# In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions

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## Introduction

As the discretionary power of administrative agencies has increased, courts have imposed procedural safeguards to insure fair and rational decisionmaking by these new centers of political authority.[1] Municipal land use planning and zoning agencies have shared in this administrative growth; in recent years their power and discretion have mushroomed.[2] Yet zoning procedures often remain abysmally inadequate. One authority on the subject has stated:

> Given [the] inherent character of the zoning process, it is a sardonic fact that the unbroken thread of criticism of zoning law, from the early days, to date, has been its unfair process and its tendency to grant special favors or to refuse to correct patent inequities, without due deliberation. The literature of zoning carries the constant refrain that the process involved in the grant or denial of change by whatever local body—city council, plan commission or board of zoning appeals—has been devoid of elementary standards of fairness and forethought.[3]

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1. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1717-22 (1975); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1240-41 (1966).

2. Zoning authorities have gained the constitutional and statutory authority to exercise increasingly restrictive and comprehensive control over the use of land. Rather than negative, defensive measures, they may now enact positive, assertive restrictions grounded in detailed planning. Tighter controls have also created a greater need for administrative relief mechanisms, such as variances, which are within the further discretion of zoning authorities. *See* R. BABCOCK, THE ZONING GAME 90-93 (1966); Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?* in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 14 (N. Marcus & M. Groves ed. 1970) [hereinafter cited as *Philosophy of Zoning*]; Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976) [hereinafter cited as *The Role of the Comprehensive Plan*]; Comment, *Land Use and Due Process—An Examination of Current Federal and State Procedures*, 9 ST. MARY'S L.J. 846 (1978).

3. R. Babcock, lead counsel, Brief for Amici Curiae: National Association of Home

There has been extensive effort to create fair procedures through statutory requirements.[4] State courts have often liberally interpreted such statutes or used common law concepts such as "fundamental fairness" to impose procedural formalities.[5] Judges, however, have been reluctant—and seldom asked—to rely on the due process clauses of the Federal Constitution[6] as authority for demanding fair procedure from zoning agencies. A relatively small number of state court decisions have explicitly relied on the Constitution to require certain procedures in zoning cases, though hundreds of cases are grounded on substantive due process[7] or the taking clause.[8] No reported federal court decision has struck down a state zoning authority's decision for failure to adhere to procedural due process requirements.[9]

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Builders, American Society of Planning Officials, and American Institute of Planners at 15, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) [hereinafter cited as R. Babcock, Brief in Eastlake]. *Accord*, 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.02 (2d ed. 1976) [hereinafter cited as R. ANDERSON]; R. Babcock, *supra* note 2, at 135; Mandelker, Philosophy of Zoning, *supra* note 2, at 18; Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 274 (1962) [hereinafter cited as Dukeminier & Stapleton].

4. *See, e.g.*, ADVISORY COMM. ON ZONING, STANDARDS BUREAU, BUILDING AND HOUSING DIVISION, U.S. DEPT. OF COMMERCE, STANDARD STATE ZONING ENABLING ACT BH5 §§ 4-7 (rev. ed. 1926) [hereinafter cited as STANDARD ZONING ENABLING ACT].

5. *E.g.*, Glaspey & Sons, Inc. v. Conrad, 83 Wash. 2d 707, 521 P.2d 1173 (1974). Common law holdings, unlike constitutional rulings, may be modified by statute. *See* Calaway v. Town of Litchfield, 112 N.H. 263, 296 A.2d 124 (1972), where the state legislature retroactively legalized local actions that failed to satisfy statutory requirements for notice to citizens. However, the court held the zoning act *sub judice* void because the state constitution also required notice.

6. U.S. CONST. amends V and XIV. The Fifth Amendment provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment makes this limitation applicable to the states.

7. "The concept the Court employs to control the substance of legislation under the due process clause is that certain types of lawmaking go beyond any proper sphere of government activity. In short, the Court views the act as incompatible with our democratic system of government and individual liberty. The judicial premise for this position is that any life, liberty or property limited by such a law is taken without due process because the Constitution never granted the government the ability to pass such a law." J. NOWAK, R. ROTUNDA & J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 382 (1978).

8. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

9. However, in Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976), a motion to dismiss a count alleging denial of procedural due process was denied. The case was later settled. In Adler v. Lynch, 415 F. Supp. 705 (D. Neb. 1976), the court found that a landowner was denied due process when the county board failed to adequately notify her of a variance hearing concerning her land. However, the action was solely for damages under 42 U.S.C. § 1983, and the court absolved the county officials of any liability because they acted in good faith. In Harnett v. Board of Zoning, 350 F. Supp. 1159 (D.V.I. 1972), a Virgin Islands zoning board's decision was overturned on due process grounds due to the board's failure to articulate decisionmaking standards. Also, in Hot

Yet, diminished reliance on the discretion of administrators, coupled with a greater appreciation of the humanistic values served by hearing procedures, has sparked a due process "explosion" which has radically altered the nature of administrative decision making in many areas.[10] The same factors are present in the land use area, and conditions are thus ripe for change. This article will examine how the due process guarantees of the Fourteenth Amendment and similar provisions in state constitutions[11] can be applied to land use decisions of all types, from the granting of permits and variances to the development of comprehensive plans.[12] First, the nature and extent of constitutionally protected interests in land will be considered, and it will be argued that the positivist conceptions currently being considered by the Supreme Court may be avoided. Next, the basic values behind procedural formalities will be noted briefly in order to establish a framework for analyzing what process is due in various situations affecting the use of real property. It will then be proposed that the legislative-adjudicative distinction be eliminated as a threshold test in local zoning decisions, and instead be incorporated into the process due balancing test now being applied by the courts. The constitutional need for specific procedural protections, including some form of comprehensive planning, will then be examined. This article will conclude that courts should vigorously enforce the Fourteenth Amendment due process clause in order to insure that state and local authorities do not unfairly impinge on property rights.

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Shoppes, Inc. v. Clouser, 231 F. Supp. 825 (D.D.C. 1964), the federal court exercised its direct jurisdiction over the District of Columbia local authorities and voided a decision where zoning board members made *ex parte* visits to the site.

10. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 514-15 (1978); Stewart, *supra* note 1, at 1717-22.

11. For discussions of the due process clauses in various state constitutions, *see generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Project, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

12. This article will not deal with any constitutional requirement of judicial review, or the standards for such review. Neither will procedural requirements for state or regional planning be discussed. In the federal courts, jurisdiction, abstention, and the existence of a federal claim for relief are also considerations, though they will not be discussed. *See, e.g.*, Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 715-20 (D.N.J. 1976); Webber v. Skoko, 432 F. Supp. 810, 811-13 (D. Or. 1977); 1 A. RAPTHKOPF, THE LAW OF ZONING AND PLANNING § 2.03 (4th ed. 1979).

# I. Property Interests

## A. Traditional Protection for Interests in Land

Until recently the nature of the interests protected by the due process clause of the Fourteenth Amendment was not a major focus of constitutional litigation.[13] In the era of substantive due process protection typified by the Supreme Court decision in *Lochner v. New York*,[14] the word "liberty," in particular, was held to refer to a wide range of interests.[15] In contrast, the "property" term of the Amendment received little attention,[16] save for a general consensus that such interests must be created by some source, usually state law.[17]

When the first of the new wave of procedural due process decisions was handed down in the early 1970's, protected interests were liberally defined. The Court found in *Bell v. Burson*,[18] without even discussing whether liberty or property was involved, that a driver's license was protected by the due process clause. Welfare benefits, along with other government entitlements, were identified as property in *Goldberg v. Kelly*.[19] The latter decision seemed to pave the way for the extension of due process protection to those entitlements formerly excluded as "privileges."[20]

13. "For decades the crucial fourteenth amendment battles have been fought over the substantive validity of action taken by the states. . . . [T]here seems to have been an overriding concensus that every individual "interest" worth talking about is encompassed within the "liberty" and "property" secured by the due process clause and thus entitled to some constitutional protection. . . . The "right-privilege" distinction, the last barrier to such a concensus, has completely fallen. That doctrine has been invoked to justify a denial of due process scrutiny of some types of governmental conduct in the public sector; for example, since there was no independent "right" to welfare payments, their denial, standing alone, did not implicate any constitutional value. . . . The "right-privilege" doctrine's lack of solid theoretical underpining resulted in its erratic enforcement and, ultimately, its demise." Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 406-07 (1977) [hereinafter cited as Monaghan]. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 506-14 (1978).

14. 198 U.S. 45 (1905).

15. *See* Monaghan, *supra* note 13, at 411-14; Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

16. Monaghan, *supra* note 13, at 435.

17. *E.g.*, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-43 (1944).

18. 402 U.S. 535 (1971).

19. 397 U.S. 254, 262 n.8 (1970).

20. "[C]ourts adhered until quite recently to a distinction . . . between individual 'rights' stemming from constitutional or common law sources and mere 'privileges' bestowed by government; the latter could be withheld absolutely and 'therefore' could be withheld conditionally—even if the condition, viewed independently, would have violated a settled constitutional norm like that against ideological censorship or racial discrimination." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 509-10 (1978) (footnote omitted).

However, the Burger Court, concerned about the growing number of procedural due process cases brought in federal courts and the resulting intrusion of federal standards into state and local government,[21] placed limits on the application of procedural due process. In *Board of Regents v. Roth*,[22] the Court established a two-step procedure for determining whether the Constitution requires due process safeguards. Initially, the deprivation of a protected interest must be shown; then the procedures to be afforded are determined by balancing the size of the protected interest against the administrative costs involved.[23] Since *Roth*, the Court has focused on the textual classifications of life, liberty and property in determining the scope of a protected interest. *Roth* reemphasized that, particularly where "new property"[24] might be involved, state law must be examined to determine when a claim of entitlement may legitimately be made.[25]

Interests in land are fundamental to the system of property classification. At least since the formulation of the common law estates doctrines,[26] land has been the most consistently protected form of property. It has long been constitutionally guarded by the due process clause.[27] Indeed, the *Roth* Court initiated its discussion of protected property interests by noting that "the property interests protected by procedural due process extend well beyond actual ownership of real estate. . . ."[28] Thus, ownership of land remains protected under the *Roth* test for entitlements; certainly the law of every state recognizes interests in real property.

### B. Dangers of Positivist Doctrine

Real property, this safest of constitutionally protected havens, may be vulnerable to the Burger Court's attempt to curtail due process protection through the positivist approach first proposed in Justice Rehn-

21. *See* Monaghan, *supra* note 13, at 408.

22. 408 U.S. 564 (1972).

23. *Id.* at 569-71, 570 nn.7 & 8.

24. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

25. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

26. *See* 1 H. TIFFANY, THE LAW OF REAL PROPERTY 1-2 (3d ed. 1939). *See also* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938): "Property . . . has varied infinitely in character and content from century to century and from place to place. Of course, land and its produce have always been with us."

27. *See, e.g.*, Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Reinman v. Little Rock, 237 U.S. 171 (1915), all of which are substantive due process decisions. *See also Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1503 (1978) [hereinafter cited as Developments—Zoning].

28. 408 U.S. at 571-72.

quist's plurality opinion in *Arnett v. Kennedy*.[29] Justice Rehnquist argued that where a state granted an entitlement subject to certain limited procedures, it can, by following those delineated procedures, deprive a person of that entitlement without impinging on a property interest.[30] In other words, the substantive interest is created only by positive law, such as a statute, and is itself limited by the procedural protections in the law. As Justice Rehnquist wryly commented, the beneficiary "must take the bitter with the sweet."[31]

Because of the rather inconsistent approaches of several justices, it is impossible to determine whether Justice Rehnquist's position has gained the support of a majority on the Court. It likely has not.[32] For

29. 416 U.S. 134 (1974).

30. *Id.* at 152-54.

31. *Id.* at 154. In *Arnett*, the Rehnquist plurality found that the statute which granted the plaintiff, a non-probationary civil service employee, an expectancy in his job also specified the procedures for terminating him. Reasoning that the state may condition an entitlement on certain procedures, the plurality held that since the specified statutory procedures had been followed, the plaintiff was not deprived of a protected interest. Chief Justice Burger and Justice Stewart joined in this opinion. Justices Powell and Blackmun were of the view that while the plaintiff had a legitimate claim of entitlement to a property interest under the Fifth Amendment, he had been afforded constitutionally adequate procedures. *Id.* at 164 (Powell, J., with whom Blackmun, J., joins, concurring in part and concurring the result in part).

32. The *Arnett* rationale was apparently followed by Justice Powell in his dissenting opinion in Goss v. Lopez, 419 U.S. 565, 584 (1975) (joined by Chief Justice Burger and Justices Blackmun and Rehnquist). Justice Stevens also employed the reasoning from *Arnett* in his opinion for the Court in Bishop v. Wood, 426 U.S. 341 (1976) (joined by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist). The *Goss* dissent stated that the right to a public school education in Ohio was limited by a statute permitting principals to suspend students for as long as ten days; therefore, the ten-day suspension of a student did not impinge on a property interest. *Bishop* held that a policeman's interest in his job was limited by the removal procedure specified in a city ordinance—simple notice before termination. Termination without a hearing was therefore held not to violate the due process clause.

The *Arnett* plurality's argument was explicitly rejected, however, by the other six members of the Court in that case as well as the dissenting justices in *Bishop*. Additionally, Justice Stevens, in a dissent to Codd v. Velger, 429 U.S. 624, 631 (1977), appears to have distinguished his *Bishop* opinion from the *Arnett* plurality's position. Stevens' dissent in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 680 (1976), could also be interpreted as a rejection of *Arnett*, as is discussed in the text *infra*.

Thus, Justice Rehnquist's only steadfast adherent appears to be Chief Justice Burger. While Justice Stewart joined Rehnquist's *Arnett* opinion, Stewart also joined the majority in *Goss*. After initially rejecting the position in *Arnett*, Justice Powell appears to be leaning towards Rehnquist's view in *Bishop* and in his *Goss* dissent. However, Justices Blackmun and Stevens appear to have rejected the application of the positivist approach in all cases. Finally, Justices Brennan, White, and Marshall have clearly rejected the position. Thus, it is far from true that a majority of the Court has adopted Rehnquist's argument. *Accord*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 535 (1978); Monaghan, *supra* note 13, at 438 n.217. *But see* Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*,

the purpose of argument, however, it will be assumed to be the law. At the very least, the following discussion will illustrate the dangers of the Rehnquist position. As several commentators have indicated, the Rehnquist argument could logically be applied to any entitlement—no matter how stable or reliable it is—to which the legislature appends even limited procedures enabling withdrawal of the entitlement.[33] More significantly, the logic could also apply to "old property," including real estate.

At the bottom of *Arnett*'s slippery slope lies the following. It is well established that the state, under the police power, may significantly burden the use of land through zoning restrictions without paying compensation.[34] That is, an owner's right to develop his land is always subject to applicable zoning restrictions.[35] Therefore, the government's ability to withdraw or fail to grant certain development rights is similar to its ability to withdraw entitlements such as government jobs or welfare benefits. If, as is generally the case, the government's statutory scheme for regulating the use of land includes certain minimum procedural safeguards, however limited, a landowner is entitled to no further procedures when the government exercises its legitimate authority.

A variation of this argument might be made in the benign defense of comprehensive planning, but is just as insidious to the fair administration of zoning. If land is already burdened by a zoning ordinance or comprehensive plan, it might be argued that a landowner seeking a more profitable use through a variance or other exception is claiming something which is purely a gratuitous government entitlement. Therefore, the most he can constitutionally claim is the protection afforded by the statutorily granted procedures; perhaps he can claim no due process at all since he has been deprived of nothing. The latter position gains particular credibility where the owner bought the land

63 VA. L. REV. 383, 425 (1977) (implying the Rehnquist position may have a majority); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 469 n.74 (1977) (indicating the same).

33. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 575 (1978); Monaghan, *supra* note 13, at 442-43; Van Alstyne, *supra* note 32, at 469-79; Note, *Democratic Due Process: Administrative Procedure after Bishop v. Wood*, 1977 DUKE L.J. 453, 459.

34. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (landmarks law prohibiting development of a plot containing historic structure is not a taking); Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972) (zoning law preventing the filling of wetlands is not a taking).

35. *E.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668-681 (1976) (Stevens, J., dissenting).

subject to the restriction, presumably paying a purchase price that reflected the limited opportunities allowed under the existing ordinance.

In a footnote to his opinion for the Court in *City of Eastlake v. Forest City Enterprises, Inc.*,[36] Chief Justice Burger seemed to adopt this view. In *Eastlake*, an amendment to the Eastlake City Charter that required change in land use be approved by a 55% vote in a referendum had been invalidated by the Ohio Supreme Court[37] as a standardless delegation of legislative power violative of the due process clause. The Supreme Court reversed, holding that a referendum for all voters was not a delegation at all, but a permissible reservation of power by the voters.[38]

Although the result in *Eastlake* implies that there was a deprivation of property for which due process could provide protection, Chief Justice Burger indicated that there was no deprivation at all. In a footnote rebutting the view expressed in two dissenting opinions[39] that the referendum plan was violative of due process for the additional reason that there were no provisions for notice and hearing, Burger stated:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner seeking approval of a new use free from the restrictions attached to the land when it was acquired.[40]

This is a remarkable comment since courts facing due process challenges to zoning decisions inevitably assume that landowners have suffered constitutionally protected deprivations.[41] Perhaps this aside is not so surprising, however, given the positivist position taken in *Arnett* and its progeny.[42]

In a thoughtful dissent to the *Eastlake* decision, Justice Stevens

36. *Id.* at 679 n.13.

37. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

38. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675 (1976).

39. *Id.* at 680 (Powell, J., dissenting), (Stevens and Brennan, JJ., dissenting).

40. *Id.* at 679 n.13 (original emphasis). *See also id.* at 674 n.8.

41. *But see* W.C. & A.N. Miller Dev. Co. v. D.C. Zoning Comm'n, 340 A.2d 420, 424 (D.C. Ct. of App. 1975) (holding that "a property owner has no right to a particular zoning classification"). *See also* 8 GA. L. REV. 254, 262 (1973) which suggests the Burger position. This is a note on South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1974), a panel decision which was subsequently overturned by the court *en banc*, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S. 837 (1974).

42. *See* note 32 *supra*. *See also* Horn v. County of Ventura, 24 Cal. 3d 605, 615, 596 P.2d 1134, 1139, 156 Cal. Rptr. 718, 723 (1979) (rejecting argument that a plaintiff "must reasonably have anticipated" a proposed project involving adjacent property).

addressed the point directly. He first stated: "The fact that an individual owner . . . may not have a legal right to relief he seeks does not mean he has no right to fair procedure in the consideration of the merits of his application."[43] Thus, Justice Stevens recognized a significant principle which underlies procedural due process: no matter how contingent a property right may be, the government must distribute it in a fundamentally fair manner. This principle is ignored by both Justice Rehnquist in *Arnett* and Chief Justice Burger in *Eastlake*. Proper application of the principle means that whenever zoning regulations restrict an owner from realizing the most profitable use of his land, he has due process rights stemming from that deprivation which guarantee fair procedures in any attempt to challenge the zoning decision.

Instead of relying solely on the inherent right to develop land, Justice Stevens noted that the procedural mechanisms themselves create the expectations which invoke due process:

> [N]o matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting, variances, amendments, or exemptions for specific uses of specific pieces of property. . . . The *expectancy* that particular changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership. . . . The fact that codes regularly provide a procedure for granting individual exceptions or changes, the fact that such changes are granted in individual cases with great frequency, and the fact that the particular code in the record before us contemplates that changes consistent with the basic plan will be allowed, all support my opinion that the opportunity to apply for an amendment is an aspect of property ownership protected by the Due Process Clause. . . .[44]

In those "regular" cases where relief mechanisms are provided for,[45] Justice Stevens' analysis would result in protection similar to that where reliance is placed solely on inherent development rights. However, Stevens also seems to imply that in some cases the legislature could denigrate property rights by limiting accompanying procedures.

43. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 682 (1976) (Stevens, J., with whom Brennan, J., joins, dissenting).

44. *Id.* at 681-83 (emphasis added and footnotes omitted). *See also* the definition of a landowner's due process interest under *Roth* provided in a recent article: "State law generally defines the entitlement to seek reclassification of zoned land as a part of land ownership." Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use?*, 28 CASE W. RES. L. REV. 41, 57 (1977).

45. Justice Stevens also implied that such mechanisms themselves may be constitutionally required. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 682 (1976) (Stevens, J., with whom Brennan, J., joins, dissenting).

This rationale must be rejected.[46] To use first-year law school property terms, due process is not triggered by a consideration of the complete "bundle of sticks" held by the landowner. Rather, it protects the right to develop, which is one of those sticks, and is itself part of the bundle.[47] This distinction is quite important given the nature of the "new" zoning.[48] In particular, municipalities which are unwilling to make choices and formulate a workable comprehensive plan may assign lower-density use than would normally be desirable, relying on a great number of individual exceptions—and administrative discretion—to allow more intensive use of the land.[49] This approach is often employed, not to prohibit the introduction of harmful or undesirable externalities, but to encourage developers to confer benefits on the community.[50] In such a situation, it is unwise to rely on the initial zoning decision to determine the extent of a property right for due process purposes. Exceptions are often the key to land use control and they should be fairly administered in order to safeguard property interests. Zoning expert Richard Babcock concurs: "Procedural due process is continually flaunted in our medieval hearings. . . . I believe it is a greater social and political evil to have a "good" municipal plan . . . but to administer it unfairly than it is to have no plan but fair administration of a zoning ordinance."[51]

### C. Property Interests of Non-Owners

Those who do not own the land involved in a zoning decision—neighbors, tenants, developers and community groups—might also claim due process rights in administrative proceedings determining its use. Before examining these non-owner's rights, three facets of the property interests of owners[52] should be identified. First, an owner has

46. Certain statutory schemes, such as where exceptions are allowed only in quite specific circumstances which can be routinely determined without a hearing, might create a situation where only minimal process is due, under the many considerations discussed in the text *infra*. Yet a court should still find a deprivation triggering due process considerations.

47. *Cf.* C. HAAR & L. LIEBMAN, PROPERTY AND LAW 841 (1977) (permission to build is a major stick in the bundle). *See also Developments—Zoning*, *supra* note 27, at 1520-21.

48. *See* note 2 *supra*.

49. *See The Role of the Comprehensive Plan*, *supra* note 2, at 910; D. MANDELKER, THE ZONING DILEMMA 61 (1971) [hereinafter cited as ZONING DILEMMA].

50. *See* Mandelker, *Philosophy of Zoning*, *supra* note 2, at 14-15; R. BABCOCK, THE ZONING GAME 90 (1966).

51. R. BABCOCK, THE ZONING GAME 135 (1966). *Accord* D. MANDELKER, ZONING DILEMMA, *supra* note 49, at 64.

52. A person under contract to buy land, pending the outcome of zoning proceedings, should also be considered an owner for due process purposes. The Supreme Court recently held that a conditional purchase contract for land would create standing for a substantive

the right to put land to its highest use, what can be called a development right.[53] Second, where an owner's land is already developed, he must still be concerned with the property's utility value, measured by his ability to continue the current use.[54] Third is the right to sell land. Although zoning regulations never prohibit alienation, if a classification decreases a parcel's development or utility value, it will certainly affect its sale value. In fact, dimunition in resale price is the traditional measure of loss of development or utility value.

These classifications can also be used to identify the rights of non-owners, because a neighboring landholder's property is similarly affected by a change in zoning and use of the nearby land (the "owner's" land). The neighbor risks loss of development value if the owner's use prevents realization of the neighbor's own plans.[55] Where the neighbor's property is already developed, a rezoning and consequent change in use of the nearby land may affect his current use and enjoyment—the utility value. Both development and utility values, of course, will affect resale value.[56] For instance, rezoning of a property to permit a

due process claim, implying that the contract created a recognized property right as well. Village of Arlington Heights v. Metro. Housing Devel. Corp., 429 U.S. 252 at 262-63 (1977). A conditional buyer's due process rights may be less than the true owner's. For instance, buyers may not be entitled to separate notice, as it would be impossible for a municipality to identify such parties and they should be able to rely on the current owner transmitting notices from the city. Also, the extent of hearing procedures should not be increased when a conditional purchaser is involved; he and the true owner should share in the quantum of procedure afforded.

53. *See* Cunningham & Kremer, *Vested Rights, Estoppel and the Land Development Process*, 29 HASTINGS L.J. 625, 629-33 (1978).

54. A question might arise as to whether utility should be measured by a subjective or objective standard. If a person is extraordinarily sensitive to noise, is his loss of enjoyment from a slightly noisy factory protected even if resale value is not diminished? This question is faced particularly where aesthetic externalities are involved. Even if a subjective standard is used, it should be noted that under a process-due balancing very little process need be granted those with ephemeral interests, and that even less substantive consideration of such claims is required.

55. It should be emphasized that for purposes of determining whether due process protection is triggered, and how much process is due, the loss to the neighbor is that incurred to his own land; the degree to which the owner's land is affected by rezoning is irrelevant. Obviously a neighbor will be less affected than the landowner in almost every situation, but under the *Roth* two-step analysis, the size of the interest is a factor in determining only what process is due, not whether it is due. Ingraham v. Wright, 430 U.S. 651, 675 (1977); Board of Regents v. Roth, 408 U.S. 566, 570-71 (1972). To determine whether a constitutionally protected deprivation has occurred at all, a court should look only to the *nature* and not the weight of the interest. Ingraham v. Wright, 430 U.S. 651, 672 (1977); Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Board of Regents v. Roth, 408 U.S. 566, 570-71 (1972). Any loss of property which is not de minimis triggers due process. Ingraham v. Wright, 430 U.S. 651, 674 (1977); Goss v. Lopez, 419 U.S. 565, 576 (1975).

56. *See* Comment, *The Fasano Procedures: Is Due Process Enough?*, 6 ENVT'L L. 139,

factory use might affect a neighbor's utility value because the noise, dirt and traffic generated by the factory might deprive him of his common law right to the peaceful use and enjoyment of his property.[57] Additionally, he might lose development value if he plans a similar factory on his land that would be hurt by the nearby competition.[58]

The courts have generally found that neighbors have interests protected by the due process clause.[59] The California Supreme Court, for example, has even recognized that a non-resident of a political jurisdiction is entitled to certain due process protections if his property is affected by the rezoning of the neighboring owner's land.[60]

Persons renting property should also be considered to have protected interests, as they are the prime beneficiaries of the land's utility value. In most cases, the owner-landlord would have similar interests and his hearing rights would protect his tenants. But often tenants will have more incentive to contest a zoning decision or have more information to contribute at a hearing. Additionally, a landlord's and tenant's concerns might diverge. For instance, particular tenants might oppose increased development in an area because it would make their building more desirable to others—without enhancing its utility value to them—

145-46 (1975). *Cf.* D. MANDELKER, ZONING DILEMMA, *supra* note 49, at 81-82 (neighbors' interest for substantive due process or taking claims); R. BABCOCK, THE ZONING GAME 140-44 (1966) (neighbors' interests generally).

57. *See* Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1149, 156 Cal. Rptr. 718 (1979). *But see* Feldman v. Star Homes, 199 Md. 1, 84 A.2d 903 (1951) (truck noise and headlights do not create a constitutionally recognized deprivation).

58. *But see Developments—Zoning*, *supra* note 27, at 1522. Even if there is a property right, a zoning board is unlikely to be impressed by such a claim on substantive grounds.

Note that development value would also be impaired if the neighbor has not yet built a factory, but plans to do so in the future, or plans to sell the land to someone else who will. This value would not be recognized if the positivist approach described above were taken. *See* text accompanying notes 1294-1315 *supra*. That approach defines property interests in terms of what the existing ordinances allow, and it could be argued that the neighbor had no right to develop beyond what uses are now permitted. A positivist analysis would also bar assertion of a deprivation based on the neighbor's intent to himself seek a rezoning in order to allow development.

59. *E.g.*, Masters v. Pruce, 290 Ala. 56, 274 So. 2d 33 (1973); Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1149, 156 Cal. Rptr. 718 (1979); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536 (1965); Morris v. City of Catlettsburg, 437 S.W.2d 753 (Ky. 1969); McCauley v. Albert E. Briede & Son, 231 La. 36, 90 So.2d 78 (1956); Town of Somerset v. Montgomery Bd. of Appeals, 245 Md. 52, 225 A.2d 294 (1966); Kuarpenko v. City of Southfield, 75 Mich. App. 188, 254 N.W.2d 839 (1977); Thomas v. Busch, 7 Mich. App. 245, 151 N.W.2d 391 (1967); Gazan v. Corbett, 278 App. Div. 953, 105 N.Y.S.2d 187 (1951); Vandervort v. Sisters of Mercy, 90 Ohio App. 153, 117 N.E.2d 51 (1952); Tierney v. Duris, 21 Or. App. 613, 536 P.2d 435 (1975) (plaintiffs simply town residents); Fasano v. Bd. of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

60. Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

thereby allowing the landlord to increase their rent. The landlord would, or course, favor the area development for this same reason.

Accordingly, a tenant ought to be able to supplement—or challenge—his landlord's presentation at agency hearings. Perhaps separate mailed notice[61] should be provided for tenants since owners may fail to pass their notification on to their tenants. It seems more practical to place the burden of notifying each tenant directly on the municipalities. Tenants also should be able to make procedural objections to administrative hearings. These due process rights are based on tenants' property interests in their leases.[62] These interests may not be as large as an owner's, but they are nonetheless worthy of some protection under the *Roth* balancing test.

In contrast, parties with no connection to zoned or neighboring land have no constitutionally protected interest. Community or special interest groups with a concern for land use, or developers studying a neighborhood but as yet owning no property in it, have no utility, development or sale interest and therefore no due process rights. This is a sensible result: it would be impractical for a municipality to notify such groups of all zoning actions and impossible for the city to identify which specific actions concerned these parties. It would also be unreasonable to require that any community group or developer claiming an interest be heard at an administrative proceeding.[63] However, these groups assist owners, tenants or neighbors, who do have a due process right to be heard when proposed zoning changes may affect their property interests, in preparing their presentations.

## II. Process Values

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[64]

61. *See* text accompanying notes 138-55, *infra*.

62. This is a seldom acknowledged constitutional interest. *But see, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972) (procedural due process challenge by tenants to state eviction statute). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 509 (1978) (footnotes omitted): "[T]he Supreme Court has . . . consistently recognized that due process requirements are implicated whenever the enforcement power of government is employed to deprive an individual of an interest . . . in the peaceful possession or use of real property. . . .": "of course, lease interests have long been recognized generally as property." 1 H. TIFFANY, THE LAW OF REAL PROPERTY 109 (3d ed. 1939).

63. A zoning body can request a written statement or testimony from a community organization or developer if it determines that such information would be helpful.

64. Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring); Goldberg v.

The Supreme Court has made clear that the determination of what process is due under certain circumstances involves an explicit balancing test.[65] Much has been written about the "process values" which are considered in such a balancing test.[66] The considerations mentioned by the Court and by commentators can be placed within three basic categories: accuracy, acceptability, and efficiency.[67] These values, which are summarized here, provide a framework within which zoning decisions may be evaluated.

Accuracy is simply the goal of eliciting optimal decisions—"good result efficacy," as one commentator has written.[68] Where factual questions are involved, the aim is to obtain all relevant information and analyze it correctly. Questions of policy have two facets. One is the scientific aspect, where expert information and analysis is required. The other facet is pure policy, where decision makers seek to ascertain the wishes of their constituents, *i.e.*, they strive for "political accuracy." With either factual or policy issues, it is crucial that decision makers not be subject to bias, undue influence, or corruption.[69] Moreover, ac-

Kelly, 397 U.S. 254, 263 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). *See also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

65. *E.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Ingraham v. Wright, 430 U.S. 651, 675 (1977); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

66. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-06 (1978); Friendly, *Some Kind of Hearings*, 123 U. PA. L. REV. 1267 (1975); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) [hereinafter cited as Mashaw]; Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS, NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977) [hereinafter cited as Michelman]; Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977); Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, *in* DUE PROCESS, NOMOS XVIII, *supra*, at 172 [hereinafter cited as Pincoffs]; Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Subrin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.—C.L.L. REV. 449 (1974) [hereinafter cited as Subrin & Dykstra]; Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974) [hereinafter cited as Summers]; Tribe, *Structural Due Process*, 10 HARV. C.R.—C.L. L. REV. 269 (1975); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975) [hereinafter cited as Note, *Limits on Use of Interest Balancing*].

67. This particular set of designations is borrowed from Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972) [hereinafter cited as Cramton].

68. Summers, *supra* note 66, at 3.

69. This has often presented problems for local zoning authorities. *See* text accompanying note 3 *supra*; Shapiro, *The Zoning Variance Power—Constructive in Theory, Destruc-*

curacy is not only a goal for each decision, but embodies an aggregate goal of uniform results where similarly situated persons are involved.[70]

The Supreme Court has identified accuracy as a key factor in its balancing test,[71] and the accuracy goal has been widely recognized by lower courts. However, in ruling on procedural challenges, courts have often failed to recognize that the goal is to obtain not just a rational decision, but the most rational decision. More specifically, procedural due process is not just a tool for preventing decisions so arbitrary or irrational that they violate substantive due process; rather, its goal is accuracy for its own sake. Courts often fail to make this distinction. For example, in his *Eastlake* opinion, Chief Justice Burger stated that subsequent judicial review is a palliative for the problems of standardless delegation raised by the Ohio Supreme Court, and those of lack of notice and fair hearing raised by the dissenters.[72] This is a relatively easy argument to make in the zoning field, given the considerable life left in substantive due process review in zoning law,[73] and the fact that speedy determinations are generally not required in land use cases.[74] However, substantive due process review of agency decisions is limited to a mere check for arbitrariness or irrationality. This limitation is to prevent judicial encroachment on executive and legislative prerogatives and to retain the efficiency behind specialized administrative decision making by avoiding de novo review.[75]

In contrast, procedural due process can be required by the courts with much less intrusion into the affairs of the other branches of government and without a wasteful repetition of the agency process in the courtroom. Justice Cardozo recognized this distinction in his opinion for a unanimous court in *Ohio Bell Telephone Co. v. Public Utilities Commission*:[76]

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*tive in Practice*, 29 MD. L. REV. 3, 17 (1969) [hereinafter cited as Shapiro]; United States v. Staszcuk, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975) (conviction of zoning official for extortion).

70. *See* Cramton, *supra* note 67, at 592; Mashaw, *supra* note 66, at 53.

71. *See* note 65 *supra*.

72. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677 (1976).

73. *See, e.g.*, Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed and cert. denied*, 429 U.S. 990 (1976).

74. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.10 (1958) [hereinafter cited as 1 K. DAVIS, TREATISE], listing Supreme Court cases holding that where time is not essential, due process is satisfied by judicial review.

75. *See id. See also* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. at 694-95 n.16 (1966) (Stevens, J., dissenting).

76. 301 U.S. 292 (1937) (citations omitted). *See also* Rosenzweig, *From Euclid to Eastlake—Toward a Unified Approach to Zoning Change Requests*, 82 DICK. L. REV. 59, 72 (1977) [hereinafter cited as Rosenzweig].

> Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints [citing cases concerning substantive due process and takings]. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when such power has been bestowed so freely, that the "inexorable safeguard" . . . of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of "the rudiments of fair play" . . . assumed to every litigant by the Fourteenth Amendment as a minimal requirement.[77]

Thus, courts should demand accurate procedures as a separate and distinct requirement of constitutional due process.

Acceptability, the court's second goal in determining proper due process procedures, involves several interrelated values mentioned by various commentators.[78] First, there is a regard for individual dignity and self-respect.[79] A hearing may allow the participant to see the strength of the opposing position, or provide time for him to adjust to an adverse decision.[80] Closely akin to this is the importance to a democratic society of individual participation in government—the need to give everyone his "day in court." Acceptability also involves "process legitimacy",[81] *i.e.*, impressing upon citizens the idea that decision makers are doing a good job in order to elicit compliance, curtail alienation and engender repose based on the belief that a fair and final decision has been made. Legitimacy is partly earned when citizens believe that authorities are accurate decision makers and free of corruption and bias. Although acceptability values are emphasized by legal commen-

77. Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 304-05 (1937).

78. *See* note 66 *supra*.

79. *But see* Michelman, *supra* note 66, which contends that is is impossible for courts to successfully interject these "interpersonal" aims into agency procedures. However, Michelman's conclusion seems to rest on the assumption that the failure to provide due process results from a total lack of good faith by the agency. In most instances, ignorance and laziness are probably the cause of the problem, and this can be cured by a judicial reminder of constitutional requirements.

There is evidence that in the very first land use decisions, due process was afforded based upon dignity considerations alone. As described in Genesis, when God decided to exlude Adam and Eve from their use and enjoyment of Paradise, a divine hearing was held to inquire of Adam if he had eaten the forbidden fruit. According to the Midrash, the inquiry was not because of any possibility of error, but to afford Adam a moment to regain his composure. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 554 (1978).

80. *See* Subrin & Dykstra, *supra* note 66, at 456.

81. Summers, *supra* note 66, at 2.

tators, the Supreme Court has generally failed to acknowledge their importance in its procedural due process decisions.[82] In *Goldberg v. Kelly*,[83] however, the Court mentioned the need to promote individual dignity, and in *Morrissey v. Brewer*,[84] the process legitimacy goal was noted. The Court recently restated the need for individual dignity and process legitimacy in *Carey v. Piphus*,[85] a case dealing with section 1983[86] damages for due process violations: "[A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."[87] It is an open question whether the courts will afford acceptability values explicit consideration, particularly given the obvious difficulty in identifying and quantifying their importance in particular cases.

Efficiency, the last goal, is well recognized by the Supreme Court[88] and lower tribunals. It provides the basis for the Court's test balancing the severity of the potential loss to the individual against administrative costs. The efficiency value can be directly quantified in terms of the monetary cost of the time and effort expended. When this value is applied along with the accuracy and acceptability values, the balancing test involves weighing the size of the individual's interest multiplied by the accuracy and acceptability fostered by a particular procedure against the costs of that procedure to the government, and, hence, society.[89]

## III. Legislative-Adjudicative Distinction

A basic tenet of procedural due process is that it applies only to adjudicative[90] decisions, and not to legislative acts.[91] This distinction is

82. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 505-06 (1978).
83. 397 U.S. 254, 265 (1970).
84. 408 U.S. 471, 484 (1972).
85. 435 U.S. 247, 261-62 (1978).
86. 42 U.S.C. § 1983.
87. 435 U.S. 247, 262.
88. *See* note 65 *supra*.
89. It has been noted that such explicit balancing recreates the very majoritarianism that due process and other Bill of Rights guarantees are designed to prevent. *E.g.*, Note, *Limits on Use of Interest Balancing*, *supra* note 66, at 1523-27. But if the acceptability value is taken into account, this result may be avoided. *See id.* at 1538-42.
90. As used in this article, "adjudicative" describes both judicial (by courts) and quasi-judicial (by agencies) acts, though the article is concerned primarily with agency actions. "Legislative" will be used to describe actions taken not only by elective bodies, but also by quasi-legislative lawmaking or rulemaking agencies. Some cases have used the term "administrative" where "adjudicative" would be appropriate. There is a separate legislative-administrative distinction, which is similar to the distinction between legislative and adjudi-

essentially a third step which must be added to the *Roth* formulation,[92] since a legislative label will prevent a court from even reaching the question of how much process is due an individual. As many zoning decisions are made by municipal legislatures or by bodies that could be viewed as delegates of those legislatures, this has been a major hurdle to parties seeking to prove constitutional violations in zoning decisions.[93] Litigation in Oregon bears this out. Since the Oregon Supreme Court decision in *Fasano v. Board of County Commissioners*,[94] which limited the application of the legislative label, the Oregon Supreme Court and Court of Appeal have decided at least fifteen zoning cases where procedural due process was at issue.[95]

This section of the article will analyze the legislative-adjudicative distinction and then advocate that the distinction no longer serves as a separate and complete bar to due process relief, but that it be incorporated into the process-due balancing of the *Roth* test.

### A. Traditional Formulation of the Distinction

The legislative-adjudicative distinction has been formulated in several similar ways.[96] In *Bi-Metallic Investment Co. v. Board of Equalization*,[97] Justice Holmes distinguished between acts which apply to many citizens and those which apply to only a few. In terms of process

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cative actions, but the former is based on state common law, and is not used for determining the applicability of constitutional due process. *See* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 93-94 (1976).

91. *Compare* Londoner v. Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Inv. Co. v. Board of Equalization, 239 U.S. 441 (1915).

92. *See* text accompanying notes 22-23 *supra*.

93. *E.g.*, South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S 837 (1974); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973); Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483, *cert. denied*, 434 U.S. 1067 (1978).

94. 264 Or. 574, 507 P.2d 23 (1973). Although the *Fasano* court never specifically mentioned the due process clause, the Oregon Court of Appeal later interpreted *Fasano* to be based on constitutional authority. West v. City of Astoria, 18 Or. App. 212, 524 P.2d 1216 (1974).

95. *See* some of the cases cited in Coon, *The Initial Characterization of Land Use Decisions*, 6 ENVT'L L. 121, 137-38 (1975); and South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 569 P.2d 1063 (1977); Petersen v. Mayor and Council of Klamath Falls, 279 Or. 249, 566 P.2d 1193 (1977); Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976); Neuberger v. City of Portland, 37 Or. App. 13, 586 P.2d 351 (1978); Wes Linn Land Co. v. Bd. of County Comm'rs, 36 Or. App. 39, 583 P.2d 1159 (1978); Bd. of Comm'rs of Clackamas County v. Dep't of Land Conservation and Dev., 35 Or. App. 725, 582 P.2d 59 (1978); Peterson v. City Council of Lake Oswego, 32 Or. App. 181, 574 P.2d 326 (1978); Bienz v. City of Dayton, 29 Or. App. 761, 566 P.2d 904 (1977).

96. *See generally* 1 K. DAVIS, TREATISE, *supra* note 74, at 412-32.

97. 239 U.S. 441, 445 (1915). *Accord*, Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 167 (1951) (Frankfurter, J., concurring).

values this is an important distinction. It is less likely that authorities will be corrupted where there are many individuals concerned. An adverse decision may be easier to accept if it applies to many people. Moreover, requiring hearings when many persons are involved will create a much greater administrative burden.

More recently, Professor Davis has advocated distinguishing between "legislative facts" and "adjudicative facts."[98] The former are the answers to questions of law, policy or discretion, while the latter are facts concerning the what, when and why of particular situations and are used to determine whether a situation fits within a certain law or rule. Davis contends that only adjudicative facts present clear, specific questions of truth, making a trial-type hearing valuable. The legislative facts-adjudicative facts distinction looks to the accuracy value, tempered by an efficiency-motivated desire to employ administrative hearings only when they will increase the accuracy of the decision.[99]

Finally, courts sometimes look to the nature of the decision-making body. According to this view, members of a legislative body receive input from their constituents and do not need a hearing to gather further information. If a decision is "democratically inaccurate," then the decision makers will be removed from office. There is no need for notice and a hearing since the legislature is generally subject to public scrutiny and debate, and acts only upon adequate knowledge and after full consideration.[100] It is also more difficult to unduly influence an entire legislature. For these reasons, acts of Congress or state legislatures are never susceptible to procedural due process attack. However, where lawmaking authority is delegated or a municipal body is involved, it is uncertain whether this exception still applies.

### B. The Distinction in the Zoning Area

A majority of jurisdictions distinguish zoning actions as either legislative or adjudicative on the basis of the decision-making body and the label of the change. Generally, enactments and amendments of zoning ordinances and comprehensive plans by elected bodies are regarded as legislative, while variances, permits and exceptions approved by boards of adjustment or appeal are deemed quasi-judicial.[101] Zon-

98. 1 K. DAVIS, TREATISE, *supra* note 74, § 7.02. *See* Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971) (Friendly, C.J.) (applying distinction).

99. *Id.*

100. *See* Southern Ry. Co. v. Virginia, 290 U.S. 190, 197 (1933); Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 889 (1975) [hereinafter cited as *Due Process Rights of Participation*].

101. *See* 1 R. ANDERSON, *supra* note 3, § 3.14; 2 R. ANDERSON, *id.* § 18.04; 8 E. Mc-

ing commissions, if they make any final decisions, are considered to be able to take either type of action, depending on the perceived delegation.[102] These classifications are a direct application of the nature-of-the-body approach to the legislative-adjudicative distinction.[103] They are based secondarily on a determination of whether policy is made or applied, and whether legislative or adjudicative facts are involved.[104]

Several recent decisions, however, have rejected making a distinction simply on the basis of whether the rezoning decision was made by a legislative or judicial body.[105] According to these cases, although initial formulation of an entire zoning ordinance and major amendments to ordinances retain a legislative character, where a municipal legislature rezones a small parcel of land, affecting just a few owners, the action is quasi-judicial.[106]

This refinement is preferable for several reasons. For one, city councils or county commissions "are simply not the equivalent in all respects of state and national legislatures."[107] Municipal bodies are often small, and therefore more susceptible to undue influence. They are also less subject to public scrutiny. Moreover, as rezoning often affects only a few landowners, these citizens are almost powerless to

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QUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.54 (3d ed. 1976); 8A E. MCQUILLIN, *id.* § 25.230; 1 E. YOKLEY, ZONING LAW AND PRACTICE § 5-3 (2d ed. 1965); 2 E. YOKLEY, *id.* § 14-1; Coon, *The Initial Characterization of Land Use Decisions*, 6 ENVT'L L. 121, 121 & n.1 (1975) [hereinafter cited as Coon, *Initial Characterization*]; Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341, 1341-42 (1975) [hereinafter cited as Cunningham]; Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 130 (1972); *Developments—Zoning*, *supra* note 27, at 1508-13; *Recent Decisions—Zoning*, 8 GA. L. REV. 254, 256-57 & n.15 (1973).

102. 3A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 25.224, .227 (3d ed. 1976). Of course, if a zoning commission is legislative by virtue of delegation rather than election, many of the reasons for not requiring procedures are inapplicable. *See generally Due Process Rights of Participation*, *supra* note 100, at 889.

103. *See* text accompanying note 100, *supra*.

104. *See* note 98 and accompanying text, *supra*.

105. *E.g.*, Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976); Donovan v. Clarke, 222 F. Supp. 632 (D.D.C. 1963); Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975); O'Meara v. City of Norwich, 167 Conn. 579, 356 A.2d 906 (1975); City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). *See* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976); Coon, *Initial Characterization*, *supra* note 101; Cunningham, *supra* note 101; Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisited*, 7 ECOLOGY L.Q. 51, 82-84 (1978); *Recent Decisions—Zoning*, 8 GA. L. REV. 254 (1973).

106. *See* text accompanying note 101 *supra*.

107. Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23, 26 (Or. 1973).

remedy an adverse decision at the polls.[108]

In addition, rezoning does not always involve questions of broad policy. Under the traditional zoning model,[109] policy is set (explicitly or implicitly) by the ordinance, and any variation from the official map is made—following guidelines in the ordinance—by the board of adjustment's grant of nonconforming use permits, special exceptions and variances. Ideally, a variance or permit will only be granted for cases of unusual hardship where the proposed use would not upset the existing zoning scheme. On the other hand, rezoning amendments are basic changes in policy which reflect changed conditions within the community.[110]

But this ideal is far from reality. The model is based on a "static end-state" conception[111] of the community, although scholars and planners now recognize that the dynamics of growth require more flexibility and change.[112] In this context, it is probably impossible to distinguish those changes in zoning which reflect existing policies and those which— often impliedly—create new ones.[113] Moreover, even if such line-drawing is possible, it is often neglected. A landowner who fails to acquire a variance from the zoning commission will often simply try again before the city council, which may be more sympathetic to pleas of hardship and less mindful of the policies underlying the existing ordinance or master plan. Zoning amendments may therefore be quite specific administrative applications of policies or exceptions from

108. *See* Booth, *supra* note 105, at 778.

109. *See, e.g.*, STANDARD ZONING ENABLING ACT, *supra* note 4; Krasnowiecki, *The Basic System of Land Use Control: Legislative Pre-regulation v. Administrative Discretion*, in THE NEW ZONING, 3, 6 (1970) [hereinafter cited as Krasnowiecki]; Dukeminier & Stapleton, *supra* note 3, at 322; Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280, 282-88 (1955); Rosenzweig, *supra* note 76, at 64-65; Shapiro, *supra* note 69, at 3-9.

110. In addition to this structure there is the comprehensive plan, an "impermanent constitution" which might reflect an even higher policy. *See* Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955). Thus, even legislative amendments may be an application of policy and therefore adjudicative. Bross, *Circling the Squares of Euclidian Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97, 98-99 (1975).

111. Under this conception, it is assumed that officials drafting an initial zoning ordinance can determine future development so well that little need be left to the ongoing discretion of officials administering the ordinance.

112. D. MANDELKER, THE ZONING DILEMMA 63-64 (1971); Krasnowiecki, *supra* note 109, at 3-7; Rosenzweig, *supra* note 76, at 64-67.

113. It has been argued that changes which do not reflect existing policies embodied in an ordinance or master plan do not create new policies, but simply apply unstated ones. Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 138 (1972). Under this view, the policy-application distinction is still blurred.

those policies made by a small group of decisionmakers—in other words, adjudicative acts in nearly all respects.[114]

Thus, if certain amendments are to be deemed quasi-judicial, new criteria are needed to distinguish these decisions from legislative acts. The Oregon courts, following the *Fasano* decision, have suggested three considerations that are helpful in making such a distinction: 1) the party initiating the change, 2) the size of the parcel affected, and 3) the number of affected owners and the diversity of their interests.[115]

Under the first criterion, if a private party initiates the zoning change, then it is adjudicative; while the amendments initiated by the local government are legislative.[116] Although this approach conforms to the traditional reasoning that adjudicative decisions address individual situations and legislative decisions set broad policy, it ignores the fact that the landowners' and neighbors' interests and the facts and policies at issue might be the same no matter who proposed the change. It could be argued that decisionmakers are less prone to undue outside influence where they themselves have proposed a change, but this would not necessarily be true where the zoning commission proposes to the city council that it amend the ordinance or master plan. Additionally, where the council members are the proponents of the change, then their own prejudice toward the proposal makes a hearing desirable. It could also be argued that the government's own proposal will always be adequately heard, but in that situation procedures are especially needed to ensure that those who oppose the government will be notified of the proposal and given an opportunity to present their views.

The second criterion, the size of the parcel,[117] is a more logical distinction, but only to the extent that size correlates to the number of owners affected. It would therefore be better to look directly to that characteristic.

The number of owners, the third criterion employed by the Ore-

114. *See* text accompanying note 101 *supra*.

115. Coon, *Initial Characterization*, *supra* note 101, at 126-31. *See also* South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 559 P.2d 1063, 1071 n.5 (1977). The footnote in *Sunnyside* also lists the kinds of standards governing the decisionmakers as a factor. However, what the court meant by this brief reference is unclear.

116. Coon, *Initial Characterization*, *supra* note 101, at 128-29.

117. *See id.* at 128, noting that in the Oregon Court of Appeal decisions since *Fasano*, quasi-judicial standards were applied to acts involving up to 32 acres, while the smallest tract affected by an act deemed legislative was 65 acres. However, in Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976), the Oregon Supreme Court labeled quasi-judicial the rezoning of two parcels totalling 140 acres that were owned by a single corporation. In Petersen v. Mayor and Council of Klamath Falls, 279 Or. 249, 566 P.2d 1193 (1977), the court held an annexation of 141 acres, owned by four parties, to be a quasi-judicial act.

gon courts, is closely related to the process values which the legislative-adjudicative distinction should serve. Decisions involving a few owners will most likely involve specific adjudicative facts and the application of policy, so that a trial-type hearing will result in the most accurate determination. An impartial tribunal and clear standards of decision will also be more effective in preventing arbitrariness. On the other hand, where many citizens are affected the action may be remedied on election day. The number of parties is also a good indication of when corruption should be anticipated. As one commentator has noted, "Acres of land are not likely to exert sinister influences on local decisionmaking bodies, but owners are."[118] In addition, the goal of acceptability[119] is more easily reached where many persons have input into a decision. Finally, administrative costs will be greater where more landowners are involved.

The decisions on comprehensive plans made by zoning commissions, planning boards (even where elected), or town councils should be evaluated in the same way. Although normally a plan is by nature a comprehensive, policy-laden document, it too can be amended piecemeal by authorities. In fact, in some jurisdictions it is routinely altered whenever an amendment is made.[120] In one case, on due process grounds, the Oregon Court of Appeal required a city council to hold a trial-type hearing before it could amend a comprehensive plan to change a single 5.29-acre plot.[121]

### C. Alternative to the Legislative—Adjudicative Distinction

Reliance on the number of owners involved, when coupled with a lesser consideration of the size of the parcel, the decisionmaking body and the type of change, will guide a court fairly well in deciding when adjudicative procedures are more beneficial. However, it is suggested that there be no threshold distinction at all. As the first half of the *Roth* test[122] eliminates only *de minimis* interests, allowing the second step, balancing, to properly allocate lesser procedures to smaller interests, the legislative-adjudicative distinction should be used to wholly deny

118. Coon, *Initial Characterization*, *supra* note 101, at 130. The author notes that in every Oregon decision after *Fasano* in which quasi-judicial action was found, only one owner was affected. *But see* Petersen v. Mayor and Council of Klamath Falls, 279 Or. 249, 566 P.2d 1193 (1977) (four-owner decision is adjudicative).

119. *See* text accompanying notes 78-87 *supra*.

120. *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 946 n.191 (1976).

121. Marggi v. Ruecker, 20 Or. App. 669, 533 P.2d 1372 (1975).

122. *See* text accompanying note 23, *supra*.

due process protection only to what might be called "*de maximis*" interests—those laws passed by state legislatures and Congress. Acts by local legislatures and commissions would be subject to due process protection, though limited by a legislative-adjudicative sliding scale of concerns—that is, those concerns outlined above[123]—employed as part of the *Roth* balancing test.

One reason for abolishing a strict distinction at the local level is that, at least in the zoning area, even a criterion based on the number of individual affected has significant problems. For one, even the most wide-ranging zoning decisions must rely on information concerning specific plots of land. For instance, if a zoning commission must choose between two large areas for establishing an industrial district, its decision should be made based on the beneficial and adverse impact on those holding land in and near the target areas, as well as the effects on the community as a whole. Planning expertise alone will not enable a zoning authority to gauge the total aggregate effect. An airing of individual views—even if elaborate hearings for everyone are impossible—would inevitably provide valuable information. Furthermore, a peculiar characteristic of zoning is that any decision involves boundaries, for which decisions must be made between individual plots of land.[124] Thus, specific information will be much more valuable to zoning authorities than it would be, for example, to administrators setting industry-wide transportation rates or trade practice rules.

Second, legislative-adjudicative distinctions, when used to deny procedural due process where large and varied interests are involved, seem to contravene the Supreme Court's rulings that the size of the interest should determine the amount of process due.[125] It is not hard to imagine an owner arguing on the one hand that the property interests involved are small enough that no existing policies need be reconsidered and consequently the zoning decision should be considered quasi-judicial, but contending on the other hand that his interests are so large as to justify a trial-type hearing on his objections. This anomaly is really nothing new; it is simply a recasting of the Supreme Court's test, balancing the size of the individual's interest and the ability of a hearing to clarify the individual's argument against the administrative burden on the government. Given this parallel, the balancing test alone could serve constitutional interests more directly and coher-

123. *See* text accompanying notes 115-21 *supra*.

124. It should be noted that variances and exceptions provide alternative quasi-judicial relief for an individual placed on the wrong side of a boundary.

125. *See* note 55, *supra*.

ently than two separate judicial tests with apparently contradictory results.

A third reason for eliminating the adjudicative threshold requirement is that, given the difficulty of drawing lines between quasi-judicial and legislative zoning actions,[126] results are inevitably harsh when large interests fall just above the adjudicative line and are wholly denied constitutional redress. The *Roth de minimis* threshold and process-due balancing tests are designed to avoid such results. Incorporating the legislative-adjudicative considerations into the balancing test and leaving only a "*de maximis*" cutoff for purely legislative acts would promote fair treatment for individuals, the main purpose of constitutional due process.

In several cases involving administrative decisions related to housing and redevelopment, the federal courts have required certain minimal procedures even though explicit legislative acts were involved. In *Powelton Civic Home Owners' Association v. Department of HUD*,[127] a group of residents sought notice and a hearing after the government

126. The general difficulty involved in this line-drawing has been recognized in both cases and commentary. The Supreme Court, in United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 245 (1973), noted that the line is "not always a bright one . . . ." The D.C. Circuit Court of Appeals has used stronger language: "In many cases, it is unnecessary, and even unwise, to classify a given proceeding as either adjudicatory or [legislative] rulemaking. The line between the two is frequently a thin one. . . . [O]bsession with attempts to place agency action in the proper category may often obscure the real issue. . . ." City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 739 (D.C. Cir. 1971). *See* a similar statement by Professor Davis, in his TREATISE, *supra* note 74, § 7.02. *See also* 1 F. COOPER, STATE ADMINISTRATIVE LAW 142 (1965): "The suggestion is found in some of the older cases (and in some texts) that in determining the constitutional necessity of notice and hearing, an important factor is the classification of the agency's function as legislative or judicial. The suggested rule is that a hearing is required if the agency is exercising judicial functions, and is not required if the agency is exercising legislative functions.

"This supposed test cannot, however, be relied on as an actual guide to decision. While some courts do apparently give some weight to the classification of the agency's function as legislative or judicial, in deciding whether there exists a constitutional right to notice and hearing (and are more inclined to insist on the allowance thereof if the agency's function is judicial) it is believed that these labels have always played a much smaller part in actual judicial decision than in opinion writing. The labelling of a function as judicial or legislative was often the result of, rather than the basis of, the court's decision on the constitutional question. In any event, it is clear that the nature of the agency's function is not often spoken of, in current decisions, as the basis for decision on the constitutional issue. In fact, hearings are required in some types of cases where the agency's function is essentially legislative in character, if the considerations [related to process values] . . ., dictate the advisibility of insisting on a hearing." Justice Newman of the California Supreme Court recently advocated elimination of the legislative-adjudicative distinction in the zoning area. Horn v. County of Ventura, 24 Cal. 3d 605, 620-21, 596 P.2d 1134, 1142-43, 156 Cal. Rptr. 718, 727, (1979) (Newman, J., concurring).

127. 284 F. Supp. 809 (E.D. Pa. 1968).

moved to condemn a large parcel of land for redevelopment. The court conceded that since legislative, not adjudicative, facts were involved in the question of the razing of the neighborhood, a trial-type hearing would be of little value; in addition, taking testimony from each of the residents would be an overwhelming administrative burden. The court concluded, however, that the Constitution nonetheless required some procedures, and held that the residents should be able to submit written and documentary evidence.[128]

Other courts have also found such a "paper hearing" constitutionally required where questions of general policy affecting many individuals were at stake. Several of these cases involved rent increases in public or publicly-subsidized housing. Although general questions of policy were involved, and the increases involved numerous residents, these courts required a paper hearing along with other procedural protections, including notice of the increase, an opportunity to inspect the landlord's application for the increase, and a statement of reasons.[129]

Thus, a paper hearing, accompanied by notice, standards and a statement of reasons, has relatively low administrative costs even if many individuals are involved. It provides information, thereby promoting accurate decisions and serves to legitimize those decisions to the citizenry. Even where policy issues are involved, individual input may still be valuable. Therefore, an adjudicative threshold requirement for due process protection is undesirable. Instead, courts should infuse the considerations behind the legislative-adjudicative distinction into the *Roth* balancing test, as the courts in the public housing cases seem to

128. *Id.* at 835.

129. Caramico v. Department of HUD, 509 F.2d 694 (2d Cir. 1974) (notice and paper hearing); Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483 (9th Cir. 1974) (notice paper hearing, and reasons); Burr v. New Rochell Mun. Hous. Auth., 479 F.2d 1165 (2d Cir. 1973) (notice paper hearing and reasons); Argo v. Hills, 425 F. Supp. 151 (E.D.N.Y. 1977) (notice, paper hearing, opportunity to inspect application and written decision); 515 Associates v. City of Newark, 424 F. Supp. 984 (D.N.J. 1977) (same). In two other cases, the court justified a due process requirement by finding adjudicative facts at issue, although many tenants were affected by a single increase. Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973) (Leventhal, J.) (paper hearing required by Housing Act, 42 U.S.C. § 1402, although due process used by court to "inform our construction of the statute. . . ."); Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971) (Friendly, C.J.) (but no process required because insufficient state involvement). *Contra*, Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970) (no due process where legislative facts and many individuals involved). *See also* Judge Hufstedler's dissent in *Geneva Towers*, 504 F.2d at 498 ("The great procedural protections of due process are reduced by the majority to little more than a right to send and receive mail."); Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974).

have done *sub silentio*. Zoning changes will thus require at least a paper hearing in order to meet constitutional standards of fairness.

## IV. Process Due

One of the principal values of the administrative process is its flexibility. While the due process clause was intended to protect individuals from unfair or arbitrary decisions, the *Roth* balancing test is designed, at the same time, to preserve administrative flexibility. As a result, a court has wide latitude in considering the value of a particular procedure in a particular situation, and the extent of constitutional protection to which a particular individual is entitled. Therefore, much law is made case by case.

In the zoning context, the multitude of administrative structures which exist in different municipalities exacerbates this uncertainty. For example, in one community permission to build an apartment is obtained by getting a permit from an elected county council vested with absolute discretion, while another community may require amendments to both a master plan and relevant zoning ordinances which must be approved by an appointed zoning board upon the recommendation of an appointed zoning commission. This disparity in administrative frameworks suggests that case-by-case litigation is necessary to clarify the minimum procedures constitutionally required of these deciding bodies.

Since it is clearly impractical to obtain judicial rulings to cover every situation and locality, decision makers will continue to follow those procedures mandated by statute and municipal ordinance as well as to develop their own rules. Nevertheless, vigilant protection of due process rights by the courts is necessary to prod lawmakers and administrators into developing fair and comprehensive codes of procedure for zoning agencies.

This article will not discuss the legislative question of what might be the most prudent procedural rules, as that issue is the topic of a vast quantity of zoning cases and commentary. Rather, the following commentary will outline those procedural safeguards which the Constitution might require. Given the multiplicity of types of administrative agencies and zoning controversies, it is impossible to draw specific guidelines here; only a general discussion of procedural problems and the applicable constitutional law will be provided.[130] Federal and state

130. No attempt will be made to discuss what safeguards beyond those required by the

court decisions which have explicitly dealt with constitutional due process challenges will be noted.

Before examining each procedural safeguard separately, it might be helpful to note a few points with respect to the *Roth* balancing test as it is applied in the zoning context. First, land is at the core of traditional notions of property.[131] Given the Burger Court's emphasis on constitutional text and the protection of traditional interests, ownership of land should be provided maximum protection.[132] Second, as a result of the narrow protection provided by the taking clause under current interpretation,[133] wide discretion is exercised by zoning agencies.[134] Much of this discretion is used not only in formulating original plans and ordinances, but also in determining amendments and variances.[135] Therefore, proceedings before these agencies often involve crucial determinations of property rights. Third, land use controls involve perhaps "more subtle considerations of public welfare"[136] than most other local administrative controls. Finally, for several reasons, local zoning bodies—especially in comparison to federal agencies—are prone to making less accurate and less publicly acceptable decisions. This is because the officials are often laymen, lacking legal knowledge; the members are often under great outside pressure from affected citizens with whom they live and do business; and such "minor" official agencies receive less scrutiny from the press and scholars.[137] Given these factors, courts should be particularly careful in weighing the interests of individual appearing before zoning agencies.

### A. Notice

Judge Friendly has written that proper notice, along with an opportunity to be heard and an impartial tribunal, is a "fundamental" aspect of due process.[138] According to the Supreme Court, notice must

U.S. Constitution are required by state constitutions, as state courts have rarely held that their constitutions impose additional procedural requirements. *See* note 11 *supra*.

131. *See* notes 26-28 and accompanying text *supra*.

132. For a discussion of whether land should be given special protection over other forms of property, compare the majority and dissenting opinions in San Diego Bldg. Contr. Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

133. *See* note 34 and accompanying text *supra*.

134. *See* note 2 and accompanying text *supra*.

135. *See* notes 112-113 and accompanying text *supra*.

136. R. Babcock, Brief in Eastlake, *supra* note 3, at 14.

137. Dukeminier & Stapleton, *supra* note 3, at 332-33. *See also* 1 F. COOPER, STATE ADMINISTRATIVE LAW 4 (1965).

138. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280 (1975). Various courts have invoked the constitutional need for notice in the zoning context. *See, e.g.*, Sixth

be

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . .[139]

The form of notice is a recurrent issue. The Supreme Court has struck down notice by publication in a condemnation case, stating: "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."[140] Yet notice by publication is a common zoning procedure.[141] This procedure, even when accompanied by posting, is certainly inadequate where only a few landowners are involved.[142] The law is not as clear where numerous owners are affected, as such action might be deemed legislative, requiring no notice.[143] If a court looks beyond the legislative-adjudicative distinction, however, notice might be required even where a new master plan or zoning ordinance is being considered. The Supreme Court has required mailed notice where the property rights of over one

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Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (1976); Masters v. Pruce, 290 Ala. 56, 274 So. 2d 33 (1973); Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536 (1965); Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956); Calawa v. Town of Litchfield, 112 N.H. 263, 296 A.2d 124 (1972); Vandervort v. Sisters of Mercy of Cincinnati, 97 Ohio App. 153, 117 N.E.2d 51 (1952); West v. City of Astoria, 18 Or. App. 212, 524 P.2d 1216 (1974); Cugini v. Chiaradio, 96 R.I. 120, 189 A.2d 798 (1963).

139. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

140. Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956). *Accord*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (requiring notice by mail to beneficiaries of judicial settlement of trust fund where addresses of recipients were known); Schroeder v. City of New York, 371 U.S. 208 (1962) (publication and posting insufficient to notify of partial condemnation where owner's name and address were available in public records).

141. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.13 (2d ed. 1976); 3 *id.* § 20.20; Annot., 38 A.L.R.3d 167 (1971).

142. American Oil Corp. v. City of Chicago, 29 Ill. App. 3d 988, 331 N.E.2d 67 (1975). *Contra*, Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961). *See also* Gulf & Eastern Dev. Corp. v. City of Ft. Lauderdale, 354 So.2d 57 (Fla. 1978) (no notice at all violates due process).

143. Krimendahl v. Common Council of Noblesville, 256 Ind. 191, 267 N.E.2d 547 (1971) (no notice required where amendment deemed a legislative act); Lawton v. City of Austin, 404 S.W.2d 648 (Tex. Civ. App. 1966) (same); Wanamaker v. City Council of El Monte, 200 Cal. App. 2d 453, 19 Cal. Rptr. 554 (1962) (published notice satisfactory for adoption of comprehensive plan, labelled a legislative act). *See also* Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 136 (1959) (publication constitutionally adequate where new zoning ordinance enacted); Clackamas County v. Emmert, 14 Or. App. 493, 513 P.2d 532 (1973) (publication adequate where amendment affects large area).

hundred individuals were involved.[144] This is not a costly procedure, and addresses would normally be available from municipal records.[145] Therefore, personal notice to all owners of land who would receive a significantly different zoning classification under a proposed new ordinance should be constitutionally required.

A tougher question is what notice should be provided neighboring owners. Several courts have upheld notice by publication as providing adequate due process.[146] However, in *Scott v. City of Indian Wells*,[147] the California Supreme Court required personal notice to all owners of property adjacent to a planned large development, including property which was outside the zoning authority's jurisdiction.[148] This seems to be a reasonable requirement which would impose little burden on zoning agencies. Personal notice to more distal neighbors, however, would involve a much greater burden. Since this is likely to include a much larger number of people, published notice might reliably inform at least a representative sample of these individuals, making it constitutionally acceptable.

The content of the notice should also meet the Supreme Court's standard of reasonable appraisal.[149] Any notice should include not only the time, date, and place of the hearing, but it should also provide an adequate description of the property at issue and the nature of the proposed change.[150] The latter information should allow a citizen to ascertain with reasonable effort whether his own property will be affected.[151] If many owners are affected by a general proposal such as a new ordinance or plan, this requirement might be satisfied by making

144. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 309 (1950).

145. Unlike class action litigation where tens and even hundreds of thousands of individuals might need to receive notice, zoning changes by municipalities will not normally affect such a large number of individuals.

146. Annot., 96 A.L.R.2d 449, § 4 (1964 & Later Case Serv.). *See also* Karpenko v. City of Southfield, 75 Mich. App. 188, 254 N.W.2d 839 (1977); Wood v. Freeman, 43 Misc. 2d 616, 251 N.Y.S.2d 996 (1964), *aff'd*, 24 App. Div. 2d 704, 262 N.Y.S.2d 431 (1965); Griest v. Hooey, 205 Misc. 396, 128 N.Y.S.2d 341 (1954); Gazan v. Corbett, 278 App. Div. 953, 105 N.Y.S.2d 187 (1951), *aff'd*, 304 N.Y. 920, 110 N.E.2d 739 (1953). *See Developments—Zoning*, *supra* note 27, at 1519.

147. 6 Cal. 3d 541, 462 P.2d 1137, 99 Cal. Rptr. 745 (1972).

148. *Id.* at 549, 462 P.2d at 1142, 99 Cal. Rptr. at 750. *See also* Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1149, 156 Cal. Rptr. 718 (1979) (striking down notice by posting in county offices).

149. *See* text accompanying note 139 *supra*.

150. *See* Adler v. Lynch, 415 F. Supp. 705 (D. Neb. 1976) (holding notice constitutionally insufficient where the specific proceeding was not mentioned). *See also* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.14 (2d ed. 1976); 3 R. ANDERSON, *id.* § 20.21.

151. Clackamas County v. Emmert, 14 Or. App. 493, 513 P.2d 532, 534 (1973); 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.249 (3d ed. 1976).

maps and proposals available at government offices.[152]

Notice must also be timely. The Standard Zoning Enabling Act provides for notice at least fifteen days prior to the hearing,[153] and an Oregon court has upheld notice given ten days in advance.[154] Less than a week's notice, however, might not offer a "reasonable time for those interested to make their appearance."[155]

## B. Hearing

### *1. Purpose and Nature*

There are three purposes of a zoning hearing; 1) to inform decision makers of public opinion on policy issues, 2) to acquaint them with specific facts concerning affected property, and 3) to give owners an opportunity to protest decisions concerning their land.[156] Courts have rarely been asked to determine the precise ingredients of such a hearing,[157] but it is widely acknowledged that even informal procedures are permissible if they allow landowners an adequate opportunity to be heard.[158] This right to present and rebut evidence[159] extends to information on policy as well as concrete fact.

Yet, the procedures which that right requires may be limited, depending upon the nature of the information sought by the zoning agency. The gathering of specific, adjudicative facts generally requires an oral, trial-type proceeding, particularly where credibility is important or where an issue cannot be easily documented.[160] In contrast, a paper hearing, perhaps accompanied by limited oral testimony, may be constitutionally adequate for the adoption of ordinances and amendments affecting many citizens' land, especially where legislative facts are involved and a full hearing for all affected citizens would consumer inordinate amounts of time and money.

Other possibilities exist, depending on the circumstances. For instance, written presentations, with opportunity given to all parties to

152. *See* Glaspey & Sons, Inc. v. Conrad, 8 Wash. App. 932, 509 P.2d 762 (1973) (due process does not require explanation of entire proposed ordinance or reference to official maps in published notice, where such information is available upon request).

153. *See* STANDARD ZONING ENABLING ACT, *supra* note 4, § 4.

154. Clackamas County v. Emmert, 14 Or. App. 493, 513 P.2d 532 (1973).

155. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

156. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 4.11 (2d ed. 1976).

157. *Id.* at § 4.16.

158. *Id.* at 214; 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.263 (3d ed. 1976).

159. Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23, 30 (1973).

160. Mathews v. Eldridge, 424 U.S. 319, 343-44 (1976); Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

examine the submissions, may be adequate to deal with legislative facts where few individuals, but many complex policy questions not adaptable[161] to oral testimony and cross-examination, are involved. Thus, where a proposed amendment would allow one owner to build a shopping center that would have an intense and complex impact on the community, the right to present oral testimony might be reserved solely for the owner, since he has a larger property interest than his neighbors and thus more weight in the *Roth* balancing test. Conversely, even where a broad ordinance is at issue, specific situations may require oral testimony.[162]

### 2. *Conduct of Hearing*

In the usual case where an oral hearing is necessary, strict rules of evidence need not be applied,[163] nor is the swearing of witnesses constitutionally required.[164] The number of witnesses and length of their testimony may be restricted for accuracy and efficiency reasons.[165]

The due process right to cross-examine witnesses has presented a thornier problem for state courts.[166] Although the use of cross-exami-

161. *See* 1 K. DAVIS, TREATISE, *supra* note 74, § 7.20. *See also* FCC v. WJR, 337 U.S. 265 (1949) (oral hearing not required for efficiency reasons).

162. For example, where a comprehensive proposal changes the classification of many parcels of land, those whose land would constitute a nonconforming use might be allowed to testify, while those with vacant land or conforming uses could only present written submissions.

163. 2 K. DAVIS, TREATISE, *supra* note 74, § 14.01 (strict application of rules not required in administrative hearings); 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.31 (2d ed. 1976); 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.263 (3d ed. 1976) (zoning boards normally do not use strict evidentiary standards).

164. Shellburne, Inc. v. Conner, 269 A.2d 409 (Del. Ch. 1970); South of Sunnyside Neighborhood League v. Board of Comm'rs, 27 Or. App. 647, 557 P.2d 1375 (1976), *rev'd on other grounds*, 280 Or. 3, 569 P.2d 1063 (1977). *Contra*, Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974) (dictum). *See also* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.34 (2d ed. 1976).

165. *See* text accompanying notes 68-77, 88-89 *supra*.

166. Courts in three states have denied any constitutional right. Shellburne, Inc. v. Conner, 269 A.2d 409 (Del. Ch. 1970); In re Coleman, 242 So. 2d 602 (La. App. 1970); South of Sunnyside Neighborhood League v. Board of Comm'rs, 27 Or. App. 647, 557 P.2d 1375 (1976), *rev'd on other grounds*, 280 Or. 3, 569 P.2d 1063 (1977). *See* Armstrong v. Zoning Bd. of Appeals, 158 Conn. 158, 257 A.2d 799 (1969) (lack of cross-examination was harmless in the particular situation). Two states have held that there is such a right in zoning proceedings. Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971); Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967) (denial of right even where plaintiff was allowed to call other side's witnesses on direct examination); Town of Somerset v. Montgomery County Bd. of Appeals, 245 Md. 52, 225 A.2d 294 (1966) (same). *See also* Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974) (dictum).

nation is rare, even before boards of adjustment or appeal,[167] the Supreme Court has held it to be a fundamental aspect of due process, at least where questions of fact are in dispute.[168] Where adjudicative facts are not at issue, however, cross-examination does not serve accuracy values; in fact, it may have a polarizing effect when a decision maker is attempting to formulate a consensus view, or determine the most rational, scientifically correct solution to a planning problem.[169] Accordingly, a constitutional balance may require cross-examination only in certain instances, with written interrogatories as an alternative for particular issues.[170] Considerations of efficiency may require that any permitted examination be reasonably limited in time and scope.[171]

In some instances, the due process clause may protect the right to a public hearing.[172] Given the potential for undue influence on zoning bodies,[173] such public access particularly serves accuracy and acceptability values. However, the Constitution does not guarantee a room large enough to accommodate all comers to a controversial hearing.[174]

*3. Right to Counsel*

Although the Supreme Court has not granted a right to have an attorney present in all administrative proceedings, expressing a legitimate concern for problems of polarization and delay,[175] the complexity and relative formality of zoning hearings, as well as the large property interests at stake, would seem to demand the right to adequate representation. As the Court itself has pointed out, "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the [client]."[176] Presence of counsel is as valuable where broad policy concerns are at issue as when specific factual questions must be answered.

167. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.23 (2d ed. 1976).

168. Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970). *But see* Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974).

169. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1283-86 (1975).

170. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (written cross-examination in agency hearing satisfied requirements of enabling statute and common law fundamental fairness).

171. Gibson v. Talbot County Bd. of Zoning Appeals, 250 Md. 292, 242 A.2d 137 (1968). *See also* Bayer v. Siskind, 247 Md. 116, 230 A.2d 316, 320 (1967) (owner of affected land has more extensive right than other interested parties).

172. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1293-94 (1975).

173. *See* note 3 and accompanying text, *supra*.

174. Gibson v. Talbot County Bd. of Zoning Appeals, 250 Md. 292, 242 A.2d 137 (1968).

175. *Compare* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) *with* Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974).

176. Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970).

*4.* Ex Parte *Evidence and Argument*

State agencies are especially prone to use *ex parte* evidence in making decisions.[177] Although the Supreme Court has held that a decision "must rest solely on the . . . evidence adduced at the hearing,"[178] it has not prohibited reliance on *ex parte* evidence, as long as it is disclosed at the hearing.[179] This latter approach is probably all that due process requires in the zoning area, as *ex parte* information is often important to land use tribunals. In most cases, disclosure of reliance upon information not introduced at a hearing will provide parties with sufficient opportunity to respond.

Valuable *ex parte* information may be obtained from various sources. Zoning officials should draw upon the technical expertise of other city officials or planning experts through informal meetings where the official or expert is not inhibited by the need to present a formal written report or to prepare testimony and submit to cross-examination. Zoning officials should also be able to personally inspect land sites that are at issue. Elected officials should be able to consult with their constituents.[180] Here, an interest in "democratic accuracy" must be balanced against the accuracy value of prohibiting *ex parte* evidence. Finally, private, legislative-type bargaining should be allowed where broad, legislative decisions are involved and traditional notions of fairness will not be violated. This is a particularly delicate issue, especially since legislators will often fail to disclose most of their *ex parte* discussions, but such bargaining is a key to the legislative process. This is one area where the legislative-adjudicative dichotomy is given great weight.

If agencies rely on *ex parte* information, they should be required to place such evidence into the record in order to enable the parties to respond to it and also to provide courts with the basis for review of zoning decisions.[181]

177. 1 F. COOPER, STATE ADMINISTRATIVE LAW 4 (1965).

178. Goldberg v. Kelly, 397 U.S. 254, 271. *Accord*, Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937).

179. *See* Morgan v. United States, 304 U.S. 1 (1938).

180. *See* Tierney v. Duris, 21 Or. App. 613, 536 P.2d 435 (1975).

181. A few cases have held *ex parte* evidence and discussions violative of due process in zoning procedures. Hot Shoppes, Inc. v. Clouser, 231 F. Supp. 825 (D.D.C. 1964); Allen v. Donovan, 43 Del. Ch. 512, 239 A.2d 227 (1968); Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971). *See also* Peterson v. City Council of Lake Oswego, 32 Or. App. 181, 574 P.2d 326 (1978) (holding no due process violation where minutes of *ex parte* meeting were available and other special circumstances indicated an impartial decision had been made); West v. City of Astoria, 18 Or. App. 212, 225, 524 P.2d 1216, 1222 (1974) (Schwab, C.J., concurring and finding an *ex parte* problem).

## C. Initiatives and Referenda

The use of initiatives and referenda has been a source of much litigation in the last several years. A majority of cases deal with state law,[182] but some courts have considered constitutional due process challenges. These challenges are of two types. Referenda procedures have been struck down as violative of due process for impermissibly delegating power without standards of guide decisions.[183] They have also been voided for precluding constitutionally required notice and hearing.[184]

Both of these problems were present in *City of Eastlake v. Forest City Enterprises, Inc.*[185] There, the Ohio Supreme Court[186] had struck

182. Referenda on zoning questions have been struck down because laws allowing them were held applicable to legislative, and not administrative, action. *E.g.*, Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Leonard v. City of .Bothell, 87 Wash. 2d 847, 557 P.2d 1306 (1976). The legislative-administrative distinction is quite similar in application to the legislative-adjudicative dichotomy and sometimes the two are confused by judges, but the former is strictly a state law doctrine. *See* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 93-94 (1976). Initiatives and referenda have also been challenged for not providing the notice, hearing, and other procedures required by state zoning laws. *E.g.*, Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); Elliott v. Clawson, 21 Mich. App. 363, 175 N.W.2d 821 (1970). Use of these two devices has been the source of much recent commentary, particularly after the *Eastlake* decision. *See* Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulations Land Use?*, 28 CASE W. L. REV. 42 (1977); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1402-25 (1978); WOLFSTONE, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisisted*, 7 ECOLOGY L.Q. 51 (1978); Note, 5 *Constitutional Law—Zoning Referenda—Mandatory Referenda on All Municipal Land Use Changes Do Not Violate the Due Process Clause*, 5 FORDHAM URB. L.J. 141 (1976) [hereinafter cited as Fordham Note]; *Developments—Zoning*, *supra* note 127, at 1530-42; Note, *Land Use Planning and the Public: Zoning by Initiative*, 36 MONT. L. REV. 301 (1975); Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes*, 6 N.Y.U. REV. L. & SOC. CHANGE 97 (1977); Note, *Adjudication by Labels: Referendum Rezoning and Due Process*, 55 N.C. L. REV. 517 (1977) [hereinafter cited as *Adjudication by Labels*]; Note, *The Proper Use of Referenda in Zoning*, 29 STAN. L. REV. 819 (1977); Note, *Preserving "The Blessings of Quiet Seclusion": The Eastlake Decision and a Community's Right to Control Growth*, 1977 U. ILL. L.F. 895; Comment, *Voter Zoning: Direct Legislation and Municipal Planning*, 1969 ARIZ. ST. L.J. 453; Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74 (1976); Comment, *Forest City Enterprises, Inc. v. City of Eastlake: Zoning Referenda and Exclusionary Zoning*, 24 CLEV. ST. L. REV. 635 (1975); Comment, *The Erumpent Power of the Initiative, Growth Control Ordinances, and the Regional Welfare: A Comment on Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore*, 1 HARV. ENVT'L L. REV. 515 (1977); Comment, *Referendum Zoning: The State and Federal Issues and a Suggested Approach*, 60 MARQ. L. REV. 907 (1977); Comment, *Zoning and the Use of the Initiative*, 1975 U. ILL. L.F. 693.

183. *E.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Marta v. Sullivan, 248 A.2d 608 (Del. 1968).

184. *E.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968).

185. 426 U.S. 668 (1976).

down an Eastlake, Ohio ordinance authorizing referenda on zoning matters, finding that the ordinance *sub judice* was an impermissible standardless delegation. This decision was based on two early U.S. Supreme Court cases, *Eubank v. City of Richmond*,[187] and *Washington Ex rel. Seattle Title Trust Co. v. Roberge*,[188] which had invalidated ordinances delegating zoning decisions to neighboring property owners. The Supreme Court reversed the Ohio court judgment, holding that a referendum involving all citizens of a city could not be an impermissible delegation because it was not a delegation at all, but simply a reservation of power held by the voters.[189]

Justice Stevens dissented,[190] asserting that the Eastlake scheme violated due process not only because there were no standards, but also because the plaintiff was not provided notice or a hearing before an impartial tribunal prior to the rejection of the proposed zone change. He contended that due process was required, despite the Ohio Supreme Court's labelling of the decision as legislative, because the controversy dealt with "particular issues involving specific uses of specific parcels."[191]

The majority position on standardless delegation is unfortunate. The nondelegation doctrine might have proved useful to limit some types of delegation to private persons. For example, the Court might have distinguished and permitted referenda on legislative issues, while allowing courts to continue to read the due process clause as prohibiting standardless delegations to voters of adjudicative questions.[192] On the other hand, the Court's decision on reservation of power is clear, limiting the nondelegation doctrine where the entire electorate is involved.[193]

186. Forest City Enterprises, Inc. v. City of Eastlake, 40 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

187. 226 U.S. 137 (1912). *But see* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917), upholding a delegation because neighbors could only remove a restriction, not impose one.

188. 278 U.S. 116 (1928).

189. 426 U.S. 668, 672 (1976).

190. *Id.* at 680. Justice Stevens was joined by Justice Brennan. Justice Powell also filed a one-paragraph dissent, basically making the same objections as Justice Stevens. *Id.*

191. *Id.* at 683. Stevens also indicates agreement with recent cases holding that amendments involving only a few parcels or owners are adjudicative. *Id. See, e.g.*, Fasano v. Board of County Comm'rs, 264 Ore. 574, 580-81, 507 P.2d 23, 26 (1973), and Fleming v. City of Tacoma, 81 Wash. 2d 292, 298-99, 502 P.2d 327, 331 (1972).

192. Under the sliding scale of legislative-adjudicative considerations proposed in this article, such a distinction could still be made.

193. 426 U.S. 668, 678. Of course, states may still prohibit referenda on adjudicative issues through statutes or by application of the common law legislative-administrative dis-

What is less clear is whether the majority actually rejected Justice Stevens' position on the requirements of notice and hearing.[194] Although the need for these two fundamental safeguards was urged by certain *amici curiae*,[195] the lack of notice and hearing was not the express ground for the Ohio Supreme Court decision; the majority therefore was not required to address the issue. Chief Justice Burger emphasized the reservation of power held by voters, and although this reservation might logically include all procedural due process rights, the majority opinion could be interpreted as precluding only the nondelegation doctrine.

If this reading is correct, litigation in other courts concerning the notice and hearing issue is still significant. While some courts have struck down zoning ordinances adopted by initiative or referendum because notice and hearing were lacking,[196] other courts have upheld such ordinances, finding that procedural due process is not required where essentially legislative matters are involved.[197] This conflict may again be resolved by absorbing legislative-adjudicative considerations into the *Roth* balancing test. Where questions on the ballot affect and interest many voters, public participation in decisions would indeed further accuracy and acceptability values. On the other hand, where only a few owners of a single parcel are affected—as in *Eastlake*—and the decision to be made requires the evaluation of specific facts, voters would have much less to contribute, while a formal hearing would be valuable. Additionally, voters will have less to complain about if they

tinction. *See* note 182 *supra*. The latter would accomplish the same goal as due process in about the same way based on very similar considerations.

194. *Compare* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.12 (2d ed. 1978) [hereinafter cited as 1 K. DAVIS, TREATISE (2d ed.)]; *The Case for a Procedural Due Process Limitations on the Zoning Referendum: City of Eastlake Revisited*, 7 ECOLOGY L.Q. 51, 93 (1978); Note, *Adjudication by Labels*, *supra* note 182, at 528; Note, *The Proper Use of Referenda in Zoning*, 29 STAN. L. REV. 819, 831 (1977); Fordham Note, *supra* note 182, at 153 *Developments—Zoning*, *supra* note 127, at 1539-41 (majority did not rule on notice and hearing question) *with* Montgomery Co. v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483, 498 (1977), *cert. denied*, 434 U.S. 1067 (1978); Comment, *Referendum Zoning: State and Federal Issues*, *supra* note 182, at 917; Note, *Zoning and Referendum: Converging Powers*, *supra* note 182, at 119 (majority held that referenda not subject to due process hearing requirement).

195. *See* Brief for *Amici Curiae*: San Diego Building Contractors Associations, and Associated General Contractors of America, San Diego Chapter, Inc., at 8-17, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

196. *E.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968).

197. *E.g.*, San Diego Bldg. Contr. Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976); Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976).

are not consulted on decisions which affect only a few citizens.[198]

Initiatives and referenda can be distinguished for due process purposes. California courts have held that, while initiatives impermissibly deny notice and hearing, referenda in which voters are asked to approve ordinances first passed by the city council satisfy procedural requirements.[199] There is some merit to this approach as interested parties do receive notice and a public airing of issues prior to the referendum. Where policy issues are involved, a hearing before a city council is perhaps the best means of informing voters about specific parcels of land while satisfying individual landowners' entitlement to due process. The initiative process might also meet constitutional standards if hybrid procedures were developed. For instance, a governing board might be given the power, after an initiative is approved, to modify or interpret a decision based on specific fact-finding.[200] Similarly, a hearing could be held and findings made with regard to purely factual issues implicated in a complex referendum question.[201] Such alternatives deserve much closer analysis than can be provided here. They illustrate the flexibility which a balancing test provides by giving the legislature an opportunity to devise creative, thoughtful devices to accommodate constitutional requirements.

### D. Impartial Tribunal

Impartiality can be compromised in several ways. First, members of a zoning authority can have a personal or pecuniary interest in a matter. In adjudicative settings, the Supreme Court has repeatedly held that even the slightest monetary interest violates due process;[202] in cases of more attenuated personal interest, however, a decision maker

198. A similar balancing test is proposed in Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 92-93 (1976).

199. Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); Taschner v. City Council, 31 Cal. App. 3d 48, 62 n.10, 107 Cal. Rptr. 214, 226 n.10 (1973).

200. This has been proposed by Justice Burke of the California Supreme Court. San Diego Bldg. Contr. Ass'n City Council, 13 Cal. 3d 205, 223-24 & n.7, 529 P.2d 570, 582 & n.7, 118 Cal. Rptr. 146, 158 & n.7 (1976) (dissenting opinion).

201. This is not to say that the electoral process itself provides any sort of due process hearing. *Accord, id.* at 221-22, 529 P.2d at 581, 118 Cal. Rptr. at 165 (Burke, J., dissenting). For possible devices to inform citizens, *see* Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulating Land Use*, 28 CASE W.L. REV. 42, 61 (1977); Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes*, 6 N.Y.U. REV. L. & SOC. CHANGE, 97,127-32 (1977); Note, *The Proper Use of Referenda in Zoning*, 29 STAN. L. REV. 819, 848-49 (1977).

202. Withrow v. Larkin, 421 U.S. 35, 47 & n.14 (1975); Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

may retain his presumption of impartiality absent specific evidence of bias.[203] Both of these principles have been applied in zoning cases.[204]

Bias on issues, a second type of impartiality, presents a more subtle problem. Though mere familiarity with the facts of a case will not disqualify,[205] an official's demonstrated prejudgment of an issue has been held violative of due process.[206] A major problem in identifying bias on issues, however, lies in the sometimes hazy distinction between questions of fact and questions of policy. Professor Davis has emphasized differences between the two,[207] noting that where policy issues are present, it is desirable from a "democratic accuracy" standpoint to have decision makers biased toward certain policies—for which preferences they were presumably elected, or appointed by elected officials.[208] Of course, this implies that elected officials should be able to speak publicly and campaign on policy issues, though the issues may be implicated in pending zoning cases.[209]

The California Supreme Court took that position in *City of Fairfield v. Superior Court*.[210] There, the court upheld a city council decision to deny a permit for a shopping center despite the fact that two council members had publicly opposed it. The court based its conclusion on the fact that the question was of great public interest and council members had a duty to discuss it publicly. In contrast, the

203. Withrow v. Larkin, 421 U.S. 35, 47 (1975).

204. Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971) (planning commissioner's prior legal representation of party precluded the appearance of fairness required by due process); Armstrong v. Zoning Bd. of Appeals, 158 Conn. 158, 256 A.2d 799 (1969) (fact that zoning board member's son had attended school owned by a party did not violate due process absent specific evidence of bias); Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975) (where the same attorney served as counsel to both the zoning board and a local township, a party to the action, due process was deemed violated without a specific showing of harm).

205. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976).

206. *E.g.*, Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965) (both cases involved disqualification of a Federal Trade Commissioner based on speeches he made concerning litigants).

207. 2 K. DAVIS, TREATISE, *supra* note 74, § 12.01.

208. *See id.* at 137. *See also* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493-95 (1976) (holding that making public a position on a policy issue does not violate due process).

209. Legislators have been immune from disqualification for bias. But under a legislative-adjudicative sliding scale for local legislative bodies, disqualification would be possible in some cases. Here, the fact-policy dichotomy would be more significant than the number of owners or size of the parcel at issue, because of the accuracy considerations mentioned in the text. *See* text accompanying notes 68-77.

210. 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975).

Washington Supreme Court in *Chrobuck v. Snohomish County*,[211] found that a planning commissioner's public statements in support of an oil refinery, made before he was appointed to the commission, precluded the "appearance of fairness" essential to due process. Undoubtedly, a delicate balancing is required here between democratic values and the protection of property owners against the unconsidered preferences of the majority, as reflected by political pressures on decision makers. This balancing is similar to the weighing of values that must be made for direct voter participation in zoning referenda.[212]

A third type of bias might result from the combination of functions handled by a particular deciding body. It is quite common for a governing board or a zoning commission to both approve a master plan or ordinance and decide on amendments to or variances from that plan. The constitutionality of such a combination of functions in the zoning area has not yet been determined. The Supreme Court has held that preliminary parole revocation hearings may not be conducted by the supervising parole officer because of his personal involvement with the parolee.[213] The Court has also held a combination of investigative and adjudicative functions constitutionally permissible, absent a specific showing of bias, in cases involving a medical licensing board[214] and a social security hearing examiner.[215] Additionally, it has upheld the Federal Trade Commissioners' dual responsibilities for policy making and adjudication.[216] Again, parallels can be drawn to the dual functions of zoning authorities. Generally, state courts have permitted agencies to serve joint functions, though they have sometimes indicated that they would undertake closer judicial scrutiny of the decisions of these agencies.[217] Since any bias by zoning agencies would usually serve the laudable end of upholding master plans and ordinances, without normally prohibiting a fair hearing on zoning changes, such a combination of functions should be allowed absent specific proof of resulting bias that precludes a fair hearing.

### E. Findings, Reasons and Record

Much of the administrative law requiring agencies to state findings

211. 78 Wash. 2d 858, 480 P.2d 489 (1971).
212. *See* notes 196-99 and accompanying text *supra*.
213. Morrissey v. Brewer, 408 U.S. 471 (1972).
214. Withrow v. Larkin, 421 U.S. 35 (1975).
215. Richardson v. Perales, 402 U.S. 389 (1971).
216. FTC v. Cement Inst., 333 U.S. 683 (1948).
217. 2 K. DAVIS, TREATISE, *supra* note 74, § 13.02.

and the reasons for decisions has judicial origins.[218] In these cases, courts have required a statement of the basis of the decision in order to allow adequate judicial review. Because of this wide application of the law to require findings and reasons and also because administrative statutes commonly impose a similar requirement, courts have rarely needed to invoke the Constitution. Zoning cases are no exception to this general rule.[219]

There is certainly nothing wrong where a judicially promulgated doctrine adequately protects individuals against constitutional violations. However, inadequate findings and reasons are still a major problem in zoning.[220] For example, judicial doctrines may mean little where an agency has almost complete discretion and is accordingly subject to narrow judicial review. Also, a federal court, which cannot substantively review state agency action absent arbitrariness or other constitutional violation, would have to rely on procedural due process to require findings and reasons. Thus, for some situations, a constitutionally based rule is necessary.

In a few cases, the Supreme Court has based a requirement of findings and reasons on the due process clause.[221] Due process values are implicated in the need for findings, beyond their usefulness to a reviewing court. According to Professor Robert Rabin,[222] "A reasons requirement would promote a heightened sense of accountability, an added impulse to investigate thoroughly, and a tendency to clarify analysis (and, in some cases, confront dubious motives)."[223] Mandatory statements of reasons and findings also tend to promote uniform decisions in similar cases,[224] again serving the values of accuracy and acceptability. The latter value is served simply because deci-

218. *Id.* §§ 16.01, .04, .12.

219. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.41 (2d ed. 1976); 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.272 (3d ed. 1976); Comment, *The Fasano Procedures: Is Due Process Enough?*, 6 ENVT'L L. 139, 160 (1975). A good example of a ruling based on common law necessity of adequate review is Donovan v. Clarke, 222 F. Supp. 632 (D.D.C. 1963).

220. *See* Dukeminier & Stapleton, *supra* note 3, at 332; Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 13 (1969).

221. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

222. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

223. *Id.* at 78. *See also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975) [hereinafter cited as Friendly].

224. *See* Friendly, *supra* note 223, at 1292. *See also* Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976), where the court cites this purpose while holding that due process requires findings in a zoning decision.

sions are made more comprehensible to those adversely affected.[225]

A requirement of findings in land use disputes has been developed in several Oregon cases following the *Fasano*[226] decision, which mandated that "adequate findings" be made in any adjudicative zoning decision. In *South of Sunnyside Neighborhood League v. Board of Commissioners*,[227] the county commissioners approved an amendment of a comprehensive plan to allow a sixty-five acre parcel to be used as a commercial district. The Oregon Supreme Court held that county commissioners had insufficiently justified the amendment. The court listed three elements required of a statement of findings and reasons: (1) the facts relied on; (2) the relevant criteria for the decision, including objectives and policies; and (3) a description of how the proposed action will serve the relevant policies. In an Oregon Court of Appeal case, *West v. City of Astoria*,[228] a planning commission provided inadequate findings when it granted a conditional use permit to allow a youth center. The court stated that the commission should have explained how the proposed center came within the statutory criteria for permits, why it conformed to the city's comprehensive plan, and how it met lot size and other similar statutory requirements for the granting of permits. Both these decisions provide intelligent delineations of what the Consitution requires from zoning authorities.

Since *Fasano*, the Oregon courts have classified zoning decisions as adjudicative whenever a few owners are involved, even though a single decision, as in *Sunnyside*, may involve the rezoning of a sixty-five acre parcel that would affect the entire community. This approach

225. Friendly, *supra* note 223, at 1292; Pincoffs, *supra* note 66, at 178-79; 8A E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.272 (3d ed. 1976).

226. Fasano v. Board of County Comm'rs, 264 Or. 574, 588, 507 P.2d 23, 30 (1973). The North Carolina Supreme Court has also established a findings requirement for land use hearings. Humble Oil & Ref. Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974).

227. 280 Or. 3, 21-23, 569 P.2d 1063, 1076-77 (1977).

228. 18 Or. App. 212, 221-22, 524 P.2d 1216, 1220-21 (1974). *See also* Petersen v. Mayor and Council of Klamath Falls, 279 Or. 249, 566 P.2d 1193 (1977) (findings and reasons required for annexation decision); Bienz v. City of Dayton, 29 Or. App. 761, 566 P.2d 904 (1977) (adequate findings and reasons given for city council's approval of a subdivision); Tierney v. Duris, 21 Or. App. 613, 536 P.2d 435 (1975) (adequate findings provided by commissioners in granting amendments to plan and ordinance although findings were adopted after due process challenge was filed in court); Auckland v. Board of County Comm'rs, 21 Or. App. 596, 536 P.2d 444 (1975) (findings in zone overlay decision adequate where county commission adopts planning commission's detailed statement); Dickinson v. Board of County Comm'rs, 21 Or. App. 98, 533 P.2d 1395 (1975) (adequate findings provided by commissioners in decision to deny amendments to plan and ordinance); Bergford v. Clackamas County, 15 Or. App. 362, 515 P.2d 1345 (1973) (county commissioners must state findings when enlarging a nonconforming use).

is similar to a legislative-adjudicative sliding scale. Under that theory, it seems that deference should be given only to legislative decisions which involve an entirely new plan or ordinance covering the entire community. In those situations, it is nearly impossible for a body to state all the reasons behind its decision, though perhaps some sort of legislative report might be required. Additionally, since policy questions are usually involved, individual legislators may have different reasons for reaching the same result, making it impossible to produce a succinct statement of the rationale for the decision. The absence of factual questions and the presence of policy issues, however, do not lessen the contribution of a reasons requirement to the goal of accurate, acceptable decision making. These values are invoked equally in both situations.[229]

The *Fasano* court also required that a record be made of every adjudicative zoning decision.[230] Although this is not a terribly onerous administrative burden on a zoning authority, it seems that a detailed statement of findings and reasons alone would satisfy due process and therefore this additional safeguard is unnecessary.[231] Indeed, the Oregon Court of Appeal subsequently held that due process was satisfied by the provision of minutes of a planning commission meeting which included summaries of testimony given at a hearing. A verbatim record of the hearing was not required.[232]

### F. Administrative Standards

The constitutional doctrine prohibiting standardless delegation of legislative power[233] has been applied extensively in the zoning context. Delegations have been struck down where power was given to voters—either neighbors or all voters—in initiative or referenda procedures,[234]

229. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 16.00 (1976) [hereinafter cited as LAW OF THE SEVENTIES].

230. Fasano v. Board of County Comm'rs, 264 Or. 574, 588, 507 P.2d 23, 30 (1973).

231. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 224 (1975).

232. Bienz v. City of Dayton, 29 Or. App. 761, 782-85, 566 P.2d 904, 921-22 (1977). Courts may deem a record necessary to enable adequate judicial review, but as noted above, that is a common law consideration, not a constitutional requirement.

233. This doctrine was upheld by the Supreme Court in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

234. *E.g.*, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912); City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Marta v. Sullivan, 248 A.2d 608 (Del. 1968). A referendum by the entire citizenry was recently deemed a legal reservation of power in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See* text accompanying notes 182-201 *supra.*

and to city legislative or administrative bodies.[235] Though the cases do not precisely state the constitutional authority, the doctrine seems to be based upon article I, section 1 of the Constitution.[236] That provision, however, refers only to Congress and is therefore inapplicable to action by the states.[237] *Eubank v. City of Richmond*,[238] *Washington ex rel. Seattle Title Trust Co. v. Roberge*[239] and similar state court decisions have relied on the due process clause in stating the nondelegation principle. Today, the doctrine is virtually dead at the federal level[240] and slowly dying in the state courts as well.[241] Zoning cases are no exception.[242] It is unreasonable to expect state legislatures to provide detailed standards when delegating zoning power to cities and counties. Accordingly, the standardless delegation issue will not be discussed here.

However, the related problem of administrative standards is worthy of analysis. Professor Davis has championed the idea that, given the foreseeable demise of the nondelegation doctrine, administrative discretion can be controlled by requiring agencies to set certain standards for their decision making.[243] He proposes that such a requirement be based on one or more of several constitutional and common law grounds, including the due process clase.[244] Some federal courts of appeal have relied on the due process clause in striking down state administrative decisions where no reasonably clear standards for decision

235. *See* 1 K. DAVIS, TREATISE, *supra* note 74, § 2.09; 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 18.08, 19.09 (2d ed. 1976); 5 N. WILLIAMS, JR., AMERICAN PLANNING LAW § 129.04 (1975) [hereinafter cited as N. WILLIAMS]; Annot., 58 A.L.R.2d 1083 (1958).

236. U.S. CONST. art. I, § 1 provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." *See* 1 K. DAVIS, TREATISE (2d ed.), *supra* note 194, § 3:4; Annot., 58 A.L.R.2d 1083, § 2.

237. Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 537 n.31 (1951).

238. 226 U.S. 137 (1912).

239. 278 U.S. 116 (1928).

240. *See, e.g.*, National Cable Ass'n v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., concurring and dissenting); 1 K. DAVIS, TREATISE (2d ed.), *supra* note 194, § 3:2. *But see* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), which by negative implication would seem to affirm the continued validity of Eubank v. City of Richmond, 226 U.S. 137 (1912), and Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). *See also* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976) (delegated standards found adequate).

241. *See* 1 K. DAVIS, TREATISE (2d ed.), *supra* note 194, § 3:14.

242. 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 18.08, 19.09 (2d ed. 1976); 5 N. WILLIAMS, *supra* note 235, § 130.02; Annot., 58 A.L.R.2d 1083, § 2.

243. 1 K. DAVIS, TREATISE (2d ed.), *supra* note 194, § 3.15; LAW OF THE SEVENTIES, *supra* note 229, §§ 2.00-2.00-6; 1 K. DAVIS, TREATISE, 1970 Supplement, *supra* note 74, §§ 2.00, 2.00-5.

244. LAW OF THE SEVENTIES, *supra* note 229, 1977 Supplement § 2.00.

making were provided by the legislature or the agencies.[245]

Professor Davis' proposal is applicable to the zoning process. In fact, a similar rule was established in some cases for municipal legislatures through the old nondelegation doctrine. These bodies were constitutionally bound to provide decision making standards when delegating power to zoning commissioners or boards of appeal. This requirement was extended to grants of power by state legislatures to municipal legislatures and even to delegations by municipal legislatures to themselves. The result was peculiar cases like *Osius v. City of St. Clair Shores*,[246] which held that a city council had failed in its legislative capacity to set sufficient standards for the delegation of permit-granting power to itself.

The articulation of standards is precisely what Davis' proposal would require, but without the legal gymnastics. It mandates that any decision making body— city council, zoning commission or board of adjustment—set reasonably clear standards to guide its own decision making. Those standards could still be set by the delegating body. It is unlikely, however, that state legislatures can provide guidelines to each town. It is much more feasible for town legislatures to provide standards to their own zoning appeals boards. Yet if a municipal council does not legislate such standards, due process could still be met if the zoning board itself set standards. These would presumably be overruled if unsatisfactory to the council.

A standards requirement would go far to prevent arbitrary decisions, and thus serve accuracy and acceptability values. Accuracy espe-

245. *E.g.*, White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (distribution of state relief monies); Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (liquor licensing); United States v. Atkins, 323 F.2d 733 (5th Cir. 1963) (voter registration). To be distinguished are cases like Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), which struck down a disciplinary sanction against a student by a state university because the university failed to provide adequate definition of a rule penalizing "misconduct." The court held this rule unconstitutionally vague and against due process. In such cases the primary purpose of requiring adequate standards is to warn individuals what conduct is prohibited or allowed, and only secondarily to guide individuals in presenting their cases to agencies. In zoning adjudication, the latter purpose is more important. Except in situations involving non-conforming uses, a property owner's prior conduct is not judged; rather, a proposal is involved which the owner should be able to carefully tailor to meet explicit zoning standards. Although a neighbor's position in a dispute is determined by the "conduct" of the neighborhood, neighbors are certainly not expected to alter their conduct in order to affect a decision. Nevertheless, they too should be given notice of the standards for decision making so they can present their situation in the best light.

246. 344 Mich. 693, 75 N.W.2d 25 (1956). *See also* Fondren v. Morgan City, 220 So.2d 136 (La. App. 1969) and cases cited therein. *But see* Zellinger v. CRC Dev. Corp., 281 Md. 614, 380 A.2d 1064 (1977).

cially would be fostered since requiring standards would make zoning decisions more consistent and rational, which should in turn create the most efficient, beneficial allocation of land.[247] This approach has been applied in a recent zoning case decided by the federal district court for the Virgin Islands.[248] In that case, the court held that while the legislature could properly leave to a zoning board the task of formulating standards for the allocation of zoning permits, the board had violated due process in failing to establish adequate guidelines:

> The problems are . . . apparent when one's ability to get approval from a board . . . cannot be predicted because no hint is ever given either prior to or after application as to when the board will give such approval and when it will withhold it. The problem is basically one inimical to ad hoc, standardless decisions. . . . [A]gency attempts to control any form of behavior should be governed by standards for decision which are stated in advance and given wide circulation . . . . For due process reasons, these standards should be publicly promulgated and written precisely enough to give fair warning as to what the standards for decision will be.[249]

Admittedly it will require delicate balancing for courts to determine just how precise the standards must be. Overly comprehensive guidelines will stifle necessary flexibility. Although the issuance of special permits implies detailed standards,[250] the allocation of variances should retain its flexible, accommodative function[251] while still requiring more definite than a showing of "unnecessary hardship."

One bold step in the direction of administrative standards would be to require that a rudimentary comprehensive plan be approved before any land may be taken under the police power.[252] Many states

247. The need for a legal doctrine mandating decision making standards is suggested in Bross, *Circling the Squares of Euclidean Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97, 144 (1975); and Dukeminier & Stapleton, *supra* note 3, at 330-32.

248. Harnett v. Board of Zoning Subdiv. & Bldg. Appeals, 350 F. Supp. 1159 (D.V.I. 1972). Several other zoning cases have relied on the nondelegation doctrine in holding that agencies must be subject to decision making standards, even if they are set by the agencies themselves. *E.g.*, Bergford v. Clackamas County, 15 Or. App. 362, 515 P.2d 1345 (1973).

249. Harnett v. Board of Zoning Subdiv. & Bldg. Appeals, 350 F. Supp. 1159, 1161 (D.V.I. 1972). The court cited the *Holmes*, *Hornsky*, and *Atkins* opinions, described in note 245 *supra*.

250. 3 R. ANDERSON, AMERICAN LAW OF ZONING, § 19.09 (2d ed. 1976).

251. *Id. See also* Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969).

252. Consideration of the overall merits of comprehensive planning is beyond the scope of this article. The classic articles advocating use of the comprehensive plan are Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); and Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955) [hereinafter cited as *The Master Plan*]. A recent discussion is Mandelker, *The Role of the Local*

statutorily require master plans, and some courts have begun to strictly enforce that requirement.[253] Absent such a statute, the Constitution may still require a minimal amount of comprehensive planning. This is because when compared with other governmental controls, zoning is constitutionally unique, partly because the right to use and enjoy land is so fundamental to our legal system and partly because the zoning controls on the use of land involve extremely subtle considerations of public welfare.[254] Additionally, planning helps decision makers reach the values behind the due process clause by contributing towards consistent, rational decisions.

Indeed, it could be argued that the Supreme Court's original approval of zoning as a valid exercise of the police power in *Village of Euclid v. Ambler Realty Co.*[255] was based on the existence of a reasoned plan for dividing the community into different uses.[256] Similarly, in *Udell v. Haas*,[257] the New York Court of Appeals recognized that planning is fundamental to the valid exercise of zoning. Although the *Udell* court needed only to interpret the planning requirements of a single town ordinance, the court spoke generally of the zoning process:

> Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a "well-considered plan" or "comprehensive plan" is a reflection of that view. (See Standard State Zoning Enabling Act, U.S. Dept. of Commerce [1926].) The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an

*Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976) [hereinafter cited as *Role of Local Plan*].

253. *E.g.*, Baker v. City of Milwaukee, 271 Or. 500, 533 P.2d 772 (1975).

254. *See* text accompanying notes 131-136 *supra*.

255. 272 U.S. 365 (1926).

256. This position was taken by some parties in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See* Brief for Respondent, at 18-19; Brief for Amici Curiae, *supra* note 3, *passim*.

257. 21 N.Y.2d 463, 470-71, 235 N.E.2d 897, 901-02, 288 N.Y.S.2d 888 (1968).

> articulate minority or even majority of the community. . . . [T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.[258]

Even a rudimentary plan has many functions and is thus a valuable requirement in any zoning scheme. It serves as a guide to the granting of special permits or variances excepting land from a general ordinance. It should also guide the municipal legislature in passing amendments to the ordinance. In this latter capacity, the plan has been labelled an "impermanent constitution,"[259] implying something more lasting and important than a zoning ordinance. That is precisely what any administrative standard under the Davis model must be: a guide which, though formulated by the deciding body that uses it, transcends that body's day-to-day decisions as a standing principle. A guide that could be changed with each decision would be no standard at all.[260] The planning model and administrative model merge here in their similar requirements of transcendent guidelines designed to impart rationality and uniformity to land use decision making.

### G. Administrative Review

Due process requires only a single hearing.[261] Accordingly, where a city council delegates to a zoning commission or board the power to

258. *Id.* at 469, 235 N.E.2d at 900-01, 288 N.Y.S. 2d at 893-94.

259. *The Master Plan*, *supra* note 252.

260. Under the older, nondelegation model as expressed in Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956), the plan takes the following role: The city council, in its legislative capacity, approves a master plan (and zoning ordinance) which become the standards accompanying the delegation of power to itself in its administrative (and adjudicative) capacity to grant amendments or permits. This older conception could guide courts in applying legislative-adjudicative considerations in a modern due process balance. A decision on a comprehensive plan or a widely applied zoning ordinance is a true legislative decision and requires no standards. Amendment of the zoning ordinance is an adjudicative decision which must be applied in accordance with minimum standards, perhaps articulated in the form of a master plan. The position of an amendment to a plan is more ambiguous. (It is ambiguous—and undesirable—in the planning model as well.) *See Role of Local Plan*, *supra* note 252, at 946-51. If the plan is a minimal, rudimentary set of guidelines, then any change is a legislative decision which requires few procedural safeguards and does not have to be made in accordance with supervening standards. On the other hand, a detailed comprehensive land use plan might be based itself on a few general principles which the legislature or zoning commission should follow in amending it. This analysis implies an infinitely receding combination of true principles and inferred guidelines, but courts should attempt to avoid such a theoretical morass and simply try to strike a balance of procedural fairness in a particular situation.

261. Goldberg v. Kelly, 397 U.S. 254, 267 n.14 (1970).

make recommendations which the council may approve or reject,[262] due process requirements may be satisifed if the delegated authority alone has a hearing and follows other procedures, and the council merely approves its decision.[263] However, if the recommendations are rejected, then due process considerations are again required. Although the council may dispense with a hearing if a full record of the earlier proceedings is available, it should submit findings and reasons for reversing the board and should be held to standards of impartiality.[264] Adherence to procedural safeguards by the council will also remedy any lack of due process accorded by the recommending board.[265] Due process should require review, with notice and hearing, of actions by ministerial officers such as zoning administrators if there is a significant question of fact involved.[266] Review should always be available in those jurisdictions where an administrator may grant a permit or variance at his discretion.[267]

## V. Conclusion

Zoning involves the employment of modern administrative and

262. This is a common practice. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 21.12-.13 (2d ed. 1976); 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, §§ 22.225-.226 (3d ed. 1976).

263. Tierney v. Duris, 21 Or. App. 613, 536 P.2d 435 (1975); West v. City of Astoria, 18 Or. App. 212, 524 P.2d 1216 (1974). These Oregon decisions also require that the recommending body provide an "adequate record" and "adequate findings" to the city council, but as long as the zoning power may be delegated anyway, the council should theoretically be able to approve a recommendation in the most perfunctory manner without violating due process. However, as noted in the text *infra*, it may not *disapprove* a recommendation without considering a full record, or holding a new hearing. Therefore, as a practical matter, the council should require a full record from the board in all cases, in order to avoid the necessity of a second hearing.

264. City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971). The court stated its intention to avoid "this anomaly: Constitutionally guaranteed freedom from arbitrary action applies only to recommendations and not to accomplished fact in rezoning cases." *Id.* at 178.

265. F.P. Plaza, Inc. v. Waite, 230 Ga. 161, 196 S.E.2d 141, *cert. denied*, 414 U.S. 825 (1973). *See also* Armstrong v. Zoning Bd. of Appeals, 158 Conn. 158, 257 A.2d 799 (1969) (a zoning commission acts in an "administrative capacity" and therefore its recommendations to a quasi-judicial board of appeals need not be formulated through a full hearing); Gulf & Eastern Dev. Corp. v. City of Ft. Lauderdale, 354 So. 2d 57 (Fla. 1978) (though a zoning board decision must be reviewed by the city commission, the board must provide proper notice of its hearing because its decision may have a temporary effect).

266. Review is commonly required by statute. *See* 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.232 (3d ed. 1976). *See also* Goffinet v. County of Christian, 65 Ill. 2d 40, 54, 357 N.E.2d 442, 449 (1976) (due process provided where officer's decision can be appealed to zoning board for a hearing).

267. This is rarely allowed. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING, § 17.06 (2d ed. 1976).

planning structures to regulate the most traditional of property rights, the use of land. This article has explored how the constitutional due process guarantee should be applied to prevent state administrative agencies from unduly and unfairly impinging on property rights. The complexity and variation among land use regulatory agencies makes control by constitutional prohibition a difficult judicial task; however, given the arbitrary decision making by many zoning bodies, courts should rigorously enforce the due process clause.

In order to effectively guard all citizens' rights, courts should avoid defining property interests in positivist terms, as that approach may exclude certain legitimate interests from due process protection. In determining what process is due those affected by zoning decisions, judges should be guided by the goals of accuracy, acceptability and efficiency. Finally, the legislative-adjudicative threshold test should be abolished for decision making by local bodies and the considerations behind the test incorporated into a more flexible process-due balancing. With these refinements, courts could effectively use the due process clause of the Fourteenth Amendment to insure fair procedures where state and local authorities have failed to establish necessary safeguards.