sciver v. Zoning Bd. of Adjustment, *supra*.

147. *E.g.*, North Plainfield v. Perone, *supra* note 121.

148. *E.g., ibid.*; Everson v. Zoning Bd. of Adjustment, *supra* note 130.

149. 86 Pitt. L.J. 115 (Pa. C.P. 1937).

150. *Id.* at 116.

Even if a condition pertains to business operations and even if the effect is unlike that produced by the statutory methods of land-use control, there are two cases which seem to indicate that the validity of the condition may still be sustained. In the earlier one a Pennsylvania court upheld a condition requiring the applicant to use a gas burner in his dry-cleaning business instead of a coal burner which he wanted to use and which most of his competitors were using.[151] In the other case a New Hampshire court upheld a conditional variance renewal which contained a condition requiring the applicant, who was the owner of an ice cream stand, to sell only the same products as had been sold by his predecessor in title.[152] Although at first glance these cases, sustaining regulation of business operations, seem inconsistent with the laundramat cases which struck down such regulation, the facts reveal that the former cases dealt with regulation of businesses which began as nonconforming uses, while the latter did not. Since such uses exist because they were present before the adoption of a zoning ordinance[153] and since they hamper achievement of the ultimate objectives of zoning,[154] there would seem to be a greater public interest in restricting them than in restricting uses which come into existence only after local officials have exercised their discretion and have concluded that there are adequate reasons for deviating from the established pattern of land use. This greater public interest in restricting nonconforming uses might justify sustaining the validity of a given condition which would be invalid but for the presence of such use. On the basis of this argument the two cases described above seem reconcilable with the laundramat cases.

*Personal Licenses*

Brief mention should be made of conditions which state that a land-use permit will terminate when the applicant sells the premises. Like conditions which affect day-to-day business operations, they are treated as being unrelated to "land use." They have been uniformly invalidated on the ground that they are mere personal licenses.[155] Another reason offered for striking them down is that they constitute an unreasonable restraint on alienation.

A problem which runs throughout the whole area of conditions is clearly pointed up by the cases dealing with these "personal conditions." If the applicant for the land-use permit secures a determination that a condition

151. Appeal of Consol. Cleaning Shops, 103 Pa. Super. 66, 157 Atl. 811 (1931).

152. Vlahos Realty Co. v. Little Boar's Head Dist., *supra* note 103.

153. See Note: *Nonconforming Uses: A Rationale and an Approach,* 102 U. PA. L. REV. 91 (1953).

154. See Bartholomew, *Nonconforming Uses Destroy the Neighborhood,* 15 J. LAND & P.U. ECON. 96 (1939).

155. See, *e.g.,* Vlahos Realty Co. v. Little Boar's Head Dist., 101 N.H. 460, 146 A.2d 257 (1958).

is invalid, the court will excise the condition and allow the unconditional permit to stand.[156] However, if an adjoining landowner obtains a similar determination, the whole permit will be invalidated.[157] The existence of these two results has the undesirable effect of encouraging a race to the courthouse whenever a condition of questionable validity is imposed. A solution to this problem may lie in an application of a severability rule,[158] or in the suggestion that the court try to determine whether the municipality would have issued the permit without the condition[159] or whether it would have been reasonable for the municipality to have issued the permit without the condition.

*Aesthetic Conditions*

Reps, in his article on conditional variances and exceptions,[160] cites the case of *Soho Park & Land Co. v. Board of Adjustment*[161] to support the proposition that aesthetic conditions may not be imposed. Of the conditions invalidated in that case, the two which the court thought had been imposed for "aesthetic reasons" were the requirements that the applicant plant trees on one side of the property and that he build only brick buildings with stone trim. Both conditions were worded so that approval of the type and number of trees and approval of the building plans had to be secured from the building inspector, and it may be that this approval feature, as noted previously,[162] may have had some bearing on the court's decision. Also, since the 1927 New Jersey constitutional amendment[163] authorizing the use of zoning had only been in effect a short time before the case arose, it may be that the decision merely illustrates a carry-over of the judicial hostility which had created the need for that amendment.[164] However, the court did use the term "aesthetic," and thus the case would seem to support the proposition for which it was cited.

Reps went on to say that the validity of aesthetic conditions was sustained in *Selligman v. Western & Southern Life Ins. Co.*,[165] where a garage

156. See, *e.g.*, Soho Park & Land Co. v. Board of Adjustment, 6 N.J. Misc. 686, 142 Atl. 548 (Sup. Ct. 1928). See also Fernald Appeal, 17 Pa. D. & C.2d 291 (C.P. 1958) (also bearing on the question of standing to sue).

157. See, *e.g.*, Olevson v. Zoning Bd., 71 R.I. 303, 44 A.2d 720 (1945).

158. See *ibid.*, where this approach is suggested.

159. See Town of Greenburgh v. Buser, 4 Misc. 2d 513, 148 N.Y.S.2d 550 (Sup. Ct. 1955).

160. Reps, *Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions*, 2 SYRACUSE L. REV. 54 (1950).

161. *Supra* note 156.

162. See the section entitled *Vagueness*, pp. 129-30 *supra*.

163. The amendment was incorporated in the New Jersey Constitution of 1947, art. 4, § 6, ¶ 2.

164. See BASSETT, ZONING 15 n.3 (1936).

165. 277 Ky. 551, 126 S.W.2d 419 (1939).

was required to be built so as to conform architecturally with a building to which it was to be attached. But the court in that case proceeded on the assumption that conditions need not be limited to the scope of the police power,[166] and this assumption has previously been rejected.

Perhaps aesthetic considerations should be within the police power, but this question is beyond the scope of this paper. The general rule seems to be that they are not,[167] and hence conditions which are primarily based on them are invalid. Conditions requiring the erection of a fence or the planting of a hedge or a buffer of trees are certainly motivated in part by aesthetic considerations, but perhaps the courts have been justified in upholding such conditions because of the public health and safety arguments which can be made to support them. There have been few recent cases dealing with "aesthetic" conditions, but several cases have set forth such conditions in their facts,[168] and it may be that although the validity of the conditions was not, in fact, passed upon, these cases may be cited in the future for the proposition that such conditions are valid.[169]

*A Reasonable Relation to the Problem Sought To Be Eliminated*

The case of *Pearson v. Shoemaker*,[170] discussed in the *Vagueness* section, and one of the coin-operated laundramat cases, *Van Sciver v. Zoning Bd. of Adjustment*,[171] illustrate another factor which the courts consider when appraising the validity of a given condition. It will be remembered that in

166. *Id.* at 560-61, 126 S.W.2d at 424.

167. *But cf.* State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

168. See, *e.g.*, Riverside St. Clair Corp. v. Walsh, 131 Misc. 652, 228 N.Y. Supp. 88 (Sup. Ct. 1928), *aff'd mem.*, 225 App. Div. 655, 231 N.Y. Supp. 869 (1928).

169. Three Pennsylvania Supreme Court cases aptly illustrate the stated proposition. In Novello v. Zoning Bd. of Adjustment, 384 Pa. 294, 121 A.2d 91 (1956), the issue was whether a conditional use permit authorizing erection of a car wash should have been issued. Although the conditions attached to this permit were set forth in the statement of facts, the court did not discuss them. Two years later, in Nicholson v. Zoning Bd. of Adjustment, 392 Pa. 278, 140 A.2d 604 (1958), the court held that a permit authorizing use of a lot in a residence district for business parking should be upheld against attack by adjoining landowners. In a dictum the court described conditions which had been imposed on the applicant for the permit and said that these were designed to limit the objections to the change in land use. But again there was no discussion as to the validity of the conditions. In Fifty-Fourth St. Center v. Zoning Bd. of Adjustment, *supra* note 129, the court was finally faced with the question whether six conditions attached to a use permit were valid. Citing *Nicholson* and *Novello* for the proposition that the validity of such conditions was *well-established*, the court dismissed the case.

If other courts use a similar approach, a number of cases might be cited as establishing the validity of conditions, although they actually do little more than enumerate the imposed conditions. See, *e.g.*, St. Patrick's Church Corp. v. Daniels, 113 Conn. 132, 154 Atl. 343 (1931); Sarber Realty Corp. v. Silver, 205 N.Y.S.2d 30 (Sup. Ct. 1960); Morris v. Zoning Bd. of Review, 52 R.I. 26, 155 Atl. 654 (1931).

170. 25 Misc. 2d 591, 202 N.Y.S.2d 779 (Sup. Ct. 1960).

171. *Supra* note 145.

*Pearson* the permit to build a swimming pool restricted membership to 150 persons. The court felt that this condition was imposed to limit the noise and traffic which would result from the operation of the pool. But since no restriction was placed on the number of guests which each member could bring, the court stated that the condition was ineffective to eliminate these problems and was therefore invalid. Likewise in the *Van Sciver* case, where the permit had been issued subject to the condition that the establishment be closed on Sundays and evenings, the court invalidated the condition, reasoning that since juvenile delinquents could congregate in these places when they were open, the hour limitations would not be effective to prevent these establishments from becoming hangouts.

Of the two cases, *Van Sciver* seems the more difficult to justify. Whereas the condition in the *Pearson* case may have had very little tendency to reduce noise or traffic, the condition in *Van Sciver* greatly reduced the number of hours during which the laundramats could be used as meeting places, particularly in view of the fact that the reduction affected those hours when youths would not be in school or at work and would have time to congregate. Perhaps to justify the *Van Sciver* result it is necessary to go beyond what the court said and to give some weight to the fact that the condition dealt with the regulation of business operations. But even with this added factor taken into consideration, the decision is not altogether satisfying.

*A Disguised Exercise of the Eminent Domain or Taxing Power*

In a previous section of this paper,[172] *Ayres v. City Council*[173] was cited to illustrate the willingness of some courts to imply a broad power to impose conditions. The case is also considered at this point because it deals with the validity of some important conditions which local administrators have been imposing as a means of controlling subdivision development. The facts of the case are that the plaintiff, Ayres, sought approval to subdivide a triangular, thirteen-acre tract in the Westchester District of the City of Los Angeles. The municipal planning commission recommended to the city council that the proposed map be approved subject to four conditions: (1) that the applicant dedicate an eighty-foot strip across his tract as a right of way for the extension of a local street; (2) that he dedicate a ten-foot strip along the boulevard which bordered one side of his property for use in widening that thoroughfare; (3) that another ten-foot strip along the boulevard be restricted to the planting of trees and shrubbery for the purpose of preventing ingress and egress between the proposed lots and that highway; and (4) that he dedicate a small triangle of land at one tip of his property so that

172. See the section entitled *Conditions on the Approval of Subdivision Maps*, pp. 115-16 *supra*.

173. *Supra* note 135.

the traffic problem, created at that point by the merging of an avenue into the boulevard, would be eliminated. The city council approved the map subject to the recommended conditions, and the applicant then appealed to the courts alleging that the imposed conditions were invalid.

As a prelude to discussion of the *Ayres* decision, it should be noted that there have been many cases which have sustained conditions requiring a developer to improve and dedicate streets,[174] to provide curbs, drains and sidewalks,[175] and to construct and dedicate sewer and water facilities,[176] when those improvements have been within the proposed subdivision. The justification for upholding such requirements seems to be that a developer should not be permitted to make a profit at the expense of the municipality. Because the subsequent residents of the subdivision will demand that the municipality furnish these necessary facilities and because, in a sense, it was the developer's action in subdividing his tract which created this demand, the developer should not be able to thrust the construction costs for such facilities on the municipality, but should be made to bear the expense himself.[177]

In upholding the condition requiring Ayres to dedicate a right of way across his tract, the California Supreme Court may have been relying on a similar rationale. But because in the *Ayres* case only two lots were to front on the right of way in question, the image of the mass of people inside the subdivision clamoring for public facilities seems much less persuasive. However, since the two lots were to be used for a church and a business drive-in, it is arguable that the condition was justified so that slow-moving traffic, church-goers and business clientele could be kept off the avenue and the boulevard on which the lots abutted. It would seem that the court was also justified in upholding the condition restricting a strip of land along the boulevard to the planting of trees and shrubbery because such a condition would promote safety by preventing ingress and egress between the proposed lots and that thoroughfare.[178]

A more questionable determination was the sustaining of the conditions requiring Ayres to dedicate the triangle and the other strip of land. The court sought to support its conclusion by noting "that the creation and the proposed uses of the subdivision would give rise to traffic and other conditions necessitating the widening of the boulevard"[179] and the elimination of

174. *E.g.*, Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952).
175. *E.g.*, Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).
176. *E.g.*, Mefford v. City of Tulare, 102 Cal. App. 2d 919, 228 P.2d 847 (1951). See also Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).
177. See Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960).
178. See the section entitled *Conditions Related to Health and Safety*, pp. 130-31 *supra*.
179. 34 Cal. 2d at 38, 207 P.2d at 5.

the tip of land.[180] Because the tract was to be subdivided into eleven residential lots, one business lot and a lot used for religious purposes, it seems clear that some traffic increase would have resulted. But because the business drive-in and the church would not usually have carried on their activities at the same time, the increase would not have been as great as it might have seemed at first glance. Furthermore, because access to the residential lots from the boulevard would have been limited, it would appear that most of the traffic problems created by slow-moving vehicles turning into the residential driveways would have affected traffic flow only on the avenue on which the driveways were to be located and not on the boulevard. Moreover, since there would have been three or four other streets, besides the boulevard, which the subdivision traffic might have used, it would seem that the total increase in congestion on the boulevard and at the point where the avenue merged with that thoroughfare would not have been very great.[181]

In support of the decision sustaining the strip and triangle dedication conditions, the court cited two cases which had upheld similar conditions in other jurisdictions;[182] however, *Ayres* on its facts would appear to have been distinguishable from these cases. In the *Ayres* case, though not in the others, it was shown that the municipal authorities contemplated widening the boulevard and eliminating the tip whether or not the plaintiff intended to subdivide.[183]

In view of three facts: (1) that the proposed subdivision would not have greatly increased traffic on the boulevard; (2) that the contemplated improvements would have benefited the entire Westchester District;[184] and (3) that the municipal officials planned to make such improvements regardless of whether Ayres sought approval of his subdivision map, it would seem that the primary reason the Los Angeles City Council imposed the conditions requiring dedication of the triangle and the strip along the boulevard was not the elimination of the traffic problems which the proposed subdivision would have created, but rather those created by the mushrooming growth of the metropolitan area. Relying on an argument similar to this, Ayres contended that the conditions effected a "taking" of his property without compensation and therefore were unconstitutional. The majority of the

180. 34 Cal. 2d at 39, 207 P.2d at 6.

181. For a case which rejects the argument that increased traffic from a subdivision justifies imposition of conditions, see Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (Sup. Ct. 1938).

182. See Newton v. American Security Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

183. 34 Cal. 2d at 38-39, 207 P.2d at 5-6.

184. The boulevard on which the proposed subdivision abutted was one of the two major arteries through the Westchester District, an area encompassing over 3,000 acres.

court, at the conclusion of its opinion, addressed itself to this argument, saying:

> A sufficient answer is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land.[185]

The first sentence of this statement places emphasis on the form of the proceedings in which the taking occurs. But this would not seem an adequate distinction between what is or is not an exercise of the power of eminent domain because, if constitutionally protected property rights[186] are to have any significance, their existence certainly should not be made to depend on a matter of form.

The second sentence of the quotation seems to suggest what might be called the "first-to-act" rule. Commenting on the *Ayres* case, the *Southern California Law Review*[187] articulated this rule in greater detail. The note seemed to say that although it is normally clear when a municipality is exercising its police power and when it is exercising its power of eminent domain, there are occasions when this distinction is difficult. It suggested that the controlling factor in solving the problem of which power is being exercised is to discover who acted first. If the private landowner acted first in requesting approval of a subdivision map, the condition which effected the taking was incident to the police power, but if the local officials acted first, the municipality was using its power of eminent domain and would have to pay for its acquisition. The note seemed to offer no justification for this rule other than that it was a rule of convenience for deciding difficult cases. But because a landowner bears a greater percentage of the total cost of a public improvement if he is required to dedicate the land on which the improvement will be constructed than if the municipality purchases that land from him, and because the question of who bears the cost of providing a needed public improvement should not turn on the fortuitous fact that a subdivision application has been filed, there is need for a more rational basis of deciding these cases than is provided by the "first-to-act" rule. An additional reason for abandoning that rule is that it may tend to retard development of land and construction of needed improvements because both the developer and the municipality may feel that delay is to their advantage.

185. 34 Cal. 2d at 42, 207 P.2d at 7.
186. CALIF. CONST. art. I, § 14.
187. Note, 23 So. CAL. L. REV. 261 (1950).

It is submitted that perhaps the most fundamental principle justifying imposition of conditions on applicants for land-use permits is that the applicant should be willing to solve the problems which his proposed use will create. The previously noted rationale for imposing conditions on subdivision developers seems to be founded on this principle.[188] Conditions attached to a variance or zoning amendment further support it, because by mitigating annoyance and inconvenience to neighboring landowners, such conditions serve to eliminate problems which would otherwise be created by a proposed use.[189] When attention is focused on particular conditions, it will be seen that they are also founded on it. Consider, for instance, conditions limiting access to a property. These have been justified as removing a safety problem which a development could create.[190] Or consider conditions limiting the number of automatic washing machines in a proposed laundramat, which have been justified as removing health problems that might be created if existing sewage facilities were overloaded.[191]

A corollary of the asserted principle is illustrated by the cases dealing with what might be categorized as quasi-tax conditions.[192] These cases suggest that where the anticipated problem will be primarily created by something other than the proposed use, the municipality should not be able to impose on the applicant a condition requiring him to bear the expense which will be incurred in solving that problem.[193] For example, the case

188. See Rosen v. Village of Downers Grove, *supra* note 177.

189. See the section entitled *Conditions Attached to a Variance or Exception,* pp. 112-15 *supra.*

190. See the section entitled *Conditions Related to Health and Safety,* pp. 130-31 *supra.*

191. *Ibid.*

192. Most of the cases which have considered the validity of conditions requiring an applicant to make a *money* payment to a municipality have been decided on the ground that the relevant state enabling act did not authorize the local officials to impose such conditions. See Rosen v. Village of Downers Grove, *supra* note 177 (alternative ground); Reggs Homes v. Dickerson, 16 Misc. 2d 732, 179 N.Y.S.2d 771 (Sup. Ct. 1958), *aff'd mem.,* 8 App. Div. 2d 640, 186 N.Y.S.2d 215 (1959); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961). *But cf.* City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (Dist. Ct. App. 1960); Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (Dist. Ct. App. 1960).

193. Consider the following statement of Justice Schaefer in Rosen v. Village of Downers Grove, *supra* note 177, at 453, 167 N.E.2d at 234:

> [B]ecause the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee. The distinction between permissible and forbidden requirements is suggested in Ayres v. City Council of Los Angeles, which indicates that the municipality may require the developer to provide the streets which are required by the activity within the subdivision but can not require him to provide a major thoroughfare, the need for which stems from the total activity of the community.

See also *In re* Appeal from Radnor Township Disapproval of Subdivision Plan, 40 Del. Co. Rep. 106 (Pa. C.P. 1953), where the court invalidated a condition requiring a

of *Kelber v. City of Upland*[194] involved a local ordinance requiring a developer as a condition to approval of a subdivision map to pay $30 per lot into the park and school site fund and $99.07 per acre into the subdivision drainage fund in lieu of constructing specified drainage structures.[195] In striking down this ordinance, the California Court of Appeals remarked:

> It rather clearly appears that these . . . provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities . . . [and that they are] not reasonably required by the type and use of the sub-division as related to the character of local and neighborhood planning and traffic conditions . . . .[196]

In light of the principle justifying imposition of conditions and the corollary of that principle suggested by *Kelber* and similar cases, it is here contended that when a court is faced with the question whether to sustain a given condition, it should identify the problem which the condition is designed to solve. If that problem will be *primarily* created by the proposed use, the condition should be upheld, though it may require dedication of land or payment of money to the municipality; otherwise, the condition should be invalidated. It is also contended that when applied to a case like *Ayres*, this problem-analysis approach, based on underlying principles of fairness, produces a more equitable result than does the "first-to-act" rule. Moreover, by de-emphasizing the significance which that rule places on the fact that an application for a land-use permit has been filed, the problem-analysis approach removes whatever incentive the developers and municipal officials might have

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developer to pay the full cost of constructing a main trunk line sewer which lay beyond his subdivided tract and which served a large drainage area besides his development. The opinion suggests that it would be unconstitutional for a state legislature to authorize the imposition of such a condition. Compare this case with City of Buena Park v. Boyar, *supra* note 192.

194. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

195. The *Kelber* case arose under the California Subdivision Map Act, CAL. BUS. & PROF. CODE §§ 11500-625, and the issue before the court was whether the local ordinance related to the "design" and "improvement" of the subdivision, rather than whether the ordinance was within the scope of the police power. However, it is submitted that the language of the opinion is so strong that when the California courts are presented with a case involving similar conditions, they will reach the same result, regardless of the zoning context in which the case arises. Some limited support for this contention may be found in the fact that these courts have treated other cases arising under the Subdivision Map Act as defining the scope of the police power. See, *e.g.*, the use of *Ayres* in a subsequent variance case, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

196. 155 Cal. App. 2d at 638, 318 P.2d at 565. For a subsequent case which relies, in part, on *Kelber*, see Wine v. City Council, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960) (suggesting invalidity of conditions requiring payment of a large sewerage connection charge and payment of the costs of improving certain streets which were not within the boundaries of the proposed subdivision).

had to delay, respectively, the development of land and the construction of public improvements.[197]

Before this Article is concluded, mention should be made of two other situations which might be thought to present disguised exercises of the power of eminent domain. The first is where a permit is issued authorizing expansion of a nonconforming use subject to the condition that after a stated period, the applicant will terminate the entire use. The only case which has considered such a conditional permit held that because the applicant had accepted the stated condition, he could not raise the question of validity.[198] Because of the strong public interest in eliminating nonconforming uses,[199] it would seem that the condition should be sustained as within the police power, particularly in a state which recognizes the technique of "amortizing" such uses.[200] Furthermore, because the applicant is only required to change the use of his property and is not asked to transfer title to land or buildings to the municipality, this type of condition would not seem to raise as difficult a problem as was presented in the *Ayres* case.

The second situation which presents a possible eminent domain question arises when, in authorizing construction of a building near a public street, a municipality imposes a condition that in the event of condemnation the size of the condemnation award will be determined by amortizing the original cost of the building over a term of years, which term is substantially less than the actual useful life of that structure. A New York court has held that such a condition is invalid on the ground that it constitutes an uncompensated taking of property.[201]

*Conclusion*

It was pointed out in the first part of this Article that a broad power to attach conditions to land-use permits has generally been expressly conferred or readily implied only in the area of variances and exceptions. It was

197. If *Ayres* was, in part, incorrectly decided, it would seem that the result in Bringle v. Board of Supervisors, *supra* note 195, was a fortiori incorrect. In *Bringle,* the landowner used his property, under a conditional use permit, for the storage of excavation equipment. When the permit expired, he applied for a renewal but was told that a new permit would be issued only if he were willing to dedicate a right of way across his land. This condition was upheld, though it would seem to have had very little to do with solving new problems which continued operation of the business would create. The court, in reaching its conclusion, presumed that the action of the municipality was valid and stated without elaboration, that the landowner had failed to prove that his use would not create traffic problems.

198. Edmonds v. Los Angeles County, 40 Cal. 2d 642, 255 P.2d 722 (1953).

199. See the last paragraph in the section entitled *Regulation of Business Operations,* p. 131 *supra.*

200. See, *e.g.,* City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959).

201. Rand v. City of New York, 3 Misc. 2d 769, 155 N.Y.S.2d 753 (Sup. Ct. 1956).

submitted that a similar power should also be implied in the area of zoning amendments. Further, it was contended that a condition, whether stated in a statute or imposed by a municipal official under a broad power, should be limited by the scope of the police power.

When deciding whether a particular condition is within that power, courts seem to have been influenced by such factors as: (1) whether the condition is vague; (2) whether it is closely related to promoting public health and safety; (3) whether it is analogous to an established type of land-use control; (4) whether it deals with the day-to-day operations of a business; (5) whether a nonconforming use is involved; (6) whether the condition constitutes a personal license; (7) whether it is founded primarily on aesthetic considerations; (8) whether it tends substantially to remedy the problem which it is designed to solve; and (9) whether it constitutes a disguised exercise of the eminent domain or taxing power. With particular reference to conditions imposed on subdivision developers, it has been suggested that the "first-to-act" rule is an inadequate justification for requiring payment of fees or dedication of land, and that a more reasonable accommodation between public and private interests would be achieved if attention were focused on the fundamental purpose for imposing and sustaining any conditions in this area, *i.e.*, preventing the developer from creating problems which the municipality will subsequently have to solve. If the suggested problem-analysis approach were adopted, where it appears that a condition is designed to cope with a problem primarily created by something other than the developer's subdivision, such a condition would be struck down on the ground that it is not within the scope of the police power.