



1980

## Zoning Law in Arkansas: A Comparative Analysis

Robert R. Wright

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Robert R. Wright, *Zoning Law in Arkansas: A Comparative Analysis*, 3 U. ARK. LITTLE ROCK L. REV. 421 (1980).

Available at: <https://lawrepository.ualr.edu/lawreview/vol3/iss2/4>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

# ZONING LAW IN ARKANSAS: A COMPARATIVE ANALYSIS

*By Robert R. Wright\**

Out of the Old Fields must spring and grow new Corn.

— Sir Edward Coke, preface, 1 Rep. (1600)

## I. INTRODUCTION

The law of zoning in Arkansas is an emerging, still developing field. By comparison to more populous states with larger and more numerous urban areas, the Arkansas courts have decided relatively few zoning cases. The judicial process in Arkansas zoning law has been characterized by some inconsistency and, until recent years, by an apparent lack of substantial understanding of this area of the law by lawyers and judges alike. It is sometimes difficult to find a clear pattern in the Arkansas cases, although some of the more recent cases illustrate an emerging direction and an increasing understanding of the problem.<sup>1</sup> If this trend continues, it would represent a welcome departure from the repeated utterance of ancient nostrums, such as that "zoning is in derogation of the common law" and thus is to be strictly construed.<sup>2</sup> To the con-

---

\* B.A., University of Arkansas; M.A., Duke University; J.D., University of Arkansas; S.J.D., University of Wisconsin. Donaghey Distinguished Professor of Law, University of Arkansas at Little Rock. The author wishes to acknowledge research performed for him, relative to Arkansas law, by Gregory T. Karber, a former student, who is now practicing law in Fort Smith.

1. Examples of this trend include *City of Conway v. Housing Auth.*, 266 Ark. 404, 584 S.W.2d 10 (1979); *Taylor v. City of Little Rock*, 266 Ark. 384, 583 S.W.2d 72 (1979); *City of Fayetteville v. S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977); *Baldrige v. City of North Little Rock*, 258 Ark. 246, 523 S.W.2d 912 (1975); *Lindsey v. City of Fayetteville*, 256 Ark. 352, 507 S.W.2d 101 (1974); *Fields v. City of Little Rock*, 251 Ark. 811, 475 S.W.2d 509 (1972); and *City of Little Rock v. Parker*, 241 Ark. 381, 407 S.W.2d 921 (1966).

2. Whenever the Arkansas Supreme Court is in the process of invalidating the use of the police power through zoning, and sometimes when it is not, it will almost invariably make this recitation. See, e.g., *Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975); *W.C. McMinn Co. v. City of Little Rock*, 257 Ark. 442, 516 S.W.2d 584 (1974); *City of Little Rock v. Andres*, 237 Ark. 658, 375 S.W.2d 370 (1964); *City of West Helena v. Bockman*, 221 Ark. 677, 256 S.W.2d 40 (1953); *City of Little Rock v. Williams*, 206 Ark. 861, 177 S.W.2d 924 (1944).

trary, zoning is predicated on the police power, which was recognized by Blackstone,<sup>3</sup> and the Arkansas General Assembly has provided that its enabling statute is to be liberally construed.<sup>4</sup> On the other hand, it may correctly be said to be in derogation of the common law in the sense that it did not come to us from the common law of England, but rather by way of the civil law of European countries.<sup>5</sup> This was also true of American condominium statutes.<sup>6</sup>

The first comprehensive zoning ordinance in the United States was adopted by New York City in 1916.<sup>7</sup> The landmark decision of the United States Supreme Court in *Euclid v. Ambler Realty Co.*<sup>8</sup> upheld comprehensive zoning approximately a decade later. Prior to *Euclid* numerous cities and towns had adopted ordinances which regulated land use and, in fact, this process can be traced back to colonial times<sup>9</sup> and before that to acts of Parliament<sup>10</sup> and

---

3. Blackstone wrote that the law had such a high regard for private property "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 W. BLACKSTONE, COMMENTARIES 139 (London 1783). But he was speaking of the right to use, enjoy and dispose of property "without any control or diminution, *save only by the laws of the land.*" *Id.* at 138 (emphasis added). The "laws of the land" include the police power.

4. ARK. STAT. ANN. § 19-2831 (1980).

5. J. METZENBAUM, LAW OF ZONING 12 (2d ed. 1955) attributed the use of zoning to a decree by Napoleon Bonaparte in 1810, also pointing out that a Prussian Code of several decades later was a more comprehensive and sophisticated development of the device. Another writer refers to the laws of the German empire in 1884. 1 E. YOKLEY, ZONING AND LAW AND PRACTICE 4 (4th ed. 1978). However, he also refers to Napoleon.

To the contrary of the foregoing, one American writer stated that zoning regulations had been in effect in the United States since colonial times. Solberg, "Rural Zoning in the United States," Information Bulletin 59, U.S. Dept. of Agriculture (1959).

6. ARK. STAT. ANN. §§ 50-1001 to -1025 (1971 & Cum. Supp. 1979), which went into effect on September 14, 1961, was the first condominium statute to be adopted on the American mainland. It was largely a translation into common law terms of the Puerto Rican statute which was of civil law origin. *See generally* R. WRIGHT, THE LAW OF AIRSPACE 87-98 (1968).

7. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.07 (2d ed. 1976). The ordinance was held to be valid in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920).

8. 272 U.S. 365 (1926).

9. *See, e.g.*, Acts and Resolves of the Province of Massachusetts Bay 1692-1693, ch. 23, which sets forth an act designed to prevent nuisances arising from slaughterhouses, tallow chandlers, curriers and other types of odiferous activities. *See also* Acts and Resolves of the Province of Massachusetts Bay 1739-1740, for an act attempting to keep horses, cattle, sheep and swine from running at large and people from setting fires on an island in Ipswich Bay called Plumb Island.

10. The Statute of Winchester, 1285, 13 Edw. 1, stat. 2 sought enlargement of highways leading from one market town to another through the clearance of trees, bushes and underbrush along each side so that no man could "lurk to do hurt" to travelers. An act in the time of Queen Elizabeth I controlled the cutting of wood for non-domestic purposes

even back to the Romans.<sup>11</sup> At least two pre-*Euclid* Arkansas ordinances regulating land use were approved by the United States Supreme Court.<sup>12</sup> These early controls on land use were sustained under the police power with the courts often drawing an analogy to the law of nuisance.<sup>13</sup>

The nuisance analogy is an easy one to utilize. The basis of the law of nuisance is the maxim, *sic utere tuo ut alienum non laedas*, meaning that no one may use his land in such a way as to interfere with the rights of his neighbor.<sup>14</sup> Thus, if a city ordinance banned livery stables or the tanning of hides from normal commercial environs, even though the ordinance was enacted under the police power, it was easy to sustain by analogy to nuisance doctrine.<sup>15</sup> In essence the city was saying that such operations constituted a public nuisance to other non-odiferous businesses in the area. Public health was promoted in that the odors produced and the flies, insects, bugs, or rodents attracted by such operations were eliminated.

This analogy carried over into the early zoning cases, including *Euclid*. Its application there, however, was in fact more questionable and certainly more subtle. The town of Euclid's ordinance was a comprehensive one which classified all of the property in the city into several overlapping use, height, and area districts. The nui-

---

within certain areas around London. 1581, 23 Eliz., c. 5. After the Great Fire, an act providing for the rebuilding of London established certain building controls designed to prevent a reoccurrence. 1666, 19 Car. 2, c. 3.

11. The Twelve Tables, drafted by a Commission in 451-450 B.C., represented the earliest code of Roman law. One provision provides for setback lines from walls, wells, trees, and neighboring property. See TREASURY OF LAW 71 (R. Nice ed. 1964).

12. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (involving an ordinance regulating the location of livery stables) and *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (involving regulation of gasoline storage facilities). See generally D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 69 (1971).

13. In *Reinman*, for example, it was argued that a livery stable is not a nuisance *per se*. The Court stated: "Granting that it is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination. . . ." 237 U.S. at 176. See also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (pertaining to brick yards or brick kilns).

14. The maxim is well-expressed in *Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 39, 258 N.Y.S. 229, 231 (1932). See also *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 P. 928 (1911). English legal scholars as early as Britton, who wrote around 1300 A.D., expressed the basic rule. 1 BRITTON 140b, 56 (F. Nichols ed. 1901).

15. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *City of Fort Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 239 S.W. 724 (1922).

sance doctrine was employed in a rather peculiar way. Justice Sutherland, writing for the Court, felt that comprehensive zoning was justified because it resulted in preserving property values and particularly served to protect single-family homes. In language which appears curiously archaic at the present time, he referred to the nuisance of apartment houses encroaching into single-family neighborhoods.<sup>16</sup> These were values which the city had the right to protect under its police power.

The *Euclid* case did not give carte blanche authority to zoning, as was illustrated shortly thereafter in *Nectow v. City of Cambridge*.<sup>17</sup> But it did approve a comprehensive zoning ordinance and the basic validity of comprehensive zoning. As such, it settled the question with regard to states which had adopted seemingly differing views.<sup>18</sup>

"Euclidian" or "Euclidean" zoning, as it has come to be called, was not a perfect tool by any means. The nature of it in terms of use districts may be likened to a pyramid. At the apex is the single-family residential district—the highest and most protected use. The pyramid broadens as you proceed toward the base because higher uses are permissible under traditional Euclidian zoning in lower use districts. The zoning is thus cumulative in nature and can produce problems in terms of nuisance litigation.<sup>19</sup> Non-cumulative zoning, utilizing the conditional use device, is more typical of modern ordinances including the recently enacted Little Rock Zoning Ordinance.<sup>20</sup>

Another problem with pure Euclidian-type zoning is its rigidity. Eventually, such devices as cluster zoning and the planned unit development, which are subsequently discussed, were employed to ameliorate the problem. These were preceded by the so-called "floating zone," which does not appear to have gained widespread

---

16. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

17. 277 U.S. 183 (1928). This case declared a zoning ordinance to be unreasonable and thus unconstitutional as it applied to a particular tract of land. It provided the basic rationale for most future attacks on the application of zoning ordinances.

18. *Compare State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923) with *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925).

19. *Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 258 N.Y.S. 229 (1932), involved a situation in which a plaintiff "moved to the nuisance" by constructing a residence in an industrial area. She was denied relief. Although this was not a zoning case, cumulative zoning would have permitted such higher uses to be constructed in incompatible surroundings and thereby spawn nuisance litigation.

20. Little Rock, Ark., Ordinance 13,777 (Dec. 18, 1979).

acceptance possibly due in part to the legal question of whether it amounts to a somewhat more sophisticated form of spot zoning.

In the evolution of zoning law in the United States, the basic problem which usually was litigated was whether the zoning was arbitrary, capricious, and unreasonable or was within the police power of the municipality. If the police power exceeded its reasonable limits in a particular ordinance or if the result of its application were such as to amount to a deprivation of the reasonable use of a particular land parcel, then such actions were invalid because they were confiscatory in nature and amounted to a taking of property without just compensation. In more recent years other constitutional issues have arisen which translate civil rights issues into land use considerations. These more recent issues revolve around the essentially exclusionary nature of zoning.

This discussion, while pertaining largely to Arkansas zoning law, will fill in some of the gaps through reference to decisions in other jurisdictions and will compare and contrast the approach taken in the various Arkansas cases to decisions from other jurisdictions.

## II. THE ENABLING STATUTE

No municipality may exercise its zoning powers without enabling authority of some kind.<sup>21</sup> While this could result from a constitutional provision or broad home rule authority, it customarily results from state enabling legislation permitting local governments to exercise such authority.<sup>22</sup> Such is the situation in Arkansas.<sup>23</sup>

More than a century ago, Arkansas granted police power authority to municipal corporations to regulate the construction and repair of buildings primarily for purposes of fire prevention.<sup>24</sup> The authority of the cities with regard to buildings was expanded in 1907,<sup>25</sup> but it was not until 1924 that zoning regulations of more

---

21. See generally J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE* 530 (2d ed. 1976). More specifically, see *State ex rel. State v. Schwartz*, 336 Mo. 932, 82 S.W.2d 63 (1935).

22. D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 80 (1971); R. WRIGHT & S. WEBBER, *LAND USE IN A NUTSHELL* 113 (1978).

23. *ARK. STAT ANN.* §§ 19-2801 to -2833 (1980).

24. *Id.* § 19-2801.

25. *Id.* §§ 19-2802 to -2803.

typical and modern vintage were permitted by statute.<sup>26</sup> These early provisions are viewed as superseded in cities establishing planning commissions under the current enabling act.<sup>27</sup> Since it is clear under the current statutes and under case authority that planning and the development of a comprehensive plan must precede the enactment of any valid zoning ordinance in Arkansas,<sup>28</sup> these older statutes are of limited importance today. However, the first section of the 1924 enabling act is of particular interest because it "recognized and hereby declared that the beauty of surroundings constitutes a valuable property right which should be protected by law, and that this is particularly true of residential sections."<sup>29</sup> The prevailing rule in the United States today is that zoning for the purpose of achieving aesthetic benefits must be accompanied by some other valid police power consideration such as the advancement and preservation of health or safety.<sup>30</sup> This old and unrepealed Arkansas statute suggests that Arkansas in 1924 adopted a modern approach, followed at the present time by only a handful of states,<sup>31</sup> which would permit zoning to be exercised to promote aesthetic purposes only. The Arkansas cases, however, suggest otherwise.<sup>32</sup>

---

26. *Id.* §§ 19-2804 to -2807.

27. See the note to ARK. STAT. ANN. § 19-2804 (1980).

28. *City of Searcy v. Roberson*, 224 Ark. 344, 273 S.W.2d 26 (1954). Related to this holding are *Taylor v. City of Little Rock*, 266 Ark. 384, 583 S.W.2d 72 (1979) and *City of Corning v. Watson*, 252 Ark. 1277, 482 S.W.2d 797 (1972).

29. ARK. STAT. ANN. § 19-2804 (1980).

30. For a good discussion, see *Mayor and City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A.2d 828 (1973); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); and Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. FLA. L. REV. 430 (1965).

31. *Berman v. Parker*, 348 U.S. 26 (1954), in dictum by Justice William O. Douglas, made a strong case for the validity of using the police power for aesthetic purposes only. The case is viewed as controlling in the District of Columbia. The *Berman* case led Wisconsin to go to the brink of zoning for aesthetics only in *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955), but it stopped short of doing so. New York embraced aesthetic zoning in *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963), and reinforced its rule in *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967). Oregon upheld zoning solely for aesthetic purposes in *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965). Hawaii, relying on a constitutional provision, did the same in *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967). Aesthetic considerations seem to underlie other decisions to the point that valid distinctions are rendered quite difficult, for example, *City of St. Paul v. Chicago, St. P., Minn. & O. Ry. Co.*, 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969). The ambivalence is particularly apparent in *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

32. Although the Florida note writer, *supra* note 30, cites Arkansas as one of the states

The enabling legislation which in general regulates exercise of zoning powers today is Act 186 of 1957.<sup>33</sup> This statute begins with a desirable requirement in that it is geared first and foremost to planning, thus recognizing that zoning is in fact only a tool to be exercised as a part of the overall planning process—a recognition that, unfortunately, is too often sadly missing during the active stages of the zoning or rezoning process. The Act states that cities and incorporated towns are empowered to adopt and enforce plans “for the coordinated, adjusted and harmonious development of the municipality and its environs.”<sup>34</sup> The plan or plans would provide for the development process and would be intended to serve traditional police power considerations. To carry out the plan, a planning commission would be established. The Commission would prepare plans, make recommendations on development, prepare regulations, prepare ordinances for the city legislative body to pass to implement the plan, and generally advise the city government. Comprehensive studies, planning area maps, and various types of plans are authorized. All public development would have to be approved by the planning commission. Private developments would have to take place pursuant to and not in violation of the various plans and particularly in accord with the master street plan, although limitations are provided in order to eliminate the possibility that this might constitute a taking.<sup>35</sup> Other provisions call for the carrying on of studies and the preparation of a land use plan, community facilities plan, a master street plan, and other plans in general.<sup>36</sup> These plans are to be implemented primarily through the zoning ordinance regulating such things as the location, height, bulk, density, and size of buildings, open space, lot coverage, population density, land uses, off-street parking, and the like.<sup>37</sup> A board of zoning adjustment is given the power to grant variances and hear administrative appeals, although its variance power is limited

---

which to some extent views aesthetics as a sufficient consideration to constitute a basis for zoning (but which has chosen to buttress the argument through traditional police power considerations), it may be fairly said that the majority of the Arkansas Supreme Court demolished the basis for this contention in *City of Fayetteville v. S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977). Arkansas has never judicially approved zoning predicated solely upon aesthetics.

33. ARK. STAT. ANN. §§ 19-2825 to -2831 (1980).

34. *Id.*

35. *Id.* § 19-2827.

36. *Id.* § 19-2828.

37. *Id.* § 19-2829.



to area variances and is not extended to use variances.<sup>38</sup> The planning commission is also given extensive power over subdivision development.<sup>39</sup> Procedures are provided for the adoption of plans, ordinances, and regulations, which involve notice and a public hearing.<sup>40</sup>

Unfortunately, the original authority permitting cities to exercise extraterritorial zoning power<sup>41</sup> was repealed by Act 379 of 1969<sup>42</sup> except with regard to land lying along a navigable waterway within five miles of the corporate limits and within two miles laterally from the "thread" of the stream. This has led to the inability of Arkansas cities to cope effectively with the development of non-conforming uses in adjoining land which will shortly or ultimately be annexed. The result is that an annexation brings with it land use problems that should not exist and that impinge upon sound planning and zoning principles. Act 379 of 1969 was probably the most damaging land use regulation ever passed by the General Assembly.<sup>43</sup>

### III. THE LEGAL PARAMETERS OF ZONING

Authorities have for many years wrestled with the question of when the police power is exceeded to the point that it may be viewed either as an improper exercise of the power or as being so limiting as to constitute a taking of private property without just compensation.<sup>44</sup> Zoning classifications or the failure to rezone are usually invalidated on the basis that the action taken or the failure

---

38. *Id.* § 19-2829(b)(2), which states: "The board of zoning adjustment shall not permit, as a variance, any use in a zone that is not permitted under the ordinance."

39. *Id.* § 19-2829(c).

40. *Id.* § 19-2830.

41. *Id.* § 19-2827(l).

42. *Id.* § 19-2804.1. This Act prohibits cities and towns from prescribing or fixing "any zoning control or zoning authority over the use of lands lying outside the corporate limits of such city or town." This is somewhat confusing in that Section (l) of ARK. STAT. ANN. § 19-2827 remains as a part of the statutes. What it seems to boil down to, as indicated by ARK. STAT. ANN. § 19-2804.3, is that a municipality may "plan" with regard to extraterritorial land but may not implement its planning through zoning. Its planning is thereby rendered of little value, with the exception of planning and zoning in "territory lying along a navigable stream for a distance of five (5) miles of the corporate limits" and "two (2) miles laterally from the thread of the stream." *Id.* § 19-2804.2.

43. ARK. STAT. ANN. § 19-2804.1 (1980).

44. See, e.g., Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971); and Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

to act constitutes arbitrary, capricious, and unreasonable conduct on the part of the municipality.<sup>45</sup> But there is much confusion with regard to these generalizations, and the confusion manifests itself in inconsistency affected by personal predilections or tinged with bias.

One prime illustration of this confusion is the preoccupation with diminution of the value of a parcel of property as opposed to the economic gain which might be realized through rezoning or the granting of some form of administrative relief. Developers and others associated with the real estate business seem to believe that the zoning of a particular tract should conform to the "highest and best use" of the parcel in question rather than to a comprehensive plan for the area. This is not the law in the United States and is patently absurd. When carried to its logical conclusion, it is the antithesis of zoning because no comprehensive plan could survive for very long in the face of such a thesis. It is also contrary to the statutes.<sup>46</sup>

This problem was enunciated by the Kentucky Court of Appeals in the following manner:

[After stating that zoning should be based on "a continuous or periodic study of the development of property uses" and growth trends which would lead to systematic and intelligent changes based on a coordinated plan:] An examination of the multitude of zoning cases that have reached this court leads us to the conclusion that the common practice of zoning agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for rezoning. The result has been that in most of the rezoning cases reaching the courts there actually has been spot zoning and the courts have upheld or invalidated the change according to how flagrant

---

45. *Higginbotham v. Barrett*, 473 F.2d 745 (5th Cir. 1973); *City of Conway v. Housing Auth.*, 266 Ark. 404, 584 S.W.2d 10 (1979); *Evans v. City of Little Rock*, 221 Ark. 252, 253 S.W.2d 347 (1952); *Duggan v. County of Cook*, 60 Ill.2d 107, 324 N.E.2d 406 (1975); *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974); and *see generally* 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.14 (2d ed. 1976).

46. ARK. STAT. ANN. §§ 19-2828 to -2829 (1980). The latter statute provides in subsection (a) that after the plan or plans are adopted, the planning commission will submit recommended "ordinances and regulations which will carry out or protect the various elements of the plan or plans." *Id.* § 19-2829(a). Subsection (c) relating to subdivisions requires "the developer to conform to the plan or plans currently in effect." *Id.* § 19-2829(c).

the violation of true zoning principles has been. It is to be hoped that in the future zoning authorities will give recognition to the fact that an essential feature of zoning is *planning*.<sup>47</sup>

Unfortunately, this represents an accurate description of the rezoning process in Arkansas and in the manifested attitudes of developers and property owners. Zoning to many of them is supposed to be something subordinate to the desire to make money on a piece of real estate. But on a national basis, case after case has stated that the opportunity or desire of a landowner or developer to gain financially through a rezoning or through administrative relief is immaterial.<sup>48</sup> The fact that the property might be worth more if some lower use were permitted is of no consequence unless the end result would be to render the property practically worthless.<sup>49</sup>

Developers, realtors, and landowners do not subscribe very often to this line of thought. In a recent case in Pulaski County, "expert" testimony was produced to show that the "highest and best use" of property in a predominantly residential area would be for a quick service grocery and merchandise store. The argument prevailed that the city had acted arbitrarily in refusing to permit this use of this small parcel of land.<sup>50</sup> It was duly noted during the course of the trial that no neighbors objected—a matter which also

---

47. *Fritts v. City of Ashland*, 348 S.W.2d 712, 714-15 (Ky. 1961). See also *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); and *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 872-73, 480 P.2d 489, 495-96 (1971). These latter cases manifest a growing tendency not to accord the legislative presumption to actions of municipal bodies relating to variances, conditional use permits, and single rezoning applications. These activities are viewed as basically administrative or quasi-judicial in nature.

48. *E.g., In re Cresko*, 400 Pa. 467, 162 A.2d 219, 222 (1960): "Business operators persist in believing that a variance can be justified by an opportunity to make money, or conversely, that it is an abuse of discretion to deny them the opportunity." Or as the Illinois Supreme Court expressed it: "Petitioner emphasizes the fact that its property would be more valuable if zoned for commercial purposes, but this fact exists in every case where the intensity with which property may be used is restricted by zoning laws." *Evanston Best & Co. v. Goodman*, 369 Ill. 207, 211, 16 N.E.2d 131, 133 (1938). See also *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. 1961).

49. *Duggan v. County of Cook*, 60 Ill. 2d 107, 324 N.E.2d 406 (1975); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964); *R-N-R Assocs. v. Zoning Bd. of Review*, 100 R.I. 7, 210 A.2d 653 (1965).

50. The decision was affirmed by the Arkansas Court of Appeals in *City of Little Rock v. Breeding*, 270 Ark. 752, 606 S.W.2d 120 (Ct. App. 1980) in a four to two decision. The majority opinion does not reflect a considered understanding of this area of law. The minority opinion is well-written and correct. The Arkansas Supreme Court granted review on November 17, 1980.

is largely irrelevant, as has been ably discussed.<sup>51</sup> The basic falsity, however, of the "highest and best use" theory is that it has nothing to do with zoning. It plays a vital role in allocating compensation in an eminent domain proceeding and indeed forms the initial basis for determining the award.<sup>52</sup> But it is of no relevance in most zoning cases and should be inadmissible evidence except as it may pertain incidentally to the "taking" issue.<sup>53</sup>

Certainly, if regulation of property goes too far, it will amount to a taking which either serves to invalidate the regulation or require compensation. Moreover, the distinction between a valid police power regulation and the taking power under eminent domain is a matter of degree which sometimes reconciles itself, depending upon the particular shade of gray involved. But the validity of zoning cannot be translated into a dollars and cents matter unless the results of the restriction are dramatically apparent.<sup>54</sup>

The Arkansas Supreme Court over the years has had only limited occasion to venture into these considerations. In one early case, a zoning ordinance was invalidated where one factor was the diminution in value from \$20,000 to \$8,000.<sup>55</sup> In another case approving rezoning, the evidence showed that a residence would increase in value from \$12,000 to \$25,000 if rezoned to permit com-

---

51. Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 221 (1974).

52. See generally R. WRIGHT, ARKANSAS EMINENT DOMAIN DIGEST § 5.5E-2, (1964) and the cases cited in that section. The rule is implicit in the UNIFORM EMINENT DOMAIN CODE § 1007 (1974).

53. For example, the highest and best use of the land might be so far removed from the zoning classification assigned to a parcel that the resultant diminution in value would be so great as to amount to a taking. This would provide evidence demonstrating that the zoning in question was arbitrary to the point of being confiscatory. On the "highest and best use" argument, see *Hyatt v. Zoning Bd.*, 163 Conn. 379, 311 A.2d 77 (1972); *Montgomery County Council v. Kacur*, 253 Md. 220, 252 A.2d 832 (1969); *Barone v. Township of Bridgewater*, 45 N.J. 224, 212 A.2d 129 (1965); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.24 (2d ed. 1976).

54. No firm line can be drawn. *Nat'l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965), in which the zoning was invalidated in part on other grounds, involved a 75% reduction in value of an 85 acre development. The Arkansas cases, see notes 55 & 56, *infra*, involve even greater percentage reductions in value. But in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the landmark zoning case, it was alleged that the market value of certain property would be reduced from \$10,000 per acre to \$2,500 per acre by the zoning. The Supreme Court approved the zoning anyway.

55. *City of Little Rock v. Sun Bldg. & Developing Co.*, 199 Ark. 333, 134 S.W.2d 582 (1939). Other factors entering into the decision were that the lots had been platted for commercial use which would be restricted by the rezoning, and the area was in the path of logical business expansion.

mercial uses.<sup>56</sup> Apparently the Arkansas Supreme Court viewed the value differential as sufficient in those cases to amount either to a taking or proof of arbitrariness on the part of the city or both.<sup>57</sup>

On the other hand, the Arkansas Supreme Court has also stated that rezoning is not justified by the mere fact that economic gain would result to the owner of a limited land parcel.<sup>58</sup> These are more recent cases and are in accord with the undisputed view on the subject.<sup>59</sup> Moreover, such a situation would often constitute spot zoning. Refusal to rezone a relatively small area, however, suggests that if current zoning adversely affects a substantial area such as an entire neighborhood, and if rezoning would enhance the property value of the entire area, then rezoning would likely be in order. Key factors which have to be considered include the question of spot zoning, which will subsequently be discussed, and the impact of the rezoning upon the comprehensive plan. If the rezoning is contrary to the comprehensive plan for the area, then the granting of the rezoning application would constitute spot zoning unless so much of the area is affected that the plan itself is suspect and warrants reevaluation and change. The trend of the Arkansas cases appears to follow that line of reasoning,<sup>60</sup> which means that substantial progress has been made in the judicial consideration of this area of the law.

### *The Taking Question*

Much of law is involved with the problem of the advancement

---

56. *City of Little Rock v. Gardner*, 239 Ark. 54, 386 S.W.2d 923 (1965). The court also stated in this case that one principal purpose of zoning is to "stabilize property values in a neighborhood, thus encouraging the most appropriate use of the land." *Id.* at 58, 386 S.W.2d at 925.

57. It is difficult to criticize these cases on the basis of the monetary differential involved. The *Gardner* case might be criticized for not affirmatively pointing out that mere economic gain, even though substantial, is not sufficient to justify rezoning, particularly where the rezoning would violate the master plan for the neighborhood or area involved and could result in ultimately changing or adversely affecting the character of land use in the area or that contemplated for the area. This has been stated by the court in other cases cited in note 58 *infra*.

58. *Lindsey v. City of Fayetteville*, 256 Ark. 352, 507 S.W.2d 101 (1974); *Tate v. City of Malvern*, 246 Ark. 316, 438 S.W.2d 52 (1969).

59. *Duggan v. County of Cook*, 60 Ill. 2d 107, 324 N.E.2d 406 (1975); *In re Cresko*, 400 Pa. 467, 162 A.2d 219 (1960); 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.27 (2d ed. 1976); and see note 46 *supra*.

60. This is implicit in *City of Conway v. Housing Auth.*, 266 Ark. 404, 584 S.W.2d 10 (1979); *Taylor v. City of Little Rock*, 266 Ark. 384, 583 S.W.2d 72 (1979); and *Baldrige v. City of North Little Rock*, 258 Ark. 246, 523 S.W.2d 912 (1975).

of the public interest without unduly impinging upon private rights. It is a question of the corporate rights and interests of all of us as opposed to the legal rights of any one of us. In the Greek City State the citizen was subordinate to the interests of the public. But Rome gave recognition to the rights which individuals could claim against the State, and thus even St. Paul as a Roman citizen was entitled to assert his right to a trial before Caesar.<sup>61</sup> The rise of Christianity placed an increased emphasis on the value of the individual in the eyes of God. These values translated themselves into the English common law and, particularly into equity, influenced as it was by the ecclesiastics who were the first Chancellors.<sup>62</sup> The protection of individual rights, in certain limited sections of the Magna Carta,<sup>63</sup> represented the lasting contribution of that document and represented the theme of the English Bill of Rights.<sup>64</sup>

The right to take private property for public use or for a public purpose is an old and venerable rule. According to one leading text, there are references to it in the Bible and it was recognized by the Romans.<sup>65</sup> The concept originated as an inherent right of the sovereign and the constitutional provisions of the United States and Arkansas Constitutions are limitations on an otherwise unlimited power.<sup>66</sup> The Magna Carta placed a limitation on the power but did not provide for payment of compensation.<sup>67</sup> Blackstone, however, advocated compensation for takings, and many of the early state constitutions as well as the fifth amendment required compensation.<sup>68</sup> Even prior to the application of the fifth amendment to the states through the fourteenth amendment, states whose constitutions did not require just compensation relied upon the natural law, with the courts assuming the burden of requiring

---

61. The Acts of the Apostles 16:36-40, 25:7-11.

62. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 139, 696-97 (5th ed. 1956).

63. Chapter 39 of the Magna Carta (1215) provides that "No freeman shall be . . . disseised of any freehold . . . except by the legal judgment of his peers or by the law of the land." W. SWINDLER, *MAGNA CARTA* 316-17 (1965).

64. See *id.* at 96, 184.

65. 1 P. NICHOLS, *EMINENT DOMAIN* §§ 1.2, .12 (1976).

66. *Id.* See also J. BEUSCHER & R. WRIGHT, *LAND USE* 709 (1969) and R. WRIGHT & S. WEBBER, *LAND USE IN A NUTSHELL* 231 (1978).

67. R. WRIGHT & S. WEBBER, *supra* note 66, at 233. For an extensive discussion of the background to the development of the law of eminent domain, see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 51-123 (1973).

68. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 67, at 101-04.

payment of compensation in eminent domain proceedings.<sup>69</sup>

The evolution of the law of eminent domain led to the development of the doctrine of "inverse condemnation" and its enlargement in more recent times. An inverse condemnation proceeding involves an assertion by an individual that some public action has resulted in a taking or damaging of his property without just compensation. The proceedings are not eminent domain proceedings initiated by the public agency but are proceedings by the landowner seeking compensation resulting from actions of that agency amounting to a taking. Although there are different varieties of inverse condemnation actions,<sup>70</sup> we are concerned here only with the allegation that a zoning regulation which would otherwise be valid under the police power is so restrictive or unreasonable that its enforcement would amount to a taking. In the zoning situation, the landowner is not seeking damages for an action already taken but is seeking to invalidate the ordinance as it applies to him on the principle that it is unenforceable without payment of just compensation. Thus, abuse of the police power through its use in an arbitrary, capricious, or unreasonable manner is akin to and is actually a form of inverse condemnation because the result is to deprive a property owner of rights which can only be impaired through eminent domain proceedings.

There are no set rules, no litmus paper test, that can be applied to this problem. There is no precise identifiable point at which the dividing line between a valid exercise of the police power and a taking can be said to have been crossed.<sup>71</sup> What courts must do is seek to identify criteria which may assist them in such

---

69. J. BEUSCHER & R. WRIGHT, *supra* note 66, at 710.

70. *E.g.*, *Arkansas State Highway Comm'n v. McNeill*, 238 Ark. 244, 381 S.W.2d 425 (1964) (involving damages allegedly resulting from a violation of restrictive covenants); *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973) (also involving restrictive covenants and holding contrary to the *McNeill* case); *United States v. Causby*, 328 U.S. 256 (1946) (the landmark case allowing inverse condemnation suits for damages resulting from invasion of airspace by low-flying aircraft); *United States v. Certain Parcels of Land in Kent County, Mich.*, 252 F. Supp. 319 (W.D. Mich. 1966) (involving excessive highway noise); and *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) (involving the taking of an easement for noise based on a nuisance theory, with the noise emanating from aircraft taking off and landing at an airport). A more typical inverse condemnation action than any of the foregoing would involve a situation in which a landowner alleged damage of some type from the construction of a new highway, but the damage did not involve the actual taking of any of his land.

71. See Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 14 (1971).

determinations.

Generally speaking, the courts have abandoned two extremes which have been advanced periodically—one being that an individual's land may never be regulated under the police power or his rights diminished without regard to the situation,<sup>72</sup> and the other being that the public has an absolute right to regulate land use no matter what the effect may be on a particular landowner.<sup>73</sup> Of these extremes, neither of which has ever been given lip service by the Arkansas Supreme Court, Arkansas has clearly tended more toward protection of individual property rights.<sup>74</sup> This may be contrasted with the approach of one group of scholars who advocate that a land use regulation should never constitute a taking if it is reasonably related to a valid public purpose.<sup>75</sup>

It is unlikely that either of these extremes will prevail in the United States, although the trend as manifested in these recent writings and in the Model Land Development Code seems more toward the vesting of greater power in public regulatory agencies.<sup>76</sup> At least part of this impetus seems to have resulted from environmental concerns.<sup>77</sup> Certainly no court today, outside of Arkansas, would assert that "the right of private property is before and higher than any constitutional sanction" (although the Arkansas Supreme Court is only quoting an obsolete provision in the state constitution).<sup>78</sup> Probably no one with a gun in his ribs and a demand for "your money or your life" would come forth with that constitutional pronouncement. Even the late Jack Benny, a self-styled skinflint, wanted time to think it over.

The current, highly generalized rule on when the police power

---

72. Blackstone did not advocate this, but his statement that private property cannot be violated "no, not even for the general view of the whole community" is sometimes cited to sustain this proposition. 1 W. BLACKSTONE, COMMENTARIES 139 (1783). The Arkansas Constitution might also be cited for this proposition since it states that "the right of property is before and higher than any constitutional sanction." ARK. CONST. art. 2, § 22.

73. F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 238 (1973) argue that a land use control should *never* constitute a taking if it is related to a valid public purpose.

74. This is implicit in numerous cases in which the Arkansas Supreme Court has cited the constitutional provision quoted in note 72 *supra*. See in particular the cases cited in note 2 *supra*, although these are only a few of many of that type.

75. See note 73 *supra*.

76. See generally ALI, MODEL LAND DEVELOPMENT CODE, Commentary on Art. 2 (1976).

77. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 73, at 238.

78. ARK. CONST. art. 2, § 22. But obsolete as it is, it was repeated in the proposed Constitution of 1980, which the voters rejected at the polls.



amounts to a taking stems from the decision written by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*<sup>79</sup> in 1922. How far the regulation of property could be carried until it constituted a taking had to be determined on a case-by-case basis. (This opinion was preceded by his similar opinion in *Rideout v. Knox*<sup>80</sup> when he was on the Massachusetts Supreme Court.) This approach reversed the predominant thinking of the nineteenth century which, while expressing the sanctity of property rights as, for example, in the Arkansas Constitution of 1874, was quite liberal as to the exercise of the police power. In *Brick Presbyterian Church v. City of New York*<sup>81</sup> the church was denied the continued use of a cemetery by the city even though the city had many years before leased the property to the church for use as a church and cemetery and had covenanted for the continuance of such use. Today that would almost certainly be viewed as a breach of covenant which would give rise to damages. Similar decisions involving somewhat different factual situations were rendered by the Massachusetts Supreme Court in 1846 and 1853.<sup>82</sup> But the most important of these nineteenth century cases was probably the United States Supreme Court decision in *Mugler v. Kansas*.<sup>83</sup> A Kansas prohibition statute had effectively rendered a brewery largely worthless. Relying on a nuisance analogy, the first Justice Harlan reasoned that police power regulations which greatly depreciate property values do not necessarily amount to a taking. While an analogy can be drawn to some later Supreme Court cases,<sup>84</sup> these decisions did not view the result as rendering the property practically worthless, nor did they ignore the taking issue.<sup>85</sup> The fact is that *Pennsylvania Coal*, decided in the early twentieth century, was a limitation on a broader view of the scope of the police power stemming from nineteenth

---

79. 260 U.S. 393 (1922).

80. 148 Mass. 368, 19 N.E. 390 (1889).

81. 5 Cow. 538 (N.Y. 1826).

82. *Commonwealth v. Tewksbury*, 11 Met. 55 (Mass. 1846); *Commonwealth v. Alger*, 7 Cush. 53 (Mass. 1851).

83. 123 U.S. 623 (1887).

84. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915). These cases upheld non-comprehensive exercises of the police power based upon a nuisance analogy.

85. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Supreme Court was involved with the prohibition of a brick manufacturing plant within a certain area. It was argued that the manufacture of brick must be carried on where the clay is suitable for that purpose. The Court disposed of the taking issue by stating that there was no prohibition on the removal of the clay and its transportation elsewhere.

century cases.

The legacy of *Pennsylvania Coal* is the case-by-case approach to police power regulations which necessitates the identification of criteria which will likely produce or will be taken into account in reaching a particular result. Diminution in value, even though fairly substantial, normally will not be enough in and of itself. The promotion of the general welfare or the importance of the public interest being protected is a consideration, although it alone is normally not conclusive. Public interest considerations are particularly important in cases involving environmental protection. At the other extreme, a resultant substantial diminution in value which nonetheless serves to protect other landowners is illustrated through the spot zoning cases. How great the harm to be prevented is viewed in relation to societal values within a particular jurisdiction is of obvious importance. The fact that, in place of preventing a public harm, a public benefit was being secured under the guise of the police power would apparently have led to a different result in *Just v. Marinette County*,<sup>86</sup> in which Wisconsin upheld a county shoreland zoning ordinance and a state statute relating to shoreland zoning. The Wisconsin Supreme Court distinguished between a public harm to be prevented, which it deemed to be a valid police power consideration, and a public benefit to be derived, which it felt would amount to a taking.<sup>87</sup>

Considering all of this, an equation might be somewhat impre-

---

86. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

87. The Wisconsin Supreme Court stated:

Many years ago, Professor Freund stated in his work on *The Police Power*, sec. 511, at 546-547, "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognises a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm. Rathkopf, *The Law of Zoning and Planning*, Vol. 1, ch. 6, pp. 6-7.

This case causes us to reexamine the concepts of public benefit in contrast to public harm and the scope of an owner's right to use of his property. In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters.

*Id.* at 16, 201 N.W.2d at 767-68.

cisely employed:

Public interest (weighed on the jurisdictional scale of values) + public harm (to be prevented, if any) + interest of other landowners (not the public generally) — severity of loss to complaining landowner and — public benefits unrelated to preventing harm or to neutral public interests = either a valid exercise of the police power or a taking.<sup>88</sup>

Translating the foregoing into the Arkansas situation is not an easy task. The Arkansas Supreme Court has dealt with the taking issue largely in relation to eminent domain. There has been a wealth of eminent domain litigation in Arkansas<sup>89</sup> but only a comparative thimbleful with respect to the police power. Early cases, some of which went to the United States Supreme Court,<sup>90</sup> upheld basic exercises of the police power. These cases, however, were geared to nuisance-like situations in which there was a basic public interest consideration such as health or safety. These were prezon- ing cases also, and the issue of zoning has seemed occasionally, although inappropriately, to wave a different flag in the faces of Arkansas judges.

The first Arkansas zoning case was *Herring v. Stannus*<sup>91</sup> in 1925, which arose after the enactment of the initial enabling legis- lation. Little Rock had adopted a zoning ordinance which was far from comprehensive but which prohibited construction of certain multi-family and commercial structures without first obtaining a permit from the city. The ordinance was challenged by persons seeking to construct a gasoline station. The zoning was upheld, the Arkansas Supreme Court stating that it must be presumed that the city council would act in an intelligent, impartial, and honest manner. In essence, *Herring* held that unless the municipality acted in an arbitrary, capricious, and unreasonable manner, or ex- ceeded its authority under the enabling act, its zoning would be upheld. This represents the generally accepted view in the United States.<sup>92</sup> *Herring* has since been followed,<sup>93</sup> and it may be viewed

---

88. R. WRIGHT & S. WEBBER, *LAND USE IN A NUTSHELL* 259 (1978).

89. By the mid-1960's, it was sufficient to justify a hardcover volume: R. WRIGHT, *ARKANSAS EMINENT DOMAIN DIGEST* (1964). There have been numerous cases since then.

90. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919); and *see also* a leading Arkansas Supreme Court decision, *City of Fort Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 239 S.W. 724 (1922).

91. 169 Ark. 244, 275 S.W. 321 (1925).

92. *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W. 2d 179 (1974); *Lowe v.*

as a viable rule of zoning law in Arkansas and one which is representative of the basic American approach. Moreover, on a number of occasions the Arkansas Supreme Court, in accord with the expressions in *Herring*, has reiterated its intent not to substitute its judgment for that of municipalities in zoning matters.<sup>94</sup> This is viewed as being "consonant with a proper theory of judicial review" by a prominent scholar in this field.<sup>95</sup> Thus, while *Herring* has been brutalized on a number of singularly undistinguished occasions<sup>96</sup> which will subsequently be discussed in greater detail, *Herring* is not dead. The basic rule remains and has been applied.<sup>97</sup>

Applied to the question of when there has been a taking as a result of a zoning action, the *Herring* rule is that a taking occurs only when the situation is so extreme that the municipality can be said to have acted in an arbitrary, capricious, and unreasonable manner.<sup>98</sup> However, the Arkansas Supreme Court has not been consistent in its application of that doctrine. The problem stems from what seems to be strictly an Arkansas peculiarity not known to the jurisprudence of other states. It stems from the early 1940's cases of *McKinney v. City of Little Rock*<sup>99</sup> and *City of Little Rock v. Bentley*.<sup>100</sup> In *McKinney* the Arkansas Supreme Court stated that it should not set aside the chancellor's decree and the action of the city unless "we can say . . . that the action of the Council

---

City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974); *City of Phoenix v. Beall*, 22 Ariz. App. 141, 524 P.2d 1314 (1974); and see generally 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.14 (2d ed. 1976).

93. *City of Little Rock v. Fausett & Co.*, 222 Ark. 193, 258 S.W.2d 48 (1953); *City of Fordyce v. Dunn*, 215 Ark. 276, 220 S.W.2d 430 (1949); *McKinney v. City of Little Rock*, 201 Ark. 618, 146 S.W.2d 167 (1941).

94. *Stuttgart Shoe Real Estate Corp. v. City of Stuttgart*, 241 Ark. 252, 407 S.W.2d 104 (1966); *City of North Little Rock v. Habrle*, 239 Ark. 1007, 395 S.W.2d 751 (1965); *City of Little Rock v. McKenzie*, 239 Ark. 9, 386 S.W.2d 697 (1965); *Economy Wholesale Co. v. Rodgers*, 232 Ark. 835, 340 S.W.2d 583 (1960).

95. Gitelman, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22, 34 (1969).

96. *City of Little Rock v. Pfeifer*, 169 Ark. 1027, 277 S.W. 883 (1925), hereinafter discussed, was the first and probably the worst. *City of Little Rock v. Bentley*, 204 Ark. 727, 165 S.W.2d 890 (1942), reiterating the *Pfeifer* rule and creating confusion as to the test to be applied in connection with judicial review, runs a solid second.

97. *City of North Little Rock v. Linn*, 252 Ark. 364, 479 S.W.2d 236 (1972); *Wendroth v. City of Fort Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971); *City of West Helena v. Davidson*, 250 Ark. 257, 464 S.W.2d 581 (1971); *City of Little Rock v. Faith Evangelical Lutheran Church*, 241 Ark. 187, 406 S.W.2d 875 (1966).

98. See note 97 *supra*.

99. 201 Ark. 618, 146 S.W.2d 167 (1941).

100. 204 Ark. 727, 165 S.W.2d 890 (1942).

and the decision of the court are unreasonable and arbitrary.”<sup>101</sup> [Emphasis added.] It was held that the chancellor’s decision was not against the preponderance of the evidence — thus considering not only whether the council’s action was arbitrary but also the chancellor’s assessment of the weight of the evidence. In *Bentley* it was reiterated that the chancellor would not be reversed where his holding was not against the preponderance of the evidence.<sup>102</sup> Notice the somewhat subtle distinction between *Herring* and *McKinney* and between *McKinney* and *Bentley*. The *Herring* test was arbitrariness or the lack of it by the city. The *McKinney* test was the arbitrariness or lack of it by the city and the chancellor and whether the preponderance of the evidence supported the decision made. The *Bentley* test was whether the *chancellor’s decision* was supported by a preponderance of the evidence. As long as the chancellor sustains the action of the city, there is not much of a problem. But if a chancellor finds that the action taken by the city is arbitrary, capricious, and unreasonable, his decision must be found to be against the preponderance of the evidence or it will be sustained. Thus, having overcome the very heavy burden of finding arbitrary and capricious action on the part of the municipality, a litigant attacking a zoning decision is now faced with the relatively meager burden of “preponderance of the evidence.” This is not a particularly difficult mountain to climb, since in any situation in which rezoning has been denied, the landowner will somewhere find realtors or expert witnesses to testify that the current zoning classification is inappropriate. The end result is to undercut the true test—the question of whether the city acted in an arbitrary, capricious, and unreasonable manner. The real question is *not* whether the property might be used more profitably for something else; it is *not* whether it might properly be rezoned for some use not requested by the landowner; it is *not* whether the current zoning is absolutely proper; it is *not* even whether there is some doubt about the wisdom of the city’s action, since reasonable minds may differ and, in that situation, the city must be sustained in its action.<sup>103</sup> The *sole* question is whether the city acted arbitrarily, ca-

---

101. 201 Ark. at 731, 146 S.W.2d at 169.

102. 204 Ark. at 729, 165 S.W.2d at 892.

103. As the United States Court of Appeals for the Eighth Circuit has stated: “Fairly debatable questions as to the reasonableness, wisdom and propriety of an ordinance are not for the determination of the courts but for that of the legislative body on which rests the duty and responsibility of the decision.” *City of St. Paul v. Chicago, St. P., Minn. & O. Ry.*

priciously, and unreasonably.<sup>104</sup> The weight given the chancellor's findings erode that test and deter the court from considering the true test of arbitrariness or the lack of it.

It should be noted in that context that the "arbitrary, capricious, and unreasonable" test is predicated on the concept that in adopting zoning ordinances and assigning zoning classifications, or in its rezoning activities, municipalities are acting in a legislative capacity.<sup>105</sup> The same test is generally applied to variances or conditional use permits even though these are basically administrative or quasi-judicial actions.<sup>106</sup> Courts which have in recent years turned away from the strong legislative presumption which favors the validity of municipal actions of this type have done so not because municipal governments have exercised their authority arbitrarily on behalf of zoning as against real estate interests, but because they have lacked such diligence in enforcing basic principles of planning and zoning that these courts have deemed it to be no longer appropriate to accord their activities the strong presumption accorded to a legislative act.<sup>107</sup> Hand in hand with that is the increased recognition that with the exception of the passage of the zoning ordinance and the original large-scale classification of prop-

---

Co., 413 F.2d 762, 767 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969).

104. *Id.* As stated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), the ordinance will be sustained unless its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See also* *Gorieb v. Fox*, 274 U.S. 603, 608-09 (1927); *McMahon v. City of Dubuque*, 255 F.2d 154, 158-59 (8th Cir.), *cert. denied*, 358 U.S. 833 (1958); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206, 212 (1968); *Herring v. Stannus*, 169 Ark. 244, 275 S.W. 321 (1925).

105. *See* note 92 *supra*.

106. Probably the most down-to-earth discussion of this is contained in the concurring opinion in *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974), in which Justice Levine, after pointing out that action based on individual grounds is normally legislative, states:

The time has come . . . to cast aside old slogans and catchwords. For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances reflecting, generally, decisions made on individual grounds brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts . . . , governmental needs, and, as important as any, market and consumer choice.

*Id.* at 168, 215 N.W.2d at 191-92. He concludes that local zoning authorities are acting on individual grounds and are exercising administrative discretion.

107. This was the conclusion of the Oregon Supreme Court in *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

erty, most subsequent municipal actions involving rezoning or the granting of variances or conditional use permits involve administrative, quasi-judicial, nonlegislative determinations.<sup>108</sup>

Arkansas follows the majority view that the legislative test is to be applied to municipal zoning actions. Through its "preponderance of the evidence" test applied to the chancellor's decision, however, it has eroded the majority rule in situations in which the chancellor rules against the municipality. The tendency of the Arkansas Supreme Court over the past half-century has not been in accord with the thinking which has motivated some courts to eliminate the legislative presumption favoring the action of the municipality. The courts taking that step have done so to maintain the integrity of zoning as against the influences of commercial real estate interests. But, in the past few years, the Arkansas Supreme Court has in some notable instances demonstrated a new awareness of the need to maintain the integrity of the planning and zoning process.<sup>109</sup> This is indeed a hopeful sign and may place Arkansas more in the mainstream of the law on this subject.

### *Spot Zoning*

A cardinal rule of the law of zoning is that "spot zoning" is invalid *per se* because it singles out a small parcel of land for use in a manner inconsistent with the other predominant land uses in the area.<sup>110</sup> As stated by the Maryland court:

'Spot zoning', the arbitrary and unreasonable devotion of a small area . . . to a use which is inconsistent with the use to which the rest of the district is restricted, has appeared in many cities in America as the result of pressure put upon councilmen. . . . It is, therefore, universally held . . . [to be] invalid if it is not in accordance with the comprehensive zoning plan and [if it] is merely for private gain.<sup>111</sup>

Oddly enough, the Arkansas cases have been somewhat ambivalent in dealing with spot zoning even though the foregoing state-

---

108. See notes 106 and 107 *supra*.

109. See cases cited note 1 *supra*.

110. See generally 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 5.08 (2d ed. 1976); 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 27.01 to -.08 (1974); and Annot., 51 A.L.R. 2d 263 (1957). See also *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954); *Pierce v. King County*, 62 Wash. 2d 324, 382 P.2d 628 (1963).

111. *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348, 355, 73 A.2d 486, 488-89 (1950).

ment represents an uncontested view in the United States.<sup>112</sup> The Arkansas Supreme Court has spoken of spot zoning as a "danger":

We perceive that the chancellor was impressed, as are we, with an abundance of evidence pertaining to the danger of spot zoning. That danger was emphasized where, as here, there is no existing barrier to prevent the spreading of rezoning into the exclusively residential area to the north.<sup>113</sup>

This might be interpreted as viewing spot zoning as being a process which is "dangerous" because it could lead to commercial incursion into a larger residential area. That, of course, is the usual result of spot zoning and is one reason why it is not countenanced, but the opinion fails to come to grips with the basic question. From a strictly legal standpoint, once spot zoning has been identified as such, the inquiry ends. Since spot zoning is contrary to the comprehensive plan and the land uses in the area in which it is proposed, it is invalid. But if you were to take the above quotation literally, the allegation of spot zoning might be avoided by showing that the proposed rezoning is "less dangerous" to neighboring landowners than other varieties of spot zoning. Support for this peculiar approach may be found in *Tate v. City of Malvern*:

Another rule of law comes into play because the Tate tract is surrounded by property zoned residential. That means that he is asking for spot zoning. Therefore *an additional burden of proof is placed on the applicant*. The decided weight of authority is found in Yokley, *Zoning Law and Practice*, § 8-4, third edition (1965). It is there stated that the council can so amend a zoning ordinance when the character of a zoned area has become so changed that a modification is necessary to promote public health, morals, safety and welfare; but mere economic gain to the owner of a comparatively small area is not sufficient cause to amend.<sup>114</sup> [Emphasis added.]

The latter part of the statement is correct with regard to a substantial change of conditions in a particular area (although what is needed then is a rezoning of the entire area as opposed to one limited tract). Moreover, by showing a sufficient change of conditions in land use within an area, the allegation of spot zoning may be avoided. But once actual spot zoning has been spotted, so to speak,

---

112. See note 110 *supra*.

113. *Marling v. City of Little Rock*, 245 Ark. 876, 881, 435 S.W.2d 94, 97 (1968).

114. 246 Ark. 316, 320-21, 438 S.W.2d 52, 54 (1969).



any rezoning would be invalid, and as *Tate* states "mere economic gain to the owner" is not a sufficient reason to rezone.

### *Non-Conforming Uses*

Statutory authority permits "elimination of uses not in conformance with provisions of the ordinance."<sup>115</sup> This authority, however, has not proved to be particularly persuasive in attempts by Arkansas cities to exercise affirmative means of disposing of nonconforming uses through the device of amortization.<sup>116</sup> This device has been particularly successful in other jurisdictions in dealing with such nuisance-like structures as junkyards and billboards.<sup>117</sup> It has on occasion been used for more permanent structures such as gasoline stations,<sup>118</sup> although its utilization in that regard necessitates a longer term with respect to the amortization process.

One of the principal problems in zoning is how to deal effectively with the nonconforming use, which is defined as "a lawful use that existed when the zoning ordinance was adopted and that is permitted by the ordinance to continue."<sup>119</sup> The problem is one of major proportions in such expanding areas as the western and southwestern perimeters of Little Rock due to the absence of extraterritorial zoning.<sup>120</sup> As new land is annexed to the city, noncon-

---

115. ARK. STAT. ANN. § 19-2829(b) (1980).

116. *City of Fayetteville v. S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977). *Contra*, *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973); *E. B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970); *Grant v. Mayor and Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957); *Naegle Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968).

117. *Grant v. Mayor and Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957) (billboards); *Contra*, *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1955). *See generally* R. WRIGHT & S. WEBBER, *LAND USE IN A NUTSHELL* 148-49 (1978).

118. *E.g.* *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950). *See also* *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (permanent structures).

119. *City of Harrison v. Wilson*, 248 Ark. 736, 737, 453 S.W.2d 730, 731 (1970).

120. The City of Little Rock has extraterritorial zoning authority within two miles from the "thread" of the Arkansas River and for five miles along the River outside of the city limits. ARK. STAT. ANN. § 19-2829(e) (1980). The same, of course, would be true of such cities as Pine Bluff and Fort Smith. However, under ARK. STAT. ANN. § 19-2804.1 (1980), the previously existing five-mile extraterritorial power of cities was revoked. The end result is that nonconforming uses spring up and developers can do as they wish in unincorporated areas in the absence of the exercise of zoning authority by counties. Little Rock and Pulaski County are currently attempting an arrangement which permits the Little Rock Planning Commission to assist the County in the planning and zoning of areas which are in the path of urban growth.

forming uses existing as a matter of right in the newly annexed area create planning and zoning difficulties, breed litigation, and often produce unsightly commercial strip zoning with concomitant traffic hazards and congestion. In the Little Rock area, the latter situation is generally summarized by the words, "Rodney Parham," which refer to that portion of Rodney Parham Road which lies generally between Reservoir Road and the beginning of the Pleasant Valley residential area. The same may be said, however, of Asher Avenue and much of Geyer Springs Road in the southwestern part of the city. Yet the status of a nonconforming use approaches that of a vested right in the sense that attempts to deprive the owner of the use existing at the time of the passage of a more restrictive ordinance have been held to amount to a taking.<sup>121</sup>

An occasional threshold question is whether a nonconforming use existed at the time of the enactment of the zoning ordinance. In *Blundell v. City of West Helena*,<sup>122</sup> in 1975, the Arkansas Supreme Court seemed to adopt a "substantial use" test:

A mere contemplated use without active steps beyond preliminary work or planning or substantial investment to effectuate it is not sufficient to invest a property owner with property rights in a nonconforming use. . . . Preliminary contracts or work which is not of a substantial nature is not sufficient to establish a vested right. . . . The mere purchase of property with intention to devote it to a use is not sufficient in spite of preliminary work, such as clearing, grading and excavating, if that work is not of a substantial nature, or if the owner has not incurred substantial obligations relating directly to the use of the property.<sup>123</sup>

This is a reasonable approach to the issue and is one which corresponds to the view taken by courts in other states.<sup>124</sup>

Another problem relates to additions to or the expansion of an existing nonconforming use. Generally speaking, a nonconforming use cannot be expanded or enlarged.<sup>125</sup> Moreover, it cannot be con-

---

121. *Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975).

122. *Id.*

123. *Id.* at 133-34, 522 S.W.2d at 668.

124. See generally 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 6.20, .22, .25 (2d ed. 1976). However, in *Griffin v. County of Marin*, 157 Cal. App. 2d 507, 321 P.2d 148 (1958), it was held that the grading of the site prior to zoning established the nonconforming use.

125. *City of West Helena v. Bockman*, 221 Ark. 677, 256 S.W.2d 40 (1953); *State v. Perry*, 149 Conn. 232, 178 A.2d 279 (1962); *Town of Seekonk v. Anthony*, 339 Mass. 49, 157 N.E.2d 651 (1959); *County of Freeborn v. Claussen*, 295 Minn. 96, 203 N.W.2d 323 (1972); 1

verted to some other nonconforming use or some hybrid form.<sup>126</sup> In Arkansas, however, this latter question may depend on the local ordinance and whether structural alterations are involved. One Arkansas case upheld a change in use from a drug store to a bakery.<sup>127</sup> Upon examination of the ordinance, the Arkansas Supreme Court concluded that a change from one nonconforming use to another was permissible in the absence of structural alterations.<sup>128</sup> Weight was given to the fact that before the building was used as a drug store it had been a bakery and had been used commercially for many years. This case is of questionable propriety. A nonconforming use is by nature the antithesis of the comprehensive plan for the area in question. It is tolerated only to avoid allegations of an unconstitutional taking of property. The ultimate hope is that it will be abandoned or otherwise be terminated. It is not necessarily the structure but the *use* which is nonconforming. To permit a nonconforming use to become any one of many nonconforming uses would almost insure its perpetual survival.<sup>129</sup>

Other than amortization, two ways in which nonconforming uses are terminated are abandonment and destruction. In connection with abandonment, Arkansas has held that after nine years of conformance, a prior nonconforming use had been abandoned.<sup>130</sup> Abandonment generally means more than a mere discontinuance. The cessation of use must be coupled with an intent to abandon.<sup>131</sup> Obviously, after nine years of cessation, an intent should be inferred somewhat on the same theory as laches or estoppel. It would be desirable to provide by statute that after a certain lapse of time, such as one or two years, the discontinuance of a nonconforming use will be deemed to constitute an abandonment and intent to abandon will be inferred in the absence of some outside cause preventing continuance of use.<sup>132</sup>

---

R. ANDERSON, *supra* note 124, § 6.43.

126. *State v. Perry*, 149 Conn. 232, 178 A.2d 279 (1962); *Phillips v. Zoning Comm'r*, 225 Md. 102, 169 A.2d 410 (1961).

127. *City of Little Rock v. Williams*, 206 Ark. 861, 177 S.W.2d 924 (1944).

128. *Id.* at 863, 177 S.W.2d at 925.

129. See generally Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U.L. REV. 174, 191 (1957); and Comment, *Regulation of Urban Non-Conforming Uses in Arkansas: Limitation and Termination*, 16 ARK. L. REV. 270 (1962).

130. *Branch v. Powers*, 210 Ark. 836, 197 S.W.2d 928 (1946).

131. *Board of Zoning Adjustment v. Boykin*, 265 Ala. 504, 92 So. 2d 906 (1957); 1 R. ANDERSON, *supra* note 124, at § 6.61; Annot., 57 A.L.R.3d 279 (1974).

132. See the discussion of a Wisconsin provision along these lines in *State ex rel. Brill v. Mortenson*, 7 Wis. 2d 325, 96 N.W.2d 603 (1959). There, however, it was not stated that

Destruction of a nonconforming use by natural causes may also terminate such use. In *Moffatt v. Forrest City*<sup>133</sup> a local ordinance provided that if damage to a nonconforming use equalled sixty percent or more of the reproductive value exclusive of foundations, a nonconforming use could not be rebuilt. Louis Moffatt had a building which consisted of a nonconforming meat market on one side and his residence on the other. The Arkansas Supreme Court upheld the city in not permitting the meat market to be rebuilt after a fire destroyed more than sixty percent of the structure. However, if the city had not had such an ordinance, the meat market could have been rebuilt.<sup>134</sup> This differs from the rule relating to enlargement or expansion, which is prohibited even in the absence of statute,<sup>135</sup> or the rule relating to abandonment, which is largely a question of fact in the absence of a relevant statute or ordinance.

Although Arkansas has been relatively hostile to the amortization device, it is the only really affirmative tool available for disposing of nonconforming uses. The procedure involves determination of the normal useful remaining economic life of the structure followed by a prohibition of that use of the structure beyond that time. The language of the Arkansas statutes clearly seems to contemplate use of this device.<sup>136</sup> But the comparatively recent case of *City of Fayetteville v. S & H, Inc.*<sup>137</sup> casts considerable doubt upon the survivability of this device when applied in Arkansas. In *S & H* the court upheld that part of the Fayetteville ordinance which prohibited existing flashing or blinking signs because this would adversely affect safety,<sup>138</sup> but it invalidated provisions amortizing excessively large signs over a seven-year period. This latter provision was viewed as a taking and as related to aesthetics alone and not to the police power.<sup>139</sup> The extensive dissent in *S & H* is more in keeping with the law on this subject in the United States and rep-

---

an intent to abandon would be inferred.

133. 234 Ark. 12, 350 S.W.2d 327 (1961).

134. See generally 1 R. ANDERSON, *supra* note 124, § 6.58 (2d ed. 1976).

135. *Id.* § 6.60.

136. ARK. STAT. ANN. §§ 19-2808, -2829(b), -2831 (1980). Section 19-2829(b) specifically provides for elimination of nonconforming uses.

137. *City of Fayetteville v. S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977).

138. *Id.* at 155, 547 S.W.2d at 98.

139. *Id.* But cf. *Osage Oil & Transportation, Inc. v. City of Fayetteville*, 260 Ark. 448, 541 S.W.2d 922 (1976).

resents a more progressive viewpoint.<sup>140</sup> At the present time, however, *S & H* can only be evaded by the argument that the amortization period was too short (which it actually was not for a sign ordinance although the majority viewed it that way) and that it was too bound up with aesthetics as opposed to the use of the police power.

### *Variances and Administrative Remedies*

The United States Supreme Court decision in *Euclid v. Ambler Realty Co.* would surely have been different except for the fact that the ordinance provided for some amelioration of the seeming harshness of the zoning being imposed.<sup>141</sup> This has been true of other ordinances since then.<sup>142</sup> There must be an escape hatch for those singularly aggrieved by the literal imposition of the terms of the ordinance. Otherwise, the potential of the ordinance for committing harm might be so extensive as to invalidate the whole of it on due process grounds as opposed to the usual consideration of whether relief should be afforded to a particular landowner.

There are two general types of variances employed in the United States—the use variance and the area variance. The use variance involves allowance of a different use within a zoned area, such as a commercial or office use as opposed to some form of residential use. Use variances proved to be such a problem to the City of Tulsa that it eliminated them altogether by ordinance—a position which the Supreme Court of Oklahoma invalidated.<sup>143</sup> That decision is predicated on the peculiar viewpoint that use variances are something of a matter of right if the landowner would suffer hardship.<sup>144</sup> But in truth, the greatest enemy of zoning and orderly

---

140. *City of Fayetteville v. S & H, Inc.*, 261 Ark. 148, 156, 547 S.W.2d 94, 98 (1977) (Fogleman, J., dissenting); R. WRIGHT & S. WEBBER, *LAND USE IN A NUTSHELL* 149 (1978).

141. "The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent so that the public health, safety and general welfare may be secure and substantial justice done." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 383 (1926).

142. See e.g., *In re Devereaux Foundation Inc.*, 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945).

143. *Nucholls v. City of Tulsa*, 560 P.2d 556 (Okla. 1976).

144. *But cf. In re Devereaux Foundation Inc.* 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945). "Mere hardship is not sufficient; there must be *unnecessary* hardship. . . . The power to authorize such a [use] variance is to be sparingly exercised and only under peculiar and exceptional circumstances, for otherwise there would be little left of the zoning law to protect public rights. . . ." *Id.* at 484, 41 A.2d at 747. See also *R-N-R Associates v. Zoning Bd. of Review*, 100 R.I. 7, 210 A.2d 653 (1965).

land use development is probably the use variance.<sup>145</sup> Arkansas, to the contrary of Oklahoma and to its credit, does not permit use variances in zoning. Only area variances are permitted by the Arkansas enabling act.<sup>146</sup>

The Arkansas statute employs the language "undue hardship" as the basis for granting area variances. The usual requirement is that unnecessary hardship result to the landowner which is unique and peculiar to his particular property.<sup>147</sup> Some statutes permit variances based upon unnecessary hardship or "practical difficulties."<sup>148</sup> The latter presumably would require less of a burden to prove and would be particularly applicable in the area variance situation.<sup>149</sup> As a practical matter, in terms of what courts and boards of adjustment actually do, the difference in statutory phraseology probably is minimal insofar as the end result is concerned. Certainly, this would seem to be the situation in Arkansas. An area variance will almost invariably be granted when the landowner can demonstrate that the peculiar shape of his lot, topographical conditions, subsurface problems or the like render him unable to comply with the requirements of the ordinance concerning such matters as the particular location of the structure on the lot. Area variances usually do not involve the controversy relating to use variances, and unless the request of the landowner involves a favoritism which is unjustified by the particular situation or condition of his property, the variance is likely to be granted with no objection from the neighbors and with no adverse effects to the neighborhood. Of course, this is not to say that all area variances should be granted. Variances which result from errors committed by the landowner or the builder are generally inappropriate.<sup>150</sup> The desire of a landowner to build a larger house on a lot involving no peculiar problems and being of ordinary size for the neighborhood

---

145. See Note, Administrative Discretion in Zoning, 82 HARV. L. REV. 668, 673 (1969), pointing out that petitions to depart from zoning requirements are usually approved almost routinely throughout the United States unless there is opposition to the request.

146. ARK. STAT. ANN. § 19-2829(b) (1980).

147. *Id.* The statute provides for the board of adjustment to hear requests for variances where enforcement of the ordinance "would cause undue hardship due to circumstances unique to the individual property . . . . The board of zoning adjustment shall not permit, as a variance, any use in a zone that is not permitted under the ordinance." Compare *In re Village of Bronxville*, 1 A.D.2d 236, 150 N.Y.S.2d 906 (1956) with *In re Cresko*, 400 Pa. 467, 162 A.2d 219 (1960).

148. *In re Village of Bronxville*, 1 A.D.2d 236, 150 N.Y.S.2d 906 (1956).

149. *Id.*

150. 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 18.55, .56 (2d ed. 1976).

with the result of evading setback requirements would not be justified (and probably would be prevented anyway by restrictive covenants). Nonetheless, the area variance is less abrasive simply because it lacks the potential for deleterious impact possessed by the use variance and because it should properly stem from problems which are unique and peculiar to the property involved and which may prevent the use or reasonable use of a particular lot. Moreover, conditions are usually or quite often imposed which are designed to protect adjacent property, and the Arkansas statute on the subject specifically provides for imposition of conditions.<sup>151</sup>

The Arkansas Supreme Court has at times apparently confused variances with other devices utilized to provide relief where appropriate. An example is *Williams v. Kuehnert*<sup>152</sup> in which the landowner sought to expand a nonconforming kindergarten. Although the case was determined based upon provisions of an ordinance providing for exceptions,<sup>153</sup> the discussion in the opinion was prefaced by quoting the statutory provision relating to variances.<sup>154</sup> What the court was actually doing is somewhat indistinct.<sup>155</sup> The court stated that a showing of undue hardship was not necessary under the ordinance in question, but, of course, the local ordinance could not supersede the statute. The case should properly be construed as permitting an exception.<sup>156</sup>

A somewhat similar confusion is illustrated by *City of Little*

---

151. ARK. STAT. ANN. § 19-2829(b) (1980): "The board of zoning adjustment may impose conditions in the granting of a variance to insure compliance and to protect adjacent property."

152. 243 Ark. 746, 421 S.W.2d 896 (1967).

153. The Board had the power to permit certain uses in districts from which they were excluded by the ordinance. *Williams v. Kuehnert*, 243 Ark. 746, 748-49, 421 S.W.2d 896, 897 (1967).

154. ARK. STAT. ANN. § 19-2829(b) (1980).

155. After speaking of the statutory provision on variances, the Arkansas Supreme Court stated that a showing of undue hardship was not necessary under the ordinance. *Williams v. Kuehnert*, 243 Ark. 746, 749, 421 S.W.2d 896, 898 (1967). If so, then there was no need to speak of variances.

156. Neither a variance nor a plain exception should be confused with a special exception, special use permit, or conditional use permit. The latter three devices are essentially the same and require that a judgmental decision be made as to whether the conditions are appropriate, when tested by the requirements of the ordinance, to permit a special or conditional use. If no criteria is provided in the ordinance or if the ordinance simply excepts certain described uses, then such uses are exceptions. Churches, for example, might be excepted from use restrictions pertaining to single-family residential districts. On the other hand, the board or commission might be called upon to pass judgment on whether a church should be permitted as a conditional use, special use or special exception. See generally 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 18.03 (2d ed. 1976).

*Rock v. Kaufman*,<sup>157</sup> although it is not possible to view that case from any perspective other than the granting of a variance. The landowner sought to expand an office building and its adjoining parking lot. The Arkansas Supreme Court concluded that lack of adequate parking for the office tenants created an undue hardship unique to this particular property and that other property in the area would not be adversely affected if a variance were granted.<sup>158</sup> However, the ordinance involved was the same one as that in *Williams v. Kuehnert*,<sup>159</sup> and the court seemed to rely somewhat on the language involving exceptions.<sup>160</sup> The reason is unclear. Moreover, in terms of what constitutes "undue hardship," it would appear that the actual fact was simply that the landowner wanted to improve the condition of his tenants. What he sought was desirable, but probably not an undue hardship in its true legal meaning.<sup>161</sup> It is also not particularly "unique" in Little Rock or in other cities for a particular commercial structure to be short on parking.

Perhaps the strangest of the variance cases, however, is *City of Little Rock v. Leawood Property Owners Association*.<sup>162</sup> The board of adjustment had denied application for a variance to permit construction of a neighborhood swimming pool and recreational facilities in the contiguous subdivisions of the Leawood area of Little Rock. The same ordinance was in effect as that involved in *Kuehnert* and *Kaufman*, but the ordinance was not discussed in the *Leawood* opinion. The Arkansas Supreme Court instead discussed a statute relating to subdivision controls, and concluded that due to "the lack of any zoning classification for swimming pools by the city zoning ordinances," the testimony, and the statutory recognition of the desirability of community facilities, the variance would be "in keeping with the spirit and intent of the provisions of the zoning ordinance" and "the proposed variance would

---

157. 249 Ark. 530, 460 S.W.2d 88 (1970).

158. *Id.* at 532-33, 460 S.W.2d at 89-90 (1970).

159. 243 Ark. 746, 421 S.W.2d 896 (1967).

160. The ordinance is reproduced by the Arkansas Supreme Court in *City of Little Rock v. Kaufman*, 249 Ark. 530, 531, 460 S.W.2d 88, 89 (1970).

161. See the language of the Pennsylvania Supreme Court quoted in note 144 *supra*. Presumably "undue hardship" in the Arkansas statutes is essentially the same as "unnecessary hardship." To be unnecessary or undue, it must be a severe hardship which would be unreasonable to impose. Moreover, it must be a hardship which is unique and peculiar to the property in question and not commonly found (although the problem might be unique and peculiar to more than one lot).

162. 242 Ark. 451, 413 S.W.2d 877 (1967).



not alter the character of the neighborhood."<sup>163</sup> This peculiar commentary demonstrates either a lack of understanding or a lack of appreciation for the statutory requirements relating to variances. The statute requires an undue hardship which is unique and peculiar to the particular property involved. It would have been better to have treated this as in keeping with the spirit and intent of the zoning ordinance due to its enhancement of the residential character of the area—and thus an implied exception.

Neither an exception nor a variance should be confused with the device variously referred to as a conditional use permit, a special use permit, or a special exception.<sup>164</sup> Although some writers attempt to distinguish between these devices,<sup>165</sup> they are essentially the same thing.<sup>166</sup> Basically, such permits may be issued when the appropriate municipal agency finds that certain conditions or requirements have been satisfied.<sup>167</sup> That determination involves the exercise of some discretion and necessitates a quasi-administrative or quasi-judicial consideration. It provides flexibility in the sense that certain uses which are not permitted as a matter of right in particular use districts may be permitted conditionally when the end result will not adversely affect the comprehensive plan for the area and is not incompatible with permitted uses.<sup>168</sup> Normally, a zoning ordinance would provide for such permits to be administered by the board of adjustment, but the recent Little Rock zoning ordinance provides for administration by the Planning Commission.<sup>169</sup> This is due to the close connection between the planning and zoning process and the issuance of such permits and the fact that conditional use permits possess a potential for determining the future of the area involved.

The conditional use permit device is quite valuable in providing flexibility to the decisions of boards or commissions involved in the zoning process. It is not possible in an ordinance to pinpoint

---

163. *Id.* at 455, 413 S.W.2d at 880.

164. See *Tullo v. Township of Millburn*, 54 N.J. Super. 483, 149 A.2d 620 (1959); 3 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 18.01, .05 (2d ed. 1976); Note, *The Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 MINN. L. REV. 973, 997 (1965).

165. Green, *Are "Special Use" Procedures in Trouble?*, 12 ZONING DIGEST 73 (1960).

166. See 3 R. ANDERSON, *supra* note 164.

167. See note 156 *supra*.

168. Churches and schools, for example, might be appropriate in some residential areas and not in others due to the nature of the area or the size of streets and traffic problems.

169. Little Rock, Ark., Ordinance 13,777 (Dec. 18, 1979), § 4-102(A).

with accuracy the potential impact of every type of use. The same general type of use, described in fairly broad terms, may be appropriate as a conditional use in one situation and not in another. The impact upon the surrounding area may differ appreciably. The inflexibility of the old Little Rock ordinance often put the Planning Commission and the City Board in the position of either acting in a "hard-nosed" or "hold the line" manner in order to eliminate the possibility of permitting questionable uses in certain zones or loosely approving rezoning applications which held the potential for producing an inappropriate change in the character of the area. Obviously, the conditional use device reduces the potential for arbitrary or unreasonable conduct by the city and enhances its ability to accommodate certain uses without creating potential harm.

In the conditional use permit situation, the uses will be permitted if in the discretion of the Planning Commission and the Board, certain conditions have been met—the most important one being that the use in question will not be incompatible with the surrounding neighborhood and will not adversely affect the plan for the area. However, another practice which promotes flexibility and which has been instituted in Little Rock, at least, provides the basis for substantially greater controversy. It is a practice which has not at this time been tested in the Arkansas courts, although it has been either approved or disapproved by a fairly evenly divided number of jurisdictions. This is the device, which will next be discussed, of attaching additional conditions to the approval of rezoning applications.

### *Contract Rezoning and Conditional Rezoning*

First, it should be reiterated that the rezoning process varies from the process involving conditional use permits and variances. The variance involves, or should involve, extraordinary relief permitting a deviation from the requirements of the ordinance. A conditional use permit, or special use permit, or special exception involves a determination by the appropriate agency that conditions set forth in the ordinance have been met and that the use should therefore be permitted. Both procedures are clearly quasi-judicial or quasi-administrative in the sense that judgmental or discretionary actions are involved. In truth, rezoning is much the same in that it usually involves a rather limited area or single parcel. Legally, however, rezoning is viewed under the majority rule in the United States as involving a legislative act (which is why it must

be approved by the City Board of Directors or City Council to be effective). Of course, under the majority view, all of these activities are clothed with the legislative presumption of validity even though the granting of variances or approval of conditional uses is purely quasi-judicial and quasi-administrative in nature.<sup>170</sup>

Conditional rezoning does not refer in any way to the granting of a conditional use permit. It involves a situation in which conditions not provided for in the ordinance are attached to the approval of a rezoning application. The property is rezoned subject to compliance with these added conditions.<sup>171</sup>

There would not seem to be anything improper about the city attaching conditions to rezoning applications. Conditions are commonly attached to the approval of variances,<sup>172</sup> and a building permit will not be issued absent compliance. But rezoning is viewed as a purely legislative act despite the *ad hoc* nature of the process which normally takes place. If the process is viewed as strictly legislative, then the city may not delegate its police power. It is for this reason that contract rezoning is universally held invalid.<sup>173</sup>

Contract rezoning is a negotiation process between the municipality and a private person which leads to the reclassification of his land. The bargaining aspect taints the transaction irretrievably because the municipal corporation is compromising its authority to legislate under the police power for the welfare of the community.

---

170. *E.g.*, in *Montgomery County v. Mossburg*, 228 Md. 555, 180 A.2d 851 (1962), the Maryland Court of Appeals discusses whether conditions attached to the granting of a special exception might be deemed unreasonable, arbitrary, and capricious. *Zweifel Mfg. Corp. v. City of Peoria*, 11 Ill. 2d 489, 144 N.E.2d 593 (1957) involves a variance with conditions attached. The variance would have to be shown to be arbitrary and capricious to overcome the conditions. Of course, variances allow a *prohibited* use while conditional use permits or special exceptions involve situations which are permitted if the terms of the zoning ordinance are met. *Stacy v. Montgomery County*, 239 Md. 189, 210 A.2d 540 (1965). Neither situation, however, actually involves legislative action. Each is a form of administrative or quasi-judicial activity.

171. See generally Stefaniak, *The Status of Conditional Rezoning in Illinois—An Argument to Sustain a Flexible Zoning Tool*, 63 ILL. B. J. 132 (1974). Cases approving conditional rezoning include *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966); *Sylvania Elec. Prod., Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *Church v. Town of Islip*, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960); and *State v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970). Conditional rezoning, as stated, varies from the granting of conditional use permits or special exceptions because conditional rezoning attaches added conditions.

172. This is specifically authorized in ARK. STAT. ANN. § 19-2829(b) (1980).

173. See *Montgomery County v. National Capital Realty Corp.*, 267 Md. 364, 297 A.2d 675 (1972), which refuses to make a distinction between contract rezoning and conditional rezoning. See also Stefaniak, *supra* note 170.

This is viewed also as amounting to spot zoning and thus invalid.<sup>174</sup>

Conditional rezoning has been distinguished from contract rezoning in a number of jurisdictions.<sup>175</sup> Those courts reason that if the city is unilaterally imposing conditions which must be met and if the rezoning is contingent upon compliance with such conditions, then there is no contractual or bargaining process but simply the unilateral exercise of authority by the municipality.<sup>176</sup> The imposition of the conditions is further justified on the pragmatic ground that the landowner will be required to perform some action or construct certain improvements that will insulate the area from any adverse effects resulting from the rezoning. This approach protects the plan for the area while accomodating the landowner—the implicit idea apparently being that it might be held to be unreasonable or arbitrary to deny a rezoning request which presents a borderline situation and which would be reasonable and workable if certain conditions were met. An additional value to city planners is that flexibility in the zoning process is enhanced by the ability to rezone conditionally. A black or white answer can be avoided in gray cases without any harm being done.

Unlike those courts which distinguish conditional rezoning from contract rezoning, some jurisdictions take the position that both are essentially the same. The Maryland Court of Appeals, for example, has referred to “impermissible conditional zoning”,<sup>177</sup> which obviously means the same to Maryland as contract zoning. These courts do not accept the distinction between a bilateral contract (as in contract zoning) and a unilaterally imposed condition. Admittedly, the distinction is somewhat tenuous since any developer or landowner goes through a fairly extensive period of discussion and negotiation process of sorts with the planning staff and possibly even the planning commission prior to approval of the rezoning. Thus “unilateral” conditions actually have usually been worked out over a period of some time, and compromises have been made by the developer on the one hand and the planning staff or occasionally the commission on the other. Theoretically,

---

174. *Montgomery County v. National Capital Realty Corp.*, 267 Md. 364, 297 A.2d 675 (1972).

175. See note 171 *supra*.

176. See note 171 *supra*.

177. *Montgomery County v. National Capital Realty Corp.*, 267 Md. 364, 371, 297 A.2d 675, 680 (1972).

this should not matter since the planning commission merely recommends approval of rezoning requests to the board of directors or city council. As a practical matter, however, very few approvals of rezoning requests are not approved by the city board or council.

At present, there seems to be a fairly even split of authority on whether it is valid to make a distinction between conditional rezoning and contract rezoning, although the trend seems to favor the distinction. It is agreed by all that contract rezoning is invalid. The issue is whether to view conditional rezoning as constituting a separate category. The validity of conditional rezoning has largely been accepted in certain Midwestern and Northeastern jurisdictions,<sup>178</sup> while some jurisdictions in the Southeast have refused to make the distinction.<sup>179</sup> There is no particular reason for this seeming, although not unanimous, regionalism.

It is somewhat surprising, in view of the extensive use of the conditional rezoning device in Little Rock in the past two years, that Arkansas has never been presented with the question of its validity. Planners, generally speaking, would favor upholding the use of the device because of the flexibility and latitude which it affords. Probably most developers would also favor it because it presents the possibility of obtaining approval of a request which might otherwise be denied. Perhaps that is the reason for the absence of litigation to this point. Litigation, when it does come, may also obscure the issue by centering on whether the conditions being imposed are unreasonable and arbitrary rather than whether conditions may validly be imposed at all.

### *Zoning and Planning Devices: Buffer Zones, Floating Zones, Cluster Zones and the Planned Unit Development*

Buffer or transition zones, which are for the purpose of providing an orderly and non-abrasive transition from one use to another, have long been utilized as a planning device.<sup>180</sup> There are no serious questions remaining as to the legitimacy of the device when

---

178. See note 171 *supra*.

179. See *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956); *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835 (1972); *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). But see *Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d. 564 (1972) and *Cross v. Hall County*, 238 Ga. 709, 235 S.E.2d 379 (1977).

180. *Evanston Best & Co. v. Goodman*, 369 Ill. 207, 16 N.E.2d 131 (1938) is an early case. See also *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E.2d 670 (1965); 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 9.11 (2d ed. 1976).

used in a reasonable manner and when not imposed to the point of amounting to confiscation.<sup>181</sup> An example of the latter would be a situation in which a green belt, free of structures, was imposed upon property without compensation to the landowner and without any concomitant benefit to the owner of the green belt. (It might be validly imposed, for example, as a condition to the development of the remainder of the tract for a multi-family subdivision, thereby decreasing the impact of the higher density dwellings on adjoining single-family zones.) The more common use of the buffer or transition zone is to smooth the transition between a single-family neighborhood and a commercial area by placing a multi-family zone in between. A park or playground, of course, provides a perfect vehicle for use of the buffer concept, and this permits an even better transition between single-family and multi-family areas or between residential and commercial. Transition zoning was simply an early recognition of the problem of accomodating disparate land uses.

More recent and more sophisticated efforts to achieve the objective of making neighboring land uses compatible have centered around the cluster zone and the planned unit development (which is generally called the PUD). These are similar devices but differ in the sense that a cluster zone involves residential uses of varying kinds while a PUD also permits compatible commercial uses and may include light industry.<sup>182</sup> Both devices are attempts to provide flexibility and to enhance aesthetics and property values. Traditional Euclidian zoning was rigid in the sense that setback lines, side-lot and back-lot lines, minimum lot sizes and the like produced subdivisions having much the appearance of a sheet of postage stamps. Structures were in similar locations on lots of similar size.

Cluster zoning permits a relaxation of the setback, side-yard,

---

181. Buffer zones are usually or quite often interrelated with the rezoning of undeveloped land. Thus, the North Carolina Supreme Court deemed it reasonable to require a 150 foot buffer strip between a residential area and an area being rezoned. *Penny v. City of Durham*, 249 N.C. 596, 107 S.E.2d 72 (1959). The buffer zone becomes part of a package in which the value of the rezoned property is enhanced to the point that its buffer part does not have a confiscatory or even a serious effect. See also *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E.2d 670 (1965).

182. One of the early cases approving the PUD was *Chrinko v. South Brunswick Township Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (1963). The distinction between the PUD and the cluster zone was set out in *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

and other requirements so that residential uses may be clustered closer together without increasing the population density. The space that is freed through clustering becomes open space, woodland, parks and recreational facilities. Thus, the population density remains the same and an area is created which has some of the amenities of rural living within an urban environment. The device has been used advantageously in certain rugged areas along the California coast and the same could certainly be said for its potential in some of the rugged terrain in western Little Rock, the Fayetteville-Springdale area, the Hot Springs area, and similar mountainous or hilly areas.

The Planned Unit Development or PUD is authorized by ordinance in Little Rock,<sup>183</sup> although it has not been put to extensive use by developers. The apparent reason is that it requires extensive site plan review of the area being developed. As mentioned, the potential scope of a PUD is greater than that of a cluster development. Clustering still takes place in the sense that the population density within the area is intended to remain about the same as if setback and similar requirements were met. On the other hand, there is a greater mix of uses within a PUD. The idea is that these varying uses will be blended so as to create an aesthetically pleasing, interrelating unit which is advantageous in terms of property values. The open land within the PUD should provide a buffer between the commercial or light industrial area and the residential area. Transition concepts are still important in relation to the development of a PUD. In this respect, the PUD concept of a harmonious blending of different uses is comparable on a smaller scale to the new town concept.<sup>184</sup> While the PUD obviously lends itself to a potential for abuse if it is used as a sham to permit commercial or industrial development in a non-orderly manner within a residential area, it possesses a number of positive values if used properly. For one thing, it has the planning value

---

183. Originally a separate ordinance, this was re-enacted as Article IX of Little Rock, Ark., Ordinance 13,777 (Dec. 18, 1979).

184. Extensive material on new towns may be found in J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE* 1080-1101 (2d ed. 1976); and D. HAGMAN, *URBAN AND LAND DEVELOPMENT* 1048-1126 (1973). A new town is planned from its inception, and in England was started in the open country and surrounded by green belts. In the United States, new towns have more often than not been satellite communities established within commuting distance of larger urban areas. A PUD takes on the potential of a new town if it involves a substantial area and a substantial variety of uses even though it exists within the corporate limits of a city.

(and energy-saving value) of permitting people to live close to shopping areas or close to where they work. If it is a carefully planned PUD, it permits emphasis on the same aesthetic values implicit in the cluster zone. In order to achieve its objective, an appropriate PUD should contain a fairly substantial amount of acreage, and the ordinance should require an adequate percentage of open space. Otherwise, the PUD concept could be perverted for monetary gain by land developers and could have an adverse impact on neighboring residential property. Concern over this problem is the reason why careful site plan review is vital to the success of the PUD.

When the Arkansas enabling act was passed in 1957, the PUD concept was either non-existent or existed only in the theories of a few urban planners or architects. It does have some interrelationship with the older planning idea of having a number of satellite cities or commercial areas within an urban complex rather than placing so much emphasis on the central core.<sup>185</sup> Obviously, it is also a logical extension of the neighborhood shopping center complex in that it simply goes a step beyond by attempting to plan the residential component as well. Be that as it may, the Arkansas statutes are silent with regard to the PUD, the cluster zone concept, and similar modern devices aimed at providing flexibility in lieu of older planning and zoning concepts. The intent of the enabling act, however, would appear to permit such devices. Planning is intended to be implemented through zoning, which involves various bulk and density controls, but there is nothing in the statute which would prevent a juggling of such controls in such a way as to achieve better planning.<sup>186</sup> Moreover, the same provisions give the planning commission extensive power over subdivision developments,<sup>187</sup> and the PUD and cluster zone represent forms of subdivision development with certain ordinary zoning requirements waived in order to achieve worthwhile objectives. Thus, while the PUD has never been challenged in Arkansas, the device probably

---

185. This concept, along with the use of the PUD, is especially relevant today in view of the energy shortage. Cities will increasingly have to consider the energy problem in conjunction with planning.

186. ARK. STAT. ANN. § 19-2829(d) (1980) states that the city legislative body *may* establish setback lines on major streets. Subsection (c) states that the municipality *may* establish certain regulations controlling subdivision of land. The overall thrust of the Arkansas statutes should present no impediment to the PUD device. See in particular *Id.* § 19-2825(a).

187. *Id.* § 19-2829(c).



would be upheld.

The floating zone is something of a forerunner of the PUD and cluster zones which seem not to have been very widely used in the United States and which met with divided opinions when challenged in the courts. Basically, the particulars of such a zone are defined in the ordinance, but its location is not designated on maps of the municipality. The idea is that when the planning commission or board finds that a situation exists which calls for that particular type of zone, then it ceases to "float" and comes to earth, so to speak, at that location by virtue of the rezoning process.<sup>188</sup> In *Rodgers v. Village of Tarrytown*,<sup>189</sup> a 1951 case, New York upheld the device when it was used to permit a floating zone of garden apartments to be located in a single-family residential area. The Court of Appeals felt that this action was part of the comprehensive plan and did not amount to spot zoning. Maryland followed suit, even to the point of permitting a restricted manufacturing district to "float" into a largely residential area.<sup>190</sup> Pennsylvania, however, invalidated the floating zone device as amounting to spot zoning and as not being in accord with the concept of comprehensive planning.<sup>191</sup>

The question is probably moot in Arkansas. The floating zone device is not in general use in the state, and the PUD provides greater flexibility along with greater planning utility.

### *Lot Size, Setback, and Similar Requirements*

The recently adopted Little Rock zoning ordinance has provisions relating to minimum lot sizes.<sup>192</sup> Also, as contemplated by the state enabling act, it has numerous provisions pertaining to setback requirements as to the front yard, backyard and side of the lot.<sup>193</sup> The ordinance also contains height restrictions.<sup>194</sup> In sum-

---

188. On the floating zone device, see generally Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); Comment, *Zoning—The Floating Zone: A Potential Instrument of Versatile Zoning*, 16 CATH. U.L. REV. 85 (1966).

189. 302 N.Y. 115, 96 N.E.2d 731 (1951).

190. *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957). See also *Beall v. Montgomery County Council*, 240 Md. 77, 212 A.2d 751 (1965).

191. *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960). See, on this case, Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary*, 74 HARV. L. REV. 1552 (1961).

192. Little Rock, Ark., Ordinance 13,777 (Dec. 18, 1979) §§ 7-101.1(d)(4), .2(d)(4), .3(d)(4), .4(d)(4), .5(d)(4), .6(d)(4), .7(d)(5), .8(e)(4).

193. *Id.* §§ 7-101.1(d), .2(d), .3(d), .4(d), .5(d), .6(d), .7(d), .8(e), .9(e).

mary, it follows the traditional Euclidian pattern of dictating in large measure the location of a building on a particular lot. There is nothing peculiar about any of this<sup>195</sup> and the legality of such regulations has not come into question in Arkansas. If any of these provisions were to be challenged, it would likely be those relating to minimum lot sizes. The minimum lot sizes in the Little Rock ordinance, however, are so extremely minimal that it seems unlikely that a challenge would meet with success. The largest of the minimums is 15,000 square feet, and numerous cases in other states have upheld much higher minimums.<sup>196</sup> If Little Rock had adopted an ordinance permitting a zone requiring three-acre minimum lots and had imposed a requirement of that type on the more expensive residential area developing beyond Pleasant Valley, the developers probably would have set Olympic records heading for the courthouse. Yet, although there are cases to the contrary, three-acre lot minimums have been upheld as well as even larger minimum lot sizes.<sup>197</sup>

The arguments for and against minimum lot sizes are probably immaterial in Arkansas because of the *de minimus* nature of the minimum sizes. The basic argument of developers against minimum lot sizes, however, is that they bear no reasonable relationship to the police power and that they are therefore confiscatory in

---

194. *Id.* §§ 7-101.1(c), .2(c), .3(c), .4(c), .5(c), .6(c), .7(c), .8(d), .9(d).

195. See generally 2 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 9.50-.67 (2d ed. 1976); Goldston & Scheur, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); Toll, *Zoning for Amenities*, 20 L. & CONTEMP. PROB. 266 (1955). The Standard State Zoning Enabling Act, prepared by the U.S. Department of Commerce in 1928, and which formed the basis or model for practically all state enabling acts in the early days of zoning, provided for height, size, amount of the lot which could be occupied, size of lots and open spaces, and population density.

196. Little Rock, Ark., Ordinance 13,777 (Dec. 18, 1979) § 7-101.1(a) (1979). Cases approving large minimum lot sizes include *Senior v. Zoning Comm'n*, 146 Conn. 531, 153 A.2d 415 (1959) (four-acre minimum); *County Comm'rs of Queen Anne's County v. Miles*, 246 Md. 355, 228 A.2d 450 (1967) (one zone with a five-acre minimum in a relatively rural area); *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1943) (one-acre minimum); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952) (three-acre minimum); *Franmor Realty Corp. v. Wesbury*, 280 App. Div. 945, 116 N.Y.S.2d 68 (1952) (two-acre minimum).

197. See note 195 *supra*. But cf. *Kavanewsky v. Zoning Bd.*, 160 Conn. 397, 279 A.2d 567 (1971) (reversing an increase from one to two acres); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) (striking down a 100,000 square foot minimum); *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970) (striking down two-acre and three-acre minimums); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) (striking down an increase from one-acre to four-acre minimums); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959) (striking down a two-acre minimum).

nature and constitute a taking under the guise of the police power.<sup>198</sup> The arguments supporting minimum lot sizes are predicated on the police power—*e.g.*, that safety is promoted through a reduction of the hazard of fire and through a reduction in traffic congestion; that health is benefitted by the aesthetics and quietude of large lots and by minimizing the requirements as to sewer and water lines; and that the public welfare in general is benefitted through the protection of property values and in relation to the tax base.<sup>199</sup> The difficulty with some of the arguments which support large minimum lot sizes is that if a large minimum is for the public welfare in one area, then the same should be true in other parts of the municipality. This line of thought proved to be the downfall of the ordinance in one situation involving minimum floor space requirements for houses.<sup>200</sup> Minimum floor space requirements have generally been upheld as a valid exercise of the police power,<sup>201</sup> although the question is largely moot in Arkansas because of the tendency to leave it to be handled through restrictive covenants in subdivision developments.

In summary, the bulk, height, setback, and lot area requirements in Arkansas are both traditional and minimal. Litigation as to the basic question of validity appears unlikely.

### *Exclusionary Zoning*

One of the most discussed topics in land use litigation in recent years relates to exclusionary zoning. In a sense the term "exclusionary zoning" is a redundancy. All zoning is exclusionary in one way or another. Euclidian zoning was cumulative in nature in that higher uses (*e.g.*, residential) were permitted in lower use zones (*e.g.*, commercial). More recent ordinances have tended toward non-cumulative zoning. For example, housing (in the absence of a planned unit development) would not be permitted in an industrial zone. This has the advantage of preventing disparate land uses within essentially the same area as well as preventing litiga-

---

198. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

199. *See Josephs v. Town Bd.*, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (1960) and *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

200. *In re Medinger*, 377 Pa. 217, 104 A.2d 118 (1954).

201. *Annot.*, 96 A.L.R.2d 1409, 1411 (1964). The leading case is probably *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693, *appeal dismissed*, 344 U.S. 919 (1953). *See also Senefsky v. Lawler*, 307 Mich. 728, 12 N.W.2d 387 (1943).

tion arising from the law of nuisance.<sup>202</sup>

But the cases on exclusionary zoning do not relate to the establishment of zones in general or to cumulative or non-cumulative zoning ordinances. Exclusionary zoning arises in situations in which a municipality zones in such a manner as to prevent a substantial number of people or certain economic, racial, or age groups from living there. While other discussions of exclusionary zoning go into much greater detail,<sup>203</sup> this discussion will attempt only to pinpoint the more common situations in which such allegations arise due to the fact that the question has not yet been presented in Arkansas:

(1) *The minimum lot size cases.* These were some of the earlier exclusionary zoning cases and were brought by developers. In addition to the standard arguments of the lack of relationship of large lot zoning to the police power and the confiscatory nature of the restrictions, the added argument was advanced that the end result would be to exclude people from the community. One of the leading cases on this is *National Land & Investment Co. v. Kohn*,<sup>204</sup> in which the Pennsylvania Supreme Court stated that a township faced with an expanding population in the area could not block suburban development through large minimum lot sizes.<sup>205</sup> The seed of this idea was planted earlier by the Massachusetts Su-

---

202. *Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 258 N.Y.S. 229 (1932) is an example of the nuisance problem and how it can arise. *See also*, *City of Fort Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 239 S.W. 724 (1922); *Koseris v. J. R. Simplot Co.*, 82 Idaho 263, 352 P.2d 235 (1960); *York v. Stallings*, 217 Or. 13, 341 P.2d 529 (1959). In *Rockenbach v. Apostle*, 330 Mich. 338, 47 N.W.2d 636 (1951), the Michigan Supreme Court stated that the weight of authority is to the effect that a zoning ordinance permitting certain uses in a particular zone is not controlling as to whether the use in question might be enjoined as constituting a nuisance. *But see* *Green v. Castle Concrete Co.*, 181 Colo. 309, 509 P.2d 588 (1973), but note the dissent of Chief Justice Pringle.

203. *See generally* 27 LAND USE LAW & ZONING DIGEST, No. 6 (1975) dealing with *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975); Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841 (1978); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Controls*, 22 SYRACUSE L. REV. 509 (1971).

204. 419 Pa. 504, 215 A.2d 597 (1965).

205. The township had increased the lot minimum from one acre to four acres and had diminished the value of the tract from \$260,000 to \$175,000 in so doing. Easttown Township was almost exclusively residential and was in the path of population expansion from two directions in the area near Philadelphia. The Pennsylvania Supreme Court stated that zoning could not be used as a device to stand in the way of a growing population and prevent the entrance of newcomers. This position was reaffirmed in *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

preme Court in *Simon v. Town of Needham*,<sup>206</sup> which upheld a one-acre minimum but stated that this type of regulation could not be employed to exclude people who wished to live there and build on lots of reasonable size. (The developers in *National Land*, of course, were not particularly concerned about excluding people but about securing the greatest possible return on their investment. This and other cases, however, lent impetus to litigation based upon civil rights arguments as opposed to the more traditional argument of taking-versus-police power.)

(2) *The minimum dwelling size cases.* These cases are perhaps more important for the controversy that they spawned and the issues presented in the arguments than for what they actually held. The most important of them was *Lionshead Lake v. Township of Wayne*,<sup>207</sup> a 1953 New Jersey case which was attacked by a leading scholar as promoting economic segregation.<sup>208</sup> What the New Jersey Supreme Court did was to uphold zoning requiring minimum floor space requirements for single-family dwellings on the basis that a minimum area was required for the mental health of the occupants. Minimum floor space requirements have generally been upheld in the United States.<sup>209</sup> Even though the situation in *Lionshead Lake* related to a problem created by vacation or second homes, it was argued that such requirements would exclude people on the basis of economics. The theory of those attacking *Lionshead Lake* survived to manifest itself in subsequent exclusionary zoning cases.<sup>210</sup>

---

206. 311 Mass. 560, 42 N.E.2d 516 (1942). See also *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964).

207. 10 N.J. 165, 89 A.2d 693, *appeal dismissed*, 344 U.S. 919 (1953).

208. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953). A response to Professor Haar's article was made by two other law professors: Nolan & Horack, *How Small A House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954). This was followed by Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954). See also Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827; Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186.

209. Annot., 96 A.L.R.2d 1409, 1411 (1964).

210. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975). Mount Laurel's system of land use regulation was such that the court found that people of low and moderate income were being effectively excluded from moving there. The New Jersey Supreme Court found this type of zoning to be violative of the substantive due process and equal protection requirements of the New Jersey Constitution. The decision was not based on racial discrimination but on economic discrimination resulting from the exclusion of housing intended for low and

(3) *The mobile home cases.* One of the arguments advanced by Justice Sutherland in sustaining comprehensive zoning in *Village of Euclid v. Ambler Realty Co.*<sup>211</sup> was that apartment houses should not be permitted to co-exist with single-family dwellings. He spoke of apartment houses as some people since World War II have spoken of mobile homes.<sup>212</sup> Some municipal corporations have attempted to exclude mobile homes by not providing for them in the zoning ordinance. This has been upheld in some cases and invalidated in others.<sup>213</sup> The argument that it is invalid not to provide for mobile homes in certain zones within the general area is based on the view that this amounts to an exclusion of an otherwise valid residential use.<sup>214</sup> It obviously has economic ramifications.

(4) *The "timed and sequential growth" cases.* These cases involve subdivision developments rather than zoning, but they interrelate with the problem of exclusion. If a suburban community is in the path of rapid urban expansion, it may find itself overwhelmed in its ability to provide the necessary municipal services to cope with such rapid growth. It is reasonably clear that a "no growth" policy which would have the effect of excluding outsiders by keeping population at a predetermined level would be an unconstitutional violation of the interstate commerce clause and the

---

moderate income groups.

211. 272 U.S. 365 (1926).

212. Sutherland wrote:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business. . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses . . . come very near to being nuisances.

*Id.* at 394-95.

213. *Compare Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129, *cert. denied*, 371 U.S. 233 (1962), with *Town of Gloucester v. Olivo's Mobile Home Court, Inc.*, 111 R.I. 120, 300 A.2d 465 (1973). *See also Gust v. Canton Township*, 342 Mich. 436, 70 N.W.2d 772 (1955).

214. *See Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129, (Hall, J., dissenting), *appeal dismissed*, 371 U.S. 233 (1962).

right to travel freely from place to place.<sup>215</sup> On the other hand, if the development of municipal facilities is keyed to a plan which permits population expansion to coincide with construction of facilities, and if the plan results from careful study and is reasonable and not arbitrary, then the plan will likely be approved.<sup>216</sup>

(5) *The multi-family dwelling cases.* These cases are in the forefront of litigation on exclusionary zoning. The city of St. Louis and its satellite suburban communities in St. Louis County provide a prime example of the problem. The situation is described graphically by the Court of Appeals for the Eighth Circuit in *United States v. City of Black Jack*.<sup>217</sup> In essence, the court demonstrated that a zoning regulation in Black Jack which excluded multi-family dwellings (and thereby excluded public housing for low income families) had the effect of locking into the city of St. Louis low income people, a substantial proportion of whom were blacks. Black Jack's ordinance was invalidated because of its discriminatory effect. Something of a limitation on this case, however, is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>218</sup> a more recent United States Supreme Court decision which stated (a) that only racial, and not economic, segregation was prohibited under the Constitution and civil rights legislation; (b) that the 14th amendment was violated (in the absence of a taking) only if there was a discriminatory intent; but (c) that in connection with public housing cases, the test might be somewhat different. Upon remand, the Seventh Circuit Court of Appeals stated that the fair housing legislation might impose standards which were more stringent and could invalidate local zoning under conditions which fell short of showing an intent or purpose to discriminate. A showing of some discriminatory purpose joined with a discriminatory effect or simply the effective exclusion of publicly supported housing projects due to zoning regulations could invalidate the zoning.<sup>219</sup> The Eighth Circuit has since followed with a decision which is even stronger and which may go too far under the

---

215. *Edwards v. California*, 314 U.S. 160 (1941).

216. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976); *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972).

217. 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

218. 429 U.S. 252 (1977).

219. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

Supreme Court decision in *Arlington Heights*.<sup>220</sup>

Of course, *Arlington Heights* and *Black Jack* were cases involving public housing and in which the question of racial discrimination and the civil rights of minorities was the central issue. Although New Jersey has held that economic discrimination resulting from zoning is unconstitutional under its state constitution,<sup>221</sup> other states have upheld zoning regulations which limited all land use in a suburban community to single-family residential. Missouri is a prime example of one jurisdiction so holding, in other cases involving the St. Louis area,<sup>222</sup> although there is authority to the contrary.<sup>223</sup> Even in the public housing situation, no less a civil libertarian than Justice Hugo Black wrote in *James v. Valtierra*<sup>224</sup> that the state of California, because of its long history of the use of the initiative and referendum process, could provide for a public referendum in a community before a public housing project would be allowed.<sup>225</sup> Nonetheless, the *Arlington Heights* test enunciated by the Seventh Circuit upon remand by the Supreme Court indicates that in the absence of such a situation as that in California, exclusion of public housing is viewed differently from exclusion of multi-family housing in general.

Cases of this type seem less likely to arise in Arkansas than in

---

220. *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979), cert. denied sub nom. *City of Black Jack v. Bates*, 445 U.S. 905 (1980). This case goes beyond the Seventh Circuit's formula in *Arlington Heights*, in indicating that the city should be "required to take affirmative steps . . . in its efforts to bring low cost housing to Black Jack." 605 F.2d at 1040.

221. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975).

222. *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970).

223. *Gundersen v. Village of Bingham Farms*, 372 Mich. 352, 126 N.W.2d 715 (1964), which relied in part upon an earlier Missouri case which was reversed in *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970). See also *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931).

224. 402 U.S. 137 (1971).

225. The Supreme Court of Ohio in *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), concluded that a provision for a mandatory referendum on changes in land use was a denial of due process of law, but the United States Supreme Court reversed this decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). The problem with referendums, mandatory or otherwise, is that there is a general lack of knowledge and expertise on the part of the public and the bias or whim of the majority prevails. In *James v. Valtierra*, 402 U.S. 137 (1971), the end result of the California requirement is to permit exclusion of public housing by a popular vote based upon racial or economic prejudice. The decision still stands, but it seems in clear conflict with the thinking of more recent United States Supreme Court cases on the subject of public housing, such as *Hills v. Gautreaux*, 425 U.S. 284 (1976).



states with large urban areas. A case relating to this situation would more likely arise in a setting comparable to that in *Hills v. Gautreaux*.<sup>226</sup> That case required the Chicago Housing Authority and the Department of Housing and Urban Development to seek area-wide solutions to the public housing problem in the Chicago area. This meant that public housing projects had to be dispersed throughout the area, including the suburbs, and not centered in certain sections of the City of Chicago. (This ultimately led to the *Arlington Heights* confrontation.) An analogy was drawn to a leading school busing case.<sup>227</sup> It could be argued, in the case of Little Rock, that future public housing should not be located east or south of the business district and should be dispersed throughout the city or into North Little Rock, Sherwood, and Jacksonville. Perhaps the Little Rock metropolitan area is not sufficiently large to sustain such an argument, but the argument is not beyond the realm of possibility.

### *Particular Types of Uses.*

Arkansas has had litigation involving certain types of uses which did not stem directly from zoning regulations but which affect zoning law. An example is the line of cases holding funeral homes to be a nuisance per se when located in a predominantly residential area.<sup>228</sup> The underlying reasoning of such cases is the discomfort and malaise produced in the neighbors by the presence of the funeral home. Thus, in a sense, the basis for the reasoning is predicated upon aesthetic considerations.<sup>229</sup> On the other hand, cemeteries are generally not viewed as nuisances in the absence of potential health hazards.<sup>230</sup> Apparently, the feelings of the neigh-

---

226. 425 U.S. 284 (1976).

227. *Milliken v. Bradley*, 418 U.S. 717 (1974). Justice Tom C. Clark wrote the opinion in *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974), *aff'd sub. nom. Hills v. Gautreaux*, 425 U.S. 284 (1976). He distinguished the reason for denying an area-wide solution in that case from the logic of an area-wide solution to the public housing problem in the Chicago area.

228. See, e.g., *Powell v. Taylor*, 222 Ark. 896, 263 S.W.2d 906 (1954).

229. This is apparent from such cases as *Smith v. Fairchild*, 193 Miss. 536, 10 So. 2d 172 (1942); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Fraser v. Fred Parker Funeral Home*, 201 S.C. 88, 21 S.E.2d 577 (1942). The Missouri case speaks of the psychological problems and mental depression produced by the proximity of a funeral home.

230. *McDaniel v. Forrest Park Cemetery Co.*, 156 Ark. 571, 246 S.W. 874 (1923); *McCaw v. Harrison*, 259 S.W.2d 457 (Ky. 1953); *Jones v. Highland Memorial Park*, 242 S.W.2d 250 (Tex. Civ. App. 1951); *Young v. St. Martin's Church*, 361 Pa. 505, 64 A.2d 814 (1949). If a cemetery endangers the public health in some way, it can constitute a nuisance.

bors are somewhat mitigated if the nearby deceased are securely planted rather than awaiting interment. In any event, zoning ordinances must take account of nuisance doctrine in this regard.

Another situation which relates even more directly is that involving "halfway houses" for the rehabilitation of prison inmates or guidance centers for juvenile delinquents or mentally disturbed individuals. Courts have often found it reasonable to exclude such facilities from single-family districts. Although the decisions are predicated on the police power, the basis for such exclusion is actually the hostility, fear, and general discomfort of neighboring landowners. Arkansas has held that the operation of a halfway house in a residential neighborhood would constitute a nuisance.<sup>231</sup> The end result of that case is to exclude such operations from constituting a permissible use within a residential zone even though the underlying social purpose of such houses is to rehabilitate the residents to living in free society. Presumably, the rule would apply regardless of the particular residential classification.

Certain uses, on the other hand, have received preferred treatment over the years. A prime example is the location of churches in single-family residential districts. Some courts have taken the view that churches are entitled as a matter of right to build in such areas since to do otherwise would offend the first amendment to the United States Constitution as applied to the states through the fourteenth amendment.<sup>232</sup> Other courts have chosen to treat churches as uses which must be permitted in residential areas unless reasonable provision has been made for them within the general vicinity or elsewhere in the community, while in some situations, courts have approved the use of conditional use permits in relation to churches — *i.e.*, churches are treated by the ordinance

---

231. *Arkansas Release Guidance Foundation v. Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972).

232. The Texas Supreme Court stated in *City of Sherman v. Simms*, 143 Tex. 115, 119, 183 S.W.2d 415, 417 (1944):

To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.

See also *Board of Zoning Appeals v. Decatur Council of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954); *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827 (1956); *State v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

as conditional uses in residential districts.<sup>233</sup> The Little Rock zoning ordinance follows this latter procedure.<sup>234</sup> Although this question has not been considered in Arkansas, it would seem that the latter procedure should be upheld. Churches are not being excluded, and unless a proposed church offers particular problems, such as through the additional construction of recreational facilities which will present abnormal traffic problems, a conditional use permit will usually be granted.

Other designated preferred uses include hospitals and schools. The problem with designating a use as "preferred" is that many residential areas cannot accomodate the problems produced by such uses, and if a use is "preferred," the burden passes to the municipality to justify its exclusion.<sup>235</sup>

In that regard, schools provide additional considerations which spawn litigation. If a zoning ordinance permits public schools within a given zone, for example, is it legitimate to exclude parochial or private schools? Some courts have held that public schools are a governmental function and thus can be distinguished on that basis.<sup>236</sup> This is a rather tenuous argument. The object of zoning is to fulfill a sound plan for the area, and it is difficult to argue rationally that a public school is somehow less of an influence or problem with regard to the plan than a private or parochial school. The better view, therefore, is that no reasonable distinction can be made.<sup>237</sup> Further, it should be observed that private and parochial schools also serve a public function indirectly through relief of the burden on the public schools. In this same regard, it seems untenable under ordinary circumstances to permit high schools and elementary schools in a zone and exclude kindergartens or day schools.<sup>238</sup> While there are certain requirements with regard to the

---

233. *State v. Village of Bayside*, 12 Wis. 2d 585, 108 N.W.2d 288 (1961).

234. *Little Rock, Ark., Ordinance 13,777* (Dec. 18, 1979) §§ 7-101.1(B)(4)(2), 7-101.3(B), 7-101.4(B), 7-101.5(B)(3), 7-101.6(B)(3), 7-101.7(B)(2) (1979). Several cases uphold denials of special or conditional use permits to churches under this type of ordinance. *West Hartford Methodist Church v. Zoning Bd. of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956); *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E.2d 834 (1950); *Milwaukee Council of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5 (1958).

235. See *Williams, The Three Systems of Land Use Control*, 25 *RUTGERS L. REV.* 80, 92 (1970).

236. *State v. Sinar*, 267 Wis. 91, 65 N.W.2d 43 (1954), *appeal dismissed*, 349 U.S. 913 (1955).

237. See *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 289 P.2d 438 (1955); *Catholic Bishop v. Kingery*, 371 Ill. 257, 20 N.E.2d 583 (1939).

238. See *City of Chicago v. Sachs*, 1 Ill. 2d 342, 115 N.E.2d 762 (1953).

land area required for high schools and elementary schools, which may not exist for kindergartens, the ultimate adverse impact on the neighborhood would seem to be much less as the result of the operation of a kindergarten or day school.

Although there are preferred uses, there are also non-preferred uses, so to speak. Clubs, fraternities, and sororities have uniformly been barred from single-family residential districts.<sup>239</sup> This is logical and appropriate. But peculiar judicial gyrations occur if the situation involves an order of nuns or housing for nurses attached to religious groups.<sup>240</sup> While reason is defied as far as zoning is concerned, courts apparently prefer nuns and nurses to Pi Phis and Tri Deltas.<sup>241</sup>

#### IV. AN ARKANSAS ODDITY: THE "PFEIFER RULE" AND ITS LINGERING DEMISE

The *Pfeifer* rule, as it came to be known, has received adequate attention in the past.<sup>242</sup> The attention was merited only because the rule was an Arkansas peculiarity unknown to the law of other states and contrary to the basic propositions of zoning as expressed both in the Arkansas statutes and in the fundamental premise that zoning is the result of a comprehensive plan. The *Pfeifer* rule did not have anything to do with a plan regardless of whether the plan was meritorious or defective. *City of Little Rock v. Pfeifer*<sup>243</sup> laid down this rule: "[A]ny attempt on the part of the city council to restrict the growth of an established business district is arbitrary."<sup>244</sup> Of course, nothing could have been more arbitrary or contrary to comprehensive planning than that statement itself.

The *Pfeifer* rule is largely or should be only of historical sig-

---

239. See, e.g., *City of Schnectady v. Alumni Ass'n of Union Chapter*, 5 App. Div. 2d 14, 168 N.Y.S.2d 754 (1957).

240. See, e.g., *Robertson v. Western Baptist Hosp.*, 267 S.W.2d 395 (Ky. 1954); *La-porte v. City of New Rochelle*, 2 N.Y.2d 921, 141 N.E.2d 917, 161 N.Y.S.2d 886 (1957); *Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954).

241. It is an incredulous strain on judicial logic to conclude that a religious order or home for nursing students fits the single family classification. These should properly fall into the same zoning category as that relating to fraternities or clubs. For a discussion of what constitutes a family, see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). On clubs, see *Annot.*, 52 A.L.R.2d 1098 (1957).

242. See Gitelman, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22 (1969); Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 262 (1974).

243. 169 Ark. 1027, 277 S.W. 883 (1925).

244. *Id.* at 1029, 277 S.W. at 885.

nificance today. The basic premises which sustain planning and zoning and thus are the antithesis of *Pfeifer* led to its ultimate downfall. The process began as early as 1952 in *Evans v. City of Little Rock*.<sup>245</sup> *Evans* rather weakly invoked the *Pfeifer* doctrine in that the landowner sought to expand a small nonconforming factory into what was almost an exclusively residential area. The first important rejection of the rule did not occur until a year later in *City of Little Rock v. Connerly*<sup>246</sup> in which the landowner wanted to rezone property on Broadway in Little Rock from an apartment classification to commercial in order to operate a radio and appliance shop. Although the area was one of mixed commercial, office, and multi-family uses, the Arkansas Supreme Court ignored *Pfeifer*, took note that more than twenty neighbors protested, and reversed the chancellor.<sup>247</sup> Denial of the request to rezone might have been a mistake — not because of the *Pfeifer* rule, not because the neighbors protested, but simply because the area may have changed to the point that rezoning was appropriate. Nonetheless, it seemed to cause grief at the court, and the mistake was acknowledged in *City of Little Rock v. Andres*,<sup>248</sup> some eleven years later. This again involved property on Broadway, about eight blocks further from the central business district than the property in *Connerly*. Noting that no property owners had “intervened” (i.e., protested), the court concluded that it “appears that we made a

---

245. 221 Ark. 252, 253 S.W.2d 347 (1952). This involved a continuing dispute first manifested in the supreme court in *City of Little Rock v. Evans*, 213 Ark. 522, 212 S.W.2d 28 (1948), in which the landowner's suit to enjoin the city from enforcing a zoning ordinance was held to be premature for the reason that *Evans* had not exhausted his administrative remedies.

246. 222 Ark. 196, 258 S.W.2d 881 (1953).

247. The effect of protest by neighboring landowners was the subject of an article by Professor Morton Gitelman. Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 221 (1974). Clearly, protest, or the lack thereof, is an influencing factor in rezoning applications, as the author of the instant article can attest from his service over the past two years on the Little Rock Planning Commission. Properly, however, the decision to rezone should not be predicated on whether the neighbors oppose, support, or are indifferent to the requested rezoning. There is some value in hearing from the neighbors on certain occasions in that the neighbors sometimes produce information which is not contained in the report of the Planning Staff and should be taken into account in considering the rezoning. Moreover, the hearing before the Planning Commission sometimes leads to reconciliation of the issues between the developer and the neighbors or concessions on the part of the developer which make the rezoning request more palatable to the neighbors. Even then, the final decision should be reached on the basis of whether the rezoning proposal is reasonable based upon conditions in the area and what effect it will have on the plan for the area involved.

248. 237 Ark. 658, 375 S.W.2d 370 (1964).

mistake" in *Connerly*.<sup>249</sup> The same reasoning was followed in *City of Little Rock v. Gardner*,<sup>250</sup> also allowing rezoning of property on Broadway from multi-family to commercial.

The Blytheville "crosstown" area was, like Broadway in Little Rock, a point of contention over the *Pfeifer* rule. *Pfeifer* was applied in *City of Blytheville v. Lewis*<sup>251</sup> but not in *Gammill v. City of Blytheville*.<sup>252</sup> The *Gammill* property was across the street from that involved in *Lewis*, but in denying the appellants' request to build a gasoline station across the street from the "Kream Kastle" drive-in that existed due to *Lewis*, the Arkansas Supreme Court decided to draw the commercial zoning line at Walnut Street, which divided the service station property and the Kream Kastle. The court felt that the residential district across from the Kream Kastle was advancing rather than deteriorating "in the face of an advancing commercial district."<sup>253</sup>

Nonetheless, the *Pfeifer* dogma lived on in cases decided in 1960 and 1965.<sup>254</sup> The retreat from *Pfeifer* began in 1966 in *Downs*

---

249. *Id.* at 659, 375 S.W.2d at 371-72. The court emphasized that in *Connerly*, twenty property owners had protested the change while in *Andres*, no neighbors had "intervened." That is relevant only if you indulge in the presumption that because no one objected the application must have been proper. It fails to take into account several other factors which can lead to non-protest: (a) the developer convinces the people in the area that his project will not be harmful and will enhance their property values (which may or may not be the case, and in either event, does not deal with the question of whether his development will be compatible with the plan for the area or with existing land uses); (b) the neighbors do not feel that their protests would avail them anything because the developer is prominent and wealthy and they are not or because they feel that city government is in the hands of the "fat cats" anyway and that the planning commission is so oriented; (c) the neighbors have to work and cannot appear at one or more afternoon meetings of the commission; (d) the neighbors do not understand the notice or the procedure and do not realize that they have any effective recourse; or (e) the developer or petitioner for the rezoning is himself a neighbor who is a "good guy" and it would not be "nice" or neighborly to object. Even aside from considering why neighbors might not protest for reasons other than that they do not oppose the project, and the fact that there are at times valid reasons for non-protest which have nothing to do with the proposal itself, it remains that protest, or the lack thereof, has no legal significance in regard to what the planning commission and the city governing body may actually do, or, with the execution of their statutory duties.

250. 239 Ark. 54, 386 S.W.2d 923 (1965). This was in the same area as the property involved in *Andres*, and that case was regarded as controlling.

251. 218 Ark. 83, 234 S.W.2d 374 (1950).

252. 226 Ark. 572, 291 S.W.2d 503 (1956).

253. *Id.* at 574, 291 S.W.2d at 505.

254. *City of Little Rock v. McKenzie*, 239 Ark. 9, 386 S.W.2d 697 (1965); *Economy Wholesale Co. v. Rogers*, 232 Ark. 835, 340 S.W.2d 583 (1960). Of course, the *Andres* case, decided in 1964, and the *Gardner* case also adhere to *Pfeifer*, as we have seen.

*v. City of Little Rock*<sup>255</sup> and, more particularly, in *City of Little Rock v. Parker*.<sup>256</sup> In reversing a chancellor who had declined to sustain the city in denying rezoning from residential to commercial, the Arkansas Supreme Court stated:

It is apparent that the passage of Act 186 of 1957, to some degree, necessarily modified our holding in *Pfeifer*, for a strict and literal interpretation of all the language in that case would certainly result in nullifying the effort by a city to coordinate development of lands, and, more than that, in effect, would nullify Act 186.<sup>257</sup>

This opinion by Chief Justice Carleton Harris recognized that *Pfeifer* was decided under the original zoning statute of 1924 which was far more limited than the 1957 act providing for comprehensive zoning. No one reading Act 186 could logically conclude that *Pfeifer* met the legislative requirement of coordinated development based upon a comprehensive plan. Even *Parker* hedged somewhat by stating that "we are not saying that the city would not be acting arbitrarily in refusing to rezone these properties to *any* type of business property."<sup>258</sup>

*Pfeifer*, however, was not without durability. It was blindly adhered to in *City of Helena v. Barrow*,<sup>259</sup> which was decided in the same year as the *Parker* case. Between 1966 and 1974, the only case to reject application of the *Pfeifer* doctrine was *Fields v. City of Little Rock*.<sup>260</sup> *Pfeifer* was followed in cases decided in 1971, 1972, and 1973.<sup>261</sup> By 1973, however, there was language in *City of*

---

255. 240 Ark. 623, 401 S.W.2d 210 (1966). The court stated: "If this property were rezoned, where would the rezoning end? If these two lots are to be placed in a different category than 'B' Residential District, why should not the lot just north of Lot 12 be placed in the same category—and so on *ad infinitum*?" *Id.* at 628, 401 S.W.2d at 212.

256. 241 Ark. 381, 407 S.W.2d 921 (1966).

257. *Id.* at 388, 407 S.W.2d at 924.

258. *Id.* at 389, 407 S.W.2d at 925.

259. 241 Ark. 654, 408 S.W.2d 867 (1966).

260. 251 Ark. 811, 475 S.W.2d 509 (1972). The court in *Fields* relied on the language of *City of Little Rock v. Parker*, 241 Ark. 381, 407 S.W.2d 921 (1966). It was conceded by the landowners that a literal interpretation of the *Pfeifer* rule was no longer proper as a result of *Parker*.

261. *City of Blytheville v. Thompson*, 254 Ark. 46, 491 S.W.2d 769 (1973); *Metropolitan Trust Co. v. City of North Little Rock*, 252 Ark. 1140, 482 S.W.2d 613 (1972); *City of West Helena v. Davidson*, 250 Ark. 257, 464 S.W.2d 581 (1971). Heavy traffic was often viewed as supportive of invocation of the *Pfeifer* rule. This was true in *Metropolitan Trust and Davidson*. It was also a major factor in the following cases: *City of Little Rock v. Gardner*, 239 Ark. 54, 386 S.W.2d 923 (1965); *City of Little Rock v. Andres*, 237 Ark. 658, 375 S.W.2d 370 (1964); *Economy Wholesale Co., Inc. v. Rodgers*, 232 Ark. 835, 340 S.W.2d 583 (1960). In *Lindsey v. City of Fayetteville*, 256 Ark. 352, 358, 507 S.W.2d 101, 105 (1974), the

*Paragould v. Cooper*<sup>262</sup> which suggested that in an appropriate case the Arkansas Supreme Court might reconsider the *Pfeifer* rule.<sup>263</sup>

*Lindsey v. City of Fayetteville*,<sup>264</sup> decided in 1974, distinguished two prior *Pfeifer*-type cases on the basis that the involved area was not an established business district.<sup>265</sup> However, the *Lindsey* tract was surrounded on two of its sides by commercial uses and light industry and there was a heavy traffic flow at the intersection where the land was located.<sup>266</sup> There would seem to be an implicit suggestion that the literal implications of *Pfeifer* would no longer be applied.

The implications of the *Lindsey* case, joined with a 4-3 split decision in the 1973 case of *City of Blytheville v. Thompson*,<sup>267</sup> perhaps made it inevitable that a reevaluation of *Pfeifer* was at hand. This took place in *Baldrige v. City of North Little Rock*<sup>268</sup> in 1975. Relying on the *Parker* case and ignoring a number of other cases, the court limited and largely gutted *Pfeifer* in this manner:

We are, therefore, of the opinion that residentially zoned property which happens to be adjacent to business zoned property is not automatically entitled to rezoning as business property as a matter of law under *Pfeifer*. To hold otherwise would be illogical and could easily defeat the entire purpose of municipal zoning, in that a string of business establishments could be driven through any residential neighborhood by the simple process of touching each other. Such is not the intent of the zoning laws and such is not the intent of the so-called "Pfeifer Rule".

Since our decision in *Pfeifer* we have attempted to point out in other cases that the "Pfeifer Rule" does not apply with equal force and rigidity to each and every case regardless of the location

---

court stated that while traffic should be considered, excess traffic alone is insufficient to justify rezoning.

262. 254 Ark. 151, 492 S.W.2d 243 (1973).

263. The court stated that it did not regard that case as appropriate "for a re-examination of *Pfeifer*, because the area south of Highway 25 was certainly not an expanding commercial district when the appellees sought rezoning." 254 Ark. at 154, 492 S.W.2d at 244.

264. 256 Ark. 352, 507 S.W.2d 101 (1974).

265. *Id.* at 355, 507 S.W.2d at 103 (distinguishing *Metropolitan Trust Co. v. City of North Little Rock*, 252 Ark. 1140, 482 S.W.2d 613 (1972), and *City of North Little Rock v. McKenzie*, 239 Ark. 9, 386 S.W.2d 697 (1965)).

266. *Id.* at 353-54, 507 S.W.2d at 102.

267. 254 Ark. 46, 491 S.W.2d 769 (1973).

268. 258 Ark. 246, 523 S.W.2d 912 (1975).



of the property or the direction of business expansion.<sup>269</sup>

The Arkansas Supreme Court would have done better simply to have repudiated the *Pfeifer* rule as an anachronism resulting from earlier zoning statutes. Its statement that the matter-of-right expansion of existing businesses was not the intent of the zoning laws was clearly correct, but its statement that this was also not the intent of the *Pfeifer* rule obviously lent some undeserving respectability to *Pfeifer*. The court sought to distinguish the fact situation in *Baldrige* from two recent cases which had followed *Pfeifer*.<sup>270</sup> But it ignored the 4-3 decision in *Thompson* as well as applications of *Pfeifer* since the *Parker* decision.<sup>271</sup>

By the time of *Baldrige*, the *Pfeifer* rule had been under attack for several years from various sources.<sup>272</sup> In defense of it, analogies might be drawn to cases involving the refusal of equity to enforce restrictive covenants in areas which had so drastically changed as to render the enforcement unjust,<sup>273</sup> or to the doctrine of ameliorating waste.<sup>274</sup> But those situations involve extreme circumstances which, by analogy to zoning, would render a refusal to rezone arbitrary. The *Pfeifer* rule was therefore not an analogous application of such circumstances to zoning law but a parody of such situations.

---

269. *Id.* at 252, 523 S.W.2d at 915.

270. *Metropolitan Trust Co. v. City of North Little Rock*, 252 Ark. 1140, 482 S.W.2d 613 (1972); *City of West Helena v. Davidson*, 250 Ark. 257, 464 S.W.2d 581 (1971).

271. *City of Blytheville v. Thompson*, 254 Ark. 46, 491 S.W.2d 769 (1973); *City of Helena v. Barrow*, 241 Ark. 654, 408 S.W.2d 867 (1966).

272. Aside from some members of the court itself, the prime attackers (in writing) were Professor Gitelman in his article, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22 (1969), and the author of a Note, 28 ARK. L. REV. 262 (1974).

273. See *City of Little Rock v. Joyner*, 212 Ark. 508, 206 S.W.2d 446 (1947). Unfortunately, the validity of applying this rule in the *Joyner* case is colored by interlocking that fact situation with the *Pfeifer* rule. The *Joyner* case, when so colored, becomes a questionable precedent for the "change of conditions" rule. But see *Storthz v. Midland Hills Land Co.*, 192 Ark. 273, 90 S.W.2d 772 (1936). The requisite for applying the rule on change of conditions is that the change must be "so radical as to practically destroy the essential objectives and purposes of the agreement." *Inabinet v. Booe*, 262 S.C. 81, 84, 202 S.E.2d 643, 645 (1974). See also *Murphey v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958); *Paschen v. Pashkow*, 63 Ill. App. 2d 56, 211 N.E.2d 576 (1965); *Eliars v. Alewel*, 393 S.W.2d 584 (Mo. 1965). To the contrary of the reasoning in *Joyner*, on encroachment by the business district, see *West Alameda Heights Homeowners Ass'n v. Board of County Comm'rs*, 169 Colo. 491, 458 P.2d 253 (1969); *Redfern Lawns Civic Ass'n v. Currie Pontiac Co.*, 328 Mich. 463, 44 N.W.2d 8 (1950); *Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943 (1958). *Joyner* voices the "change of conditions" rule, but it is a victim of the *Pfeifer* philosophy and thus is bastardized as a precedent.

274. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N.W. 738 (1899) is the leading case.

*Baldrige*, despite its failure to pronounce the outright demise of *Pfeifer*, should have been adequate to lay the rule to rest. Perhaps the reason it did not was that despite the *Parker* case, the *Pfeifer* rule had been applied in a number of cases. To lawyers finding *Pfeifer* useful, there remained some hope that it might only be dying and had not yet passed away. These hopes were dashed further by the court in *City of Conway v. Housing Authority*<sup>275</sup> in 1979. The property involved there was multi-family residential land bounded on three sides by a "highway service" zone and on one side by a business district. Obviously, the property should have been rezoned commercial, but the city refused. The chancery court reversed the city and assigned a commercial classification which was the same as the highway service zone. The Arkansas Supreme Court's opinion in *Conway* deals in large measure with the fact that the role of the chancellor is to determine whether the city acted in an unreasonable and arbitrary manner. In essence, although the court does not say so explicitly, the chancery court determines the question of unreasonableness of the municipal action, but it does not then determine the appropriate classification. This is in line with earlier scholarly criticism.<sup>276</sup> In the process of modifying the chancellor in that regard while affirming his obvious conclusion that the municipal authorities acted arbitrarily, the court made it clear that it was not applying the *Pfeifer* rule:

Residential property which is adjacent to business zoned property is not automatically entitled to rezoning as business property. This is so even though the highest and best use of the property might be other than residential. To allow such rule would be to violate the zoning act itself. If we were to allow any property abutting business property to be rezoned as business property, there would be no need of a zoning ordinance in the first place. We have stated too many times to mention that the court should sustain the city's action in zoning matters unless it is found that the municipality was arbitrary in setting up the ordinance.<sup>277</sup>

In support of that proposition, the court cited *Baldrige*. But the statement of the court is, if not dictum, only borderline lan-

---

275. 266 Ark. 404, 584 S.W.2d 10 (1979).

276. Gitelman, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22, 36-40 (1969). See *Olsen v. City of Little Rock*, 241 Ark. 155, 406 S.W.2d 706 (1966) (an example of judicial rezoning).

277. *City of Conway v. Housing Auth.*, 266 Ark. 404, 409, 584 S.W.2d 10, 13 (1979).

guage when utilized in connection with the basic issue of the case. After stating the facts, the city's case could easily have been rejected in one paragraph since it was obviously an arbitrary, unreasonable decision by the city which was further tainted by apparent considerations of self-interest on the part of the municipality.<sup>278</sup>

What the court did was to go out of its way to reaffirm the sound principle of *Baldrige*. In so doing it sought once again to rid itself of the *Pfeifer* spectre without saying so unequivocally. In reality, the *Pfeifer* rule is dead; but also in reality it is not buried. Lawyers and chancellors alike continue to invoke it.<sup>279</sup> Planning and zoning in Arkansas owe a great deal to the Arkansas Supreme Court for its decisions in *Parker*, *Baldrige*, and *Conway*. But in the spirit of judicial cleanliness, the court should simply state, in an appropriate case: "The *Pfeifer* rule, as it has come to be known, is no longer applicable in Arkansas. Contrary language in cases previously decided is not expressive of the law."

## V. CONCLUSION

Arkansas planning and zoning law, has in recent years, evolved from a somewhat *ad hoc* posture involving a seeming lack of direction or understanding into a more predictable and understandable approach. It is still somewhat rudimentary in the sense that Arkansas zoning cases are concerned with very basic questions on such issues as rezoning appeals, variances, and nonconforming uses. While more sophisticated issues will likely eventuate, the Arkansas cases to this time have been typical of rather basic zoning confrontations at the local level.

As this process has taken place, the Arkansas Supreme Court itself has evolved to the point of greater understanding of the basic

---

278. The Arkansas Supreme Court, per Justice Purtle, stated: "It is obvious [that] the city of Conway wants to obtain title to this particular property and thereafter reclassify it either as B-1 or B-3." *Id.* at 410, 584 S.W.2d at 13. Yet the city had refused to rezone the property B-3 as requested by the Housing Authority. The city had offered to buy the property for the amount of indebtedness against it.

279. *Breeding v. City of Little Rock*, No. 79-2520 (Pulaski Chancery Court, 1980). Both the attorney for the applicant and the Chancellor relied on the *Pfeifer* rule even though the property is in an area to which the rule, during its full flowering, would not apply since the area is not in the path of commercial expansion. Despite this fact, the Arkansas Court of Appeals, in a 4-2 and singularly unfortunate opinion, sustained the findings of the Chancellor and thereby undercut and eroded the law as stated by the Arkansas Supreme Court. *City of Little Rock v. Breeding*, 270 Ark. 752, 606 S.W.2d 120 (Ct. App. 1980). For the correct statement of the law on the subject, see the minority opinion by Judge David Newbern. On November 17, 1980, the Supreme Court of Arkansas granted review.

precepts of planning and zoning law. Recent cases have illustrated the court's understanding that although the property rights of an individual are not and never were immune from the rights of the public in general, controls on the property rights of a single individual may serve to preserve and protect the property rights of many individuals. Viewed in this way, zoning does not seem so much to be a bureaucratic intervention into the rights of a particular landowner as a public protection of the property rights of citizens in general. The very first of the legal maxims is "Salus Populi est suprema Lex"—regard for the public welfare is the highest law.<sup>280</sup> That maxim was attributed to Francis Bacon;<sup>281</sup> but even his old adversary, Coke,<sup>282</sup> the great exponent of the common law, would concede that implicit in judge-made law is its ability to adapt to new times and new conditions.<sup>283</sup> This has been the greatness of the common law, at once its living essence, its roots, its maturation, its harvest.<sup>284</sup>

---

280. H. BROOM, *LEGAL MAXIMS* 1 (10th ed. 1939).

281. *Id.*

282. Sir Edward Coke lived in the late sixteenth and early seventeenth century. His life was the subject of the book, C. BOWEN, *THE LION AND THE THRONE* (1956). For an extensive evaluation, see 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 523-93 (2d ed. 1937).

283. See generally Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319 (1971) and Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321 (1974). In the latter article, Professor Leflar states:

The common law system could not have survived through the centuries if it had been no more than a method of perpetuating its own past. It has survived and is healthy today because in the hands of wise judges it is a system that calls for growth, one that builds on the past to meet the needs of the present and the future. The system will not tolerate hog-wild innovation, but without innovation, it will die—it would have died long ago. Legislatures can aid the courts in updating the law, but much of the ultimate responsibility rests upon our appellate courts and, specifically, upon the judges who sit on those courts.

*Id.* at 346.

284. The law fosters change. It promotes orderly acclimation to the effects of change. This is implicit in American legal order from the early days of the Republic when the essential nature of federalism, dual sovereignty and the relative positions of institutions in our legal system were being determined on down to the present time. Law in America, when broadly viewed, could never be equated with the status quo or with vested interests or inflexible bastions of settled power. \*\*\* The fact of change, and the inescapable truth that ever-continuing change is the certainty with which the law must reckon in providing a collateral social stability in the midst of existing newness, is the central theme of American law. Law's conservatism, in the real and best sense of the word, has been manifested in its ability to accomplish the purpose of assimilating change into the broader fabric of our life and institutions without disturbing the basic framework or upsetting the momentum.

R. WRIGHT, *THE LAW OF AIRSPACE* 277 (1968). See also 3 R. POUND, *JURISPRUDENCE* 387-88, 428-29 (1959).

