may be able to solve these problems. New or amended ordinances may be needed, but they will be far less helpful than will careful forethought and planning.

FLEXIBLE LAND USE CONTROL: HEREIN OF THE SPECIAL USE

TRADITIONALLY, land use control schemes contain provisions which allow for flexibility in application. Flexibility relieves the potentially harsh application of zoning restrictions through "safety valve" devices such as the special use.[1] Since such devices operate in all areas of land use control, a study of them will aid in the examination of the problem of zoning for apartments only insofar as such devices apply to most kinds of land use. Consequently, this comment does not purport to present an exposition of concepts applicable to the apartment problem alone. Rather, the special use will be defined and compared with conventional methods of land use control and the validity of the device will be discussed generally.

THE SPECIAL USE: DEFINITION AND DEVELOPMENT

The special use is a zoning device which purports to allow flexibility in the application of a zoning ordinance[2] which otherwise delineates inflexible use districts.[3] The usual residential, commercial and industrial

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[1] Haar and Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552, 1566 (1961). Other commentators have noted that the goal of the special use is to provide flexibility in the zoning laws. See, *e.g.*, Reno, *Non-Euclidian Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); Recent Cases, 67 DICK. L. REV. 185 (1963); Comment, 46 IOWA L. REV. 479 (1961).

[2] See Kotrich v. County of Du Page, 19 Ill. 2d 181, 185, 166 N.E.2d 601, 604 (1960):

> Instead of excluding [certain] uses entirely from certain zones because of the harm they might cause, or, despite the potential harm, including them because of the benefits they will bring, the special use technique allows a more flexible approach.

[3] Conventional, or Euclidian—named after the scheme approved by the Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)—zoning involves the designation of various districts for specified uses. For example, there may be single-family residence, light industrial, commercial and heavy industrial zones. The uses permitted in each zone are clearly set out in the ordinance. In addition, there may be physical requirements imposed within each use district or within boundaries superimposed upon the use zones. These physical requirements usually designate minimum and maximum height of buildings, or open area surrounding buildings on the land.

zones are retained, each district having its permitted uses specified. However, special uses, not falling into the broader use categories, are provided for within each of the conventional use districts or within the community at large.[4] One desiring to put his land to a use not otherwise permitted in his district, but denominated a special use, must apply to the local zoning authority, empowered to hear such applications,[5] for

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Although there may be provisions for varying the application of the scheme, Euclidian zoning on its face is inflexible.

[4] Currently two types of special use techniques are particularly popular. The first, which may be called the "districted special use," involves the specification of uses which may be allowed in a given zone in addition to the uses permitted therein. Where this technique is used, the ordinance contains a section which defines special uses, states the procedures to be followed for application for such uses, and sets out the standards to be applied by the zoning authority in passing on applications for special uses. See, *e.g.*, the standards for recommendation of a special use by the Zoning Board of Appeals of Cook County, Illinois, Zoning Ordinance of Cook County, Illinois, art. VI, § 6.9h (1962 as amended).

In the portion of the ordinance which sets out the conventional use districts, two types of uses are specified: permitted and special. Thus, for example, there may be a single-family residence district with permitted uses for single-family detached dwellings and other generally compatible uses. See, *e.g.*, Zoning Ordinance of Cook County, Illinois, art. VIII, § 8.3-1 (1962 as amended). But in the same single-family residence district, special use may be allowed (under the methods provided in the general sections of the ordinance for approval of special uses) for airports, educational institutions, certain excavations, medical institutions, land fill projects, philanthropic institutions, planned developments, public utilities and services, radio and TV stations, recreational facilities, and accessory uses. Zoning Ordinance of Cook County, Illinois, art. VIII, § 8.4-1 (1962 as amended). In a similar manner each general use district (residential, commercial, and industrial) sets out in detail all permitted and special uses.

The second type of special use technique currently in vogue is popularly called the "floating zone." The floating zone embodies uses which may be needed or desirable in the community but which, for one reason or another, are not placed in any specific district.

Where the floating zone technique is used, the ordinance sets out the conventional use districts, specifying the uses and requirements within each zone in the usual way. However, one section of the ordinance provides procedures and standards for permitting certain uses in any zone in which the use is otherwise prohibited. See, *e.g.*, Village of Skokie, Illinois, Amended Zoning Ordinance, art. XVII, § 1 (1956). Some uses which may fall within this category are public buildings, schools (both public and private), hospitals and other institutions, nursing homes, airports, greenhouses, gardens, cemeteries, roadside stands, extraction of natural resources, garbage dumps, trailer camps, radio and TV stations, and motels. See, *e.g.*, Village of Skokie, Illinois, Amended Zoning Ordinance, art. XVII, §§ 1-3 (1956).

[5] The zoning authority here referred to is the body designated in the zoning ordinance and empowered to decide, either initially or ultimately, applications for special use permits. This body may be the local legislature, such as a village board of trustees. See Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951). Or, the zoning authority may be an administrative body, such as a board of zoning appeals. See Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957).

Whether the zoning authority is a legislative or administrative body may have

permission to use his land in the desired manner. The zoning authority will then hold public hearings (after giving notice) and, if not empowered to make a final determination itself,[6] will make a recommendation to the local legislative body as to the propriety of the desired use. Allowance of the proposed use may be conditioned upon satisfaction of requirements imposed by the ordinance,[7] or, the petitioning party may be required to submit a plan which may be approved or varied by the zoning authority.

Although it has been said that the special use is a relatively new method of land use control,[8] similar devices have existed since the advent of intensive zoning. One device of early vintage, aimed at giving greater flexibility to a zoning scheme, is the special exception, a method which still enjoys wide popularity.[9] Where the special exception is employed, the zoning authority is given the power to hear and decide applications for deviation from the literal application of the zoning regulations in accordance with procedural safeguards and other standards specified in the zoning ordinance.[10]

Two other methods of avoiding strict application of a zoning ordinance are amendment and variation.[11] It has been suggested that these

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importance in regard to the question of delegation of legislative power. See text accompanying notes 72-111 *infra*.

[6] In some instances the body that hears the initial application for a special use permit may only have authority to recommend action to the body empowered to make final determination. *E.g.*, the planning commission in *Huff* only had power to recommend action to the zoning commissioner. After the decision by the zoning commissioner, appeal was allowed to the Board of Zoning Appeals, 214 Md. at 55-56, 133 A.2d at 87.

An interesting distinction between the reasoning of the court in Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960), and in Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960), is that in *Eves* the fact that final determination was made by a legislative body on a case by case basis was thought a crucial weakness because such body is not "specialized" as is an administrative body. On the other hand, the *Kotrich* court supported its view of the validity of the special use technique with the fact that the permit there involved was granted by a legislative body. 19 Ill. 2d at 187, 166 N.E.2d at 605. See text accompanying notes 84-87 *infra*.

[7] *E.g.*, the ordinance in *Rodgers* required a minimum of ten acres of land, a maximum building height of three stories, set-back and spacing requirements for structures, and a requirement that no more than fifteen per cent of the ground area of the plot be occupied by buildings. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 120, 96 N.E.2d 731, 732 (1951).

[8] Kotrich v. County of Du Page, 19 Ill. 2d 181, 183, 166 N.E.2d 601, 603 (1960).

[9] The special exception is authorized by the enabling acts of a number of states, patterned after the provision in the standard enabling act, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7 (1926), as found in 2 RATHOPF, THE LAW OF ZONING AND PLANNING 100-01 (3d ed. 1962). See Comment, 46 IOWA L. REV. 479, 482 n.22 (1961).

[10] See Comment, 46 IOWA L. REV. 479, 482-83 (1961).

[11] A case by case determination of the propriety of the literal application of a zon-

two methods represent the extremes which the special use ameliorates by providing a middle ground.[12] Amendment represents, at least, a change of the legislative mind. Amendment generally requires a more than majority vote of the legislative body,[13] and in some jurisdictions must be based upon either a mistake in the original zoning ordinance or a change of condition which warrants the amendment.[14] On the other hand, variation of the ordinance to allow an otherwise prohibited use is designed to prevent undue hardship or practical difficulty in the application of the ordinance to the particular case.[15] The distinction between the special use and the amendment or variation is evident. Change of condition or mistake and relief from undue hardship, which bottom these methods, are different from the general welfare theory which underpins the special use method. However the special exception is more difficult to distinguish from the special use.[16]

The special exception has, to a certain extent, bridged the gap between amendment and variance by allowing certain uses otherwise prohibited when such uses are deemed desirable. If the special use serves the same purpose, there seems to be little distinction between the two methods. It has been suggested[17] that one distinction is that while the special use serves the broader interests of the community, a special exception is permissible only if it is "consistent with and beneficial to the residential use or for the benefit and service"[18] of the surrounding uses in the district.

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ing scheme will hereinafter be referred to as "varying the application of the zoning scheme" or words to that effect. Such deviation differs from a "variance" which is a specific method of accomplishing deviation from the prevailing zoning regulations.

[12] See Kotrich v. County of Du Page, 19 Ill. 2d 181, 185, 166 N.E.2d 601, 604 (1960); see also Comment, 46 IOWA L. REV. 479, 480 (1961).

[13] In Illinois, for example, a three-fourths vote of the county board is required if twenty per cent of the adjacent property owners object to the proposed amendment of the zoning ordinance. However, no findings of fact are necessary since an amendment is viewed as a legislative act. Kotrich v. County of Du Page, 19 Ill. 2d 181, 188, 166 N.E.2d 601, 605 (1960). See ILL. REV. STAT. ch. 34, § 3158 (1963).

[14] Huff v. Board of Zoning Appeals, 214 Md. 48, 62, 133 A.2d 83, 91 (1957); Haar and Hering, *supra* note 1, at 1567.

[15] See Comment, 48 NW. U.L. REV. 470, 476-77 (1953). A discussion of particular problems in Illinois, which nonetheless examines the relationship of the techniques for avoiding strict application of zoning restrictions, appears in Dallstream and Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213.

[16] See Comment, 46 IOWA L. REV. 479, 482 (1961). Another justification for the special exception, as stated in *Huff*, is that the technique contemplates zoning "not only in the public good but in the interests of nearby property owners." 214 Md. at 62, 133 A.2d at 91.

[17] Haar and Hering, *supra* note 1, at 1568.

[18] *Ibid.*

The validity of the special use may be sustained on the basis of its similarity to the special exception.[19] However, there appear to be unique advantages to the special use, which justify its independent identity. It is submitted that the primary distinction between the special use and the special exception is the planning factor present in the special use method which is not present in the special exception device. This planning factor supports the validity of the special use and gives weight to it as a method of control as well as a method of flexibility.

The Validity of the Special Use

The special use technique has been considered recently in the courts of six jurisdictions.[20] Four of the six dealt with the floating zone device,[21] two holding the technique invalid.[22] In the fifth, the propriety of the districted special use method was considered and upheld.[23] A hybrid of the floating zone and districted special use methods was considered valid in the sixth.[24]

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[19] *Ibid.*

[20] Another jurisdiction has decided the validity of amendments to zoning ordinances which are similar to the special use techniques herein considered.

In Prince v. W. H. Cothrum & Co., 227 S.W.2d 863 (Tex. Civ. App. 1950), the City Council of Dallas, Texas, granted a "special permit" authorizing the erection of an apartment housing project on a twenty-two acre tract of land in a single-family residence district. The amendments were adopted in accordance with an ordinance providing for the location of such projects in any use district by the City Council upon the recommendation of the City Plan Commission after consideration of plans and imposition of any conditions necessary to protect adjoining landowners. Since the court viewed the rezoning technique as a conventional amendment to the zoning ordinance, it had no difficulty in upholding the technique. The same ground for validating the same scheme was stated in Nichols v. City of Dallas, 347 S.W.2d 326 (Tex. Civ. App. 1961), and Clesi v. Northwest Dallas Improvement Ass'n, 263 S.W.2d 820 (Tex. Civ. App. 1953).

Although these cases may be viewed as condoning a special use technique, they will not be discussed at length herein. Because the courts chose to take a narrow view of the zoning device before them, their opinions are of little value in examining the validity of the special use technique.

[21] Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

[22] Rockhill v. Township of Chesterfield, Eves v. Board of Adjustment, *supra* note 21.

[23] Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960). The *Kotrich* case was reaffirmed in Camboni's, Inc. v. County of Du Page, 26 Ill. 2d 427, 187 N.E.2d 212 (1962); Ward v. Village of Skokie, 26 Ill. 2d 415, 186 N.E.2d 529 (1962) and Hartung v. Village of Skokie, 22 Ill. 2d 485, 177 N.E.2d 328 (1961).

[24] McQuail v. Shell Oil Co., — Del. —, 183 A.2d 572 (1962).

The Technique Under Attack

The validity of the special use technique must be measured both by constitutional and statutory standards.[25] Since the same considerations are relevant to both such standards, constitutional and statutory validities are evaluated concurrently. The relevant qualities of the special use are: (1) the apparent disregard for a comprehensive plan, (2) the failure to prospectively locate special use districts, (3) the fact that the zoning body engages in a legislative act when special uses are granted, and (4) the possible transfer of the planning function to the private landowner.

All of the objections to the special use technique seem to relate to the concept of planning which is thought to justify land use control. Two views of planning are presented in the cases dealing with the special use, the validity of the technique turning upon the view taken of the planning concept. Planning may be viewed as a definite formulation of land use, *i.e.*, a statement of particularized uses permitted on particular parcels of land in the community. On the other hand, planning may be viewed as a process of considering the development of the community in terms of the most beneficial use of land, on a continuing basis. The former concept of planning requires a relatively inflexible statement, a tangible "plan," and may be referred to as inflexible planning. The latter concept requires only that criteria be specified for a continuing process of consideration aimed at greater flexibility, and may be referred to as flexible planning.

Contrary to Comprehensive Plan. By definition, valid zoning requires a comprehensive plan.[26] This requirement follows from the underlying

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[25] Since pre-statutory case law dealing with government control of land use is virtually nonexistent, the validity of the special use technique cannot be measured by common law principles. Even the analogy between the zoning power and judicial control of nuisances does not serve to analyze the special use device since the only time a nuisance suit would raise the same issues as an application for a special use permit is when the alleged improper use has not been undertaken and injunctive relief is appropriate. Even if injunctive relief were appropriate the same considerations would not necessarily aid in an analysis of legislative or administrative action authorizing a special use.

However, there is similarity between nuisance control through the courts and the concept of land use control by means of the restrictions of a zoning ordinance. A good example of this similarity is the *McQuail* controversy. Two weeks after the Delaware Supreme Court decided the zoning issues in McQuail v. Shell Oil Co., — Del. —, —, 183 A.2d 572, 581 (1962), the Delaware Court of Chancery, on the same facts, determined that the proposed land use was not an actionable nuisance.

[26] The power to zone is based upon the police power of the state, and is valid if reasonably related to the public health, safety, morals or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). However, exercises of the police

justification of the zoning power, namely that land use control is based upon the police power of the state. If the control is aimed at protection of the public health, safety or morals or is in the interest of the general welfare, it is deemed within the police power of the state.[27] Although such generalizations do not offer definite bounds for the police power, courts have not hesitated to deal with zoning ordinances in these general terms.[28] However, even though a particular scheme may fall within the police power, its application must be in accordance with a comprehensive plan which affords protection to the landowners in the area affected by the restrictions.[29] The lack of comprehensive planning is argued to deny surrounding landowners of due process while depreciating their land.[30] Thus the plan must serve to protect community interests through stability and predictability—considerations somewhat apart from the usually more particular protections afforded by the police power.

Because control in accordance with an overall plan seeks to protect community-wide interests, an ordinance fulfilling this goal is not subject to attack merely because it interferes with an individual's right to use his land as he so chooses.[31] Exactly what constitutes a comprehensive

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power must be uniform in application in order to avoid being arbitrary or unreasonable and hence unconstitutional. Rockhill v. Township of Chesterfield, 23 N.J. 117, 126, 128 A.2d 473, 478 (1957). Lack of uniformity in the application of a zoning ordinance may be termed spot zoning and cause the ordinance to be struck down as invalid. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123-24, 96 N.E.2d 731, 735 (1951). Thus most enabling acts, fashioned after the standard act, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926), found in 2 RATHOPF, THE LAW OF ZONING AND PLANNING 100-01 (3d ed. 1962), limit the zoning power to control in accordance with a comprehensive plan. The result is that zoning is defined as the legislative division of a community into areas of designated use in accordance with a comprehensive plan for community development. See *e.g.*, Village of Euclid v. Ambler Realty Co., *supra*; Eves v. Zoning Board of Adjustment, 401 Pa. 211, 215, 164 A.2d 7, 9 (1960); Comment, 48 NW. U.L. REV. 470, 473 (1953); Note, 10 SYRACUSE L. REV. 303, 304 (1959).

[27] Village of Euclid v. Ambler Realty Co., *supra* note 26.

[28] In addition to *Euclid*, see, *e.g.*, Bartram v. Zoning Comm'n, 136 Conn. 89, 68 A.2d 308 (1949); People *ex rel.* Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957).

[29] See, *e.g.*, Rockhill v. Township of Chesterfield, 23 N.J. 117, 125-26, 128 A.2d 473, 478 (1957).

[30] *Ibid.*

[31] Zoning in general is in derogation of the common law and the constitutional right of the individual to use his land as he chooses. However, those individual rights must yield to the restrictions imposed through a valid exercise of the police power of the state. See 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 149, 69 N.E.2d 827, 832 (1946).

plan is not clear.[32] The generality, if not ambiguity, of the public interest requirements offer no tangible guidelines in ascertaining whether a given plan satisfies the requisite of a "comprehensive" plan. Conventional Euclidian zoning usually meets this requirement since that scheme entails tangible prospective line-drawing, *i.e.*, all land in the community is divided, labelled, and set aside for specified use. On the other hand, the special use leaves considerable question as to the exact location of the uses denominated "special." Consequently the inflexible planning element in the special use scheme seems secondary, if planning in the inflexible tangible sense is in fact an element.

In *Eves v. Zoning Board of Adjustment*[33] the court avoided pinpointing exactly what a comprehensive plan consists of.[34] Rather, the court concluded that it is necessary for a local legislative body to consider the formulation of a plan for land use for the orderly development of the community.[35] The court stated:

> [S]ince any zoning ordinance must be enacted in accordance with the comprehensive plan, the plan itself, embodying resolutions of land use and restrictions, must have been at the point of enactment a final formulation.[36]

Furthermore, the fact that a procedure was adopted which postpones the location of the floating zone was said to amount to an admission that there was no plan in existence.[37] The court concluded that "the development itself would become the plan," a result termed "the antithesis of" valid zoning.[38]

The court in *Rockhill v. Township of Chesterfield*[39] likewise set aside a floating zone device. The ordinance delineated only two general zones, allowing all other uses to be permitted upon application for a special use.[40] Comprehensive zoning was said to be based upon socio-economic needs,[41] *i.e.*, the plan should "stand until changing conditions dictate otherwise" and should serve the purpose of "stabilization of property uses."[42]

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[32] See Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

[33] 401 Pa. 211, 164 A.2d 7 (1960).

[34] *Id.* at 215, 164 A.2d at 10.

[35] *Ibid.*

[36] *Ibid.*

[37] *Id.* at 217, 164 A.2d at 11.

[38] *Ibid.*

[39] 23 N.J. 117, 128 A.2d 473 (1957).

[40] *Id.* at 119-20, 128 A.2d at 475.

[41] *Id.* at 127-28, 128 A.2d at 479.

[42] *Id.* at 129, 128 A.2d at 480.

On the other hand, the court in *Rodgers v. Village of Tarrytown*[43] concluded that the zoning ordinances embodying a floating zone scheme "were enacted to promote a comprehensive zoning plan."[44] That conclusion was based primarily upon the fact that "while stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans . . . ."[45]

The court in *Huff v. Board of Zoning Appeals*[46] also upheld a floating zone ordinance in the face of the objection that there was no comprehensive planning involved in the scheme. However, the conclusion was based upon the idea that the local legislature's decision to scatter "about the undeveloped areas of the County tracts of five acres or more . . . [for] very light and unoffensive manufacturing operations," coupled with the procedures for application for such use, was part of a general plan.[47] Embodying indefiniteness in the ordinance was likewise held to satisfy the planning requirement in *McQuail v. Shell Oil Co.* [48]

The difficulty of specifying particular locations for certain types of land use, even in conventional zoning schemes, is underscored by the methods resorted to in order to avoid the application of the strict letter of zoning restrictions.[49] Thus the variance, amendment, and special exception have been utilized and accepted by the courts. Common experience dictates that there are some uses which are desirable or necessary but cannot be geographically pinpointed because their location is dependent upon future development incapable of prediction. Since conventional zoning schemes allow some latitude within each use district, and the fringe areas of a given district invite a wink at, or variance of, the strict letter of an ordinance, it is unrealistic to cause validity of a zoning ordinance to turn upon inflexibility at the time of enactment.

The *Eves* objection to flexibility in the ordinance before it apparently was founded upon such unreality. While the *Eves* court viewed procedures which postpone location of a use district as an admission of the nonexistence of a plan,[50] the *Huff* and *McQuail* courts found that those very procedures constituted a plan.[51] Apparently the *Eves* court feared

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[43] 302 N.Y. 115, 96 N.E.2d 731 (1951).

[44] *Id.* at 124, 96 N.E.2d at 735. Although the court here stated that it had already concluded that the promotion of a comprehensive plan was embodied in the ordinance, such conclusion can only be inferred from the language preceding this statement.

[45] *Id.* at 121, 96 N.E.2d at 733.

[46] 214 Md. 48, 133 A.2d 83 (1957).

[47] *Id.* at 59, 133 A.2d at 89.

[48] — Del. —, —, 183 A.2d 572, 578 (1962).

[49] See text accompanying notes 8-15 *supra.*

[50] See note 37 *supra.*

[51] See notes 47 & 48 *supra.*

the misapplication of the procedures for flexible zoning because the landowners in the community would be the primary instigators of development.[52] This might be a valid objection, but it is not the same as the absence of a plan. On the other hand, a total lack of specified land use, as in *Rockhill,* may be too extreme and may be suited to the label of the "antithesis of zoning."

Recognition of the community's inability to control totally may even *require* the type of loose planning embodied in the special use device. In this sense, the special use affords what may be deemed by many the most beneficial type of planning. Inherent in the lack of specificity is a quality of planning for future development which does not foreclose deviation from what presently may appear to be the most probable course of development.[53]

Indefinite Location of Zones. One of the most evil methods of zoning, in the judicial eye, is a device known as "invalid spot zoning."[54] As the name implies, spot zoning is the designation of a small area of land (the "spot") for a specific use which differs from the permitted uses in the surrounding area.[55] According to the view taken by the *Huff* and *Rodgers* courts, not all spot zoning is bad. Under that view, if the "zoning of the small parcel is in accord and in harmony with the comprehensive"[56] plan and is for the public good, or is "for the general welfare of the community"[57] and not for the benefit of the individual, it is valid. On the other hand, the *Eves* and *Rockhill* courts took the position that all spot zoning is evil in that it allows "piecemeal placement of relatively small acreage areas in differently zoned districts"[58] or leads to "invidious distinctions" and lack of uniformity in application of the zoning laws,[59] a clearly unconstitutional quality.[60]

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[52] See text accompanying note 38 *supra.*

[53] It is interesting to note that the *Rockhill* court, in striking down the scheme there involved, stated that language in Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949), which emphasized the need for flexibility in land use control, was not contrary to its decision. 23 N.J. at 128-29, 128 A.2d at 479-80.

[54] See Comment, 29 FORDHAM L. REV. 740 (1961); Note, 10 SYRACUSE L. REV. 303 (1959).

[55] Huff v. Board of Zoning Appeals, 214 Md. 48, 57, 133 A.2d 83, 88 (1957).

[56] *Ibid.*

[57] Rodgers v. Village of Tarrytown, 302 N.Y. 115, 124, 96 N.E.2d 731, 735 (1951).

[58] Eves v. Zoning Board of Adjustment, 401 Pa. 211, 218, 164 A.2d 7, 11 (1960).

[59] Rockhill v. Township of Chesterfield, 23 N.J. 117, 126, 128 A.2d 473, 478 (1957).

[60] See note 26 *supra.*

There is one situation which might occur which would give rise to an even stronger argument along the lines of arbitrariness of the operation of the special use method. If one is denied permission to put his property to use in a way which is provided in a zoning ordinance as a special use, the conventional constitutional objection is avail-

Because special use districts apply to small parcels of land not prospectively located, location of boundaries through spot zoning is implicit in the technique.[61] However, the validity of the device must turn, in view of the distinction between valid and invalid spot zoning, upon the planning justification for the redistricting. As a result, the same inquiries are appropriate to evaluate the indefinite location objection as were examined in connection with the comprehensive plan objection.

If the action of the zoning authority is for the benefit of the community and accords with some general concept of planned development, the cry of spot zoning will not invalidate the action, under the *Rodgers-Huff* rationale. This concept was aptly stated by the Illinois Supreme Court in meeting an objection to the districted special use ordinance in *Kotrich v. County of Du Page*.[62] The objection, more specifically, was that *ad hoc* determination as to particular parcels of land contemplates piecemeal changes in the general zoning scheme.[63] The court stated:

> [U]nlimited application of the special use technique is not required to meet the problem it was designed to solve. Only those infrequent uses which are beneficial, but potentially inconsistent with normal uses in the various zones, need be included.[64]

The apparent basis for the opposition to a flexible planning device in *Rockhill* and *Eves* is the fear of misapplication of the technique in particular circumstances. Such fear of misapplication seems to be present in

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able. Unreasonable restraint upon land use so as to amount to a taking without due process of law may be claimed. However, if someone else has previously been granted permission for the same use under similar circumstances, additional constitutional arguments are apparent.

A charge of arbitrary application of the zoning scheme will have more weight in such circumstances. The argument will be even stronger if the previously special use is on land adjoining that owned by the disappointed applicant. Under either view of the planning concept (*i.e.*, flexible or inflexible), the charge of arbitrariness and lack of uniformity is strong. If zoning is viewed as inflexible planning, by definition denial of the second special use application is arbitrary administration of the zoning laws since it lacks uniformity in application. Even if zoning is viewed as flexible planning, denial of the second special use application points to unfairness in the administration of the scheme.

However, since the granting of two or more adjacent uses might be objectionable to members of the community, even though they are not next-door neighbors, there is ground for refusing the second application. For example, two heliports or four cemeteries (albeit small ones) in a single-family residence district might horrify many in the community.

[61] The concept that spot zoning is implicit in the special use technique was conceived in *Rodgers*, 302 N.Y. at 123-24, 96 N.E.2d at 735, and developed in *Huff*, 214 Md. at 57, 133 A.2d at 88-89.

[62] 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

[63] *Id.* at 185, 166 N.E.2d at 604.

[64] *Ibid.*

both the planning and indefinite location objections to the special use technique. The fear is that individual landowners in the community will be afforded no protection from incompatible land use which may depreciate the value of their property or interfere with the normal use of their land.[65] For example, opponents of flexible zoning devices argue that an individual who wishes to build a single-family residence in a district set aside for such purpose should be assured that a hospital, church, radio station, motel or apartment building will not be erected on adjoining property.[66] The special use fails to give such assurance to private landowners if (1) there is no notice of any contemplated varying use[67] or (2) even if landowners are aware of the possibility of deviating uses, they cannot know the exact location and thus they may suffer economic injury through fluctuating land values.[68]

However, the special use technique provides notice of possible location of deviations from the permitted use pattern. Where the districted special use is employed, landowners in each conventional zone are aware that the enumerated varying uses may be located in that district upon application by a prospective user. The notice afforded by the floating zone method (or a districted special use method with the same uses enumerated in each district) is less satisfactory since the varying uses may be located in any district in the community. However, private landowners are aware of contemplated deviation from the general use pattern even in the case of the floating zone.

An answer to the objection based upon economic injury is that the special use technique is designed to allow consideration of such factors in determining the propriety of locating the special use upon application. In fact, the ordinance usually requires the "protec[tion of] the uses in neighboring residential zones" as a condition to the grant of a special use.[69] As was pointed out in *Huff* the courts are capable of providing a "check on arbitrary action."[70]

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[65] *Id.* at 189, 166 N.E.2d at 606.

[66] Assurance of conforming use has been termed "stabilization of property uses." Rockhill v. Township of Chesterfield, 23 N.J. 117, 129, 128 A.2d 473, 480 (1957).

[67] Eves v. Zoning Board of Appeals, 401 Pa. 211, 218, 164 A.2d 7, 11 (1960).

[68] The economic argument, see text accompanying note 65 *supra*, is implicit in the following argument made before the *Eves* court:

> [B]ecause of the absence of a simultaneous delineation of the boundaries of the new . . . district, no notice of the true nature of his vicinity or its limitations is afforded the property owner or the prospective property owner. While it is undoubtedly true that a property owner has no vested interest in an existing zoning map . . . the zoning ordinance and its accompanying . . . maps . . . should reflect the current planned use of the community's land so as to afford as much notice as possible.

Ibid.

[69] Huff v. Board of Zoning Appeals, 214 Md. 48, 59, 133 A.2d 83, 89 (1957).

[70] *Id.* at 64, 133 A.2d at 92.

If there were community-wide confidence in the zoning authority's ability to balance the individual's economic interest upon application for a special use and the court's ability to review such determinations, then even economic loss due to speculation as to location of special uses could be minimized. Even so, it is possible, perhaps even probable, that some individual interests will suffer upon location of a hospital, church, apartment house, or other special use. But, as was recognized in *Rodgers*, the same objection exists in any zoning scheme: "[T]he same uncertainty . . . would be present if a zoning ordinance were to sanction garden apartments as well as one-family homes in a Residence *A* district—and yet there would be no doubt as to the propriety of that procedure."[71] Furthermore, conventional zoning may similarly affect land values initially, and conventional variation techniques may affect land values subsequently.

Inadequate Legislative Standards. Location of the boundaries of a special use may be accomplished by amendment of the zoning ordinance and maps[72] or by grant of permission by an administrative body,[73] or by a legislative body acting in an administrative capacity.[74] When the zoning ordinance is amended to permit a special use, such action may be attacked as an abuse of legislative discretion as being beyond the power of the local governing body,[75] or as being arbitrary and unreasonable.[76] The local legislative action may also be judged in terms of the standards embodied in the state enabling act.[77] If the local governing body subdelegates its zoning authority to an administrative body, the propriety of such delegation may be questioned.[78] In such case, if the ordinance contains sufficient standards to be applied by the administrative body, it may be upheld.[79]

By granting a special use through amending the zoning ordinance,

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[71] 302 N.Y. at 126, 96 N.E.2d at 736.

[72] *E.g.*, McQuail v. Shell Oil Co., — Del. —, 183 A.2d 572 (1962); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960). See also cases discussed in note 20 *supra*.

[73] Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957).

[74] See Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

[75] See, *e.g.*, Rodgers v. Village of Tarrytown, 302 N.Y. 115, 127, 96 N.E.2d 731, 736 (1951) (dissent).

[76] *E.g.*, McQuail v. Shell Oil Co., — Del. —, —, 183 A.2d 572, 578-79 (1962); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 122, 96 N.E.2d 731, 734 (1951); Eves v. Zoning Board of Adjustment, 401 Pa. 211, 220-21, 164 A.2d 7, 12 (1960).

[77] See Kotrich v. County of Du Page, 19 Ill. 2d 181, 186-87, 166 N.E.2d 601, 604-05 (1960) (legislature acting in an administrative capacity); Rodgers v. Village of Tarrytown, *supra* note 75; Eves v. Zoning Board of Adjustment, *supra* note 76.

[78] Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957).

[79] *Ibid.*

a local governing body may effectively limit inquiry into the propriety of the scheme. Thus, in *Prince v. W. H. Cothrum & Co.*[80] the court took the view that a special use permit granted by the Dallas City Council was just an ordinary amendment of the zoning ordinance. Consequently, the court concluded that it could not substitute its judgment for that of the Council.[81] Similarly, in *Rodgers* the court limited its inquiry into the governing body's action to a determination that its decision was not "arbitrary or illegal."[82] In other words, the legislative acts of a local governing body enjoy a presumption of legality and will not be struck down unless proven arbitrary.[83]

On the other hand, the final character of a decision by the local legislature led the court in *Eves* to set aside the local legislative action.[84] The *Eves* court did not wish to determine that "each legislative act of amending the zoning map" was not "arbitrary, capricious, or unreasonable" nor did the court wish to be limited to such inquiry upon judicial review.[85] However, the more fundamental objection stated by the *Eves* court is that the state enabling act set out a scheme for making changes in the zoning regulations on a case by case basis. But this scheme did not empower the legislative body to make such changes; rather, "a specialized body such as the zoning board of adjustment," was so empowered.[86] The court was thus concerned that since the enabling act made no provision for the flexible scheme involved in *Eves*, even though accomplished by legislative act, the local legislature would not be bound to follow the "rigid statutory standards" set out in the state statute for the other methods of changing the zoning regulations.[87]

The *Rodgers* court met the argument that the local governing body's action has the same effect as the granting of a variance (for which there was a separate procedure specified in the enabling act) by noting that the legislature could have simply amended the ordinance to permit the

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[80] 227 S.W.2d 863 (Tex. Civ. App. 1950).

[81] *Id.* at 866. See discussion of *Prince v. W. H. Cothrum & Co., supra* note 20.

[82] 302 N.Y. at 126, 96 N.E.2d at 736.

[83] [D]ecision as to how a community shall be zoned or rezoned, as to how various properties shall be classified, or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it.

Id. at 121, 96 N.E.2d at 733.

[84] 401 Pa. at 220, 164 A.2d at 12.

[85] *Ibid.*

[86] *Ibid.*

[87] *Ibid.* The *Rockhill* court also concluded that the state enabling act standards would not necessarily be followed by the zoning authority under the ordinance, but did not state its reasoning as clearly as the *Eves* court. The *Rockhill* court merely stated that the ordinance was "*ultra vires* and void." 23 N.J. at 127, 128 A.2d at 479.

special use on a particular tract in accordance with a comprehensive plan.[88] Consequently, by making changes in the zoning scheme a two step process (one, enabling application for a change; and two, making the change) the same result was achieved.[89] To strike down such a scheme, the *Rodgers* court concluded, "would be to exalt form over substance and sacrifice substance to form."[90] Nor was the *Rodgers* court concerned over standards since it had concluded that the scheme had to be applied "pursuant to a comprehensive plan for the general welfare of the community,"[91] so as to be reasonable,[92] and, in any event, the action of the local legislature was subject to judicial review as to the question of its reasonableness.[93] Since the *Rodgers* court accepted flexible planning as "pursuant to a comprehensive plan" the provision in the ordinance for changing the zoning restrictions was relied upon to satisfy the planning requirement to validate the scheme.

If the *procedures* for amending the zoning ordinance are not substantially different from those required for other methods of varying the scheme, the *Rodgers* conclusion is justified. There being no difference in these procedures in *Eves*, it appears that the reason for the position there taken was that either (1) the administrative body empowered to grant variances and special exceptions was the only group possessing the expertise required to change the zoning regulations, or (2) the standards for variation or special exception were so different from the standards for adoption of general zoning regulations as to prevent the local legislature from acting in the field of variation.

If the local legislature lacked the expertise to change the zoning laws, even as to individual application, it would be questionable whether it had the expertise to zone at all. Consequently, if the standards for adopting zoning restrictions are satisfactory, those same standards should be sufficient for changing the zoning regulations.

On the other hand, if the state legislature set out more restrictive standards for varying the application of the zoning scheme than for legislative change through amendment, the local legislature would not be justified in attempting to apply the less restrictive standards by varying by amendment.

In *Eves* the standard for variance and special exception, to be granted by an administrative body, was stated as the existence of "unnecessary

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[88] 302 N.Y. at 125-26, 96 N.E.2d at 736.
[89] *Ibid.*
[90] *Ibid.*
[91] *Id.* at 124, 96 N.E.2d at 735.
[92] *Id.* at 123, 96 N.E.2d at 734.
[93] *Ibid.*

hardship" if the prevailing zoning restrictions be literally enforced.[94] Since uniformity of application so as not to be "arbitrary, capricious or unreasonable" has been read into the police power standards for zoning in general,[95] it is difficult to see how avoiding "unnecessary hardship" is a different standard.

A different question is presented if the enabling act provides more restrictive *procedures* for variation of the zoning scheme than for adoption or amendment of a zoning ordinance. Similarly, even if the local legislature acts in an administrative capacity when granting a special use permit (*i.e.*, there is no change in the classification of the use district for the land in question, the use merely being allowed), the more restrictive procedures are arguably applicable.[96] Thus, in *Kotrich* the court noted that the Illinois enabling act requires a vote of three-fourths of the local governing body for the granting of a variance or, in some instances, for an amendment.[97] However, the court concluded that since the special use is neither a variance nor an amendment, the statutory procedures applying to them would not apply to the special use technique.[98] What procedure, if any, should be required for the special use was said to be a "matter for legislative determination."[99]

Implicit in the *Kotrich* approach to the question of differing procedures is the assumption that the action of the county board of supervisors was valid. Even if the procedures to be followed in application of the special use device is a question for the legislature, to uphold the employment of such technique allows the same result as an amendment without resort to the procedures provided by the state legislature. On the other hand, it is apparent that the *Kotrich* court was satisfied that the enabling act standards for exercise of the zoning power coupled with judicial review provide adequate safeguards for the employment of the special use technique.[100]

Adequacy of standards is also important in the determination of the validity of a special use technique which is applied by an administrative body. The legislative determination of the standards prevents the administrative action from encroaching upon the legislative function.[101] Instead, the administrative body merely utilizes its expertise in deter-

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[94] 401 Pa. at 219-20, 164 A.2d at 12.

[95] See text accompanying notes 91-93 *supra*. The *Eves* court recognized that the zoning power of the local legislature is limited in that it cannot be arbitrary. See text accompanying note 85 *supra*.

[96] See Kotrich v. County of Du Page, 19 Ill. 2d 181, 187, 166 N.E.2d 601, 605.

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Id.* at 187-88, 166 N.E.2d at 605-06.

[101] See 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.09-.10 (1958).

mining the applicability of the standards set out by the legislature.[102] In addition, standards are necessary to keep the zoning scheme in accordance with the comprehensive plan. By placing standards in the ordinance the local legislative body manifests that it has considered the factors embodied in the standards. Under either a flexible or inflexible concept of planning, such manifestation is necessary to justify the scheme, although the adequacy of the standards may be dependent upon the accepted meaning of planning.

The standards placed in most zoning ordinances embodying a special use technique have been molded by the standards which have been recognized as sufficient for variance and special exception. Undue or particular hardship has been held to be a satisfactory standard for variance.[103] Precautions for the protection of adjoining landowners has been held a satisfactory standard for the special exception.[104] On the other hand, the overriding goal of the standards provided in special use ordinances is the benefit to the community at large, not just the surrounding landowners[105] although the surrounding landowners are afforded protection in that the administrative body is authorized to impose conditions upon the proposed use for the purpose of protecting surrounding uses.[106] Such protection may even be embodied in the text of the ordinance as to certain uses which are recognized by the local governing body as being particularly prone to adversely affect surrounding properties if not limited.[107]

Even if adequate standards are provided by the local or state legislatures, another criticism of the local governing process remains. The possibility of self, or affected, interest is always a danger.[108] Although this danger exists in any local governing function, it may be argued that by turning over the task of deciding special use applications on an *ad hoc* basis, the door will be opened for irresponsible or self-interested decisions.[109]

The thought of allowing the fate of future development and economic stature of the community to lie in the hands of a local zoning authority

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[102] Huff v. Board of Zoning Appeals, 214 Md. 48, 61-62, 133 A.2d 83, 90-91 (1957).

[103] See note 15 *supra*.

[104] *E.g.*, Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953).

[105] See, *e.g.*, Zoning Ordinance of Cook County, Illinois, art. VI, §§ 6.9h & f (1962 as amended).

[106] See text accompanying note 69 *supra*.

[107] *E.g.*, the restrictions as to motels in the ordinance of the village of Skokie involved in Ward v. Village of Skokie, 26 Ill. 2d 415, 416, 186 N.E.2d 529 (1962).

[108] See 2 DAVIS, *op. cit. supra* note 101, § 12.03, at 155.

[109] Fear of irresponsible or self-interested decisions seems to be implicit in the objection to *ad hoc* zoning and may be based upon the fear of economic loss discussed in notes 65-68 *supra* and accompanying text.

may be alarming to some. Perhaps it is enough to point out that such misadministration need not exist unchecked since one may turn to the courts for a review of the propriety of an alleged unreasonable determination.[110] Although judicial review may not always be readily available for all phases of the zoning decision,[111] the special use scheme does not discourage judicial review.

Transfer of Planning Function to Private Landowners. If government control of land use finds its strongest justification in planning the development of the community, allowing individuals to substitute their private goals for those in the best interest of the community would be contrary to valid zoning. Since the special use technique contemplates initiation of the application of the scheme by the private landowner, it has been charged that the planning function is thus transferred to the individual. However, the flexible planning implicit in the special use scheme[112] coupled with the factors which are considered by the zoning authority upon application for a special use permit[113] support the conclusion that the planning function remains in the zoning authority.

In *Eves* the court addressed itself to the issue of shifting the planning function to the landowner and concluded that final determination of land use would "await solicitation by individual landowners, thus making the planned use of the community dependent upon its development."[114] That the *Eves* court feared the zoning authority would not fulfill its planning function is further supported by the statement that "the personal predilections of the [members of the zoning authority] or the affluence or political power of the applicant would have a greater part in determining rezoning applications than the suitability of land for a particular use from an overall community point of view."[115]

On the other hand the *Rodgers* court believed that the zoning authority would be bound to decide applications for special use "in the exercise of a reasonable discretion" upon a finding that granting the application "accords with the comprehensive zoning plan and benefits the village as a whole."[116] The availability of the court to set aside any decision which is unreasonable or, by implication, not in accordance

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[110] *E.g.*, Eves v. Zoning Board of Adjustment, 401 Pa. 211, 221, 164 A.2d 7, 12 (1960); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951).

[111] The limits of judicial review of amendments of the zoning ordinance are discussed in notes 80-85 *supra* and accompanying text.

[112] See text accompanying notes 44-52 *supra*.

[113] See text accompanying note 69 *supra*.

[114] 401 Pa. at 217, 164 A.2d at 11.

[115] *Ibid.*

[116] 302 N.Y. at 123, 96 N.E.2d at 734.

with the comprehensive plan was believed to be an additional safeguard.[117]

The fear of lack of adequate judicial review is the basis of the *Eves* belief that the planning function would be transferred to the individual landowner through the special use technique.[118] To assume that a court is incapable of reaching a reasonable decision as to whether a particular application of a zoning device benefits the community, is to deny the ability of the courts to appraise any zoning scheme.[119]

Even greater support for the proposition that the planning function is not transferred to the private landowner is found in the procedure for granting a special use permit. The ordinance itself may specify requirements for the proposed use for the protection of the community or the surrounding property owners.[120] In such case, the most crucial problems in terms of the existence of the proposed use are recognized, considered, and set out in the form of a legislative plan. Moreover, the body which decides whether to grant the application may have the power to withhold permission if the desired use will conflict with the general goals of the community.[121] Consequently, the community interest is well protected where the special use device is employed, nothwithstanding initiation of its application by interested individuals.

CONCLUSION

The special use technique of land use control introduces an unconventional flexibility into an area of government control hitherto believed to require inflexibility. Consequently, the technique has been subject to vigorous attack. However, the majority of the cases dealing with such zoning techniques have recognized the place of flexibility in land use planning.

Where the special use is valid as a means of land use control, it offers a method of dealing with the problem of apartments, as well as many other controversial uses of land.

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[117] *Ibid.*

[118] See text accompanying note 85 *supra.*

[119] Implicit in the *Eves* decision is the conclusion that judicial review of the special use procedures under a test that it be not "arbitrary, capricious or unreasonable" does not afford adequate protection to those who are adversely affected. *Ibid.*

[120] See note 107 *supra.*

[121] See Zoning Ordinance of Cook County, Illinois, art. VI, §§ 6.9h & f (1962 as amended).