NOTE

THE AD HOMINEM ELEMENT IN THE TREATMENT OF ZONING PROBLEMS

Zoning is a statutory form of land-use planning by which property is classified according to the uses to which it is susceptible, the various uses are drawn together in compatible groups, and each group is assigned to a district in the community reserved exclusively for residential, commercial, or industrial purposes. Because no broadly-conceived zoning ordinance can explicitly provide for all of the particularized needs of the individuals and property it encompasses, three methods have evolved for permitting property to be used in ways inconsistent with the zoning program. Prohibited uses dating from before the passage of a zoning ordinance (called nonconformities) are sometimes condoned solely because they pre-exist the ordinance on the theory that it would be unfair or unconstitutional to make an owner abandon an employment of his property which was legal when instituted. Frequently special exceptions (for public service facilities and the like) are specifically enumerated in the ordinance and must be permitted unless opponents can demonstrate in each case that the establishment of an excepted use would be detrimental to the neighborhood. Variances, either as to use or dimensions, are new and otherwise unsanctioned employments of property which are generally granted when the applicant cannot feasibly

1 See Dallstream & Hunt, Variations, Exceptions, and Special Uses, 1954 U. ILL. L. Forum 213, stressing the “two cardinal objectives of sound zoning: first, to keep the number of districts as few as possible; and, second, to include only those uses which may properly be associated.”


3 See notes 65-67 infra and accompanying text. The justification for a nonconformity provision resembles that offered for permitting variances, see Green, The Power of the Zoning Board of Adjustment to Grant Variances From the Zoning Ordinance, 29 N.C.L. REV. 245, 249-70 (1951), insofar as requiring the cessation of existing nonconforming uses could be considered an unnecessary hardship on the landowner. Cf. Mack Appeal, 384 Pa. 586, 122 A.2d 48 (1956). See also the discussion of “single and separate ownership” provisions, text accompanying notes 85-90 infra.


5 Cf. notes 61-63 infra and accompanying text.
make a conforming use of the property and the use which he contemplates will not seriously disrupt the neighborhood plan.  

Since inevitably demands arising under any of these circumstances threaten to corrode the effectiveness of the zoning plan, those responsible for its implementation must, in the exercise of discretion, be extremely cautious in evaluating the merits of each application. This caution should, however, be tempered by an awareness that overstrict enforcement of the ordinance might make the use of some land prohibitively expensive. Such a result would be objectionable not only from the point of view of individual landowners but also from the standpoint of the community, which is legitimately interested in achieving the maximum productive use of all property.

When the agency responsible for administering a zoning ordinance deals with a request for permission to use property in an unsanctioned manner by one who has owned the property since before the ordinance was enacted, the proper questions for resolution are whether the use which is sought to be made of the property is reasonably amenable to the general plan of uses permitted in the area, and whether the physical character of the land is such as to justify some relaxation of the zoning scheme. Normally the agency will be concerned with the applicant only insofar as he has taken or plans to take some action which alters the land itself. An owner, however, may sell, lease, or otherwise transfer an interest in his land to another who may wish to use the land in a manner not permitted by the ordinance. Then the question arises whether his application should be resolved solely on the basis of the physical condition of the land and its surroundings or whether the application may properly be resolved by placing personal restrictions upon the applicant who acquired his interest in the property subsequent to the passage of the ordinance. In other words, does or should the fact that a subsequent owner (or lessee, etc.) is applying instead of the owner (or lessee, etc.) of the property when the ordinance was passed lead to a different result? The treatment of this question goes to the fundamental principles of zoning.

The Doctrine of Self-Imposed Hardship

One facet of the problem involves the doctrine of self-imposed hardship by which a purchaser of land after the enactment of a zoning ordinance will not be granted a variance permit if the conditions which make the property worthless for conforming uses existed before the zoning ordinance. For present purposes this doctrine must be distinguished from what may be

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8 See, e.g., Standard State Zoning Enabling Act § 7(3) ("such variance ... as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement ... of the ordinance will result in unnecessary hardship ... "); Colo. Rev. Stat. § 106-2-17 (1953) (variance permissible "where by reason of exceptional narrowness [and other extraordinary conditions] ... the strict application [would work hardship on] ... the owner of such property"). See also Model Zoning Ordinance § 9(3), adopting the language of the Standard State Zoning Enabling Act § 7(3). See generally Green, supra note 3.
termed self-created hardship,\(^7\) which applies a similar bar with regard to hardship conditions arising from acts done to the property after the passage of the ordinance. An example of self-created hardship would arise where \(A\), owning property in an area already restricted to single-family dwellings, quarries sand on the property to a depth of ten feet and then allows the property to be used as a dump; \(B\) later buys the property and seeks permission to erect an apartment house, complaining that to require him to fit the property for single-family dwellings would be prohibitively expensive. \(B\) will be denied the permit, as \(A\) would have been, because the hardship was created by the owner himself—if not by \(B\) then by his predecessor in title—since the ordinance was adopted.\(^8\) The situation would be one of self-imposed hardship if the sandpit and dump had existed before the ordinance’s passage: even assuming that \(A\), had he applied, would have been granted a variance, \(B\)'s application will be denied because he purchased with knowledge that the only feasible uses to which the property could be put were not sanctioned by the terms of the ordinance.\(^9\) It is obvious that zoning laws could easily be evaded if any other result were reached with regard to self-created hardships. But in the self-imposed hardship situation the only thing that \(A\) or \(B\) has done to “evade” the ordinance is to contract to sell the land. To deny the variance permit to \(B\) is to ignore the fact that the owner has done nothing to alter the physical character of the property in contravention of the ordinance. Thus the self-imposed hardship doctrine may be said to be ad hominem in the sense that it concerns itself not with the physical characteristics of the land as it existed at the ordinance’s passage but with private arrangements between its owners.

The doctrine appears to be most commonly invoked in New York;\(^10\) but it also provides the basis of decisions in other jurisdictions.\(^11\) Else-

\(^7\)For cases confusing the distinction, see Board of Zoning Appeals v. Waskelo, 168 N.E.2d 72 (Ind. 1960); Gleason v. Keswick Improvement Ass’n, 197 Md. 46, 78 A.2d 164 (1951); Volpe Appeal, 384 Pa. 374, 121 A.2d 97 (1956).

\(^8\)The fact that \(B\) in a case like this did not know that the hardship had been self-created led the court in Matter of Hepner, 152 N.Y.S.2d 984 (Sup. Ct. 1956), to hint that the property might be rezoned, although it held that a variance could not be granted.

\(^9\)The hypothetical self-imposed hardship situation discussed in the text closely corresponds to the facts of Wyrostok v. Town of Hempstead, 16 Misc. 2d 554, 176 N.Y.S.2d 441 (Sup. Ct. 1958). In that case the complaint challenged the constitutionality of the ordinance as applied; the demurrer relied on the plaintiff’s failure to apply first to the zoning board. It was held that such an application was unnecessary since the doctrine of self-imposed hardship would have rendered the application futile. See Blumberg v. Feriola, 8 App. Div. 2d 850, 851, 190 N.Y.S.2d 543, 545, aff’d, 7 N.Y.2d 852, 164 N.E.2d 863, 196 N.Y.S.2d 989 (1959): “One who knowingly enters into a contract to purchase land for a prohibited use cannot thereafter have a variance in the use of the premises on the ground of unnecessary hardship.” Cases are collected and criticized in 1 Rathkopf 48-6 to -20; another collection is found in Annot, 168 A.L.R. 13, 45-46 (1947).

\(^10\)See cases collected in authorities cited in note 9 supra.

where, the fact that the applicant bought with knowledge of the zoning restriction has been said to "weigh heavily" against him or at least to be one of the circumstances to be considered. New York, however, has specifically declined to apply the doctrine to applications for permission to build on lots substandard as to size, the theory being that a denial in such circumstances would render the land in question entirely useless unless adjoining property could be acquired. The refusal to employ the rule in these circumstances reveals one of its logical weaknesses. There are only two ways in which property can become substandard as to size. On the one hand, a plot which conforms as to size at the ordinance's passage may be divided and sold in part so as to render the remainder substandard. This is an example of a self-created hardship for which a permit may be denied without resort to the rule of self-imposed hardship.

The effect which zoning laws may properly have on requiring a transfer of property is still unsettled. In Macchia v. Board of Appeals, 7 Misc. 2d 763, 765, 164 N.Y.S.2d 463, 465 (Sup. Ct. 1957), involving property substandard as to size, it was said: "No Administrative Board may compel a property owner either to sell his property to a neighbor or to purchase additional property from him, nor may it use his refusal so to as a ground for denying any application he may present to it." But see Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958), upholding the principle of amortization, see note 75 infra and accompanying text, but remanding to determine whether the cost—including that of relocation—was confiscatory. Compare the Cook County, Illinois, practice of permitting certain variations by way of conveyance to a third party and reconveyance to the original grantor, with the second deed containing a covenant embodying the "permit" limitations and running in favor of area residents. Dallstream & Hunt, supra note 1, at 236-38.
lot were substandard before the ordinance's passage it would be a nonconformity on which the zoning board should permit the owner to build, without any need to raise, if only to reject, the rule of self-imposed hardship.\textsuperscript{16}

A rather different rationale is sometimes encountered in cases where it is claimed that the denial of a variance will deprive the property of all economic utility whatsoever. This rationale attempts to distinguish between the balancing process involved in considering variance applications and the unqualified constitutional prohibition on taking property without just compensation.\textsuperscript{17} The distinction is perhaps founded on the usual statutory mandate that variances shall be permitted where a requirement of conformity would be unnecessarily severe and the proposed variance would not seriously disrupt the neighborhood plan.\textsuperscript{18} This balancing of interests is said to be inapplicable to cases where the land cannot possibly conform and still have any utility.\textsuperscript{19} In that situation a purchaser with knowledge of the ordinance may still qualify for a variance,\textsuperscript{20} whereas in the other his knowledge will be a factor to be balanced against the possibility of unnecessary severity. While it is valid to distinguish between situations in which the variance is sought simply to enable the applicant to maximize his profit and those in which the land cannot otherwise provide a reasonable return on investment (it is only in the latter situation that a variance is ever permissible\textsuperscript{21}), the further distinction which some courts have tried to draw is unjustified by the facts of the cases which were before them; the “taking” rationale is apparently only a subterfuge for avoiding the inequities of the self-imposed hardship rule.

In defense of the doctrine of self-imposed hardship it may be suggested that when an owner sells his land without having previously acquired a variance permit, the purchase price will ordinarily be adjusted downward to compensate the purchaser for his trouble and expense in making the property conform. To grant the purchaser a variance after he has gotten


\textsuperscript{17}See Frankel v. City of Baltimore, 223 Md. 97, 162 A.2d 447 (1960) (permission to build professional office building improperly denied where property had no value for residential use although in an area zoned residential), citing City of Baltimore v. Cohn, 204 Md. 523, 105 A.2d 482 (1954), which held that a refusal to grant a permit to a vendee was arbitrary, without specifically reaching the self-imposed hardship point, and Gleason v. Keswick Improvement Ass'n, 197 Md. 46, 78 A.2d 164 (1951), using self-imposed hardship language in a self-created hardship case. Compare Searles v. Darling, 46 Del. (7 Terry) 263, 83 A.2d 96 (1951), with Homan v. Lynch, 51 Del. (1 Storey) 433, 147 A.2d 650 (1958). See also Jersey Triangle Corp. v. Board of Adjustment, 127 N.J.L. 194, 21 A.2d 845 (Sup. Ct. 1941).

\textsuperscript{18}E.g., Standard State Zoning Enabling Act § 7(3). For a comparison of variances, which are to be granted only when not seriously disruptive of the neighborhood plan, and special exceptions, see notes 4-6 supra and accompanying text.


\textsuperscript{20}See cases cited note 17 supra.

the property at a lower price would give him a bonus. Whether or not this is the usual situation, it is rarely mentioned as a fact bearing on the result in particular cases. And the argument is at best circular; if there were no self-imposed hardship rule there would be no need to sell land at a sacrifice price in these circumstances.

A more persuasive argument in favor of the rule is that a major goal of zoning, neighborhood conformity, is furthered by precluding a class of variance applicants who might have avoided hardship. But such an argument is *ad hominem* in that it penalizes either the vendor by making it impossible for him to sell at a decent price, when, by hypothesis, he has done nothing wrong, or the purchaser who has been foolish enough to buy land which he cannot develop in conformity with the ordinance’s standards. A possible solution for the owner and prospective purchaser would be for them to apply jointly for the variance. In most cases this procedure would work, although some courts have reasoned that the prospective purchaser is the real applicant in interest and have proceeded to determine the issue as if the present owner had not been joined. But even if the plan does work, it is an unnecessary technicality; the only procedure consistent with the aims of zoning regulation is to treat owner and purchaser exactly alike when the board inquires whether or not the property can feasibly be used in a conforming manner. If such use is not feasible, a variance should be granted.

**STANDING**

A requirement that the parties must have “standing” before a court will hear their case generally means that they must have a sufficient interest in the outcome of the suit to insure that resolution of the issues will be of more than academic interest to them. In connection with zoning, the term


23 In addition to Blumberg v. Feriola, supra note 22, see Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (Dist. Ct. App. 1958), appeal dismissed, 359 U.S. 436 (1959), which noted that the applicant, a contract vendee, could refuse to perform if the permit were not granted and therefore would incur no hardship from the board’s refusal.

24 Or the vendor could apply himself. But see Wyrostok v. Town of Hempstead, 16 Misc. 2d 554, 176 N.Y.S.2d 441 (Sup. Ct. 1958), where the vendor alleged financial inability even to have plans drawn on which the zoning board might determine his right to a variance.


26 E.g., Arrow Transp. Co. v. Planning & Zoning Comm’n, 299 S.W.2d 95 (Ky. 1956) (joint application by owner and contract vendee refused on self-imposed hardship reasoning as to latter); cf. Sun Oil Co. v. Macauley, 72 R.I. 206, 49 A.2d 917 (1946) (applicant held to have failed to show a clear legal interest).

27 A number of cases have so reasoned. E.g., Goldreyer v. Board of Zoning Appeals, 144 Conn. 641, 136 A.2d 789 (1957); Schneider v. Board of Appeals, 402 Ill. 536, 84 N.E.2d 428 (1949); Board of Adjustment v. Board of Educ., 326 P.2d 800 (Okla. 1958).

has been used with a great deal of confusion. At the minimum it means that the applicant must show some interest in the property in question before his application for a permit to use it in a varying manner will be considered.29

In an early New Jersey case 30 a contract vendee who sought to reverse a zoning board's refusal of a variance permit was denied mandamus on the ground that he had no present right to build. A later decision in the same litigation 31 admitted the vendee to standing because the owner of the property had by then been joined in the action. Notably, however, the earlier opinion had admitted that the owner was at that time a party to the action. More recently, the refusal to give an applicant with no present right to build standing to apply for a variance has been espoused in Rhode Island, although in that case as well the owner had joined in the application.32 In 1954 Kentucky held that a contractor can apply in his own name as agent of an absentee owner.33 The court said that protestants who thought themselves prejudiced by the owner's absence from the record could have joined him had they desired.34 But two years later the same court, adopting the reasoning of the self-imposed hardship rule, held that a contract vendee—the real applicant in interest—was not entitled to a variance permit.35 Since rules of standing and the availability of affirmative relief are inevitably related, this holding effectively undermines the earlier liberality as to standing which the Kentucky court seemed to manifest. Elsewhere, vendees,36 lessees,37 optionees,38 and prospective purchasers 39 have been

29 At the maximum it will require that the applicant be the owner of the property in question before standing is accorded. Tripp v. Zoning Bd. of Review, 84 R.I. 262, 123 A.2d 144 (1956). Cf. Colo. Rev. Stat. § 106-2-17 (1953) (variances are to be granted where their refusal would work hardship on "the owner of such property"). (Emphasis added.)
33 Stout v. Jenkins, 268 S.W.2d 643 (Ky. 1954); see Hatch v. Fiscal Court, 242 S.W.2d 1018 (Ky. 1951).
34 268 S.W.2d at 645.
37 E.g., City of Little Rock v. Goodman, 228 Ark. 350, 260 S.W.2d 450 (1953).
40 E.g., Chad Homes, Inc. v. Board of Appeals, 5 Misc. 2d 20, 159 N.Y.S.2d 383 (Sup. Ct. 1957); Appeal of Schaeffer, 7 Pa. D. & C.2d 468 (C.P. 1955). But see
denied standing. In some cases the power of the applicant to rescind the transaction if the permit were refused has been given as the reason for denying standing.\(^4\) In others the reasoning has rested on language of the local ordinance requiring applications by the owner—even where the enabling statute has not used that term.\(^4\) On the other hand, almost all state statutes have a “persons aggrieved” test to determine who may appeal from the initial determination of a variance application;\(^4\) a nonowner has been accorded standing under this broad test.\(^4\)

The argument that a qualified applicant must be able to show that some injury will result from the denial of his application closely resembles the reasoning used in support of the self-imposed hardship doctrine; to deny standing because the applicant can show no prospect of injury is to ignore the principle that the basic question in passing on such an application is whether the land, regardless of who its owner may be, is amenable to use—if it is to be used at all—in strict conformity with the zoning regulations.

Two factors of practical importance must be borne in mind when considering who should have standing. First, to deny standing to all but the legal owner applying as the prospective user of the permit may discourage the transfer of property. Obviously, a prospective purchaser will seldom be inclined to buy land if he cannot be assured that his contemplated use of the property will be allowed. Even assuming the feasibility of a joint application with the owner,\(^4\) its use may be stymied by the vendor’s re-

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Goldreyer v. Board of Zoning Appeals, 144 Conn. 641, 136 A.2d 789 (1957) (owner and prospective purchaser join). In both White v. City of Twin Falls, 81 Idaho 176, 338 P.2d 778 (1959), and Guenther v. Zoning Bd. of Review, 85 R.I. 37, 125 A.2d 214 (1956), the owner was permitted to apply for the benefit of a prospective purchaser.


41 Tripp v. Zoning Bd. of Review, 84 R.I. 262, 123 A.2d 144 (1956); cf. Richman v. Zoning Bd. of Adjustment, 391 Pa. 254, 137 A.2d 280 (1958), where standing was granted because the requirement of the ordinance as to who must fill in an application had been changed from “owner or his authorized agent” to “applicant or his authorized agent.”

42 E.g., STANDARD STATE ZONING ENABLING ACT § 7; ARIZ. REV. STAT. ANN. §§ 9-465A, 11-807D (1956); CAL. GOV’T CODE § 65856; DEL. CODE ANN. tit. 22, § 324 (1953); ILL. ANN. STAT. tit. 24, § 73-5 (Smith-Hurd 1942); cf. IOWA CODE ANN. § 414.7 (1949) (“property owner aggrieved”); ME. REV. STAT. ANN. ch. 90-A, § 61 (Supp. 1959) (no specification of nature of interest). See also GA. CODE ANN. §§ 69-821 (1957) (“person or persons having a substantial interest”); KY. REV. STAT. § 100.079 (1959) (persons “injuriously affected or aggrieved”). As to ordinances see Los Angeles, Cal., Ordinance 1494, Dec. 13, 1949, as amended, §§ 633 (”any person desiring any permit may appeal”), 634 (contemplating application with the owner’s permission), in 3 METZENBAUM, ZONING (2d ed. 1955); New Haven, Conn., Zoning Ordinance, Dec. 1958, §§ 1032-1033A.


44 See notes 24-27 supra and accompanying text.
luctance to appear before the board, or simply by his unavailability. On the other hand, the heavy burden already on some boards would be materially augmented by an increase in the number of applications following any relaxation in the rules of standing.

A resolution of the problem of standing in the light of these conflicting factors may be aided by examining the function of a zoning board. Theoretically, such a board is established to give concrete meaning to an abstract program of land use fashioned for a specific area. It is in the interest of the community in general that the zoning board be informed as to the possible uses to which land within its jurisdiction may be put; this function may be better served if every reasonable opportunity is taken to clarify the ambiguities resulting from the interplay of abstract zoning laws and the physical realities of the property in question. The fact that applications usually may be made ex parte suggests that the framers of zoning laws did not contemplate the adversary procedure associated with civil litigation wherein a party disputes specific rights of another within a particular factual context. The fact that enabling acts fail to equate "applicant" and "owner" and adopt a "persons aggrieved" test for appeals to the zoning board militates against restricting standing to make the initial application to owners alone. A better rule would give standing to all those who have entered into some good-faith bargain for the purchase or use of the property in question, including optionees, lessees, and vendees. The group which this rule leaves out consists of persons such as prospective purchasers who have not vouchsafed their commitment by a cash expenditure or legal obligation which would justify the sacrifice of the board's time which their admission to standing would require.

**Assignability of Rights**

There is another possible difficulty in requiring the prospective user (lessee, vendee, etc.) to rely on the owner's obtaining a permit which will be transferred to him with the property: the board may grant the permit but limit its use to the owner. A vendee will discover that he cannot use the property as the vendor had; or he may learn of the limitation beforehand and refuse to consummate the transaction. In either event, an *ad hominem* approach to permit rights will hamper the use and transfer of property.

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47 See *ibid*.

48 The situation is analogous to the problem posed when rights in a nonconforming use are limited by ordinance to the present owner, see text accompanying notes 60-84 infra. It may be said that in the case of a nonassignable permit for a variance or special exception the owner or user of the permit has acquiesced in the permit re-
AD HOMINEM ELEMENT IN ZONING PROBLEMS

Except at the zoning board level, the ad hominem solution of making variance or special exception permits nonassignable has apparently gained a foothold only in Massachusetts. An early case in that state held that a permit to erect buildings, which remained unexercised over eight years, was not assignable to a purchaser of the property. A dictum indicated that if a building had been erected, rights to its maintenance would have run with the land. However, a more recent Massachusetts case held that a permit to use a wharf for a boat-rental service, a use not expressly authorized by the ordinance, was not assignable, despite the fact that it had been exercised. The prospective assignee had, in fact, sought to expand the use, but the court refused even to allow its continuation.

This amenability to an ad hominem approach in the granting of permits may find its source in the power commonly conferred on zoning boards to grant variances subject to “appropriate conditions and safeguards” and to “modify” the orders of zoning officers in granting or refusing permits. Within this broad range of discretion some boards have attempted to make permits personal rather than related to the physical characteristics of the

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51 Id. at 565, 139 N.E. at 654.


53 A subsequent reconveyance to the original permittee was held incapable of restoring the permit rights. Maki v. Town of Yarmouth, 163 N.E.2d 633 (Mass. 1960).

54 E.g., STANDARD STATE ZONING ENABLING ACT § 7. A typical provision as to a zoning board's appellate powers is that the board may affirm, reverse, or modify the zoning officer's initial order. See KY. REV. STAT. § 100.082(1) (1959). Applications to the board for special exceptions may generally be granted “subject to appropriate conditions and safeguards.” See, e.g., MASS. ANN. LAWS ch. 40A, § 4 (1961). See generally the discussion in REPs, Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions, 2 SYRACUSE L. REV. 54 (1950). Conditions must be consonant with the general spirit of the legislation. MODEL ZONING ORDINANCE § 9.2; STANDARD STATE ZONING ENABLING ACT § 7. For an example of improper conditions, see Soho Park & Land Co. v. Board of Adjustment, 6 N.J. Misc. 686, 142 Atl. 548 (Sup. Ct. 1928), in which the zoning board had imposed the following conditions on a variance permit to erect a wire factory: (1) that the building be occupied only by the applicant and be used only as a wire factory; (2) that three of the sides be of brick trimming; (3) that trees be planted in the immediate area; and (4) that the ground within a one hundred foot radius be landscaped in a manner suitable for a residential area. The court struck down all the conditions as unrelated to valid zoning objectives.
With the exception of Massachusetts, however, these attempts have been thwarted by the courts. The conditions and safeguards which have been sustained by the courts have had limitations determinable apart from change of ownership; for example, a Rhode Island court upheld permission to use a lot in a varying manner "as long as the conditions affecting the beneficial use of [the lot and] . . . not the character of the neighborhood" remained the same.

The ad hominem approach to permit rights is clearly faulty. It is theoretically unsound because it ignores the principle that zoning looks to the land and not to its owners. Furthermore, such an approach presents practical difficulties. It is open to abuse by board members wanting to insure their own reappointments, to earn illegal compensation, or simply to extend neighborly courtesy. In addition, the personal settlement of zoning disputes is difficult to administer. How can a court review a board's finding that an applicant may or may not be trusted? Will the fact that the applicant is honest lessen the impact of the variation on the neighborhood plan or insure that the owner will always be able to maintain a decent establishment? These questions answer themselves. And so here too the proper approach should be to determine what use the land justifies, not what consideration the owner deserves.

55 See note 49 supra. It has been suggested that personal permits can be justified on the basis that zoning boards, knowing the persons with whom they deal, may properly trust one applicant but not others to maintain the property in an acceptable fashion. Horack & Nolan, Land Use Controls 184 (1955). This kind of discrimination ought to be unnecessary; any correction of a failure to conform to the conditions imposed may properly be handled through zoning sanctions. Furthermore, the personal approach is subject to the worst kind of politically-motivated abuse.


57 See, e.g., Reps, supra note 54, at 65: "[P]ermits in which the sole condition concerned a time limitation on the permitted use . . . have been frequently ordered by the New York courts." Guenther v. Zoning Bd. of Review, 85 R.I. 37, 125 A.2d 214 (1956), comes close to the line separating time limitations from personal permits. In that case an owner was granted a two-year permit to use a large, unsalable house in a residential zone as a convalescent home. Other homes in the area faced the same problem, and the court knew that the house was to be sold if the permit were obtained. Nonetheless it affirmed. The danger, of course, is that this kind of temporary expedient may ripen into a permanent permit and that other homeowners in the area will then resort to the same device.


59 In Gold v. Zoning Bd. of Adjustment, 393 Pa. 401, 143 A.2d 59 (1958), a claim by a barber that he was too old and ill to work for others was rejected as a basis for allowing him to conduct a barbershop in his basement as an accessory use.
THE TRANSFERABILITY OF A NONCONFORMITY

Nonconformities, are uses or dimensional or structural variations existing at the time of passage of a zoning ordinance which are not permitted except insofar as the ordinance expressly suffers their continuation. Three reasons are usually assigned for permitting these uses and variations to continue even though they would not be allowed to commence as variances after the ordinance's passage: it would be too great a hardship to require the immediate destruction of all nonconformities; zoning laws would have met with much more popular resistance had they required the immediate termination of nonconformities; and due process requires that owners be permitted to exercise existing uses indefinitely. These reasons illustrate a fundamental divergence in the approach to zoning problems. The second (and perhaps, tacitly, the first) presupposes that it is within the competence of the police power of a state to require immediate cessation of uses which do not conform to its zoning laws. This view, however, has gained little acceptance. The more common view admits that sometimes the hardship on the occupant or owner becomes so great that his nonconforming use must be allowed to remain despite the community's desire for its destruction. In the ad hominem context, the question is whether cessation of a nonconforming use can validly be made to hinge on a change of ownership or possession.

As a practical matter a permissible nonconformity gives the owner an unnatural and remunerative monopoly, especially — and this is frequently the case — insofar as the nonconformity has a unique economic value. If the owner wishes to sell his land but finds that he cannot transfer the right to exercise the nonconforming use, he will either have to make the property conform at some expense to himself or sell at a price adjusted downward to

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60 In Model Zoning Ordinance § 4, at 30 (Commentary) it is proposed that the term "non-conformity" should include both nonconforming uses and all other variations which are permissible because they were in existence at or before the ordinance's passage.

61 E.g., a grocery store in a residential district.

62 E.g., a lot with a frontage of 40 feet in a district requiring 60 feet.

63 E.g., a building set back 15 feet from the street line in a district requiring 25 feet.


67 See, e.g., Schneider v. Board of Appeals, 402 Ill. 536, 84 N.E.2d 428 (1949); Note, supra note 65, at 483. See also Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); Pierce Appeal, 384 Pa. 100, 119 A.2d 506 (1955), 104 U. Pa. L. Rev. 1011 (statute questionably construed so as to allow housing of former outdoor welding shop).

68 See Note, supra note 65, at 477, 482-86.

69 See Note, supra note 64, at 101.
compensate for the vendee's difficulties in achieving conformity. In these circumstances the original owner will probably continue his use of the property until, for personal reasons, he is forced to sell at the lower price.

The only court which seems to have dealt directly with this problem is the Idaho Supreme Court in O'Connor v. City of Moscow. The ordinance in question prohibited the opening of specified new businesses in a given district and provided that any change of ownership should be deemed such an opening. In striking down the ordinance as an unconstitutional taking of property, the court explained that:

"Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right."

This language suggests that any requirement that nonconforming uses be terminated would be invalid not simply as an unreasonable means of achieving the legitimate object of zoning but as a deprivation of the unqualified right to continue indefinitely all preexisting lawful uses. The dissent draws the implication that the majority would find it just as unreasonable to require the cessation of nonconformities within a fixed time period as to fix a cut-off point for nonconformities timed by the duration of the ownership existing at the time of the ordinance's passage. Such a rule would destroy the principle of amortization which has gained increasing acceptance as an equitable means for achieving zoning aims.

Some zoning ordinances provide for fixed periods of amortization during which an owner must wind up his nonconforming use. Commentators

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70 69 Idaho 37, 202 P.2d 401 (1949).
71 For other statutes and ordinances seeking to achieve a similar effect, see the Chicago, Ill., Zoning Ordinance, April 5, 1923, as amended, § 20 in 3 Metzenbaum, Zoning 2209 (2d ed. 1955): "[Various nonconforming uses] shall be discontinued upon transfer of ownership or termination of the existing lease ... of the person in possession ... unless then maintained in a building designed for such nonconforming use, in which event ... [the use must cease at the end of the building's normal useful life]"; Ill. Ann. Stat. tit. 24, § 73-1 (Smith-Hurd Supp. 1960), authorizing the enactment of provisions for "the elimination of such uses of unimproved lands or lot areas when the existing rights of the persons in possession thereof are terminated. ..." See the discussion of such an ordinance in Todd v. Board of Appeals, 337 Mass. 162, 166, 148 N.E.2d 380, 383-84 (1958).
72 Under both U.S. Const. amend. XIV, and Idaho Const. art. 1, § 13.
74 See 69 Idaho at 46, 202 P.2d at 405.
75 See, e.g., Colo. Rev. Stat. Ann. §106-2-19 (1953) (empowering board to provide for termination "either by specifying the period in which nonconforming uses shall be required to cease, or by providing a formula [for termination] ... so fixed as to allow for the recovery or amortization of the investment in the nonconformance"); Ga. Code Ann. § 69-835 (1957) (amortization); Ohio Rev. Code Ann. tit. 7, § 713.15 (Page Supp. 1960) (requiring corporation to "provide in any zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of
believe that the period allowed should be sufficient to permit the landowner to earn compensation for the eventual termination of the nonconformity. Of course, a legislature can only estimate the time required for such recoupment; but Louisiana’s judicial acceptance of a one-year period has been strongly condemned and certainly does not reflect sober consideration of the compensation principle. Although O’Connor properly rejected nontransferability—albeit with broader language than the facts of that case demanded—the Idaho court failed to examine the sharp practical distinction between any time limitation applicable to all landowners in a single community and a limitation based on the termination of ownership.

The O’Connor rationale—that a state may not constitutionally deprive an owner of his right to make a lawful use of property and to transfer that property together with its use—could be applied as strongly to defeat the principle of amortization as to invalidate the unbending nontransferability of nonconformities. Yet while it is true that amortization depresses the sale value of property and, at the appointed time, will extinguish the valuable nonconforming use, this sort of program for the orderly extinguishment of nonconformities may easily be distinguished from a system which chooses such a fortuitous date for achieving conformity as that of transfer. By amortization all objectionable uses will be removed from a neighborhood within a definite and ascertainable period. To require their removal as of the date of transfer of ownership encourages owners of nonconforming uses to hold their property until the last benefit has been wrung from it. Frequently this period will be measured by the very lives of the users of the property when the ordinance was passed. The effect is to achieve expeditious conformity only as to property whose owners are forced by personal considerations to sell before all economic advantage has been realized. And since, as has been seen, these owners will be compelled to sell at a loss, they will have been penalized for reasons having no relation

nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance76. Compare ILL. ANN. STAT. tit. 24, § 73-1(a) (Smith-Hurd Supp. 1960) (allowing provisions to be made “for the elimination of uses of unimproved lands or lot areas when the existing rights of persons in possession thereof are terminated or when the uses to which they are devoted are discontinued”), with Village of Skokie v. Almendinger, 5 Ill. App. 2d 522, 126 N.E.2d 421 (1955) (allowing a purchaser subsequent to the ordinance’s passage to continue operation of a trailer camp on a lot previously used by the purchaser adversely to the owner).


Michigan has attempted to avoid the problem altogether by allowing nonconforming uses to continue but authorizing condemnation of them, declaring such condemnation to be for a public purpose. MICH. STAT. ANN. § 5.2933(1) (1958).

State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, cert. denied, 280 U.S. 556 (1929), upholding a New Orleans ordinance passed pursuant to LA. CONST. art. 14, § 29, which authorizes municipalities to pass zoning ordinances “to prohibit the establishment of places of business in residential districts.”

E.g., Fratcher, Constitutional Law—Zoning Ordinances Prohibiting Repair of Existing Structures, 35 MICH. L. REV. 642, 644 (1937); Noel, Retroactive Zoning and Nuisances, 41 COLUM. L. REV. 457, 468-69 (1941); Comment, 39 YALE L.J. 735 (1930); cf. Fordham, Legal Aspects of Local Planning and Zoning in Louisiana, 6 LA. L. REV. 495, 507 (1946).
to questions of proper land use. Superficially it could be said that land-use considerations impelled the loss: the zoning ordinance was aimed at eliminating nonconforming uses. But the fact remains that the line drawn between those nonconforming uses which may continue and those which may not is fashioned by considerations wholly personal to the landowners. All that such an ad hominem provision accomplishes is to render the property relatively unmarketable without insuring, concomitantly, that the nonconformity will be eliminated within a reasonable time.80

The argument that change of ownership should require the cessation of a nonconformity has not been made in many cases.81 More often the concern has been with applications for the expansion of such nonconforming uses beyond their original limits.82 The reason offered for allowing the expansion of a nonconformity is that to require its limitation would be too great a hardship on the owner—precisely the consideration which must be urged in variance applications for new uses.83 The reasoning of the self-imposed hardship doctrine, if applied to applications by purchasers subsequent to the passage of the ordinance to expand nonconformities, would be that the applicant need not have purchased the nonconformity and cannot now complain of any hardship with regard to it.84 Nevertheless the courts have not explained their failure to apply this rule where logic seems to require it.

Single and Separate Ownership Provisions

Some property can never be made to conform. An illustration of such a situation is provided when permission is sought to build on a lot which

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80 Although the Idaho court in O'Connor properly rejected such an objectionable result, the language of the court's opinion is unacceptable. The decision suggests that existing nonconformities could never be legally terminated without direct compensation; for one of the likely consequences of the ordinance which disturbed the court was that the rights of heirs would be jeopardized by an owner's death. O'Connor v. City of Moscow, 69 Idaho 37, 43, 202 P.2d 401, 405 (1949).

81 And the argument, when made, has been rejected. E.g., Schneider v. Board of Appeals, 402 Ill. 536, 84 N.E.2d 428 (1949); Hawkins v. Talbot, 248 Minn. 549, 80 N.W.2d 863 (1957); Rogers v. Association for the Help of Retarded Children, 308 N.Y. 126, 123 N.E.2d 806 (1954). But see Todd v. Board of Appeals, 337 Mass. 162, 148 N.E.2d 380 (1958).


83 See Note, 74 HARv. L. Rev. 1396, 1402 (1961).

has been substandard as to size since the date of the ordinance's passage. Insofar as the applicant hopes to commence a new, although otherwise conforming, use of the property he may be said to be applying for a variance and must make a showing of hardship. But insofar as the hardship is caused by a feature of the property which has existed since the ordinance's passage, the hardship is "built in," as in the nonconformity situation. For that reason, many ordinances provide that lots substandard as to size may be built upon if they have been held in "single and separate ownership" since the ordinance's passage.\^85 This language, coupled with uncertainty as to whether an application to build is an application for a variance or for a permit to continue a nonconforming use, could raise perplexing problems. For instance, if the application is treated as seeking a variance and the owner holds other property adjacent to the lot for which the permit is sought, should he have to prove not only that the parcel has been single since the ordinance's passage but also that he cannot reasonably join the adjacent lot? Does "single . . . ownership" mean that the applicant must be the owner at the time of the ordinance's passage, or does it mean that any subsequent owner may apply provided the lot has never been split off from a larger piece of land that has always been used by the applicant and his predecessors as a separate and independent holding? If the former interpretation is chosen—if it is the owner's relationship to the land and not the land itself which controls the disposition of these questions—the approach could operate *ad hominem.*\^86 It is suggested that a more precise phrase should be used in the statutes, such as "property comprising a single commercial parcel since the passage of the ordinance."

Under statutes employing "single and separate ownership" language there is general agreement that the transfer of a single lot not adjacent to other property of the transferee or transferor will not impose a disability on the transferee.\^87 Where, however, there is such adjacent property, courts are divided as to whether either the initial or subsequent owner must join the properties so as to achieve conformity.\^88 Certainly if the owner

\^85 E.g., Lower Merion, Pa., Ordinance 640, March 16, 1927, as amended, July 19, 1939, § 1609. See substantially similar provision in *MODEL ZONING ORDINANCE* § 4(2), and Chicago, Ill., Zoning Ordinance, April 5, 1923, as amended, § 23, in 3 *METZENBAUM, ZONING* 2210 (2d ed. 1955).

\^86 Cf. note 15 supra.


\^88 Compare Russell v. Board of Adjustment, 31 N.J. 58, 155 A.2d 83 (1959) (owner not required to join adjacent lots to achieve conformity), and Schack v. Trimble, 28 N.J. 40, 143 A.2d 1 (1958) (owner not required to join adjacent substandard lots purchased on different dates after passage of ordinance and never treated as single), with Howland v. Acting Superintendent of Bldgs., 328 Mass. 155,
desires to join he should be allowed to do so. If the owner does not so desire, the issue should be whether the properties can reasonably be joined without becoming so large or oddly shaped as to be relatively unmarketable. The question should not turn on the fact that the original owner, rather than the present applicant, owned a particular parcel at a given time.

CONCLUSIONS

In one sense the human element cannot be kept out of zoning litigation: the impetus behind almost every challenge to an ordinance or zoning board ruling is that it threatens to depress the value of the challenger's property. If the ordinance reads clearly and the power to enact it has not been unconstitutionally delegated, its validity and reach will turn on the result of balancing the gain to the public and the disadvantage to the individual landowner by its strict application in individual cases. The Supreme Court has said that a diminution in the value of land by three-fourths of the pre-ordinance value, when wrought by legislation otherwise reasonable, is permissible under the police power and not confiscatory. Nevertheless, it must be recognized that the choice of means for achieving zoning goals is not unlimited. As Mr. Justice Holmes cautioned in Pennsylvania Coal Co. v. Mahon:

102 N.E.2d 423 (1951) (owner not allowed to subdivide lot with three houses thereon and sell as three lots), and Ardolino v. Board of Adjustment, 24 N.J. 94, 108, 130 A.2d 847, 855 (1957) (dictum). See also Peterson v. Vasak, 162 Neb. 498, 76 N.W.2d 420 (1956) (developer subdivided lots and filed plot plan not conforming with terms of ordinance later declared invalid; purchaser after invalidation granted variance).

One case, however, has held otherwise. State ex rel. Jack v. Russell, 162 Ohio St. 281, 123 N.E.2d 261 (1954). The grounds for decision are confusing, but appear to be a combination of self-imposed hardship reasoning and concern that the owner would build so many houses on the interior lots in question (which he hoped to join with his street lots to achieve the required street frontage) that a fire hazard would be created.

But see Volpe Appeal, 384 Pa. 374, 121 A.2d 97 (1956) (owner bought two irregularly shaped lots totalling 32,500 square feet in a 20,000 minimum district and then sold 20,000 square feet; remainder held to be self-created hardship).

See, e.g., Howland v. Acting Superintendent of Bldgs., 328 Mass. 155, 161, 102 N.E.2d 423, 426 (1951) ("A large proportion of the owners of lands and buildings affected by zoning ordinances could say with equal truth that their lands would be more salable if there were no such ordinances"); Connor v. Township of Chanhassen, 249 Minn. 205, 207, 81 N.W.2d 789, 793 (1957) (suit for declaratory judgment brought "to improve the marketability of the property" in question). See also Spalding v. Board of Zoning Appeals, 144 Conn. 719, 137 A.2d 755 (1957) (previous owner could not sell for 35 years; rule of self-imposed hardship applied to purchaser); Lumund v. Board of Adjustment, 4 N.J. 577, 73 A.2d 545 (1950) (rule of self-imposed hardship applied even though applicant could not find buyer for 12 years); Edwards Zoning Case, 392 Pa. 188, 140 A.2d 110 (1958) (fact that owner paid $28,000 for property which ordinance now renders worth $12,000 does not justify finding of hardship); Note, 103 U. PA. L. Rev. 516, 520 nn.33, 34 (1955).

Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931), held part of an early Illinois zoning enabling statute invalid on this ground.

E.g., White v. City of Twin Falls, 81 Idaho 176, 338 P.2d 778 (1959), which held that where the disadvantage to the neighborhood would be slight, a reduction to one-fourth of the preordinance value was grounds for a variance.


260 U.S. 393 (1922).
AD HOMINEM ELEMENT IN ZONING PROBLEMS

We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.98

One of the most arbitrary short cuts which zoning boards and courts have been disposed to use is the solution of zoning problems by the use of personal restrictions rather than analysis based on the condition of the land in question, regardless of who its owner may be or have been.

Zoning laws being of recent origin,97 it is perhaps understandable that some courts have fallen into the habit of examining the equities of the owner as if he were a party litigant in an adversary proceeding. But the facts that applications may be made ex parte99 and that resistance to applications before the zoning board is conducted by informal protest in most cases99 lead to the conclusion that the applicant should appear not as the owner standing up for his own personal interest in the premises but as the voice by which the land speaks. The question before the zoning board ought always to be: does the land in its physical surroundings justify the board in relaxing the zoning standards without regard to the individual who happens to be the owner?100 Any attempt to frame the question in terms of the identity and circumstances of the applicant makes zoning speak ad hominem rather than to the land and leads to arbitrary results not based on sound zoning principles.

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98 Id. at 416.
97 In this country the first zoning law designated as such was that of New York in 1916. Bassett, ZONING 20-21 (1936).
100 See, e.g., Olevson v. Zoning Bd. of Review, 71 R.I. 303, 307, 44 A.2d 720, 722 (1945); Metzenbaum, ZONING 12 (2d ed. 1955): "indeed, the 'use' limitation may be said to be the cardinal and primary motif of comprehensive zoning; not its [sic] ownership. . . ." Thus statutes ordinarily provide that classification shall be according to "the location, size, use, and height of buildings," Minn. Stat. Ann. § 462.05 (1947), for the purposes of lessening congestion, preventing fire and depression in value, and promoting sanitation, health, adequate transport, water, and sewage disposal, so as "to encourage the most appropriate use of land . . . and to preserve and increase its amenities," Mass. Ann. Laws ch. 40A, § 3 (1961).