FROM KRONER TO FASANO:

An Analysis of Judicial Review of Land Use Regulation in Oregon

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I. INTRODUCTION

The year 1974 marks the fiftieth anniversary of the Oregon Supreme Court's upholding of public land use regulation of private lands in this state.[1] It is the purpose of this paper to assess the development of court review of such public regulations. As will be seen, this course has been somewhat inconsistent. While the Oregon courts have upheld land use regulations in theory, they have been troubled by the seemingly unjust application of those regulations in particular cases.

The approach undertaken by this paper is to first analyze the history of judicial review of land use regulations in Oregon with emphasis upon the form which that review has assumed. A central theme of this article is that the medium of review, as an expression of the scope of review, is directly dependent upon the confidence of the courts in the land use regulatory process: the zoning process. The main argument of this paper is that the only proper form of judicial review of administrative decisions on permissible uses of specific parcels of land is a review limited to the record of the deciding agency.

An analysis of the 43 Oregon land use cases to date suggests some tentative conclusions:

1. For the most part, Oregon courts are ambivalent as to their role in the land use regulatory process; however, the tendency has been towards substantive review of local decisions, both formally (by proceeding in forms of action or suit not limited to the record) and informally (through a shifting standard of review).

2. There has been a tendency to side with the neighbor as opposed to the successful applicant and the granting government, toward the governmental agency in review of policy-making decisions as opposed to a property owner seeking to invalidate an ordinance, and toward the governmental agency in reviewing denials of permits as opposed to the disappointed applicant.

3. There is a generally unstated, yet deep-seated, distrust of local government by the courts.

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The author expresses his thanks to Carleton Foss Knappe, third-year law student at Willamette University for his assistance in the preparation of this article.

[1] Kroner v. City of Portland, 116 Or. 141, 240 P. 536 (1925) (two dissenting opinions).

4. Until recently, the courts have tended to adopt standards of review which fit the exigencies of a particular situation, only to change those standards in later decisions.

In recent years, Oregon courts have been disturbed, both by the spotty history of judicial review and by the absence of procedural or substantive guidelines which could be useful to local governments. By separating the policy-making and adjudicative functions of the land use regulatory process, the much heralded case of *Fasano v. Board of Commissioners of Washington County*[2] took an important step towards finding a solution of these problems. But even if *Fasano* clarifies the standards by which courts review land use decisions, the question of what form such review should take has still not been sufficiently treated in Oregon. As will be seen herein, the courts have accepted, generally without challenge, the premise that such review is *de novo* rather than of the limited scope of looking for errors in the record. Further, while the courts state that great weight is to be given to the decisions of the local agency, this article will demonstrate that *who* brings the challenge of the agency's decision is often practically speaking dispositive of the result of such challenge.

Because the form of review of land use decisions is of great importance, because the writ of review[3] or similar form limited to the record should arguably be the exclusive vehicle for review of most individual parcel land use decisions of local government, and because there is no existing adequate analysis as to the nature and procedure of the writ of review, an attempt will be made to explain the nature, form and function of that writ.

Finally, some suggestions will be advanced as to how the land use process may be strengthened and become the subject of greater judicial and public confidence so that the tendency of courts to go beyond the record in local land use decisions will be as minimal as it is in other areas of administrative law.

II. THE RECORD OF REVIEW

In the 50 years since an Oregon appellate court first passed upon the validity of public regulation of the use of private lands, there have been 43 reported Oregon decisions dealing with this area of the law.[4] For the purpose of analysis, the 50-year period under consideration can be categorized into three periods reflecting different judicial attitudes toward land use regulation.

The first period extended from the first Oregon land use regulation cases. Encouraged by the unanimous decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[5] state courts upheld both zoning enabling legislation and zoning ordinances against a host of

[2] 96 Or. Adv. Sh. 1059, ___ Or. ___, 507 P.2d 23 (1973).
[3] ORS 14.010 to 34.100.
[4] *See* Appendix. Note, however, that decisions, though peripherally relating to land use, but dealing primarily with other issues, are omitted, such as Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1961); Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960), and the cases arising out of ORS 215.203 and 215.213, which are essentially property tax cases.
[5] 272 U.S. 365 (1926).

challenges. Typically, these early decisions were based on the mere presumption of legislative validity.[6]

Cases in the next period demonstrated a reaction by the courts to the seemingly limitless authority which was by then accorded local government in the area of land use regulation. The reaction came in the form of judicially conceived rules designed to check the abuse of regulatory power by local zoning authorities. These rules included the requirement of conformity to a comprehensive plan,[7] prohibition against "spot zoning"[8] and the "change or mistake rule."[9]

In the final period, the courts distinguish between the policy-making function of local planning agencies and the application of these policies by the agencies to specific parcels of land.[10] Reviews of the policy-making functions in this later period still are based on the presumption of legislative validity. For an attack on the policy-making functions to be successful, every conceivable basis of support for the policy developed must be negated. In contrast, the application by local agencies of policies to specific parcels of land are subject to closer judicial scrutiny. In these latter situations the local actions are considered either as judicial or quasi-judicial actions and a more stringent standard of review consequently is applied.[11]

According to the Oregon Supreme Court, a judicial or quasi-judicial action is separated from a policy-making or legislative action on the following basis:

> Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests or situations, or whether it entails the application of a general rule or policy to specific individuals, interests or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.[12]

As the court suggests, quasi-judicial actions are distinct from "legislative-type" rule-making or policy-making power. It is these legislative-type actions which the courts, as a matter of policy,

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[6] Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920), was the first case to uphold land use regulation by zoning under the New York City Zoning Resolution of January 25, 1916, the court reasoning that, just as individual uses of land may be regulated, so the totality of uses may also be regulated. In Kroner v. City of Portland, 116 Or. 141, 167-69, 240 P. 536, 540 (1925), the dissent by Chief Justice McBride excerpted from Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925); Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923); Brett v. Bldg. Comm'n, 250 Mass. 73, 145 N.E. 269 (1924); and State v. Harper, 182 Wis. 148, 196 N.W. 451 (1923), noting that in each of these cases, zoning had been upheld, but added that these excerpts " . . . show the flimsy and unsound pretexts advanced as grounds for sustaining [zoning ordinances]." Indeed, the early cases rely almost exclusively on the presumption of validity accorded an exercise of the police power.

[7] Comment, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

[8] *See, e.g.*, Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965).

[9] *See, e.g.*, McDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965); Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969).

[10] Fasano v. Board of Comm'rs, 96 Or. Adv. Sh. 1059, 1063, ___ Or. ___, 507 P.2d 23, 26-27 (1973).

[11] *Id.*

[12] *Id.* at 1063, 507 P.2d at 27, quoting from Holman, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 137 (1972).

do not wish to reopen or retry. Although not given as heavy a presumption of validity as usually is afforded legislative action, land use policy decisions are presumed valid and reviews of such decisions are limited to the record of the lower body.[13]

The form of judicial review in Oregon also appears to be influenced by the type of function used by the regulatory bodies in their administrative action. Of the 43 Oregon cases relating to land use, 24 (or 56 percent) involved a quasi-judicial decision. An examination of the forms of review utilized in these cases is helpful:

Form of Judicial Review	All Land Use Cases	Quasi-Judicial Decisions
Injunction	16	2
Declaratory Judgment	18	15
Writ of Review	5	5
Mandamus	3	2
Criminal Sanctions	1	-

It is apparent that the form of review utilized in the majority of all land use cases, and particularly in those of the quasi-judicial type, has been a form of de novo review. This uniformity is best explained as a result of the older characterization of all land use decisions, whether policy-making or quasi-judicial, as "legislative" actions.

However, it should be noted that even before *Fasano*, Oregon appellate courts had devised a method of covertly penetrating the "legislative" shell and dealing with the lower decision as they saw fit.[14] Reflecting an innate conservatism, the courts were much more willing to affirm application denials by the lower bodies than they were willing to affirm application approvals by the same body.[15] Further, those courts seemed to have much more sympathy for a beleaguered neighbor who opposed the granting of an application than they had for a disappointed applicant.[16] And finally, as was manifest in *Fasano*, there was a distinct doubting of the ability of local governments to administer land use regulations fairly.[17]

A more detailed inquiry into the course of judicial review of land use decisions in Oregon throughout these three periods is now in order.

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[13] Bay v. State Bd. of Educ., 233 Or. 601, 378 P.2d 558 (1963); Wright v. Bateson, 5 Or. App. 628, 485 P.2d 641, *cert. denied*, 405 U.S. 930 (1971).

[14] Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965).

[15] As the chart in the Appendix demonstrates, approval of an application by a quasi-judicial agency has been affirmed only four times while being reversed eleven times; however, denial of an application has been affirmed seven times and reversed only once. One decision was found moot.

[16] The applicant who has been turned down in the quasi-judicial process has had such denial affirmed seven times while reversal of denial has occurred only once. The neighbor, however, has successfully reversed the decision of the inferior tribunal 11 times and has had only four defeats. *See* Appendix.

[17] As the chart in the Appendix demonstrates, the decision of a quasi-judicial agency has been upheld 12 times and reversed 11 times.

The Age of Belief (1925-1946)

The first land use regulations in Oregon were established by an ordinance of the City of Portland in 1918.[18] One year later, the Oregon legislature enacted legislation which permitted every Oregon city to pursue this new experiment of zoning.[19] In the 1925 case of *Kroner v. City of Portland*,[20] a property owner attacked zoning regulations which prevented him from erecting a creamery. The plaintiff alleged, *inter alia*, that these regulations amounted to a taking of his property without due process. Rejecting plaintiff's argument, the Supreme Court upheld the regulations involved in the dispute stating:

> . . . It is plain that governmental agencies entrusted with the police power, as the City of Portland is, can enact laws regulating the use of property for business purposes. Otherwise, it would be permissible to erect a powder mill on the site of the Hotel Portland or to install a glue factory next to the City Hall or to erect a boilership adjacent to the First Congregational Church. Such things would be legitimate but for the restraint of the police power. The difference between such instances and the present contention (i.e., violations of the due process and equal protection provisions) is in degree and not in principle.[21]

In their dissenting opinion, Chief Justice McBride and Justice Rand expressed their belief that the regulations were *ultra vires* as well as bad policy. The Chief Justice considered that:

> . . . Giving to the council and neighbors the right to change the boundaries of the zoning law at will and without any external legal standard by which such changes could be made is a grant of arbitrary power . . . .[22]

The problem of defining the legal standard to use in reviewing the administration of land use regulations was to be a continual problem for Oregon courts as they threaded their way between the Scylla of affirming the decisions of those regulatory bodies in broad police power terms and the Charybdis of reversing such decisions for the practical reason that the court lacked confidence in the competence or honesty of local government. Only three other cases relating to land use were decided in the first 21 years following *Kroner*. All four cases supported the concept of the potential validity of municipal land use ordinances by finding them generally necessary to promote the general welfare. However, the courts were equally solicitous of individual rights; they tried to prevent the abuse of ordinance power by providing involved neighbors with a veto power over proposed land uses[23] and by balancing the very need for

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[18] PORTLAND, OR. ORDINANCES No. 33911 (1918). The Portland ordinance was only two years behind the enactment of the country's first zoning regulations. *See* note 6 *supra*.
[19] Ch 300, Or. Laws 1919, *presently* ORS 227.210 to 227.300.
[20] 116 Or. 141, 240 P. 536 (1925).
[21] *Id*. at 151, 240 P.2d at 539 (opinion by Justice Burnett). The Portland Realty Board filed an *amicus curiae* brief.
[22] *Id*. at 171, 240 P.2d at 545. The Chief Justice disparages the premises of the "City Beautiful Movement" which was the ideological initiative to zoning. *Id*. at 153, 240 P.2d at 540. However, two years later in Ludgate v. Somerville, 121 Or. 643, 648, 256 P. 1043, 1045 (1927), Justice Belt went so far as to say: "The general scheme of maintaining and perpetuating Laurelhurst as a high class, exclusively residential district certainly promotes the general welfare."
[23] Archbishop of Oregon v. Baker, 140 Or. 600, 15 P.2d 391 (1932).

regulation against the freedom of private property owners.[24] All four of these cases, however, were suits for injunctive relief and involved substantive review of the local regulatory decision. In no case was there any discussion relating to the propriety of substantive review.

The Age of Skepticism (1946-1969)

Following World War II, Oregon, along with the rest of the nation, embarked upon a period of growth and expansion which was highlighted by a trend toward suburbanization. This development created conflicts between those people established within a neighborhood and potential newcomers. In the cities, land became expensive and conflicts arose between those owning property with established uses and those who had different uses in mind and were seeking to locate. It was inevitable that these conflicts would reach the courts with increasing frequency.

The attitude of the courts toward land use regulation began to change during this period. No longer was a simple assertion of public health, safety, morals and general welfare sufficient to uphold a land use decision, especially if the rights of neighbors were involved.[25] Nine of the 14 cases decided during this period involved quasi-judicial decisions; of these nine, only five upheld the decision of the local regulatory body (two affirming approval and three upholding denial of applications).[26]

However, it was three of the four remaining quasi-judicial cases in which the decisions to rezone were reversed that helped establish what were to become seminal influences on modern Oregon land use law. In these decisions, the court wrote extensively on its standard of review and the burdens on the parties in quasi-judicial matters. The distinct objective of the court was to curb abuses which had crept into the land use regulatory process as a result of the sweeping language in earlier cases. To accomplish such an objective, the court found it necessary to make a complete *de novo* review in each case.

The first of these significant decisions, *Page v. City of Portland*,[27] dealt with a residential area which had been rezoned to permit the building of a supermarket. The court was especially skeptical of the propriety of allowing rezoning, an arguably adjudicative act, to be undertaken by a legislative body (a city council) in legislative form (an ordinance). However, the court finally justified its reversal on the grounds that there was no relationship between public welfare and that particular reclassification, an unusual substantive due process finding. In addition, it relied on two concepts which were to pervade future decisions during this period:

1. That there was a neighborhood "right to rely" on existing land use regulations.

[24] Ludgate v. Somerville, 121 Or. 643, 256 P. 1043 (1927).
[25] *See, e.g.*, Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969); Smith v. County of Washington, 241 Or. 380, 206 P.2d 545 (1965); Robertson v. City of Salem, 191 F. Supp. (D. Or. 1961); Page v. City of Portland, 178 Or. 632, 165 P.2d 280 (1946).
[26] *See* Appendix.
[27] 178 Or. 632, 165 P.2d 280 (1946).

2. That a change of regulations depended not upon the police power but upon change of neighborhood circumstances.[28]

The second major case in this period was *Smith v. County of Washington*.[29] In this case, the Oregon Supreme Court reversed a quasi-judicial county decision allowing the rezoning of a residential zone into a manufacturing zone. The major thrust of the decision was that a change in zoning classification depended upon changes in the character of the neighborhood following the adoption of a county "comprehensive zoning plan." The court also engaged in vague "spot zoning" terminology; if a small parcel of land was rezoned to a classification out of character with the remainder of the neighborhood, this would make the reclassification suspect. On finding that the reclassification in the *Smith* case was suspect due to its suspicious nature, the court required that the county bear the burden of proof. In this case, the county did not meet the burden.

It was the final case of this period, *Roseta v. County of Washington*,[30] that completed the journey to skepticism. That case involved the rezoning from a single-family residential classification into multifamily. In this case, as well as in *Smith* and later *Fasano*, the court was not only disturbed over the lack of legislative guidelines and useful precedent to aid its review but also by the lack of judicial control over actual or potential abuse of the land use regulatory power in the possession of local government. *Roseta* also emphasized that the primacy of the existing zoning patterns and land us
es and the "vested rights" of neighbors were the practical criteria necessary to justify a change in land use regulations. The court considered that these criteria were based on a statutory mandate which required that the regulations be in accord with a comprehensive plan. However, to assuage its feelings of judicial abdication, the court also formulated some new rules for the land use game:

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[28] 178 Or. at 639, 165 P.2d at 283. Actually, *Page* framed this requirement in terms of a right to rely by a "home owner" on the "rule of law that a classification made by ordinance will not be changed unless the change is required for the public good" rather than for the accommodation of private interests to the detriment of "other property owners in the same district." *Page* then framed a rule that while there is a discretion in enacting a zoning ordinance, in changing its application to one parcel of property, there must be reasonable grounds for doing so. The court then added:

> Whether there has been such a substantial change of conditions in a use district as to warrant the enactment of an amendatory zoning ordinance is primarily a question for the Council to determine, and its action, in reference thereto, will not be reviewed by the courts if the question is fairly debatable. It is only when the legislation is clearly arbitrary and unreasonable that a court will interfere.

Id.

In *Page* can be found the germs of the "public need" and "other available property" requirements of *Fasano*, but the court viewed the action as legislative, focused primarily on the rights of neighboring property owners and intimated that a change of regulations on a small parcel of property could result only after a change of (physical) conditions.

[29] 241 Or. 380, 406 P.2d 545 (1965). *Smith* was the first case involving county zoning regulations made possible by chapter 537, Oregon Laws 1947.

[30] 254 Or. 161, 458 P.2d 405 (1969).

1. The court could require findings of the local legislative body to justify its decision.

2. There must be a change of physical circumstances in the neighborhood or a mistake in the original zoning to justify a land use reclassification. (This standard is termed the "change or mistake" rule.)[31]

Despite the pronouncements of hard and fast rules in *Roseta*, troublesome points were left unresolved. The most important of those points was the dichotomy between the traditional view which emphasized the presumption of validity and the police power basis for land use regulations[32] and the view expressed in the *Smith, Page* and *Roseta* cases which emphasized that the application of the police power was somehow limited if it changed the effect of the regulations on one parcel of property.

The Age of Functionalism (1969-____)

The major case decided during this period, *Fasano v. Board of Commissioners of Washington County*,[33] provided a basis for synthesizing the traditional and modern views. *Fasano* struck down a rezoning, but not on the grounds that it constituted "spot zoning" or because there existed a "right to rely" on existing regulations. In viewing the rezoning *function*, which the court found analogous to the rendering of an order in an administrative adjudication, there was no substantial evidence to support the decision to rezone. The court examined the *function* of the action rather than its *form*.[34]

Even before *Fasano*, there were efforts to examine the function of proceedings to review land use decisions relating to small parcels of land. In *Roseta*, the Supreme Court required findings to be entered in such proceedings. *Page* and *Smith* indicated a standard of review in the change of land use regulations which differed from the liberal standard relating to their adoption. In *Milwaukie Co. of Jehovah's Witnesses v. Mullen*,[35] the court described the issuance of a special use permit for a church as an "administrative act." *Archdiocese of Portland v. County of Washington*,[36] a companion case to *Roseta*, found that in granting a conditional use permit,

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[31] *See* McDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965), especially the dissent by Judge Barnes. As in *Smith*, the court in *Roseta* associated the zoning maps with the "comprehensive plan," a separate document adopted (by the county planning commission at that time) pursuant to ORS 215.050 to 215.060. Apparently, the court then applied the "change or mistake" rule, citing Offutt v. Board of Zoning Appeals, 204 Md. 551, 105 A.2d 219 (1954), as authority (*Offutt* was cited in the Oregon Court of Appeals decision in *Fasano*) and apparently finding the standard in *Offutt* equivalent to its own standard in *Page* and *Smith*. The Oregon Supreme Court did not distinguish the comprehensive plan and zoning until *Fasano*, although the Court of Appeals did so in Sammons v. Sibarco Station, 10 Or. App. 43, 497 P.2d 862 (1972).

[32] *See, e.g.*, City of Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965).

[33] 96 Or. Adv. Sh. 1059, ___ Or. ___, 507 P.2d 23 (1973).

[34] Holman, *supra* note 10.

[35] 214 Or. 281, 330 P.2d 5 (1958), *cert. denied*, 359 U.S. 436 (1959).

[36] 254 Or. 77, 458 P.2d 682 (1969). This reasoning was followed in a *rezoning* case in Rust v. City of Eugene, 3 Or. App. 386, 474 P.2d 374 (1970), despite the prohibitions of *Smith* and *Roseta*.

which was in harmony with the comprehensive plan and the zoning ordinances, the court would require only a fair hearing and a rational basis for its decision.[37]

Prior to *Fasano*, Oregon land use decisions could perhaps best be termed consistent in their inconsistency. It seemed that when the courts upheld a local land use decision, the public welfare aspects of regulation were emphasized and a statement was added that such decisions would be upheld unless the presumption of its validity was overcome. But, when such a decision was reversed by the courts, the importance of the original "comprehensive zoning plan" was emphasized and a statement was often added to the effect that the "zoning plan" old never be changed unless the "character of the neighborhood" changed after the enactment of the original land use regulations.

As a result of *Fasano*, procedural and substantive guidelines were established so that the courts could have solid criteria upon which to base their opinions. These new criteria stressed conformity to the comprehensive plan. In establishing a new standard of review, the court rejected the "presumption of (legislative) validity," the "arbitrary and capricious" standards and the "change or mistake" rule.

In sum, with respect to quasi-judicial land use decisions made by counties, the court supplanted the older criteria with a four-fold test. Each local government land use decision must contain:

1. Conformity with the comprehensive plan (as required by ORS 215.110(1));

2. Conformity to the standards for planning and land use regulation of the enabling legislation (as required by ORS 215.055(1));

3. A showing that there is a public need for the change in question; and

4. A showing that that need will best be served by granting the application with respect to the particular piece of property in question as compared with other available property.[38]

The last two criteria are not strictly statutory requirements but are judicial constructs meant to serve the exigencies of immediate situations in the absence of better legislative guidelines. For this reason, they may wither away in the face of greater judicial understanding and trust in the planning process and planning which is more responsive to established localized

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[37] The state of the law after *Archdiocese* and *Roseta* and before the Oregon Supreme Court decision in *Fasano* became a semantical game as pointed out in MANDELKER, THE ZONING DILEMMA 70-77 (1971). If a conditional use permit were required, the liberal standard of *Archdiocese* applied; whereas, if a rezoning (even for the same use) were applied for, the strict "change or mistake" standard of *Roseta* applied.

[38] 96 Or. Adv. Sh. at 1067-1070, 507 P.2d at 27-29. Some question might be raised as to whether *Fasano* is limited to rezonings (as opposed to the issuance of conditional use permits or other quasi-judicial land use activities). The functional approach taken by the court in *Fasano* indicates that the attributes of quasi-judicial actions with respect to rezoning also apply to these other activities. Further, some question might be raised as to the application of *Fasano* to municipalities. The participation of the League of Oregon Cities in *Fasano* in an *amicus curiae* capacity and the sweeping scope of the opinion seems to cast little doubt as to the general applicability of *Fasano*.

criteria for the various uses. Recent legislation intended to strengthen planning may also aid in this result. On the other hand, because of the lack of established definitions of "public need" and "other available property," these last two standards could well be used as the vague justification for the visceral feelings of local decision-makers or the courts. Such a situation would unfortunately mark a return to the pre-*Fasano* wilderness of subjective judgment.

The more important aspect of *Fasano* is its dicta relating to procedural fairness before land use regulatory bodies. This problem of procedural fairness has troubled courts and legal writers even more than the standard of review in land use cases.[39] The court quoted from a Washington decision[40] and tended to follow a line of Washington cases which utilize a standard of "appearance of fairness," i.e., that a land use hearing must not only be fair but also *appear* to be fair to all participants therein.[41]

The court also relied upon a comment by Michael Holman, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*[42] as the basis for its formulation of procedural requisites for hearings before land use bodies and required the following to be accorded parties at such hearings:

1. Opportunity to be heard;

2. Opportunity to present and rebut evidence (probably including cross-examination);

3. Right to an impartial tribunal which has had no pre-hearing or ex parte contacts on the matter at issue; and

4. Right to a record and adequate finding upon which the ultimate decision is justified.[43]

The procedural requirements are the more permanent aspects of *Fasano*. Nevertheless, in this transition, the difficulties of adjusting to the new standards, especially by small decision-making bodies, remain significant.

With only two post-*Fasano* decisions in the quasi-judicial area,[44] it is impossible to tell whether the court is master or victim of its own pronouncements in the land use field. However,

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[39] Holman, *supra* note 10. *See also* Comment, *Judicial Review of Zoning Administration*, 22 CLEV. ST. L. REV. 239-58 (1973); Comment, *Within a Delicate Jurisdiction: The Rights of Parties Before Zoning Authorities*, 41 MISS. L.J. 271-88 (1970); Topper & Toor, *Judicial Control Over Zoning Boards of Appeal: Some Suggestions for Reform*, 12 UCLA L. REV. 937-53 (1965); Green, *Is Zoning by Men Replacing Zoning by Law*, J. AM. INST. PLANNERS 82-87 (1965).

[40] Chrobuck v. Snohomish County, 78 Wash.2d 858, 480 P.2d 489 (1971).

[41] Anderson v. Island County, 81 Wash.2d 312, 501 P.2d 594 (1972); Fleming v. City of Tacoma, 81 Wash.2d 292, 502 P.2d 327 (1972); Buell v. City of Bremerton, 80 Wash.2d 495 P.2d 1358 (1972); Smith v. Skagit County, 75 Wash.2d 715, 453 P.2d 832 (1969).

[42] *Supra* note 10.

[43] 96 Or. Adv. Sh. at 1071, 507 P.2d at 30. Holman did not advocate avoidance of pre-hearing or ex parte contacts, merely that such contacts be revealed at the hearing. Holman, *supra* note 10, at 141.

the *Fasano* decision marks a radical departure in the way courts view land use decisions and, probably, the form of that review.

III. REVIEW OF THE RECORD

No analysis of judicial review of land use decisions could be complete without some commentary on the form of that review. As noted above, the court in *Fasano* based its discussion on the premise that such decisions are quasi-judicial rather than legislative actions.[45]

However, it should be reiterated the Oregon courts traditionally have treated local land use actions, especially rezoning, as legislative actions. Indeed, a majority of the cases seeking review of quasi-judicial proceedings[46] have been brought under the Oregon Uniform Declaratory Judgments Act.[47] Combined with this form of proceeding is the standard prayer for injunctive relief and an allegation that no plain, speedy or adequate remedy at law exists.[48] It is the contention of this paper that since *Fasano*, this allegation is incorrect and that the declaratory judgment is an inappropriate form of relief from quasi-judicial decisions made by governmental land use agencies.[49]

It is submitted that, under the present statutory scheme, the writ of review[50] is the appropriate form of proceeding in all but an extremely limited number of quasi-judicial land use decisions. In this connection, it is important to note that the 1973 Oregon Legislative Assembly stressed that it intended that the writ be the exclusive form of judicial review of most quasi-judicial decisions,[51] especially those relating to land use.[52]

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[44] Frankland v. City of Lake Oswego, 98 Or. Adv. Sh. 519, ___ Or. ___, 517 P.2d 1042 (1973); Bergland v. Clackamas County, 97 Or. Adv. Sh. 2319, ___ Or. ___, 515 P.2d 1345 (1973).

[45] 96 Or. Adv. Sh. at 1060-1065, 507 P.2d at 25-27.

[46] Fifteen out of 24 cases.

[47] ORS 28.010 to 28.160.

[48] *Cf.* Nelson v. Knight, 254 Or. 370, 460 P.2d 355 (1969); Campbell v. Henderson, 241 Or. 75, 403 P.2d 902 (1965); Employers Mut. Liab. Ins. Co. v. Bluhm, 227 Or. 415, 362 P.2d 755 (1961).

[49] Normally, a demurrer will not lie to a declaratory judgment petition. Webb v. Clatsop County School Dist. No. 3, 188 Or. 324, 215 P.2d 368 (1950); Cabell v. City of Cottage Grove, 170 Or. 256, 130 P.2d 1013 (1943). *But see*, Morgan v. Masters, 7 Or. App. 375, 491 P.2d 637 (1971); Miles v. Veatch, 189 Or. 506, 220 P.2d 511, 221 P.2d 905 (1950).

[50] ORS 34.010 to 34.100.

[51] Ch. 561, Or. Laws 1973 amends ORS 34.040 to read:

> The writ shall be allowed in all cases where the inferior court, officer or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or *quasi-judicial* functions appears to have:
>
> (1) Exceeded its or his jurisdiction;
>
> (2) Failed to follow the procedure applicable to the matter before it or him;
>
> (3) Made a finding or order not supported by reliable, probative and substantial evidence; or
>
> (4) Improperly construed the applicable law;
>
> to the injury of some substantial right of the plaintiff, *and not otherwise*. The fact that the right of appeal exists is no bar to the issuance of the writ. (Emphasis supplied.)

One of the actual changes provided for by this amendment was to add the words "or quasi-judicial" to the former statute. Note that ORS 203.200 has made the writ the manner of judicial review of county business. This statute has

The objection to the use of the declaratory judgment in lieu of the writ of review stems from several compelling considerations:

1. The writ provides a period of 60 days after the final decision of the inferior court, officer or tribunal, to make application for judicial review, while the declaratory judgment provides no time limitation whatsoever.[53]

2. The declaratory judgment may be utilized by anyone, regardless of his participation, or lack thereof, in the proceeding below.[54] The state zoning enabling legislation[55] and the writ of review statutes themselves[56] limit such review to "parties" and thereby follow the traditional administrative law principle that one must exhaust his administrative remedies before resorting to judicial review.

3. The writ, if properly used, is an inexpensive, expeditious and procedurally simple remedy which consists, upon issuance of the writ, of a "return," the record of the decision below and argument thereon, whereas, the declaratory judgment presumes to try the lower proceeding *de novo*.

It is this last point which militates so heavily against the use of the declaratory judgment and is one of the foremost reasons for the hopeless quagmire in which the Oregon appellate courts have found themselves in the past. Because local land use decisions involving rezoning were, before *Fasano* deemed legislative,[57] a review of the quasi-judicial decisions of land use bodies by writ of review was not common. Because *Fasano* clearly identified the decisions of land use authorities concerning specific applications of policy, as being quasi-judicial and because ORS 34.040, as amended in 1973,[58] requires that such decisions be reviewed by means of the writ "and not otherwise," the use of the declaratory judgment, with certain limited exceptions, is entirely inappropriate.

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been interpreted to mean that the writ is the sole method for judicial review. Leader v. Multnomah County, 23 Or. 213, 31 P. 481 (1892). *See also*, ORS 215.110(5).

[52] Sec. 12, ch. 739, Or. Laws 1973; sec. 18, ch. 552, Or. Laws 1973. However, note that section 51 of chapter 80, Oregon Laws 1973 provides that land use "actions" of cities, counties, special districts or state agencies may be reviewed by the Land Conservation and Development Commission upon proper petition by another governmental agency for consistency with statewide planning goals and the interim goals provided by the Act. Those who are not governmental agencies may not have such "actions" reviewed but may have comprehensive plans and implementing ordinances reviewed for consistency with those statewide and interim goals. The effect of this section is to have individual land use decisions reviewed by the courts, rather than the commission. However, decisions of local governments relating to "activities of statewide significance" designated and administered pursuant to sections 25 to 31 of that chapter must receive a permit from the commission. Chapters 561 (writ of review), 552 and 739, were later legislation intended to provide for such review by the courts rather than the commission, except as noted above.

[53] ORS 34.030.

[54] *See* Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965), and the court's footnote 1 which speaks of county legislative action.

[55] *See* note 52 *supra*.

[56] ORS 34.040.

[57] Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965).

[58] *See* note 51 *supra*.

Further, a constitutional argument also weighs heavily against the use of the declaratory judgment. The declaratory judgment normally consists of a trial that deals not only with the record of the original proceeding but also with any admissible evidence the parties choose to submit. The review thus involves a complete retrial of the merits of the original decision. Besides giving a disappointed applicant or opponent "two bites at the apple," there is a significant question as to whether a court is able, under Article III, section 1 of the Oregon Constitution,[59] to try such a decision *de novo*.

Admittedly, this separation-of-powers argument has not been tested in the land use context in Oregon. Indeed, the Oregon Supreme Court has, on two occasions, chosen not to pass on the issue.[60] In *Fasano*, Justice Howell considered this point in passing, stating:

> At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.[61]

However, it must be remembered that in implementing their comprehensive plans through ordinances and quasi-judicial decisions, cities and counties are exercising a delegated power and for this reason act as an administrative agency of the state.[62] This is true whether they act pursuant to enabling legislation or pursuant to the relevant constitutional "home rule" provision.[63] Indeed, in *Fasano*, the court recognized that this delegated function was a part of its judicial review of the land use actions of local government.[64] The Oregon Administrative Procedures Act avoids any constitutional conflict by limiting review of administrative agency proceedings to the record, much the same as the writ does.[65] Even if this constitutional issue did not exist, the courts would be pushed to develop a similar doctrine; the judges simply do not

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[59] OR. CONST. art. III, § 1:

> The powers of the Government shall be divided into three separate departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

[60] Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965); Archdiocese of Portland v. County of Washington, 254 Or. 77, 458 P.2d 682 (1969). *See also* Vollmer v. Schrunk, 242 Or. 196, 409 P.2d 177 (1965) (Denecke, J., concurring).

[61] 96 Or. Adv. Sh. at 1062, 507 P.2d at 26. Justice Howell later states, "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority." *Id.*

[62] However, the Oregon Legislative Assembly has not seen fit to apply ORS chapter 183, the Oregon Administrative Procedures Act, to local governments. ORS 183.310(1).

[63] OR. CONST. art. VI, § 1; art. XI, § 2.

[64] 96 Or. Adv. Sh. at 1062, 507 P.2d at 26.

[65] ORS 183.480. It is interesting to note that prior to the Oregon Administrative Procedures Act, review of state administrative agency decisions were often by writ of review. Cookinham v. Lewis, 58 Or. 484, 114 P. 238 (1911); Safeway Stores v. State Board of Agri., 198 Or. 43, 255 P.2d 564 (1953). *See also*, Strawn v. State Tax Comm'n, 1 Or. Tax. R. 98 (1963).

want to be placed in the position, formally, at least, of being the authority which rezones or issues permits.

Finally, Oregon courts have taken a strong policy stand against *de novo* reviews in the situation when a writ of review could have been used to attack a judicial or quasi-judicial decision and no other remedy was provided by statute.[66] While the use of the declaratory judgment has never been passed upon by Oregon courts in such cases, mandamus will lie if the writ of review is unavailable[67] or inadequate.[68] The substitution of an equitable injunction for the judicial review of a quasi-judicial proceeding is also generally inappropriate.[69] Oregon courts have thus taken the position that the writ is the only procedure for judicial review of the decisions of inferior tribunals[70] but that its use may be limited by the legislature.[71] In addition, it is well to note that since the purpose of the declaratory judgment is remedial,[72] the proceeding will not lie if an alternate remedy is available.[73]

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[66] In other states, provisions for *de novo* review have been found unconstitutional on a basis similar to that advanced herein. 3 ANDERSON, AMERICAN LAW OF ZONING, § 21.19 (1st ed. 1968). Note also that section 9-101 of the ALI MODEL DEVELOPMENT CODE (Tent. Draft No. 3, April 1971) speaks of a declaratory judgment proceeding but on the record; section 9-109 limits the basis of relief to certain standards.

[67] State v. Etling, 256 Or. 33, 470 P.2d 950 (1970).

[68] McCleod v. Scott, 21 Or. 94, 26 P. 1061, 29 P. 1 (1891). *See also*, Parks v. Board of County Comm'rs, 95 Or Adv. Sh. 929, ___ Or. App. ___, 501 P.2d 85 (1972), in which mandamus was had against the Board of County Commissioners of Tillamook County which required them to revoke issuance of a building permit issued by its planning agency. This act was ministerial and its remedy lay in mandamus rather than quasi-judicial action.

[69] Holmes v. Graham, 159 Or. 466, 80 P.2d 870 (1938); Leader v. Multnomah County, 23 Or. 213, 31 P. 481 (1892); Oregon & Wash. Mort. Sav. Bank v. Jordan, 16 Or. 113, 17 P. 621 (1888). *See also*, ORS 203.200. In Town of LaFayette v. Clark, 9 Or. 225 (1881), the Oregon Supreme Court refused to take an appeal as to the validity of a town ordinance, stating:

> Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining trials *de novo* are unknown to the common law and can only be prosecuted where they are expressly given by statute. *Id*. at 227-28.

The court indicated that the writ of review was the proper procedure for relief. *See also*, Asher v. Pitchford, 167 Or. 70, 79, 115 P.2d 337, 341 (1941); Brown v. City of Portland, 120 Or. 76, 79, 249 P. 819, 820 (1926); McAnish v. Grant, 44 Or. 57, 62, 74 P. 396 (1903); School District No. 116 v. Irwin, 34 Or. 431, 435, 56 P. 413, 414 (1899).

[70] In Strawn v. State Tax Comm'n, 1 Or. Tax. R. 98 (1963), the Oregon Tax Court reviewed the history of the writ in assessment cases and found the remedy dependent upon statute. In Holmes v. Graham, 159 Or. 466, 80 P.2d 870 (1938), the Supreme Court found the writ to fulfill the adequate remedy at law requirement to bar review in equity. In *In re* Petition of Reeder, 110 Or. 484, 222 P. 724 (1924), the court found that, unlike assessments of damages in road proceedings, which could be the subject of an appeal, the jurisdiction of the county court in those proceedings is exclusively by writ of review. In Flagg v. Columbia County, 51 Or. 172, 94 P. 184 (1908), the court determined that payment of the statutory publication fees to newspapers was a decision which could only be reviewed via the writ. *See also*, Oregon & Wash. Mort. Sav. Bank v. Jordan, 16 Or. 113, 17 P. 621 (1888); Mountain v. Multnomah County, 8 Or. 470 (1880).

[71] City of Portland v. Erickson, 39 Or. 1, 62 P. 753 (1900); Simon v. Portland Common Council, 9 Or. 437 (1881). *But see* Note, 2 CUMBER.-SAM. L. REV. 482 (1971).

[72] ORS 28.120.

[73] Note 4 *supra*.

What is this writ of review? The writ of review in Oregon is the codification of the common law writ of certiorari.[74] The purpose of the writ is to bring the record of the inferior court or tribunal before a superior court so that a limited determination concerning the regularity of its proceedings[75] may be made. Although most appellate courts have been faithful to the codified version, the writ in Oregon has had a checkered career.[76] To assist in understanding the nature of the writ of review, the categories used below are utilized in an attempt to isolate the issues which normally arise in such a proceeding; no attempt will be made to examine all aspects of the writ. Rather, an attempt has been made to set forth the requisite elements of a valid petition for the writ, the grounds upon which the writ may issue and those entitled to seek the writ.

A. The Nature of the Writ

The writ of review is neither an action at law nor a suit in equity; it is a special proceeding,[77] a creature of statute. When a writ of review is issued, the superior court calls up the record of the inferior court, officer or tribunal and examines it for such errors as may appear in the petition. However, the courts are limited in their consideration to the statutory grounds set forth in ORS 34.040. In some cases, the superior court may grant a stay of the proceedings in the tribunal below pending the decision of the superior court on the record before it.[78]

B. Who May Procure the Writ

ORS 34.020 limits those who may procure the writ of review to "parties" of the proceeding below. To re-enforce the limitation of the writ to judicial and quasi-judicial proceedings, the Oregon courts have not allowed the writ to issue in those cases in which an

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[74] ORS 34.010. *See, e.g.*, School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952); Crowe v. Albee, 87 Or. 148, 169 P. 785 (1918); McAnish v. Grant, 44 Or. 57, 74 P. 396 (1903); Garnsey v. County Court, 33 Or. 201, 54 P. 539 (1898); Thompson v. Multnomah County, 2 Or. 34 (1861). There was a common law writ of review which removed the case to the superior court prior to its conclusion in the inferior court. This position has been rejected in Oregon. Holmes v. Cole, 51 Or. 483, 94 P. 964 (1908).

[75] Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478 (1963); *see also*, J. Hanus, *Certiorari and Policy-Making in English History*, 12 AM. J. LEGAL HIST. 63 (1968).

[76] The leading opinion on the history and limitations of the writ in Oregon is that of Justice Lusk in Bechtold v. Wilson, 182 Or. 360, 186 P.2d 525, 187 P.2d 675 (1947). In Garnsey v. County Court, 33 Or. 201, 54 P. 539 (1898), the Supreme Court observed that the writ of review in Oregon was substantially that of common law certiorari except that the time of issuance and the relief which may be granted are limited by statute.

[77] In School District No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952), the Oregon Supreme Court noted that because the writ was a special proceeding, its scope of inquiry was limited. In Asher v. Pitchford, 167 Or. 70, 74, 115 P.2d 337, 340 (1941), that court noted that the circuit court in a writ of review proceeding could exercise only those powers conferred upon it by statute and could not try a case *de novo* thereunder. Finally, in Feller v. Feller, 40 Or. 73, 66 P. 468 (1901), the court carefully distinguished statutes governing appeals and special proceedings. *But see*, Holland-Washington Mort. Co. v. County Court, 95 Or. 668, 674, 188 P. 199, 201 (1920).

[78] The stay is discretionary. ORS 34.070. Feller v. Feller, 40 Or. 73, 63 P. 468 (1901). However, some question arises as to whether an ex parte stay is constitutional. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). There is also some question as to whether a stay without a bond, other than the cost bond provided for by ORS 34.060 which does not exceed $100, can be had when in reality the "stay" is a preliminary injunction. *See* ORS 32.010 to 32.060.

action affects all of the people within a jurisdiction as opposed to particular persons or classes of persons.[79]

Oregon courts have taken two positions with respect to the definition of "party." Under the older of the two approaches, a party is one who is entitled to notice, has the power to control the proceedings, has an interest in the outcome thereof and has rights which are effectively concluded thereby.[80] The second and more recent view adds the additional requirement that a party must participate in the lower proceeding.[81]

A final note on party defendants is in order. The actual decision maker or body need not be made a party defendant nor served with the writ if its proceeding is contested.[82] However, any opponent to the petitioner's case below must be served in order for him to defend the decision rendered in his favor.[83]

C. The Petition for the Writ

Much of the litigation concerning the writ has had to do with the sufficiency of the petition. The statutes relating to the petition[84] are deceptively simple in form but many attorneys have had difficulty with these statutes in practice.

The petition for the writ must describe the decision of the inferior court, officer or tribunal with "sufficient certainty" so that the proceeding may be identified.[85] Further, it is incumbent upon the petitioner to describe the alleged errors of that person or body.[86] In this respect, the petition serves as a complaint to which the court looks and to which it is limited, in

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[79] Burnett v. Douglas County, 4 Or. 388 (1873). *Compare*, Millersburg Dev. Corp. v. Mullen, 97 Or. Adv. Sh. 1710, ___ Or. App. ___, 514 P.2d 367 (1973), in which an order applicable to a class of persons was examined by writ of review. Note also, Smith v. County of Washington, 241 Or. 380, 406 P.2d 545 (1965), in which the "party" question is avoided altogether.

[80] Gaines v. Linn County, 21 Or. 430, 28 P. 133 (1891). *See also*, concurring opinion of Justice McArthur in Canyonville & Galesville Road Co. v. County of Douglas, 5 Or. 280 (1874).

[81] Castel v. Klamath County, 56 Or. 188, 108 P. 129 (1910); Garrison v. Richardson, 54 Or. 269, 101 P. 900 (1909); Raper v. Dunn, 53 Or. 203, 99 P. 889 (1909). In Fisher v. Union County, 43 Or. 223, 72 P. 797 (1903), the party status of a remonstrator in a road vacation proceeding did not seem to turn on plaintiff's participation (although he did participate), but upon a combination of his remonstrance and interest in the outcome. *See also* Farrow v. Nevin, 44 Or. 496, 75 P. 711 (1904).

[82] Asher v. Pitchford, 167 Or. 70, 76, 115 P.2d 337, 340 (1941) (writ decision in district court); Holland-Washington Mort. Co. v. County Court, 95 Or. 668, 188 P. 199 (1920) (contested road establishment proceeding); Farrow v. Nevin, 44 Or. 496, 75 P. 711 (1904) (contested probate); Malone v. Cornelius, 34 Or. 192, 55 P. 536 (1899) (contested probate). Contra Wood v. Riddle, 14 Or. 254 (1886) in which the Douglas County Court denied plaintiff a liquor license and there were no other parties; however, it appears to be contrary but only because the county court denied the license on its own motion.

[83] Maizels v. Kozer, 129 Or. 100, 276 P. 277 (1929); Williams v. Henry, 70 Or. 466, 142 P. 337 (1914). *See also* Wood v. Riddle, 14 Or. 254 (1886).

[84] ORS 34.020 to 34.040.

[85] Drummond v. Miami Lumber Co., 56 Or. 575, 109 P. 753 (1910); Holmes v. Cole, 51 Or. 483, 94 P. 964 (1908); Fisher v. Union County, 43 Or. 223, 72 P. 797 (1903); Southern Oregon Co. v. Coos County, 30 Or. 250, 47 P. 856 (1897).

[86] Cases cited note 85 *supra*. *See also* White v. Brown, 54 Or. 7, 101 P. 900 (1909).

reviewing the alleged errors in the proceeding below. The petition must also be accompanied by a certificate of an attorney:

> to the effect that he has examined the process or proceeding, and the decision or determination therein, and that it is erroneous as alleged in the petition.[87]

Most importantly, the petition must be filed within 60 days of the decision or determination sought to be reviewed.[88] Finally, the petition must allege an injury to a substantial right of the petitioner.[89]

Some important caveats should be noted:

1. The petition, upon challenge by motion to quash, is construed most strongly against the pleader;[90]

2. As in other pleadings, conclusions of law are inappropriate and can be the basis for dismissal of the writ proceeding;[91]

3. The writ usually issues from the circuit court. However, it never issues from the Supreme Court which is constitutionally limited to the original proceedings and such appellate proceedings;[92]

4. Minor errors, such as improper title on the case, will not be fatal to an otherwise valid petition;[93]

5. The petition may not include supplemental allegations outside the record;[94]

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[87] ORS 34.030. This section intimates that something beyond the standard attorney verification in actions and suits under ORS 16.070 is necessary under ORS 30.030 and that the certificate is a document separate from the petition. Few cases have passed upon this requirement, but it seems to be a requisite for maintenance of the proceeding. State *ex rel.* Carson v. Kozer, 118 Or. 556, 559, 247 P. 806 (1926); Hodgdon v. Goodspeed, 60 Or. 1, 4, 118 P. 167 (1911); Vincent v. Umatilla County, 14 Or. 375, 12 P. 732 (1887).

[88] ORS 34.030. The Court of Appeals in Meury v. Jarrell, 98 Or. Adv. Sh. 798, ___ Or. App. ___, 517 P.2d 1221 (1974), *petition for Supreme Court review pending*, allowed an amended petition to be filed after the 60-day period had run.

[89] Chapman v. Hood River County, 91 Or. 92, 97, 178 P. 379 (1919); Heuel v. Wallowa County, 76 Or. 354, 149 P. 77 (1915); Kinney v. City of Astoria, 58 Or. 186, 189, 113 P. 21 (1911); Drummond v. Miami Lumber Co., 56 Or. 575, 577, 109 P. 752, 754 (1910); Dayton v. Board of Equal., 33 Or. 131, 139, 50 P. 1009 (1897).

[90] Drummond v. Miami Lumber Co., 56 Or. 575, 578, 109 P. 753, 754 (1910); Elmore Packing Co. v. Tillamook County, 55 Or. 218, 223, 105 P. 898, 900 (1909).

[91] Andrews v. City of Corvallis, 200 Or. 632, 268 P.2d 361 (1954); Kinney v. City of Astoria, 58 Or. 186, 113 P. 21 (1911); School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952); Drummond v. Miami Lumber Co., 56 Or. 575, 109 P. 753 (1910); Fisher v. Union County, 43 Or. 223, 72 P. 797 (1903); Southern Oregon Co. v. Coos County, 30 Or. 250, 47 P. 852 (1897).

[92] State *ex rel.* Carson v. Kozer, 118 Or. 556, 247 P. 806 (1926).

[93] Farrow v. Nevin, 44 Or. 496, 75 P. 711 (1904); Adams v. Kelly, 44 Or. 66, 74 P. 399 (1903).

[94] Elmore Packing Co. v. Tillamook County, 55 Or. 218, 223, 105 P. 898, 900 (1909); Reiff v. City of Portland, 71 Or. 421, 141 P. 167, 142 P. 827 (1914); Gue v. City of Eugene, 53 Or. 282, 100 P. 254 (1909); Curran v. State, 53 Or. 154, 99 P. 420 (1909); Smith v. City of Portland, 25 Or. 297, 35 P. 665 (1894). *But see*, Oregon R.R. & Nav. Co. v. Umatilla County, 47 Or. 198, 81 P. 352 (1905).

6. The petition may be brought to the judge prior to filing. However, upon issuance, the writ must be served like a summons upon all proper defendants;[95]

7. An undertaking, as described in ORS 34.050, must accompany the petition.[96]

D. Grounds for Issuance

There are presently four grounds for the issuance of a writ of review. The original writ, codified in 1862,[97] established only two grounds, i.e., that the inferior court, officer or tribunal either exceeded his or its jurisdiction or acted erroneously. In 1965, arbitrariness was added as a ground;[98] and in 1973, the nature of the grounds were reworded so that failure to construe the applicable law correctly became a ground.[99] An examination of each of these grounds is in order.

The first ground is that the inferior court, officer or tribunal exceeded his or its jurisdiction. This is an especially strong ground when dealing with officers, courts or tribunals of limited jurisdiction. If any statutory requisite is missing, the writ will automatically be sustained.[100] However, the courts will not allow an allegation of lack of jurisdiction to be used to circumvent the limited grounds upon which the writ may issue.[101] The question here is clearly one of power to do the challenged act.[102] It should be noted here that the question of a defect in the *acquisition* of jurisdiction (as opposed to a complete lack of the same) may be waived by a failure to raise the question within the time period allowed by the writ.[103] Yet a court, on viewing the return, could sustain the writ for lack of jurisdiction solely on its own motion.[104]

The second ground applies when the inferior officer, court or tribunal has failed to follow the procedure applicable to the matter before it. This is the 1973 revision of the former ground: i.e., the action below was "erroneous."[105] Therefore, the revision itself is not substantive. If the

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[95] Holland-Washington Mort. Co. v. County Court, 95 Or. 668, 188 P. 199 (1920).
[96] State *ex rel.* Carson v. Kozer, 118 Or. 556, 247 P. 806 (1926).
[97] DEADY, LAWS OF OREGON §§ 571 *et seq.* (1845-64).
[98] Ch. 292, Or. Laws 1965.
[99] Ch. 561, Or. Laws 1973.
[100] Cole v. Marvin, 98 Or. 175, 193 P. 828 (1920); Crowe v. Albee, 87 Or. 148, 169 P. 785 (1918); Birnie v. LaGrande, 78 Or. 531, 153 P. 415 (1915); Applegate v. City of Portland, 53 Or. 552, 99 P. 890 (1909); Fisher v. Union County, 43 Or. 223, 72 P. 797 (1903); Ferguson v. Byers, 40 Or. 468, 67 P. 1115, 69 P. 32 (1902).
[101] Lindley v. City of Klamath Falls, 8 Or. App. 375, 494 P.2d 464 (1972); Asher v. Pitchford, 167 Or. 70, 115 P.2d 337 (1941). In Baker v. Steele, 229 Or. 498, 366 P.2d 726 (1961), the Supreme Court noted that an allegation that a civil service board "exceeded its jurisdiction" by failing to agree with plaintiff's legal theory was a "transparent attempt" to bring the case under the writ. As the board had jurisdiction and proceeded to exercise the same correctly, dismissal of the writ was affirmed. Few Oregon cases have treated this "back door" approach. Draper v. Mullennex, 225 Or. 267, 357 P.2d 519 (1960).
[102] Vollmer v. Shrunk, 242 Or. 196, 409 P.2d 177 (1965).
[103] Stadelman v. Miner, 83 Or. 348, 155 P. 708, 163 P. 585, 163 P. 983 (1917).
[104] School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952).
[105] This former ground has been interpreted in the words now used to describe the ground by chapter 561, Oregon Laws 1973. The leading case on this ground in Bechtold v. Wilson, 182 Or. 360, 186 P.2d 525, 187 P.2d 675 (1947). *See also*, City of Portland v. Garner, 226 Or. 80, 358 P.2d 495 (1960); Holmes v. Graham, 159 Or. 466, 80 P.2d 870 (1938); Asher v. Pitchford, 167 Or. 70, 115 P.2d 337 (1941); Brown v. City of Portland, 120 Or. 76, 249 P.

irregularity is not raised at the proceeding below or there is no record of the error, the court will not presume erroneous procedure.[106] However, not every irregularity is deemed a failure to follow the applicable procedure; the irregularity must be (1) one in which there has been a major deviation from prescribed procedure, (2) apparent from the record, and (3) have injured the petitioner.[107]

The third ground is that the inferior court, officer or tribunal lacked reliable, probative and substantive evidence to support its decision. This ground is a revision of the pre-1973 "arbitrary" standard[108] and is now equivalent to the standard of evidence required in cases arising under the Oregon Administrative Procedures Act.[109] The revision is a major one and the wording has yet to be tested in an Oregon appellate court.

The final ground is a new one. It arises when the inferior court, officer or tribunal improperly construed the applicable law. For many years, Oregon courts have limited their review under the writ to questions of jurisdiction and irregular procedure. They have stated that the writ would not lie to correct "mere error."[110]

The effect of the 1973 amendments is to expand the function of the writ to include the old basis (an examination of the basis for jurisdiction, proper procedural exercise and the existence of an evidentiary basis for the decision) plus a more substantive examination of the record (an

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819 (1926); Hodgdon v. Goodspeed, 60 Or. 1, 118 P. 167 (1911); Title Guar. & Abstract Co. v. Nasburg, 58 Or. 190, 113 P. 2 (1911); Cookinham v. Lewis, 58 Or. 484, 114 P. 238 (1911); Elmore Packing Co. v. Tillamook County, 55 Or. 218, 105 P. 898 (1909); Flagg v. Columbia County, 51 Or. 172, 94 P. 184 (1908); Malone v. Cornelius, 34 Or. 192, 55 P. 536 (1899); Garnsey v. County Court, 33 Or. 201, 54 P. 539 (1898).

[106] Lechneider v. Carson, 156 Or. 636, 68 P.2d 482 (1937) (no record of the error claimed); Heuel v. Wallowa County, 76 Or. 354, 149 P. 77 (1915) (same); Reiff v. City of Portland, 71 Or. 421, 141 P. 167, 142 P. 827 (1914) (waiver by failure to raise).

[107] Baker v. Steele, 229 Or. 498, 366 P.2d 726 (1961). *See also* note 8 *supra*, and text thereto.

[108] This former standard was interpreted in Evans v. Schrunk, 4 Or. App. 437, 443, 479 P.2d 1008, 1011 (1971) to mean:

> In disregard of facts and circumstances of the case * * * Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

See also Millersburg Dev. Corp. v. Mullen, 97 Or. Adv. Sh. 1710, 1720, ___ Or. App. ___, 514 P.2d 367, 371 (1973), in which the Oregon Court of Appeals equated "rational reasons" with the negation of arbitrariness; and concurring opinion of Justice Denecke in Vollmer v. Schrunk, 242 Or. 196, 199, 409 P.2d 177, 178 (1965).

[109] ORS 183.480(7)(d).

[110] See cases collected and analyzed in Bechtold v. Wilson, 182 Or. 360, 186 P.2d 525, 187 P.2d 675 (1947). *See also* Miller v. Schrunk, 232 Or. 383, 375 P.2d 823 (1962); Baker v. Steele, 229 Or. 498, 366 P.2d 726 (1961); School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952). In McAnish v. Grant, 44 Or. 57, 62, 74 P. 396, 398 (1903), the court summarizes the former law:

> In those states which have not materially departed from the doctrine of the common law in respect to the remedy of certiorari, the rule prevails that the writ will not lie to correct errors in the exercise of a rightful jurisdiction, the causes never being tried de novo on the merits . . . . "An error of judgment on the part of a judge or officer, either as to the facts or the law of the case" says Mr. Spelling in his work on Extraordinary Relief (Section 1891), "could not be inquired into and corrected."

examination of the quality of the evidence to support that decision and whether the correct law was followed). In land use cases, the distinction is of tremendous importance and, correctly utilized, the writ will make a full examination of the record for error, preserve judicial restraint and avoid *de novo* review, all laudable objectives.

E. The Subject Matter of Review

The various types of proceedings that may be considered under a writ of review have received little judicial analysis. From the first Oregon decisions, it has been clear that the rulings of inferior courts (i.e., below the circuit court) could be reviewed by the writ. The writ has also been used on those occasions when no remedy by appeal existed from local or state boards of equalization,[111] in civil service cases relating to employee dismissals,[112] assessments by municipal authorities,[113] reviews of the decision of county courts in the transaction of county business,[114] the failure of a court or tribunal to correct its records on request and other acts by officers or tribunals described as judicial or quasi-judicial.[115] The courts have tended to refuse the writ when the subject matter concerns policy-making and there were no "parties" as that term is used in the law.[116] More than 110 years ago, the Oregon Supreme Court demonstrated its consciousness of the wide application of the writ when it took the functional approach which characterized the *Fasano* decision in stating:

> It may be appropriately timely to say that a jurisdiction clothed with discretionary power to deal with the person, property, or interest of third persons, or to change the relation of such property or interest, is a judicial act.[117]

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[111] Elmore Packing Co. v. Tillamook County, 55 Or. 218, 105 P. 898 (1909); Oregon Coal & Nav. Co. v. Coos County, 30 Or. 308, 47 P. 851 (1897); Dayton v. Board of Equal., 33 Or. 131, 50 P. 1009 (1897); Poppleton v. Yamhill County, 8 Or. 337 (1880). *See also* Strawn v. State Tax Comm'n, 1 Or. Tax R. 98 (1963).

[112] Lechneidner v. Carson, 156 Or. 636, 68 P.2d 482 (1937); Crowe v. Albee, 87 Or. 148, 169 P. 785 (1918).

[113] Lindley v. City of Klamath Falls, 8 Or. App. 375, 494 P.2d 464 (1972); Wing v. City of Eugene, 249 Or. 367, 437 P.2d 836 (1968); Applegate v. City of Portland, 53 Or. 552, 99 P. 890 (1909); Mitchell v. City of Portland, 53 Or. 547, 99 P. 881, 101 P. 388 (1909).

[114] ORS 203.200. *See, e.g.*, Flagg v. Columbia County, 51 Or. 172, 94 P. 184 (1908).

[115] Millersburg Dev. Corp. v. Miller, 97 Or. Adv. Sh. 1710, ___ Or. App. ___, 514 P.2d 367 (1973); School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1957); School Dist. No. 116 v. Irwin, 34 Or. 431, 56 P. 413 (1899). The *Fasano* characterization of legislative v. quasi-judicial functions of tribunals has caused the Court of Appeals in *Millersburg* to treat what it termed a "legislative" act under a quasi-judicial review in reviewing a boundary procedure (though in *Hoskins* the boundary change was described as a quasi-judicial function). Perhaps a descending scope of review is needed so that broader policy determinations (and, unfortunately, larger room for error) to carry out general legislation are not reviewed quite as closely as applications of that policy to particular situations.

[116] Burnett v. Douglas County, 4 Or. 388 (1873).

[117] Thompson v. Multnomah County, 2 Or. 34, 37 (1861). The court added, rather prophetically:

> It is not controverted that both English and American courts recognize the boundary of judicial proceedings as the limit of inquiry to which a certiorari will reach, though very many modern cases have gone much further, and innovated upon a rule well understood before judicial functions were cast upon an almost infinite number of corporate bodies and associations of men. *Id*. at 38.

It is well established that policy-making decisions, such as whether an improvement should be made, cannot be attacked by writ of review.[118] Similarly, ministerial acts in which no judgment is exercised, are not judicial or quasi-judicial, and thus are not subject to the writ of review.[119] It must also be remembered that the writ is a discretionary procedure[120] and may be denied if the court finds another adequate remedy available.[121] Similarly, if the court determines that relief through the writ is precluded by statute, it will deny the writ.[122] In addition, the writ is seen as a direct rather than a collateral attack on the decisions of inferior officers or bodies.[123] For this reason, the statutory time limitations as to the writ are of great importance.

F. Challenging Review

Since shortly before the turn of the century, the motion to quash has been the proper and accepted means of challenging the right of the petitioner to procure a writ of review.[124] Traditionally, a motion to quash is based upon insufficient jurisdictional allegations in the petition. It may also be used when another remedy is available or when administrative remedies have not been exhausted.[125] The use of a demurrer to test the petition is improper, but has been treated as a motion to quash.[126] If these jurisdictional facts are missing or alleged in a conclusory manner, the petition is defective and the proceeding can be dismissed unless the court can and does permit amendment. The court may also dismiss the proceeding on its own motion for insufficiency of allegations in the petition.[127] As the writ is usually issued ex parte, the issuing

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[118] Lindley v. Klamath Falls, 8 Or. App. 375, 494 P.2d 464 (1972); Applegate v. City of Portland, 53 Or. 552, 99 P. 890 (1909).

[119] Holmes v. Graham, 159 Or. 466, 470, 80 P.2d 870, 872 (1938); City of Oregon City v. Clackamas County, 118 Or. 546, 552, 247 P. 772, 774 (1926); Thompson v. Multnomah County, 2 Or. 34, 38 (1861). *See also* Parks v. Board of County Comm'rs, 95 Or. Adv. Sh. 929, ___ Or. App. ___, 501 P.2d 85 (1972).

[120] State *ex rel*. Carson v. Kozer, 118 Or. 556, 559, 247 P. 806, 807 (1926); Oregon R.R. & Nav. Co. v. Umatilla County, 47 Or. 198, 81 P. 352 (1905).

[121] Kamm v. City of Portland, 132 Or. 311, 317, 285 P. 240, 241 (1930); Reiff v. City of Portland, 71 Or. 421, 141 P. 167, 142 P. 827 (1914).

[122] Broback v. Huff, 11 Or. 395 (1884); Simon v. Portland Common Council, 9 Or. 437 (1881).

[123] Cole v. Marvin, 98 Or. 175, 193 P. 828 (1920); Stadelman v. Miner, 83 Or. 348, 155 P. 708, 163 P. 585, 163 P. 983 (1917); Southern Oregon Co. v. Coos County, 51 Or. 483, 94 P. 964 (1908). *Stadelman* refused a collateral attack in a probate proceeding while *Cole* allowed a direct attack by the writ. In Oregon & Wash. Mort. Sav. Bank v. Jordan, 16 Or. 113, 17 P. 621 (1888), the Supreme Court refused a collateral attack on a tax roll when plaintiffs had failed to use a direct attack by the writ. *See also* Hodgdon v. Goodspeed, 60 Or. 1, 118 P. 167 (1911).

[124] Bechtold v. Wilson, 182 Or. 360, 380, 186 P.2d 525, 533, 187 P.2d 675 (1947). Fay v. City of Portland, 99 Or. 490, 195 P. 828 (1921); McCabe-Duprey Tanning Co. v. Eubanks, 57 Or. 44, 102 P. 795, 110 P. 395 (1910); Holmes v. Cole, 51 Or. 483, 94 P. 964 (1908).

[125] Miller v. Schrunk, 232 Or. 383, 375 P.2d 823 (1962); Kamm v. City of Portland, 132 Or. 311, 285 P. 240 (1930).

[126] Fay v. Portland, 99 Or. 490, 492, 195 P. 828 (1921) (demurrer improper). McCabe-Duprey Tanning Co. v. Eubanks, 57 Or. 44, 102 P. 795, 110 P. 395 (1910) (demurrer treated as motion to quash). In Gaston v. Portland, 48 Or. 82, 84 P. 1040 (1906), the court doubted the motion to quash would lie (even though it upheld the same in Southern Oregon Nav. Co., 51 Or. 483, 94 P. 964 (1908) to terminate the proceedings and treated a demurrer as a motion to dismiss. This case is an anomaly and its reasoning has not been followed in Oregon.

[127] Baker v. Steele, 229 Or. 498, 366 P.2d 726 (1961); School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952); Bechtold v. Wilson, 182 Or. 360, 380, 186 P.2d 525, 528, 187 P.2d 675 (1947). As the motion looks to jurisdiction, it may be filed either before (Holland-Washington Mort. Co. v. County Court, 95 Or. 668, 188 P. 199 (1920)) or after (Holmes v. Cole, 51 Or. 483, 94 P. 964 (1908)) the return.

court must have before it all the facts which would enable it to issue the writ. If any of these necessary facts are found to be missing, the writ may be challenged on that basis.[128]

G. Considerations on Review

In Oregon, it has become the practice, especially in land use decisions, to require inferior officers or tribunals (but not necessarily courts) to enter findings of fact upon which they base their decision. Such factual findings may be reviewed by the appellate court.[129] With the new standard requiring reliable, probative and substantive evidence to support such decisions, this requirement is of increasing importance.

As noted above,[130] every fact showing the jurisdiction of the inferior court, officer or tribunal must appear in the record. The court will engage in no presumptions of jurisdiction. However, once jurisdiction is acquired, there is no presumption that the proceeding was correctly conducted.[131]

A few words might also be spent on the issue of the degree of proof necessary to uphold the decision of the inferior court, officer or tribunal. The pre-1965 decisions relating to the writ emphasize its purely procedural nature, i.e., it would lie only to keep officers and tribunals within their rightful jurisdiction and require them to proceed with regularity in the exercise of that jurisdiction. It would not be used to review the nature or quality of evidence.[132] The post-1965 ground of arbitrariness may have required that some evidence support the lower decision,[133] but the 1973 standard requiring reliable, probative and substantive evidence to support the lower decision now requires at least some evidence in support. The writ is tried on

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[128] Kinney v. City of Astoria, 58 Or. 186, 113 P. 21 (1911); Holmes v. Cole, 51 Or. 483, 94 P. 964 (1908).

[129] Fasano v. Board of Comm'rs, 96 Or. Adv. Sh. 1059, ___ Or. ___, 507 P.2d 23 (1973); Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969). *See also* City of Portland v. Garner, 226 Or. 80, 358 P.2d 495 (1960); Crowe v. Albee, 87 Or. 148, 169 P. 785 (1918). In Heuel v. Wallowa County, 76 Or. 354, 149 P. 77 (1915), the court stated that, as no findings were requested below on the point of dispute, it would not infer such error. In City of Oregon City v. Clackamas County, 118 Or. 546, 555, 247 P. 772, 774 (1926), the court described the entry of findings and conclusions by the circuit court as a matter of "supererogation" and, while not necessary, did not, of itself, void the proceeding.

[130] See cases cited in note 105 *supra*.

[131] Heuel v. Wallowa County, 76 Or. 354, 149 P. 77 (1915); Tyler v. State, 28 Or. 238, 42 P. 518 (1895). *Fasano* did not seek directly to change this presumption, but it did increase the burden which must be met.

[132] *See especially* Miller v. Schrunk, 232 Or. 383, 375 P.2d 823 (1962), which discusses City of Portland v. Garner, 226 Or. 80, 358 P.2d 495 (1960), as to the problem of whether the lack of any evidence for a conclusion constitutes an "erroneous" exercise of judicial function and facts to resolve the question. *See also* Mundt v. Peterson, 211 Or. 293, 315 P.2d 589 (1957) (which intimates that it does); Safeway Stores v. State Board of Agri., 198 Or. 43, 255 P.2d 564 (1953) (which intimates that it does not). In School Dist. No. 68 v. Hoskins, 194 Or. 301, 240 P.2d 949 (1952), the court indulged in a presumption against an abuse of discretion in weighing the evidence (citing ORS 41.360); in Tyler v. State, 28 Or. 238, 42 P. 518 (1895), the court stated that discretionary and other evidence at a justice court hearing not recorded or before the reviewing court was unnecessary for the review in that only the docket, files and records of the court were necessary if the testimony were not reduced to writing, the presumption of regularity being utilized and no duty to preserve evidence or transcribe testimony being found. *See also* Oregon Coal Co. v. Coos County, 30 Or. 308, 47 P. 851 (1897).

[133] Evans v. Schrunk, 4 Or. App. 437, 479 P.2d 1008 (1971).

the record, which all parties must accept, and the record cannot be contradicted upon review.[134] In no case will the facts be tried upon review.[135]

IV. PROSPECTS AND CONCLUSION

The new approach taken with respect to review of quasi-judicial decisions in *Fasano* marks a great departure from the previous policy of substantive review of those decisions. The Oregon Supreme Court has stated that the review will now approximate that of a state administrative agency.

If that approach be a salutary one, there is a need to undertake further efforts to inspire judicial and public confidence in the land use regulatory process. Unless such efforts are undertaken, the tendency of the courts will be to break down the formalities of the review process to assure that the basic requirements of fairness and necessity have been fulfilled. In conclusion, some alternatives to the present land use regulating system should be considered as means of assuring procedural fairness.

A. *A More Scientific Basis for Planning and Regulation*

While there have been many requirements that land use regulations be "well considered"[136] or "in accordance with a comprehensive plan,[137] the nature of this plan has not been discussed by the courts. Implicit in the decisions of some courts is the feeling that the plan is merely a matter of opinion.[138] The decision might well focus upon the rights of the objecting neighbor because it is he who has the immediate interest in the outcome of the case before the court. If the public interest in the integrity of the plan and its implementation is seen as being without justifiable basis when balanced against the harm asserted by the neighbor, the form which that review takes will be of little import.

Only recently has the concept of planning as a matter of opinion been changed on a wide scale. Popularized by Ian McHarg in his book *Design with Nature,*[139] the emphasis of planning has been adapted to stress the "givens" of topography, slope, soil types, present land uses, ecologically sensitive areas and the like. This has been done by developing a system of weighted values for each category, thus lending a better picture of the alternatives open to each

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[134] Gay v. City of Eugene, 53 Or. 289, 100 P. 306 (1909); Gue v. City of Eugene, 53 Or. 282, 100 P. 254 (1909); Curran v. State, 53 Or. 154, 99 P. 420 (1909).

[135] *See, e.g.*, Silva v. State, 243 Or. 187, 188, 412 P.2d 375 (1966); Mundt v. Peterson, 211 Or. 293, 315 P.2d 589 (1957); Cookinham v. Lewis, 58 Or. 484, 114 P. 238 (1911); Elmore Packing Co. v. Tillamook County, 55 Or. 218, 105 P. 898 (1909); Oregon R.R. & Nav. Co. v. Umatilla County, 47 Or. 198, 81 P. 352 (1905); Oregon Coal Co. v. Coos County, 30 Or. 308, 47 P. 851 (1897); Vincent v. Umatilla County, 14 Or. 375, 12 P. 732 (1887).

[136] ORS 227.240, enacted in 1919 and which requires city zoning regulations to be in accord with a "well-considered" plan, is typical of the model legislation exemplified in the Standard Zoning Enabling Act (1925) suggested by the United States Department of Commerce under President Herbert Hoover.

[137] Comment, *supra* note 7.

[138] R. BABCOCK, THE ZONING GAME (1966).

[139] I. MCHARG, DESIGN WITH NATURE (1969); a better planning process might well obviate the need for stop-gap "moratoria" and single purpose legislation such as environmental impact statement requirements.

jurisdiction.[140] Such an approach gives the public more confidence in the planning process by establishing for the necessity of planning and other regulatory and zoning classifications.

B. *Additional State Participation in the Planning Process*

For 50 years, land use regulation has been entrusted solely to the hands of local government with nominal state participation. Until 1973, the only exception in Oregon was certain legislation which required local governments to adopt planning and zoning regulations.[141]

When decisions of local governing bodies are supported by their participation within and use of a regional and statewide planning and regulatory process in Oregon,[142] the courts should restore the formal presumption of validity to such decisions and limit review to the record. Such a salutary effect has been seen in those states which have undertaken an active role in the land use process, notably Hawaii,[143] Vermont,[144] and Maine.[145] That local government will still have an active role in that process is emphasized by the legislative experience in Florida[146] and by the proposed Model Land Development Code.[147]

C. *Re-Organization of Local Government*

Oregon county government evolved as a means of dividing the state into administrative districts in which the public business could be transacted at centers less than a one-day journey by horse and buggy. The large number of general purpose governmental agencies able to provide service, along with the proximity of location through urban transportation systems, dictates some fresh thinking about the reallocation of local government powers.

It may be time to redraw county boundary lines in order to make the counties larger and to give to them sufficient powers to handle matters of regional concern.[148] More local needs could be met by districts within the county so that each level of government may address itself to appropriate needs while preserving the opportunity to participate in decision-making.[149] In addition, legislation is needed to reduce the dependence of local government on the property tax, a fact which encourages premature and ill-considered development pressure.

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[140] *See, e.g.*, the Washington County Comprehensive Framework Plan (adopted November 26, 1973). For the use of this approach on individual parcels, *see* K. LYNCH, SITE PLANNING (1962).
[141] ORS 215.055 to 215.535, *as amended*, sec. 47-49, ch. 80, Or. Laws 1973.
[142] Ch. 80, Or. Laws 1973.
[143] HAW. REV. STAT. Ch. 205 (1973 Supp.).
[144] VT. STAT. ANN. Title 10 *et seq.* (1973).
[145] ME. REV. STAT. ANN. Title 38, §§ 481-87 (1973 Supp.).
[146] FLA. STAT. ANN. Ch. 380 (1974 Supp.).
[147] ALI MODEL LAND DEVELOPMENT CODE (Tent. Drafts 2 & 3; April 1970, April 1971).
[148] This approach has been utilized in the Portland metropolitan area by enabling legislation for a regional planning agency by the 1971 Oregon Legislative Assembly. Ch. 482, Or. Laws 1973.
[149] G. Finney, *The Intergovernmental Context*, in PRINCIPLES AND PRACTICE OF URBAN PLANNING (Goodman & Freund, ed. 1968).

D. *Revision of Planning-Enabling Legislation*

The typical planning-enabling legislation is too often couched in terms of "public health, safety and general welfare."[150] As a result, neither a plan, an implementing regulation nor a decision can be reviewed by a court to any real degree of certainty. The McHarg approach, discussed above, may be one solution to this dilemma.

Further, the courts must insist upon adequate legislative guidelines for procedural fairness.[151] If a court is confident that the policies enunciated in the local plan were carefully formulated and that adequate procedural safeguards were afforded participants in a land use hearing, it should be a small step towards insisting that review be conducted solely on the record.

It might also be suggested that an integration of planning-related functions be undertaken so that zoning, capital improvement budgeting, programming, reservation of future rights-of-way, urban renewal, new communities, housing authorities and the like are all segments of an overall program.[152]

Finally, land use regulation must be seen as part of a unified whole of welfare legislation. Such regulation, in conjunction with taxation policies, can be molded to achieve socially desirable ends. As a nation, we have just begun to realize the policy implications of land use regulation.

Whatever options are undertaken, it is clear that it must be the legislature and local administrative bodies which make the policy decisions. Those decisions, of necessity, must have the greatest degree of latitude so long as they are procedurally correct and do not impinge on constitutional guaranties. In implementing policy and passing upon individual applications, the standards to which quasi-judicial bodies must adhere are those of fidelity to policy and procedural fairness. Any lesser standard allows for administrative control without judicial review. Any greater standard would provide that, by whatever method, the courts, rather than legislative bodies, would make the policy decisions, an undemocratic process which, hopefully, has seen its last days in Oregon.

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[150] *E.g.*, ORS 215.055.

[151] The Oregon Legislative Assembly has taken this first step through chapters 552 and 769, Oregon Laws 1969, which, *inter alia*, require the adoption of rules of procedures by local government units. This legislation also provides the beginnings of even greater reform, *i.e.*, full disclosure of interest or bias and conflict of interest standards. Coupled with adequate campaign disclosure and expenditure limitations, the land use regulatory process could be vastly de-politicized.

[152] It might be suggested that a single "development permit" replace the vast number of state and local permits now required for development. ALI MODEL LAND DEVELOPMENT CODE § 1-202 (Tent. Drafts 2 & 3; April 1970, April 1971).

APPENDIX

ANALYSIS OF OREGON LAND USE DECISIONS

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Kroner v. City of Portland	116 Or. 141, 240 P. 536 (1925)	Injunction	Applicant challenging denial of building permit	Prohibition under city zoning ordinance upheld	No
Ludgate v. Somerville	121 Or. 643, 256 P. 1043 (1927)	Injunction	Property owner seeking to enforce restrictive covenants	Zoning does not affect covenants	No
Berger v. City of Salem	131 Or. 674, 284 P. 273 (1930)	Injunction	Applicant challenging denial of permit	Prohibition under city zoning ordinance upheld	Yes
Roman Catholic Archbishop of Diocese of Oregon v. Baker	140 Or. 600, 15 P.2d 391 (1932)	Injunction	Applicant challenging denial of permit	Zone change denial by city reversed	Yes
Page v. Portland	178 Or. 632, 165 P.2d 280 (1946)	Injunction	Neighbor challenging grant of permit	Zone change approval by city reversed	Yes
Holt v. Salem	192 Or. 200, 234 P.2d 564 (1951)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by city upheld	Yes
Shaffner v. City of Salem	201 Or. 45, 268 P.2d 599 (1954)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by city upheld	Yes
Milwaukie Company of Jehovah's Witnesses v. Mullen	214 Or. 281, 330 P.2d 5, *cert. denied*, 359 U.S. 436 (1958)	Mandamus	Applicant challenging denial of permit	Special use permit denial by city upheld	Yes

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Dennis v. City of Oswego	223 Or. 60, 353 P.2d 1044 (1960)	Declaratory Judgment	Property owner challenging zoning regulation	Ordinance barring gas stations downtown upheld	No
Robertson v. Salem	191 F. Supp. 604 (D. Or. 1961)	Declaratory Judgment	Property owner challenging zoning regulation	Voided regulation	No
Lane County v. Heintz Construction Co.	228 Or. 152, 364 P.2d 627 (1961)	Injunction	County seeking to enforce zoning regulation	Zoning ordinance found void	No
Witham Hill Corp. v. City of Corvallis	234 Or. 236, 380 P.2d 792 (1962)	Declaratory Judgment	Property owner seeking interpretation of zoning regulation	City interpretation of regulations prohibiting commercial use in residential zone upheld	No
Oregon City v. Hartke	240 Or. 35, 400 P.2d 255 (1965)	Criminal Conviction	Property owner challenging zoning regulation	Aesthetic base for zoning upheld	No
Smith v. Washington County	241 Or. 380, 406 P.2d 545 (1965)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by county reversed	Yes
Bither v. Baker Rock Crushing Co.	249 Or. 640, 438 P.2d 988, 440 P.2d 368 (1968)	Injunction	Neighbor challenging expansion of nonconforming use	Nonconforming use limited	No
Perkins v. Marion County	252 Or. 313, 448 P.2d 374 (1969)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by county reversed	Yes
Archdiocese of Portland v. County of Washington	254 Or. 77, 458 P.2d 682 (1969)	Declaratory Judgment	Applicant challenging denial of permit	Conditional use denial by county upheld	Yes

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Roseta v. County of Washington	254 Or. 161, 458 P.2d 405 (1969)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by county reversed	Yes
Washington County v. Stearns	3 Or. App. 366, 474 P.2d 360 (1970)	Injunction	County seeking to enforce zoning regulation	Injunction approved	No
Rust v. City of Eugene	3 Or. App. 386, 474 P.2d 374 (1970)	Writ of Review	Applicant challenging modification of application	Zone change modification of application by city upheld	Yes
Clatsop County v. Rock Island Constructors	5 Or. App. 15, 482 P.2d 541 (1971)	Injunction	County seeking to enforce zoning regulation	Denial of injunction affirmed	No
Follmer v. County of Lane	5 Or. App. 185, 480 P.2d 722, 486 P.2d 1312 (1971)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by city upheld	Yes
Fasano v. Board of County Commissioners					
Court of Appeals	7 Or. App. 176, 489 P.2d 693 (1972)	Writ of Review	Neighbor challenging grant of permit	Zone change approval by county reversed	Yes
Supreme Court	96 Or. Adv. Sh. 1059, 503 P.2d 23 (1973)				
Brandt v. Marion County	6 Or. App. 617, 488 P.2d 1391 (1971)	Declaratory Judgment	Neighbor challenging grant of permit	Zone change approval by county reversed	Yes

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Frankland v. City of Lake Oswego					
Court of Appeals	8 Or. App. 224, 493 P.2d 163 (1972)	Declaratory Judgment	Neighbor seeking to void or enforce zoning regulation	Regulation enforced	Yes
Supreme Court	98 Or. Adv. Sh. 519, 517 P.2d 1042 (1973)				
Multnomah County v. Howell	9 Or. App. 374, 496 P.2d 235 (1972)	Injunction	County seeking to enforce zoning ordinance	Denial of injunction reversed	No
Erickson v. Portland	9 Or. App. 256, 496 P.2d 726 (1972)	Writ of Review	Neighbor challenging grant of permit	Variance approval by city reversed	Yes
Sammons v. Sibarco Station	10 Or. App. 43, 497 P.2d 862 (1972) *rev. denied*	Declaratory Judgment	Neighbor challenging grant of permit	Conditional use approval by city reversed	Yes
Washington County v. Stark	10 Or. App. 384, 499 P.2d 1337 (1972) *rev. denied*	Injunction	County seeking to enforce zoning regulation	Injunction approved	No
Parks v. Board of County Commissioners	95 Or. Adv. Sh. 929, 501 P.2d 85 (1972) *rev. denied*	Mandamus	Neighbor challenging grant of building permit	Mandamus issued	No

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Clackamas County v. Holmes					
Court of Appeals	95 Or. Adv. Sh. 967, 501 P.2d 333 (1972)	Injunction	County seeking to enforce zoning regulation	Nonconforming use found	No
Supreme Court	96 Or. Adv. Sh. 1510, 508 P.2d 190 (1973)				
Bennett v. Lincoln City	96 Or. Adv. Sh. 175, 503 P.2d 724 (1972)	Declaratory Judgment	Neighbor challenging grant of permit	Approval of variance by city reversed	Yes
Cunningham v. Brookings	96 Or. Adv. Sh. 242, 504 P.2d 760 (1973)	Declaratory Judgment	Neighbor challenging grant of permit	Approval of zone change by city upheld	Yes
Bissell v. Board of County Commissioners	96 Or. Adv. Sh. 730, 506 P.2d 499 (1973)	Writ of Review	Applicant challenging denial of permit	Denial of zone change by county upheld	Yes
Hill v. Board of County Commissioners	96 Or. Adv. Sh. 917, 506 P.2d 519 (1973)	Declaratory Judgment	Neighbor challenging grant of permit	Variance approval by county reversed	Yes
Seawright v. Nelson	97 Or. Adv. Sh. 1090, 511 P.2d 1256 (1973)	Writ of Review	Applicant challenging modification of permit	Denial of county of variance found moot	Yes

Case Title	Citation	Form	Plaintiff	Outcome	Quasi-Judicial
Culver v. Sheets	97 Or. Adv. Sh. 134, 509 P.2d 1221 (1973)	Mandamus	Applicant challenging denial of permit	Denial of conditional use permit by county upheld	Yes
Washington County v. Manfold Business and Investment Co., Inc.	97 Or. Adv. Sh. 223, 510 P.2d 574 (1973)	Injunction	County seeking to enforce zoning regulation	Injunction approved	No
Clackamas County v. Portland City Temple	97 Or. Adv. Sh. 373, 511 P.2d 412 (1973)	Injunction	County seeking to enforce zoning regulation	Injunction approved	No
Clackamas County v. Emmert	97 Or. Adv. Sh. 1174, 513 P.2d 534 (1973)	Injunction	County seeking to enforce zoning regulation	Injunction approved	No
Bergford v. Clackamas County	97 Or. Adv. Sh. 2319, 515 P.2d 1345 (1973)	Declaratory Judgment	Applicant challenging denial of permit	Nonconforming use expansion denial by county upheld	Yes
Twin Rocks Watseco Defense Committee v. Sheets	98 Or. Adv. Sh. 61, 516 P.2d 472 (1973)	Declaratory Judgment	Neighbor challenging grant of building permit	Building permit alone insufficient for nonconforming use status	No
Columbia County v. O'Black	98 Adv. Sh. 701, ___ P.2d ___ (1974)	Injunction	County seeking to enforce partitioning regulation	Injunction approved	No