

June 1976

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John Preston Bailey

West Virginia University College of Law

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Recommended Citation

John P. Bailey, *Zoning--Modification of Zoning Ordinance Use Restrictions*, 78 W. Va. L. Rev. (1976).

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ZONING—MODIFICATION OF ZONING ORDINANCE USE RESTRICTIONS

As the population of this country increases, as new areas are developed, and as older communities and parts of communities change in character, the law of zoning will play an increasingly important role in the life of every citizen. As zoning law becomes more important, certain aspects of its application will become increasingly controversial.

One area of zoning law which in the past has been surrounded by controversy and by a great deal of confusion is the "use variance," whereby a board of zoning appeals¹ permits a landowner to use a parcel of land in a certain use district in a manner prohibited by the zoning ordinance. In two recent decisions, *Harding v. Board of Zoning Appeals*² and *Wolfe v. Forbes*,³ the West Virginia Supreme Court of Appeals did a great deal to lessen this confusion.

In *Harding*, the court recognized the valid distinction between a conditional use and a variance, expressly overruling as to this issue *Miernyk v. Board of Zoning Appeals*⁴ in which the distinction had been erroneously obliterated.⁵ A conditional use, special exception, or special exception permit⁶ is a permit granted by the

¹ The West Virginia statutes concerning the organization and powers of the board of zoning appeals are W. VA. CODE ANN. § 8-24-51 to -58 (1969). These statutes (and most of article 24 of chapter 8) are modeled after the Standard State Zoning Enabling Act prepared under the auspices of the United States Department of Commerce. Acts patterned after the Enabling Act have been adopted in many of the states. See 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.49 (3d ed. 1965). In some states the board of appeals is called a board of adjustment.

² 219 S.E.2d 324 (W. Va. 1975).

³ 217 S.E.2d 899 (W. Va. 1975).

⁴ 155 W. Va. 143, 181 S.E.2d 681 (1971).

⁵ 219 S.E.2d at 327.

⁶ "In A.H. Rathkopf, *The Law of Zoning and Planning* 54-1 (3rd ed. 1972), Chapter 54 is entitled 'Conditional Uses or Special Exception Permits;' footnote one of this chapter explains why it is so entitled:

'Although in this chapter we adhere to ordinary terminology and use the term "special exception use" or "special exception permit," it should be pointed out in the beginning that this term is a misnomer. As will be made clear in this chapter, no "exception" is made to the provisions of the ordinance in permitting such use; the permit granted is for a use specifically provided for in the ordinance in the case in which conditions, legislatively prescribed are also found. A much more accurate description would be "conditional use" permit.'

Harding v. Board of Zoning Appeals, 219 S.E.2d 324, 327 (W. Va. 1975).

board of zoning appeals enabling a landowner to use his land in a manner specifically enumerated in the zoning ordinance.

In explaining the distinction, Chief Justice Haden, speaking for the court, quoted at length from Rathkopf's *The Law of Zoning and Planning*,⁷ wherein Rathkopf restates the following "excellent language"⁸ from *Syosset Holding Corp. v. Schlimm*:⁹

There is a substantial difference between the two. The granting of a *special exception* is apparently not too generally understood. It does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions. In short, a special exception is one allowable when the facts and conditions specified in the ordinance as those upon which the exception is permitted are found to exist.

A special exception, unlike a variance, does not involve the varying of the ordinance, but rather compliance with it.¹⁰

Justice Haden also quoted Rathkopf's quotation from *Tullo v. Millburn Township*:¹¹

The term ('special exception') might well be said to be a misnomer. 'Special use' or 'special use permits' would be more accurate. The theory is that certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community and its citizenry or substantial segments of it, are entirely appropriate and not essentially incompatible with the basic uses in any zone (or in certain particular zones), but not at every or any location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint, such as traffic congestion, safety, health, noise, and the like. The enabling act therefore permits the local ordinance to require approval of the local administrative agency as to the location of such use within the zone. If the board finds compliance with the standards or requisites set forth in the ordinance, the right to the exception exists, subject to such specific safeguarding conditions as the agency

⁷ A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1972). [hereinafter cited as RATHKOPF].

⁸ Both the Chief Justice and Rathkopf refer to the quote as "excellent language."

⁹ 15 Misc. 2d 10, 11, 159 N.Y.S.2d 88, 89 (1956).

¹⁰ 2 RATHKOPF, *supra* note 7, at 54-6; *Harding v. Board of Zoning Appeals*, 219 S.E.2d 324, 327-28 (W. Va. 1975).

¹¹ 54 N.J. Super 483, 490, 149 A.2d 620, 624-625 (App. Div. 1959).

may impose by reason of the nature, location and incidents of the particular use The point is that such special uses are permissive in the particular zone under the ordinance and neither non-conforming or akin to a variance. The latter must be especially clearly distinguished.¹²

The West Virginia Code section granting the board of zoning appeals its authority reflects the distinction between a conditional use and a variance, stating that:

The board of zoning appeals shall:

. . . .
. . . .

(3) Hear and decide *special exceptions* to the terms of the ordinance upon which the board is required to act under the ordinance; and

(4) Authorize upon appeal in specific cases such *variance* from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. [Emphasis supplied].¹³

The major controversy arises when a land owner desires to use his land in a manner prohibited by the zoning ordinance and not enumerated as a use for which a special exception may be obtained. In *Wolfe v. Forbes*,¹⁴ the court held that a board of zoning appeals may not by variance amend a zoning ordinance by permitting a use expressly prohibited thereby. Rathkopf states that "the extent to which a board of appeals can, in the case of unnecessary hardship or practical difficulty, vary the use provisions of the ordinance and permit uses prohibited in a specific district in which property lies is the subject of divergent views in the courts."¹⁵

Some courts have held that the purpose of a variance is to allow a board to correct minor deficiencies caused by the operation of the ordinance by varying provisions relating to size, density,

¹² 2 RATHKOPF, *supra* note 7, at 54-6; *Harding v. Board of Zoning Appeals*, 219 S.E.2d 324, 328 (W. Va. 1975). For additional discussion see 2 RATHKOPF, *supra* note 7, ch. 54; E. YOKLEY, *ZONING LAW AND PRACTICE* § 15-4 (3d ed. 1965); and 8 E. MCQUILLIN, *MUNICIPAL CORPORATIONS* § 25.160 (3d ed. 1965).

¹³ W. VA. CODE ANN. § 8-24-55 (1969); *Harding v. Board of Zoning Appeals*, 219 S.E.2d 324, 328 (W. Va. 1975).

¹⁴ 217 S.E.2d 899 (W. Va. 1975).

¹⁵ 2 RATHKOPF, *supra* note 7, at 38-1.

setback, and other requirements of this nature,¹⁶ reasoning that to allow the board of zoning appeals to amend the use provisions of the ordinance by varying its application to a particular parcel would be to allow the board to exercise a legislative function reserved for the governing body of the municipality, thereby constituting an invalid and unconstitutional delegation of powers.¹⁷ In considering this question, one court summarized:

While it is true that no body in which is vested the legislative power may abdicate its legislative function by delegating power to another body to make the law, it is equally well established that the legislative body may delegate to a subordinate body the power to execute and administer its laws, where the legislative body has formulated a standard reasonably clear to govern the action of such subordinate body. While these general rules are well settled, their applicability probably never will be. The ever-recurring problem is whether any statute constitutes an unlawful delegation of legislative power or merely a power to administer and execute the declared policy of the legislative body within reasonably clear standards fixed by the statute.¹⁸

Those states which subscribe to the view that the power to grant a use variance would be an unconstitutional delegation include Kentucky,¹⁹ North Carolina,²⁰ North Dakota,²¹ Texas,²² Utah,²³ Louisiana,²⁴ Missouri,²⁵ Wisconsin,²⁶ and South Dakota.²⁷ On the other hand, a larger number of states have taken the view that a

¹⁶ *Id.*

¹⁷ *Id.*; See *Nelson v. Donaldson*, 255 Ala. 76, 50 So. 2d 244 (1951) and cases collected therein.

¹⁸ *Nelson v. Donaldson*, 255 Ala. 76, 81, 50 So. 2d 244, 248 (1951).

¹⁹ *Arrow Transportation Co. v. Planning and Zoning Comm.*, 299 S.W.2d 95 (Ky. 1956); *Bray v. Beyer*, 292 Ky. 162, 166 S.W.2d 290 (1942).

²⁰ *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969); *Application of O'Neal*, 243 N.C. 714, 92 S.E.2d 189 (1956); *James v. Sutton*, 229 N.C. 515, 50 S.E.2d 300 (1948); *Lee v. Bd. of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946).

²¹ *Livingston v. Peterson*, 59 N.D. 104, 228 N.W. 816 (1930).

²² *Board of Adjustment v. Willie*, 511 S.W.2d 591 (Tex. Civ. App. 1974); *Swain v. Board of Adjustment*, 433 S.W.2d 727 (Tex. Civ. App. 1968); *Board of Adjustment v. Rich*, 328 S.W.2d 798 (Tex. Civ. App. 1959).

²³ *Walton v. Tracy Loan & Trust Co.*, 97 Utah 249, 92 P.2d 724 (1939).

²⁴ *City of New Orleans v. Leeco*, 219 La. 550, 53 So. 2d 490 (1951).

²⁵ *State ex rel. Meyer v. Kinealy*, 402 S.W.2d 1 (Mo. 1966); *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 27 S.W.2d 1030 (1930).

²⁶ *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317 (1932).

²⁷ *Graves v. Johnson*, 75 S.D. 261, 63 N.W.2d 341 (1954). See also *State v. Hull*, 65 Wyo. 251, 199 P.2d 832 (1948).

board of zoning appeals may constitutionally vary the use provisions of the ordinance.²⁸

West Virginia has adopted the former view, Chief Justice Haden stating, "we must concur with the rationale of the leading case, *Lee v. Board of Adjustment*²⁹ . . . , that 'no variance is lawful which does precisely what a change of map would accomplish.'"³⁰ A board of zoning appeals, being an administrative agency, acting in a quasi-judicial capacity, is not a law-making body. As a result, the board has no power to amend the zoning ordinance under which it functions.³¹ The court noted:

This is particularly true under the West Virginia statute, where, as previously noted, only the governing body of a municipality is granted the authority to regulate and determine the use of land, to classify, regulate and restrict the location of businesses, and to divide the municipality into zoning districts.³²

In West Virginia, if a landowner wishes to use his land in a manner not permitted by the zoning ordinance or enumerated as a special exception thereto, what recourse is available to him, since he may not have the use restriction modified by variance?³³ One remedy available is resort to the political system. He may ask the governing body to amend the zoning ordinance³⁴ to permit the use

²⁸ *Arant v. Board of Adjustment*, 271 Ala. 600, 126 So. 2d 100 (1960); *Appeal of Blackstone*, 8 Del. 230, 190 A. 597 (1937); *Wood v. Twin Lakes Mobile Home Village, Inc.*, 123 So. 2d 738 (Fla. 1960); *State v. Gunderson*, 198 Minn. 51, 268 N.W. 850 (1936); *Freeman v. Board of Adjustment*, 97 Mont. 342, 34 P.2d 534 (1934); *Fortuna v. Zoning Bd. of Adjustment*, 95 N.H. 211, 60 A.2d 133 (1948); *Oklahoma City v. Harris*, 191 Okla. 125, 126 P.2d 988 (1941); *Application of Devereaux Foundation, Inc.*, 351 Pa. 478, 41 A.2d 744 (1945); *See other cases collected in Nelson v. Donaldson*, 255 Ala. 76, 50 So. 2d 244 (1951) and 2 РАТНОКОВ, *supra* note 7, at 38-1.

²⁹ 226 N.C. 107, 37 S.E.2d 128 (1946).

³⁰ *Wolfe v. Forbes*, 217 S.E.2d 899, 906 (W. Va. 1975), *citing Lee v. Board of Adjustment*, 226 N.C. 107, 112, 37 S.E.2d 128, 133 (1946).

³¹ *Wolfe v. Forbes*, 217 S.E.2d 899, 906 (W. Va. 1975). *See also Lee v. Board of Adjustment*, 226 N.C. 107, 112, 37 S.E.2d 128, 133 (1946); *Welch v. Swasey*, 193 Mass. 364, 79 N.E. 745, 118 Am. St. Rep. 523 (1907); J. METZENBAUM, *LAW OF ZONING* 259 (2d ed. 1955).

³² *Wolfe v. Forbes*, 217 S.E.2d 899, 906 (W. Va. 1975), *discussing W. VA. CODE ANN. § 8-24-39* (1969).

³³ This situation is to be distinguished from that in which the landowner would wish to complain of an error of the board of zoning appeals (such as improper construction of the ordinance) or errors in the procedure followed by the board (such as a lack of findings), in which case the proper remedy would be certiorari to the circuit court under W. VA. CODE ANN. § 8-24-59 (1969).

³⁴ W. VA. CODE ANN. § 8-24-23 (1969).

he desires in his area.³⁵ The efficacy of this remedy, of course, depends solely on the landowner's ability to convince the governing body that the proposed amendment is consistent with the comprehensive plan of the municipality and is in the best interests of the general welfare of the inhabitants.³⁶ The other remedy available to the landowner is the extraordinary remedy of mandamus.³⁷ In order to utilize mandamus, the landowner should apply to the building inspector or other such administrative agent for a permit to use his land in the desired manner. If refused on the ground that the zoning ordinance forbids such use, he should seek a writ of

³⁵ There is no minimum size as to the area which must be rezoned. Contrary to popular belief, spot zoning, which is a practice whereby a single lot or area is granted privileges not granted or extended to other land in the vicinity in the same use district, is not always invalid. The general rule is that "it is only when there is an arbitrary or unreasonable devotion of the small area so zoned or rezoned to uses inconsistent with those to which the rest of the district is restricted, and it is so rezoned for the sole benefit of the private interest of the owner, that such zoning is invalid, but if the rezoning is in accordance with the comprehensive plan and serves the general welfare it is valid." 1 RATHKOFF, *supra* note 7, at 26-3, 26-4.

³⁶ There can be no court review of this method since certiorari does not lie to review actions of a governing body of a municipality in enacting a zoning ordinance, or an amendment thereto. *Garrison v. City of Fairmont*, 150 W. Va. 498, 147 S.E.2d 397 (1966).

³⁷ The West Virginia Supreme Court of Appeals has held on numerous occasions that a writ of mandamus will not issue unless three conditions coexist: (1) a clear legal right to the relief sought; (2) a legal duty on the part of respondents to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. *E.g.*, *Traverse Corporation v. Latimer*, 205 S.E.2d 133, 138 (W. Va. 1974).

That mandamus may be used to raise the issue of the constitutionality of a zoning ordinance was settled in *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949). *See also* *State ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); *State ex rel. Ammerman v. City of Philippi*, 136 W. Va. 120, 65 S.E.2d 712 (1951); *Sudduth v. Snyder*, 120 W. Va. 746, 200 S.E. 55 (1938); *Central Nat'l. Bank v. City of Buckhannon*, 118 W. Va. 26, 188 S.E. 661 (1936); *State ex rel. Austin v. Thomas*, 96 W. Va. 628, 123 S.E. 590 (1924); *State ex rel. Johnson v. City of Charleston*, 91 W. Va. 318, 112 S.E. 577 (1922); *State ex rel. Sale v. Stahlman*, 81 W. Va. 335, 94 S.E. 497 (1917); *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915).

In West Virginia "the tendency . . . is to enlarge and advance the scope of the remedy of mandamus, rather than to restrict and limit it, in order to afford the relief to which a party is entitled when there is no other adequate and complete legal remedy." *State ex rel. Smoleski v. County Ct. of Hancock County*. 153 W. Va. 307, 312, 168 S.E.2d 521, 524 (1969). For a more detailed discussion on the use of mandamus see Davis, *Mandamus To Review Administrative Actions In West Virginia*, 60 W. VA. L. REV. 1 (1957).

mandamus against the municipality or county, the mayor or county commissioners, and the official who refused the permit, ordering that a permit be granted.³⁸

There are three possible grounds upon which to support a writ of mandamus; these grounds are all interrelated and indistinct, and all raise the issue of the constitutionality of an ordinance. The grounds are: (1) that the ordinance is unconstitutional because it is not sufficiently related to the police power of the municipality; (2) that although the ordinance may be valid in its adoption and may fall within the police power vested in the city council, it is invalid in its application or affect upon a particular piece of property because of arbitrariness or as being unreasonably discriminatory; and (3) that although the ordinance may be valid in its adoption, may fall within the police power vested in the city council, and has been uniformly applied in the area, it is nevertheless invalid because it denies the landowner any reasonable use of his property and is, therefore, a taking of private property without compensation.

The West Virginia Supreme Court of Appeals initially considered the first of these grounds in the 1915 case, *Fruth v. Board of Affairs*.³⁹ In this decision, the court held that a zoning regulation based solely on aesthetic grounds was not within the police power of the state and constituted a taking without compensation. However, a zoning ordinance based on the traditional police powers of health, safety and general welfare, and to which aesthetic considerations are merely incidental, would be valid.⁴⁰ The *Fruth* decision is in accord with the majority of jurisdictions in this country,⁴¹ but there is a modern trend emerging which recognizes that protecting the aesthetics of an area may also be a valid purpose of zoning ordinances.⁴² Although the *Fruth* holding has never been overruled, West Virginia may have adopted the modern trend, since later

³⁸ Of course, under W. VA. R. PRAC. SUP. CT. OF APP. XVIII the action would have to be brought in the circuit court.

³⁹ 75 W. Va. 456, 84 S.E. 105 (1915).

⁴⁰ *Farley v. Graney*, 146 W. Va. 22, 39-40, 119 S.E.2d 833, 843-844 (1960). See also 1 RATHKOFF, *supra* note 7, at 11-1. In *Farley*, the court said: "To say the very least, the prior decisions of this Court are authority for the proposition that unsightliness may be considered with other proper factors in upholding a legislative enactment based on an exercise of the police power." 146 W. Va. at 47, 119 S.E.2d at 848.

⁴¹ 1 RATHKOFF, *supra* note 7, at 11-1. See also Annot., 21 A.L.R.3d 1222 (1968).

⁴² 1 RATHKOFF, *supra* note 7, at 11-1. See also Annot., 21 A.L.R.3d 1222 (1968).

West Virginia cases, although not dealing with zoning, have held that the police power does extend to aesthetics.⁴³

In *State ex rel. Sale v. Stahlman*,⁴⁴ the court overturned an ordinance requiring all new buildings in a certain area to be at least three stories in height. The court, noting that ordinances limiting the height of buildings could be justified on grounds of fire safety, saw no relation between this law and the police power and held it unconstitutional, stating that a law cannot be imposed to effect symmetry or ornamentation.

Another case invalidating an ordinance as being outside the ambit of the police power is *State ex rel. Austin v. Thomas*,⁴⁵ where the court considered an ordinance which provided that no commercial buildings could be built if within 300 feet of the proposed site there were more residences than business houses, unless three-fourths of the residential owners consented. The court held that:

⁴³ *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960); *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949); *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 191 S.E. 368 (majority opinion), 192 S.E.2d 291 (1937) (concurring opinion).

In *Barrack*, a suit to enjoin a nuisance, Judge Maxwell, writing for the court, stated: "Happily, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobrium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society." 118 W. Va. at 612-13, 191 S.E. at 371.

In a concurring opinion, Judge Kenna voiced the belief that considerations of unsightliness or aesthetics should be left to the legislature in the exercise of the police power. 118 W. Va. at 614-619, 192 S.E. at 291-294 (concurring opinion). See *Farley v. Graney*, 146 W. Va. 22, 45, 119 S.E.2d 833, 846-47 (1960).

In *Berman v. Parker*, 348 U.S. 26, 33 (1954), the United States Supreme Court stated:

"The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

⁴⁴ 81 W. Va. 335, 94 S.E. 497 (1917).

⁴⁵ 96 W. Va. 628, 123 S.E. 590 (1924).

A legal exercise of the police power should operate uniformly upon all persons similarly situated who may be affected thereby. Testing the ordinance by these principles, has it a valid basis? It does not place an absolute restriction on the use of property within residential districts for business structures, but undertakes merely to confer upon three-fourths of the property owners authority to say who shall be granted the privilege. The ordinance would clothe these individuals with the powers of government to refuse the right to one and bestow it upon another; thus denying to the former a legitimate use of his property, not in return for any general benefits resulting to the neighborhood from a strict maintenance of its residential character (this will not be accomplished), but in order simply that the latter may be favored.⁴⁶

It is important to note that the three preceding cases were decided in 1915, 1917, and 1924. Since then, courts have demonstrated a tendency to constantly expand the police power. More recently, the West Virginia Supreme Court of Appeals has stated:

In brief the police power is an inherent attribute of sovereignty, existing independently of a constitutional grant thereof. In general terms it may be said that it is as broad and comprehensive as the demands of society for its exercise. It is not static, but it is capable of evolving within constitutional limits to meet the demands or needs of an increasingly dense population and an increasingly complex society. Its scope is not to be determined on the basis of precedent alone, for there may be no precise precedent for the needs or demands of a given time; but such needs or demands also may furnish a measure of its scope.⁴⁷

Furthermore, the court has stated that it is not within its province or power "to pass judgment on the exercise of the legislative discretion and prerogative in determining the need for or the wisdom of legislation enacted in pursuance of the police power."⁴⁸ Accordingly, the standard of review has been set as follows:

Whether in any given case the general welfare calls for particular legislation is a question primarily for the legislature; and the courts will not ordinarily interfere therewith, unless, after every allowance is made, the legislature has been found to have ex-

⁴⁶ *Id.* at 633, 123 S.E. at 592.

⁴⁷ *Farley v. Graney*, 146 W. Va. 22, 38, 119 S.E.2d 833, 843 (1960).

⁴⁸ *Id.* at 37, 119 S.E.2d at 842.

⁴⁹ *Id.*, quoting 16 C.J.S. *Constitutional Law*, § 198, at 968 (1956).

ceded its powers or no sufficient basis for such exercise can be found.⁴⁹

As a result, the police power ground for mandamus in challenging the validity of a zoning ordinance will be limited in application and usefulness.

The second ground upon which to seek a writ of mandamus is that, although the zoning ordinance may be valid in its adoption and fall within the police power vested in the municipality, it is arbitrary or unreasonably discriminatory in its application to a particular piece of property.⁵⁰ Most cases in which a landowner wishes to challenge a zoning ordinance will lend themselves more readily to this ground, and therefore it should prove most useful to the West Virginia practitioner. In *Carter v. City of Bluefield*,⁵¹ a landowner challenged the zoning of a particular area as residential where his property was virtually surrounded by lots devoted to industrial and business uses. The court found that the predominate use of the greater part of the area was business and industrial, and that the area was unsuitable for residential purposes as evidenced by the absence of any newly constructed residences and by only two or three old residences in the area. Based on these findings, the court held that the ordinance had no relation to the public health, safety, morals, or general welfare of the city, amounted to a taking of private property without compensation, and was violative of article 3, section 9 of the West Virginia Constitution⁵² and the fourteenth amendment to the Constitution of the United States.

*G-M Realty, Inc. v. City of Wheeling*⁵³ involved an ordinance setting up two commercial zones, Commercial A and Commercial B, with the only material difference in the two zones being that in Commercial A gasoline stations were prohibited. A landowner, desiring to erect a gasoline station in an area zoned Commercial A, challenged the ordinance on the grounds that the distinction

⁴⁹ *State ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949). See also *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927); *Sudduth v. Snyder*, 120 W. Va. 746, 200 S.E. 55 (1938); *State ex rel. Johnson v. City of Charleston*, 91 W. Va. 318, 112 S.E. 577 (1922).

⁵⁰ 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁵¹ W. VA. CONST. art. III, § 9 provides: "Public property shall not be taken or damaged for public use, without just compensation"

⁵² 146 W. Va. 360, 120 S.E.2d 249 (1961).

was invalid. The court rejected this claim, finding that there had been no other gasoline stations permitted in the area and that gasoline stations inherently involve potential danger to the public safety, stating:

There appears no doubt that the effects of such ordinance do, to some extent, lessen the value and limit the free and independent use of plaintiff's property. That, however, does not afford the test of unreasonable discrimination. No doubt rights and privileges [sic] of some individuals are to some extent limited or controlled by every such zoning ordinance. The spacious and indefinable breadth of the police power, though not entirely without constitutional limitations, permits reasonable restrictions of the rights and privileges of the individual for the needed protection of the health, safety, morals or general welfare of all. Due process, of course, requires that no unreasonable discrimination exist, but in the instant case no person is allowed to construct a gasoline service station within the prohibited area, while the plaintiff, or no other person, is denied the right to construct a building or to operate a business therein which falls within the class of businesses permitted by the ordinance. All are treated alike.⁵⁴

In *Anderson v. City of Wheeling*,⁵⁵ landowners sought a writ of mandamus to compel the city to rezone their properties as commercial. The landowners owned property fronting on a street which intersected a main thoroughfare. The lots fronting on the side street were zoned as residential while those facing the main thoroughfare were commercial. The plaintiffs' properties were contiguous with the commercial property, being the end properties on the side street. The court affirmed the circuit court's refusal of a writ of mandamus on the ground that since there were both positive and negative factors in the record, the decision of the city authorities in the exercise of their legislative function would not be overruled, since all reasonable presumptions should be indulged in favor thereof.⁵⁶

The most recent case of this genre is *State ex rel. Cobun v. Town of Star City*,⁵⁷ in which a landowner challenged the applica-

⁵⁴ *Id.* at 366, 120 S.E.2d at 252-53, citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and 101 C.J.S. *Zoning*, § 15 (1958).

⁵⁵ 150 W. Va. 689, 149 S.E.2d 243 (1966).

⁵⁶ *Id.* at 701, 149 S.E.2d at 251, citing *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961) and *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁵⁷ 197 S.E.2d 102 (W. Va. 1973).

tion of a zoning ordinance forbidding her to use her land as a trailer park, since two adjacent landowners were being permitted to use their land as trailer parks. The court upheld the ordinance, stating that the evidence did not show that the area in question was primarily a commercial area. The turning point in this case seemed to be that only two other landowners were permitted to so use the property, one of which was permitted under a "grandfather"⁵⁸ clause, the other under an improper spot zone.⁵⁹

From these cases several rules are evident. First, when a zoning ordinance is challenged with regard to the validity of the restriction imposed by such ordinance, each case should be determined on the particular facts involved.⁶⁰ Second, these cases have announced and followed the "fairly debatable" rule, which rule has been summarized and explained as follows:

The determination of the necessity for or the nature of a zoning ordinance is a function of the legislative department of the government, though the courts cautiously, and with prudent regard for the rights of the individual, must determine whether an ordinance, or, for that matter, any other legislative enactment, constitutes a violation of due process, or for any reason is violative of any constitutional provision, when such a question is properly presented. That department possesses the facilities, or may obtain the same, for determining the wisdom of or necessity for such a law, and its probable effects on the health, safety, morals and general welfare of the people of the municipality, including the necessity for shaping a program or the planning for future improvement or growth of the municipality. . . . [C]ourts are not disposed to declare ordinances invalid, in whole or in part, "where the question whether they are arbitrary or unreasonable is *fairly debatable*."⁶¹

⁵⁸ If, prior to the adoption of a zoning restriction, property was used for a lawful purpose which the ordinance would thereafter prohibit, such property is held to have acquired a vested right to continue such nonconforming use. Most zoning ordinances contain a section specifically exempting such properties from their operation. Such sections are often referred to as grandfather clauses. 2 RATHKOPF, *supra* note 7, at 58-1; State *ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973).

⁵⁹ See note 35, *supra*.

⁶⁰ State *ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); Anderson *v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); G-M Realty, Inc. *v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); Carter *v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶¹ G-M Realty, Inc. *v. City of Wheeling*, 146 W. Va. 360, 367, 120 S.E.2d 249, 253, *citing* Carter *v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949); See

Third, the courts have indicated several factors which they will consider in reviewing ordinances under this type of challenge: (1) What is the use of the property surrounding that under consideration?⁶² (2) What is the predominate use of nearby property?⁶³ (3) Would the use which the challenger desires tend to produce results not already present in the property located in the nearby area?⁶⁴ (4) For what purpose is the property best suited?⁶⁵ and (5) Does the challenger seek to use his property in the same manner as other owners in the area?⁶⁶

The third method of challenging the application of a zoning ordinance by mandamus is that although the ordinance may be valid in its adoption, may fall within the police power vested in the city council, and has been uniformly applied in the area, it is nevertheless invalid as it applies to or affects a particular piece of property in that it denies the owner any reasonable use of his property and is, therefore, a taking of private property without compensation.⁶⁷

In order to utilize this third method, the landowner must show that the property in question cannot be reasonably used for any of the purposes permitted by the ordinance. In *Carter v. City of Bluefield*,⁶⁸ the court stated that the effect of the ordinance under scrutiny was to deprive the landowners of their right to use the land for any other purpose except for residential purposes.⁶⁹ The court then observed that the property was unsuitable for that pur-

also *Goreib v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927).

⁶² *State ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶³ *State ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶⁴ *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966).

⁶⁵ *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶⁶ *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961); *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶⁷ *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949). See also 1 RATHKOFF, *supra* note 7, at 6-1 et seq. and cases collected therein.

⁶⁸ 132 W. Va. 881, 54 S.E.2d 747 (1949).

⁶⁹ 132 W. Va. at 906, 54 S.E.2d at 761.

pose, as evidenced by the lack of any new residential construction and the virtual absence of any old residences.⁷⁰ Because of these factors, the court found that the ordinance amounted to a taking of private property without compensation.⁷¹ This ground of mandamus will be somewhat limited in its application due to the unique circumstances required for its invocation.

The reliance of the West Virginia court on its lower courts' ability to oversee the application of zoning ordinances and relieve unnecessary hardships in the limited situations described above is superior to the method utilized in other states of giving boards of zoning appeals the power to grant a "use variance." The application of use restrictions should be sparingly modified and then only in the above described situations when failure to do so would result in the partial or total unconstitutionality of the ordinance. The reasons for this include the fact that the ordinance represents the legislative body's determination of what is proper and best for the public welfare both now and in the future,⁷² and that property values of a neighborhood will be depreciated if people feel that the use or character of the area may be freely changed by variance.⁷³

The standard of unnecessary hardship which would cause the unconstitutionality of an ordinance is a complex one to apply, and while theoretically a board of zoning appeals might be able to do so, in practice they are found wanting. Too often, rather than basing their decisions on a legal standard, the boards of zoning appeals often base their decisions on either political or popular grounds or on the "chamber of commerce" view of what the board feels is best for the general welfare of the city, a laudable ground perhaps, but nevertheless one which invades the determinative province of the governmental body's legislative branch.

The use of mandamus provides a detached, judicial, *de novo*⁷⁴ determination of unnecessary hardship under a legal standard which will be applied equally to each person, based truly on unnecessary hardship. While it may seem that going to court represents additional trouble and expense for those entitled to a modification

⁷⁰ *Id.*

⁷¹ 132 W. Va. at 907-908, 54 S.E.2d at 762.

⁷² See *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 366-67, 120 S.E.2d 249, 253 (1961).

⁷³ 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.162 (3d ed. 1965).

⁷⁴ In the case of appellate review of the board's decision, the correctness of the board's actions would have to be presumed.

of use, the practitioner must remember that the instances where there is legal entitlement to a use modification are rare, and in those cases, a great number end up the subject of a court proceeding anyway, as an appeal from the ruling of a board of zoning appeals.

John Preston Bailey