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ARABY REVISITED: THE EVOLVING CONCEPT OF PROCEDURAL DUE PROCESS BEFORE LAND USE REGULATORY BODIES

Edward J. Sullivan*

INTRODUCTION

Procedural due process in hearings before local governmental authorities is the most uncertain area of modern municipal law. A re-examination of what accurately can be described as the greatest source of public discontent in land use regulation—procedural due process in hearings before land-use regulatory bodies—is necessary in view of the increase in public control over the private use of land.

This article will describe the problem of providing a fair hearing before lay tribunals which pass on land-use questions. Further, it will analyze the development of judicial response to that problem. Finally, the article will consider recent responses to the problem by the American Law Institute and various appellate courts, and will suggest workable solutions for the future.

The principal focal point of this article is the judicial distinction drawn between "legislative" and "quasi-judicial" land-use decisions. This distinction ultimately has permitted many courts to tolerate the lack of procedural standards in land-use regulation. Despite academic recognition of the general lack of adequate procedural standards, there continues to be a virtual procedural void in most hearings before land-use regulatory bodies. This article, by examining the nature of the land-use regulatory process, will offer a method of providing those procedural reforms so long overdue.

I. THE "LEGISLATIVE" NATURE OF ZONING REGULATIONS—WHAT'S IN A NAME?

The history of land-use regulation in the United States cannot

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be separated from the climate which spawned it. The first comprehensive zoning ordinance was enacted in New York City in 1916. During the 1920's there was a substantial increase in the use of zoning as a land planning device, especially in the urbanized areas. Zoning was encouraged by realtors and homeowners who saw it as the means of preserving the pinnacle of the American Dream—the single family home. The movement for increased zoning was facilitated by the preparation of two model acts by the United States Department of Commerce under its Secretary, Herbert Hoover: the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act. Finally, the effort was crowned with success in 1926 when a conservative United States Supreme Court upheld the concept of private land use regulation by public agencies in Euclid v. Ambler Realty Co. The two Standard Acts were adopted by many states. Unfortunately the Acts failed to specify clear procedural standards to be used by local governing bodies in making land-use decisions; thus implementation of the Acts was difficult. The Standard State Zoning Enabling Act did specify certain strict procedural standards to be followed by local boards of adjustment in their consideration of applications for variances and special exceptions. The Standard City Planning Enabling Act, however, imposed few procedural restrictions on the actions of planning commissions, and the Standard State Zoning Enabling Act placed virtually no

5. 272 U.S. 365 (1926).
8. A variance is "an authorization for the construction or maintenance of a building structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance." Anderson, supra note 2, at § 14.02.
9. The special exception involves a use which is "permitted rather than proscribed by the zoning regulations." Such a use is allowed only upon the approval of the board of adjustment or another similar administrative body. Id. § 15.01.
10. City Planning Enabling Act, supra note 4, at § 8 (requiring only newspaper notice and a single hearing before adoption).
restrictions on the decision-making process of the local legislative bodies.\textsuperscript{11}

The board of adjustment, planning commission and local legislative body of a city perform different functions in the process of regulating land use. Applications for variances and special exceptions usually are heard and decided by the board of adjustment.\textsuperscript{12} Traditionally, these decisions by the board have been classified as "quasi-judicial" in nature.\textsuperscript{13} Applications for zoning ordinance amendments are heard by the planning commission, which makes recommendations on the applications to the local legislative body.\textsuperscript{14} These recommendations are reviewed by the legislative body, which generally holds a public hearing on the proposed rezoning.\textsuperscript{15} A rezoning decision by a local legislative body traditionally has been deemed to be a "legislative" act.\textsuperscript{16}

The assumption that land-use decisions by the local legislative body are "legislative" acts, subject to reversal by a court only if clearly arbitrary,\textsuperscript{17} has led many state legislatures to forego requiring these local bodies to meet strict procedural standards in their public hearings. In addition, this "legislative" classification of certain local land-use decisions has retarded the growth of a body of land-use law addressing the procedural rights of parties before land-use regulatory bodies. Indeed, until recently, the courts have struck down few such decisions on procedural grounds.\textsuperscript{18} While the courts and the commentators repeatedly have expressed their concern over the lack of procedural standards,\textsuperscript{19} the legislatures have failed to answer the call for statutory guidance.

A. \textit{The Scope of Judicial Review}

In most of the early cases, the chief concern of the courts when reviewing land-use regulations, was whether the regulation was for the benefit of the "public health, safety, morals and gen-

\begin{itemize}
    \item[\textsuperscript{11}] ZONING ENABLING ACT, supra note 3, at § 4. This section specifically refers to the "legislative body" of municipalities having the sole power to adopt, amend or change zoning regulations.
    \item[\textsuperscript{12}] D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE 425 (1969) [hereinafter cited as ZONING PRACTICE].
    \item[\textsuperscript{13}] See notes 48-50 and accompanying text infra.
    \item[\textsuperscript{14}] ZONING PRACTICE, supra note 12, at 424.
    \item[\textsuperscript{15}] Id. at 426.
    \item[\textsuperscript{16}] See, e.g., Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958); Richter v. Board of Supervisors, 259 Cal. App. 2d 99, 66 Cal. Rptr. 52 (1968).
    \item[\textsuperscript{17}] See, e.g., Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949).
    \item[\textsuperscript{18}] ZONING PRACTICE, supra note 12, at 255.
    \item[\textsuperscript{19}] See text accompanying notes 44-98 infra.
\end{itemize}
The "general welfare" standard, however, proved to be too vague. Lacking a clear standard, many courts became frustrated in their attempts to review land-use regulations. As a result, courts adopted the rule that if the reasonableness of an ordinance was "fairly debatable" the ordinance would be upheld. This rule has been used by the courts in their review of both initial zoning regulations and later modifications of these regulations.

The courts generally have been reluctant to review local "legislative" land-use decisions. The reluctance of the courts to scrutinize closely these local decisions is attributable to various factors. In reviewing local actions, the courts, in effect, were guided only by the permissible limits of the local police power. These limits were never clearly defined and thus the courts were left with little real guidance. In addition, the courts were faced with the vague language of the Standard State Zoning Enabling Act, which mandated that land-use regulations be in accordance with a comprehensive plan. This mandate proved to be confusing since courts and legal commentators were in disagreement as to what should be the content of the comprehensive plan. Further, the term "legislative" as applied to the rezoning decisions of local governments hindered any substantive judicial review of these decisions. In general, any zoning ordinance or amendment to a zoning ordinance passed by a local legislative body was sustained by the courts if there was any reasonable justification for


22. See ANDERSON, supra note 2, at § 2.16.


24. ZONING ENABLING ACT, supra note 3, at § 3.


As legislative acts, zoning ordinances and amendments enjoyed a presumption of validity and those attacking these regulations had the burden of proving them invalid—often a difficult, if not impossible, task.

Thus, the "legislative" classification given to zoning and rezoning actions has, in effect, provided the courts with a reason to refrain from thoroughly reviewing such actions. As a result, the courts have given little attention to the problem of the lack of adequate procedural standards in hearings on proposed zoning changes.

B. The Lack of Procedural Standards

Despite the lack of procedural standards in hearings before local legislative bodies, it was the procedural deficiencies of appointed administrative bodies, such as the board of adjustment—not elected legislative bodies—that drew most of the fire from the critics. Under the Standard Zoning Enabling Act, authority to rule on variance applications normally was delegated to an appointed board of adjustment. This board was characterized by

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28. See, e.g., Vickers v. Township Comm'n of Glouster Township, 37 N.J. 232, 181 A.2d 129 (1962), appeal dismissed and cert. denied, 371 U.S. 233 (1963). In Vickers, the court explained the effect of the presumption as follows: "The court cannot pass upon the wisdom or unwisdom of an ordinance, but may act only if the presumption in favor of the validity of the ordinance is overcome by an affirmative showing that it is unreasonable or arbitrary." Id. at 242, 181 A.2d at 134. Because the plaintiff failed to show beyond debate that the ordinance was unreasonable or arbitrary, the ordinance was upheld.
29. The characterization of zoning and rezoning decisions as "legislative" has had other consequences. For one, only the local "legislative body" may act upon the same. ZONING ENABLING ACT, supra note 3, at § 4. For another, the initiative may be used, but often only after the notice and hearing requirements for rezoning have been met. Compare Meridian Dev. Co. v. Edison Township, 91 N.J. Super. 310, 220 A.2d 121 (1966), with Hancock v. Rouse, 437 S.W.2d 1 (Tex. Civ. App. 1969). The better line of cases holds that small tract rezoning is not a true "legislative" act but "administrative" in nature and cannot be the subject of initiative. Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Foreman v. Eagle Thrifty Drugs & Markets, 89 Nev. 533, 516 P.2d 1234 (1973); Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85, aff'd, 54 N.J. 525, 257 A.2d 698 (1969). See also Comment, Zoning by Initiative to Satisfy Local Electorates: A Valid Approach in California?, 10 CAL. W.L. REV. 105 (1973); Comment, Voter Zoning: Direct Legislation and Municipal Planning, 1969 LAW & SOC. ORDER 453; Note, 1971 U. OF TOLEDO L. REV. 448. A third consequence is the use of the referendum, allowed in most states. Witkin Homes, Inc. v. City and County of Denver, 31 Colo. App. 410, 504 P.2d 1121 (1973); Denney v. City of Duluth, 295 Minn. 22, 202 N.W.2d 892 (1972). However, the legislative-administrative distinction is making inroads. In West v. City of Portage, — Mich. —, 221 N.W.2d 303 (1974), the Michigan Supreme Court used the distinction to disallow a referendum on a rezoning. See also Bird v. Sorsenson, 16 Utah 2d 1, 394 P.2d 808 (1974).
the courts as an administrative body rendering "quasi-judicial" rather than legislative decisions. As a quasi-judicial body its procedure was more circumscribed than that of a legislative entity.

The Standard Zoning Enabling Act specified the procedure to be followed by the board of adjustment. The Act entrusted the chairman of the board with the right to compel attendance of witnesses and administer oaths during a meeting of the board. Under the Act all meetings of the board were to be open to the public and minutes of its proceedings were to be kept by the board, showing the vote of each member on each question. The board was to have the power to review certain administrative decisions and grant special exceptions and variances. In exercising this power the Act required the board to hold public hearings, after giving public notice and due notice to the parties in interest. Any party could appear at the hearing in person or by agent or attorney. The decision of the board could be judicially reviewed if the court were petitioned within thirty days following the filing of the board's ruling. Compared to the sections of the Act relating to "legislative" actions, which usually required only notice and an opportunity to be heard, section seven of the Act created only limited potential for abuse of discretion by a board of adjustment.

Despite the restrictive nature of the procedural requirements, however, the boards often granted variances when they were inappropriate. Such actions frequently resulted from the board members allowing their personal beliefs to take precedence over procedural requirements. Deference to personal beliefs was especially prevalent when there was no voiced opposition to the

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31. ZONING ENABLING ACT, supra note 3, at § 7.

32. Id.

33. Id.

34. Id.

35. Id., §§ 4, 5. Note that Section 4 required a public hearing "at which parties in interest and citizens shall have an opportunity to be heard" and at least 15 days notice given in a local newspaper of general circulation. However, if more than 20% of the landowners within a given area protest, Section 5 provided that a three-fourths affirmative vote of all the members could be required for the change.

particular variance application. In addition, the improper granting of variances often was the result of a lack of adequate substantive standards. Boards continued to base their decision to grant or deny a variance on the traditional consideration of whether the existing zoning of the subject property created "practical difficulties" or "unnecessary hardships" for the landowner applying for the variance. These general standards of "practical difficulties" and "unnecessary hardship" provided the boards with little guidance. Thus, despite the detailed procedural standards applicable to board actions, the practices of the local boards were not in any way comparable to those of a traditional administrative agency, and for this reason such practices were frequently the subject of criticism.

While strong criticism of the procedural deficiencies of administrative bodies was common, few attempts were made to remedy the procedural void in hearings before local legislative bodies. The procedural aspects of regulatory actions by local governments were left untouched because of the "legislative" character of these actions. While some form of notice and an opportunity to be heard were required in hearings before legislative bodies, municipal legislatures, in general, tended to be insensitive to most due process rights. For example, many individuals were allowed to make their views on a land-use matter known to the local body, but some views were permitted to carry greater weight than others. In addition, the fact that an individual participated in the local proceedings was no guarantee that the same individual would be found by a court to have standing if he later sought a judicial review of the local decision. Further, the motives of the "legislative" body could not be challenged except in the most


40. See note 35 and accompanying text supra.

41. In Annot., 71 A.L.R.2d 569 (1960), the use of the "legislative" label is seen to preclude inquiry into a rezoning action, even in those cases involving financial gain to a member of the zoning body. See, however, notes 97-98 and accompanying text infra discussing the judicially created "appearance of fairness" rule. In Annot., 10 A.L.R.3d 694 (1966), a stricter position is utilized in more
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egregious circumstances, and, since "legislation" did not require a record or articulated justification, the courts often were left with the unenviable job of ex-post-facto justification.

Thus, because of the "legislative" classification given decisions by local legislatures, the lack of due process rights in hearings before these bodies was tolerated. Only recently have courts begun to re-examine the validity of this "legislative" label.

II. First Efforts to Cope With the Legislative Designation

The "quasi-judicial"—"legislative" distinction became a fetish with the courts. Both courts and legal commentators were critical of the quasi-judicial decisions rendered by boards of adjustment, and were solicitous of the rights of parties appearing before such bodies. The courts, however, found themselves with limited power to overturn those decisions which were labelled "legislative."

Most courts were not clear as to the nature of various land-use decisions. The distinctions between "legislative" and "quasi-judicial" decisions remained vague. As a result, the courts found themselves unable to develop basic procedural requirements to be met by local land-use regulatory bodies.

The courts' inability to review effectively land-use decisions was reflected in various ways. One commentator has observed that the Illinois Supreme Court seemed to have only one end in mind when reviewing land-use regulations—to reduce the number of recent cases in which "administrative officials" act in a "judicial or quasi-judicial capacity." But see City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. Dist. Ct. App. 1958), cert. denied, 112 So. 2d 838 (Fla. 1959); Coffin v. City of Lee's Summit, 357 S.W.2d 211 (Mo. Ct. App. 1962); Burford v. City of Austin, 379 S.W.2d 671 (Tex. Civ. App. 1964); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948).

42. Perhaps the most ludicrous of the "motive" cases is DeSena v. Gulde, 24 App. Div. 2d 165, 265 N.Y.S.2d 239 (1965) in which a black neighborhood was zoned for light manufacturing by the Hempstead, N.Y., Zoning Ordinance. After picketing and demonstrations, however, the zone designation was changed to reflect a residential classification. The Mayor read a statement into the record at the public hearing on the rezoning stating that the reclassification was due to threats of violence. The court in reviewing the rezoning reversed the reclassification by finding the motive behind the rezoning unacceptable and carving out an exception to the general rule that a court will not inquire into the legislative motives. The result was that the blacks were once again in the industrial area. See Comment, Legislative Motive in Enacting Zoning Ordinance May Be Examined When Disclosed in Record of Public Hearing: The Exception Swallows the Rule, 17 Syracuse L. Rev. 687 (1966).


44. See note 36 supra.
of land-use decisions to come before the court. He added that

the court

may in its decisions speak of "principles" but there is persuas-
ive evidence that the court has convenient braces of zoning
axioms, one of each pair useful whenever the court has con-
cluded that the facts favor the municipality, the other when
the court interprets the facts sympathetically to the land-
owner.

The same commentator has quoted one jurist as saying that he
based his decisions regarding land-use matters on "gut instinct." This quotation illustrates the sorry state to which land-use law had fallen.

Out of these ashes arose the seeds of a reconceptualization
of the land-use regulatory process. Ironically, the first thoughts
on this subject originated with the "legislative"-"quasi-judicial"
dichotomy which distinguished the rezoning function undertaken
by the local governing body from the variance and special permit
granting functions undertaken by the board of adjustment under
the Standard State Zoning Enabling Act. The courts and legal
writers had long termed proceedings of the board of adjustment
in granting variances, correcting errors of administrative officers,
and issuing special exception permits as "quasi-judicial" acts of
an administrative agency. By using this characterization, the
courts indicated that although the board of adjustment was not a
formal judicial tribunal, it was required to follow a rule of "fundamental fairness" in its proceedings. This rule countenanced not only a requirement of notice and opportunity to be heard, but also a right to have legal counsel present, to cross-examine opponents, and to have the board utilize its power to administer oaths and subpoena witnesses.


46. Id. at 533.

47. R. BABCOCK, THE ZONING GAME 106 (1966) [hereinafter cited as BABCOCK].

48. Originally, the stability to be provided by the zoning pattern was emphasized. The few decisions which would have to be made (for example, the granting of a variance to avoid a "taking" claim and the granting of a special permit or conditional use relating to inherently benign uses, such as churches and schools) were geared to low visibility. MANDEIKER, THE ZONING DILEMMA (1971).


50. See note 48 supra. See also M. LEARY, "ZONING" IN PRINCIPLES AND PRACTICES OF URBAN PLANNING 440-41 (1968).
Slowly, the distinctions between actions taken by a board of adjustment and local legislative bodies began to break down. Commentators began to urge judicial establishment of a more functional distinction between the older "legislative" and "quasi-judicial" categories based on the administrative law distinctions between rule-making and adjudication. 51 Moreover, writers began to question the distinctions traditionally made between a variance or special exception granted by the board of adjustment, and a rezoning decision by the local legislative body. Many commentators found the distinction to be a matter of form rather than substance. 52 A uniform approach was urged for all exercises of the land-use regulatory power.

A. A Break With the Past

There were indications that the courts were heeding the writers who urged reconceptualization, but few courts were willing to make a clean break with the past. New Jersey 53 and Oregon 54 were among the first states to treat small-tract rezonings as quasi-judicial acts, stripped of their legislative cloak.

In Aldom v. Borough of Roseland the New Jersey Supreme Court held that the action of the local governing body in amending a zoning ordinance was not exclusively legislative. 55 The court noted that review of a purely legislative act of a local government was beyond its power except where the act evidenced a "clear perversion of power." 56 The Aldom court found, however, that the rezoning by the council in the instant case was quasi-judicial in nature and thus was subject to judicial review. 57

In Fasano v. Board of County Commissioners of Washington County, 58 the Oregon Supreme Court also held a rezoning action by the county board of commissioners to be judicial rather than legislative in nature. 59 The Fifth Circuit Court of Appeals, in South Gwinnett Venture v. Pruitt, 60 adopted a rationale similar to that used by the Fasano court. In Pruitt the court distinguished the adoption of a comprehensive zoning scheme from a decision to

52. See note 39 supra.
56. Id. at 508, 127 A.2d at 197.
57. Id.
59. See text accompanying notes 100-17 infra.
60. 482 F.2d 389 (5th Cir. 1973).
rezone a specific tract of land. The court found the enactment of the overall zoning scheme to be legislative in nature and the rezoning decision to be judicial in nature. The court concluded that,

distinguished from the legislative action of adopting a comprehensive zoning plan, the adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process. [cases omitted] Here, appellants' complaint alleged the rezoning of the property had been denied by the Commissioners without a statement of their reasons and by recourse to evidence which was not in the record. Such administrative action has long been condemned.

Recently, the Colorado Supreme Court also found a city council decision on a rezoning to be quasi-judicial in nature. The court, however, made no determination as to the procedural requirements to be met in a rezoning hearing. In addition, the Hawaii Supreme Court, in Town v. Land Use Commission, recently found that the action of the State Land Use Commission, which had sole jurisdiction in the matter, in changing the classification of land from "agricultural" to "rural" was subject to the Hawaii Administrative Procedures Act and would be judged by the standards for adjudication, rather than rule-making.

Thus, some courts have been willing, in certain situations, to discard the "legislative" label usually attached to actions by local governing bodies. This willingness, however, remains a distinct minority position.

Most courts have been unwilling to treat rezoning decisions as quasi-judicial acts. However, these courts have created various methods of judicially controlling local "legislative" power, especially in the area of rezoning.

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61. Id. at 391.
62. Id. Unfortunately the Fifth Circuit Court of Appeals, on its own motion, chose to have the case reheard en banc. South Gwinnet Venture v. Pruitt, 487 F.2d 1333 (5th Cir. 1973). With Judges Ingraham and Wisdom dissenting, the court reversed itself, affirming the District Court opinion that it was not the function of the federal court to serve as a zoning appeals board. The Circuit Court found that the decision of the zoning board was of a legislative character and therefore no due process rights had been violated. South Gwinnet Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974). On April 1, 1974, the United States Supreme Court denied certiorari in Pruitt v. South Gwinnett Venture, 94 S. Ct. 1625 (1974).
63. City of Colorado Springs v. District Court, 519 P.2d 325 (Colo. 1974).
64. 524 P.2d 84 (Hawaii 1974).
65. Not only have courts created methods of controlling rezoning, but some local governments also have established their own methods of restricting rezoning activities. Such restrictions have been established through the use of contract and conditional zoning. Contract zoning occurs when a city enters into a direct contract with a developer to rezone certain property upon the understanding that the property will be put to a particular use within a certain time. D. Hagman, Pub-
The change or mistake rule. The change or mistake rule has been forged by the judiciary in an attempt to check arbitrary use of the zoning power through the use of substantive rather than procedural safeguards. The rule, in brief, provides that no rezoning can be accomplished without proof of a change in the physical character of the neighborhood to be rezoned or a mistake in the original zoning. This rule, especially prevalent in Maryland, has provided the judiciary with a means of overturning a rezoning decision despite its strong presumption of legislative validity. Courts which have adopted this rule refuse to uphold rezoning decisions where there is a failure to show a change or mistake. It should be noted that the rule has been criticized for exalting older "legislation" over subsequent amendatory action.

Weakened presumption of validity. The courts also have begun to re-examine early decisions which upheld land-use decisions of local governments in almost carte-blanche fashion. Circumstances have arisen under which courts have found the full presumption of legislative validity to be inapplicable. For example, where a court which has adopted the change or mistake rule finds that a local legislative body has rezoned property where there has been no change in the character of the neighborhood and no mistake in the original zoning, the court usually does not uphold the rezoning despite the traditional presumption of validity. In addition, courts have refused to apply the presumption where a rezoning appears to be spot zoning, or where a rezoning...
is not supported by an existing comprehensive plan. Further, where there is a failure to provide for "preferred uses" or where the zoning is exclusionary, some courts have found the presumption of validity to be inapplicable.

B. Movement Toward Procedural Safeguards

Many courts have been requiring, on a case-by-case basis, more and more procedural safeguards in all land-use regulatory proceedings. The due process rights of notice and an opportunity to be heard always have been required in both legislative and quasi-judicial proceedings. Some courts also have held that parties should be allowed to cross-examine witnesses in hearings before local zoning authorities. It should be noted, however, that the courts usually allow such cross-examination only in administrative or quasi-judicial hearings.

The lack of any written findings by the local legislative body often has made it difficult for the judiciary to give adequate re-
view to decisions made by such a body.\textsuperscript{78} Thus, many courts have required that the local bodies make written records of their findings.\textsuperscript{78}

In addition, the judiciary has refused to stand idle while local zoning authorities fail to accord the parties any semblance of procedural fairness.\textsuperscript{80} Even when the decision being reviewed is one traditionally classified as "legislative," the courts often refuse to uphold the decision if the local authority has committed gross procedural error.\textsuperscript{81} In \textit{Ford v. Baltimore County},\textsuperscript{82} the county council adopted a new comprehensive zoning plan which eliminated the business zoning on a certain tract of property and placed the property in a residential zone.\textsuperscript{83} The public hearing on the proposed zoning change was described by the court as "in reality no hearing at all but rather a rowdy and uncontrolled mob . . . ."\textsuperscript{84} The court noted that when a hearing is required "it must be a fair hearing in all respects and not a mere form."\textsuperscript{85} The evidence showed that, because of the conditions surrounding the "hearing," the appellants were never "heard" by the council in regard to their opposition to the proposed zoning change.\textsuperscript{86} Thus, the court held that the subsequent action by the Council was void for failure to

\textsuperscript{78} The Oregon Supreme Court in \textit{Roseta v. County of Washington}, 254 Ore. 161, 170, 450 P.2d 405, 410 (1969) expressed its reasoning as follows:

Since we cannot properly exercise our function of judicial review without a record of adequate findings by the board or the Planning Commission on which it based its decision to allow a change of use within a zone, it is within our province to require such findings as an essential part of the Board's procedure.


\textsuperscript{81} \textit{Id.} In Oregon, even prior to \textit{Fasano}, the appellate courts have emphasized procedural fairness even to the extent of not requiring standards for administration of legislation. \textit{Warren v. Marion County}, 222 Ore. 307, 353 P.2d 257 (1960). \textit{See also K. Davis, DISCRETIONARY JUSTICE} (1969).

\textsuperscript{82} 268 Md. 172, 300 A.2d 204 (1973).

\textsuperscript{83} \textit{Id.} at 182, 300 A.2d at 209.

\textsuperscript{84} \textit{Id.} at 192, 300 A.2d at 214.

\textsuperscript{85} \textit{Id.} at 186, 300 A.2d at 211.

\textsuperscript{86} \textit{Id.} at 192, 300 A.2d at 214.
give a proper hearing.\textsuperscript{87}

Various other procedural safeguards gradually have been instituted by the courts. Even while not adopting the quasi-judicial model, many courts have begun viewing the actions of local government in a more realistic and practical manner. To facilitate judicial review, these courts are using burdens of proof\textsuperscript{88} and the "substantial evidence" standard of review\textsuperscript{89} in their determination of whether a zoning action is valid.

In addition, the courts have attempted to curb some of the abuses which have arisen from the use of the "legislative" label by closely reviewing rezoning actions where it is alleged that a member of the local zoning authority was biased or his vote was influenced by an improper motive.\textsuperscript{90} It should be noted, however, that there have been few, if any, suggestions that pre-hearing contacts between the members of the local zoning authority and interested parties be barred.\textsuperscript{91}

Many courts also have changed the traditional standing requirements. Under the theory that zoning actions are legislative, only those who had suffered damages which were different in kind from those suffered by the public were eligible to contest such zoning actions.\textsuperscript{92} Recently, however, many non-residents have attempted to challenge zoning changes in jurisdictions in which they did not even own property.\textsuperscript{93} As zoning ordinances often affect the property of individuals who do not live within the boundaries of the locality in which the ordinances are enacted, courts and commentators have come to recognize that, in certain in-

\textsuperscript{87} Id. at 193, 300 A.2d at 214.


\textsuperscript{90} See notes 41-42 and accompanying text supra.

\textsuperscript{91} Contra, Mignone, supra note 51, at 194.


stances, non-residents should be allowed standing to challenge these ordinances.\(^9^4\)

So that the judiciary is better able to solve the problem of inadequate procedural standards in hearings before local zoning authorities, it is necessary that the courts have the opportunity to review adequately decisions by those authorities. Recognizing this necessity, some courts have developed more realistic, clear-cut tests for determining whether an action of a legislative body is an “unreviewable” legislative act or an administrative act which could be reviewed.\(^9^5\) For example, in Donnelly v. City of Fairview Park the court found that if an action by a legislative body creates a law, then that action is legislative; whereas, if the action merely consists of executing a law, then the action is administrative.\(^9^6\) By fashioning such tests, these courts have been able to tailor the scope of their review in order to control more effectively abuses in the land-use regulatory process.

Finally, a major break with the past occurred when the Washington Supreme Court created the “appearance of fairness” rule.\(^9^7\) This rule grew out of a need to control procedural abuses before zoning authorities at the local level. Briefly stated, the rule requires that not only shall all land-use regulatory proceedings be fair, but that they also appear to be fair to all parties involved.\(^9^8\) It was on this series of Washington cases that the Oregon Supreme Court based its landmark decision in Fasano v. Board of County Commissioners of Washington County.\(^9^9\)


\(^9^5\) See, e.g., Donnelly v. City of Fairview Park, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968).

\(^9^6\) Id. at —, 233 N.E.2d at 502.


\(^9^8\) In Smith v. Skagit County, 75 Wash. 2d 715, 733, 453 P.2d 832, 842 (1969), the court said:

The public hearings, therefore, must not only be fairly undertaken in a genuine effort to ascertain the wiser legislative course to pursue, but must also appear to be done for that purpose. In short, when the law which calls for public hearings gives the public not only the right to attend, but the right to be heard as well, the hearings must not only be fair but must appear to be so. It is a situation where appearances are quite as important as substance. (Emphasis in original).

III. THE QUASI-JUDICIAL FORM RECONSIDERED—FASANO v. BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY

In 1970, AGS Development Co., the owner of thirty-two acres of land which was zoned R-7 (Single Family Residential) applied for and received from the Washington County Board of County Commissioners, a rezoning of the property to P-R (Planned Residential). This zone change would have allowed for the construction of a mobile home park on the thirty-two acres of suburban land just outside Portland, Oregon. Upon petition from neighboring property owners the trial court examined the Board's decision by writ of review, and used recent Oregon precedent utilizing the "change or mistake" rule to overturn the decision. The Oregon Court of Appeals affirmed and on January 4, 1972, the Oregon Supreme Court granted review.

In its consideration of the case, the state supreme court decided to reconsider the entire nature of the land-use regulatory process, since the past record of the court was conspicuously inconsistent on this issue. After hearing arguments on March 1, 1972, the court ordered additional arguments on certain issues, among which were:

If the "Comprehensive Plan" (as distinct from zoning) must be followed by the Board of Commissioners in [rezoning],

a. What minimal procedural requirements are necessary to assure a meaningful record on appeal?

b. How specific must the Board's findings be to provide an adequate basis for judicial review?

c. How specific must the Board's findings be to provide an adequate basis for judicial review?

d. Does the Board or the complaining property owner have the burden of proof on the issue of compliance with the Comprehensive Plan?

In rendering its decision in Fasano v. Board of County Commissioners of Washington County, the court characterized the issues as follows:

100. The writ of review is the statutory derivative of common-law certiorari in Oregon. ORE. REV. STAT. § 34.010 (1974).

101. See text accompanying notes 67-69 supra, for an explanation of the "change or mistake" rule.


103. Review of matters within the jurisdiction of the Court of Appeals is not a matter of right. ORE. REV. STAT. §§ 2.510-.520 (1974).

104. Fasano v. Board of County Comm'rs of Wash. County, 264 Ore. at 574, 507 P.2d at 23. The briefs of amicus curiae, Association of Oregon Counties, League of Oregon Cities and Oregon Chapter of the American Institute of Planners stressed past inconsistencies (on file with the author).

105. Letter from Clerk of Oregon Supreme Court to Counsel, Sept. 18, 1972 (on file with the author).

We granted review in this case to consider the questions—by what standards does a county commissioner exercise his authority in zoning matters; who has the burden of meeting those standards when a request for change of zone is made; and what is the scope of court review of such actions?107

To define the proper scope of review, the court first determined whether the zoning decision by the county board was "legislative" or "administrative." After reviewing its previous decisions involving the characterization of zoning actions108 and after considering the nature of various local zoning actions, the court concluded that it "would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity . . . ."109 The court found that ordinances which state general policies without regard to a specific piece of property usually are legislative acts,110 whereas a determination of whether the permissible use of a specific piece of property should be changed is usually a judicial act.111 Thus, the court held that the small-tract zoning change effected by the county board in Fasano was administrative or "quasi-judicial."112

The court rejected the county's contention that the judicial review of the zoning decision was limited to a determination of whether the zoning was "arbitrary and capricious."113 Instead, the court looked to the statutory requirement that zoning "carry out" the comprehensive plan,114 and determined that a zoning change would be upheld only if it was shown that the change was in conformance with the comprehensive plan.115 As there was no showing that the rezoning was in accord with the plan, the Fasano court reversed the board's decision.116

Thus, the Oregon Supreme Court's denomination of small

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107. Id. at 579, 507 P.2d at 25.
110. Id.
111. Id. at 581, 507 P.2d at 26.
112. Id.
113. Id. at 581, 507 P.2d at 27.
115. 264 Ore. 574, 507 P.2d 23 (1973). The court found that the burden of demonstrating conformity to the comprehensive plan increased as the intensity of the proposed use increased over that of existing uses. That burden included demonstrating a public need for the proposed use and that the need was best satisfied by the proposal. Id. at 586, 507 P.2d at 29.
116. Id. at 589, 507 P.2d at 30.
tract zoning changes as administrative, "quasi-judicial" acts resulted in a broader scope of judicial review over such changes and necessitated certain procedural reforms:

Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.\(^\text{117}\)

A. Effects of Fasano

In order to appreciate the significance of the *Fasano* decision, an analysis of its impact on the land use regulatory process is necessary.

The burden of proof. As discussed earlier, a legislative act is not susceptible to judicial attack on the sole ground that there was an inadequate showing at the local level of the propriety of such an action.\(^\text{118}\) By contrast the *Fasano* court’s adoption of the quasi-judicial model for some land-use decisions requires that certain land-use hearings be “mini-trials” at which the petitioner must convince the hearing officer or body that the requested action meets either the relevant comprehensive plan or statutory standards for such changes.\(^\text{119}\)

In *Fasano* the court also developed the notion of a “graduated burden of proof.” Under this concept the “more drastic the [requested] change, the greater will be the burden of showing that the [change] is in conformance with the comprehensive plan . . . .”\(^\text{120}\)

Notice and opportunity to be heard. The *Fasano* decision effects no drastic change in the requirements of notice and opportunity to be heard in hearings before local zoning authorities. The traditional due process requirements of both notice and opportunity to be heard were already requisites of “legislative” as well as “quasi-judicial” hearings.\(^\text{121}\)

\(^{117}\) Id., citing Comment, Zoning Amendments—The Product of Judicial or Quasi-Judicial Action, 33 Ohio St. L.J. 130 (1972).

\(^{118}\) See, e.g., Kozesnick v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957).

\(^{119}\) See K. DAVIS, ADMINISTRATIVE LAW TEXT § 6.05 (1972) [hereinafter cited as DAVIS], which speaks of the “threshold of a new era” in which the courts will require administrative agencies to promulgate standards against which their actions can be measured.

\(^{120}\) 264 Ore. at 586, 507 P.2d at 29. This rationale is good only for “upzoning” (that is, zoning which effects an increase in density or intensity of use).

\(^{121}\) ANDERSON, supra note 2, at §§ 4.14, 4.16; DAVIS, supra note 119, at § 7.03.
Impartial tribunal. No aspect of the administrative process runs so counter to traditional notions of land-use regulation as does the idea of limiting contacts between parties and members of the zoning authority prior to a quasi-judicial hearing. In Oregon, the Fasano decision has been extended by legislation which creates conflicts of interest standards for planning commission members.\textsuperscript{122}

The standards in this area parallel those used in the legal community which place restrictions on conversation between a judge and parties, or their attorneys, on a matter upon which the judge must pass.\textsuperscript{123} The Oregon rule prohibiting such contacts may not be entirely workable because it is improbable that a person in political office, such as a city council member, could avoid being approached and influenced by a constituent. Nevertheless, the rule could be modified to accommodate these realities of local government practice.\textsuperscript{124}

Opportunity to present and rebut evidence. By virtue of the trial-like hearing required under the quasi-judicial model adopted by Fasano,\textsuperscript{125} it is in the evidentiary area that the model is most significant. The traditional land-use hearing has long been marked with irrelevancies, exaggerations and crowd-pleasing antics on either side of the rostrum.\textsuperscript{126} With the use of a trial-type procedure, especially if the administration of an oath is required,\textsuperscript{127} the incidence of "stretching the truth" will be diminished.

The issue of cross-examination is problematical.\textsuperscript{128} Indeed,

\textsuperscript{122} See Ore. Rev. Stat. § 215.035 (1974) (referring to county planning commission members) and § 227.035 (1974) (referring to city planning commission members. The identical text of the statutes explains the standards as follows:

A member of a planning commission shall not participate in any commission proceeding in which any of the following has a direct or substantial interest: the member or his spouse, brother, sister, child, parent, father-in-law, mother-in-law, partner, any business in which he is then serving or has served within the previous two years or any business with which he is negotiating for or has an arrangement or understanding concerning prospective partnership or employment. Any actual or potential interest shall be disclosed at the meeting of the commission where the action is taken.

\textsuperscript{123} ABA Canons of Professional and Judicial Ethics, Judicial Canon no. 17, at 49 (1957).

\textsuperscript{124} A more effective practice may require full disclosure at the time of hearing and inquiry by all parties to determine the nature and weight of their contacts.

\textsuperscript{125} 264 Ore. at 589, 507 P.2d at 30 (1973).

\textsuperscript{126} BABCOCK, supra note 47.

\textsuperscript{127} Dietrich v. District of Columbia Bd. of Zoning Appeals, 293 A.2d 470 (D.C. App. 1972) (In this case, the court found that the hearing was not in conformity with the requirements for contested cases because of a failure to swear in the witnesses).

\textsuperscript{128} DAViS, supra note 119, at § 14, 10. See also Northampton Corp. v. Prince George's County, 21 Md. App. 625, 321 A.2d 204 (1974).
it is a right which must not be disregarded in a quasi-judicial proceeding. However, the multiplicity of parties and the possibilities of abuse present obvious difficulties. These problems could most easily be avoided by allowing an individual a degree of procedural rights based on the extent of his interest in the outcome of the hearings. Thus, while all would be allowed to exercise their right to "testify" at land-use hearings, only those accorded "party" status should be able to cross-examine.

The standards for presentation of evidence should not differ from those used in other administrative hearings—that is, the rules should be less restrictive than those utilized in jury trials and sufficiently liberal to accord with the general informality of administrative hearings.

Another practical problem arises: how do the triers of fact limit irrelevant or cumulative testimony? The vesting of discretionary power in the hearing officer or body would seem to be the best solution to this problem. Such an approach has proved successful in other administrative proceedings.

The record. The possibility that a zoning decision will be subject to judicial review should impel the hearing officer or body to make an adequate record for review. Basic to the notion of due process and effective judicial review is a record which may be reviewed for sufficiency of evidence and absence of procedural error. Use of a court reporter or tape machine is preferable to hand-taken minutes—especially in view of the decided judicial preference for verbatim transcripts. All exhibits should be systematically marked and their use (for example, pointing to maps) should appear clearly in the record.


130. In Chrobuck v. Snohomish County, 75 Wash. 2d 858, 480 P.2d 496 (1971), a case relied upon by the Oregon Supreme Court in Fasano, the Washington Court recognized that such cross-examination may be limited within reason to relevant issues.

131. In Davis supra note 119, at §§ 14.01-.06, the author comments that: The direction of movement on evidence problems throughout the legal system, in the judicial process as well as in the administrative process, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon 'that kind of evidence on which responsible persons are accustomed to rely in serious affairs'.

132. Id.

133. Printzas v. Borough of Norristown, 10 Pa. Cmwlth. 482, 313 A.2d 781 (1973); Loveless v. Yantis, 82 Wash. 2d 754, 513 P.2d 1023 (1973). In West v. City of Astoria, 524 P.2d 1216 ( Ore. App. 1974), the Oregon Court of Appeals held that two full hearings on the same application by an agency need not be held so long as the record of the first hearing is adequate.
As discussed earlier, the use of specific findings, accompanying even "legislative" decisions, has been a requirement of many courts. Such a requirement both insures due process to all parties and better enables the court to review the decision of the land-use agency below. The future of this requirement is not difficult to foresee—the decisions will turn not upon whether findings were made, but on whether those findings were adequate. With the introduction of these procedural safeguards, the rights of all parties are accorded greater protection and there is substantially less likelihood that land-use decisions will be arbitrary.

IV. MODEL LAND DEVELOPMENT CODE

Responding in part to the concern over the adequacy of the procedures employed in the land-use regulatory process, the American Law Institute has developed "A Model Land Development Code." The Model Code has relied on the rationale of the Fasano court as a basis for providing more effective substantive judicial review over land use changes. The basic trend of land-use law in this area is shown by the Code.

A. The Legislative v. Quasi-Judicial Distinction

The Model Code adopts the distinction between "rulemaking" and "adjudication," and seeks to attach different classes of procedural rights to each, in accordance with its purpose of establishing,

a system of administrative and judicial review of local and state land use decisions which encourages both effective citizen participation and prompt resolution of disputes.

For example, the Code distinguishes a "general development permit," which issues as a matter of right, much as a building permit, from a "special development permit," which issues only after

134. See notes 78-79 and accompanying text supra.
137. See Model Code, supra note 30, at § 2-312, Note at 111-16.
138. Compare Model Code, supra note 30, at § 1-201(13) with (14); compare §§ 2-303 with 2-304.
139. See Model Code, supra note 30, at § 1-101(5).
140. Id. § 2-102. The Model Code provides that a local development ordinance may divide developments into four categories:
   development which is permitted as of right ("general development"); development which may be permitted at the discretion of the Land Development Agency ("special development"); development which needs no
notice, hearing and final order, using the quasi-judicial model.\textsuperscript{141} The hearing is before the local “land development agency,” which may be the local governing body or a committee or officer of the local government.\textsuperscript{142}

The Model Code makes additional “legislative”-“adjudicative” distinctions. The Code treats the adoption of local and state land development plans,\textsuperscript{143} and the application of those plans to large areas, as legislative acts.\textsuperscript{144} Decisions relating to specific pieces of property, however, are deemed to be adjudicative in nature.\textsuperscript{145} In all cases, there are provisions for public notice\textsuperscript{146} and the requirement that specific procedures be followed.\textsuperscript{147}

B. Legislative and Adjudicative Procedures

Under the Model Code, procedures employed in rulemaking and adjudicative procedures differ sharply. Rulemaking requires notice and a hearing except in an emergency.\textsuperscript{148} The “land development agency” is permitted to render a declaratory order, interpreting the local regulations after notice and hearing. In its order, the agency specifies the special development that it can and will permit on a particular parcel of land. This order binds the permit but which must comply with the general development regulations; and development exempt from the regulations of the ordinance. 

\textit{Id.} § 2-101, Note, at 38. The notice requirements of the Code are specific and meant to apply on a statewide basis. §§ 1-201(11) and (12) define a “newspaper general circulation” and the manner of giving notice by mail, while § 2-304 (2) provides for the manner of giving notice to certain parties in adjudicative hearings.

\textsuperscript{141} See Model Code, supra note 30, at §§ 2-102 and 2-201(1) and (2) which describe certain situations in which special development permits may be issued only after notice and hearing.

\textsuperscript{142} See Model Code, supra note 30, at §§ 1-201(7), 2-102, 2-301, at 82-85.

\textsuperscript{143} See Model Code, supra note 30, at §§ 3-106, 8-401, 8-405.

\textsuperscript{144} See Model Code, supra note 30, at §§ 2-101(2) which refers to the ordinance-making process, in determining what areas or activities are encompassed in the “special development permit” process and 8-301 to 8-303, referring to the adoption of a state official map.

\textsuperscript{145} See Model Code, supra note 30, at §§ 2-304 (special development permit issued only after quasi-judicial procedures), 7-501 to 7-504 (quasi-judicial appeals hearing procedure before State Land Adjudicatory Board).

\textsuperscript{146} Id. § 8-208 (weekly notice of certain land development proposals); art. 11 (relating to filing of notices).

\textsuperscript{147} Id. § 11-101 provides that local ordinances, rules and orders will not be effective unless the requirements of the Code for filing have been completed. Generally, the Code requires that an order, rule or ordinance be filed in “the public office where a deed of the land involved in the order, rule or ordinance would be recorded.” Id. § 11-102. It should be noted that ordinances, rules and orders are subject to invalidation if procedural requirements are met. Id. at § 9-109(1) (c).

\textsuperscript{148} Id. §§ 2-303, 2-305 (which set out procedures for legislative type hearings).
local government for one year. Adoption of general ordinances relating to land use follows local ordinance-making procedures. Amendments to ordinances, however, cannot be adopted without first being transmitted to the land development agency, for comments and recommendations. This requirement frustrates efforts to pass “quickie” amendments.

With regard to adjudication, the Model Code encourages the land development agency to adopt its own rules of procedure, but certain requirements for the conduct of “administrative hearings” are set forth in the Code. These requirements are: the giving of notice, the appointment of a presiding officer, providing for appearances of record, the giving of “party” status to certain individuals, the administration of oaths and issuance of subpoenas, presentation of evidence, cross-examination and rebuttal, adequate hearing record, prohibitions on ex parte communications, a review of the proposed decision by the parties if the full land development agency issuing the same was not present at the hearing, a requirement that the decision be based on the hearing record, and written findings of fact and conclusions of law.

The local hearing may be combined with other hearings if multiple permits are involved. Any order granting a special development permit must be published. If the permit request is denied, the applicant must be given the reasons therefor and be barred from making a similar application for one year. Finally, small-tract changes (denominated “special amendments”)

149. Id. § 2-308.
150. Id. § 2-310.
151. Id. § 2-311. This section requires referral to the Land Development Agency for comments. Before adoption the comments of the agency must have been available to the public or twelve weeks must have elapsed since the transmission of the proposed amendment to the agency. The Land Development Agency must hold a legislative-type hearing on the proposal, which itself requires four weeks notice under § 2-305.
153. Model Code, supra note 30, at § 2-304. In addition, the Code gives standing to “qualified” neighborhood organizations, which meet the standards prescribed in § 2-307. The State Land Planning Agency may grant standing in local adjudicatory hearings, by rule promulgated under § 8-204. However, if one did not participate in an adjudicatory hearing due to lack of notice, § 9-103(4) allows the court to grant standing to test a final order. Finally, § 9-103(5) allows one to pursue review of an order if he can show that he has a significant interest which was not adequately represented.
154. Id. § 2-402.
155. Id. § 2-306(2).
156. Id.
are severely restricted to prevent abuse.\textsuperscript{158}

C. \textit{Other Rulemaking and Adjudicative Exercises}

Even outside the local-general-ordinance-versus-special-amendment dichotomy, the Model Code distinguishes the two functions. For example, the \textit{passage} of an ordinance which discontinues certain classes of land uses, either generally or in specified areas, is a \textit{legislative} act\textsuperscript{159} but its \textit{enforcement} as to specific persons or properties is an \textit{adjudicative} act.\textsuperscript{160}

A similar distinction is drawn in Article 5 with regard to actions relating to the acquisition and disposition of land.\textsuperscript{161} While the power to condemn usually is seen as a legislative act,\textsuperscript{162} the Code provides for a proceeding, which requires notice, hearing and findings, through which the state land planning agency may condemn private land for private "large scale development."\textsuperscript{163}

Further, the state land planning agency may designate certain geographical areas as "areas of critical state concern,"\textsuperscript{164} and thereby restrict development in these areas.\textsuperscript{165} The state agency also has the power to define categories of development which are likely to present issues of regional or state significance.\textsuperscript{166} However, once this agency has passed regulations governing development, the process focuses on quasi-judicial approval of individual applications.\textsuperscript{167}

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\textsuperscript{158} \textit{Model Code, supra} note 30, at § 2-312. This section follows the rule in \textit{Fasano, Id., Note}, at 112. The "special amendment" is described as an amendment whose effect is limited to a single parcel or several parcels in related ownership, or which changes the regulations of an area of 50 acres or less, or wherein development is permitted only after approval of the local governing body. Prior to the adoption of a special amendment, the Land Development Agency is to hold a hearing and make findings and recommendations. \textit{Id.}

\textsuperscript{159} The discontinuance of disfavored land uses is initiated by rule. \textit{See Model Code, supra} note 30, at §§ 4-101, 4-102.

\textsuperscript{160} \textit{See Model Code, supra} note 30, at §§ 4-201, 4-202.

\textsuperscript{161} \textit{Id.}, art. 5.

\textsuperscript{162} \textit{See Model Code, supra} note 30, at §§ 5-301, 5-302.

\textsuperscript{163} This legislative characterization appears to be continued in the Model Code. \textit{See Model Code, supra} note 30, at §§ 5-203, 5-204. The process by which land is acquired for private development by the State Land Planning Agency results in an order after an adjudicative hearing.

\textsuperscript{164} \textit{See Model Code, supra} note 30, at § 7-201, Note at 295-96, for examples of areas to which the designation "Area of Critical State Concern" might be applied.

\textsuperscript{165} \textit{Id.} § 7-202.

\textsuperscript{166} This is also accomplished by a "rule." \textit{Id.} § 7-301(1).

\textsuperscript{167} The result of designating an area of activity of state or regional concern is to add substantive, rather than procedural, requirements to land use regulation. Individual applications would still be treated in an adjudicative setting. \textit{See Model Code, supra} note 30, at §§ 7-207(1), (3); 7-303(2); 7-304. \textit{See also} the procedures for appeals of "orders" to the State Land Adjudicatory Board. \textit{Id.} §§ 7-501 to 7-504.
Finally, the state land planning agency may adopt, by rule, an official map designating future land acquisitions and a state or regional land development plan for all legislative activities.

Most significantly, in all of the above provisions, the Model Code has carefully distinguished between the rulemaking and the adjudicative processes. Similarly, as the processes differ so do the standards of judicial review. In all cases, however, the Code encourages the judiciary to enforce strict procedural requirements. The distinctions made by the Code between legislative and adjudicative actions were carefully considered by the drafters and deserve recognition in the light of their functional approach.

V. DEMOCRATIC PLANNING FOR THE FUTURE

While the courts, as in Fasano, have often found it necessary to lead the way, the judiciary cannot hope to solve the multifarious problems relating to procedures to be employed before land-use regulatory bodies. Courts by their nature act on a case-by-case basis and in a negative manner, striking down decisions which fail to meet the standard of due process regarding the legislative or quasi-judicial act.

The solution to the problem lies in legislative action. The legislatures of the several states must assert their concern, and, just as they provided for appropriate procedures in the standard acts of the twenties, so they must provide for appropriate procedures in the seventies. There are various procedural reforms which would produce positive effects on public confidence in land-use decision making.

A. Use of a Hearing Officer

Perhaps the most common complaint of planners, planning commissions and local governing bodies with regard to land-use planning is that their attention is constantly given to zoning disputes rather than planning. To alleviate this problem a hearing

168. Id. § 8-303.
169. Id. §§ 8-401 to 8-405.
170. Compare the different criteria for review of adjudicatory acts under MODEL CODE, supra note 30, at § 9-103 with the criteria listed for the review of rulemaking acts under MODEL CODE, supra note 30, at § 9-104.
171. MODEL CODE supra note 30, at § 9-109(1)(c).
172. Justice Bryson's special concurrence in Fasano points out that while the court can formulate rules, it cannot provide a panacea:

It is solely within the domain of the legislative branch of government to devise a new and simplified statutory procedure to expedite finality of decision.

173. See BABCOCK, supra note 47, at 62-64.
officer could be appointed to hear quasi-judicial “contested cases” and render opinions. Such a system is already in operation in Cincinnati, Ohio, and Montgomery County, Maryland. The use of hearing officers has proved successful in Washington, and has been adopted on a permissive basis in Oregon. The opinion of the hearing officer may be advisory only, as proposed to the Washington Legislature, or it may be deemed a binding decision subject to an appeal. In either case, any decision subsequent to that of the hearing officer would be based solely on the record before the hearing officer so that only one public hearing would be required on each application.

B. Standing Without Economic Injury

No issue in land-use regulation is so vexing as that of standing. In land-use law, a party usually is found to have standing where he has an economic interest in the outcome of the litigation or where the outcome might result in an infringement of his “fundamental rights.” There is some evidence that the federal courts are modifying their concept of standing, but legislation is probably the more appropriate solution.

In response to this issue, the Model Code provides that a party may have standing in two instances without any showing of economic injury or threat to a fundamental right. Under the Code a “qualified” neighborhood organization is given auto-

174. See Model Code, supra note 30, at § 2-301, and Note, at 82-85.
175. Id. The Maryland Court of Appeals allowed the use of a hearings officer who submitted findings and recommendations to a county governing body who did not make the final decision in a contested case. Northampton Corp. v. Prince George's County, 21 Md. App. 625, 321 A.2d 204 (1974).
179. Id.
180. See Scott v. City of Indian Wells, 6 Cal. 3d 541, 547-49, 492 P.2d 1137, 1140-42, 99 Cal Rptr. 745, 748-50 (1972); see generally periodicals cited in notes 92, 94 and accompanying text supra.
183. Model Code, supra note 30, at § 2-307 provides that the local Land Development Agency shall issue an order designating a neighborhood organization as qualified under the Code if: 1) the organization has filed an application showing its boundaries, and the names of its officers and directors; 2) the organization represents more than half of the adults residing within its boundaries; 3) the organization has at least 50 members; 4) at least 50% of the area within its bound-
matic standing. In addition the Code gives the state land planning agency the power to grant automatic standing in local decisions through its rulemaking power.  

C. Encouraging an Extensive Deliberative Process

The failure of the courts to break down the legislative barrier to examination of the rationale behind small tract zoning changes has been mitigated in many states by the requirement of an Environmental Impact Statement for zoning changes which are "major actions affecting the environment." Use of the Statement encourages a thorough consideration of specific proposals relating to alternative sites, a "no-build" alternative and means for lessening the impact of the proposal.

The extension of this deliberative process to land-use regulation now requires regulatory agencies to review at great length the effects of decisions which heretofore have been undertaken without careful consideration. Social and economic factors, as well as environmental impacts, are considered in land-use regulation, so that the Environmental Impact Statement analogy is not stretched too thinly by application to land use regulations.

D. State and Regional Land Use Planning

The Euclidean model of complete delegation of land-use powers to local government, has given land-use controls a parochial character. In the past two decades, however, there has been a trend away from complete delegation of land-use powers to municipalities and toward a regional or statewide approach. In California, under the California Shorelines Conservation Act,

184. See Model Code, supra note 30, at §§ 2-304; 2-307; 8-204; 9-103(4), (5).  


187. The Euclidean model refers to the type of zoning which was the subject of litigation in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).  


and by statute in Vermont\textsuperscript{190} and Maine,\textsuperscript{191} state agencies have been created with the power to make land-use decisions. Procedures which these state agencies are to follow are found in the administrative procedures act of each state.\textsuperscript{192}

In Oregon, an appeal from a local land-use decision may be taken to the State Land Conservation and Development Commission in certain limited situations.\textsuperscript{193} Florida follows the Model Code provision which allows for appeals from local decisions concerning development having regional significance.\textsuperscript{194} In Massachusetts, an appeal from the decision of a local governing body to exclude low or moderate income housing is available.\textsuperscript{195}

E. \textit{Use of the State Administrative Procedures Act}

Perhaps the most likely trend to emerge from recharacterizing individual tract reclassifications as quasi-judicial is increased state legislative intervention into the procedural field. Although replacing the usual atmosphere of exaggeration and crowd pleasing,\textsuperscript{196} prevalent at public hearings, with a balanced adjudicative approach will be demanding in terms of money and expertise,\textsuperscript{197} the adoption of a state administrative procedures act would guard against distortion of the merits often occasioned by loose proce-

\textsuperscript{190} VT. STAT. ANN. tit. 10, § 151-6001 \textit{et seq.} (Supp. 1974). \\
\textsuperscript{191} ME. REV. STAT. ANN. tit. 30, § 239-4511 \textit{et seq.} (Supp. 1973). \\
\textsuperscript{192} See \textit{In re Preseault}, 130 Vt. 343, 292 A.2d 832 (1972), detailing the procedures in Vermont whereby the petitioners filed an application with the District Environmental Commission, the application was published providing requisite notice, hearings were held, the permit was denied, an appeal was taken to the State Environmental Board and an appeal was then taken to the Vermont Supreme Court. See also \textit{Town v. Land Use Comm'n}, 524 P.2d 84 (Hawaii 1974).

\textsuperscript{193} ORa. REV. STAT. §§ 197.300-.315 (1974) providing for review upon petition by a county governing body of a comprehensive plan provision or ordinance or regulation not in conformity with adopted state planning goals; or upon petition by a city or county governing body of an action taken by another governmental agency not in conformity with such goals; or upon petition by a governmental agency of a county action not in accordance with the special role given counties (to review and coordinate plans); or petition by any "person or persons whose interests are substantially affected" by a plan or ordinance provision in violation of the aforesaid goals. Review is coordinated by the Land Conservation Development Commission, a state administrative body.


dure. Indeed, as one commentator urges, there should be less emphasis on substantive standards, which have often been too broad to be of any use, and more concern with procedural safeguards.

F. Defining the Burden of Proof

Finally, a clear distinction, both at the hearing level and on review, should be made between the burden of persuasion (which remains upon the applicant throughout the hearing) and the burden of proof (which may shift back and forth between the parties during the course of the hearing). With such a distinction the legislature could clarify what evidence the hearings body, and ultimately the courts, should require from parties at the lowest level of a contested case. If the courts will allow small-tract changes to be treated as contested cases under general principles of administrative law, in lieu of attempting to retry the matter, and insist upon adequate procedural safeguards, the emphasis at hearings will be the land-use matters at issue, rather than the personalities involved.

CONCLUSION

Procedural reforms in hearings before local zoning authorities are long overdue. An individual whose property might be affected by a proposed rezoning can hope to have a fair hearing before the local governing body only if he is afforded the protections of procedural due process. Courts and legislatures have been slow to require these procedural reforms at the local level. Fasano and the Model Code, however, give new hope for relief from this traditional absence of procedural standards.

Before we can expect the judiciary to require that proper procedural standards be followed at the local level, however, the courts must first be encouraged to abandon their customary, arbitrary classification of local land-use decisions as "legislative." Out of necessity, many courts already have made inroads into the previously "unreviewable" local legislative field, and by doing so have been able to establish procedural standards for actions traditionally deemed "legislative." In addition, Fasano and the Model Code mark widely-heralded departures from the traditional treat-

ment of local land-use actions. Both the Code and *Fasano* provide examples to be followed by legislatures and other courts. Only by re-evaluating the function of various local actions, as did the court in *Fasano* and the draftsmen of the Model Code, will we be able to obtain the needed procedural reforms in land-use hearings before local governing bodies.