

Special Comments

Zoning and Land Use

Where Is Indiana Zoning Headed?

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I. HISTORICAL BACKGROUND

A. *Enabling Legislation*

The failure of the common law nuisance action, a growing urbanization, a post-World War I housing boom, and the beginning of the golden era of the mass-produced automobile all materially contributed to the abandonment of traditional legal remedies for a new and untried field of property law: zoning. The United States Supreme Court, in 1926 in *Village of Euclid v. Ambler Realty Co.*,¹ upheld a comprehensive zoning scheme enacted by the Village Council of Euclid, Ohio. Even prior to the *Euclid* Court's legitimization of zoning, the Indiana General Assembly in 1921 granted the common council of each city the power to regulate land use by the creation of zoning ordinances.²

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¹272 U.S. 365 (1926). On November 13, 1922, the Village Council of Euclid, Ohio, adopted a comprehensive zoning plan which established building requirements and regulated and restricted the location of trades, industries, single and multi-family residences, and apartment houses. The appellee assailed the ordinance and asked that its enforcement be enjoined on the ground that it deprived him of liberty and property without due process by restricting the lawful uses of his land "so as to confiscate and destroy a great part of its value." *Id.* at 384. The Supreme Court upheld the ordinance as a reasonable exercise of the police power in the interest of public health, safety, morals, and the general welfare.

²Ch. 225, §§ 1-7, [1921] Ind. Acts 660, *as amended*, ch. 125, §§ 1-3, [1925] Ind. Acts 304 (repealed 1947). This enabling statute granted the common council of each city the power:

To classify, regulate and limit the height, area, bulk and use of buildings hereafter to be erected; . . . to regulate and determine the use and intensity of use of land and lot areas; to classify, regulate and restrict the location of trades, callings, industries, commercial enterprises and the location of buildings designed for specified uses; to divide the city into districts of such kinds, character, number, shape and area as it may deem best suited to carry out any or all of the purposes of this section.

Later, in 1947, unincorporated areas and small cities and towns were granted similar zoning and districting powers.³ Significantly, this legislation possibly constituted the most serious interference with property rights since the creation of the fee simple absolute, because to regulate land use is to control the basic structure of community growth.

Because this regulatory authority was predicated upon the exercise of the state's police power in the interest of public health, safety, and general welfare, such power could be exercised only by an elective body as a legislative function. Ironically, one of the most serious criticisms of the zoning process today is that its status as a legislative function has caused it to become tainted by politics and the parochial interest of local pressure groups.

Interestingly, Indiana law does not contain any serious constitutional arguments against the early zoning ordinances, although in *General Outdoor Advertising Co. v. City of Indianapolis Department of Public Parks*,⁴ the Indiana Supreme Court made collateral reference to the constitutionality of zoning ordinances when it cited *Euclid*.⁵ The litigants in *General Outdoor Advertis-*

Ch. 225, § 1, [1921] Ind. Acts 660 (repealed 1947). The statute directed that the common council, in making the regulations and districts, "pay reasonable regard to existing conditions, the character of the buildings erected in each district, the most desirable use for which the land of each district may be adapted and the conservation of property values throughout the city." *Id.* at 661. The common council was granted the authority to amend or supplement the regulations after public notice and hearing. *Id.* § 3, at 662. Every proposed change was required to first be submitted to the city plan commission for consideration before any final action could be taken by the city council. *Id.* The common council was empowered to create a five-member board of zoning appeals, whose function was to hear and determine appeals from any "order, requirement, decision or determination" made by administrators charged with enforcing the zoning ordinance and to authorize exceptions to and variations from the ordinance. *Id.* § 4, at 664. Decisions of the board of zoning appeals were subject to review by certiorari upon an allegation of illegality. *Id.* §§ 4-5.

The City of Indianapolis was the first city in Indiana to promote land use reform with a general ordinance closely patterned after the enabling act. Indianapolis, Ind., Gen. Ordinance 114, Dec. 4, 1922.

³Ch. 174, §§ 1-93, [1947] Ind. Acts 571, *repealing* ch. 225, [1921] Ind. Acts 660, *as amended*, ch. 125, [1925] Ind. Acts 304. Comprehensive enabling legislation is now codified at IND. CODE §§ 18-7-1.1-1 *et seq.* (1974) (regional planning); *id.* §§ 18-7-2-1 *et seq.* (metropolitan planning in first-class cities and counties); *id.* §§ 18-7-3-1 *et seq.* (metropolitan planning in larger counties); *id.* §§ 18-7-4-1 *et seq.* (area planning); *id.* §§ 18-7-5-1 *et seq.* (advisory plan commissions); *id.* §§ 18-7-5.5-1 *et seq.* (multi-county planning).

⁴202 Ind. 85, 172 N.E. 309 (1930).

⁵The court cited *Euclid* in support of its statement that restrictions on individual rights become more common as social relations become more complex:

ing, however, did not question the validity of a zoning ordinance, but challenged a specific park board ordinance which prohibited and ordered the removal of existing outdoor advertising signs within 500 feet of a park or parkway. Unlike enabling zoning legislation, the legislation authorizing this ordinance made no provision for zone districting and instead gave park boards the power of eminent domain in compensating for the mandatory removal of a lawfully established sign.

*City of Indianapolis v. Ostrom Railroad & Construction Co.*⁶ is exemplary of the confusion found in early Indiana zoning decisions. This case arose from an attempt by a city plan commission to change a zone district by resolution. The Indiana Court of Appeals ruled that such a change could be made only by ordinance enacted by a common council. The court then proceeded to define the powers of a board of zoning appeals and suggested, without explanation, that the land use change of six lots from residential to commercial use was beyond the power of the board of zoning appeals and was illegal. Thus, the court, by judicial legislation, established standards concerning the powers of the boards beyond the express language of the enabling statute. The court stated that the boards were probably created because the legislature realized that there would be "many *small* matters in which is a *very slight deviation* from the ordinance" could be made without reduction in the value of neighboring property and without harm to the general public welfare.⁷ The statute, by comparison, granted the boards power to modify the provisions of an ordinance whenever "there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance."⁸ The modifications should be made "so that the spirit of the ordinance shall be observed, public welfare secured or substantial justice done."⁹

B. *Strict Construction of the Enabling Acts*

Judicial review of zoning recommendations, decisions, and ordinances made by planning commissions, common councils, and boards of zoning appeal has been strictly limited. Land use change

Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained.

Id. at 97, 172 N.E. at 313.

⁶95 Ind. App. 376, 176 N.E. 246 (1931).

⁷*Id.* at 382, 176 N.E. at 248 (emphasis added).

⁸Ch. 125, § 2, [1925] Ind. Acts 304, *amending* ch. 225, § 4, [1921] Ind. Acts 660 (repealed 1947).

⁹*Id.*

by rezoning was exclusively delegated to legislative bodies.¹⁰ Thus, the landowner aggrieved by an oppressive and unreasonable zoning land use restriction had no recourse to the courts to question the wisdom or discretionary authority of the legislative action. Although the enabling statutes made it mandatory that a rezoning petition be filed and presented in public hearing to a plan commission before being certified to a common council, the actions taken by these plan commissions were likewise not reviewable by the courts:

[S]uch actions are recommendations of an advisory nature only, which are inoperative and ineffectual for any purpose unless acted upon by the proper municipal authority [common council], or allowed to become operative by the reason of the failure of a Board of County Commissioners [or a common council] to act within the 60-day period.¹¹

Thus, an enigma resulted. A property owner with an unreasonable restriction upon his land could not appeal the recommendation of a plan commission because the commission acted only in an advisory capacity and did not render an appealable final decision or order. He could not attack an ordinance enacted by a common council because the council acted in a legislative capacity. Although he could appeal to a board of zoning appeals for a variance of use,¹² his chances of success there were far from certain. In typical communities, professional planners hired by plan commissions as their executive directors would design a mas-

¹⁰The legislative body with authority to amend or modify a zoning ordinance was either a city council, a town board of trustees, or a board of county commissioners, depending upon whether the zoned area was an incorporated city or town, or a rural unincorporated area. Ch. 174, §§ 1, 3, [1947] Ind. Acts 571.

¹¹*McGraw v. Marion County Plan Comm'n*, 131 Ind. App. 686, 694, 174 N.E.2d 757, 761 (1961). A plan commission is empowered by statute to adopt a master plan after public hearing and to certify this plan to the common council or board of county commissioners with a recommendation that the plan be enacted. If the council or commissioners fail to take action within sixty days after the certification, the ordinance becomes effective as though enacted. IND. CODE §§ 18-7-5-41, -42 (Burns 1974).

¹²IND. CODE § 18-7-4-78 (Burns 1974). A variance of use differs from rezoning by amendment to the master plan in that rezoning contemplates the enactment of an ordinance permanently changing the general zoning classification, which classification might allow a variety of related residential, commercial, or industrial uses. A variance of use, on the other hand, varies the terms of the master plan ordinance as it applies to a particular tract of land and authorizes a particular use of the property not authorized by the existing zoning classification. Although an owner of land with a variance can sell his land and business as a going concern to others for the same use and purpose, the use of the land may not be changed without obtaining another variance or a rezoning authorizing the new use.

ter plan for community growth.¹³ When a landowner appealed to a board of zoning appeals for a variance from the master plan, he was immediately at odds with the professional planning staff. Literally, every variance that is granted is a commentary on the inefficacy of the master plan.¹⁴

Further, although decisions of the boards of zoning appeals were reviewable by way of certiorari, early court opinions built a wall of insularity around these decisions and refrained from reversing when a board denied a variance. For example, in *Board of Zoning Appeals v. Waintrup*,¹⁵ a property owner with a residential use restriction upon his property sought a variance to conduct a furniture store on the premises.¹⁶ The board denied the variance, the trial court reversed the board, and the Indiana Court of Appeals reinstated the denial. The court of appeals stated that a reviewing court on appeal by way of certiorari has no discretionary authority and can consider only specific allegations of illegality. The court intimated that there could never be illegality in the decision of a board in its discretion to deny a variance.¹⁷

¹³A master plan zoning ordinance is one adopted as a comprehensive land development scheme for community growth. The master plan may involve not only land use districting, but also thoroughfare plans, flood control plans, park and school plans, subdivision control, etc. In recommending a master plan, a plan commission is directed to consider the existing conditions and uses of the land involved, the most desirable use, and the conservation of property values. *Id.* § 18-7-4-46.

¹⁴In creating the boards of zoning appeals, the legislature realized that master plan zoning ordinances, although objectively enacted to enhance the general public welfare, might contain inequitable and arbitrary restrictions on particular parcels of land. One function of the boards is to grant relief in the form of variances and exceptions of use upon particular parcels when the master plan creates a true zoning hardship. *Id.* § 18-7-4-78. The boards are truly quasi-judicial bodies, whose findings of fact and conclusions of law are by statute subject to judicial review. *Id.* § 18-7-4-89.

¹⁵99 Ind. App. 576, 193 N.E. 701 (1935).

¹⁶The issue of the constitutionality of the ordinance as it applied to the appellee was raised, and the court stated that constitutionality of a zoning ordinance could not be put in issue in a variance proceeding. *Id.* at 588, 193 N.E. at 704. This statement was subsequently overruled by the Indiana Supreme Court in *City of South Bend v. Marckle*, 215 Ind. 74, 18 N.E.2d 764 (1939).

¹⁷An allegation that strict enforcement of the zoning ordinance will result in practical difficulty and unnecessary hardship to the petitioner for a variance, and that strict enforcement is not in keeping with the spirit of the zoning ordinance, is not an allegation that the board's action in denying a variance was illegal. 99 Ind. App. at 586, 193 N.E. at 704. The court clearly stated that the decision of the board to grant or deny a variance of use is discretionary and by statute there can be no illegality in the use of this discretion:

Whether the board should act and vary the ordinance is a matter for the board to determine in its discretion, and such discretionary action, unless illegal, is not subject to review. If it had varied

In *O'Connor v. Overall Laundry, Inc.*,¹⁸ an overall laundry predating the 1922 city zoning ordinance and located in a residential district sought to connect two existing commercial buildings for greater efficiency of operation. The board of zoning appeals denied a variance, the trial court reversed, and the Indiana Court of Appeals reinstated the denial. The court of appeals especially emphasized that "the power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised."¹⁹

Possibly the most exemplary case showing the courts' persistent refusal to overturn variance denials is *Board of Zoning Appeals v. American Fletcher National Bank & Trust Co.*²⁰ In this case, a property owner sought a variance to build a service station on apartment-zoned land because the tract was too small for apartment development and financing could not be obtained. A church and an apartment developer protested, however, on the basis of noise and unsightliness interfering with the use of their respective properties. The variance was denied. Again, the trial court reversed, but the Indiana Court of Appeals reinstated the variance denial. The court of appeals emphasized the administrative character of the zoning board and its special expertise in the zoning problems of its jurisdiction: "Therefore, the Board

the ordinance and had acted illegally in doing so, then persons who were thereby aggrieved would have the right to have such action reviewed as provided by statute. . . .

. . . .

. . . . The fact is that the board failed to vary the ordinance so there could be no illegality in the decision as provided by the statute. Whether its decision was contrary to law is not a ground for review under the statute.

Id. at 586-87, 193 N.E. at 704-05.

¹⁸98 Ind. App. 29, 183 N.E. 134 (1932).

¹⁹*Id.* at 37, 183 N.E. at 137, quoting from *Norcross v. Board of Appeal of Bldg. Dep't*, 150 N.E. 887, 890 (Mass. 1926). The *O'Connor* court noted that although the laundry was in the district when the zoning ordinance was adopted, the intent of the ordinance was that nonconforming uses should be discouraged from remaining in the districts. 98 Ind. App. at 39, 183 N.E. at 138. The court emphasized that the public health, safety, and general welfare of the community "must be the pole star for the guidance of the board." *Id.* at 39, 183 N.E. at 138. Important considerations in this regard are stability of the community and protection of neighboring property:

The financial situation or pecuniary hardship of a single owner affords no adequate ground for putting forth this extraordinary [variance] power effecting other property owners as well as the public. . . . This is quite insufficient to constitute "unnecessary hardship" or to involve "practical difficulty."

Id. at 38, 183 N.E. at 138, quoting from *Prusik v. Board of Appeals of Bldg. Dep't*, 160 N.E. 312, 314 (Mass. 1928).

²⁰139 Ind. App. 9, 205 N.E.2d 322 (1965).

has wide discretion whether or not to grant a variance to a zoning ordinance, . . . [and] the trial court may not substitute its discretion for that of the Board."²¹

*Metropolitan Board of Zoning Appeals v. Standard Life Insurance Co.*²² summarily represents the difficulty in obtaining a variance. Standard Life owned residentially-zoned property at a business intersection between its office building to the west and a Shell service station and theatre to the east. The highway authority effectively put the Shell station out of business through a highway improvement program, and Shell desired to relocate on the Standard Life property across the street. Only the technical staff of the plan commission and a representative of the Indianapolis Redevelopment Commission who believed that the requested variance would interfere with rehabilitation, redevelopment, and code enforcement were present at the hearing. No neighborhood remonstrators attended.

The court of appeals, in affirming the board's denial of a variance, emphasized the five statutory prerequisites to obtaining a variance²³ and placed the burden of proof by substantial evi-

²¹*Id.* at 12, 205 N.E.2d at 324. At least, by 1965, the court indicated that it might overturn a variance denial if, from the evidence presented before the board and before the court, it could "be concluded as a matter of law that the grant of a variance would not be injurious to the public health, safety and morals and general welfare of the community, or that the use or value of the area adjacent to the property included in the proposed variance would not be adversely affected." *Id.* at 14, 205 N.E.2d at 325.

²²145 Ind. App. 363, 251 N.E.2d 60 (1969).

²³In the 1921 enabling legislation, it was provided that a variance could be granted when there are "practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance," so long as "the spirit of the ordinance shall be observed, public welfare secured or substantial justice done." Ch. 225, § 4, [1921] Ind. Acts 660, *as amended*, ch. 125, § 2, [1925] Ind. Acts 304 (repealed 1947). The 1947 legislation similarly provided that a variance could be granted, if not contrary to the public interest, "where, owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." Ch. 174, § 77, [1947] Ind. Acts 569.

In 1955, these general statements of authority were expanded to five statutory prerequisites which must be proved by petitioner and detailed as findings by the board:

1. The grant will not be injurious to the public health, safety, morals, and general welfare of the community.
2. The use or value of the area adjacent to the property included in the variance will not be adversely affected.
3. The need for the variance arises from some condition peculiar to the property involved and does not exist in similar property in the same zone.
4. The strict application of the terms of the ordinance will constitute an unusual and unnecessary hardship if applied to the property for which a variance is sought.

dence upon the petitioner. The court stated that it is inappropriate to require justification by the board of a negative decision.²⁴

C. Liberalizing Trends of Statutory Construction

While the courts were insulating the boards from judicial review, however, signs of greater latitude in the jurisdictional authority of boards of zoning appeal were beginning to appear. For years, the courts stringently interpreted the boards' authority. Thus, in 1952 in *Antrim v. Hohlt*,²⁵ when petitioners sought a variance to build an eighty-three unit apartment building in a residential district, the variance was denied, and the denial was upheld by the court of appeals, which stated:

Any variance which so changes the character of an area so that it is not in harmony with the general purpose and intent of the zoning ordinance must be effected by an amendment of the zoning ordinance of which the master plan is a part.²⁶

5. The grant of the variance does not interfere with the metropolitan comprehensive plan adopted pursuant . . . [to] this act: Provided that no zoning ordinance or ordinances classifying or restricting the use of or otherwise applicable to the property involved shall be considered to be part of such metropolitan comprehensive plan.

Ch. 283, § 69, [1955] Ind. Acts 786, *as amended*, IND. CODE § 18-7-2-71 (Burns 1974). The first requirement requires proof, for example, that the use will serve the community and that utilities and other municipal facilities are available to serve the intended use. The second prerequisite might involve proving that similar uses are established in the district and that the proposed use is harmonious to existing uses. The third might be established by showing, for example, that the property in question is the only property in the zone district contiguous to a railroad track. The fourth requires a showing, for example, that the property is not usable in its unimproved state and is unmarketable for use as zoned, so that the owner is paying taxes and maintenance on land of which he has been deprived the beneficial use and enjoyment. Ingenuity and imagination may be required to convince the board that the proposed use will not decrease the use of or value of adjacent property; however, this element is as flexible as the imagination, since landscaped buffer strips, attractive fencing, and intelligent use of natural buffers may effectively render the neighboring property owners unaware of the proposed use.

²⁴The court noted the substantially different standards of review of board decisions granting or denying a variance. To reverse a denial, the reviewing court must find that the five statutory prerequisites have been established as a matter of law, resolving all evidentiary doubts in favor of the board's decision. In reversing a grant of variance, it is immaterial that there is substantial evidence tending to show the converse of the board's determination. The question then is whether there is "substantial evidence of probative value authorizing the grant of a variance." *See also* R.J. Realty, Inc. v. Keith, 145 Ind. App. 314, 250 N.E.2d 757 (1969).

²⁵122 Ind. App. 681, 108 N.E.2d 197 (1952).

²⁶*Id.* at 686, 108 N.E.2d at 199.

The liberating trend allowing greater jurisdictional authority first emerged soon after the *Antrim* decision. As early as 1953, in *City of East Chicago v. Sinclair Refining Co.*,²⁷ a plan commission caused thirty-four acres of land to be rezoned from an industrial classification to a residential classification. A large industrial concern, owning this land for future development in conjunction with adjacent industrially-improved land, was denied permission to expand its laboratory and bulk storage facilities on the land. The company filed a declaratory judgment action and emphasized that it had owned the land for many years before zoning and had embarked on a substantial industrial development program in reliance upon opportunities for future expansion on this land. The trial court granted judgment for the company on the theory that the zoning officials had acted illegally in taking, by imposing an unreasonable restriction on, Sinclair's land. The Indiana Supreme Court reversed the trial court for failure of the company to exhaust its administrative remedy of applying for a variance.²⁸ In dictum, however, the court stated that thirty-four acres of land was not too large an area for a board of zoning appeals to consider for a variance.²⁹ Thus, the court expressly modified the judicial standards enunciated earlier in *City of Indianapolis v. Ostrom Realty & Construction Co.*³⁰

Concomitant with the enlargement of jurisdictional authority was a gradual deterioration in the insulation of the boards of zoning appeals from judicial review. *Board of Zoning Appeals v.*

²⁷232 Ind. 295, 111 N.E.2d 459 (1953).

²⁸The court relied upon its earlier decision in *City of South Bend v. Marckle*, 215 Ind. 74, 18 N.E.2d 764 (1939), to require exhaustion of the administrative remedy of applying for a variance.

In *Marckle*, the court summarized the rules of review of zoning recommendations and decisions: (1) A court will not review an exercise of the discretionary powers of a board unless there is a clear abuse of discretion, (2) an appeal by way of certiorari is proper when the board has acted illegally, even though the illegality is a violation of petitioner's constitutional rights, so long as it is not claimed that the entire ordinance is invalid, and (3) when it is asserted that the entire ordinance is invalid, the remedy is not by certiorari but by direct action. *Id.* at 82-83, 18 N.E.2d at 767. Since the petitioners in *Sinclair* claimed only that the ordinance was unreasonable as it applied to them, the proper course for them to follow was to apply to the board for a variance to relieve the hardship and, if relief was not granted, to ask a review in the circuit court by way of certiorari.

²⁹232 Ind. at 312, 111 N.E.2d at 464.

³⁰95 Ind. App. 376, 176 N.E. 246 (1932). The *Ostrom* court had held that an attempt by the board to modify by variance an entire city block without an ordinance by the common council was not contemplated by the statute. The *Sinclair* court expressly stated that the authority of the board to modify ordinances when the conditions impose unnecessary hardship is nowhere limited to property of a certain area or size. Unnecessary hardship must be determined by considering all relevant factors.

*Decatur, Indiana Co. of Jehovah's Witnesses*³¹ is an early indication of this development. The court found justification for reversing the decision of a board of appeals which had denied a variance of building setback and parking requirements when a religious group sought authorization to build a church in a residentially-zoned area. The court balanced the interests of freedom of worship and of promoting the public welfare by land use restrictions and found that the refusal to grant a variance, which refusal resulted in the exclusion of a church from a residential district, was a denial of the right of freedom of worship. Thus, the zoning board decision was reversed because the interest in land use control did not outweigh the opposing constitutional interest.

*Town of Homecroft v. Macbeth*³² was the first major decision to penetrate the veil of administrative insularity. Macbeth owned and operated a rural grocery which successfully traded in a market of farm neighbors and passers-by until, eventually, a community of single-family housing was built around his property. The community incorporated itself into a town, adopted a zoning ordinance, and created a master plan which relegated his property to single-family residential use. As a result of these developments and changes, and since Macbeth could not be put out of business without just compensation, his property became what is known as a lawfully established nonconforming use. According to this designation, one can continue his present business operation ad infinitum, but if he proposes a new use, it must conform to the master plan.

Unfortunately, because of competition from suburban chain supermarkets, the grocer was forced out of business to avoid bankruptcy. After two years of offering his property for sale, the only bona fide offer he received was from the Pure Oil Company who proposed to tear down the market and erect a Pure Oil Gasoline Service Station. Application was made to the Town of Homecroft Board of Zoning Appeals for a variance to permit the gas station use. The people of Homecroft, encouraged by the vice-president of a neighboring competitive oil company, arose in indignant protest against the proposed variance from their master plan. Unsurprisingly, the variance was denied.

The Indiana Supreme Court held that the zoning ordinance established by the town of Homecroft was unconstitutional as applied to Macbeth. The court gave particular emphasis to the fact that the lot in question was not suitable for use as a residential area and stated that "an ordinance which *permanently* so re-

³¹233 Ind. 83, 117 N.E.2d 115 (1954).

³²238 Ind. 57, 148 N.E.2d 563 (1958).

stricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."³³ Further, the supreme court raised doubts that the power to restrict property use should be vested in administrative bodies which are subject to personal and political considerations.³⁴

In *Board of Zoning Appeals v. LaDow*,³⁵ a board of appeals denied a building permit for the construction of a service station in a commercial zone because the city had amended its zoning ordinance to prohibit per se service stations in any commercially-zoned area. The Indiana Supreme Court stated that this prohibition was violative of due process according to both the Indiana and the United States Constitutions. This result is not surprising, but the case did set a precedent for the use of an additional remedy by a landowner laboring under a confiscatory classification. In *LaDow*, the property owner did not apply for a variance. Instead, he appealed the denial of a building permit to the board on entirely constitutional grounds. The court stated that the denial of an application for a building permit is contemplated and authorized by the act creating boards of zoning appeal as an appealable "order," "decision," or "determination" by an administrative official.³⁶ Thus, the question was appropriately presented.

Nobody took the *LaDow* case too seriously because its stark facts dictated that relief should be granted, whatever the empirical recourse to stare decisis indicated. However, this somewhat obscure case became very important in New Albany, Indiana, in

³³*Id.* at 68, 148 N.E.2d at 569, quoting from *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938). The *Homecroft* court stated that an "attempt to zone for residential purposes only, property fronting on a busy highway, in order to provide a beautiful and dignified village frontage can be unreasonable under restriction of the property to uses to which it is not adapted." 238 Ind. at 68, 148 N.E.2d at 569.

³⁴The court stated:

[I]t is . . . apparent that the power to restrict the uses of private property under the police power should be exercised with caution, and that when the power in the first instance is vested in municipal officers, who are not trained in the history and traditions of the law, and who may be particularly subject to personal and political considerations, there exist grave dangers that owners may be deprived of their constitutional rights in the use of their property. 238 Ind. at 64, 148 N.E.2d at 567.

³⁵238 Ind. 673, 153 N.E.2d 599 (1958).

³⁶*Id.* at 679, 153 N.E.2d at 602. The applicable statute provides for appeals to the board and review of any "requirement, decision or the determination made by an administrative official or board charged with the enforcement of any ordinance" adopted pursuant to the enabling legislation. IND. CODE § 18-7-4-79 (Burns 1974).

a case which arose a few years later. In *Board of Zoning Appeals v. Koehler*,³⁷ a new master plan provided for commercial centers in the periphery of the county but in such isolated circumstances and with such poor utilities and roads that it was unlikely they would ever develop.³⁸ The Koehler property was situated in a large and growing commercial section of the city which was zoned for residential use. Instead of seeking a rezoning, which involves a discretionary legislative act with no judicial recourse, or seeking a variance, in which case the burden of proving the statutory prerequisites is an onerous one for petitioner, Koehler appealed the denial of a building permit, asserting that the ordinance was unconstitutional as applied to her property. Relying on *Homecroft* and *LaDow*, the Indiana Supreme Court ruled in favor of the landowner and reiterated that the constitutionality of a zoning ordinance as applied to a specific tract of land can be brought to court from the zoning board after the denial of a variance or after the denial of a building permit.

*Metropolitan Board of Zoning Appeals v. Gateway Corp.*³⁹ involved a factual situation similar to that in *Homecroft* except that the owner in *Gateway* wanted to build townhouses on single-family zoned land. The property contained residential improvements of such age and condition that they had been ordered razed by the public health authorities, and there was no market or mortgage financing available to build new single-family dwellings in the area. The court again relied on the *Homecroft* case and, more particularly, declared that the five statutory standards governing the approval of a variance have no application when the issue of the constitutionality of the zoning ordinance is involved.

Most recently, in *Metropolitan Board of Zoning Appeals v. Sheehan Construction Co.*,⁴⁰ the Indiana Court of Appeals upheld, on constitutional grounds, the trial court's reversal of the decision of a zoning board to deny a variance. In discussing the scope of review, the court of appeals distinguished review founded on statutory guidelines, in which case the burden is on the petitioner to establish the five statutory prerequisites and the appellate court must consider all the evidence in the light most favorable to the board's decision, and a review founded on constitutional guidelines, in which case the trial court may consider the evidence de novo and the appellate court must consider all the evidence in the light most favorable to the trial court's decision. Sheehan's argument was that, since the property was not suited for residential

³⁷244 Ind. 504, 194 N.E.2d 49 (1963).

³⁸Obviously the plan commission was dominated by a strong downtown merchants' association when the master plan was adopted.

³⁹256 Ind. 326, 268 N.E.2d 736 (1971).

⁴⁰313 N.E.2d 78 (Ind. Ct. App. 1974).

single-family development, the zoning ordinance was unconstitutional and confiscatory as applied to this property. The court of appeals stated:

The commercial proliferation of this area by the granting of variances has so changed its character that the zoning restrictions placed upon it are no longer realistic or meaningful. The enforcement of such restrictions can only result in the deprivation of property to those choosing [*sic*] a different use not incongruous to the surroundings.⁴¹

The court cautiously pointed out, however, that not every zoning burden placed upon private property constitutes a confiscation or taking. A distinction must be made between an assertion that a parcel of property is not zoned for its best and most profitable use and a finding that the zoning restriction results in a deprivation of property rights. Significantly, only the latter is confiscatory.

If there appear to be inconsistencies in the case law of zoning, it is perhaps because the appellate tribunals were unwillingly thrust into an uncharted course of law without historical precedent. Thus, when a citizen owns real estate which has virtually no value as restricted by an unrealistic zoning classification, and he has an economic opportunity to realize a substantial value from the land by changing its use in a manner not inconsistent with land use changes in the neighborhood, it is difficult for a constitutionally-oriented judiciary to disregard his plea for "equal treatment under the law."

D. *Future Problems of Interpretation*

In reviewing the increasing number of zoning enabling acts, the increasing number of amendments to these acts, and the rapidly growing body of case law concerning zoning, it is apparent that planning and zoning have not been the panacea of orderly community growth its creators envisioned. The divergence in Indiana between enabling acts for cities, cities of the first class, towns, counties, and other areas evidence the perennial efforts of the General Assembly to find better ways of land use regulation. Unfortunately, there is little uniformity among these acts. For example, the acts have different statutory requirements which must be met before a variance may be granted.⁴² Since statutory

⁴¹*Id.* at 83.

⁴²*Compare, e.g.,* IND. CODE § 18-7-2-71 (Burns 1974) (establishing five statutory prerequisites for the granting of a variance in cities and counties of the first class, which encompasses only Indianapolis and Marion County) with *id.* § 18-7-4-78 (establishing four statutory prerequisites for the grant-

variations do not promote uniformity in law, an onerous burden will eventually be placed upon appellate tribunals to resolve the conflicts.

II. CURRENT TRENDS IN LAND USE REGULATION

The decline of the railroad and the rise of the trucking industry have dramatically affected the growth of communities and their social and economic structure. Moreover, the post-World War II housing boom, the increasing dependence upon the automobile, and the existence of less expensive lands in the rural periphery surrounding the cities resulted in a more ambulatory society and a flight to the suburbs. Other, dramatic changes have occurred because of this flight to the suburbs. The development of one of the most elaborate interstate highway systems in the world has made thousands of acres of relatively cheap land within easy commuting distance of most employment centers. Concomitantly, the employment centers have relocated from the traditional inner-city railroad sidings to the periphery of the community and to even smaller satellite communities. Planning and zoning were caught in the middle of these changes.

Furthermore, the inner cities have undergone a socio-economic upheaval. Because of the movement to the suburbs, inner cities have a lower tax base to support municipal facilities depended upon by the suburban dwellers. Increasingly, only the lower income elements, notably minority groups, remain locked into the inner-city environment. Closed inner-city schools, busing, increased crime rates, and vacant and vandalized older structures are symptoms of the inner-city problems. Subsidized housing, federal grants-in-aid for demolition, rehabilitation, and redevelopment, and neighborhood participation in local government are typical of recent attempts to alleviate the cities' dilemma.

Conversely, suburban life has not turned out to be the idyllic life of grassy meadows, green forests, and clear streams that may have been expected. Development patterns of similar houses on similar lots with similar families emerged across the landscape. This questionable result was achieved through zoning restrictions which mandated sameness. For example, typical master plans disallowed \$40,000 homes in \$25,000 neighborhoods and prohibited multi-family housing, subsidized housing, shopping facilities, and commercial centers in suburban areas. Escalating property taxes in support of a burgeoning public school system

ing of a variance and prohibiting the grant of a variance from a use district or classification). The fifth prerequisite for first-class cities and counties requires a finding that the grant of a variance "will not interfere substantially" with a metropolitan comprehensive plan. *Id.* § 18-7-2-71.

and rapidly expanding (and expensive) utility services represent a further jaundice to the suburban scene. Impact zoning, cluster housing, green-area planning, and density zoning represent recently devised methods of controlling development so as to minimize ill effects on the environment and on the economy.

The courts have been thrust directly into these experiments in social engineering, and, for the first time since *Village of Euclid v. Ambler Realty Co.*,⁴³ the federal courts are playing an increasing role in policy determination. Federal intervention to date has been largely in the field of exclusionary zoning.⁴⁴

In *Dailey v. City of Lawton*,⁴⁵ a housing sponsor for the Diocese of Oklahoma City applied to the city for a multi-family, federally-subsidized, low-cost housing project in a white multi-family neighborhood. This request was rejected by the City. The Court of Appeals for the Tenth Circuit, however, upheld the district court which overruled the City and ordered the land zoned to allow for the housing project. The court emphasized that plaintiffs had established racial prejudice as a potential motive for the City's decision and the City had failed to negate this showing by anything more than "bald, conclusory assertions that the action was taken for other than discriminatory reasons."⁴⁶ Thus, the court placed the burden of proof in a zoning challenge of this nature upon the City.

*Southern Alameda Spanish Speaking Organization v. City of Union City*⁴⁷ arose out of a similar factual situation. In SASSO, a Mexican-American sought to build a multi-family project on twenty-four acres of land outside the ghetto section of the city. Passage of a rezoning ordinance was successfully obtained, but the white citizenry called for a referendum and the rezoning ordinance was nullified.⁴⁸ SASSO sought injunctive relief to imple-

⁴³272 U.S. 365 (1926).

⁴⁴Exclusionary zoning is a term to describe zoning practices which effectively exclude minority group members from communities in which they desire to live. Exclusionary zoning is typically accomplished by frustration of the ability of members of the excluded groups to move into the community. See Note, *Exclusionary Zoning: Will the Law Provide a Remedy?*, at pp. 995-1027 *infra*.

⁴⁵425 F.2d 1037 (10th Cir. 1970).

⁴⁶*Id.* at 1040.

⁴⁷424 F.2d 291 (9th Cir.), *aff'g* 314 F. Supp. 967 (N.D. Cal. 1970).

⁴⁸Article XXXIV of the California Constitution mandates a referendum to approve a proposal involving low-cost public housing. The validity of this referendum procedure was upheld in *James v. Valtierra*, 402 U.S. 137 (1971), wherein the Court stated that the procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." *Id.* at 143. The Court further commented:

ment the zoning change and attacked the referendum and its results as violative of its constitutional rights. The issue before the Ninth Circuit Court of Appeals was whether or not to raise a three-judge federal court to consider the constitutional questions. Although the Ninth Circuit determined that a three-judge court should not be convoked, the court succinctly stated the issues to be determined in considering plaintiff's allegations:

Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families who usually—if not always—are members of minority groups.⁴⁹

While the exclusionary zoning battle is raging in both federal and state court systems, many unique devices are being designed to control, limit, and even eliminate growth. In *Golden v. Planning Board*,⁵⁰ a "slow growth" zoning ordinance was recently upheld. This particular ordinance established a point system which required potential builders to qualify by accumulating fifteen of a possible twenty-three points. These points were based on the availability of five municipal services: sewers, drainage, roads, firehouses, and parks and schools. The point system was keyed to an eighteen-year municipal capital improvements program, and, if the developer did not want to subsidize the missing municipal service to obtain the needed fifteen points, he was forced to wait until the capital improvements program caught up with his property.

More recently, in *Construction Industry Association v. City of Petaluma*,⁵¹ although a "slow growth" ordinance was struck down by the district court, the Ninth Circuit reversed and upheld the ordinance. The City of Petaluma had experienced a population growth

"Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *Id.* at 141.

⁴⁹424 F.2d at 295-96. Courts have struck down zoning restrictions and building requirements which have an exclusionary effect. *See, e.g.*, *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970) (land restricted to use as a park and no further building allowed); *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970) (zoning plan failed to provide for apartments and was unconstitutional); *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970) (minimum lot size requirements struck down).

⁵⁰30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

⁵¹44 U.S.L.W. 2093 (9th Cir., Aug. 13, 1975), *rev'g* 375 F. Supp. 574 (N.D. Cal. 1974).

from 19,050 in 1965, to 29,500 by the end of 1971, and attempted to restrict growth to a maximum of 500 new living units per year. The district court stated that a municipality "capable of supporting a natural population expansion [may not] limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand."⁵² The Ninth Circuit, however, found the restriction reasonably related to a legitimate state interest. The Ninth Circuit noted that the ordinance does not freeze the present population levels and does not have the "effect of walling out any particular income class or any racial minority group,"⁵³ unlike other zoning ordinances struck down by courts in recent years.⁵⁴

Fiscal zoning is another vehicle currently being attempted to control growth. The Florida Court of Appeals held that developers of property can provide for the furnishing of essential services and, by covenants, bind the owners of lots to pay for them.⁵⁵ However, the Supreme Court of Utah struck down a provision in the State Health Code which would have added between \$125 and \$1000 to the cost of a house for a back flow prevention device to be installed in sprinkling systems.⁵⁶

In addition to the ever-increasing judicial decisions in the area of land use regulation, a series of both federal and state legislation has arisen in an attempt to improve regional considerations in community growth for the benefit of both the home environment and the ecological environment. Perhaps the most notable of the proposed legislation is a bill⁵⁷ which would provide about \$800 million in federal aid to the states for establishing

⁵²375 F. Supp. at 583. The basis of the court's decision was the constitutional right to travel.

⁵³44 U.S.L.W. at 2093.

⁵⁴In *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), the Ninth Circuit upheld an ordinance which permitted only single-family dwellings on residentially zoned property and thus practically prevented the poor from living in the community. In *Petaluma*, the court noted that the zoning plan required that houses be equally divided between single-family and multi-family and that a certain percentage of the units be constructed specifically for low and moderate-income persons.

⁵⁵*Sloane v. Dixie Gardens, Inc.*, 278 So. 2d 309 (Fla. Ct. App. 1973) (fees for garbage collection services).

⁵⁶*Kesler & Sons Constr. Co. v. Utah State Division of Health*, 513 P.2d 1017 (Utah 1973).

⁵⁷S. 268, 93d Cong., 1st Sess. (1973); H.R. 10,294, 93d Cong., 2d Sess. (1974). The Senate Bill was passed on June 21, 1973, but its House of Representatives counterpart was reported to the House as amended and no further action was taken. The Senate Bill was sent back to the Committee on Interior and Insular Affairs and it is the author's expectation that it will not be brought out again in the near future.

uniform land use regulation standards.⁵⁸ In this assistance to the states, the Bill requires that the state plan be designed to develop and maintain sound policies and coordination procedures with respect to federally conducted and assisted projects on non-federal lands having land use implications.⁵⁹

The Environmental Protection Agency is also concerned with land use regulation. For example, it has attempted to control air pollution caused by automobiles in cities, shopping centers, apartment complexes, and industrial developments.⁶⁰ Furthermore, recently enacted federal legislation by HUD requiring federal flood insurance on any federally insured mortgage has established very stringent standards for shoreline, lakeside, and streamside development.⁶¹

State legislation has also been forthcoming. For example, each session of the Indiana General Assembly proposed a state-wide planning act,⁶² and most recently a regional planning act was enacted⁶³ resulting in the creation of an eight-county regional planning authority called Hoosier Heartlands.

Additionally, the American Law Institute, in conjunction with the American Society of Planning Officials, has been working for several years on a Model Land Development Code, which has reached a stage of printed fruition.⁶⁴ Discarding the complicated tautology of the traditional zoning codes, such as "variance," "permissive use," and "exception," this Code sets up a land de-

⁵⁸S. 268, 93d Cong., 1st Sess. (1973). The findings of Senate Bill 268 state:

The Congress hereby finds that there is a national interest in a more efficient system of land use planning and decision making and that the rapid and continued growth of the nation's population, expanding urban development, proliferating transportation systems, large-scale industrial and economic growth, conflicts in patterns of land use, fragmentation of governmental entities exercising land use planning powers, and the increased size, scale and impact of private actions have created a situation in which land use management decisions of wide public concern often are being made on the basis of expediency, tradition, short-term economic considerations, and other factors which too frequently are unrelated or contradictory to sound environmental, economic, and social land use considerations.

Id. § 101(a), reprinted at 119 Cong. Rec. 20,632 (daily ed. June 21, 1973).

⁵⁹*Id.* § 202(b)(4), at 20,633.

⁶⁰*See, e.g.*, 40 C.F.R. § 52.22(b) (1974); 39 Fed. Reg. 45,014 (1974).

⁶¹24 C.F.R. § 203.16(a) (1974).

⁶²Ind. S. 423, 99th Gen. Assembly, 1st Sess. (1975) (vehicle bill for regional planning); Ind. H.R. 1114, 99th Gen. Assembly, 1st Sess. (1975) (emergency bill calling for the creation of state and regional land use policies and for increasing the powers of the State Planning Services Agency).

⁶³IND. CODE §§ 18-7-1.1-1 to -9 (Burns 1974).

⁶⁴ALI MODEL LAND DEVELOPMENT ACT (Tent. Draft, 1968).

velopment agency with powers and duties enumerated in simplified language and an appeal procedure from its decisions to a specially constructed state agency. Most significantly, it takes land use control on a case-by-case basis out of the legislative arena into a quasi-judicial posture.

Whether the belated efforts of the legal profession, in conjunction with the planners, will provide remedies for the evils presently existing in land use regulations remains to be seen. Given the pre-eminence of federal control, the task of convincing a state body politic that local land use controls should be removed from local control and placed in the hands of a new and untried partisan body is, at best, an awesome one. Land use problems are ever-increasing, however, and if the states do not bring about a catharsis in land use regulation at the local government level, the federal authority will take over.