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Judicial Review of Zoning Administration

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Judicial Review of Zoning Administration

THE PRECURSOR OF THE MODERN ZONING ORDINANCE was promulgated by the City Council of New York City on July 25, 1916 when that body enacted the *New York Building Zone Regulation*.¹ Ten years subsequent to that resolution, the United States Supreme Court, in *Euclid v. Ambler Realty*, gave judicial endorsement to the zoning concept of land use control when Justice Sutherland enunciated for the majority that a city could enact such legislation under the auspices of its delegated police power.² From those two major events, zoning has evolved into its present state of confusion involving the interrelation of legislative, administrative and judicial functions.

This discussion will focus on the role of the courts in zoning administration — judicial review. More specifically, the limitations of that role, as it is now employed, will be examined with a suggested alternative. However, before a meaningful explanation of that topic can be undertaken it is necessary to provide a brief description of the zoning procedure before judicial review is summoned into the fray. For this reason, the initial portion of this comment is devoted to a general discussion of the source of the municipality's authority to promulgate zoning ordinances, and the makeup and function of the local zoning board. Provided with this background, one should be better able to appreciate the problems encountered by the courts when judicial review is applied.

The Origin of Zoning Authority and the Board of Zoning Appeals

In Ohio, the axiom for municipal ordainment of zoning regulations is Article XVIII, Sec. 3 of the State Constitution, the home rule provision for a municipal corporation.³ Refinement on the procedure is afforded by the municipal charter,⁴ with final specifications and possible deviations for a particular area enumerated in the zoning ordinance.⁵ The two latter pronouncements have the common source of the State's police power as delegated to the city.⁶

¹ "ZONING VARIANCE IN NEW YORK CITY," 3 COLUMBIA JOURNAL OF LAW & SOCIAL PROBLEMS 120 (1967).

² *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³ 10 OHIO JUR. 2d CONSTITUTIONAL LAW §228 (1954). In Ohio a municipal corporation is able to enact zoning ordinances without a state enabling statute. Young, "The Regulation & Removal of Non-Conforming Uses," 12 W. RES. L. REV. 681, 683 (1961).

⁴ C. CRAWFORD, STRATEGY & TACTICS IN MUNICIPAL ZONING 104 §11.2 (1969) [hereinafter cited as "CRAWFORD"].

⁵ *Id.*

⁶ See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), where J. Sutherland states in his opinion "Government power to interfere by zoning regulation with the general rights of the landowner by restricting the character of his use is not unlimited . . . such restriction cannot be imposed unless it bears a substantial relation to public health, safety, morals or general welfare. See also, *Cleveland Trust Co. v. Brooklyn*, 92 Ohio App. 351, 110 N.E.2d 440 (1952).

Thus, in accordance with the normal limitations on police powers, such zoning regulations must have a tendency to serve the health, safety, morals or general welfare of the community.⁷

Theoretically, zoning precepts reflect a precise weighing of public interests and private deprivation in their application. To accomplish what is not readily possible by the naked zoning resolution, an administration agency is established to exercise amelioration in varying the stringent letter of those ordinances.⁸ The purpose of this agency is to provide the necessary flexibility when conditions warrant,⁹ alleviate the hardships an individual situation may cause and generally prevent the ordinance from becoming the unconstitutional taking of property from the land owner without due process of law.¹⁰

The local administrative medium (hereinafter referred to as the "board" or "agency") thus becomes the heart of zoning application.¹¹ Its powers have been delegated to it by the city council¹² to exercise discretionary authority upon request for variations, exceptions, non-conforming uses and accessory uses.¹³ Dissatisfied property owners can appeal to this board from adverse ruling by the administrative officer (typically the building commissioner) or request one of the above-mentioned alterations to the zoning ordinance.¹⁴

The typical agency is composed of local citizens appointed by the mayor with the approval of council.¹⁵ Qualifications vary, but

⁷ J. ADAMS, "MUNICIPAL ZONING," MUNICIPAL LAW CONFERENCE (OHIO LEGAL CENTER INST. REFERENCE MANUAL FOR CONTINUED EDUCATION) 11.02 (73-1972).

⁸ *In re Appeal of Clements*, 2 Ohio App. 2d 201 at 207, 207 N. E. 2d 573, 577 (1965).

⁹ "Zoning regulations must be strictly construed because [they are] in derogation of property owner's constitutional rights" C. J. Bell of the Pennsylvania Supreme Court in *Cleaver v. Bd. of Adj. of Tredyfrin Township*, 414 Pa. 367, 200 A.2d 408, 412 (1964). Comment, "Judicial Control over Zoning Boards of Appeals: Suggestions for Reform," 12 U.C.L.A. L. REV. 937, 951 (1964-65).

¹⁰ *Bieger v. Moreland Hills*, 3 Ohio App. 2d 32, 37, 209 N. E. 2d 218, 221 (1965).

¹¹ Under some zoning systems the planning commission can be the administrative body with authority equivalent to the board of zoning appeals. N. MARCUS & M. GROVES, *THE NEW ZONING: LEGAL ADMINISTRATION AND ECONOMIC CONCEPTS AND TECHNIQUES* 5 (1970). [Hereinafter cited as "MARCUS"]. Future reference to the board of zoning appeals herein will be synonymous to board of adjustments, planning commission, or whatever the name is attached to the agency which performs a similar function.

¹² *Id.* xxi.

¹³ Uses not according to zoning ordinances: 1) Exceptions; ordinance specifically allows a property owner to use his property in the manner other than primarily intended by the enactment if certain conditions exist. 2) Variances; board can hear a request by an owner to use land not in accordance with the ordinance. 3) Non-conforming uses; uses in existence when the ordinance was effective but does not comply with zoning regulation. 4) Accessory uses; incident to conforming use but not sanctioned by ordinance. Young, "The Regulation and Removal of Non-Conforming Uses," 12 W. RES. L. REV. 681, 684-685 (1961).

¹⁴ MARCUS, *supra* note 11 at 97.

¹⁵ WARRENSVILLE HEIGHTS (OHIO) CITY CHARTER, art. V §8(b). Such a provision is typical and the above is cited only as an example.

the average member is not trained in the law, is in "harmony" with local public opinion, has close association with those in the community and is familiar with the general areas of the city.¹⁶ The local nature of zoning issues lend credence to the last three qualifications.¹⁷ Likewise, the parochial characteristics of land use tend to justify autonomous responsibility and control of zoning variations accomplished through these agencies. It must be noted, however, that these same close community alliances of the board's members, coupled with their non-legal background, can be a prolific source of problems¹⁸ when the requirements of due process are considered.

In light of the reality of the board's makeup and the political considerations involved, an adequate safeguard must be installed to check possible abuses of discretion.¹⁹ The lack of a specific administrative "watchdog" has been noted as one of the major deficiencies in the present system²⁰ and that inadequacy has caused an undue burden on judicial review as an attempt to impose some licit order and form in the execution of zoning decisions.²¹ Because the courts are generally an unwilling recipient of this responsibility, judicial review of zoning administration is, at best, "fraught with difficulty."²²

Judicial Review of Zoning Administration

Due to the absence of an administrative check on local zoning, judicial review has been historically relied on to provide control.²³ The essence of the court's action in this capacity is to "control the

¹⁶ Comment, "Judicial Control over Zoning Boards of Appeal: Suggestions for Reform," 12 U.C.L.A. L. REV. 937, 946 (1964-65) [Hereinafter cited as "Comment"]

¹⁷ D. MANDELKER, THE ZONING DILEMMA: A LEGAL STUDY FOR URBAN CHANGE 3 (1971). [Hereinafter cited as "MANDELKER"]

¹⁸ CRAWFORD, *supra* note 4 at 37 §3.2; McCarty, "Zoning and the Property Rights of Others," 48 MASS. L. R. 473, 499-500 (1963); Comment, *supra* note 16 at 946 & 953. The following was quoted in Michalski, "Zoning — The National Peril," *Planning* 62-64 (1963) [selected papers from the Annual Planning Conference of the American Society of Planning Officials] as quoted in R. BABCOCK, THE ZONING GAME 91 (1966):

Many planning commission hearings have taken on the characters of an oriental bazaar where applicants wheel and deal with the commission on conditions and restrictions to be imposed on zoning . . . Two often decisions are not based on facts or master plans, but on pressures of bitterly complaining or approving neighborhood improvement associations . . . The protection of health, safety and general welfare has been forgotten in the desire to control competition, keep out foreigners, favor special interests, obtain public right of way for free, zone tax users out and high tax payers in.

¹⁹ Comment, *supra* note 16 at 937.

²⁰ Dowd, *The Courts as a Restraint on Administrative Power: A Comparative Study in Constitutional Theory*, 40 U. DET. L. J. 597, 615 (1962-63).

²¹ MANDELKER, *supra* note 17 at 4; Comment, *supra* note 16 at 944. The purpose of judicial review is generally to insure that the actions of an agency have been "in accordance with the cherished judicial traditions embodying the basic concepts of fair play. See also Morgan v. United States, 304 U.S. 1, 22 (1937).

²² 2 E. YOKLEY, ZONING LAW AND PRACTICE 341 §18-7 (3rd ed. 1965) [Hereinafter cited as "YOKLEY"].

²³ MANDELKER, *supra* note 17 at 4.

administrative action [of the local zoning board] against the framework of statutory guidelines."²⁴ The courts are utilized for this function (judicial review of zoning) in all the states²⁵ in varying degrees of importance and impact depending, primarily, on whether a trial de novo is allowed or not. As a caveat, however, authors have warned that judicial review should not be regarded as a panacea.²⁶ The local boards exercise the discretionary authority involved and the courts act in a general form of supervision to avoid only the flagrant abuses of such power by the agency.²⁷ As Justice Mowbray of the Supreme Court of Nevada noted in *Coronet Homes, Inc. v. McKenzie*, "Courts are becoming increasingly aware that they are neither super boards of [appeals] nor planning commissions of the last resort."²⁸ Functionally, the courts are to determine if the board's action was arbitrary on the basis of that agency's evidence.²⁹ The resulting dilemma for judicial review is, generally, how to impose a safeguard against board abuses and not interfere with the operational effectiveness.³⁰

The statutory means, in Ohio, of appealing to the courts from an adverse board decision, to test either the validity of the ordinance or solicit perusal of the final administrative order, is Sec. 2506.01 et. seq. of the Ohio Revised Code (ORC).³¹ This Section of the Code does not intend to substitute the courts for the local agency³² but to provide the vehicle of access to the judiciary. Such a provision is necessary considering that the Ohio Administrative Procedure Act (Sec. 119.01 et. seq. of the ORC) applies only to designated State agencies.³³ Thus, the proper nexus between the zoning

²⁴ Comment, *supra* note 16 at 944.

²⁵ 3 R. ANDERSON, *AMERICAN LAW OF ZONING* 544-545 §21.01 (1968).

²⁶ "Zoning Variance in New York City," 3 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 120, 133 (1967).

²⁷ B. BOOLAY, *PLANNING AND ZONING IN THE UNITED STATES* 70 (1961).

²⁸ *Coronet Homes, Inc. v. McKenzie*, 439 P.2d 219, 223 (Nev. 1968).

²⁹ 23A *S P O Zoning Digest* 51 (1971) citing *Wells v. Fiscal Ct. of Jefferson County*, 457 S. W.2d 498 (Ky. 1970).

³⁰ Comment, *supra* note 16 at 937.

³¹ *Shaker Coventry Corp. v. Shaker Heights*, 115 Ohio App. 472, 473, 180 N.E.2d 27, 29 (1962). Chapter 2506 of the Ohio Revised Code, Appeals from Orders of Administrative Officers and Agencies, was promulgated to lend clarification to the procedural steps for appeal from the final order of any agency of any political subdivision of the state not otherwise designated within the Code. ORC §2506.1. The dual purpose of the enactment is to protect the rights of the municipality (or any other subdivision) and ensure due process protection for the individual. Koach, "Appeals from Orders of Administrative Agencies," MUNICIPAL LAW CONFERENCE (OHIO LEGAL CENTER INST. REFERENCE MANUAL FOR CONTINUED EDUCATION) (73-1972).

³² *Shelby Realty, Inc. v. Springdale*, 27 Ohio App. 2d 204, 208, 273 N.E.2d 800, 802-803 (1971).

³³ 1 OHIO JUR. 2D ADMINISTRATIVE LAW & PROCEDURE §61 (1953).

board and the court is Charter 2506 of the ORC. However, legislative action (enacting the zoning ordinance³⁴) is not appealable under the above provisions.³⁵

A study of judicial review in this area is more properly an examination of inadequacies rather than adequacies, as this tribunal's power is limited, nearly to the point of impotency, by several factors. Broadly, these factors include: 1) the necessity that the administrative procedure be exhausted³⁶ and a final order be obtained;³⁷ 2) the presumption of validity given to the zoning ordinance and the board actions;³⁸ and 3) the reluctance of the courts to hear zoning cases.³⁹

The initial curb, exhaustion of the administrative procedure, is a usual feature of administrative law. Compliance with this requirement should be alledged and the obtainment of a final order is essential.⁴⁰ On the surface, then, there appears to be nothing more restrictive here than in any other appeal from a board action to the courts. However, in the administration of local zoning, a point of disarrangement arises in some cases when the query is, which body issues the final administrative order?

Logic would imply that the administrative agency, be it the board of zoning appeals or the planning commission, would be the procedural terminal point. Some municipalities, however, afford an appeal from such an agency to the city council or reserve final approval for that body,⁴¹ the legislative branch in the zoning system. A final decision from the latter may thus have the aura of a legislative action and possibly appear to be a bar to judicial review.

In *Jacobs v. Maddux*, C.J. William O'Neill of the Ohio Supreme Court pronounced such activity by the city council to be executory by the maxim that if settlement of such an appeal involves the application of existing law it is an administrative function.⁴² This served to expand the Ohio doctrine on the matter explained one year earlier, that the granting of a variance was an administrative

³⁴ YOKLEY, *supra* note 22 at 363 §18-6.

³⁵ *Berg v. Struthers*, 176 Ohio St. 146, 198, N.E.2d 48 (1964).

³⁶ *State ex rel Lieux v. Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951).

³⁷ *State ex rel Forman v. Bellefontaine*, 1 Ohio St. 2d 132, 205 N.E.2d 398 (1965); *Fleischmann v. Medina Supply Co.*, 111 Ohio App. 449, 453, 173 N.E.2d 168, 170 (1960).

³⁸ *In re Appeal of McDonald*, 119 Ohio App. 15, 16, 196 N.E.2d 333, 334 (1963) (case later questioned on a different point).

³⁹ MANDELKER, *supra* note 17.

⁴⁰ *State ex rel Foreman v. Bellefontaine*, 1 Ohio St. 2d 132, 205 N.E.2d 398 (1965).

⁴¹ *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1, 2, 233 N.E.2d 500, 501, (1968); *In re Appeal of Clements*, 2 Ohio App. 2d. 201, 207, 207 N.E.2d 573, 577 (1965).

⁴² *Jacobs v. Maddux*, 7 Ohio St. 2d 21, 23, 218 N.E.2d 460, 461 (1966).

endeavor regardless of which municipal commission or council rendered it.⁴³ Further limpidity was provided by J. Zimmerman when he stated that a legislative body could indeed operate in an administrative capacity, the test being whether such activity was the making of a law or the executing of one already in existence.⁴⁴

Thus, it now appears well settled that when the legislative body of a city reserves powers to itself which are customarily discharged by an agency, the council's decision is subject to judicial review.⁴⁵ The council's action under such conditions is simply not legislative in nature and, therefore, appealable.⁴⁶ One must bear in mind, however, that this duty of the legislature is the granting of a variance, exception, etc. and not the initial enactment of a zoning ordinance.

J. Oppenheimer of the Maryland Court of Appeals made a pungent observation in *Poe v. Baltimore* when he noted, "There are few absolutes in the law, and the rule that an administrative remedy must be exhausted before recourse is had to the courts is not one of them."⁴⁷ This is true in Ohio, as it is elsewhere and the courts will not require the doing of a vain act⁴⁸ or pursuing an administrative process that cannot afford an adequate remedy.⁴⁹ Unfortunately, when it is observed that procedural ignorance reigns supreme in zoning application at the local (and higher) level, it is easy to understand why an applicant may exhaust himself before his administrative remedies and thus not employ the court's aid when appropriate.

To better appreciate the second tempering factor, the presumption of validity allocated to the zoning enactment, it is necessary to observe that when an appeal is brought to and accepted by the court for review, the judiciary poses three general queries: 1) Did the administrative agency possess the requisite power and authority to render the decision? 2) Was due process afforded the applicant? 3) Did the agency abuse its discretion?⁵⁰ These questions are not all present in every zoning review case but depend on the issues raised by the appellant. They do serve as a preface to the relatively narrow perusal given by the court.

⁴³ *In re* Appeal of Clements, 2 Ohio App. 2d 201, 209, 207 N.E.2d 573, 579 (1965).

⁴⁴ *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1, 3, 233 N.E.2d 500, 502 (1968).

⁴⁵ R. ANDERSON, *AMERICAN LAW OF ZONING* 551, 555-556 §21.04 (1968).

⁴⁶ *Bieger v. Moreland Hills*, 3 Ohio App. 2d 32, 37, 209 N.E.2d 218, 222 (1965).

⁴⁷ *Poe v. Baltimore*, 241 Md. 303, 306, 216 A.2d 707, 709 (1966).

⁴⁸ *Killeen Realty Co. v. East Cleveland*, 169 Ohio St. 375, 378-379, 160 N.E.2d 1, 4 (1959).

⁴⁹ *Cubbon v. Winterfeld*, 104 Ohio App. 260, 264, 148 N.E.2d 523, 526 (1957).

⁵⁰ *Reid v. Cleveland Heights*, 119 Ohio App. 67, 68, 192 N.E.2d 74, 75 (1963). The fourth question, was the ordinance constitutional? is too involved to warrant treatment here.

The first inquiry is usually settled by making reference to the city's charter and/or the zoning ordinance involved. The board's powers are delegated to it by the city council and, as has been mentioned previously, the two bodies are interwoven closely enough so that seldom will the authority necessary not have been executed properly by someone.

The light impact of the second and third interrogatories are more readily appreciated when consideration is given to the fact that the local board can formulate its own fact finding procedure.⁵¹ Couple this with the premises that Ohio with certain qualifications does not allow for a trial de novo in appeals from administrative agencies⁵² and that the court's interrogation relies on the records as supplied by the board from which the appeal originated.⁵³ It can now be observed that due process may be lost in the administrative maze and abuse of discretion would necessarily have to be flagrant before prompting judicial response.

The necessity of providing clarification in the evidence gathering procedure has not escaped the court's attention as can be seen by the observation of J. Jones of the Geauga County Court of Appeals, "A litigant ought not suffer the consequences of a procedure that is . . . loose and indefinite."⁵⁴ Referring to Chapter 2506 of the ORC, the court concluded in *Shaker Coventry Corp. v. Shaker Heights*, that it would grant broad discretion in admitting new evidence considering that the administrative procedure of some boards of zoning appeals are "not conducted with the considered deliberation and objectivity warranted in every case."⁵⁵ Thus, the judicial amelioration of allowing additional evidence when required "in the interest of justice"⁵⁶ has given an applicant a slight chance to overcome the parochial bias to which he may have been subjected. But, if in fact this is a trend, it is apparently too slow, too indefinite, too unclear and too subjective as to each court to be effective in improving zoning law.

⁵¹ *Deibel v. Wilson*, 77 Ohio L. Abs. 471, 475, 150 N.E.2d 448, 452 (Franklin Co. Ct. of App. 1957).

⁵² *In re Appeal of Manning*, 117 Ohio App. 55, 189 N.E.2d 651 (1962).

⁵³ OHIO REV. CODE §2506.02.

⁵⁴ *Chester Township v. Kline*, 19 Ohio App. 2d 63, 66, 249 N.E.2d 921, 924 (1969).

⁵⁵ *Shaker Coventry Corp. v. Shaker Heights*, 18 Ohio Op.2d 272, 275, 176 N.E.2d 332, 335 (C.P. Cuyahoga Co. 1961); *aff'd* 115 Ohio App. 472, 180 N.E.2d 27 (1962); appeal dismissed 173 Ohio St. 572, 184 N.E.2d 212 (1962).

⁵⁶ *Vlad v. Cleveland*, 111 Ohio App. 70, 74, 164 N.E.2d 797, 800 (1962) The court explained that under OHIO REV. CODE §2506.03 the Common Pleas Court could admit new evidence in such a situation.

Thus, the second limitation, the presumption of validity given to the zoning enactment and the administrative decision, has a tendency to frustrate supervisory control by the courts⁵⁷ as it nearly requires a judicial finding of board misconduct before a discretionary decision of the latter can be interfered with by the courts.⁵⁸ Some authors believe such a "drastic" requirement is "unfortunate"⁵⁹ as it appears to pay tribunal homage to form rather than justice.

The burden of overcoming this prima facie validity falls upon the applicant as the attacker of the board's decision or zoning ordinance.⁶⁰ He must cogently demonstrate that, 1) serious injury is done to his land, and 2) the ukase is not a licit exercise of the municipality's delegated police power.⁶¹ Such a burden of proof weighs heavily on the average applicant and may preclude his appeal to judicial review, except in the most clearcut case of capricious discretionary abuse by the board.

The final barrier, and perhaps the most formidable, is the court's reluctance to entertain zoning litigation. The extent of this aversion is best manifested by statements from members of the bench.

C.J. John C. Bell of the Pennsylvania Supreme Court allowed publication of his sentiments when he was quoted by the "Washington Post" as saying, "[T]he Pennsylvania Supreme Court no longer will hear zoning and other cases of little significance . . ."⁶² Similar attitudes are apparent in recorded decisions such as the *First National Bank and Trust Co. v. Evanston* where the Illinois Supreme Court refused to hear a zoning contest because it lacked the "substantial question" required by the amended state constitution.⁶³ Georgia's highest court proclaimed that an alteration in that State's constitution had accomplished what must be the epitome of local autonomous land use control, stripped the court of judicial review powers over zoning administration.⁶⁴ A summation and enlightening

⁵⁷ Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A. L. REV. 937, 949 (1964-65).

⁵⁸ B. POOLEY, *PLANNING & ZONING IN THE UNITED STATES* 69 (1961).

⁵⁹ *Id.*

⁶⁰ 2 J. MEYZENBAUM, *LAW OF ZONING* 942 (2d ed. 1955).

⁶¹ *In re Appeal of McDonald*, 119 Ohio App. 15, 16, 196 N.E.2d 333, 334 (1963) (later questioned on a different point); *Shopping Centers of Greater Cincinnati, Inc. v. Cincinnati* 110 Ohio Op.2d 313, 315, 173 N.E.2d 196, 198 (C.P. Hamilton Co. 1958).

⁶² "THE WASHINGTON POST" (Dec. 1, 1963) as quoted in R. BABCOCK, *THE ZONING GAME* 104 (1966).

⁶³ *First Nat'l. Bank & Trust Co. v. Evanston*, 30 Ill. 2d 479, 197 N.E.2d 705, 707 (1964).

⁶⁴ *Vulcan Mat'l. Co. v. Griffith*, 114 S.E.2d 29 (Ga. 1960).

explanation was supplied by C.J. Duckworth of that court when he stated, "We [the courts] have neither the information nor desire to make public policy in respect to legislative uses of private property."⁶⁵

This admitted lack of expertise, allied with the incredible "mishmash" of local procedure and factual "brambles"⁶⁶ thus generated makes the courts' reluctance to deal with zoning cases understandable. The courts are, as has been noted above, hesitant to look at the fairness of zoning application and the criteria upon which such decisions are made at the local level.⁶⁷ Notwithstanding the improvements noted, the effectiveness of judicial review over zoning administration, as it now prevails, appears thwarted.

Alternative to Judicial Review

Judicial review is not the problem. The difficulty lies in the chaotic condition of the subject matter when presented to the court for its perusal. This disarray is spawned by the lack of uniformity at the local level. Apparently, the means of clarification is via legislative action to install the requisite procedural guide for zoning appeals boards and creation of a "watchdog" agency.⁶⁸ This last suggestion alone may prove valuable, as it would establish an administrative body more remote from the emotional aspects under which the local boards labor. Theoretically, such an agency would be the buffer between the courts and community and could serve as an arbitration on application of zoning ordinances and overseer on local board procedure.

This structure is modeled on the English system. There, a four step process is applied in land control:

- 1) There is a general plan, but no zoning ordinance, specified by local application, not by predetermination.
- 2) A land owner applies to local authorities for permission for specific development.
- 3) The authority to grant permission for land use is in local officials.
4. There is a national ministry to review the local decision upon appeal by the applicant.⁶⁹

⁶⁵ *Id.* at 33.

⁶⁶ R. BABCOCK, *THE ZONING GAME* 106 (1966).

⁶⁷ MANDELKER, *supra* note 17 at 71.

⁶⁸ Dowd, *The Courts as a Restraint on Administrative Power: A Comparative Study in Constitutional Theory*, 40 U. DET. L.J. 597, 615 (1962-63).

⁶⁹ MANDELKER, *supra* note 17 at xi.

With the exception of predetermination by means of the zoning ordinance and lack of administrative overseeing, the Ohio format is structurally similar to the English procedure. With the retention of the former and addition of the latter, judicial review could be reassigned a more productive role in zoning administration.

The proposed agency could be state or county wide. How broad or narrow its powers would be is debatable, but generally should not be extended to interfere with the local promulgation of zoning ordinances. Basically, its functions should include, 1) clarifying uniform procedures for local board hearings and evidence gathering duties, and 2) providing a more objective administrative appellate body before judicial review is resorted to by the municipality. This format should then provide the courts with a more lucid and accurate transcript for utilization in judicial review.

Conclusion

The premise throughout this discussion has been that the present system of judicial review in zoning administration is in need of amendment. The courts appear uncomfortable and mal-equipped in their role, the property owner is often denied use of his land without due process, and the local board is uncertain (and occasionally unconcerned) as to the extent of its authority under the city zoning ordinance and administrative law. A plan akin to that proposed above could afford a balancing of the municipality's legitimate concern in keeping land use control parochial and protection of the land owner against deprivation of his property without due process.

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