

ZONING AMENDMENTS—THE PRODUCT OF JUDICIAL OR QUASI-JUDICIAL ACTION

Because the use of rezoning to make *specific* land-use-control decisions is so widespread . . . developers and their attorneys have joined in the game and have ceased to regard rezoning as a legislative matter; instead, they approach it for what it is, a *specific development decision*.¹

Most of the bench² and the bar³ have traditionally regarded "zoning" with considerable distaste and have attempted to chart their legal careers around what they regard as a potential quagmire. Zoning disputes, accordingly, are often handled like "hot potatoes"—shunted to a few specialists or resolved with all possible dispatch and frequently in a cursory manner. This comment may cause unrest for those who argue for this "hands off" approach, since it advocates a course which would produce considerable judicial activity by intruding upon an area which traditionally has been regarded as legislative. Specifically, this comment will analyze zoning amendments from a precedential and practical standpoint to determine whether they are legislative or judicial/quasi-judicial⁴ acts. Brief consideration will be given to the consequences which result from the current practice of labeling rezonings as legislative acts, and to the changes which would occur if most zoning amendments were held to be the product of judicial action.

I. THE TRADITIONAL LABEL—LEGISLATIVE

[T]he . . . amendment of a zoning regulation or ordinance is a legislative act⁵

The above quotation represents the overwhelming majority view throughout the United States.⁶ From it flows the strong presumption of constitutionality which attaches to legislative action.⁷ Although this presumption is rebuttable,⁸ the burden which the opponent of the zoning

¹Craig, *Discretionary Land-Use Controls the Iron Whim of the Public*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 1, 14 (1971) (emphasis added) [hereinafter cited as CRAIG].

²See R. BABCOCK, *THE ZONING GAME* 101 (1966).

³*Id.* at 89.

⁴Judicial and quasi-judicial are used interchangeably throughout this comment. It is recognized that there is a distinction. See *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 578, 583 (1966). For the purposes of this comment, however, it is submitted that this distinction is unimportant.

⁵*Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 3, 233 N.E.2d 500, 501 (1968).

⁶See, e.g., *Frankel v. City and County of Denver*, 147 Colo. 373, 363 P.2d 1063 (1961); *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959); *Robinson v. City of Bloomfield Hills*, 350 Mich. 425, 86 N.W.2d 166 (1957); *Tuber v. Perkins*, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966); *O'Rourke v. City of Tulsa*, 457 P.2d 782 (Okla. 1969).

⁷1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.14 (1968) [hereinafter cited as ANDERSON].

⁸*Id.* at 69.

change must carry is quite formidable. Generally, it is said that the opponent of legislative action must prove, either by clear and convincing evidence⁹ or beyond a reasonable doubt,¹⁰ that the zoning amendment as embodied in an ordinance or regulation bears substantial relation to the public health, safety, morals, or welfare. This requirement is commonly stated in terms similar to the "fairly debatable" test laid down by the Supreme Court in *Euclid v. Ambler Realty Co.*: "If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control."¹¹ Furthermore, classification as "legislative" has a dramatic impact on due process requirements.¹² While they may have the right to notice and the right to be heard,¹³ parties interested in a zoning change have no right to be represented by counsel,¹⁴ to cross-examine adverse witnesses,¹⁵ or to have made a record of the entire proceeding which includes the findings and conclusions of the legislative body,¹⁶ unless these procedural safeguards are required by statute or rule. In most cases, however, some of these procedural safeguards will be required. For example, parties interested in zoning amendment in Columbus, Ohio, are entitled to notice,¹⁷ have a right to be heard,¹⁸ may be represented by an attorney,¹⁹ and have access to a record of the entire proceeding.²⁰ Absent from this list and generally absent in most other local government zoning procedures is the right of cross-examination and the requirement that the decision-making body make findings and conclusions in support of its decision.

Thus, it is seen that the legislative label carries with it limited procedural safeguards and limited judicial review.²¹ At least in theory, this combination should not lead to corruption or abuse of individual rights. Since the legislative process is highly visible, and since legislative action has a broad

⁹ *Id.* § 2.17.

¹⁰ *Id.* § 2.18.

¹¹ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (emphasis added).

¹² "In legislation . . . there is no constitutional right to any hearing whatsoever." R. PARKER, ADMINISTRATIVE LAW 169 (1952) [hereinafter cited as PARKER].

¹³ See *Hart v. Bayless Investment & Trading Co.*, 86 Ariz. 379, 389, 346 P.2d 1101, 1103 (1959); but see *Harris v. Goff*, 151 So. 2d 642, 644 (Dist. Ct. App. Fla. 1963); PARKER, *supra* note 12, at 37, 169.

¹⁴ *Harris v. Goff*, 151 So. 2d 642, 644 (Dist. Ct. App. Fla. 1963); PARKER, *supra* note 12, at 37, 169.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ COLUMBUS ZONING CODE § 3313.04 (1967).

¹⁸ The right to be heard is specified in a rule of council which permits the proponents and opponents to each have three speakers who can speak for up to three minutes each.

¹⁹ The right to be represented by an attorney is not set forth in any rule or ordinance but is an existing practice which is apparently not open to question.

²⁰ COLUMBUS CITY CHARTER § 8 (1914).

²¹ ALI MODEL LAND DEVELOPMENT CODE commentary to Article 8, at 204 (1963).

based impact, it should be self-remedying at the polls.²² Unfortunately these theoretical teachings do not appear to be true where rezonings are involved. Instead, because of the procedural informality and limited judicial review which accompany legislative action, the presence of improprieties looms large,²³ and individual rights are often sacrificed either on the alter of public opinion²⁴ or ex parte over a lunch at the club.²⁵ Sadly, this conduct seldom produces a ripple in the political pond because most rezonings concern only a very small segment of the electorate.

Elimination of the aforementioned abuses can be accomplished through the elimination of procedural informality and the requirement for more thorough judicial review. One way to accomplish this result is through the enactment of legislation prescribing procedures which are adequate to protect the interests affected by rezonings. It is submitted that this approach is unnecessary because most rezonings are judicial rather than legislative, and the procedural safeguards and standards of judicial review applicable to judicial functions—which are designed to protect individual interests—should be adequate to protect the interests affected by rezonings. This assertion is not generally accepted, however, as may be illustrated through examination of several judicial decisions holding that rezonings are legislative procedures.

Chapter 2506 of the Ohio Revised Code, which provides for appeals from administrative orders of specified bodies of political subdivisions, has generated considerable litigation focused on the legislative-administrative²⁶ distinction in rezoning disputes. This litigation sheds light on the typical judicial response to a challenge that a zoning amendment is a judicial act and on the "prevailing rule" applied by the courts.

²² This is apparently the underlying reason for the strong presumption which attaches to legislative action. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

²³ The presence of improprieties has caused one author to remark that, "One of zoning's primary failings is that it has become a 'marketable commodity.'" Balk, *Invitation to Bribery*, HARPER'S, Oct. 6, 1966, at 18 quoted in Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L. Q. 267, 282 (1968). For a fascinating study of municipal zoning improprieties see Freilich and Larson, *Conflicts of Interest: A Model Statutory Proposal for Regulation of Municipal Transactions*, 38 U. M. K. C. L. REV. 373, 390-98 (1970).

²⁴ There can be little doubt that the popularity of a proposed zoning amendment is a factor of considerable significance to the councilmen or commissioners who will either approve or disapprove it. See C. CRAWFORD, *STRATEGY AND TACTICS IN MUNICIPAL ZONING* 117 (1969).

²⁵ This threat follows from the fact that councilmen are regarded as legislators to whom one can privately argue his case. C. CRAWFORD, *STRATEGY AND TACTICS IN MUNICIPAL ZONING* 106 (1969).

²⁶ It is submitted that judicial references to administrative action in rezoning cases have been imprecise. This follows from the fact that administrative action involves either rule making, which in an ordinance by a legislative body would be legislative action, or an adjudication. It appears that reference only to the former is intended by the courts. Otherwise an attempted comparison between legislative and administrative functions in rezoning cases could be wholly illusory. It is suggested, therefore, that where the term administrative is used by courts quoted in this comment, the substitution of the terms adjudicative, judicial, or quasi-judicial would be more precise.

The Supreme Court of Ohio in *Berg v. City of Struthers*²⁷ pointed out that the Ohio Administrative Appeals Act (Chapter 2506, Ohio Revised Code) does not permit appeals from acts of legislative bodies. The terse two sentence per curiam opinion implies that the city council is a legislative body outside the scope of this statute, and characterizes the council's refusal to grant the requested zoning change as "legislative action." Why the action is so characterized, other than by implication from the legislative character of the council, is not explained. After considering the converse of *Berg*, an action amending a zoning ordinance vice inaction in failure to amend, and holding that this too was legislative action,²⁸ the court in *Donnelly v. City of Fairview Park*²⁹ then exposed for public view the test it was applying in drawing the line between administrative and legislative action. Quoting from the prominent case of *Kelley v. John*,³⁰ the court stated:

The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law, or executing or administering a law already in existence.³¹

The refusal of the city council of Fairview Park to approve a plan for re-subdivision of land which complied with the terms of the existing zoning ordinance was, therefore, an administrative act.³² In the recent case of *Meyers v. Schiering*,³³ the same test was applied in holding that an ordinance passed by the city council of Fairfield, Ohio, approving the location of a sanitary land fill in an existing "heavy industrial" district was the product of administrative action³⁴ and, hence, not subject to referendum proceedings available under the Ohio constitution for legislative action of a city council.

While the "prevailing rule"³⁵ of *Kelley v. John* as applied by the Supreme Court of Ohio may be convenient to an overworked judge faced with staking out the boundaries between legislative and judicial action, it is nevertheless apparent that this rule is form oriented. If, for example, instead of passing the resolution granting the permit for the operation of the sanitary land fill the Fairfield city council had created a "sanitary land

²⁷ *Berg v. City of Struthers*, 176 Ohio St. 146, 198 N.E.2d 48 (1964).

²⁸ *Tuber v. Perkins*, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966).

²⁹ *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968).

³⁰ *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956).

³¹ *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 4, 233 N.E.2d 500, 502 (1968).

³² *Id.*

³³ *Meyers v. Schiering*, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971).

³⁴ In *Meyers* the existing zoning ordinance created a heavy industrial district within which a sanitary land fill could be operated if a permit for the land fill was obtained from city council. The Fairfield zoning code required the city council to approve the location of the sanitary land fill before it granted a permit. *Id.* at 13, 271 N.E.2d at 866.

³⁵ See quotation accompanying note 31 *supra*; *City of Bowie v. County Comm'rs for Prince George's County*, 258 Md. 454, 463, 267 A.2d 172, 177 (1970).

use" district in its zoning code and had passed an ordinance rezoning the land for "sanitary land use," the legislative label would have applied. Yet in both cases the same substantive factors would have been considered by the council before making its decision.³⁶ It appears, therefore, that under the *Kelley* test as applied, characterization as either legislative or administrative turns merely on the presence of succeeding levels of ordinance generality and disregards the nature of the ordinance and its relative impact.³⁷ It is submitted that this test by itself is artificial and that a proper test for determining what is legislative and what is judicial must consider primarily the nature of the ordinance enacted and its relative impact.

II. THE HAZY LINE: LEGISLATIVE VERSUS QUASI-JUDICIAL ACTION

It is elementary that governmental bodies, tribunals, agencies, boards (and by whatever other appellations they may be known), and officials, in the performance of their public duties, exercise functions that are divided into three general categories: executive, judicial, and legislative.³⁸

There is little controversy about the capacity of city councils, boards of county commissioners, or boards of township trustees to act other than legislatively. As the above quotation indicates, it is clear that these decision-making bodies perform not only legislative but also executive and judicial functions.³⁹ Unfortunately any clarity vanishes when an attempt is made to stake out the boundary between what is legislative, executive, and judicial.⁴⁰ Confusion abounds, and as a result proceedings are often labeled legislative when in reality they involve a combination of legislative, judicial, or executive action.⁴¹

In spite of the confusion over the distinction between legislative and judicial action, it is nevertheless possible to discern characteristics peculiar to each category. First, judicial action is narrow in scope, focusing on specific individuals⁴² or on specific situations,⁴³ while legislative action is open-

³⁶ This assumes that the Fairfield zoning code specified no standards to be met before the permit would issue. The language of the case, which quotes from § 525.02 of the Fairfield zoning code, indicates the absence of standards: "[U]nless the location of such use shall have been approved by the city council. . . ." *Meyers v. Schiering*, 27 Ohio St. 2d 11, 13, 271 N.E. 2d 864, 866 (1971).

³⁷ See note 59 *infra* for a suggested test which would take these factors into consideration.

³⁸ *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 578, 582 (1966).

³⁹ See *id.*; 1 E. YOKELY, MUNICIPAL CORPORATIONS § 74, at 179 (1956); B. BURRUS, ADMINISTRATIVE LAW AND LOCAL GOVERNMENT 108 (1963), [hereinafter cited as BURRUS].

⁴⁰ *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 578, 583 (1966).

⁴¹ *Id.*; see BURRUS, note 39 *supra*.

⁴² See, e.g., *Charles Green's Son v. Salas*, 31 F. 106, 107 (S.D. Ga. 1887) (the naturalization of an alien as a citizen of United States); *In re McGarry*, 380 Ill. 359, 365, 44 N.E.2d 7, 10 (1942) (the action of a municipal judge in admitting a person to bail); *In re Chernoff*, 344 Pa. 527, 534, 26 A.2d 335, 339 (1942) (the suspension or disbarment of an attorney); cf. *Fuchs, Pro-*

ended, affecting a broad class of individuals or situations.⁴⁴ This characteristic, which is based upon the relative impact of the action, was apparently relied upon by the Supreme Court in *Bi-Metallic Investment Co. v. State Board of Equalization*⁴⁵ to distinguish its prior holding in *Londoner v. Denver*.⁴⁶ Faced with the task of justifying the recognition of the right to a hearing in *Londoner* with the denial of the same right in *Bi-Metallic*, the Court reasoned:

A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county have been laid.⁴⁷

This distinction appears to be sound; a large group is generally much better equipped to protect itself in the absence of procedural safeguards than are a few isolated individuals.

Secondly, legislative action results in the *formulation* of a general rule or policy, while judicial action results in the *application* of a general rule or policy.⁴⁸ Normally, this dichotomy will see the legislative body passing a law and the judicial body applying it. But as pointed out before,⁴⁹ the dichotomy is not always accurate because both legislative and judicial functions can be and often are vested in a single body.⁵⁰ When this occurs, definitional difficulties arise where particular consequences turn on whether the action is legislative or judicial.⁵¹

Thirdly, it is generally stated that judicial action is retrospective,⁵² determining "[t]he rights and duties of parties under existing law and with relation to existing facts . . ."⁵³ By contrast, legislative action is said to be prospective,⁵⁴ determining "[w]hat the law shall be in future cases.

cedure in Administrative Rule Making, 52 HARV. L. REV. 259, 263 (1938) [hereinafter cited as Fuchs].

⁴³ See, e.g., *Sears v. Atlantic City*, 73 N.J.L. 710, 711, 64 A. 1062, 1063 (1906) (a municipal ordinance providing for the paving of a street at the cost of benefited property).

⁴⁴ See, e.g., *Gorman v. City of Peabody*, 312 Mass. 560, 564-65, 45 N.E.2d 939, 943 (1942) (vote of a school committee increasing salaries of all public school teachers); *Lone Star Gas Co. v. State*, 137 Tex. 279, 307, 153 S.W.2d 681, 693 (1941) (rate making by the Railroad Commission); cf. Fuchs, *supra* note 42.

⁴⁵ *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441 (1915).

⁴⁶ *Londoner v. Denver*, 210 U.S. 373 (1908).

⁴⁷ *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441, 446 (1915).

⁴⁸ *Id.*, see *Kuberski v. Haussermann*, 113 N.J.L. 162, 168, 172 A.738, 741 (1934).

⁴⁹ See the quotation accompanying note 38 *supra*.

⁵⁰ See *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 3, 233 N.E.2d 500, 501 (1968).

⁵¹ *Id.*

⁵² See BURRUS, *supra* note 39, at 17 n.62; Fuchs, *supra* note 42, at 260.

⁵³ *Gulnac v. Board of Chosen Freeholders of the County of Bergen*, 74 N.J.L. 543, 546, 64 A. 998, 1000 (1906) (concurring opinion).

⁵⁴ See note 52 *supra*.

. . ."⁵⁵ This simple distinction, however, is of very limited utility since to some extent judicial action is predicated on its future impact, and legislative action is based upon historic events.⁵⁶

Lastly, it has been held that the test for judicial action is whether it is the result of judgment or discretion.⁵⁷ This standard is rejected as unsound because "[i]t is not true that every function wherein judgment and discretion are exercised is a judicial function."⁵⁸ Legislative and executive action require judgment and discretion just as much as judicial action. The distinguishing factor is that legislative discretion is circumscribed only by constitutional provisions whereas judicial and executive discretion are limited by statutes and the common law as well.

Although the above discussion does not purport to provide an easy solution to the problem of distinguishing legislative from judicial action, it does make possible the formulation of a test which should have general validity.⁵⁹ This test would be helpful in resolving most cases and, in particular, the problem of distinguishing legislative from judicial action as it arises in the context of zoning amendments.

III. THE ZONING AMENDMENT: LEGISLATIVE OR JUDICIAL?

Initially, it may be argued the authority . . . as concerns enactment or amendment of zoning laws properly may be denominated a legislative function when invoked for classification of all property for zoning purposes. . . .

It is difficult to understand, however, upon what basis the relief extended by adoption of [an] . . . ordinance varying the original plan likewise can be called a legislative function.⁶⁰

As the above quotation indicates, the action of a local government in initially enacting a comprehensive zoning ordinance will be assumed to be legislative action. Furthermore, it is assumed that major changes⁶¹ to the zoning map are also the product of legislative action. However, as it will be developed below, other changes to the zoning map, the majority of all

⁵⁵ *Newell v. Franklin*, 30 R.I. 258, 263, 74 A. 1009, 1011 (1910).

⁵⁶ *See Fuchs*, *supra* note 42, at 262.

⁵⁷ *See Pyatt v. Mayor & Council of Borough of Dunellen*, 9 N.J. 548, 555, 89 A.2d 1, 4 (1952).

⁵⁸ *Hammer v. Smith*, 11 Ariz. 420, 423, 94 P. 1121 (1908).

⁵⁹ This test is: Does the action formulate a general rule or policy which is applicable to an open class of persons, interests, or situations, or does the action apply a general rule or policy to specific persons, interests, or situations? If the answer is yes to the latter half of the question, then legislative action is present. If the answer is yes to the first half of the question, then there is judicial action.

⁶⁰ *O'Rourke v. City of Tulsa*, 457 P.2d 782, 786 (Okla. 1969) (Berry, V. C. J. and Blackbird J., dissenting).

⁶¹ Major change will be assumed to involve 20 or more acres.

zoning amendments,⁶² should be considered the product of either judicial or quasi-judicial action.

The fundamental inquiry into whether a zoning amendment is the product of legislative action or judicial/quasi-judicial action will incorporate the test formulated earlier.⁶³ Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations.⁶⁴ If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.

While performance standards establishing maximum noise levels or a set back requirement might be statements of land use policy or general rules and hence legislative, it is difficult to visualize a typical zoning amendment of a few acres falling into this category. It would, instead, appear that zoning amendments entail the imposition of burdens or the conferment of privileges with respect to specific tracts of land⁶⁵ and thus approximate the judicial model. Nevertheless, the notion that a zoning amend-

⁶² Of 80 zoning changes taken at random from the 1970 COLUMBUS, OHIO CITY BULLETIN, 64 involved zoning changes of less than 20 acres. Of this number 32 were of one acre or less, 21 were between one to five acres, eight were between five to 10 acres and three were between 10 to 20 acres.

⁶³ See note 59 *supra* and the accompanying discussion.

⁶⁴ [I]t is feasible to distinguish a general regulation from an order of specific application on the basis of the manner in which the parties subject to it are designated. If they are named, or if they are in effect identified by their relations to a piece of property or transaction or institution which is specified, the order is one of specific application. If they are not named, but the order applies to a designated class of persons or situations, the order is a general regulation or rule . . . [T]he increase or reduction of a single taxpayer's assessment is different . . . from the order of state board raising or lowering the assessments upon a given class of property throughout a county.

Fuchs, *supra* note 42, at 264.

⁶⁵ This fact has been recognized by several writers who have variously described the zoning amendment process as "a specific development decision" or "a series of individual permissions." CRAIG, *supra* note 1; Heyman, *Innovative Land Regulation and Comprehensive Planning*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 23, 26 (1970) [hereinafter cited as NEW ZONING]; Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in NEW ZONING 3, [hereinafter cited as Krasnowiecki]. The commentary to the ALI MODEL LAND DEVELOPMENT CODE at 204 (1968) also recognized this and states:

As has been noted . . . the principal problem of an end-state concept of land use control has been the zoning amendment. Since the concept denies the possibility that a community may have no fixed idea as to its end state and that it may prefer to shape its destiny as each applicant for development is received, it does not recognize the fact that *an amendment may possess little, if anything, of the impersonal generality which alone justifies the consequences we have learned to attach to the "legislative" label*. As a result, reviewing courts have been forced to struggle with local "legislative" decisions which in theory are entitled to a strong presumption of validity, which require no advance statement of standards to guide the public officials who make them and which can be made without a record, findings and reasons given, *when in fact they are decisions undertaken in favor of individual applicants—decisions which respond to the needs and pressures of the occasion*. (Emphasis added.)

ment is a statement of land use policy, and hence legislative,⁶⁶ appears to be widely accepted.⁶⁷ Because of this disparity between what is apparent and what is accepted, the proposition that a zoning amendment is a statement of land use policy should be examined carefully.

Where a comprehensive land use plan has been adopted by the legislative body, this plan is regarded as an overall statement of the local government's land use policy⁶⁸ and hence the product of legislative action. Unfortunately, in many cases there is no existing statement of land use policy, or the proposed zoning change does not conform to the existing comprehensive plan. In the former case it can be contended that any action constitutes a statement of land use policy,⁶⁹ and is therefore legislative action. In the latter case, it can be argued that if the proposed change is adopted it is the manifestation of new land use policy, and is accordingly the product of legislative action as well. This analysis, however, erroneously equates the zoning change or its defeat with land use policy. In reality, they are not the same. Instead, a correct statement of their relationship indicates that the zoning change or its defeat is the result of the application of existing *but often unstated* land use policies⁷⁰ to a particular tract of land—an adjudication. The fact that these policies are often unstated serves to obscure their relationship with the zoning amendment and has resulted in the term *policy* being applied to the amendment itself.

A discussion of a hypothetical zoning case will serve to highlight this distinction between land use policy and the application of land use policy. If a local government enacts a zoning code which provides for a zoning district that requires a minimum four acre lot size, the zoning code and the four acre code provision represent land use policy. This policy is simply that some land within the community will or does require a minimum of four acre zoning for various reasons which can only be tested by the "fairly debatable" test. This is true because the four acre ordinance is a general rule or land use policy statement applying to an open ended class of situations and, therefore, is the product of legislative action. The same analysis is not valid when a particular tract of land is rezoned for four acre minimum lot size. This action involves the application of the stated land

⁶⁶ This result is reached by substituting "one making policy" for "one making a law" in the quotation accompanying note 31 *supra*.

⁶⁷ See Krasnowiecki, *supra* note 65, at 5, 6.

⁶⁸ It may be contended, however, that the portion of a comprehensive plan which details the land uses throughout the community is not a statement of the plan's policy, but instead represents application of land use policies stated elsewhere in the plan or of unstated land use policies to specific tracts of land.

⁶⁹ See Krasnowiecki, *supra* note 65, at 6.

⁷⁰ Examples of particular land use policies which are often unstated but which are nevertheless applied to specific zoning amendments are: a policy conditioning approval of the zoning amendment upon the guarantee of prompt development in accordance with an approved plot plan, and a policy excluding mobile homes even though a mobile home district is provided in the zoning code.

use policy represented by the four acre ordinance⁷¹ plus the application of several often unstated land use policies⁷² to a particular tract of land—judicial action. While the standard of review here would approximate the “fairly debatable” test,⁷³ important procedural safeguards would have to be met in the interest of due process because of the judicial nature of the action. These safeguards would include the requirement that the decision be supported by findings which detail not only the unstated land use policies but also the evidence which supports either a finding of these policies’ applicability or non-applicability. This assertion follows from the fact that the four acre ordinance is not self-executing but requires the presence of other land use policies to trigger it. A statement of these land use policies and the facts which support them in each case should, accordingly, be essential to the findings.⁷⁴

IV. THE CONSEQUENCES OF FINDING QUASI-JUDICIAL ACTION

It should be evident that the determination that most zoning amendments are the product of quasi-judicial action has no impact on the substantive validity of zoning itself. The mandate of *Euclid v. Ambler Realty Co.*⁷⁵ that zoning is a valid exercise of the police power is not affected. What is affected, however, is the manner in which the police power is exercised. The recognition that zoning amendments are the product of judicial or quasi-judicial action would mean that additional procedural requirements must be adhered to in the name of due process. No attempt will be made to detail these requirements.⁷⁶ An effort will be made, however, to sketch out the most significant of these requirements and point out several potential problem areas.

It is evident that the phrase “due process” has no precise meaning.⁷⁷ This can be seen from the statement by the Supreme Court that “The fundamental requisite of due process of law is the opportunity to be heard . . .

⁷¹ By itself the four acre ordinance is not self-executing. Its application is dependent upon the presence and use of other land use policies.

⁷² For example, the policy that development of housing should correspond with the availability of water, sewer, and school services; the policy that only housing which can “pay its own way” should be permitted; and the policy that open space should be preserved.

⁷³ This assertion is based upon the assumption that courts would apply a standard of review similar to that applied to decisions of boards of zoning adjustment. That standard is generally whether the decision is “[i]llegal, arbitrary, and an abuse of discretion; if it is arbitrary and capricious, and therefore an abuse of discretion; or if it is a manifest, flagrant abuse of discretion.” 3 ANDERSON, *supra* note 7, § 21.16, at 58-89 (footnotes omitted).

⁷⁴ 3 ANDERSON, *supra* note 7, § 16.43, at 248.

⁷⁵ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁷⁶ For a general discussion of the procedural requirements accompanying judicial functions of local administrative agencies see Merrill, *The Local Administrative Agencies*, 22 VAND L. REV. 775, 791-809 (1969).

⁷⁷ PARKER, *supra* note 12, at 39.

at a meaningful time and in a meaningful manner."⁷⁸ The term "meaningful" is necessarily vague, and, as a result, the surrounding circumstances must be looked at to add substance to the term. This is the nature of due process.

Thus, it is apparent that due process does not require uniformity of procedure. Procedural requirements will vary with the circumstances. A capital crime case, therefore, must have more procedural safeguards than a misdemeanor case or the hearing of a welfare recipient whose benefits may be terminated, if due process is to be satisfied. Since this is the case, what procedural requirements does due process demand for the zoning hearing? An adequate jumping-off point for the answer to this question is the often quoted statement of Justice Brandeis that what due process assures is:

[T]hat the trier of the facts shall be an impartial tribunal; that no findings shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.⁷⁹

Turning first to the requirement that the hearing be conducted by an impartial tribunal, it should be clear that a person who owns an interest in a tract of land or who is directly affected by the rezoning should not vote upon the zoning amendment. To hold otherwise would completely destroy any notions of "impartiality" or "meaningfulness." This desirable result has been reached in proceedings before zoning boards of adjustment where they are performing quasi-judicial functions, but it stands in stark contrast to the current practice where the legislative label is applied to rezonings. There the majority rule precludes an examination of a legislator's motives.⁸⁰

The requirements of due notice and an opportunity to be heard should be regarded as fundamental to a zoning hearing if the rights of interested parties are to be protected. Ex parte decision making with its inherent capacity for abuse has no place in a rezoning hearing where the issue to be decided does not require immediate or emergency action. The questions still remain, however, as to whom should notice be given, how should notice be given, what should notice contain, and how can the interested parties be accommodated at the hearing. While not attempting to answer these questions, it can be pointed out that the boards of zoning adjustment have

⁷⁸ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

⁷⁹ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (concurring opinion).

⁸⁰ 1 ANDERSON, *supra* note 7, § 4.18; see Annot., 71 A.L.R.2d 568 (1960). There have been, as a result of the majority rule which is applicable to rezonings labeled as legislative, situations like *Schauer v. Miami Beach* where a councilman voted to approve a rezoning where property owned by him increased \$600,000 in value by reason of the rezoning, and the matter was held not to be open to judicial inquiry. *Schauer v. Miami Beach*, 112 So. 2d 838 (Fla. 1959).

operated subject to the notice and hearing requirements of due process. Furthermore, even though due process does not demand notice and a right to be heard for a legislative hearing,⁸¹ most rezonings currently require notice and afford interested parties an opportunity to be heard either by statute, ordinance or rule. Thus, while the recognition that amendments are the product of judicial action would present definitional difficulties, as a practical matter probably no change to existing procedures affording notice and an opportunity to be heard would be required in many communities.

Requiring a rezoning hearing to be "consistent with the essentials of a fair trial" does not mean that the hearing must abide by formal rules of evidence.⁸² It would, instead, seem to envision an opportunity to present relevant evidence to the councilmen or commissioners and rebut evidence offered by opposing interests through cross-examination.⁸³ It would, furthermore, probably require that the decision makers refrain from *ex parte* contacts or announce the content of these *ex parte* contacts at the hearing so that interested parties could present evidence in rebuttal. Present procedure probably affords interested parties an opportunity to present evidence and perhaps question adverse parties; however, *ex parte* contacts without any disclosure requirements are currently regarded as an accepted practice.⁸⁴ Requiring elected representatives to cease all *ex parte* contacts relevant to rezonings or announce them at the rezoning hearing might, therefore, present problems because of the radical but not across-the-board break with past practices. Moreover, the prospect of laymen acting pursuant to even informal rules of evidence might also present difficulties which may or may not be curable through the retention of legal counsel to assist them.

Finally there must be a record and findings which are adequate for "[a] court to determine whether the applicable rules of law and procedure were observed."⁸⁵ Without an adequate record and findings, the court would be unable to exercise any control over the decision making body.⁸⁶ These requirements, additionally, would have the positive effect of making the decision makers more aware of their responsibility by requiring greater self-discipline⁸⁷ and would provide a valuable source for community enlightenment. Implementation of these requirements would, how-

⁸¹ PARKER, *supra* note 12, at 37, 169.

⁸² 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.01 (1958); 3 ANDERSON, *supra* note 7, § 16.31.

⁸³ This right is generally recognized in hearings before boards of zoning adjustment. Annot., 27 A.L.R.3d 1304 (1969).

⁸⁴ See C. CRAWFORD, STRATEGY AND TACTICS IN MUNICIPAL ZONING 106 (1969).

⁸⁵ See quotation accompanying note 79 *supra*.

⁸⁶ Cf. Comment, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A. L. REV. 937, 947 (1965).

⁸⁷ *Id.* at 952.

ever, present some problems of varying difficulty. The least difficult would be the necessity for an adequate record. This could be provided by hiring additional clerical help whose cost could be recouped by increasing the application fees. The requirement for findings would present difficulties of a greater magnitude, at least, if the boards of zoning adjustment are an indication of what is to be expected.⁸⁸ There is, however, a significant difference between the variance process and rezonings. In the former, the interests at stake are relatively small. Consequently, procedural abuse can easily escape detection. On the other hand, rezonings often have an impact on land values running into the tens of thousands of dollars. Thus, if procedural safeguards are applicable to rezonings, it is more likely that the parties will use them and prosecute a vigorous appeal if they are denied their use.

The above discussion of procedural requirements and problems is by no means exhaustive. Procedural requirements should be considered in greater depth with consideration being given to the particular situation in which they would apply. Moreover, additional problems would undoubtedly arise as most rezonings are recognized for what they are, the product of judicial or quasi-judicial action.

V. CONCLUSION

The present procedural framework within which proposed zoning amendments are determined is not satisfactory.⁸⁹ This condition stems from the application of the legislative label to all rezonings. Although this labeling has been questioned, it nevertheless represents the overwhelming consensus of judicial opinion in this country. This apparently form oriented labeling is strongly contested here. The basis for this disagreement is found in the distinction between legislative and judicial action which rests primarily on the spectrum of interests affected. Legislative action creates a general rule or policy which will apply to an open-ended class of interests, while judicial action applies a general rule or policy to specific interests.

Rezonings of individual tracts of land, while mislabeled as statements of new land use policy, are actually the application of often unstated land use policies to specific interests—judicial action. Accordingly, due process demands that rezonings be accompanied by certain procedural safeguards, many of which are not presently utilized in rezoning hearings. Requiring

⁸⁸ See Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study of Misrule*, 50 KY. L.J. 273, 324, 334 (1962); McBride, *The Governmental Decision-Making Structure for Land-Use Regulation*, in PROCEEDINGS OF THE SEVENTH INSTITUTE ON PLANNING AND ZONING 153, 170 (1968); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 13 (1969).

⁸⁹ For example, there would be the problem of defining who would qualify as proper parties, and the question would surely arise whether state administrative procedure acts were applicable. The latter problem might produce special difficulties in "home rule" states.

these safeguards would not be without its problems. Nevertheless, when the effort which would be expended to resolve these problems is weighed against the confusion, corruption, and abuse of individual rights which is inherent in the process under the "legislative" label, it should be more than offset by the advantages which would be gained.

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