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The Administration of Zoning Flexibility Device
An Explanation for Recent Judicial Frustration

Recent Minnesota zoning cases have contained language which, taken at face value, tends to subvert long-established governmental powers to regulate land use. The author of this Note examines three such decisions arising from the use of zoning flexibility devices, analyzes the language that has occasioned concern, and considers silent factors that may explain the results. He contends the decisions should have been and possibly were grounded on an unarticulated and entirely justifiable concern with the absence of effective limitations upon the administration of the flexibility devices involved. He concludes that even though the court reached correct results in the subject cases, it should clarify its reasoning to avoid confusion on the part of local governmental officials and their counsel as to the scope of the zoning power.

INTRODUCTION

“Courts Don’t Understand Zoning” cried a Minneapolis suburban newspaper headline.\(^1\) The accompanying article quoted a city manager as declaring “I have a feeling that the [Minnesota] Supreme Court does not fully understand the requirements of zoning to protect citizens in general,” although he admitted that municipalities might share responsibility for the misunderstanding. The same article reported the complaint of a city attorney that “the [Minnesota] Supreme Court has been holding regularly in favor of owners of specific properties, probably without giving enough consideration to effects upon surrounding properties.” Similar comments from other members of the bar reflecting concern and doubt as to the import of recent Minnesota zoning decisions prompted the writing of this Note.

The burden of this Note is that the concern and doubt reflects judicial language relating to matters which need not have been considered by the court. This language includes such comments as the use of the zoning power to effect authentic objectives; the extent to which property value may be diminished through the application of zoning regulations; limitations on the application

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of zoning ordinances to property purchased before their effective date; the scope of appellate review of a trial court's findings; and the relationship between nuisance and zoning law. It is submitted that the real issues raised by these cases, and obscured by this language, involve the use of certain devices designed to impart greater flexibility to the exercise of the zoning power. In two of these cases the device used was a "special permit," and in a third it was a "hold order." In each, inadequate attention was given the flexibility device and the manner of its use. Though the results were probably correct, they ought to have been rested on the absence of adequate limitations upon the use of the flexibility device rather than the factors relied upon by the court.

An analysis of the language contained in three of these decisions, together with an examination of unexpressed factors which they share, may contribute to better understanding by both municipalities and the judiciary of each other's responsibilities and problems in relation to the administration of the zoning flexibility devices involved.

The procedure followed in this Note is to present brief abstracts of the subject cases, including the language within each which has occasioned concern. Elements of this language are then analyzed separately. Finally, attention is given the unconsidered or inadequately considered factors upon which the decisions arguably should have been rested—the absence of restrictions upon the exercise of discretion in employing the zoning flexibility devices. Consideration of other zoning flexibility measures or of modern zoning philosophy in general, with its attributes and deficiencies, is beyond the scope of this Note.

I. THE SUBJECT CASES

In Olsen v. City of Minneapolis\textsuperscript{2} plaintiff wished to construct a service station on property that was zoned for commercial use including service stations,\textsuperscript{3} although located in a predominantly residential area near a school. A city ordinance enacted subsequent to the zoning ordinance required that a "special permit" be obtained from the city council before the

\textsuperscript{2} 263 Minn. 1, 115 N.W.2d 734 (1962).

\textsuperscript{3} The comprehensive zoning ordinance in force at that time provided that all buildings and premises located in the commercial district could be used, "except as otherwise provided in this ordinance," for any use permitted in the multiple dwelling district or for any other use, and then specifically enumerated exceptions which did not include gasoline filling stations. MINNEAPOLIS, MINN., ORDINANCES 1:31–5 (1939).
construction of a service station was undertaken, but established no standards for the council to use in acting upon permit applications. Upon the council's refusal to issue plaintiff a permit, an action was commenced to compel issuance. The trial court rejected the city's claims that the proposed service station would create fire, traffic, health, and safety hazards and enjoined interference with its construction. On appeal the supreme court affirmed, apparently holding that the council was bound by the commercial classification of the property under the comprehensive zoning ordinance in the absence of findings supported by the evidence that the proposed use would constitute a nuisance, and pointing out that the city had not even claimed that the service station would be a nuisance. Further, the court noted that a trial court's findings of fact were entitled to the same weight as a jury verdict and would not be reversed on appeal unless manifestly contrary to the evidence. The court also speculated that the city's motive for rejecting the plaintiff's request was fear that a filling station would not accord with neighborhood development. Rejecting the propriety of such a motive, the court declared that purely aesthetic considerations were an inadequate basis for deprivation of property interests without compensation. Finally, the court asserted that one who acquires property classified under a comprehensive zoning ordinance should be able to rely upon that classification as against the "arbitrary enactment of amendments" which tend to diminish the value of the property.

Golden v. City of St. Louis Park also involved the denial of a request for a special permit. Plaintiff wished to operate an auto reduction yard on property located in a heavy industrial zone. The city zoning ordinance provided that no structure or land in a heavy industrial zone could be used for such a purpose except by special permit granted by resolution of the city council. It also enumerated standards to be applied by the council in considering applications for special permits, though they were essentially those contained in the state zoning enabling acts.

4. MINNEAPOLIS, MINN., ORDINANCES 1:17 (1959). The 1960 reenactment of this section is substantially the same.
5. 263 Minn. at 11, 115 N.W.2d at 741.
6. 263 Minn. at 12, 115 N.W.2d at 741, citing, inter alia, State ex rel. Foster v. City of Minneapolis, 255 Minn. 249, 97 N.W.2d 273 (1959).
7. 266 Minn. 46, 122 N.W.2d 570 (1963).
with some deviations. Finally, it provided that a motion of the council denying a permit application constituted a finding and determination that the standards for issuance of a permit had not been satisfied. In a suit for a declaratory judgment that the plaintiff was entitled to a permit, the trial court held for the plaintiff, rejecting the explanation proffered by the city for denying the permit and concluding that aesthetics formed the primary reason for doing so. In affirming this decision, the supreme court held that there was ample evidence to sustain the lower court's determination that the council's rejection of the application was unrelated to promotion of the public health, safety, or welfare, and was therefore arbitrary and unreasonable. The court asserted that it was unconstitutional to destroy property rights without compensation solely to realize aesthetic objectives.

In Alexander v. City of Minneapolis, plaintiff had purchased property zoned for multiple dwellings to a height of six stories. The city council subsequently passed a "hold order" prohibiting the issuance of building permits for that property pending adoption of a new comprehensive zoning ordinance. Although a new ordinance had never been enacted, plaintiff's application for a building permit nine years later was refused on the basis of the

9. St. Louis Park, Minn., Ordinance 730, Dec. 28, 1959, § 6:193, provides in part:

   ... the City Council shall consider the advice and recommendations of the Planning Commission and the effect of the proposed use upon the health, safety and welfare of occupants of surrounding lands, existing and anticipated traffic conditions, including parking facilities on adjacent streets, and the effect on values of property in the surrounding area, and the effect of the proposed use on the Comprehensive Plan. If it shall determine by resolution that the proposed use will not be detrimental to the health, safety or general welfare of the community nor will cause serious traffic congestion nor hazards, nor will seriously depreciate surrounding property values, and that the same is in harmony with the general purpose and intent of this ordinance and the Comprehensive Plan, the Council may grant such permits and may impose conditions and safeguards therein.

The zoning enabling acts for municipalities of various sizes authorize the use of zoning to promote the public "health, safety, order, convenience, prosperity, and the general welfare." Minn. Stat. §§ 462.01, .05, .18 (1961).


11. The trial court thought that the city's claims that establishment of the proposed auto reduction yard would create health, parking, traffic, law enforcement and drainage problems, adversely affect surrounding property values, and constitute a nuisance were unfounded. See 266 Minn. at 52, 122 N.W.2d at 574.

12. 267 Minn. 155, 125 N.W.2d 583 (1963), 49 Minn. L. Rev. 109 (1964).
hold order. Prior to plaintiff's application, surrounding land-
owners had petitioned for a rezoning of his property. Before trial, 
the city council had rezoned property including plaintiff's in ac-
cordance with the petition to permit multiple dwellings to a 
height of only two and one-half stories. In plaintiff's action for a 
declaratory judgment that he was entitled to a building permit, 
the trial court invalidated both the hold order and the zoning 
amendment as applied to plaintiff's property. On appeal the su-
preme court affirmed, holding that the state zoning enabling act 
did not authorize the indefinite suspension or nullification of zon-
ing ordinances by hold orders and, for grounds that are unclear, 
that the amendment was also invalid as applied to this prop-
erty. The court noted that application of the amendment would pro-
duce a substantial diminution in the value of plaintiff's property. 
It also asserted that the enactment of “spot” zoning ordinances 
or amendments to comprehensive zoning ordinances which result 
in a “total destruction” or “substantial diminution” in value of 
the affected property constitutes the taking of property without 
due process of law. It declared that this was especially true where 
the enactment is motivated by aesthetics. Finally, the court 
iminted that the purchase of property with intent to use it as 
the then effective zoning ordinance allows ordinarily gives the 
purchaser a right so to use it.

II. AN ANALYSIS OF THE FOREGOING 
JUDICIAL COMMENTS

A. AESTHETICS AND THE ZONING POWER

In all three of the subject cases, the court asserted or strongly 
iminted that zoning for solely aesthetic reasons is invalid. This 
is the traditional view, although many courts have said that 
zoning which is justifiable on other grounds is not invalid simply 
because it incidentally reflects a desire to achieve aesthetic ends. 
However, there is often an important difference between what

13. For a detailed analysis of this case, see 49 MINN. L. REV. 109 (1964).
14. See 8 McQuillin, MUNICIPAL CORPORATIONS § 25:29 (3d ed. 1963) 
[hereinafter cited as McQuillin]; 1 Rathkoff, ZONING AND PLANNING 11–1 
(3d ed. 1992) [hereinafter cited as Rathkoff]; 1 Yokley, ZONING LAW AND 
15. A fairly representative statement of the traditional rule is given in 
E.g., Welch v. Swasey, 193 Mass. 364, 375, 79 N.E. 745, 746 (1907): “The in-
habitants of a city or town cannot be compelled to give up rights for purely 
aesthetic objects; but if the primary and substantive purpose of the legisla-
tion is such as justifies the act, considerations of taste and beauty may enter, 
in, as auxiliary.”
is said and what is done in this area. Significant aesthetic motivations are sometimes ignored by the courts, and rarely faced squarely. Thus the courts have upheld certain types of zoning seemingly founded largely upon aesthetic considerations, e.g., billboard restrictions and devices to protect historically significant areas, without conceding that aesthetics is a permissible basis for exercising the zoning power.

The United States Supreme Court indicated in a famous 1954 dictum that aesthetic considerations are within the scope of the “public welfare.” True, this was said in an eminent domain rather than a zoning case, so that it does not afford direct support for the proposition that zoning for purely aesthetic purposes is within the police power. Nevertheless, the statement does reflect considerable evolution in attitude during the last several decades toward the role of aesthetic considerations in land-use

16. This was noted 35 years ago, Light, Aesthetics in Zoning, 14 Minn. L. Rev. 109, 122 (1930), and seems more obvious today. Compare Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Probs. 218 (1955). As one commentator observed, “It must surely be admitted that much zoning which is in fact inspired by aesthetic considerations achieves constitutionality by a somewhat spurious implied connection with the public health, welfare, safety, or morals.” Pooley, Planning and Zoning in the United States 85 (1961).


18. A recent Ohio decision upheld the constitutionality of statutes restricting the use of billboards near interstate highways. Gherster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964). One commentator has suggested this decision impliedly held that aesthetics was a sufficient basis for a valid exercise of the police power. 16 W. Res. L. Rev. 431, 435 (1965). See generally Moore, Regulation of Outdoor Advertising for Aesthetic Purposes, 8 St. Louis U.L.J. 101 (1963).


20. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.


One state court has seized upon it for support in upholding an ordinance restricting architectural design, although it relied primarily upon the alleged tendency of architectural non-conformity to diminish substantially neighboring property values. The latter ground, however, is of dubious validity, since it has long been recognized that preservation of property values is merely a derivative of zoning objectives—a by-product of the desired end, which is the stabilization of the living and working milieu.

The New York Court of Appeals has frankly considered the propriety of zoning for aesthetic purposes and upheld the ordinance before it, although some reliance was also placed upon the tendency of the regulation to conserve property values. It would seem not only that aesthetics should be a proper basis for an exercise of the zoning power, but also that the courts probably would uphold some ordinances based primarily on aesthetics. They have had no difficulty finding that aesthetic considerations are proper where one or more of the traditional bases for zoning are found to exist. In fact it may well be that even where invocation of a conventional basis for zoning is unpersuasive in a particular case, the courts will uphold the ordinance because the aesthetic undesirability of the prohibited use seems so clear. Many commentators have therefore urged open recognition of the substantial role played by aesthetics in zoning. The essentially subjective nature

22. Professor Rodda asserts that the change has been so great that the traditional rule is now largely a fiction. Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 So. Cal. L. Rev. 149, 150 (1954).

23. State ex. rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955). The court said: This court pointed out in . . . 1962 . . . that while the general rule is that the zoning power may not be exercised for purely aesthetic considerations, such rule was undergoing development. In view of the latest word spoken on the subject . . . in Berman v. Parker . . . this development of the law has proceeded to the point that renders it extremely doubtful that such prior rule is any longer the law. Id. at 271, 69 N.W.2d at 222.


27. Pooler, op. cit. supra note 16, at 89; Dukeminier, supra note 16, at 237; Kucera, The Legal Aspects of Aesthetics in Zoning, 1 Institute on
of aesthetics is doubtless the reason why courts have been reluctant to do so.\textsuperscript{28} It is therefore important that a reasonably objective standard be found to replace the old rule. The difficulty inherent in drafting such a standard may well be the only barrier preventing widespread acceptance of the validity of zoning to achieve aesthetic objectives.\textsuperscript{29} A standard might be based upon community opinion as to the aesthetic merits of a certain use or structure as reflected, for example, by a drop in market value of surrounding property.\textsuperscript{30} Such a test would make the validity of an ordinance depend not upon whether aesthetic views formed the sole or primary basis for it, but rather whether they were widely enough held to be classified as reasonably objective.\textsuperscript{31}

It might be noted parenthetically that the Oregon court, in \textit{Oregon City v. Hartke},\textsuperscript{32} recently reviewed the trend toward recognition of aesthetics alone as a sufficient basis for zoning. It held that a city might entirely exclude automobile wrecking yards

\textsuperscript{28} See City of Norris v. Bradford, 204 Tenn. 319, 324, 381 S.W.2d 643, 545 (1965): "[W]hile public health, safety, and morals, which make for the public welfare, submit to reasonable definition and delimitations, the realm of the aesthetic \cite{sic} varies with the wide variations of tastes and culture.'" Quoted from 58 \textit{Am. Jur. Zoning} § 30 (1948).

\textsuperscript{29} It was probably for this reason that time has added credence to one commentator's view: "While a strong trend is evident in favor of direct approval of aesthetic purposes in a number of situations, it may be expected that the nominal general rule will die a slow and lingering death." Rodda, \textit{supra} note 38, at 179. See also Cunningham, \textit{Land-Use Control—The State and Local Programs}, 50 \textit{Iowa L. Rev.} 367, 390–91 (1965).

\textsuperscript{30} The property value standard has been criticized as insufficiently related to the general welfare unless there is great and widespread diminution threatened. \textit{Symposium—Apartments in Suburbia: Local Responsibility and Judicial Restraint}, 59 \textit{Nw. U.L. Rev.} 944, 989–90 (1964). Such diminution probably should be balanced against other interests within the general welfare heading, \textit{id.} at 990, yet diminution of serious proportions in the aggregate and the possibility of similar future diminution elsewhere in the municipality might well be a sufficiently serious threat to the general welfare to justify preventive zoning measures, see \textit{State ex rel. Saveland Park Holding Corp. v. Wieland}, 269 Wis. 262, 270–71, 69 N.W.2d 217, 222, \textit{cert. denied}, 350 U.S. 841 (1955).

Another proposal is to limit the aesthetic justification for zoning to situations where there is a clear public interest in the result sought to be achieved. \textit{Symposium}, 59 \textit{Nw. U.L. Rev.} 944, 382 (1964).

A third suggestion is to use a reasonable man standard, \textit{i.e.}, "when from an aesthetical point of view the minds of reasonable men cannot easily differ . . . ." Kucera, \textit{supra} note 27, at 49.

\textsuperscript{31} See \textit{Pooley}, \textit{op. cit. supra} note 16, at 89.

\textsuperscript{32} 400 P.2d 355 (Ore. 1965).
from its limits for solely aesthetic reasons, stating that “we join in the view ‘that aesthetic considerations alone may warrant an exercise of the police power.’”

It seems likely that even the Minnesota court, although perhaps not openly, would sustain some zoning measures based mainly on aesthetic considerations. It has already sustained an ordinance prohibiting projecting signs which was primarily aesthetically motivated. Consequently, it seems unfortunate that the subject cases have been used to create an unnecessary impediment to open recognition of the propriety of zoning to achieve aesthetic objectives in future deserving situations. This may have resulted from a misreading of the court’s own precedents. In Olsen the court cited State ex rel. Lachtman v. Houghton for the proposition that deprivation of property interests without compensation could not be justified on purely aesthetic grounds. The Lachtman court had held that a city could not validly exercise its police power to prohibit the construction of a store in a residential district. As one commentator has noted, however, the opinion suggests that the decision was based upon a finding that the store would not constitute a nuisance. The court appears to have reasoned that since the presence of a retail store would not produce “injurious consequences” of the kind associated with a nuisance, any objection to it was based solely on aesthetic grounds; and since restrictions on the use of property could not be imposed under the police power for purely aesthetic reasons, the regulation of the subject property was invalid. Consequently, the Lachtman decision might well be regarded merely as an expression of the early view that municipal land-use regulation could not go beyond the elimination of nuisances. Further, in a somewhat later case, State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, the court upheld on reargument the condemnation of property to achieve a restricted residence district free of apartment buildings on the ground that this was a “public use.” Adopting the view of the dissent in the original decision and emphasizing the important effects of aesthetics upon neighboring property values,

33. 400 P.2d at 262.
34. Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 899 (1950).
35. 134 Minn. 226, 158 N.W. 1017 (1916).
36. WALKER, PLANNING FUNCTION IN URBAN GOVERNMENT 65 (2d ed. 1950).
37. 144 Minn. 13, 170 N.W. 159 (1920). The original opinion in this case may be found in 144 Minn. 1, 174 N.W. 885 (1919).
38. [T]he construction of . . . apartments or other like buildings in a terri-
the court stated that aesthetics might properly be considered in determining whether property was taken for a "public use." Moreover, it strongly intimated that aesthetic considerations might also afford a basis for exercise of the police power. 9

However Lachtman is read, its implications for the propriety of aesthetically motivated zoning were seriously weakened by the Twin City decision, even though the latter dealt with condemnation rather than the police power. Moreover, the thrust of the Twin City decision was subsequently reaffirmed in State ex rel. Beery v. Houghton, 40 which upheld the constitutionality of a provision of a comprehensive zoning ordinance excluding multiple dwellings from a restricted residential district. After discussing the Lachtman line of cases, the Beery court expressly overruled previous Minnesota cases inconsistent with its decision. However, it will be recalled that the Lachtman court seemed to equate restrictions designed to achieve more than the elimination of nuisances with those founded on aesthetics. Since the Beery court did not hold that zoning could be based upon purely aesthetic considerations, its criticism of Lachtman did not necessarily con-

tory of individual homes depreciates very much the values in the whole territory. The loss is not only to the owners, but to the state and municipality by reason of the diminished taxes resulting from diminished values. . . . It is time that courts recognized the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures. But it is not sufficient that the building is fit and proper, standing alone, it should also fit in with surrounding structures to some degree.

144 Minn. at 19–20, 176 N.W. at 162 (Holt, J.).

39. The right to restrict under the police power without compensation and to restrict by condemnation with compensation differ, but have much in common. It is likely that many of the businesses and buildings referred to in the statute [providing for condemnation] could be excluded under the police power.

144 Minn. at 17, 176 N.W. at 161. Also, the court recognized in State ex rel. Beery v. Houghton, 164 Minn. 146, 148, 204 N.W. 569 (1925), aff'd, 273 U.S. 671 (1926), that members of the court and the profession had with some justification regarded the Twin City case as having implications for land-use planning under the police power as well as the power of eminent domain. The Beery court did nothing to dispel this notion.

40. 164 Minn. 146, 204 N.W. 569 (1925), aff'd, 273 U.S. 671 (1926), on the authority of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Euclid decision was the first by the United States Supreme Court to uphold the constitutionality of a comprehensive zoning ordinances.

One writer considers Beery highly significant in that it indicated a trend to be rapidly followed by other state courts in reversing their earlier decisions invalidating comprehensive zoning ordinances. 1 Yokley, op. cit. supra note 14, § 23.
stitute an overruling of the statements contained in that case objecting to land-use restrictions founded on aesthetics. It may have been saying implicitly that while the power to regulate land-use is broader than the power to control nuisance it does not encompass aesthetically motivated zoning. Nevertheless, Lachtman is at best indecisive and weak authority as to the propriety of restricting land-use to achieve aesthetic objectives. Consequently, the dictum in Olsen should not be considered as resurrecting Lachtman until the question is decided of necessity and upon full consideration.

B. DIMINUTION IN PROPERTY VALUE

The Alexander court indicated that a spot or amendatory zoning ordinance which totally destroys or substantially diminishes the value of property, without providing the owner just compensation therefor, involves a taking of property without due process. It is generally agreed that the constitutional requirement that just compensation be paid for private property taken for public use is inapplicable to losses incurred as a result of governmental regulation. However, uncertainty exists as to the proper means to distinguish a taking of property from a regulation. A theory frequently invoked by judges makes the decision turn upon the extent to which governmental regulation diminishes property value; an ordinance which deprives property of all beneficial use is treated as a compensable taking.

Assuming that the extent of diminution in property value is the proper test for determining whether a zoning regulation constitutes a taking of property, it would seem that more than sub-

42. See generally Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on Suburban Residents Through Subdivision Exactions, 73 YALE L.J. 1119, 1126-30 (1964); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964).
43. See 8 McQuillin § 25.44, at 103 and cases cited therein.

The Minnesota Supreme Court appeared to recognize this test in State ex rel. Foster v. City of Minneapolis, 255 Minn. 249, 253, 97 N.W.2d 273, 276 (1959), 44 MINN. L. REV. 181 (1960).

The New York court has invalidated an ordinance as to particular property where the owner was deprived of all its economic use for an unreasonably long time, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 292, 15 N.E.2d 587 (1938), though the court might well have sustained the ordinance had there been total deprivation for only a limited or reasonable period.

One court has gone further and upheld a zoning ordinance even though, in effect, it deprived a landowner of all economic use of his land without compensation. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal.
substantial diminution in absolute terms would be required for a taking to occur. The owner of land worth $500,000 before the enactment of a regulation and $125,000 afterwards has surely lost more than one whose land value declines from $100,000 to $10,000. Yet equality of treatment in applying the diminution test would seem to require a relative rather than an absolute measure of loss. Even then the phrase “substantial diminution” is too vague to admit of fair application. It would therefore seem that deprivation of all reasonable or beneficial use ought to be required to classify the application of a regulation as a taking. Perhaps the Alexander court meant to suggest this by its use of the phrase “total destruction or substantial diminution.” However, if it meant to require only a partial reduction in value for the owner to secure compensation, it would seem to be on untenable ground in terms of both the practical line-drawing problem suggested above and recent decisional law. The mere fact that a forbidden use would yield a greater return than does the permitted use does not mean that the owner has suffered a violation of his constitutional rights.

44. The most recent Minnesota zoning decision, Filister v. City of Minneapolis, 133 N.W.2d 500 (1964), may portend a rejection of this rule. The court states the issue before it as “whether, because of the topography of plaintiffs’ property, the zoning restrictions render it valueless and therefore constitute a confiscatory and unconstitutional taking.” Id. at 501. (Emphasis added.) Further, in referring to cases including Alexander, the court said that “none of the cases cited . . . deals squarely with a situation where real estate has been deprived of all practical use by restrictive zoning under circumstances where surrounding property owners would be adversely affected by holding the ordinance unconstitutional.” Id. at 503. (Emphasis added.)

value does not render it unconstitutional. This would seem to re-affirm implications to be drawn from the landmark zoning case of Village of Euclid v. Ambler Realty Co., where the Court upheld the validity of a zoning ordinance as applied to property which consequently suffered a 75 percent decline in value.

Furthermore, absent inquiry into the relationship of the ordinance or amendment to protection of the public health, safety, and welfare, the statement in Alexander that a spot zoning ordinance or an amendment to a comprehensive zoning ordinance, which totally or substantially destroys property value, involves an unconstitutional deprivation of property is equally unfortunate. Spot zoning is zoning not in accordance with a comprehensive plan. It is invalid regardless of its effect upon the value of the affected property. An amendment of a comprehensive zoning ordinance is usually authorized by the zoning enabling act and, insofar as valid, is designed to achieve the same objectives as the original ordinance; thus it should be judged by the same standard as is the comprehensive ordinance itself — whether it bears substantial relation to the public health, safety, or welfare. The factor of diminution in property value should, therefore, be accorded no greater weight than it is when considering the validity of the original ordinance.

C. PURCHASE OF PROPERTY WITH INTENT TO USE IT AS ZONING REGULATIONS THEN PERMIT

The Olsen and Alexander courts suggested that mere purchase of property with intent to use it as zoning regulations then permit is enough to immunize the property from subsequent zoning

46. Goldblatt v. Town of Hempstead, supra note 45, at 592, 594.
47. 272 U.S. 365 (1926).
49. E.g., Zuckerman v. Board of Zoning Appeals, 144 Conn. 160, 128 A.2d 325 (1966); 1 Rathkopf 26-1.
50. See 1 Rathkopf 26-5 n.10.

changes. This is not consistent either with most authority elsewhere or with zoning theory. The interest of the community in promoting the public welfare through the restriction of land-use will inevitably conflict with the interests of individual landowners, even where the regulation does not totally destroy property values. From the beginning it has been sought to protect property owners in certain of these cases through application of the constitutional prohibition against the taking of property without due process of law. The problem has been to determine when a constitutionally recognized property right exists. While the zoning of undeveloped land may involve a “taking of property” in the sense that its owner is thereby deprived of the opportunity to develop it as he had originally anticipated, the courts have generally held that an unconstitutional deprivation of property occurs only where newly enacted zoning restrictions prohibit an “existing” rather than an “intended” or “contemplated” use. This has been done in reliance upon the somewhat question-begging, though frequently reiterated, assertion that the owner of an “existing use” has a “vested right” in the original ordinance. As a result such a person is said to possess a “legal nonconforming use,” i.e., a use which is exempt from the ordinance unless com-

55. “Courts are almost universally agreed that there are no vested rights in a zoning ordinance. Nor is there a contract between the municipal corporation and property owners who purchase in reliance upon a municipal zoning classification.” 1 ANTIEAU, op. cit. supra note 51, § 7.16(3), at 490.
56. “The doctrine of vested non-conforming uses sprang from the reluctance of courts to give to zoning ordinances a retroactive effect which would destroy substantial existing property rights . . . .” 2 RATHKOFF 58-1. The term vested right is “but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.” People v. Miller, 394 N.Y. 103, 105, 106 N.E.2d 33, 35 (1952). An official local definition of the term “nonconforming use” can be found in Minneapolis, Minn., Zoning Ordinance, May 31, 1963, art. III, § B(84).
pensation is paid for its elimination.\textsuperscript{57}

The critical problem is to determine the elements of an existing use. The courts generally have resolved the question by holding that mere purchase of property with an intention to use it as then permitted is insufficient;\textsuperscript{58} rather, substantial expenditures and/or various degrees of construction undertaken in good faith reliance on a building permit,\textsuperscript{59} or the likelihood that one will be ins-


\textsuperscript{58} See authorities cited in note 54 supra; 8 McQuillin \S 25.188.

\textsuperscript{59} E.g., Asquino v. Tobriner, 298 F.2d 674 (D.C. Cir. 1961); Nott v. Wolff, 18 Ill. 2d 365, 186 N.E.2d 899 (1960); Board of Supervisors v. Paaske, 250 Iowa 1285, 98 N.W.2d 827 (1959); Mayor of Baltimore v. Shapiro, 187 Md. 923, 51 A.2d 253 (1947); Bonan Realty Corp. v. Young, 16 Misc. 2d 119, 192 N.Y.S.2d 132 (Sup. Ct. 1958); Stowe v. Burke, 225 N.C. 527, 122 S.E.2d 574 (1961); Lower Merion Township v. Frankel, 358 Pa. 430, 57 A.2d 900 (1948).

This is the rule in most jurisdictions. 1 Antiou, op. cit. supra note 51, \S 7.10; 8 McQuillin \S 25.157; 2 Rathkopf ch. 57. \S 3. Courts disagree as to what is substantial construction and/or expenditures. See ibid. However, since the object of the exception is to accommodate conflicting interests, a court does not decide in vacuo. Each case must be decided upon its circumstances, e.g., the type of project, its location, its ultimate cost, and the amount expended or accomplished. See Board of Supervisors v. Paaske, supra; Tremarco Corp. v. Garzia, 32 N.J. 448, 161 A.2d 241 (1960).

The Washington Supreme Court does not follow this rule. It holds that a right to construct a building vests when the permit is applied for if the permit is later issued, on the ground that this standard is more practical to administer than the majority rule, which forces the court to inquire into the moves and countermoves of the parties. Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 555 (1958); State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954).

Courts disagree as to whether, under all circumstances, a permit must have been issued, especially in cases of willful delay, or, as in Alexander, unjustified refusal to issue a permit. See 2 Rathkopf 57–8. It has been contended that no vested right can exist without the issuance of a permit because there is no opportunity to rely to one's detriment in its absence. Price v. Schwafel, 25 Cal. App. 2d 77, 83, 206 P.2d 683, 687 (Dist. Ct. App. 1949). For example, in Gramatan Hills Manor, Inc. v. Manganiello, 30 Misc. 2d 117, 213 N.Y.S.2d 617 (Sup. Ct. 1961), it was held that the mere filing of the application for a building permit conferred no right; New York law required a commencement of construction or the like before any vested right accrued. Some courts, however, have said that vested rights exist if a permit should have been issued. See Vine v. Zabriskie, 132 N.J.L. 4, 3 A.2d 886 (Sup. Ct. 1938); Dubow v. Ross, 175 Misc. 219, 22 N.Y.S.2d 610 (Sup. Ct. 1948). Under such an approach the plaintiff in Alexander arguably had a vested right in the prior ordinance. It could reasonably be held that while the making of substantial expenditures is ordinarily required, an exception...
sued, are required to immunize property from subsequently enacted zoning regulations.

The selection of any step in the process of property improvement as the point at which a use is deemed to come into existence may seem somewhat arbitrary. However, the criterion of substantial construction and/or expenditure in reliance on a permit or on the probability that one will be issued appears reasonable in light of one suggested rationale for excepting legal nonconforming uses from zoning regulations—to encourage or at least to avoid discouraging the development or improvement of land in which the public has a substantial interest. An obvious consideration militating in favor of a relatively limited scope of exemption is that nonconforming uses vitiate the effectiveness of the planning and zoning scheme; thus the spirit of zoning to this rule will be made where invalid governmental action effectively prevents the owner from undertaking such expenditures. See Phillips Petroleum Co. v. City of Park Ridge, 16 Ill. App. 2d 355, 366, 149 N.E.2d 344, 350 (1958); 49 Minn. L. Rev. 109 (1964).

60. The Illinois rule confers immunity where there are substantial expenditures in reliance upon the probability that a permit will issue. See Cos Corp. v. City of Evanston, 27 Ill. 2d 570, 180 N.E.2d 364 (1963); Chicago Title & Trust Co. v. Village of Palatine, 22 Ill. App. 2d 294, 160 N.E.2d 697 (1959). One authority indicates that this rule recognizes that permit requirements can be so strict that even the application for a permit may involve substantial expenditures. 2 Rathkopf 57-10. For example, Minneapolis, Minn., Code of Ordinances § 11.010 (1969) (Building Code), entitled "Permit Procedure," requires the filing of three complete sets of plans and specifications, prepared and signed by a registered architect or registered professional engineer, with a building permit application for a structure to cost over $10,000, other than a single or two-family dwelling. Thus, although excavation prior to issuance of a building permit is prohibited, compliance with these requirements would normally entail some expenditures. The plaintiff in Alexander prepared final plans for the foundation and preliminary plans for the building itself. The foundation plan was approved but no permit was issued due to the hold order. Record, p. 156, Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963).

61. The cases cited in Alexander, 267 Minn. at 160, 125 N.W.2d at 587, do not provide support for the proposition that the purchase of property creates immunity from future changes in zoning classification. For a capsule presentation of the distinguishing features of these cases, see 49 Minn. L. Rev. 109, 115 n.22 (1964).


"[C]ourts are keenly sympathetic to persons who have invested in and improved property in reliance upon a municipal zoning classification." 1 Antieau, op. cit. supra note 51, § 7.15 (9), at 480. (Emphasis added.)
quires that they be limited in number as much as is possible and eliminated as rapidly as is fair.\footnote{64}{See 8 McQuillen § 25.183; 2 Rathkopf ch. 62.}

Even the foregoing capsulized consideration of the role and scope of the nonconforming use illustrates the significant departure from zoning theory and practice which would result if the comments in Olsen and Alexander were construed to mean that mere purchase of property with intent to use it as zoning regulations then permit is sufficient to immunize the property from subsequent zoning changes.\footnote{65}{All zoning regulations would be invalid, since every change in classification, including enactment of the initial ordinance, would affect the expectations held by the then owner when he acquired the property. Thus, the efficacy of the present system would be substantially diminished, if not entirely destroyed. However, the most recent Minnesota case having any bearing on the question suggests that purchase and im-}

\footnote{64}{See 8 McQuillen § 25.183; 2 Rathkopf ch. 62.}

\footnote{65}{It is possible that the Olsen court meant that issuance of a building permit is sufficient to immunize the property from later zoning changes. This could indicate acceptance of the Washington rule discussed in note 75 supra. Reference to prior Minnesota cases is unhelpful since at most they are inconsistent and at least are unclear as to the degree of development necessary to entitle property to the status of a nonconforming use. State ex rel. Berndt v. Iten, 259 Minn. 77, 106 N.W.2d 366 (1960), and Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 383 (1953), indicate that the "substantial expenditures view" may prevail in this state. Dicta in Olsen, Alexander, and \textit{State ex rel. Foster v. City of Minneapolis}, 255 Minn. 249, 97 N.W.2d 273 (1959), 44 Minn. L. Rev. 181 (1960), however, cast doubt on this conclusion. In Berndt, supra, the court said that Kiges, supra, "held that where a building permit was acquired but construction proceeded no further than excavation, no vested rights to use the premises for the purposes planned existed which could not be cut off by a subsequent amendment of the ordinance." 259 Minn. at 81, 106 N.W.2d at 369. The court in Berndt went on to say with respect to its own facts: [W]here a part of the property—constituting less than half of the total consideration—was purchased prior to the submission of an official application for a permit and in reliance upon statements of the village clerk and the village attorney; where an option to purchase the balance of the property was not exercised until subsequent to a denial of the application; and where no building permits were applied for, nor actual construction begun, before the denial of the application, no vested rights were acquired in the ordinance. . . . \textit{Id. at 81-82, 106 N.W.2d at 369}. In Foster, supra, the court quoted from Leighton v. City of Minneapolis, 16 F. Supp. 101, 106 (D. Minn. 1936): "When zones are established, citizens buy and improve property relying on the restrictions provided by law. They have a right to the permanency and security that the law should afford." 255 Minn. at 263, 97 N.W.2d at 276. If emphasis is placed on the words, "and improve," the statement is fully in accord with the view enunciated in Kiges.}
provement of property may be required. In any event, the uncertainty surrounding the status of Minnesota law on this important question clearly requires early explanation.

D. The Scope of Appellate Review of a Trial Court's Findings of Fact

The Olsen court said that the trial judge's findings of fact relating to the validity of the city council's action upon the application for a special permit were entitled to the same weight as a jury verdict. Criticism of this comment requires a background discussion of judicial and administrative fact-finding and review thereof.

There are generally considered to be two types of facts, adjudicative and legislative. The former relate to the events or occurrences in the particular case under judicial consideration. Although the latter also occasionally bear a special relation to the parties, they are used primarily to assist the court in deciding questions of policy or law. In fact, every adjudication of the

The Olsen court noted:

While it is true that a number of courts have held that the issuance of a permit to erect a structure for a permitted use under a zoning ordinance does not create a vested right that cannot be cut off by subsequent amendment . . . we feel that in justice the better rule is to give full accord to the rights of property owners based upon interests therein arising out of comprehensive zoning ordinances. 263 Minn. at 12, 115 N.W.2d at 742. The court added that the Kiges case had not determined whether plaintiff had vested rights under the prior comprehensive zoning ordinance. Id. n.2.

The comment by the Alexander court was: "Numerous courts have given approval to the doctrine that where zones have been established in a municipality, and property has been purchased with intent to use it in conformance with such zoning, the purchaser ordinarily has a right to so use it." 125 N.W.2d at 587. Read with the comment in Olsen, the implication exists that purchase of property with intent to use it as then permitted is sufficient to immunize the property from subsequent zoning changes; yet the cases cited in Alexander fail to support this proposition. See note 61 supra.

66. In Filster v. City of Minneapolis, 183 N.W.2d 500 (Minn. 1970), the court considered whether neighboring landowners had sufficiently relied upon the classification of the subject property to prevent modification thereof. It concluded that the owner of the subject property was guilty of laches in failing to secure a zoning change before his neighbors had developed their land in reliance upon the present classification of his.

67. 2 Davis, Administrative Law Treatise § 15.03 (1958) [hereinafter cited as Davis]. See generally Karst, Legislative Facts in Constitutional Litigation, 1960 SUP. CT. REV. 75.

68. 2 Davis § 15.03; Karst, supra note 67, at 77.
constitutionality of legislation involves an explicit or implicit consideration of questions of legislative fact, since a function of the court in such a case may be to determine whether or not the legislative judgment is reasonable. 69

The scope of review of adjudicative facts generally depends upon the identity of the fact-finder. Where the trier of fact is a jury or an administrative body, the reviewing tribunal will usually defer to a finding of adjudicative fact if it is based upon "substantial evidence" on the whole record, 70 i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 71 A different rule prevails in Minnesota and the federal courts where a judge is the fact-finder. Federal Rules of Civil Procedure 52(a) and Minnesota Rules of Civil Procedure 52.01 provide that in this situation "findings of fact shall not be set aside unless clearly erroneous," 72 and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. 73

For several reasons broader appellate review is permitted under the "clearly erroneous" rule than the "substantial evidence" 70

69. See Karst, supra note 67, at 84-85; Bkle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6 (1924).


MINN. STAT. ANN. § 15.0425 (Supp. 1964) provides that a reviewing court may reverse or modify the decision of an administrative agency if "(e) Unsupported by substantial evidence in view of the entire record as submitted . . . ."


72. "Clearly erroneous" describes the situation which arises "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

73. See generally 2 YOUNGWQUIST & BLACIK, MINNESOTA RULES PRACTICE 648 (1953); WRIGHT, MINNESOTA RULES 396-97 (1954). For a history of the controversy over such appellate review of trial court decisions, see Clark & Stone, Review of Findings of Fact, 4 U. Chi. L. Rev. 190 (1937).
When the jury is the trier of fact there is a limitation in some cases on appellate review by virtue of the constitutional guarantee of trial by jury. Further, one reason for leaving the determination of questions of fact to juries is to elicit decisions reflecting the underlying community sense of fairness. Finally, since juries are \textit{ad hoc}, there is an element of futility in continually reversing and remanding a jury verdict for a new trial; a new jury would be selected and the process would merely begin anew. The principal reasons for entrusting the determination of fact to administrative bodies are to obtain the advantage of expertise and the promotion of a defined legislative policy in judicial-type proceedings. In view of these considerations substantial deference must generally be given the factual determinations of juries and administrative bodies; as the scope of review becomes broader the reasons for introducing a jury or agency into the fact-finding process are frustrated. On the other hand, when the court is the trier of fact, limitations upon the scope of appellate review are justified only by the trial judge’s opportunity to assess credibility and the smoother judicial administration which will result from making him the primary fact-finder.


Some commentators have argued that there is no practical difference between the two. Cooper, \textit{Judicial Review}, 30 N.Y.U.L. Rev. 1375, 1380 (1955); Davis, \textit{Judicial Trends in the Review of Administrative Agency Decisions}, 11 Ad. L. Bull. 191, 195 (1958). The courts have regularly recognized a distinction. W.R.B. Corp. v. Geer, 313 F.2d 750, 753 (5th Cir. 1963); NLRB v. Southland Mfg. Co., 201 F.2d 244, 246 (4th Cir. 1952). However, “In the last analysis . . . whatever the verbal formula, the crucial thing is the attitude with which the reviewing judge approaches the question.” Hart, \textit{An Introduction to Administrative Law} 686 (2d ed. 1950).

75. See \textit{Pound, Appellate Procedure in Civil Cases} 225 (1941).

76. Stern, \textit{supra} note 70, at 81.


It is noted in Wright, \textit{Minnesota Rules} (Supp. 1956, at 64), that a jury verdict and a finding of fact by a trial court are not entitled to the same weight in the eyes of an appellate court. Deference to the trial judge is justified only by his ability to see and hear the witnesses, \textit{Pound, op. cit.}
With respect to legislative facts, the scope of review afforded the findings of a trial judge logically should depend upon whether they are based on oral testimony, written memoranda, or merely assumptions reflecting the judge’s own experience and education. At least in the last instance there appears to be no reason for appellate court deference except to the extent justified by administrative convenience, which would seem to vary inversely with the importance of the fact in question. In addition the need for uniform application of the law within a jurisdiction requires that findings of legislative fact — as essential ingredients of rules of law — be consistent throughout the trial courts within that jurisdiction. If they are not, there might be as many different laws as there are trial courts. Thus, if appellate courts could reverse only those findings of legislative fact which are “unreasonable” within the meaning of the substantial evidence test, their raison d’être would be largely frustrated.

In any event, the scope of review of a trial judge’s findings of legislative fact is at least as broad as that applicable to his findings of adjudicative fact. A fortiori, an appellate court should defer less to a trial judge’s findings of legislative fact than to a jury verdict. It is clear, therefore, that whether the Olsen court was referring to adjudicative or legislative facts, its statement that the trial judge’s findings of fact were entitled to the same

One commentator, however, feels that deference to a trial judge’s findings because of his opportunity to judge credibility may often be unwarranted, since the urban nature of much of our present society makes it unlikely that the trial judge will know the witnesses and their reputations or idiosyncrasies, as once may have been the case, and since demeanor alone allegedly does not provide a fair basis for evaluating a witness’ credibility. Hardy, The Manifest Error Rule, 21 La. L. Rev. 749, 752 (1961).

Another aspect of the “clearly erroneous” rule is its applicability to documentary or undisputed evidence. See generally Note, 49 Va. L. Rev. 506 (1963). One authority argues that the scope of review should be no greater even where no credibility factor is involved, and asserts that this has long been the rule in Minnesota. Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 764–66 (1957).

79. In Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924), the Supreme Court said that “the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law . . . .” Professor Davis notes that the practical difference between adjudicative and legislative facts is that the latter “need not be, frequently are not, and sometimes cannot be supported by evidence.” 2 Davis § 15.08. Another commentator has observed, however, that there is no real basis for assuming that a trial judge’s training and experience specially qualify him to determine legislative facts unless evidence relating to those facts is developed in the case. Bikle, supra note 68, at 6.
weight as a jury verdict is at variance with both reason and authority, although admittedly supported by previous statements of the Minnesota court.80

E. NUISANCE AND THE SPECIAL PERMIT

The Olsen court indicated that the City of Minneapolis could not utilize the special permit device to prevent the landowner's construction of a filling station on property where the comprehensive zoning ordinance permitted that use, unless the use would constitute a nuisance.81 Although there has been no exhaustive analysis of the relation between regulation of land use through the power to eliminate nuisance and through the zoning power,82 certain things are clear. The exercise of the police power through adoption of zoning ordinances does not depend upon the existence of nuisance for its validity.83 In fact it was early noted that the

80. See, e.g., Gethsemane Lutheran Church v. Zacho, 258 Minn. 438, 104 N.W.2d 645 (1960); Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 94 N.W.2d 273 (1959); Nielson v. City of St. Paul, 252 Minn. 12, 88 N.W.2d 853 (1959).

81. 263 Minn. at 11, 115 N.W.2d at 741.
83. See Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 863 (1953); Jones v. City of Los Angeles, 511 Cal. 304, 295 Pac. 14 (1930); Basnett, Zoning 93 (1940); Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 437 (1941); Comment, 54 Mich. L. Rev. 266 (1955). This was early recognized. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1927); Miller v. Board of Pub. Works, 195 Cal. 477, 487, 234 Pac. 391, 394 (1925).

Especially during the early years of zoning law, when the regulations were very unsophisticated and not unlike nuisance regulations, it was natural for courts to use the concept of nuisance by analogy in passing on the validity of zoning regulations. See Noel, Unaesthetic Sights as Nuisances, 25 Cornell L.Q. 1, 14 (1939). However, it is clear that nuisance law is concerned with unwarranted interference with another's use or enjoyment of his property, whereas zoning is concerned with land use regulation, whether or not a use falls within the nuisance category. As was stated in an early Illinois zoning decision:

The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development.

City of Aurora v. Burns, 319 Ill. 84, 85, 149 N.E. 784, 788 (1925). The above was quoted with approval in the Euclid decision. Supra at 392–93. See generally Kurtz, The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas, 36 Dicta 414 (1959); Comment, 29 Fordham
inadequacy of nuisance law gave rise to the need for zoning, under which uses beneficial and entirely harmless in the ordinary sense may be barred from certain areas. Although comprehensive zoning may well have evolved from a form of nuisance control, it is presently a tool for land use planning.

The statement in Olsen lends itself to several alternative interpretations. Taken on its face, it would seem to nullify the special permit device as a means of planning land use, since nuisance may be regulated by a municipality which possesses no zoning authority. However, the peculiar facts involved in Olsen suggest a narrower construction. The Minneapolis Comprehensive Zoning Ordinance of 1924 permitted the use of property within commercial zones for gasoline filling stations. Seven months after enactment of the zoning ordinance, another ordinance was passed requiring the acquisition of a special permit from the Council as a condition for the construction of a filling station. However, the zoning enabling act for first class cities specifies procedures to be followed in amending a comprehensive zoning ordinance which were not followed in the enactment of the special permit ordinance. Thus, if the Olsen court felt that the use of special permits could be authorized only by the zoning ordinance or an amendment thereto, it may have concluded that Minneapolis' special permit ordinance was invalid. If so, it might reasonably be concluded that Minneapolis could have properly used the special permit device only as a means for exercising the municipality's common law power to control nuisance.

The above construction may be a reasonable interpretation of the enabling act as it existed in 1924, when the special permit device under which the city acted in Olsen was enacted. However, a 1953 amendment to the enabling act relating to special permit devices referred to them as being adopted "by any local rule or ordinance." Arguably this amendment is significant for several reasons.

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86. MINNEAPOLIS, MINN., ORDINANCES 1:31-5 (1939).
88. MINN. STAT. § 462.18 (1961), provides in part (Emphasis added): In any such city in which by any local rule or ordinance the use of any land, or the construction or use of any building located within a zoned district, shall have been made conditional upon the applying
reasons. First, since it was incorporated into a zoning enabling act, it seems to reflect legislative recognition of the special permit device as a tool of zoning rather than nuisance control. Second, since it does not authorize the use of the special permit device, but assumes its existence, it may support the view that the use of special permits is impliedly authorized by the zoning enabling act. Third, the reference to "any local rule or ordinance" would seem to reflect a legislative assumption that a special permit device need not be adopted as an amendment to the comprehensive zoning ordinance.

Assuming the reasoning above to be sound, the result in Olsen ought not to have been founded upon the failure of the city to allege or prove that the proposed filling station would constitute a nuisance. It should have been justified instead on the failure of the city council to state in writing its reasons for denying the permit, as required by statute. The court's statement that the city had failed to make a finding that the proposed use would be a nuisance may reflect a partial application of this statute.

III. THE INADEQUATELY EXPRESSED FACTORS

It has been said with respect to modern municipalities that "planning for flexibility to meet the changing pattern of tomorrow is a must in this age of accelerated change." Though the final responsibility for properly channeling such flexibility rests upon the legislature, a considerable burden rests upon the judiciary, one of whose traditional functions has been to serve as a brake upon abuses and excesses arising from the exercise of governmental power. Neither municipality nor judiciary can satisfactorily fulfill these functions without recognizing the proper role of the other. Respect for and cooperation with each other may go far toward achieving a workable zoning system which does not produce unfair loss to the individual property owner.

90. Brief of Respondent, p. 28, Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 784 (1962).
91. See note 88 supra.
It is submitted that each of the three cases discussed in Part I of this Note involved a somewhat misunderstood and unarticulated clash between a municipal attempt to achieve a measure of zoning flexibility and a countervailing judicial effort to restrict the desired freedom. In Olsen and Golden, the municipality had sought to accomplish flexibility by conditioning particular uses of property upon the acquisition of special permits from the local governing body. In acting upon permit requests this body performed an administrative rather than a legislative function, since it applied a previously enacted zoning ordinance to particular cases. Consequently limitations ought to have been placed upon its exercise of discretion. In neither Olsen nor Golden was this done adequately. In the third case, Alexander, the flexibility device involved was a hold order without express limitation as to time or provision for reasonable use.

Neither of these flexibility devices is really new, though both may often have been misunderstood. Attention is now turned to the desirable if not essential restrictions on their use, since the absence of such restrictions may or at least should have been the court's major concern in each case.

A. The Special Permit

This much-discussed and frequently misunderstood flexibility device goes by various names in different areas: special exception permit, conditional use permit, special use permit. Regardless of name the assumption underlying its application is that while certain uses may generally be compatible with others, their compatibility in any particular case depends upon sur-

94. See note 113 infra and accompanying text.
96. HAGMAN, WISCONSIN ZONING PRACTICE 7, 51 (1962); 2 RATHKOPF 54-1 n.1.
rounding circumstances. That is not to say, however, that the determination of each case is to be entirely at large. Although unique characteristics may make it virtually impossible to authorize such a use generally within a particular zone, many of the circumstances which would make it incompatible with its surroundings can be anticipated. Criteria or standards to assist in making the particularized determination may be derived from a consideration of those circumstances. Since the desirability, if not necessity, of such criteria or standards is central to the special permit problem, some consideration of their origin and purpose will be helpful.

One means of achieving adherence to standards may be to require administrative bodies to support their decisions with findings of fact and conclusions of law contained in a reasoned opinion; some attention will be given the possibility of requiring that such an opinion accompany any action taken upon an application for a special permit. Brief reference will also be made to recent Illinois experience in applying standards and findings requirements to the administration of certain zoning flexibility devices. Finally, the role which these requirements might and/or should have played in the decision of Olsen and Golden, the two subject cases involving denial of special permits, will be discussed.

1. Standards

Though it was thought at one time that there could be no delegation of federal legislative power,\textsuperscript{98} this inflexible and unrealistic view has been progressively liberalized by the courts to enable the federal government to cope with the increasingly complex problems of our age.\textsuperscript{99} The currently prevailing theory is that a

\textsuperscript{97} E.g., Tullo v. Milburn Township, 54 N.J. Super. 483, 490-91, 149 A.2d 620, 624-25 (App. Div. 1959); National Maritime Union v. City of Norfolk, 292 Va. 672, 678, 119 S.E.2d 307, 311 (1961); see HAGMAN, op. cit. supra note 96, at 8, 51; 2 Rathkopf (Supp. 1964, at 54-18); Reps, supra note 95, at 61.

\textsuperscript{98} The history of this theory and its implications for governmental activity are critically discussed in Duff & Whitside, Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law, 14 Cornell L.Q. 168 (1928). An earlier article offering an explanation of the theory and its limitations is Cheadle, The Delegation of Legislative Functions, 27 Yale L.J. 592 (1918). For an example of early judicial treatment of the problem see Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 582 (1813).

\textsuperscript{99} FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 77-78 (1936). For evidence of the trend, see Sears, Roebuck & Co. v. FTC, 255 Fed. 307, 312 (7th Cir. 1919).
valid delegation of power must contain standards adequate to channel its exercise.\textsuperscript{100} Yet the requirement of adequate standards at the federal level is of limited significance; it appears to be “more a matter of form than substance.”\textsuperscript{101} Only rarely has the United States Supreme Court invalidated a congressional delegation on the ground of inadequate standards,\textsuperscript{102} though many cases involve standards which are very general at best.\textsuperscript{103}

If, as has been generally assumed, the delegation doctrine developed by the federal courts is premised largely upon the separation of powers of the national government required by the federal constitution, the doctrine would not, without more, be applicable to the states.\textsuperscript{104} However, most state constitutions also provide for a separation of powers;\textsuperscript{105} hence the doctrine is generally applicable at the state level. But, unlike the federal rule, the standards requirement is far from dead in the states.\textsuperscript{106} There are sev-

\begin{tabular}{l}
Major premise: Legislative power cannot be constitutionally delegated by Congress.

Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion: Therefore the powers thus delegated are not legislative powers.
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Schwartz, An Introduction to American Administrative Law 32 (1958). Even recently, state courts have often used language to the effect that if the power delegated is adequately limited by standards it is not legislative. E.g., Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958); Lee v. Delmont, 228 Minn. 201, 36 N.W.2d 530 (1949).

100. See e.g., United States v. Chicago, M., St. P. & P.R.R., 282 U.S. 311, 324 (1931); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); 1 Davis ch. 2.


104. The states are not required by the federal constitution to heed in their internal organization the separation of powers doctrine. Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908).

105. E.g., Minn. Const. art. III, § 1; see Kilbourn v. Thompson, 103 U.S. 185, 190-91 (1880); Burnes 32.

106. Burnes 32; 1 Davis § 2.07; Schwartz, A Decade of Administrative Law, 61 Mich. L. Rev. 775, 782 (1933).
eral possible reasons for this. An alternative means of channeling the exercise of administrative discretion at the federal level — continuous legislative oversight by subcommittees or standing “watchdog” committees — is available only to a very limited extent, if at all, at the state level. Moreover, procedural safeguards protecting the citizen affected by administrative action are available to a lesser extent at the state than the federal level. Finally, it is sometimes intimated, if not asserted, that state administrative bodies are usually more susceptible to control by interest groups than are their federal counterparts.

Local government is said to be the great exception to the American system of trifurcated authority; municipal officials supposedly may be invested with any desired combination of executive, legislative, and judicial powers, though this would doubtless depend upon individual state statutory and constitutional provisions. Therefore, if the constitutional necessity for standards to govern the exercise of delegated power is based upon the separation of powers, it is arguable that they are unnecessary in zoning administration at the local level. However, commentators have claimed it to be well settled that a valid delegation of power by a zoning ordinance to an administrative body must be circumscribed by reasonably ascertainable standards.

Two alternative explanations for this policy are available. It may

As to Minnesota cases, see, e.g., Anderson v. Commissioner of Highways, 267 Minn. 308, 128 N.W.2d 773 (1964); Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1959).

107. These devices are more readily available and have been widely used at the federal level because Congress is in session every year. Gellhorn & Byse 169–80.

108. The Administrative Procedure Act, 60 Stat. 297 (1946), 5 U.S.C. §§ 1001–11 (1958), is generally applicable at the federal level. However, not all states have legislation similar to the APA, and those that do frequently offer less comprehensive protection. Gellhorn & Byse 1281. See generally Heady, Administrative Procedure Legislation in the States (1952).


110. E.g., State ex rel. Simpson v. City of Mankato, 117 Minn. 458, 190 N.W. 264 (1919).

111. 1 Yokley, Municipal Corporations § 74, at 179 (1956); see Note, 18 Ind. L.J. 146 (1943).

112. See text accompanying note 104 supra.

113. Burdick 102, 104; Craig, Particularized Zoning: Alterations While You Wait, 1 Institute on Planning and Zoning 163, 167 (1960). Another writer has said that the courts are now demanding the use of more definite standards in special permit or special exception cases than has been the case in the past. Reps, supra note 95, at 71.
be strongly contended that, irrespective of whether there exists a separation of local governmental powers, the due process clause requires that an official or body acting in an administrative capacity be guided by standards to encourage similar application of the law to similar fact situations.\footnote{114. See North Bay Village v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956); Osius v. City of St. Clair Shores, 344 Mich. 693, 700, 75 N.W.2d 25, 28 (1956); Taylor v. Moore, 303 Pa. 469, 479, 154 Atl. 799, 802 (1931).}

However the constitutional issue is resolved, the practical reasons for requiring the use of standards in local zoning administration—drafted as specifically as possible\footnote{115. Reps, supra note 95, at 72.} and set forth in the special permit ordinance\footnote{116. See cases cited in note 97 supra, and note 124 infra.}—are even more compelling than is the case at the state level. Local administrative practices receive very little attention or publicity in comparison with those at higher levels of government,\footnote{117. Further, when the administrative decision is rendered by the local legislative body itself, legislative oversight is lacking. Local administrative bodies are also subject to little, if any, political responsibility in this type of situation; the electorate is usually unaware of proceedings directly affecting only one or a few of its number. Thus properly drafted standards may help prevent discrimination and abuse of discretion by affording the judiciary a basis for review.\footnote{118. See cases cited in note 97 supra, and note 124 infra.} At the same time they may aid and guide the administrative body itself.\footnote{119. Some commentators feel that the need for specific standards is lessened where the municipal governing body itself makes the decision. See Pooley, supra, note 95.} Furthermore, they give the persons who may be affected by discretionary administrative action a basis for predicting the circumstances in which various powers will be exercised.\footnote{120. Even at the federal level, where the standards requirement is dying, writers who have been administrators indicate that administrators often refer to the standards which are given. Landes, The Administrative Process 67 (1988); Newman, The Literature of Administrative Law and the New Davis Treatise, 43 Minn. L. Rev. 637, 641–43 (1959).}

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particularized determination. Though judicial authority is split, most recent decisions seem to have considered that a governing body acts in an administrative capacity when it makes particularized, case-by-case zoning determinations and consequently have required such bodies to formulate and adhere to standards. This view would seem to be the better one. The desirability or necessity of standards usually should depend not upon governmental structure—the identity of the body exercising the power—but upon the function which that body performs. Experience indicates that some curb on discretion is necessary where the local legislative body is making particularized zoning determinations, if indeed it should perform such functions at all.

123. 2 Rathkopf 54–51.
126. See Burtis 103; Mandelker, supra note 119, at 85, 86.
127. The impact of improper political pressure upon zoning is not unknown. See 700 Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 150, 69 N.E.2d 827, 833 (1946), 14 U. Cal. L. Rev. 718, 721 (1947). In fact a common objection to zoning flexibility devices is that their administration is subject to pressures of money, power, and friendship. See Haar & Hering, The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?, 74 Harv. L. Rev. 1552, 1565 (1961). One writer asserts that the abuse of power by planning commissions and boards of zoning appeals is due mainly to “their susceptibility to local influence and pressure groups.”
In considering whether standards should be required even if not constitutionally dictated, the question is not whether to guard against arbitrariness, but how best to do so. Professor Davis concedes that definite standards can provide some protection against favoritism and discrimination, but argues that other methods are likely to be superior. It is true that "mere lan-

Note, 30 Ind. L.J. 521, 530 (1955). Other commentators, however, have argued that abuse of power "is less likely to come from the board [of zoning appeals] than from the city council," since political pressure is more likely to be brought to bear successfully on the latter. Dallstream & Hunt, Variations, Exceptions and Special Uses, 1954 U. Ill. L.F. 218, 240.

Whether or not the legislative body acting in an administrative capacity does decide the problems before it in light of improper political considerations, the members of the public who are aware of the decisions may think that they are influenced by politics. "[T]hat the public believe justice is done is no less important than that it be done . . . ." Pound, Justice According to Law, 13 Colum. L. Rev. 696, 701-02 (1913). Thus it might be wise not to have the local legislature apply the policy decisions it has reached in a zoning ordinance, but to delegate the responsibility to an administrative body and to limit its exercisable discretion by imposing standards and requiring that it make written findings of fact and develop the reasons for its conclusion in each case.

The susceptibility of municipal councils to political influence may even have implications for the scope of judicial review of zoning ordinances:

The rationale behind the presumption of validity generally is that the political processes are adequate to assure representation of affected interests in the legislature and that, therefore, the court should not "substitute its judgment" for that of the democratically chosen and responsible body.


Professor Mishkin contends that in view of the pressures inevitably involved in the enactment of a zoning ordinance, local political processes "cannot be relied upon to ensure representation of those interests which are in fact being affected by the legislation. Under such circumstances, a greater judicial role is called for in reviewing the legislative action; there is less reason for an automatic 'presumption of validity.'" Mishkin, supra p. 3. He would retain the presumption as to any governmental unit large enough to "carry a circumstantial guarantee of representation of affected interests." Id. p. 4.

This is contrary to the traditional view that the presumption applies with equal strength at all levels. See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935). See also New Orleans Public Service, Inc. v. City of New Orleans, 291 U.S. 682, 686 (1939); Bilbar Constr. Co. v. Board of Adjustment, 393 Pa. 62, 71, 141 A.2d 851, 856 (1958).

When findings [of fact] . . . are required and made, the chances of favoritism are much reduced. The protection that comes from a hear-
guage cannot provide the stabilizing element . . . ." Adequate standards and even a public hearing are of limited value to both the landowner and the reviewing court if the body exercising discretion is not required to make findings of fact and provide other than conclusory reasons to justify its decision. However, to say that standards alone are inadequate to curb arbitrariness is not to say that we should dispense with them. It means simply that they should be complemented by other safeguards. Findings alone are unhelpful in the absence of sufficiently specific standards to isolate the relevant facts.

2. Findings and Reasons

The significance of findings and a reasoned opinion in achieving effective limitation upon the exercise of discretion makes it important to consider the desirability, if not necessity, of requiring their use in zoning administration proceedings. The Federal Administrative Procedure Act requires in certain cases that an administrative agency's decision become part of the record and include a statement of the findings of fact, conclusions of law and reasoning upon which it is based. Many state statutes

1 DAVIS § 2.09, at 111. Davis further notes that requiring definite standards may produce excessive inflexibility. Ibid.

In Warren v. Marion County, 222 Ore. 307, 353 P.2d 257 (1960), the Oregon court expressly adopted Professor Davis' view and held that the state legislature need not prescribe standards when delegating power if adequate safeguards were provided against arbitrary administrative action. This case is roundly criticized in 14 STAN. L. REV. 372 (1962).

129. Mandelker, supra note 119, at 97.

130. Without any policies, standards, or rules to guide the [Zoning] Board's decisions, and without any requirement that the Board justify its actions by an opinion, the possibilities of arbitrary use of power are great . . . . [N]ot only the petitioners but also the public . . . . have a right to expect, as part of the basic administrative process, that discretionary exceptions will be decided by something more than the individual preferences of Board members and with regard to the public interest.

Dukeminier & Stapleton, The Zoning Board of Adjustment: A Case Study in Misrule, 50 KY. L.J. 273, 309 (1962). (Emphasis added.)

131. See Crawford, supra note 95, at 181–82; Mandelker, supra note 119, at 78.

contain similar requirements.\textsuperscript{133} Usually, these statutes simply

codify prior, judicially-imposed requirements,\textsuperscript{134} as was the case

at the federal level.\textsuperscript{135} Though they do not require that findings

be set out in the formal manner to which trial judges are accus-

tomed,\textsuperscript{136} they are enforced more rigorously by the courts than

are the requirements imposed upon trial judges.\textsuperscript{137} Though argu-

ably somewhat burdensome,\textsuperscript{138} they are generally conceded to be

salutary.\textsuperscript{139}

Some commentators insist that procedural due process does

not require administrative agencies to make findings.\textsuperscript{140} Others

argue that while this may be true at the federal level, there are

practical reasons for distinguishing local zoning bodies.\textsuperscript{141} In any

\textsuperscript{133.} HEADY, op. cit. supra note 108, at 88. The Model State Administrative

Procedure Act § 11 does not require the inclusion of reasons for the decision.

This is typical of the state acts. HEADY, op. cit. supra note 108, at 88; see


(Emphasis added.) provides:

Every decision and order adverse to a party of the proceeding

rendered by an agency in a contested case, shall be in writing or stated

in the record and shall be accompanied by a statement of the reasons

therefor. The statement of reasons shall consist of a concise statement

of the conclusions upon each contested issue of fact necessary to the

decision.

\textsuperscript{134.} GELLHORN & BYSE 1131.

\textsuperscript{135.} 2 DAVIS § 16.02.

\textsuperscript{136.} Timberg, Administrative Findings of Fact (pt. 2), 27 WASH. U.L.Q.

169, 177 (1942).

\textsuperscript{137.} 2 DAVIS § 16.01. It has been suggested that the difference in enforce-

ment policies arises from the consciousness of the appellate courts that they

possess a relatively restricted scope of review of administrative findings of fact.

2 DAVIS § 16.05, at 446–47. See notes 70–74 supra and accompanying text.

For a contention that trial judges should not have to make findings of

fact if they give the reasons for their decisions, see Hanson, Findings of Fact


\textsuperscript{138.} Stason, The Model State Administrative Procedure Act, 33 IOWA L.

REv. 196, 207 (1948).

\textsuperscript{139.} See HEADY, op. cit. supra note 108, at 88; Feller, Prospectus for the

Further Study of Federal Administrative Law, 47 YALE L.J. 647, 666 (1938); HARRIS, Administrative Practice and Procedure: Comparative State Legislation,

6 OKLA. L. REv. 29, 51 (1953); STASON, supra note 138, at 207.

\textsuperscript{140.} 2 DAVIS § 16.04; MAGAW, LEGAL ASPECTS OF ADMINISTRATIVE HEAR-

INGS AND FINDINGS 18, 20 (1939).

\textsuperscript{141.} Dukeminier & Stapleton, supra note 130, at 332:

[We are not entirely convinced that no stricter guarantees of due

process should be required of local zoning boards than are required of

federal agencies and courts. Members of the zoning board of adjustment

usually lack both the law-conditioning of judges and the expertise of

federal administrators. They are subject to great pressure from people

whom they know personally and with whom they do business—pres-
event, there are reasons for requiring findings which seem particularly compelling at the local level.\textsuperscript{142} Thus, carefully drawn findings may induce a sense of responsibility on the part of the person drafting them\textsuperscript{143} which will help to prevent arbitrary or careless action;\textsuperscript{144} may facilitate judicial review, especially where there are multiple and complex issues;\textsuperscript{145} may prevent inadvertent judicial usurpation of administrative functions by facilitating adherence to a narrow scope of review;\textsuperscript{146} and may assist in the formulation of decision and the preparation of cases for rehearing or review.\textsuperscript{147} Consequently, a court would have ample justification for holding that local administrative agencies are required by the due process clause to make findings.\textsuperscript{148}

Reasons relate to discretion, law, and policy, as opposed to fact.\textsuperscript{149} Although reasoned opinions may not be required by due

\textsuperscript{142} "The validity of such requirement is sufficiently sustained in practical considerations and we need not inquire too closely for a constitutional basis." Delaware, L. & W. Ry. v. City of Hoboken, 10 NJ. 418, 426, 91 A.2d 739, 742 (1952); see Feller, supra note 139, at 666.

Professor Davis asserts that "the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement." 2 Davis § 16.05, at 444.

143. United States v. Forness, 125 F.2d 928, 942 (2d Cir.) (Frank, J.), cert. denied, 318 U.S. 694 (1942); Feller, supra note 139, at 666.

144. 2 Davis § 16.05, at 444, 446.

145. Professor Davis notes that this is the reason most often discussed by the courts. 2 Davis §16.05, at 444. Two other commentators feel that, as to zoning boards of appeal, infrequent appeals make this reason much less compelling than the necessity of findings to develop a body of precedent and curb discriminatory or arbitrary administration. Dukeminier & Stapleton, supra note 130, at 881.

146. 2 Davis § 16.04, at 445.

147. Id. § 16.04, at 444; Feller, supra note 139, at 666.

148. Most states have no statutory requirement applicable to zoning administration at the local level. Dukeminier & Stapleton, supra note 130, at 892. In such jurisdictions the courts generally have not required findings except as a basis for review on appeal. Ibid.

149. 2 Davis § 16.12, at 476; Gellhorn & Bess 1156.
process, they are highly desirable. Like findings, they help prevent the careless or arbitrary use of discretion. By providing a body of precedent, they facilitate the case-by-case development of standards where the subject matter makes it difficult to formulate them in advance. This would be particularly valuable when dealing with special permits since they are used with respect to uses whose proper placement in the community is by definition uncertain. Moreover, it would seem that a statement of sound reasons would increase judicial respect for the decision and make it less susceptible to successful appeal.

The primary objection to requiring a statement of reasons seems to be the time necessarily involved in preparing them. This argument is probably equally applicable to findings of fact. Yet mental, if not written, compliance with both functions is necessary if proper decisions are to be reached. Moreover, the degree of formality with which findings of fact and reasons ought to be rendered will depend upon the particular situation under consideration. As to zoning administration, it has been suggested that a stenographic transcript of an oral decision and statement of reasons might suffice and, if not, that the responsibility for decision should be given to a body possessing the time required to prepare the necessary opinion.

3. The Illinois Experience

Recent Illinois experience illustrates the application of standards and reasoning requirements to proceedings involving the use of some zoning flexibility devices. The relatively new Illinois Municipal Code requires that every variation granted from the terms of a zoning ordinance be accompanied by findings of fact specifying the reason or reasons supporting it. A recent Illinois decision, International Harvester Co. v. Zoning Bd. of Appeals, suggests that such limitations on administrative discretion might also have been initiated by the judiciary. The court said in strong dicta, if it did not hold, that even though not required to do so

150. Burros 67; 2 Davis § 16.13, at 487; Dukeminier & Stapleton, supra note 130, at 331.
152. Burros 67.
153. Dukeminier & Stapleton, supra note 130, at 334.
154. Gellhorn & Byrne 1159.
155. Dukeminier & Stapleton, supra note 130, at 334.
by statute, a zoning board of appeals should make findings of fact when it grants an application for a special use because, inter alia, they were essential to judicial review under the Administrative Review Act.\textsuperscript{158} However, another Illinois case suggests a seemingly undesirable distinction: that standards and findings are unnecessary in dealing with special use applications where the local legislature is the issuing body.\textsuperscript{159} The result was to confuse labels such as “legislature” with the governmental function actually being exercised\textsuperscript{160} and consequently, as pointed out by the dissent, to confer complete discretion upon the body administering the flexibility device. Moreover, a decision not made in accordance with standards and which does not embody findings of fact simply begs for judicial reaction beyond that required by the issues in the case, if the reviewing court is more concerned with the obvious dangers of such practices and less impressed by labels than was the Illinois court. The dicta likely to result from this reaction will probably cause unnecessary confusion as to the validity of the flexibility devices themselves.

4. The Subject Cases

Neither Olsen nor Golden considered whether standards, findings of fact, or statements of non-conclusory reasons are necessary ingredients of action taken upon requests for special permits. Thus it is difficult to know whether their absence provoked the court’s decisions or was immaterial. The speculation of the court in both cases that the municipalities involved had acted for impermissible reasons (aesthetic considerations) may suggest concern with the absence of articulated and precise standards and reasons for the administrative action. The court has said that it will not inquire into the motives of a municipal council when considering the validity of its legislative acts.\textsuperscript{161} This accords with the views of other courts.\textsuperscript{162} However, the Olsen

\textsuperscript{158} Id. at 449, 193 N.E.2d at 861. The court noted that a special use differed from a variation (also called variance), so that the statute requiring the preparation of findings of fact and reasons to justify granting a variation did not apply. Id. at 446, 193 N.E.2d at 859–60. There was no statutory provision explicitly dealing with special uses; they had been held impliedly authorized by the zoning enabling act in Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

\textsuperscript{159} Id. at 187–88, 166 N.E.2d at 605. This case is criticized for its unconcern with reality in 46 Iowa L. Rev. 479 (1961).

\textsuperscript{160} See note 126 supra and accompanying text.

\textsuperscript{161} E.g., Arcadia Dev. Corp v. City of Bloomington, 267 Minn. 221, 226, 125 N.W.2d 846, 851 (1964).

\textsuperscript{162} See 2 RATHKOPP 52–1 and cases cited therein.
and Golden courts were confronted with administrative rather than legislative action. Consequently their inquiry into motive may reflect a legitimate concern that the absence of precise standards and reasoning prevented the proper performance of judicial review.

A few Minnesota decisions might have been viewed as holding that standards for the issuance of special permits are not required where the governing body itself passes on the applications. For example, State ex rel. Rose Bros. Lumber & Supply Co. v. Clousing\(^\text{163}\) rejected a claim that a Minneapolis ordinance which required city council permission to erect a lumber yard without imposing limitations upon the council's discretion was an unconstitutional delegation of power. However, the Rose court relied upon cases\(^\text{164}\) decided before zoning had been recognized as constitutional, so that the council's discretion was implicitly limited to determining whether the proposed use was likely to constitute a nuisance. In view of the greater complexity of the issues confronted in applying a special permit device under a zoning ordinance than in determining whether a nuisance exists, it would seem that Rose and the authorities upon which it relied did not preclude a determination that standards were necessary in the present context. Thus the Olsen court might have rested its decision upon the absence of standards without departing from precedent.

The necessity of using standards in applying special permit devices is no longer debatable in Minneapolis. The new comprehensive zoning ordinance adopted by that city in 1963 authorizes the use of a special permit device, which it terms a conditional use, and enumerates governing standards which restate and develop to a limited extent the standards contained in the state enabling act.\(^\text{165}\) The landowner is entitled to a hearing on his

\(^{163}\) 198 Minn. 35, 268 N.W. 844 (1936).

\(^{164}\) Fischer v. St. Louis, 194 U.S. 361 (1904); State v. Dirnberger, 152 Minn. 44, 187 N.W. 972 (1922); State v. Rosenstein, 148 Minn. 127, 181 N.W. 107 (1921); State v. Taubert, 136 Minn. 371, 148 N.W. 281 (1914).

\(^{165}\) Minn. Stat. §§ 462.01, .05, .18 (1963). Minneapolis, Minn., Zoning Ordinance, May 31, 1963, art. VI, para. 9f provides:

f. STANDARDS: No conditional use shall be recommended by the Board of Adjustment unless such Board shall find:

1. that the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare,

2. that the conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property values within the neighborhood,
application before the board of adjustment, which is required to make written findings of fact from the evidence presented at the hearing and report the same to a committee of the city council, together with its recommendations. The city council may then grant or deny the request. The ordinance does not require the council to give reasons for its decision, though the zoning enabling act discussed above doubtless obliges it to do so.

The provisions of the St. Louis Park ordinance at issue in *Golden* are sufficiently similar to those of the 1963 Minneapolis ordinance that the *Golden* case may be a reasonable approximation of what would happen today in a case where the Minneapolis City Council refused a requested permit, except for the fact that St. Louis Park is not subject to the written reasons requirement imposed on first class cities by the state enabling act. The *Golden* court did not consider whether the standards established by the ordinance were necessary and, if so, whether they were sufficiently specific. Neither did it consider whether the absence of a requirement that the city council make findings of fact or elaborate its reasoning vitiates the ordinance or whether it would judicely impose such a requirement to save the ordinance.

If the *Golden* court had considered the role of standards in applying zoning flexibility devices, it might have discussed the adequacy of the standards set forth in the St. Louis Park ordinance, which seem only to mirror those contained in the state zoning enabling acts to govern the enactment of zoning

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\begin{align*}
(3) & \text{ that the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district,} \\
(4) & \text{ that adequate utilities, access roads, drainage and/or necessary facilities have been or are being provided,} \\
(5) & \text{ that adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets, and} \\
(6) & \text{ that the conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located.}
\end{align*}
\]

166. Minneapolis, Minn., Zoning Ordinance, May 31, 1963, art. VI, para. 9d.
168. Ibid.
169. See note 88 supra.
170. See note 9 supra.
It is arguable that such standards are sufficiently specific to help prevent the abuse of the discretionary authority devolved upon the local administrative body. If so, it might be suggested that the courts simply impose such standards upon all municipalities utilizing a special permit device. Yet the courts could reasonably believe that local development of standards would serve to keep the attention of the governing body focused upon proper decision-making criteria. Further, selection of policy would then be left to the governing body rather than the courts.

However, as pointed out earlier in this Note, the presence of standards, no matter how specific or by whom they are drawn, ought not be enough. This is especially true where there are multiple standards. Unless findings of fact and a meaningful written opinion accompany the denial of a permit application, there is no way to afford anything but what is in effect de novo judicial review. Such review merely duplicates the administrative function. But the only alternative would be total abdication to the local body's decision. This in turn would trench on the rights of both the public and the individual. The production of a meaningful written opinion would both avoid duplication by the court of the local body's functions and make possible a meaningful judicial check on the process of administrative decision-making.

Of course the provision of the zoning enabling act for first class cities, which requires the production of written reasons for denial of a special permit, would not apply to St. Louis Park, since it is not a first class city. Further, no similar requirement is contained in the zoning enabling acts applicable to other municipalities. This may reflect slight use of the special permit in smaller communities or insufficient pressure by their inhabitants to secure limitations on the use of the device. In any event, the requirement of reasons in the enabling act for first class cities indicates that at least in such cities the legislature felt that the possibilities of discrimination in administration of the special permit must be limited. No substantial reason appears to make this any the less true in small municipalities. The Golden situation was an excellent opportunity for the court to point this out and to invalidate the permit denial for lack of accompanying findings and reasons.

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172. See Minn. Stat. §§ 462.01, .05, .18 (1961).
If it be insisted that a local legislative body passing on permit requests need not adhere to formulated standards nor make findings of fact and a statement of reasons, the municipality may well suffer rather than profit. Even if a presumption of validity does and should attach to a municipal ordinance, the subject cases make it clear that this is not true with respect to a particularized application of an administrative provision of an ordinance, since the justification underlying the presumption is inapplicable in the latter situation.\textsuperscript{174} Further, as a practical matter a complainant should have an easier time convincing a court that denial of a permit application was arbitrary if the ordinance under which the action was taken contained no standards or if the action was unaccompanied by a meaningful opinion or nonconclusory findings of fact and reasons. Even if proper reasons for the municipality’s action exist, the fact that they are stated contemporaneously is likely to increase the chance that they will be found adequate on review. A charge of afterthought is then considerably less persuasive. Moreover, a meaningful opinion permits establishment of a body of precedent for the benefit of both the municipality and landowners, somewhat reducing the uncertainty implicit in the use of zoning flexibility devices. This is especially significant if the incidence of appeal from application of these devices is slight. It is contended, therefore, that whether the requirement of a meaningful written opinion is legislatively, judicially, or voluntarily imposed, it may be expected to facilitate rather than hinder the development of zoning flexibility.

B. Hold Order

The hold order encountered in \textit{Alexander} might also be viewed as a measure for achieving some degree of flexibility in land use planning. Such orders have been used long and frequently in Minneapolis\textsuperscript{175} for various purposes, such as preventing the frustration of pending zoning ordinances through precluding the creation of nonconforming uses, freezing the development of privately owned property which the city expects to condemn in the future for road building, and conferring virtual veto power over construction in particular wards. Thus,

\begin{flushright}
\textsuperscript{174} See note 196 \textit{supra}.
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\textsuperscript{175} In 1959 there were in effect 91 hold orders covering 10\% to 15\% of the land area of the city, some dating back 20 years. Planning and Zoning Comm. of the Citizens League of Minneapolis and Hennepin County, Report, March 25, 1959.
\end{flushright}
they seem to have been used as a sort of all-purpose, unlimited special permit device.\textsuperscript{176}

The alleged reason for using a hold order in Alexander was to freeze construction in the area to which it was applicable while a proposal for a new comprehensive zoning ordinance was pending. The order in Alexander directing the building inspector not to issue building permits for specified property was embodied in a city council resolution, and consequently was not subject to the waiting period and publication requirements applicable to ordinances.\textsuperscript{177}

It has usually been held that zoning ordinances may not constitutionally be applied to uses existing when they take effect—termed legal nonconforming uses.\textsuperscript{178} They are by definition likely to be incompatible with surrounding uses permitted under the ordinance. To the extent that they are, realization of zoning objectives will be frustrated by their presence.\textsuperscript{179} This is particularly true if their existence becomes a basis for granting variances or amendments for the benefit of neighboring landowners. The studies, drafting, and deliberations required to prepare and enact a comprehensive zoning ordinance mean that a considerable period will almost certainly elapse between the time when deficiencies in land-use planning are recognized and the effective date of remedial legislation.\textsuperscript{180} Unless develop-

\textsuperscript{176} Ibid.

\textsuperscript{177} It was stipulated in Alexander, 267 Minn. at 159 n.2, 125 N.W.2d at 586 n.2, that the hold order was not an ordinance. The distinction between a hold order and an ordinance is not described in either the briefs and record or the opinion of the Alexander case. However, the Minneapolis Municipal Charter requires that ordinances and resolutions be enacted by a majority of the city council. MINNEAPOLIS, MINN., CITY CHARTER ch. 4, § 9 (1963). The same section then requires a waiting period between the first reading and passage of ordinances, and continues: “When approved, they shall be recorded by the City Clerk . . . and before they shall be in force they shall be published in the official paper of the city.” It is unclear from the context whether “they” refers to both ordinances and resolutions, or merely the former. However, the Hennepin County District Court said in an earlier, unreported decision invalidating a hold order that “the result of holding [the order valid] . . . would be uncertainty and chaos. One would have to comb the minutes of every City Council meeting to know what law governed.” Brief for Respondent, p. 9, Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963). Thus it may be inferred that a hold order is properly classifiable as a “resolution” and consequently is not subject to the waiting period and publication requirements.

\textsuperscript{178} See notes 54–57 supra and accompanying text.

\textsuperscript{179} See note 63 supra and accompanying text.

\textsuperscript{180} See HORACE & NOLAN, LAND USE CONTROLS 48 (1955); Note, 14 W. RES. L. REV. 132, 143 (1963).
ment contrary to the tenor of the proposed new ordinance can be prohibited during this period, opportunists may obtain a legal right to continue such development at the expense of neighbors and competitors. Moreover, unsuspecting landowners may obtain a permit and prepare for construction during this period, only to be halted when the new ordinance becomes effective if preparations have not proceeded far enough to create an existing use.\footnote{181}

Thus it would appear to be in the interest of both municipalities and to a limited extent even landowners to restrict the planning and construction of uses which are likely to become nonconforming under a pending zoning ordinance. The problem is to find a way in which to do this which accommodates all interests as fairly as possible.

Several types of interim zoning measures, such as hold orders, have been employed in attempts to restrict the acquisition of nonconforming uses and to prevent needless loss by landowners during the incubation periods of comprehensive zoning ordinances. An even less formal measure which has sometimes been successfully employed is mere refusal to issue permits during the pendency of a comprehensive zoning ordinance.\footnote{182} Another, the temporary or interim zoning ordinance, has been the more orthodox measure by which municipalities have attempted to solve this problem. Yet the courts have often been rather unsympathetic to the municipalities' problem. Thus they have frequently construed constitutional and statutory provisions narrowly to invalidate such stopgap or interim measures\footnote{183} on grounds of non-authorization by the constitution or enabling act,\footnote{184} or noncompliance with the procedural requirements of the enabling act.\footnote{185} Occasionally they have even suggested that such measures are unnecessary.\footnote{186} On the other hand, some

\footnote{181. See notes 58–61 supra and accompanying text.}


184. Downey v. City of Sioux City, 208 Iowa 1273, 227 N.W. 125 (1929).

185. \textit{E.g.,} City of Somerset v. Weise, 268 S.W.2d 921 (Ky. 1954); Krajenke Buick Sales v. Kopkowski, 322 Mich. 250, 33 N.W.2d 781 (1948); State \textit{ex rel.} Kramer v. Schwartz, 336 Mo. 932, 82 S.W.2d 63 (1935).

courts have upheld interim measures, emphasizing their reason- ableness even where their effective period is not expressly limited, by finding them to be impliedly authorized and of limited duration.

A court ought, and doubtless would be much more inclined, to find a stopgap zoning measure valid where its effectiveness is expressly limited to a reasonable period of time and where it forbids only uses which are prohibited by the provisions of the pending ordinance. The latter restriction would prevent the use of interim devices until the proposed comprehensive zoning ordinance is sufficiently developed to indicate the uses which would be permitted in various areas. This point of development no doubt would vary somewhat among localities, depending upon the procedures followed in enacting comprehensive zoning ordinances. Nevertheless, in most cases it would seem likely to yield a fair compromise.

In view of the serious problem which they are designed to remedy, interim zoning measures ought to be upheld through liberal construction of constitutional and statutory provisions, if they are fairly limited both as to period of validity and prohibitions on construction. Conversely, the absence of such limitation reasonably should result in judicial rejection of the device, but only as insufficiently limited. Moreover, the courts ought to...


188. Miller v. Board of Pub. Works, 192 Cal. 477, 496, 234 Pac. 381, 388 (1923); Fowler v. Obier, 224 Ky. 742, 7 S.W.3d 219 (1928); see Downham v. City Council, 88 F.2d 783, 788 (E.D. Va. 1932); Butvinik v. Mayor of Jersey City, 8 N.J. Misc. 508, 143 Atl. 759 (Sup. Ct. 1928).


190. A resolution or hold order of limited duration was sustained in Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (Dist. Ct. App. 1960). A city council had passed a resolution forbidding issuance of building permits for one year in a proposed redevelopment area. The court noted only incidental injury to appellants; there was no finding of deprivation of property or diminution of property value, aside from the expense of preparing plans and of delay in erecting the contemplated structure. Analogizing from an earlier zoning case, the court found the resolution reasonably necessary to serve a public purpose. See cases cited note 188 infra and accompanying text.
recognize that the utility of interim zoning devices will be substantially eliminated if their enactment depends upon compliance with time-consuming procedural requirements.

In the Alexander case the zoning enabling act contained no express provision for a hold order, though one might have been implied. Further, there was no restriction on the period of time for which the order would be effective, although a reasonable time limit might have been judicially imposed. Moreover, the order permitted no construction on the land. Yet had the city limited the effective duration of the hold order and provided that construction permits would be issued for structures clearly compatible with the proposed new ordinance, the court might well have found that the enabling act, by implication, permitted the use of such a device as an essential incident to the enactment of a comprehensive zoning ordinance. The nine year duration of the Alexander order and the breadth of its scope probably prevented its enforcement, but did not require the condemnation of hold orders generally.

Whatever might have been, the breadth of the court’s reaction to the unlimited hold order was such that it might well be thought that legislative action is now necessary to authorize the future use of a properly limited flexibility device of this nature in Minnesota. Yet it might reasonably be argued that the court left the door ajar, and could distinguish Alexander to uphold a fairly limited interim zoning measure in the future. Strictly speaking, it held only that the applicable enabling act did not authorize the indefinite suspension of zoning ordinances. It only speculated that the validity of the hold order would have been doubtful even if it had been enacted as an ordinance. Further, the court acknowledged that several other courts had upheld such stopgap devices where they were effective for only short periods of time and noted by way of contrast that the Alexander hold order had been in effect over nine years.

It might fairly be concluded that municipal carelessness, if not worse, in failing to impose adequate safeguards upon the use of this zoning flexibility device, may have resulted in unnecessary restriction on municipal capacity to anticipate and thwart the growth of nonconforming uses.

191. See cases cited note 188 supra.
192. See text accompanying notes 12 & 18 supra.
193. See 49 Minn. L. Rev. 109, 112 (1964).
194. 267 Minn. at 159, 125 N.W.2d at 586.
195. 267 Minn. at 158 n.3, 125 N.W.2d at 586 n.3.
CONCLUSION

Since the local legislative bodies in Olsen and Golden applied the special permit ordinances to individual cases, they acted in an administrative capacity. Therefore, the court should have considered in both cases whether to require standards, written findings of fact, and a statement of the reasons for the decision. In Olsen the ordinance permitted the operation of a filling station only after a special permit had been obtained, but failed to establish standards or require written findings of fact or reasons for the council's conclusions. The court could have relied upon these deficiencies in reaching its result. In Golden standards existed but a meaningful written explanation of their application in particular cases was not required. This could have been the basis of the court's decision. In Alexander the court unfortunately made no inquiry into the very real problem prompting the use of interim zoning measures and the functions which they service. The obvious impropriety of the hold order's nine-year effective duration may indicate that the court's cryptic treatment of the issue ought to be construed as evidence of admirable judicial self-restraint. Yet the uncertainty as to the legal status of any interim zoning device likely to be generated by such treatment and the importance of the problem should have prompted a clearer consideration of the issue.

The subject cases probably indicate that the employment by a municipality of devices to impart flexibility to zoning, without properly limiting their exercise, may risk judicial reaction beyond the matter requiring decision. Thus in each case the result reached by the court could and should have been based upon the inadequate limitation of the zoning flexibility measures. It is possible that the reason for the result in each case was apprehension over municipal attempts to achieve zoning flexibility without proper channeling of the administrative machinery, in spite of the fact that the language utilized does not clearly reflect this concern. If this is in fact the basis for the decisions, much of the disturbing language encountered in the opinions may be dismissed as ill-considered dicta. Nevertheless, the confusion which has arisen from these dicta, if such they be, makes prompt explanation desirable. "[A] right result reached by unsound reasons gives no assurance of permanent acquisition."

106. L. Hand, Have the Bench and Bar Anything To Contribute to the Teaching of Law, 5 AMERICAN L. SCHOOL REV. 621, 624 (1926).