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FLEXIBILITY WITHOUT ARBITRARINESS IN THE ZONING SYSTEM: OBSERVATIONS ON NORTH CAROLINA SPECIAL EXCEPTION AND ZONING AMENDMENT CASES

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I. INTRODUCTION

Traditional zoning practices have been criticized as the product of a "static, end state concept of land use control."[1] To the extent that the criticism is accurate, it provides some insight into the source of zoning's strength as well as its weakness. On one hand, zoning has proved to be a most effective tool for "preserving the character" of established neighborhoods by excluding "undesirable" or "incompatible" development. On the other hand, as a device for guiding and controlling development, rather than preserving the status quo, the traditional zoning system has proven woefully inadequate, because a system based upon a "static, end state concept" cannot allow for the degree of flexibility necessary to allow local officials to respond appropriately to the complex web of constantly shifting conditions and public needs.

In recent years, the increasing need for flexibility in responding to the pressures of urban and suburban development has forced a wedge between the theory and the practice of zoning. The theory held that most development would occur in the manner prescribed by the regulations applicable to the various individual districts, and deviations from the preset rules (through use of variances, special exceptions, or zoning amendments) would occur only in exceptional cases. But as the system evolved, use of these three devices, and their more sophisticated progeny—planned unit developments, floating zones, contract and conditional zoning, etc.—became so widespread that one commentator in 1954 was moved to wonder: "Have not these safety valves, which were originally intended to be only minor features of the zoning system, become the system itself?"[2] Today, the

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1. Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 4 (N. Marcus & M. Groves ed. 1970).

2. Haar, *Emerging Legal Issues in Zoning*, 1954 PLANNING 145.

answer is no longer in doubt. Through use of these devices, called "wait and see" techniques by the National Commission on Urban Problems,[3] a system originally conceived to permit development by legal right in accordance with specified criteria has now evolved into a system requiring specific development permission in most instances.[4]

This introduction of greater flexibility into the zoning system may have been the inevitable result of the pressures of urbanization, but such flexibility has not been achieved without cost. An age-old dilemma of governmental theory is that when a governmental body is given new powers to accomplish some laudable objective, it simultaneously acquires new opportunities to interfere arbitrarily or maliciously with legitimate private prerogatives. The zoning system simply represents one small illustration of this problem. Tightly constricted by an inflexible zoning map, local officials cannot respond most appropriately to changing patterns of development—but neither are they afforded a wide range of opportunities for dealing arbitrarily with individual property owners. Conversely, a system allowing local officials to deal with each development proposal on a case-by-case basis offers the greatest possibility for rational land use control, but also opens the decision-making process to greater pressure from special interests concerned with private want, not public need.

Recent cases in the North Carolina Supreme Court dealing with the special exception and zoning amendment devices represent attempts by the court to grapple with this dilemma and to locate the elusive point on the continuum between complete rigidity and total freedom of action that will allow maximum flexibility and still prevent arbitrary treatment. At this stage of development in North Carolina law, it may be less important to understand where the court appears to be drawing the line than to comprehend the analytical framework it is using to reach its conclusions. In the opinion of this writer, legal theories expounded by the court in explaining its decisions in several recent cases—including ideas concerning the unlawful delegation of legislative power, spot zoning, and contract zoning—are inadequate to achieve the court's real goal of striking the proper balance between necessary flexibility and undesirable abuse in our land use control system. The remaining pages of this article expand this idea and

3. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 206 (1969).

4. Craig, *Discretionary Land-Use Controls: The Iron Whim of the Public*, 1971 INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 20.

offer suggestions toward the development of an alternative approach for resolving special exception and zoning amendment cases.

II. THE SPECIAL EXCEPTION

The special exception is one of the principal devices used to bring flexibility to a land use control system. In dealing with challenges to the use of this device, the North Carolina Supreme Court has relied heavily on the doctrine that legislative power cannot be delegated to an administrative agency without adequate standards to guide the agency in the exercise of its discretion . More recently, the court has also begun to apply certain principles of administrative law to the procedures of local boards of adjustment. Before examining and analyzing the cases which expound these ideas, it is helpful to explore briefly the nature of the special exception device.

Authority for use of the special exception is contained in two separate sections of the North Carolina zoning enabling legislation.[5] In the "grant of power" section[6] the law provides that "the board of adjustment or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits."[7] And the section pertaining to the board of adjustment states that: "The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance."[8]

As the enabling legislation suggests, the terms "special exception," "special use," and "conditional use," are used interchangeably. All refer to a land use control device whereby the landowner must obtain

5. The North Carolina General Statutes provide both cities and counties with zoning power in nearly identical language. The zoning enabling act for cities is found at N.C. GEN. STAT. §§ 160A-381 to -392 (1972), *as amended*, (Supp. 1974), while that for counties is located at *id.* §§ 153A-340 to -347 (1974). For the sake of convenience, where the enabling legislation is quoted, the language of the city zoning enabling act is used but citations to both the city and county enabling acts are given.

6. The enabling acts authorize local governing boards as well as boards of adjustment to issue special use permits. The terms "board" or "board of adjustment" as used in this article, include the terms "city council" or "board of commissioners" unless the context clearly indicates otherwise.

7. N.C. GEN. STAT. § 160A-381 (1972); *id.* 153A-340 (1974).

8. *Id.* § 160A-388 (1972); *id.* § 153A-345 (1974).

administrative permission before he can put his property to a use specified as conditionally permissible in the ordinance. To bring this concept more clearly into focus, it is useful to compare the special use permit to two other types of land use permits—the variance and the standard zoning permit.

While often confused, the only thing that the variance and the special use permit have in common is that both can be issued by the board of adjustment. But as explained by the North Carolina Court of Appeals, the difference in theory between the two is quite fundamental:

> The variance and exception are designed to meet two entirely different needs. The variance contemplates a *departure* from the terms of the ordinance and is authorized where the literal enforcement of its terms would result in unnecessary hardship . . . . The exception contemplates a *permitted* use when, under the terms of the ordinance, the prescribed conditions therefor are met.[9]

The special use permit has one element in common with the standard zoning permit, and two important differences. Like the zoning permit, the special use permit can be issued only after the applicant demonstrates that his land satisfies the criteria established in the ordinance concerning location and minimum acreage and that his development (if completed in accordance with submitted sketches or plans) will comply with the ordinance's specifications concerning such matters as setback lines and side yard requirements, height limitations, ingress and egress requirements, etc. However, the differences between the special use permit and the zoning permit are more significant. First, while the zoning enforcement officer who issues the zoning permit cannot impose additional requirements on the developer beyond those specified in the ordinance, the board of adjustment is specifically authorized by statute to attach additional conditions to the special use permit.[10] In other words, though not mandated by the ordinance, the board might require a developer to surround his development with a buffer zone or some sort of screening device. Secondly, and more importantly, while the zoning enforcement officer has no discretion about whether to issue the zoning permit (in most cases the objectively determinable facts of the case, viewed in light of the ordinance requirements, dictate the results), the board is usually required to exer-

9. Jackson v. Guilford County Bd. of Adjustment, 2 N.C. App. 408, 415, 163 S.E.2d 265, 270 (1968), *aff'd*, 275 N.C. 155, 166 S.E.2d 78 (1969).

10. *See* text accompanying note 7 *supra*.

cise some discretion in determining whether the conditions precedent to the granting of a special use permit have been satisfied. This latter point is central to this article and deserves a further word of explication.

The North Carolina Supreme Court has stated that a "special exception within the meaning of a zoning ordinance is one that is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist."[11] Certainly such matters as the size of the special use applicant's parcel of land, its distance from sewer connections and fire stations, and the degree of conformity of the developer's plans to the ordinance's specific requirements, are "facts" that the board can objectively determine before granting or refusing a permit. But just as certainly, if the board is required by the ordinance to determine whether the proposed development will have an adverse reaction upon the public health and safety or whether it will be compatible with surrounding development (requirements similar to those contained in many zoning ordinances), the board must exercise its judgment and draw conclusions. In other words, the typical zoning ordinance requires that both specific and general conditions be satisfied before a special use permit is issued. The specific conditions can truly be found as *facts* by the board, but the general conditions can only be "found" by an exercise of administrative discretion or judgment. As intimated earlier, the court has expressed a concern that local boards be guided in the exercise of their discretion by adequate standards. It should be emphasized that the standards the court seeks are to be found in the statement in the ordinance of these general conditions precedent to the issuance of the special use permit.

In a recent trilogy of cases, the court explained how the nondelegation doctrine applies to special use permit cases. The first of these three cases, *Jackson v. Guilford County Board of Adjustment*,[12] contains the most complete exposition. In this case, the court was faced with an ordinance which authorized the board of adjustment to grant special exceptions "in accordance with the principles, conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance." As one of the enumerated special exceptions, the ordinance allowed a landowner in an agricultural district to use his property as a mobile home park, provided that certain specifi-

11. *In re* Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970).
12. 275 N.C. 155, 166 S.E.2d 78 (1969).

cally stated conditions were satisfied, and subject to the general condition that: " 'The Board shall make a finding that it is authorized and empowered to grant a special exception under the section of this ordinance described in the application *and that the granting of the special exception will not adversely affect the public interest.*' "[13] The supreme court focused its attention on this last italicized portion of the ordinance, and the issue discussed was whether this attempt to require the board of adjustment to consider "the public interest" in processing applications for special exceptions constituted an unlawful delegation of legislative power to an administrative body.

The court began its discussion of this issue with the understatement that, "[a]dmittedly, the line dividing administrative powers which may be delegated from legislative powers which may not be delegated is not sharp and clearly defined."[14] It followed with the questionable assertion[15] that "the governing principle, applicable to the delegation of powers by the General Assembly to State Agencies, is also applicable to determine what powers may be conferred by a city or county upon its board of adjustment in a zoning ordinance."[16] It then set forth a series of quotations from a leading case involving a State administrative agency, *Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority*,[17] which summarized the standard distinctions between legislative power and administrative authority: the legislative body establishes public policy and determines what the law shall be, and the administrative body "executes the law" or " 'determine[s] the existence or non-existence of a factual situation or condition on which the operation of a law is made to depend. . . .' "[18] Applying these principles to the case at hand, the court concluded that the provision of the ordinance requiring the board of adjustment to determine the impact of the proposed use on the "public interest" was invalid.

> Such delegation makes the determinative factor the opinion of such officer, or board, as to whether such structure in such area, under

13. *Id.* at 159, 166 S.E.2d at 81, *quoting* GUILFORD COUNTY, N.C., COMPREHENSIVE ZONING ORDINANCE § 6-13B (1964) (emphasis by the court).

14. 275 N.C. at 164, 166 S.E.2d at 84.

15. The assertion is questionable because it is doubtful that the separation of powers doctrine, which is at the root of the non-delegation controversy, applies to local government.

16. 275 N.C. at 164, 166 S.E.2d at 85.

17. 237 N.C. 52, 74 S.E.2d 310 (1953).

18. 275 N.C. at 165, 166 S.E.2d at 85, *quoting* 237 N.C. at 61, 74 S.E.2d at 316.

> prevailing conditions, would be desirable or undesirable, beneficial to the community or harmful to it. This is a delegation of the power to make a different rule of law, case by case. This power cannot be conferred by the legislative body upon an administrative officer or board.[19]

In the second case, *In re Ellis*,[20] the court had before it the same county ordinance considered in *Jackson*, with one modification. Subsequent to the *Jackson* decision, the Guilford County Board of Commissioners had apparently reasoned that, if the objectionable feature of the prior ordinance were its attempt unlawfully to delegate legislative power, that obstacle could be removed by having the Board itself (as the legislative body), rather than the board of adjustment, weigh the public interest in considering applications for special exceptions. The Board so modified the ordinance and, acting pursuant to the new procedures, considered and rejected (without comment or explanation) petitioner's application for a special exception that would have allowed him to construct a mobile home park. The superior court upheld the Board's denial of the permit, but the supreme court flatly rejected the Board of Commissioners' interpretation of *Jackson*, stating:

> Like the board of adjustment, the commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would "adversely affect the public interest." The commissioners must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits.[21]

In other words, the exercise of discretion must be guided by adequate, pre-stated standards regardless of whether the body exercising that discretion is an administrative body or a legislative body acting in an administrative capacity.

The final case in this trilogy, *Keiger v. Winston-Salem Board of Adjustment*,[22] involved an ordinance that allowed property to be used as a mobile home park, provided the property owner first obtained a special use permit. The ordinance was similar to the one considered

19. 275 N.C. at 165, 166 S.E.2d at 85. Presumably, at this point the court was basing its conclusion that legislative power cannot be so delegated on constitutional grounds, although at a later point in its opinion the court also pointed out that the enabling act does not authorize the county commissioners to delegate to the board of adjustment this sort of discretionary power.

20. 277 N.C. 419, 178 S.E.2d 77 (1970).

21. *Id.* at 425, 178 S.E.2d at 81.

22. 278 N.C. 17, 178 S.E.2d 616 (1971).

in *Jackson* insofar as it established particular requirements that the applicants for special use permits had to meet and then provided more generally that: "In acting upon an application for a special use permit, the Board of Adjustment shall consider, and base its decision upon . . . the purpose and intent of this ordinance and the public interest."[23] The purpose and intent of the ordinance were set forth in another section and consisted essentially of a restatement of the purposes of zoning listed in the enabling act.[24]

The Board of Adjustment denied the petitioner's application for a special use permit to construct a mobile home park. The superior court affirmed the denial. Pursuant to *Jackson*, it read the ordinance as if it did not contain the words "and the public interest" in the clause quoted above and found that the board had denied the permit after lawfully considering the purposes and intent of the ordinance as therein expressed. The court of appeals affirmed the trial court's rulings, but the supreme court reversed. In doing so, the high court seemed to return with renewed vigor to its statements in *Jackson* suggesting that the board of adjustment had only fact-finding responsibilities. The court apparently accepted the argument of counsel for petitioners that once the detailed conditions set forth in the ordinance were met the board had no discretion to deny the permit. The court stated: "Precise conditions were set forth by the Board of Alderman as requirements for the granting of a special or conditional use permit by the Board of Adjustment. Petitioners complied with these requirements."[25] And it concluded that:

> [For] the Board of Adjustment to deny such permit on the ground *it* did not consider the use *specified in the Ordinance as a conditional permissible use* to be in accord with the "purpose and intent" of the Ordinance . . . [would constitute] . . . an unlawful exercise of legislative power . . . in violation of Article II, Section 1, of the Constitution of North Carolina.[26]

Numerous objections can be raised to the court's using the delegation doctrine as the basis for its decisions in these cases. Professor Kenneth Culp Davis, in his exhaustive writing on administrative law, has extensively criticized the concept of unlawful delegation and the

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23. *Id.* at 21, 178 S.E.2d at 619.
24. N.C. GEN. STAT. §§ 160A-381, -383 (1972).
25. 278 N.C. at 23, 178 S.E.2d at 620.
26. *Id.* N.C. CONST. art. I, § 1 states simply: "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." The doctrine of non-delegability of legislative powers is judicial gloss.

concomitant requirement of "adequate standards,"[27] and no attempt is made here to recapitulate all of his arguments. But it is important to understand how some of these objections apply to the developing North Carolina case law in this area.

The first problem with the validity of the non-delegation doctrine in North Carolina is that it is applied at best, inconsistently. Cases can be found covering the spectrum from the most literal application of the doctrine to a near total rejection of the concept. At one end of the continuum, one can marshal cases to support the proposition that legislative power can never be delegated.[28] A number of cases take the more moderate position that legislative power, including the power to issue rules and regulations, can be delegated if the administrator is guided by "adequate standards."[29] And at the other end of the continuum, at least one recent case[30] candidly recognized that the North Carolina Utilities Commission was "exercising a function of the legislative branch of government" and assumed the validity of this delegation, even though the only substantive standards given by the legislature to guide the Commission in the exercise of its rate-fixing responsibilities were that such rates must be "reasonable and just."[31]

It is, of course, appropriate to note the distinction between the case where an administrator is authorized to set a general rule applicable to everyone in an affected class (*e.g.*, rate setting) and the situation where an administrator is called upon to establish, apply, or interpret the law with respect to one individual (*e.g.*, special use permit applications). But even in the latter type of case, other examples can be found in the statute books of situations in which administrators are called upon to deal with individual applicants for licenses according to their (the administrators') interpretation of what "will promote the convenience and advantage of the community"[32] or

27. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.08-.09 (1958).

28. Carolina-Va. Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (1953); Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

29. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971); Harrill v. Teachers' & State Employees' Retirement Sys., 271 N.C. 357, 156 S.E.2d 702 (1967).

30. State *ex rel.* Utilities Co. v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

31. N.C. GEN. STAT. § 62-130 (1965).

32. *Id.* § 53-168 provides that the Commissioner of Banks shall not issue a license to conduct consumer finance businesses unless and until he finds, among other things "[t]hat authorizing the applicant to engage in such business will promote the convenience and advantage of the community in which the applicant proposes to engage in business . . . ."

what will "serve the public interest."[33] These statutory provisions have not yet been judicially challenged, but the fact that they exist is another indication that the non-delegation doctrine is neither as sacrosanct nor as well established as language in some cases would indicate.

A second problem with the non-delegation doctrine, well illustrated by *Ellis*, is that the doctrine cannot comfortably be applied to situations in which a legislative body is acting in an administrative capacity. The concept that a legislative body cannot delegate legislative power to itself without standards is a little too esoteric to be useful. For, as put facetiously by Professor Davis: "This means that the city council, when it sits without the facts of the particular case before it, must provide some guidance so that the city council, when it sits with the facts before it, will have some help in making the decision."[34] In such cases, the court can only do as it did in *Ellis*—discard the doctrine and admit that its real objective is, not to prevent the delegation of legislative power, but to insure that "[n]either the legislature by statute nor a municipal corporation by ordinance or resolution nor an administrative board exercising delegated police powers . . . arbitrarily or capriciously restrict[s] an owner's right to use his property for a lawful purpose."[35]

A third major objection to the utility of the non-delegation doctrine is that the only way the adequate-standards requirement can be meaningful and enforceable is for the court to restrict the exercise of discretion by the local administrative body so tightly that the usefulness of the special exception device as a technique for bringing flexibility to the land use control system is almost entirely eliminated. The premise behind this objection is that the court, with linguistic expression as its only resource, simply is not equipped to draw even a shadowy line marking the point at which an administrative body ceases to exercise properly delegated powers and moves into the forbidden realm of "unbridled discretion." As a result, each case tends to be decided on its own merits, providing little future guidance either to lower courts or to those who must draft ordinance provisions relating to the special exception. For example, in *Jackson*, while

33. *Id.* § 58-41 requires that before the Commissioner of Insurance "issues a license to such agent, general agent, or insurance adjuster, the Commissioner shall satisfy himself that such license, if issued, shall serve the public interest" and that the applicant meets other specified criteria.

34. 1 K. DAVIS, *supra* note 27, § 2.09, at 109.

35. 277 N.C. at 424, 178 S.E.2d at 80.

the court struck down the requirement in the ordinance that the board of adjustment consider the public interest in evaluating applications for special exceptions, it specifically *upheld* the board's authority to determine whether the proposed use was "in harmony with the purpose and intent of the ordinance," stating that this latter determination involved a "matter of administration, not a delegation of the legislative power . . . ."[36] The court of appeals in *Keiger* relied directly on this distinction in rejecting a challenge to an ordinance after the trial court had found that the board of adjustment had properly considered "the purpose and intent of the ordinance" in turning down an application for a special exception. The court of appeals might understandably have been surprised when, in reversing on the grounds of unlawful delegation of power, the supreme court said: "We perceive no substantial difference between the denial of a permit on the ground the conditional use is adverse to the public interest and the denial thereof on the ground the conditional use is not in accord with the 'purpose and intent' of the Ordinance."[37]

Four cases involving challenges to the Chapel Hill zoning ordinance provide further illustration of the point that judicial attempts to define "adequate standards" for delegation of legislative power often prove unsatisfactory.[38] All four cases were handed down subsequent to the supreme court's decisions in *Jackson* and *Keiger*. Yet in all four, the court of appeals upheld the ordinance against a challenge that the standards were inadequate, despite the fact that the ordinance required the board considering the application for a special use permit

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36. 275 N.C. at 166, 166 S.E.2d at 86.

37. 278 N.C. at 23, 178 S.E.2d at 620. It is true that in *Jackson*, the ordinance listed the purposes sought to be achieved by each district classification, while in *Keiger* the purposes listed for the whole ordinance were identical to those mentioned in the enabling act. However, there is little difference in specificity between the relevant provisions in the two cases. *Compare, e.g.*, Jackson v. Guilford County Bd. of Adjustment, 2 N.C. App. 408, 414, 163 S.E.2d 265, 269 (1968) ("to discourage any use which, because of its character or size, would create unusual requirements and costs for providing public services, such as law enforcement, fire protection, water supply and sewage disposal before such services are generally needed"), *with* Keiger v. Winston-Salem Bd. of Adjustment, 8 N.C. App. 435, 440, 174 S.E.2d 852, 855 (1970) ("to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements").

38. Humble Oil & Ref. Co. v. Board of Aldermen, 20 N.C. App. 675, 202 S.E.2d 806, *rev'd on other grounds*, 286 N.C. 170, 209 S.E.2d 477 (1974); Humble Oil & Ref. Co. v. Board of Aldermen, 17 N.C. App. 624, 195 S.E.2d 360 (1973), *rev'd on other grounds*, 284 N.C. 458, 202 S.E.2d 129 (1974); Carter v. Town of Chapel Hill, 14 N.C. App. 93, 187 S.E.2d 588, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972); Kenan v. Board of Adjustment, 13 N.C. App. 688, 187 S.E.2d 496, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972).

to consider, among other things, whether the use "will not materially endanger the public health or safety," is a "public necessity," and "will be in harmony with the area in which it is located." It may be true, as the court found, that the standards contained in the Chapel Hill ordinance do not allow the local board the same kind of unbridled discretion given to the board by the public interest standard in *Jackson*, but it is far from clear that the Chapel Hill ordinance keeps as tight a rein on the board as *Keiger* demands. The point is simply that the non-delegation doctrine forces mere guesswork about what language a court will ultimately accept as meeting the test of adequate standards.

Of course, the court can enforce the non-delegation rule in such a fashion that few interpretive questions remain. Accepting the idea that a special use permit is to be given "upon proof that certain facts and conditions detailed in the ordinance exist,"[39] the court need only interpret the words "facts and conditions" to mean "objectively determinable facts and conditions." In that way, the administrative board would then be limited to making findings of *actual fact* (*e.g.*, size of lot, distance from fire station, etc.), rather than judgmental conclusions (*e.g.*, whether a use would increase traffic hazards, lower property values, etc.). Since a relatively clear differentiation exists between an objectively verifiable "pure" fact and an interpretive conclusion, lower courts would have little trouble enforcing this rule.

But while such a restrictive requirement is enforceable, the price of its imposition is the flexibility needed for proper developmental control. For if the position taken by the court in *Keiger* is carried to its logical extreme, the only way to retain the utility of the special exception as a device for bringing flexibility to the land use control system would be to list all factors relevant to the granting of special exceptions in an ordinance the size of the tax code.[40] Not only is this totally impractical, but, as the court of appeals recognized in *Jackson*, "[i]t would be difficult, if not impossible to designate in minute detail in what circumstances exceptions should be granted and in what circumstances denied. That would depend on a great many unforeseeable factors."[41] And so the basis of the third objection to the non-delegation doctrine is the dilemma that, in order to have an

39. *In re* Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970).

40. The comparison is suggested by R. BABCOCK & J. KRASNOWIECKI, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT § 2.3, at 15 (Urban Land Institute, Technical Bull. No. 52, 1965).

41. 2 N.C. App. at 420, 163 S.E.2d at 273.

enforceable doctrine, the usefulness of the special exception must be severely diminished, if not destroyed.

The fourth and most important objection to the non-delegation doctrine is that, because the doctrine is not aimed directly at the court's real goal of limiting the arbitrary exercise of power in dealing with local property owners, it frequently misses the mark. In using this approach, the court invites argument and focuses attention on the issue of whether the local board *might* have acted arbitrarily (because not guided by proper standards), not whether it actually *did* act arbitrarily. The result is that, where the general conditions precedent to the granting of a special exception are listed in the ordinance with sufficient specificity to satisfy the court, a local board can conceal a truly arbitrary decision by simply giving as its "findings" a verbatim restatement of the conditions listed in the ordinance.[42] On the other hand, a thoroughly documented and well reasoned decision by a board may be struck down simply on the basis that the ordinance alone might have permitted capricious action as well.

One should not conclude from these criticisms of the non-delegation doctrine that standards or general conditions in an ordinance are useless or undesirable. On the contrary, when a local legislative body specifies in the ordinance those factors which the administrative body must consider in exercising its discretion, the council is forced to make policy choices that should be made by elected, rather than appointed, officials. But while standards are desirable for this reason, it is neither necessary nor feasibile for a court to apply the adequate standards test to achieve this objective. It is unfeasible for the reasons discussed above with respect to objections two and three, and it is unnecessary because (a) the natural inclination of local legislative bodies is jealously to guard their policy setting prerogatives, particularly where land use matters are concerned and (b) unpopular policies pursued by an administrative body can always be reversed by the elected officials (directly) or by the electorate (indirectly).

However, as indicated above,[43] the principal goal of the court in

42. *See* Carter v. Town of Chapel Hill, 14 N.C. App. 93, 187 S.E.2d 588 (1972), where the court found that the Board of Alderman's "findings of fact" amounted to a verbatim restatement of the four general requirements listed in the ordinance as prerequisites to issuance of the special use permit. This is not to suggest that the decision in this case was in fact arbitrary; but the case does illustrate the point that, when a court allows a local board to use this technique, meaningful examination of the issue of arbitrariness is precluded.

43. *See* text accompanying note 35 *supra.*

using the non-delegation doctrine is not to enforce either the separation of powers concept or the idea that policy decisions should be made by elected officials, but to prevent the arbitrary treatment of property owners. While, for all the reasons discussed above, the non-delegation doctrine and the concomitant adequate standards test should be abandoned, it does not necessarily follow that local property owners should be left completely at the mercy of city councils or boards of adjustment. In fact, property owners and all other affected citizens need more, not less protection. But as Professor Davis put it: "the problem is not whether we want to prevent arbitrariness but how to do it. Putting some words into a statute that a court can call a legislative standard is not a very good protection against arbitrariness. The protections that are effective are hearings with procedural safeguards, legislative supervision, and judicial review."[44] In other words, if the local legislative body adopts procedural regulations that guarantee that the special use permit hearings will be fairly conducted, and if the permit-issuing body follows those procedures and makes a record stating its conclusions and the basic facts it finds in support of those conclusions, then the chances of arbitrary action by the board are significantly diminished. In addition, in such a case a court is in a position to review the record to determine whether the board's findings of fact are supported by substantial evidence and whether the board's conclusions (concerning the existence or non-existence of the general conditions precedent to the issuance of the permit) are reasonable in light of the basic facts found. It is through emphasis on these procedural safeguards, rather than concern over adequate standards, that individual property rights can best be protected without destroying the special use permit device as a technique for bringing flexibility to a land use control system.

While not repudiating the non-delegation doctrine, the North Carolina Supreme Court in a recent case did recognize that enforcement of procedural safeguards may also help to achieve the court's objective of minimizing arbitrary action. In *Humble Oil & Refining Co. v. Board of Aldermen*[45] petitioner's application for a special use permit to construct a gasoline station was denied. The supreme court found for the petitioner, primarily on the basis that the city had not complied with the requirement of the ordinance that the Board of Alder-

44. 1 K. DAVIS, *supra* note 27, § 2.08, at 108.
45. 284 N.C. 458, 202 S.E.2d 129 (1974).

men receive the recommendation of the local planning board before acting on the application. But the most pertinant aspect of the case was the court's response to Humble Oil's contention that the ordinance was void for lack of adequate standards:

> Some of the ordinance requirements for a special use permit are specific; others, not susceptible of exact definition, are necessarily stated in general terms. In our view the ordinance achieves reasonable specificity. Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material, and substantial evidence; and (4) in allowing or denying the application, it state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.[46]

The passage quoted above was only dicta, but in a subsequent case involving the same principal parties, *Humble Oil & Refining Co. v. Board of Alderman*,[47] the court revealed that it was indeed serious about protecting the rights of property owners through the application of certain administrative law principles to special use permit cases. In this case, the Board's denial of the permit was based in part on two pieces of evidence received by the Board after the public hearing—a letter from the State Highway Commission opposing the permit and a a publication entitled "Model Zoning Recommendations" published by the Mid-America Gasoline Dealers Association. In addition, it appeared that the Board also relied on facts known to individual Board members but not revealed at the public hearing. The court held that "[t]he use of any of these factors before the Board under the circumstances disclosed was in direct violation of our decision in *Refining Co. v. Board of Alderman*."[48] The court did not specify precisely why reliance on these matters was erroneous, but merely quoted its own explanation of the statement it made in the first *Refining Co.* case that in a quasi-judicial hearing, the Board can dispense with no essential element of a fair trial:

> (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal;

46. *Id.* at 471, 202 S.E.2d at 138.
47. 286 N.C. 170, 209 S.E.2d 447 (1974).
48. *Id.* at 174, 209 S.E.2d at 449.

> (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements (Citations omitted); and (3) crucial findings of fact which are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" cannot stand.[49]

An extensive discussion of the implications of these cases for the way in which boards of adjustment or local governing boards hold hearings on special use permit applications, take evidence, and make and record decisions, is beyond the scope of this article.[50] The two passages quoted above outline the nature of the requirements that the court intends to impose on local permit-issuing boards. But with all the complexities associated with applying the principles of administrative law to local agencies, these statements can represent no more than a sketchy outline. Many important questions remain. What sorts of evidence will be regarded as "competent"? What is a "crucial" finding of fact? Who can stipulate to facts or waive procedural rights? How specific must the board's findings of fact be? These and similar matters will have to be worked out in subsequent litigation. Nevertheless, although not repudiating the non-delegation doctrine, the court has embarked down a new and important road in its effort to prevent the arbitrary exercise of administrative powers. Hopefully, as the court faces future special exception cases, it will continue to explore procedural questions and will cast aside the non-delegation doctrine as a tool that has outlived its usefulness.

III. THE ZONING AMENDMENT (SPOT ZONING AND CONTRACT ZONING)

The zoning amendment is a second device commonly used to bring flexibility to the zoning system. Superficially, this device is less complex than the special exception. The enabling act clearly provides that "[z]oning regulations and restrictions and zone boundaries may from time to time be amended, supplemented, changed modified, or repealed."[51] In other words, like other ordinances, the zoning ordinance may be changed or altered when the local governing board finds that circumstances warrant such action.

The principal theory developed by the North Carolina Supreme

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49. *Id.*

50. *See* M. Brough, Procedures of the Board of Adjustment in Conducting a Hearing, Taking Evidence, and Making a Record, (pts. 1-3) (Institute of Government, 1975).

51. N.C. GEN. STAT. § 160A-385 (1972); *id.* § 153A-344 (1974).

Court to respond to challenges to zoning amendments, grounded in the idea that zoning amendments are like amendments to other ordinances, is that amendments should be judged by the same criteria as the original ordinance.[52] Unfortunately, this theory has proved inadequate to protect against abuses of the zoning amendment power. Thus, in recent cases the court has resorted to using the labels "spot zoning" and "contract zoning" to invalidate zoning changes. To understand the inadequacies of the original theory and the reasons for use of the contract zoning and spot zoning language, it is necessary to review the legal arguments ordinarily available to one challenging an original zoning ordinance and then examine these arguments to identify those available to the type of plaintiff likely to challenge a zoning amendment.

The zoning ordinance is an example of the exercise of the police power, and like other police power ordinances it is subject to constitutional limitations. Perhaps the most commonly stated constitutional restriction is the due process[53] idea that zoning regulations must have some "reasonable tendency to promote" or "substantial relationship to" the public health, safety, morals, or general welfare.[54] This due process standard really embraces at least four ideas. First, the regulations must be designed to promote some public interest that can be legitimately supported by the police power of the state (*e.g.*, it is still doubtful in North Carolina whether aesthetic considerations alone will support zoning restrictions).[55] Secondly, there must be an *actual* and *substantial* (not merely purported) relationship between the restrictions and a legitimate goal.[56] Thirdly, even though the regulations do advance the public interest, if on balance, the hardship to the individual outweighs the public benefit derived, the restrictions may be invalidated as unreasonable.[57] Fourthly, and most

52. "We think the basic rule to determine the validity of an amending ordinance is the same rule used to determine the validity of the original ordinance. . . . If the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act." Walker v. Elkin, 254 N.C. 85, 89, 118 S.E.2d 1, 4 (1961).

53. U.S. CONST. amend. XIV; N.C. CONST. art. I, § 19.

54. Helms v. City of Charlotte, 255 N.C. 647, 650, 122 S.E.2d 817, 820 (1961); *In re* O'Neal, 243 N.C. 714, 719, 92 S.E.2d 189, 192 (1956).

55. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972); Little Pep Delmonico Restaurant, Inc. v. Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959).

56. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

57. *Cf.* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226 (1958). *See also* Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

significantly for the purposes of this article, since the power of local governments to zone is derived from the police power of the state, zoning regulations must be adopted in pursuit primarily of *public*, rather than private, interests.[58] Regulations otherwise adopted are arbitrary and void.

The second constitutional principle is that the zoning ordinance, as applied to particular property, must not discriminate among landowners in violation of the equal protection clauses of the federal and state constitutions.[59] Of course, the zoning system is founded upon different classifications of property, but these classifications must have some rational justification.[60]

Thirdly, zoning regulations cannot be confiscatory: they cannot amount to a taking of private property for public use without compensation.[61] Mere pecuniary loss is an unfortunate result which the individual property owner must bear as a member of society,[62] but "if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid."[63]

In theory then, assuming that both the original zoning ordinance and the amendment are to be judged according to the same criteria, this whole range of constitutional arguments should be available to a plaintiff challenging either the original or the amended ordinance. The reality, however, is that an individual attacking the original ordinance is likely to have different interests to protect than one challenging the amending ordinance, and therefore different arguments will be advanced in the two cases.

A plaintiff attacking the original ordinance is most likely to be a landowner seeking to avoid the impact of the zoning regulations on *his own* property.[64] Consequently, using the best arguments at his disposal, he contends that the ordinance as applied to his property is un-

58. *See* State v. Ray, 131 N.C. 814, 42 S.E. 960 (1902).
59. U.S. CONST. amend. XIV; N.C. CONST. art. I, §§ 1, 19.
60. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968).
61. U.S. CONST. amends. V, XIV; N.C. CONST. art. I, § 19.
62. Kinney v. Sutton, 230 N.C. 404, 411-12, 53 S.E.2d 306, 311 (1949).
63. Helms v. City of Charlotte, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961).
64. This author is not aware of any cases in which the application of an original zoning ordinance to a particular piece of property has been challenged (successfully or otherwise) by a neighboring landowner or any person except the individual owning or having property rights in the particular piece of property in question.

reasonable, discriminatory, and confiscatory (as those terms are used above). On the other hand, the individual urging the invalidity of a zoning amendment is almost[65] invariably a person whose property lies near the property rezoned.[66] In most instances, such a plaintiff[67] is not in a position to assert that the reclassification of nearby property affects *his* (plaintiff's) property in a way that is unreasonable, discriminatory, or confiscatory. A neighbor cannot usually claim that the rezoning is unreasonable as to him, since, if he can demonstrate any real loss at all, such loss is usually shared by all other similarly situated property owners.[68] Even less can he argue that the rezoning is confiscatory, because it is extremely unlikely that the new regulations affecting his neighbor's property will prevent him from making any reasonable use of his own property. Finally, he cannot build a case of discrimination unless he too applies for a similar zoning change and it is denied. But in virtually all such cases, the plaintiff does not want to change the use of his own land; his goal is merely to prevent the less restrictive use of his neighbor's land. As a result, the plaintiff in a contest over the validity of a rezoning amendment is denied most of the effective arguments available to one challenging the original zoning ordinance.

Consequently, in most cases when a plaintiff seeks to invalidate the rezoning of a neighbor's property, the only potentially successful argument available to him must be based on the grounds of arbitrariness. In other words, such a plaintiff must contend that the amendment was adopted "for the benefit of the owner [of the property rezoned] and to the detriment of the community, or without substantial public purpose."[69] This practical limitation on the types of arguments available to the individual most likely to challenge a zoning

65. An unusual exception is Orange County v. Heath, 278 N.C. 683, 180 S.E.2d 810 (1971).

66. Of course, the reason that zoning amendments are seldom challenged by those owning the reclassified property is that such amendments are usually requested by the owners themselves.

67. A preliminary question that may come to mind is what basis does the adjoining landowner even have to claim standing to maintain such a suit. The answer in North Carolina is stated in Zopfi v. City of Wilimington, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968), where the court said that if the rezoning was invalid, the original zoning is still in force. If any use is made of the property in violation of the original zoning ordinance, a neighboring landowner, by alleging injury from that unlawful use, could seek injunctive relief.

68. Most suits are brought by a large number of neighboring property owners acting as co-plaintiffs.

69. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.04, at 242 (1968).

amendment is the first reason why the standard theory of judicial review of zoning amendments has proven inadequate.[70]

The theory also forces a plaintiff to attack a formidable presumption of validity. According to standard doctrine, an amendment to a zoning ordinance is entitled to the same presumption of validity granted the original ordinance. And, if statements in some cases can be taken at face value, that presumption places a heavy burden on the challenger.

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.[71]

Of course, all plaintiffs who challenge a zoning ordinance or amendment are faced with this presumption; but the difficulty of rebutting the presumption varies with the issues raised by a plaintiff. In the ordinary case, when a landowner attacks the application of the original zoning ordinance to his own property, the presumption of validity means merely that the court presumes that the legislative body legitimately passed the ordinance in the public interest, and therefore the landowner has the burden of proving its invalidity. But, as indicated, such a property owner usually bases his attack on the grounds that the ordinance as applied to his property is unreasonable, confiscatory, or discriminatory, not that it is arbitrary (*i.e.* adopted to further private, not public, interests). In other words, he can admit that the ordinance is in the public interest in the sense that the community would be better off if the ordinance went unchallenged, but still assert that the ordinance requires more of him than the community can legitimately demand without compensation. In this way, one challenging the original ordinance is not required to fly directly in the face of the presumption. On the other hand, since a plaintiff questioning the validity of a zoning amendment is almost invariably a neighboring landowner whose only substantive basis for challenge is on the grounds of arbitrariness, a presumption in favor of the amending ordinance in such a case amounts, in effect, to a presumption on the very question at issue

70. *See* text accompanying note 52 *supra*.
71. *In re* Parker, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

—whether the action was taken for private or public benefit. If the court were actually to indulge such a presumption, and to require to sustain it only a showing of "some plausible basis"[72] for the belief that the amendment was in the public interest, in most cases even the actual victim of an arbitrary decision would be presumed out of court.

In summary then, the stated theory of review in zoning amendment cases has proven inadequate for two reasons—because the typical plaintiff in such an action is likely to be a neighboring landowner who can allege only that the amendment was arbitrary (*i.e.* not in the public interest) and because that argument is almost certainly a losing one if the standard presumption of validity of ordinances obtains.

The result of this theoretical inadequacy is injustice, or at least the potential for injustice. When faced with such situations, courts have two basic alternatives: they can refuse to follow the theory, or they can reexamine the presumptions underlying the theory.

In North Carolina, the supreme court has apparently chosen the first alternative. It appears that, while still paying lip service to the theory, the court in reality provides a *de novo* review of zoning amendment cases. When the court concludes, after reviewing the evidence, that an amendment was really adopted for sound public purposes, as in *Zopfi v. City of Wilmington*,[73] it is an easy matter to state its conclusion in terms of the presumption of validity and the court's unwillingness to "substitute [its] own opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body."[74] However, when the court has doubts about whether the local governing body was more concerned for the welfare of the public or the developer,[75] the presumption evanesces, and "a clear showing of a reasonable basis"[76] for the amendment is required.

Clearly a reexamination of the court's theory of review is preferable to this ad hoc approach. To do this, the court must begin by reexamining the theory's basic assumption that a zoning amendment is a legislative act. A first look reveals that the original zoning ordinance itself is unlike most ordinances in that different zoning regula-

72. Zopfi v. City of Wilmington, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968).
73. 273 N.C. 430, 160 S.E.2d 325 (1968).
74. *Id.* at 437, 160 S.E.2d at 332.
75. *E.g.*, Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).
76. *Id.* at 549, 187 S.E.2d at 45.

tions apply to different property owners. Nevertheless, at least the zoning ordinance as a whole applies to all property owners within a city or to all property owners within a rationally defined area of the county,[77] and large-scale revisions of the zoning map are similarly comprehensive. While this comprehensiveness gives legislative character to the original zoning ordinance and the large-scale amendment, the typical zoning amendment, granted at the request of the individual property owner affected, hardly resembles legislation at all. The output of this amendment process, whereby an official body directs its attention to one particular landowner and one tract of land, and decides on a case-by-case basis what use can be made of that land, can more appropriately be called an administrative,[78] rather than a legislative, decision.

The significance here lies not in a choice of names, but in a recognition that the two different types of processes—legislative and administrative—warrant different types of judicial review. When considering the original zoning ordinance and to a large degree when considering a major revision of the ordinance, the sheer magnitude of the effort and the nature of the process helps insure that the local legislative body has the broad picture before it and lessens the likelihood that individual property owners will be subjected to arbitrary action. For this reason and because of the types of arguments available to a landowner challenging the original ordinance,[79] the court can appropriately accord to the zoning ordinance the same presumption of validity applicable to other ordinances. On the other hand, when considering requests for zoning amendments, the local legislative body brings its decisionmaking authority to bear on particular pieces of property, and the output of this process directly affects only isolated individuals or groups of individuals. Such a process is far more conducive to arbitrary action; therefore, there is a corresponding need for courts more closely to scrutinize zoning amendment decisions than other decisions that actually involve the exercise of legislative discretion. In other words, courts should evaluate zoning amendments according to the same standards applicable to review of other administrative actions.

The idea that zoning amendments are in reality administrative

77. *See* N.C. GEN. STAT. § 153A-342 (1974).

78. The term "quasi-judicial" is occasionally used to refer to this type of decisionmaking process.

79. *See* text accompanying notes 64-69 *supra*.

decisions, and should be reviewed as such, has been given increasing recognition in recent cases[80] and commentaries.[81] But as indicated above, the North Carolina Supreme Court has not elected to follow this course. Rather, it has sought to achieve a more searching review of zoning amendments than would otherwise be allowed under its stated theory of review by resort to the concepts of "spot zoning" and "contract zoning."

While these two concepts do provide a vehicle for a more penetrating type of review, they also suffer from certain concomitant disadvantages. The difficulty with the use of the term "spot zoning" is that, when the court is freed from the constrictions imposed by the theory of review of legislative acts, its determination of whether the amendment process has been abused tends to be colored by its own preconceptions of good land use planning. The problem with the "contract zoning" concept is that, like the non-delegation doctrine, it is not well designed to achieve the court's real objective of avoiding arbitrary action. And the disadvantage inherent in the use of both terms is the danger that cases will be resolved, not by analysis of legal principles applied to particular facts, but according to a jurisprudence of labels.

A. Spot Zoning

"Spot zoning" can be defined in two ways—either in a descriptive or in a conclusory fashion. The best neutral definition in North Carolina jurisprudence is contained, ironically, in a case that in context uses the term pejoratively. In *Blades v. City of Raleigh*[82] spot zoning is described as:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected . . . .[83]

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80. Hays v. City of Winchester, 495 S.W.2d 768 (Ky. 1973); Pistorio v. Zoning Bd., 268 Md. 558, 302 A.2d 614 (1973); Fasano v. Board of Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973); McClellan v. Zoning Bd., 8 Pa. Commw. 537, 304 A.2d 520 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

81. Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

82. 280 N.C. 531, 187 S.E.2d 35 (1972).

83. *Id.* at 549, 187 S.E.2d at 45.

However, the term is also used as a shorthand way of expressing the legal conclusion that, when measured by certain statutory or constitutional principles, an amendment is unlawful. Thus, the North Carolina Supreme Court stated in *Zopfi v. City of Wilmington* that: "Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed *arbitrarily* in a different use zone from that to which the surrounding property is made subject."[84]

But whether defined in a descriptive or conclusory fashion, the term "spot zoning" in reality adds nothing (except, perhaps, brevity) to the analysis of a case. For a moment's reflection reveals that there is nothing *inherently* illegal about the type of amendment described in the *Blades* quotation above, even though such an amendment *may* be unlawful if unreasonable, discriminatory, arbitrary, etc. And, when used in a conclusory sense, the label can be applied only *after* the facts of a case have been measured against the legal principles described earlier. In other words, "spot zoning" is a label, nothing more.

Yet the cases reveal a tendency to free the term "spot zoning" from the statutory and constitutional moorings that give it meaning and set it adrift as a legal principle in its own right. However unfortunate from the standpoint of sound legal analysis, the court has found it convenient to encourage this development. In this way the court can avoid asking directly the very troublesome question of whether the local legislature has acted arbitrarily by asking instead the surrogate question—does this zoning amendment constitute spot zoning? Since everyone knows spot zoning is illegal, a court which concludes that a particular amendment does amount to spot zoning need not be bothered with presumptions of validity or facts indicating "some plausible basis" for the adoption of the amendment.

As indicated above, the danger in this approach (besides the conceptual confusion) is that the court is tempted to substitute its judgment for that of the local zoning authority. Since few courts have the time or inclination to become familiar with contemporary planning principles, the result is likely to be an unhappy one. *Blades v. City of Raleigh* is illustrative. In that case, the North Carolina Supreme Court rejected the conclusions of the local planning commission, the city council, and the trial court concerning the legitimate need for the

84. 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968) (emphasis added).

amendment and held that the zoning change constituted illegal spot zoning. As part of its rationale for this conclusion, the court made two statements revealing its point of view on two controversial issues in the field of land use control. First, it quoted with approval Justice Sutherland's statement from *Village of Euclid v. Ambler Realty Co.*[85] that apartment houses (and by implication, townhouses as well) are mere parasites in an area of single family homes and in fact come very close to being nuisances.[86] Secondly, the court said: "If the need for additional luxurious town houses in Raleigh be a change in conditions since the adoption of the original ordinance in 1958, nothing in the record shows a need for such land use in this particular area."[87] Here, the court implicitly rejected the idea that the council, having identified a need, should be able to respond to that need as individual applications were made. Since these issues—the compatibility of diverse uses and the need for a flexible, rather than a predetermined response—are matters of some debate among planning experts today, it is hardly appropriate for the court to determine the outcome of that debate in North Carolina as a matter of judge-made law. Yet, review under the spot zoning theory always poses the danger of such an outcome.

B. Contract Zoning

The label given by the North Carolina Supreme Court to the second concept it uses to avoid the natural consequences of its stated theory of review is "contract zoning." However, the court has applied the label to a set of circumstances that differ considerably from the type of situation that would be characterized as contract zoning by most other courts. Therefore, to put the North Carolina cases in perspective, it is necessary to examine how the term is used in other jurisdictions and to evaluate the validity of the concepts it represents.

Contract zoning, and its first cousin, conditional zoning, are devices that have arisen as a result of conflict at the local level between an awareness of the need for more intensive development and a concern that whatever development occurs be compatible with the surrounding area. For example, a developer may wish to construct a professional office building in an area currently zoned for residential

85. 272 U.S. 365 (1926).
86. 280 N.C. at 546, 187 S.E.2d at 44.
87. *Id.* at 548, 187 S.E.2d at 45.

use. Perhaps such a building would be a welcome addition to the neighborhood, but a party store or all-night restaurant would not be. Unfortunately, a zoning change that would permit the desirable development might also allow the undesirable. The governing board could simply rezone and rely upon the assurances of the developer that he will in fact develop according to his proposals. However, since it is not beyond experience that a developer will later renege on such assurances, the board might be hesitant to grant the rezoning request without additional security. The development of the contract and conditional zoning techniques represents an attempt to meet this need for security.

Like other terms in the land use control field, "contract zoning" and "conditional zoning" are subject to various interpretations, depending on the source and context of the interpretation. They are sometimes used interchangeably, but seldom consistently. In what might be called "pure" contract zoning, the local zoning authority and the developer enter into a bilateral contract—the governing board promising to rezone the developer's property in a specified way and the developer promising to develop the property according to certain specifications. One step away from this process is the unilateral contract in which the developer promises that, *if* the local legislative body rezones, he will develop the property in a certain way. The board, of course, promises nothing, and the developer becomes obligated only if the legislative body actually rezones the designated property. So-called "conditional zoning" can involve both conditions precedent and conditions subsequent. The city or county may establish as a condition precedent to the rezoning that the developer perform some act or refrain from some action. Not uncommonly, according to reported cases, the condition is that the developer enter into a set of restrictive covenants with neighboring landowners (the consideration on the part of the neighboring landowners may be that they will refrain from opposing the zoning amendment desired by the developer). Conditions subsequent are simply additional restrictions imposed on the developer over and above these contained in the zoning ordinance. The difference between contract zoning and conditional zoning lies in their potential enforcement mechanisms. As the name suggests, restrictions imposed under contract zoning would be enforced as other contracts. The zoning authority enforces conditions precedent by simply not adopting the requested amendment until the conditions are fulfilled, and condi-

tions subsequent are enforced in the same manner as other zoning regulations.

Contract zoning and conditional zoning have experienced a mixed reception when challenged in courts across the country. To understand the arguments raised against these techniques, it is again necessary to distinguish between the types of plaintiffs bringing the suit and the conflicting goals sought by each. The developer whose property is subjected to additional restrictions wants these restrictions invalidated, while leaving the zoning amendment intact. His argument is that the amendment was right but the additional restrictions (covenants or conditions) were wrong. On the other hand, the adjacent property owners are not satisfied with the additional safeguards imposed for their benefit and want the amendment invalidated altogether. They argue that the amendment itself was wrongly adopted and the additional restrictions prove it.

The objection most frequently raised to contract zoning is that the city or county cannot lawfully "contract away the police power." While undoubtedly true as a statement of general principle, it is not always precisely clear what application the principle has to the arguments of those opposed to the alleged contract zoning. If those challenging the contract zoning mean that the local zoning authority cannot bind itself not to change the zoning classification of the developer's property in the future, the argument is spurious since there is seldom any intention to make any such commitment.[88] However, if the essence of this argument is that it is beyond the power of a local legislative body to enter into a contract by which it binds itself to exercise its legislative discretion in a certain way (*i.e.* by making the initial zoning change) in return for consideration offered by a private individual or group, the argument has merit.

The developer seeking to escape the restrictions imposed by such a contract is in the best position to advance such an argument. He can contend that, since the local legislative body could not lawfully bargain with him concerning the proposed zoning changes, he received no consideration for the promise he made, and consequently the

88. Certainly the developer needs no such commitment, since the typical zoning ordinance provides for the continuation of "nonconforming uses" even after the initial ordinance or an amendment prohibits new development of a particular type in a particular district. Consequently, once a developer secures a zoning amendment and commences construction, even a subsequent zoning change cannot prevent completion of his development plans.

additional restrictions are not binding upon him. However, this elementary principle of contract law is not particularly helpful to the landowners adjacent to the proposed development who want to invalidate the whole amendment, not just the additional restrictions. They must make the more nebulous, if no less valid, argument that the output of any legislative process in which an individual is allowed to bargain for the law that is to govern him, should be void as against public policy.

The developer is also in a better position than neighboring landowners to challenge conditional zoning. He can argue that there are no provisions in the enabling act that give the local legislative body the authority to attach conditions precedent to the granting of a rezoning request.[89] His argument against conditions subsequent imposed by the zoning authority is even stronger, for there such extra restrictions run afoul of the explicit requirement in the enabling legislation that regulations be uniform within each district.[90] On the other hand, neighboring landowners face a more difficult task, since the foregoing arguments result in the elimination of only the conditions, not the zoning amendment. The only argument available to those opposed to the amendment itself is the same argument made by neighbors alleging illegal spot zoning—that the amendment was arbitrarily adopted for private interests, not the public good. The argument here is that conditional zoning is conclusive evidence of illegal spot zoning. In other words,

> when a municipality has rezoned a property without conditions, its actions at least appear to constitute a judgment that changed conditions in the neighborhood of the property require a reclassification for the general welfare. When rezoning is made subject to conditions, however, the board's actions begin to look not like an act of sound judgment of what the public good requires, but a bargain that is feasible politically, but still made for the benefit of a private individual.[91]

With this background regarding the meaning of and objections to contract and conditional zoning, one is in a better position to understand the North Carolina Supreme Court's use of the contract zoning idea in *Allred v. City of Raleigh*.[92] In that case, the city, acting at

89. N.C. GEN. STAT. § 160A-385 (1972); *id.* § 153A-344 (1974).

90. *Id.* § 160A-382 (Supp. 1974); *id.* § 153A-342 (1974). *See* Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969).

91. Trager, *Contract Zoning*, 23 MD. L. REV. 121, 136 (1963).

92. 277 N.C. 530, 178 S.E.2d 432 (1971).

the request of the petitioner/developer, rezoned a 9.26 acre parcel from R-4, single family residential, to R-10, a classification that would allow the petitioner to construct two high-rise apartment buildings. In no sense of the word did the city attempt to enter into a *contract* with the developer, binding him to develop the land in accordance with the proposals he submitted to the planning board and to the council. Nor did the city attempt to exact any conditions precedent to granting the rezoning request or impose conditions subsequent to the rezoning. Instead, the city was apparently willing to rely in this instance on the good faith of the developer. Nevertheless, the court invalidated the rezoning, stating that "in enacting a zoning ordinance, a municipality is engaged in legislating and not in contracting."[93] The court reasoned that:

> In our view, and we so hold, the zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in an R-10 district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land.[94]

At first blush, it appears that the court, in adopting this line of reasoning, departed substantially from the concepts other courts have associated with the terms contract or conditional zoning. But upon reflection, the court's analysis is not so very far out of line with the approach of other courts in cases where neighboring landowners challenge a zoning amendment using a contract zoning argument. For in such cases, where plaintiffs seek not just to invalidate the extra restrictions, but to void the amendment itself, it makes little difference (except for evidentiary purposes) whether a formalized contract is signed, whether additional conditions are spelled out in the amending ordinance, or whether the governing board merely relies on the good faith of the developer. The essence of the process is the same in each case—the legislative body, while purporting to make a legislative policy decision that a certain tract of land should be rezoned from one use classification to another, in reality is responding to the initiative of

93. *Id.* at 545, 178 S.E.2d at 440.
94. *Id.*

a particular developer and fully expects that the particular tract of land under consideration will be developed only in a specified manner. The existence of such an "understanding" between the developer and the zoning authority, when detected by the court, triggers judicial skepticism about whether the amendment was adopted in the public interest. In other words, the North Carolina Supreme Court appears to be using the contract zoning term to refer to a conclusion that the local legislative body has engaged in illegal spot zoning.

Unfortunately, when used in this way, the contract zoning concept is subject to the same disability that applies to the delegation of powers issue—it is not aimed directly at the court's real objective, the elimination of arbitrary actions. It is no doubt true that when a governing body approves a particular development by making zoning changes only after considering the plans of a particular developer, the danger that the decision will be an arbitrary one is greater than when a zoning authority approves a class of development (*i.e.* the whole range of uses permissible within a zoning district) without any particular development plans before it. But just as obviously, not all decisions made in the former manner ignore the public interest (in fact, the process offers the greatest opportunity of maximizing the public interest), and a legal theory which cannot discriminate between actual and potential abuses of authority is clearly inadequate.

Furthermore, the contract zoning concept as applied by the North Carolina Supreme Court is objectionable because the essence of the process that it condemns is inherent in a land use control device that is routinely accepted—the special use or special exception. As indicated above,[95] a local council can issue special use permits upon the application of a developer and can attach conditions to the permit so that the regulations applying to that developer are completely unique. An observor unskilled in legal niceties might be hard put to understand why a council approached by a developer who wishes to build apartments cannot consider the developer's plans if a zoning amendment is required, but can, and perhaps must, consider those plans and attach conditions if the council has merely had the foresight to provide in the zoning ordinance for apartment development as a special use.

A third basis for criticism of the court's use of this version of the contract zoning concept is that the thrust of the court's de-

95. *See* text accompanying notes 8-11 *supra*.

cision in *Allred* is easily circumvented by a technique now used or authorized for use by at least three city/county areas in North Carolina —Greensboro/Guilford, Winston - Salem/Forsyth, and Charlotte/Mecklenburg.[96] The principal intention and effect of this technique is to integrate into the zoning amendment process the advantages offered by the special exception device. For each classification in the zoning ordinance that permits specified types of development to occur as of right, there is a corresponding special use classification under which development can occur only after issuance of a special use permit with whatever conditions are attached. A developer desiring to change the classification of his property from residential to business may choose to apply either for the regular business classification or for the business special use classification. If he applies for the former, he may not present any information describing the exact nature of his proposed development, but must take his chances that the council will approve an amendment that will permit the full range of development allowable under the requested classification. On the other hand, if the developer applies for the business special use classification, he must present detailed plans and specifications concerning the proposed development. Since all development in this classification is by special permit only, the council can impose reasonable conditions on the developer. In theory, the request for the special use category is entirely optional, but obviously, the developer stands a much greater chance of persuading the local zoning authority to permit the more intensive development if the members of that body have the assurance that they can impose legally enforceable conditions on the developer to ensure that what takes place on the land conforms to what is described in such glowing terms on paper.

There appears to be nothing wrong or illegal about local governments using the special use district zoning technique. In fact, as pointed out above, there is nothing even unusual about a local board or council acting on the application of a landowner, considering specific plans, and attaching conditions to development permission. This is done regularly with the special exception device. What is unusual, and what bothers the courts, is for this process to be carried out under the rubric of legislation. Thus, the process of analysis comes full cir-

96. Although it is not at all clear that special use district zoning cannot be achieved under the Zoning Enabling Act, two of the three areas mentioned have taken the precaution of obtaining special legislation authorizing them to use this technique; *see* Act of May 8, 1973, ch. 381, [1973] N.C. Sess. Laws 445 (Winston-Salem/Forsyth); Act of April 11, 1974, ch. 1283, [1973] N.C. Sess. Laws 461 (Charlotte/Mecklenburg).

cle to a restatement of the central problem with zoning amendments—they most typically are not legislative, but administrative, acts. Consequently, if courts are to protect the rights of property owners without stifling the flexibility essential to an effective, contemporary land use control system, a theory of judicial review must be developed that is compatible with the nature of the zoning amendment process.

Since the typical zoning amendment closely resembles an administrative action, it follows that the process of judicial review should closely resemble that review applicable to other administrative actions —like the issuance or denial of a special use permit. As indicated above, precedents from other jurisdictions support this type of departure from the traditional standard of review of zoning amendments.[97] Instead of reviewing the amending ordinance to determine whether it was totally arbitrary and without any plausible basis in fact, the court could then apply standards most likely to protect the rights of all property owners—whether due notice of the rezoning hearing was given,[98] whether procedural regulations adopted by the governing body were followed,[99] whether the proceedings at the rezoning hearing were fair and regular,[100] whether the rezoning authority made findings of basic fact supported by substantial evidence,[101] whether the reasons for the governing board's decision, stated for the record, followed reasonably from the facts it found,[102] and whether

97. *See* cases cited note 80 *supra.*

98. Notice is required by statute. N.C. GEN. STAT. § 160A-364 (Supp. 1974); *id.* § 153A-323 (1974).

99. The zoning authority is required by law to adopt procedures that must be followed in the zoning amendment process. *Id.* § 160A-384 (1972); *id.* § 153A-343 (1974).

100. For an explanation of what the court considers fair and regular in the context of a special use permit case see text accompanying notes 45-49 *supra.*

101. A requirement that governing boards make findings of basic fact in zoning amendment cases is a significant departure from current practice, but it is in keeping with the realization that the rezoning process is administrative, not legislative, in nature.

102. It is important that the court require governing bodies in zoning amendment cases to state their reasons for granting or denying the rezoning. In special exception cases, reasons for issuing or denying the permit are stated in the ordinance in the form of the general conditions discussed above. Courts can then examine the record to see if the facts found by the board lead reasonably to the board's conclusion that the conditions either have or have not been satisfied. But the permissible reasons for rezoning are seldom stated in the zoning ordinance. Unless a board is required to commit itself as to the reasons for its decision, a reviewing court cannot determine whether the facts found support the board's conclusions or whether the reasons behind the board's decisions were in accordance with constitutional limitations on the exercise of the police power. A second reason for requiring the board to state its reasons is that the very act of articulating the bases for its decision minimizes the likelihood that the zoning authority will act arbitrarily.

the reasons given for the rezoning were in accordance with substantive standards established in the zoning ordinance and with constitutional limitations on the exercise of the police power.

In addition to emphasizing procedural safeguards, the court can also minimize the possibility of arbitrary decisionmaking without second-guessing the zoning authority by giving greater weight to a community's comprehensive plan as it reviews zoning amendment cases. Currently, North Carolina is aligned with a majority of other jurisdictions in holding that an amendment to a zoning ordinance need not be in accordance with any document or plan external to the zoning ordinance itself.[103] A number of courts, however, have now begun to reexamine this position and to place greater emphasis on the comprehensive plan when zoning amendments are challenged.[104] This is certainly a desirable development. After all, the plan contains a statement of how the community intends to grow and develop, backed up in most cases by a good deal of supporting data and analyses. More importantly, the plan represents a set of principles or standards that pre-dates any rezoning request. Consequently, an amendment that is in accordance with a comprehensive plan is surrounded by an aura of rationality, while a zoning change that is inconsistent with the plan smacks of favoritism. To give proper weight to the plan without foreclosing the governing board's opportunities to respond to particular circumstances or changed conditions, the court ought to establish a rebuttable presumption that zoning amendments that are consistent with a comprehensive plan are valid, while those that are inconsistent with it are arbitrary (*i.e.* not in the public interest) and void.[105]

If the North Carolina Supreme Court recognizes that zoning amendments are administrative, not legislative acts, and raises the comprehensive plan to a new level of importance, it can protect property owners without acting as a super-zoning board. The court's willingness to move in a new direction in reviewing special exception

103. Allred v. City of Raleigh, 7 N.C. App. 602, 173 S.E.2d 533 (1970), *rev'd on other grounds*, 277 N.C. 530, 178 S.E.2d 432 (1971).

104. Padover v. Farmington, 274 Mich. 622, 132 N.W.2d 687 (1965); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960); Petlin Associates, Inc. v. Township of Dover, 64 N.J. 327, 316 A.2d 1 (1974).

105. A governing board could avoid the presumption by amending the plan at the same time it adopted the rezoning ordinance. This process would force the board to consider the broader impact of its incremental zoning decisions. Of course, since the presumption would be rebuttable, it could be overcome by showing a strong justification for the change, even when the comprehensive plan was not altered.

cases raises hope that it may also develop a new approach to zoning amendment cases.

IV. CONCLUSION

While it is not yet accurate to call North Carolina an urban state, there is no doubt that it is a rapidly urbanizing state. And as the number of people who choose to live in North Carolina's metropolitan areas continues to grow, the need for a land use control system that can respond flexibly to the problems created by urbanization will increase correspondingly. Unfortunately, the same flexibility that is needed if local governments are to make wise land-use decisions can also be used to make arbitrary land-use decisions. The challenge posed by this dilemma will have to be recognized and faced if the special exception and the zoning amendment, building blocks of a flexible land use control system, are to be utilized fairly and effectively.