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THE ROLE OF VARIANCES IN DETERMINING RIPENESS IN TAKINGS CLAIMS UNDER ZONING ORDINANCES AND SUBDIVISION REGULATIONS OF TEXAS MUNICIPALITIES

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I. INTRODUCTION

Texas zoning law follows the national standard in creating a board of adjustment with the power to:

> authorize . . . a *variance* from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.[1]

However, unlike most states,[2] Texas does not allow its boards of

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1. TEX. LOC. GOV'T CODE ANN. § 211.009(a)(3) (Vernon 1988) (emphasis added); *see also* New York City Hous. Auth. v. Foley, 223 N.Y.2d 621, 627 (1961) (stating that when the board grants a variance, it acts as a "safety valve by releasing restrictions"); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 20.02 (4th ed. 1996) (defining and explaining the purpose of permitting variances). The underlying theory of allowing boards of adjustment to grant variances is to provide "an escape hatch from the literal terms of the ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to confiscation." *Id.* (quoting Lincourt v. Zoning Bd. of Review, 201 A.2d 482, 485–86 (1964)).

2. *See* 5 NORMAN WILLIAMS JR., AMERICAN LAND PLANNING LAW § 132 (1985) (describing the detail the jurisprudence of individual states concerning use variances). Most states allow their Boards of Adjustment to authorize use variances to lessen a hardship created by the legislative designation of a landowner's property in a specific use district, such as residential. *See, e.g.*, City of Mobile v. Cunningham, 243 So. 2d 723, 726 (Ala. 1971) (noting that Alabama recognizes the Board of Adjustment's authority to provide use variances when the specific enforcement of an ordinance's provisions results in unnecessary hardship); Bishop v. Board of Zoning Appeals, 53 A.2d 659, 661–62 (Conn. 1947) (upholding Section 1033 of the Zoning Ordinances of the City of New Haven, which autho-

adjustment to grant so-called "use" variances.[3]

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rizes the Board of Zoning Appeals to vary regulations of the ordinance); Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 538 (D.C. 1972) (interpreting Section 5–240 of the D.C. Code 1967, which outlines the Board of Adjustment's ability to grant variances); Clarke v. Morgan, 327 So. 2d 769, 771–73 (Fla. 1975) (discussing the constitutionality of Chapter 69–1651, laws of Florida, Special Acts of 1969, which confers authority on the Board of Adjustment of Tampa to grant "use" variances from the express terms of the city's zoning ordinances, and holding it to be constitutional); Heft v. Zoning Bd. of Appeals, 201 N.E.2d 364, 365–66 (Ill. 1964) (revealing that the Zoning Board of Appeals of Peoria County is authorized to grant variations to an ordinance subsequent to a hearing); English v. City of Carmel, 381 N.E.2d 540, 541–42 (Ind. 1978) (affirming the Board of Zoning Appeals' ability to grant a "use" variance from provisions of the city's zoning ordinance); Cavanaugh v. DiFlumera, 9 Mass. App. Ct. 396, 401 N.E.2d 867, 868–69 (Mass. 1980) (giving effect to the board of appeals' ability to grant "use" variances, specifically to allow DiFlumera to use his property as a general store, despite its location within a residential district); Farah v. Sachs, 157 N.W.2d 9, 11 (Mich. 1968) (recognizing that the board of zoning appeals is empowered by the governing zoning enabling act and the Detroit zoning ordinance to grant "use" variances "on the grounds of unnecessary hardship or practical difficulties"); *see also* Slate v. Boone County Bd. of Adjustment, 810 S.W.2d 361, 362 (Mo. Ct. App. 1991) (upholding denial of variance to build a storage facility for automobile parts); Kingsley v. Bennett, 586 N.Y.S.2d 640, 641 (N.Y. 1992) (denying petitioner's application for use variance to erect a commercial office building); Warner v. Jerusalem Township Bd. of Zoning Appeals, 629 N.E.2d 1137, 1139 (Ohio 1993) (holding that drying of commercial fishing nets was impermissible in residential district); Civera v. Zoning Bd. of Adjustment, 395 A.2d 700, 701 (Pa. 1979) (affirming a use variance for off-street parking facility). *Compare* Taylor Inv. Ltd. v. Upper Darby Township, 983 F.2d 1285, 1289 (3d Cir. 1993) (holding that use variances are an available remedy to a land owner), *and* Koch v. Board of County Comm'rs, 342 P.2d 163, 172 (Kan. 1959) (validating use variances in Kansas), *and* People *ex rel.* Sheldon v. Board of Appeals, 138 N.E. 416, 416 (N.Y. 1923) (upholding the constitutionality of two local government ordinances permitting their boards of adjustment to grant use variances in New York), *and* Reddoch v. Smith, 379 S.W.2d 641, 645 (Tenn. 1964) (expressly recognizing the right of local governments to authorize zoning adjustment boards to grant use variances in Tennessee), *with* Bradley v. Zoning Bd. of Appeals, 334 A.2d 914, 916 (Conn. 1973) (voiding use variances in Connecticut), *and* Josephson v. Autrey, 96 So. 2d 784, 787 (Fla. 1957) (holding that boards of adjustment cannot grant use variances because the recognition of that power would instill an invalid legislative authority in boards), *and* Bray v. Beyer, 166 S.W.2d 290, 292 (Ky. 1942) (establishing jurisprudence in Kentucky invalidating use variances), *and* Lea v. Board of Adjustment, 37 S.E.2d 128, 132–33 (N.C. 1946) (ruling that giving permission to the board of adjustment to grant use variances would amount to authority to amend ordinances, which is not constitutional under state law).

3. *See* Board of Adjustment of the City of Fort Worth v. Rich, 328 S.W.2d 798, 799 (Tex. Civ. App.—Fort Worth 1959, writ ref'd) (reversing the grant of a use variance that authorized the operation of a liquor store in a prohibited area); Gartner v. Board of Adjustment of City of San Antonio, 324 S.W.2d 454, 456 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.) (invalidating a use variance permitting a rendering plant to operate in a retail area); Davis v. City of Abilene, 250 S.W.2d 685, 688 (Tex. Civ. App.—Eastland 1952, writ ref'd) (denying a use variance for the building of a garment factory in a residential district); Board of Adjustment of City of San Antonio v. Levinson, 244 S.W.2d 281, 285 (Tex. Civ. App.—San Antonio 1951, no writ) (prohibiting a use variance that allowed the

A variance is essentially a legal waiver from compliance with certain land-use regulations that is granted to a landowner by a government entity in certain limited cases.[4] There are two general types of variances: the area variance and the use variance. A use variance permits the property in question to be used in a manner

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operation of a beauty parlor in a residential area); Texas Consol. Theatres v. Pittillo, 204 S.W.2d 396, 398–99 (Tex. Civ. App.—Waco 1947, no writ) (denying a use variance for a parking lot in a residential area); Connor v. City of Univ. Park, 142 S.W.2d 706, 715–16 (Tex. Civ. App.—Dallas 1940, writ ref'd) (forbidding the granting of a use variance for a dentist's office in a residential area); *see also* Harrington v. Board of Adjustment, 124 S.W.2d 401, 403–06 (Tex. Civ. App.—Amarillo 1939, writ ref'd) (invalidating the board's grant of a use variance on the ground that such a grant usurps the legislative powers of the State of Texas). Focusing on the argument of legislative powers, the *Harrington* Court stated:

> By giving to the board the power of variance from the ordinance, it was not intended the board should be permitted to perform an act or grant a privilege that would be in conflict with the provisions of the ordinance. . . . The board is not permitted to enact legislation. That is the function of the city council and it cannot be usurped by, nor delegated to the board of adjustment.

Harrington, 124 S.W.2d at 403–04. Texas courts have consistently taken a narrow view of the board's variance power, restricting its ability to grant variances to only those cases involving area, setback, height, and the like; and most importantly for purposes of this discussion, holding the board cannot authorize an owner to devote property to a specific use that is prohibited by the regulations in the area in which the land was located. *See* West Texas Water Ref. v. S & B Beverage Co., 915 S.W.2d 623, 627 (Tex. App.—El Paso 1996, no writ) (stating that the exception to land use which the board may authorize "must be explicitly spelled out in the ordinance itself, and a board of adjustment may not grant exceptions not otherwise expressly provided for in the ordinance"); *Pittillo*, 204 S.W.2d at 399 (construing the board's power narrowly and noting that a broad exercise of the board's power would lead to an "absurd result"); *Harrington*, 124 S.W.2d at 404, 407 (holding that the board of adjustment, in granting exceptions to a zoning ordinance, may not violate the relevant zoning ordinance because such an act would amount to making legislation; noting further that the board's power to grant special exceptions is narrow).

4. *See* 3 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 18.02 (2d ed. 1977) (defining a variance as "an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land which is prohibited by a zoning ordinance"). In Texas, a landowner must establish application of the regulation to his or her property that would cause an "unnecessary hardship" before a variance will be granted. *See* TEX. LOC. GOV'T CODE ANN. § 211.009(a)(3) (Vernon 1988). *See generally* 3 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 18.09 (2d ed. 1977) (detailing typical findings whereupon variances may be granted under the "unnecessary hardship" standard). Professor Anderson, using a New York zoning regulation as an example of what factors will weigh in favor of the grant of a variance, noted as follows: (a) the unique physical conditions of the land in question; (b) a resulting lack of reasonable possibility that the land can be developed in strict conformity with zoning; (c) the fact that a variance, if granted, will not change the essential character of a district or neighborhood; (d) the factors contributing to unnecessary hardship were not created by landowner; and (e) the fact that if a variance is allowed, it will be the minimum necessary to afford relief. *See id.* (citing Zoning Resolution, City of New York § 72–21 (1975)).

totally different than that allowed by the ordinance, whereas the area variance only modifies or relaxes the degree of the restrictions outlined in the ordinance.[5] Consequently, under current Texas law, a board of adjustment can allow a lot owner in a residential district to build a structure on a smaller lot than allowed in the zoning ordinance (*i.e.*, 4,000 square feet as opposed to 5,000 square feet), but not a structure of a different type (*i.e.*, a convenience store as opposed to a residential home).[6]

The Texas policy for granting variances has an important impact on regulatory "takings" cases. On several occasions when landowners have claimed that the application of regulations to their land amounted to a regulatory taking or violated their constitutional rights, both federal[7] and Texas courts[8] have stated that the

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5. *See* DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 6.5 (2d ed. 1986) (characterizing area variances as "minor departures" from the terms of a zoning ordinance); *id.* § 6.10 (arguing that use variances may achieve the same result as an actual rezoning of the property at issue). Fearing the threat to the integrity and impartiality of the zoning ordinance, many courts require a higher standard of proof to enforce a use variance than an area variance. *See* Ivancovich v. City of Tuscon Bd. of Adjustment, 529 P.2d 242, 250 (Ariz. Ct. App. 1975) (applying a more deferential standard of review for area variance); Board of Adjustment v. Kwik-Check Realty, Inc., 389 A.2d 1289, 1291 (Del. 1978) (identifying reasons for dual standards required for area and use variances); Matthew v. Smith, 707 S.W.2d 411, 414–15 (Mo. 1986) (discussing varying standards required for area and use variances).

6. *See Harrington*, 124 S.W.2d at 403–04 (stating that the board can make variances that are not "contrary to the public interest" and that do not destroy the "spirit and the purpose" of the ordinance).

7. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986) (holding that since the city's board of supervisors had not made a final decision on how it would apply the challenged regulations, the landowner could not satisfy the ripeness requirement for adjudication); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193–94 (1985) (holding that a developer's failure to seek a variance prevented the takings claim from ripening); Taylor Inv. Ltd. v. Upper Darby Township, 983 F.2d 1285, 1289 (3d Cir. 1993) (holding that a claim had not ripened because the complaining party did not appeal the decision to revoke his permit); Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 500 (9th Cir. 1990) (analyzing the ripeness of a claim by considering the availability of conditional-use permits, zoning changes, and variances). *But see* Hoehne v. County of San Benito, 870 F.2d 529, 535 (9th Cir. 1989) (holding that a claim will ripen even if the party did not seek a variance if an application for such variance would have been futile).

8. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 247 (Tex. App.—Dallas 1994) (holding that the failure of a landowner to reapply for a development or seek a variance kept his claim from ripening), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 400 (Tex. App.—El Paso 1991, writ denied) (stating that Texas applies the ripeness doctrine, requiring claimants to seek a variance as a condition precedent to adjudication). The Private Real Prop-

landowner must first seek a variance before the claim will become ripe for adjudication. This ripeness requirement would be logical if the potential for obtaining such a variance actually existed; however, under Texas law, the approving agency (usually the board of adjustment) lacks the power to provide the necessary relief if the claim relates to restrictions as to use.

Because Texas boards of adjustment cannot grant use variances, one might logically conclude that takings claimants should not be required to apply for them as a condition of ripeness. However, this approach would allow such claimants to immediately bring suit without affording municipalities the opportunity to take a second look at the regulations at issue and the claims asserted by the landowner. Therefore, some other approach should be designed which ensures that a landowner has a realistic path to pursue his claim and that the local government retains the opportunity to take a serious last look at a challenged regulation prior to suit.

In order to have a better understanding of this problem, this Article reviews the ripeness doctrine in the context of pursuing a takings claim based on land-use regulations and discusses the history of land-use regulations, specifically focusing on the distinction between the granting of variances in cases of subdivision and zoning regulations. Next, it addresses the confusion that Texas courts have created regarding the meaning of the term "use variance" in applying the ripeness doctrine. Finally, this Article offers four alternative proposals for resolving the inconsistency of requiring a landowner to seek a variance from an agency that cannot grant a variance as a condition of ripeness.

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erty Rights Preservation Act, TEX. GOV'T CODE ch. 2007 (Vernon Supp. 1998), established certain procedures plaintiffs must follow when suing Texas governmental entities for excessive regulation. However, the Act does not apply to zoning and other actions by municipalities. *See* TEX. GOV'T CODE ANN. § 2007.003(b) (Vernon Supp. 1998). The Act does apply to regulations that a municipality imposes on an extraterritorial jurisdiction that do not uniformly apply throughout the entire area of that jurisdiction. *See* TEX. GOV'T CODE ANN. § 2007.003(a)(3) (Vernon Supp. 1998). Nevertheless, the Act, even if applicable, would not answer the ripeness issue posed herein. It would, however, reduce governmental exposure for massive damages by limiting an overregulated owner to a single remedy—nullification of the order—unless the regulating entity elects to pay the amount of compensation set by the court for keeping the regulation in effect.

II. Overview of Ripeness Doctrine As Applied in Takings Claims

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation."[9] Fifth Amendment guarantees apply to state governments through the Due Process Clause of the Fourteenth Amendment.[10] Takings under the Fifth Amendment are not limited to actual physical appropriations of land but also include unreasonable interferences with the landowner's use and enjoyment of the land.[11]

Compensation for takings from excessive regulation is available through an action for inverse condemnation.[12] Like other constitu-

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9. U.S. Const. amend. V.

10. *See* Bennis v. Michigan, 516 U.S. 442, 446 (1996) (stating that the Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (explaining that "the right to compensation for property taken" implicates the Fourteenth Amendment); Estate of Scott v. Victoria County, 778 S.W.2d 585, 589 (Tex. App.—Corpus Christi 1989, no writ) (noting that the takings provision of the Fifth Amendment applies to the states through the Fourteenth Amendment).

11. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1013–14 (1992) (noting that the Takings Clause applies to government actions that impinge on a landowner's property interest and is not just limited to the physical deprivation of the property itself); *see also* DuPuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965) (holding that state action which left the plaintiff's property facing a cul-de-sac after the construction of a viaduct constituted a taking); Golden Harvest, Inc. v. City of Dallas, 942 S.W.2d 682, 689–90 (Tex. App.—Tyler 1997, writ denied) (reversing summary judgment for the city in a case in which the plaintiff alleged that the city effected a taking by failing to prerelease water, resulting in the flooding of the plaintiff's property).

12. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987) (emphasizing that an action for inverse condemnation can lie for governmental regulation of private property even if such regulation is not embodied in any formal proceeding); United States v. Clarke, 445 U.S. 253, 257 (1980) (noting that inverse condemnation has been defined as "a cause of action against a governmental defendant, . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency" (quoting Donald G. Hagman, Urban Planning and Land Development Control 328 (1971))); MacLeod v. City of Santa Clara, 749 F.2d 541, 544 n.5 (9th Cir. 1984) (explaining that inverse condemnation is the proper cause of action to assert when police power regulations result in the destruction of use and enjoyment of a landowner's property); Woodson Lumber Co. v. City of College Station, 752 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1988, no writ) (outlining the elements of an inverse condemnation claim). In order to prevail in an inverse condemnation claim, the property owner must establish that the government intentionally committed acts, such as enacting excessive regulations, that amounted to a taking of the property for public use. *See Woodson*, 752 S.W.2d at 746 (elaborating on the requirements for establishing a takings claim). Such claims can be difficult to establish because the property owner's land is subject to the

tional claims,[13] claims of inverse condemnation must be ripe for review before they will be addressed on the merits.[14] Under current takings jurisprudence, a Fifth Amendment claim based on inverse condemnation for excessive land-use regulation is ripe for review only if the government entity administering the regulation has made a final and definitive decision applying the regulation to the property in question.[15] In the case of land regulation, denial of

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proper and reasonable exercise of a state's police power and regulations that further a legitimate state interest. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 259–60 (Tex. App.—Dallas 1994) (explaining that regulations which are designed to advance the goals of "public health, safety and general welfare" are a valid exercise of the police power), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).

13. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., 477 U.S. 619, 631–33 (1986) (Stevens, J., concurring) (acknowledging that hypothetical or speculative concerns regarding infringement upon religious freedom are not enough to make a claim ripe for judicial review); Laird v. Tatum, 408 U.S. 1, 13–14 (1972) (ruling that a First Amendment claim was not ripe for adjudication because it was based on nothing more than mere "[a]llegations" of a potential chilling effect); Binker v. Pennsylvania, 977 F.2d 738, 753 (3d Cir. 1992) (reiterating that constitutional claims, including those alleging violation of the Equal Protection Clause through age discrimination, must meet the ripeness requirement for the court to obtain subject matter jurisdiction); Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991) (requiring compliance with the ripeness doctrine in order to invoke the jurisdiction of the court in an Equal Protection Clause case); Herrington v. County of Sonoma (Herrington II), 857 F.2d 567, 569 (9th Cir. 1988) (emphasizing that the ripeness requirement applies to substantive due process claims). *See generally* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) (stating that "[r]ipeness is peculiarly a question of timing" determining when courts may adjudicate constitutional claims (citing Regional Rail Reorganization Cases, 419 U.S. 102, 140 (1974))); Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967) (explaining that the rationale for requiring ripeness as a condition precedent to adjudication of constitutional claims is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements"); Eide v. Sarasota County, 908 F.2d 716, 725 (11th Cir. 1990) (discussing the differing standards of ripeness used, which depend upon the type and manner in which complainant asserts claim); Gene R. Nichols, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 183 (1987) (discussing the many constitutional claims requiring ripeness).

14. *See* Hoehne v. County of San Benito, 870 F.2d 529, 535 (9th Cir. 1989) (holding that a claim of inverse condemnation cannot ripen without a request for variance); Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 244–45 (Tex. App.—Dallas 1994) (noting that ripeness standards apply to claims of inverse condemnation), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 401 (Tex. App.—El Paso 1991, writ denied) (dismissing landowners' claim of inverse condemnation because it was not ripe).

15. *See Hamilton Bank*, 473 U.S. at 186 (discussing when a claim is ripe). In *Hamilton Bank*, the plaintiff/respondent did not seek variances after his original plat was rejected despite the fact that a variance might have allowed him to circumvent the zoning ordinances. *See id.* at 187–88 (listing specific restrictions that the board of zoning appeals was authorized to waive). Because of the plaintiff/respondent's inaction, the Court decided

a permit to proceed with a particular development plan is not considered final until the property owner has had a development plan finally rejected and, *in appropriate cases, has been denied a variance.*[16] Both federal[17] and state[18] courts have held that a landowner is excused from complying with the second requirement upon a showing that submitting an application for a variance would be futile. Federal courts apply the ripeness doctrine as a condition precedent to jurisdiction,[19] and at least two Texas courts have ap-

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that he had not received a final, definitive decision from the zoning regulatory agency; therefore, his claim was not ripe. *See id.* at 194 (concluding that "the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision."). Similarly, in *Agins v. Tiburon*, the plaintiffs had not submitted a plan for development, and their claim was also held to be not ripe. *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980) (concluding that "there is as [of] yet no concrete controversy regarding the application of the specific zoning provision").

16. *See Hoehne*, 870 F.2d at 534; *see also* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–88 (1985) (refusing to designate denial of permit as final because although the respondents had their plan rejected, they did not seek a variance); *Agins*, 447 U.S. at 260 (concluding that the court was unable to rule on whether the zoning ordinance was being applied in an unconstitutional manner because the appellants had neglected to submit a specific plan for approval); *Madero*, 803 S.W.2d at 399 (citing the failure to seek a variance as justification for finding the claim unripe).

17. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 363 (9th Cir. 1996) (recognizing a "futility exception" to the doctrine of ripeness); Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1547 (11th Cir. 1994) (excusing the landowner's failure to appeal to the planning commission because it would have been futile); Del Monte Dunes v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990) (noting that the Ninth Circuit recognizes the futility exception); Eide v. Sarasota County, 908 F.2d 716, 727 (11th Cir. 1990) (acknowledging the validity of the futility exception); *Hoehne*, 870 F.2d at 535 (explaining that "[r]e-application and re-submission to the county 'is excused if such an application would be an idle and futile act'") (citations omitted); Herrington v. County of Sonoma, 857 F.2d 567, 569–70 (9th Cir. 1988) (explaining that an application for a variance is not required if pursuit of a variance is not a viable option); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987) (outlining "futility exception" doctrine); *see also* Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 379 (9th Cir. 1988) (holding that at least one application must have been submitted before landowner can establish that the futility exception applies).

18. *See* Town of Sunnyvale v. Mayhew, 1998 WL 107927, at *6 (Tex. Mar. 13, 1998).

19. *See* Taylor Inv. Ltd. v. Upper Darby Township, 983 F.2d 1285, 1290 (3d Cir. 1992) (explaining that unripe claims should be dismissed because ripeness affects "justiciability"); St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (stating that "[w]hether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal constitution").

plied the doctrine before agreeing to consider a takings claim invoking either the federal or the state constitutions.[20]

The doctrine of ripeness has been justified on the grounds that it conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes.[21] Furthermore, the doctrine is based upon the notion that "[a] court cannot determine whether a regulation has gone too far unless it [actually] knows how far the regulation goes."[22]

In addition to ensuring that the scope of the regulations at issue is properly defined for the reviewing court,[23] the ripeness doctrine serves several important public policy and efficiency goals. First, it sends the municipality a clear message that the landowner is serious about challenging the regulation *before* the case winds up in court, allowing the municipality time to effect a possible compromise. This message should increase the likelihood that the city attorney will educate the governing body and board of adjustment on the necessity of looking at the classification, assessing its reasonableness, and weighing its value against the chance of substantial monetary loss. Second, the procedure can shift the municipality's focus away from whether a regulation furthers the community's health, safety, and welfare (a legislative matter), toward considera-

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20. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 244 (Tex. App.—Dallas 1994) (stating that Texas courts apply the ripeness doctrine to determine whether an action can be brought), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 400 (Tex. App.—El Paso 1991, writ denied) (noting that the ripeness doctrine is used to ascertain whether the court has subject matter jurisdiction and power to render a particular judgment); *cf.* Winn v. City of Irving, 770 S.W.2d 10, 11 (Tex. App.—Dallas 1989, no writ) (finding that a complainant must exhaust all administrative remedies before going to the courts). According to the *Mayhew* court, the ripeness doctrine requires a landowner to obtain a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" before the court will agree to hear a takings claim. *Mayhew*, 905 S.W.2d at 244 (quoting MacDonald, Sommer & Frates v. Yoto County, 477 U.S. 340, 348 (1986)). The *Madero* court defined ripeness as the point at which a controversy has "legally matured," explaining that "[t]he finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Madero*, 803 S.W.2d at 399.

21. *See Mayhew*, 905 S.W.2d at 244 (explaining that the doctrine "avoids premature adjudication and prevents courts from entangling themselves in abstract disagreements over administrative policies") (citing *Madero*, 803 S.W.2d at 398–99).

22. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986).

23. *See* 3 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 19.08, at 375–76 (4th ed. 1996) (listing as one of the purposes of the board of adjustment the duty to fine-tune zoning regulations in an effort to ward off unnecessary litigation).

tion of the impact such regulations are likely to have on a particular landowner (an adjudicative matter). This individual focus dictates that adjudicative formalities such as procedural due process be followed to ensure that the landowner receives a fair and principled hearing on the takings claim.[24] In sum, the ripeness doctrine ensures that the affected parties have a final chance to work out their differences before resorting to the expense, delay, and aggravation of a lawsuit—resulting in a potential benefit to all parties.

III. Overview of Land Regulations

A. *Zoning Regulations and Subdivision Regulations*

Municipalities may trigger takings claims through two types of land regulations—zoning or subdivision regulations. The first of these two mechanisms to be generally applied in the United States was zoning regulations. The Supreme Court approved the constitutionality of zoning regulations in the landmark case of *Village of Euclid v. Ambler Realty Co.*[25] After the *Ambler* case, zoning regulations became a matter of national policy embodied in the Standard State Zoning Enabling Act (SSZEA).[26] This Act was

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24. *See* Daniel R. Mandelker, *Procedural Due Process*, C629 ALI-ABA § 302, at 349, 355 (1991) (outlining the procedural due process elements to which a landowner could be entitled in a takings claim), *available in* WL ALI-ABA Database. Recent commentary indicates that the board of adjustment must afford a landowner procedural due process by providing the opportunity for a hearing before unbiased decision-makers, allowing the presentation of evidence, and cross-examination of opposing witnesses. *See id.* § 3.03, at 358–59. In addition, the decision must be made on the basis of articulable standards that can be subject to judicial review. *See id.* § 3.03, at 359. An appeal to the governing body for a zoning amendment is, by contrast, generally considered to be a request for a political decision that does not automatically trigger these constitutional requirements of fairness. *See id.* § 2.03, at 364 (noting that most jurisdictions characterize the zoning amendment as legislative in nature rather than adjudicative).

25. 272 U.S. 365 (1926). In *Euclid*, Ambler Co. challenged the constitutionality of the city's zoning ordinance. *See Euclid*, 272 U.S. at 384. Ambler averred that the ordinance invaded its property rights by zoning its property as a residential district and thereby significantly reducing the property's value. *See id.* The Court held that the ordinance in its "general scope and dominant features" was a valid exercise of authority within the State's police powers. *Id.* at 397. Further, the Court stated that it would review the constitutionality and application of provisions to particular cases as they arose, rather than attempting to establish "general rules that future case must be fitted," thereby maintaining the flexible power of police with which the Court's concerned. *Id.*

26. *See* The Advisory Committee on Zoning, U.S. Dep't of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zon-

promulgated by the United States Department of Commerce in 1926 as a guide to help cities implement procedures for regulating the various uses of land.[27] The Act was subsequently adopted throughout the country.[28] The entity primarily responsible for establishing zoning regulations is a municipality's governing body.[29]

ING REGULATIONS (1926) [hereinafter SSZEA]. Nearly every state has empowered its municipalities to create zoning boards of adjustment, which in turn, are authorized to grant or deny variances to ordinances in certain situations. *See* 3 KENNETH H. YOUNG, AMERICAN LAW OF ZONING § 19.27, at 401–02 (4th ed. 1996) (asserting that the authority for zoning regulations "set forth in the SSZEA, and the same or similar authority is vested, or authorized to be delegated, by nearly all of the state enabling statutes"). Prior to the enactment of the SSZEA, a citizen's only recourse for problems relating to the use of private property was typically limited to causes of action in nuisance or breach of a restrictive covenant. *See* James Poradek, Comment & Note, *Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws*, 81 MINN. L. REV. 1343, 1347 (1997) (explaining that governmental efforts at land control through zoning developed as the populations of urban industrial centers became more concentrated, and that zoning did not become the "dominant mode of municipal land control" until after the First World War). *See generally* J. Peter Byrne, Book Review, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2268 n.18 (1997) (asserting that the Act "popularized the concept of cumulative zoning, in which only less 'intensive' uses are permitted in each district; thus single family houses may be built in districts zoned for apartment buildings but not vice versa").

27. *See* SSZEA, *supra* note 26, at 6 (urging the legislative bodies of municipalities to enact regulations "with a view to encouraging . . . the most appropriate use of land throughout such municipalities"). Examples of different types of uses to which land can be put include residential, industrial and agricultural. *See* SSZEA, *supra* note 26, at 5 (granting the legislative body of a city the power to regulate the location and use of land "for trade, industry, residence, or other purposes"); *see also* TEX. LOC. GOV'T CODE ANN. § 211.003(a)(5) (Vernon 1988) (outlining the power of the governing body to regulate the various uses of land).

28. *See* 1 KENNETH H. YOUNG, AMERICAN LAW OF ZONING § 2.21, at 67–69 (4th ed. 1995) (tracing the history of the SSZEA). Every state has adopted zoning enabling legislation and most have relied heavily on the SSZEA in doing so. *See id.* (noting that in the 1930s, "all of the states finally adopted zoning enabling legislation, and most reflect the thinking of the draftsmen of the Standard Act"). The Act advised the states to adopt the Act as fully as possible, recommending that changes be made only to comply with local laws and customs. *See id.* (recognizing that "state legislative bodies were encouraged to enact the Standard Act with only those additions or omissions essential to compliance with local laws and customs"). Most states complied with this request soon after the Act was passed. *See id.* (recognizing that great similarities exist between the legislation many states passed and the Standard Act).

29. *See* SSZEA, *supra* note 26, at 8–9 (directing the legislative body to appoint a zoning commission "to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein"); *see also* TEX. LOC. GOV'T CODE ANN. § 211.007(a) (Vernon 1988) (indicating provisions for the appointment of a zoning commission to exercise various powers outlined in the zoning enabling act).

The enabling act provides for a board of adjustment to grant variances from such regulations.[30]

The second dominant mechanism for land regulation to be applied in the United States was subdivision regulation. This type of regulation was not made a part of the zoning enabling act, but was instead the focus of the Department of Commerce's 1928 Standard City Planning Enabling Act (SCPEA),[31] an Act which was not as widely adopted as the SSZEA. The purpose of subdivision regulations is not to regulate the use of land, but to impose basic quality standards in areas of land that have been partitioned off for subdivision development.[32] These standards relate to matters such as establishing accurate surveys, ensuring proper street layouts, and determining minimum lot sizes on which a landowner can build.[33] Land subdividers must comply with these requirements and obtain

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30. *See* SSZEA, *supra* note 26, at 9 (allowing for the appointment of a board of adjustment to "make special exceptions to the terms of the ordinance in harmony with its general purpose"); *see also* TEX. LOC. GOV'T CODE ANN. § 211.009(a)(3) (Vernon 1988) (authorizing boards of adjustment to grant variances in certain cases to avoid unnecessary hardship).

31. *See* THE ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928) [hereinafter SCPEA]; *see also* Robert H. Freilich & Stephen P. Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L. REV. 153, 161 n.36 (1987) (characterizing the effect of the SCPEA as one that shifted the function of subdivision regulations from being a mere land recordation device to providing a basis for community planning); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 525 (1988) (listing the requirements that the SCPEA imposes on subdividers, such as the duty to improve streets in the subdivision and provide public facilities).

32. *See* SCPEA, *supra* note 31, at 26–27 (detailing that the purpose of subdivision regulations is to ensure "adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population"); *see also* TEX. LOC. GOV'T CODE ANN. § 212.010 (Vernon 1988) (outlining general standards for approval of proposed plats).

33. *See* SCPEA, *supra* note 31, at 27 (citing the regulation of "minimum width and area of lots" as one purpose of subdivision regulations); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 541–43 (1990) (explaining that subdivision regulations help "govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development"); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 493 (1994) (discussing different requirements subdivision regulations impose); *see also* HOUSTON, TEX., CODE OF ORDINANCES ch. 42 art. VI, § 42–85(b)(5) (1985) (requiring off-street parking); *id.* § 86–323 (regulating the location of adult-oriented businesses); *id.* § 42–85(e) (imposing commercial structure setback requirements).

subdivision plat approval from local authorities before connecting utilities and recording the plat in the county real estate records.[34]

Subdivision regulations apply primarily, but not exclusively, to new subdivisions.[35] These regulations may complement local zoning regulations,[36] or operate alone in the absence of any such regulations.[37] Like zoning regulations, these requirements can generate takings claims,[38] and the same ripeness rules apply.[39]

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34. *See* SCPEA, *supra* note 31, at 27–28 (labelling a finding of compliance with various subdivision regulations "a condition precedent to the approval of the plat"); *see also* FORT WORTH, TEX., CODE § 35–70.1 (Supp. 1990) (prohibiting plat approval until an assessment of an impact fee has been made); R. Freilich & M. Schultz, *National Model Subdivision Regulations, Planning & Law* (explaining that communities have refused to approve requests for subdivision development when such development would cause problems with municipal facilities and the environment), *in* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND-USE 151 (2d ed. 1994); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 510 (1994) (explaining that only after a developer can demonstrate that the required services are available can the project proceed).

35. *See* DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.1 (1986) (noting that most of the regulations on subdivisions are put in place at the beginning of the process); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 542 (1990) (acknowledging that subdivision regulations, when serving as planning devices, apply to new streets and serve as standards for plotting new neighborhoods). *See generally* Singer v. Davenport, 264 S.E.2d 637, 639 (W. Va. 1980) (addressing the issue of how far a community can go in regulating new developments with subdivision regulations).

36. *See* James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 501 (1994) (explaining that a planning commission, the duties of which may include adopting subdivision regulations, operates independently of the zoning commission); David S. Winakor, Note & Comment, *Not in My Front Yard?* Greenwich v. Zoning Board of Appeals: *The Pitfalls of Local Zoning Decisions and the Power to Consider Historic Factors in Connecticut*, 28 CONN. L. REV. 201, 206 (1995) (stating that "[w]ithin the general realm of zoning lies another system which regulates subdivisions"); *cf.* Timothy J. Choppin, Note, *Breaking the Exclusionary Land-Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2041 (1994) (discussing the effects of the combination of zoning and subdivision regulations).

37. *See* Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 299–300 (1990) (explaining that, although zoning does not occur in the majority of the Houston Standard Metropolitan Statistical Area, the city does employ subdivision regulations); *see also* Showers v. Postenkill Zoning Board of Appeals, 575 N.Y.S.2d 600, 601–02 (N.Y. App. Div. 1991) (detailing that at the time that the landowner filed his subdivision plat in accordance with the local regulations governing subdivisions, there were no zoning regulations in place).

38. *See, e.g.*, Coastland Corp. v. County of Currituck, 734 F.2d 175, 179 (4th Cir. 1984) (addressing the issue of whether subdivision regulations that required developers to dedicate a portion of their land for public streets amounted to an unconstitutional taking);

B. *Differences Between the Law of Variances in Zoning Regulation and Subdivision Regulation Cases in Texas*

Texas law relating to subdivision regulation is not as fully developed as the law relating to zoning regulation, and it may be fundamentally different because of the state's two enabling acts.[40] The Texas Zoning Enabling Act[41] specifically grants legislative power to governing bodies within municipalities to adopt zoning ordinances. Furthermore, the Act authorizes the governing body to empower boards of adjustment to issue variances.[42] The language of the act thus indicates that it is intended to delegate the legislative power to zone to the city's governing body.[43] It does not appear to authorize the empowerment of the board of adjustment to

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Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880, 884–86 (Conn. 1970) (discussing plaintiff's assertion that subdivision regulations, which required the developer to dedicate a portion of his land as open space for public use, resulted in a taking of private property without just compensation); T & M Homes, Inc. v. Township, 393 A.2d 613, 624–25 (N.J. Super. Ct. Law Div. 1978) (responding to plaintiff's claim that subdivision regulations are so restrictive as to constitute inverse condemnation); City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923, 929–30 (Tex. 1968) (considering plaintiff's argument that enforcement of subdivision regulations requiring dedication of easements constituted an unconstitutional taking).

39. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 200 (1985) (dismissing a takings claim brought by a landowner who was adversely affected by a subdivision regulation because his claim was not ripe); Wilkinson v. Board of County Comm'rs, 872 P.2d 1269, 1279 (Colo. Ct. App. 1993) (holding that a challenge to a subdivision regulation on the ground that it violates the landowner's constitutional rights is not ripe until a final determination is made as to how the regulations will be implemented); Weingarten v. Town of Lewisboro, 572 N.E.2d 40, 40–41 (N.Y. 1991) (explaining that the plaintiff must satisfy the ripeness requirements before attacking the constitutionality of subdivision regulations).

40. *Compare* TEX. LOC. GOV'T CODE ANN. ch. 211 (Vernon 1988) (authorizing governing bodies of municipalities to empower boards of adjustment to issue variances), *with* TEX. LOC. GOV'T CODE ANN. ch. 212 (Vernon 1988) (failing to address the issue of variances as the Act neither authorizes nor prohibits the right to issue variances).

41. TEX. LOC. GOV'T CODE ANN. ch. 211 (Vernon 1988).

42. *See* TEX. LOC. GOV'T CODE ANN. § 211.008 (Vernon 1988) (noting that such variances can only be issued if they are "consistent with the general purpose and intent of the ordinance").

43. *Compare* City of Pharr v. Tippitt, 616 S.W.2d 173, 175 (Tex. 1981) (characterizing the adoption and amendment of zoning ordinances as legislative acts), *with* Swain v. Board of Adjustment, 433 S.W.2d 727, 731 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (noting that a board of adjustment has "no statutory power to legislate" and that "any provision of a municipal ordinance that undertakes to confer legislative functions on such board would be invalid").

perform anything other than adjudicative functions.[44] By comparison, the Texas subdivision enabling act makes what appears to be a direct grant of undefined police power to the governing body to enact subdivision regulations,[45] while leaving local municipal planning commissions free to formulate standards used in reviewing approval of plats of new subdivisions (unless there is no planning commission, in which case the governing body acts).[46]

The planning commission arguably has the power to issue use variances. Since the subdivision enabling act names the planning commission as the approval entity,[47] this statute could be interpreted to authorize the planning commission to issue use variances. In addition, municipalities may find support to give the commission such a role in general sources of authority, such as home rule provisions.[48] Power to authorize variances from platting requirements must come from a source outside the zoning enabling act, inasmuch as a municipality's zoning board of adjustment does not have the power to decide appeals from planning commission actions.[49]

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44. *See* Board of Adjustment v. Rich, 328 S.W.2d 798, 799 (Tex. Civ. App.—Fort Worth 1959, writ ref'd) (holding that the board of adjustment did not have the legislative power to authorize the construction of a gasoline filling station in a residential area); Gartner v. Board of Adjustment, 324 S.W.2d 454, 456 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.) (declaring illegal a use variance granted by the board of adjustment permitting a rendering plant to operate in a retail area); Board of Adjustment v. Levinson, 244 S.W.2d 281, 285 (Tex. Civ. App.—San Antonio 1951, no writ) (concluding that under the board of adjustment's delegated powers, it could not grant a use variance allowing the operation of a beauty parlor in a residential area); Harrington v. Board of Adjustment, 124 S.W.2d 401, 403–06 (Tex. Civ. App.—Amarillo 1939, writ ref'd) (reasoning that a use variance granted by the board of adjustment usurps the legislative powers of the state).

45. *See* TEX. LOC. GOV'T CODE ANN. § 212.002 (Vernon 1988) (authorizing the governing body to enact rules governing plats and subdivisions of land within the municipality's jurisdiction "to promote the health, safety, morals, or general welfare of the municipality").

46. *See* TEX. LOC. GOV'T CODE ANN. § 212.006(a) (Vernon 1988) (granting the municipal planning commission the power to approve plats). If the city has no planning commission then the governing body itself is responsible for approving such developments. *See id.* § 212.006 (reserving the power of final approval of proposed plats to the governing body).

47. *See* TEX. LOC. GOV'T CODE ANN. § 212.006 (Vernon 1988) (naming the municipal planning commission as the authority responsible for approving plats).

48. *See* TEX. CONST., art. 11, § 5 (establishing procedures for adoption of city charter to establish home rule); City of Houston v. State *ex rel.* City of West University Place, 142 Tex. 190, 195, 176 S.W.2d 928, 931 (1943) (stating that the purpose of the home rule provision is to bestow on home-rule cities the full legislative power of self-government).

49. *See* Lacy v. Hoff, 633 S.W.2d 605, 610 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (voiding attempts by the board of adjustment to exercise appellate jurisdiction

One might infer that the power to authorize variances is essential for either a municipality or a county planning commission to carry out its delegated tasks. If so, then a Texas court could require an applicant for plat approval to seek a variance as a condition of ripeness in a subdivision regulations case without the contradiction of a similar requirement in a case involving zoning regulations. Notably, a variance in a subdivision regulations case would not likely refer to use regulations, inasmuch as plat approval is conditioned on compliance with nonuse "performance" standards that set out "the general plan of the municipality and its current and future streets, alleys, parks, playgrounds, and public utility facilities."[50]

A survey of the subdivision regulations of several Texas cities reveals that some cities have included variance procedures within their subdivision regulations and others have not.[51] Amarillo and San Antonio, for example, authorize variances from rules adopted by the city or the planning commission,[52] whereas Dallas does not.[53] No Texas cases were found that deal directly with the power of the planning commission to authorize variances; thus, whether

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over the decisions of planning commissions); *cf.* West Texas Water Refiners, Inc. v. S&B Beverage Co., 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ) (stating that "[a] board of adjustment must act within the strictures set by the legislature and the city council and may not stray outside its specifically granted authority.").

50. TEX. LOC. GOV'T CODE ANN. § 212.010 (Vernon 1988).

51. *Compare* SAN ANTONIO, TEX., CODE OF ORDINANCES § 35-3045 (Supp. 1987) (authorizing the grant of variances where a literal enforcement of the provisions of the development code would result in unnecessary hardship), *and* FORT WORTH, TEX., CODE § 31-36 (Supp. 1995) (allowing the planning commission to authorize a variance from an application when hardship will result from requiring strict compliance), *and* LUBBOCK, TEX., CODE OF ORDINANCES §§ 21-41 to 21-50 (1983) (providing for variances), *with* DALLAS, TEX., CODE OF ORDINANCES vol. 3, art. IV (1997) (lacking provision for variances), *and* HOUSTON, TEX., CODE OF ORDINANCES ch. 33, art. III (1985 & Supp. 1998) (lacking variance procedure), *and* AUSTIN, TEX., ORDINANCES ch. 13, art. I, § 13-1-37 (1981) (excluding provisions regarding variances).

52. *See* AMARILLO, TEX., CODE OF ORDINANCES ch. 4-10, art. II, div. 2, § 4-10-39(c) (Supp. 18) (1996) (authorizing the board of adjustment to issue variances involving height, area, and parking); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 35, § 35-3045 (Supp. 1987) (authorizing variances in the event of undue hardship).

53. *See* DALLAS, TEX., CODE OF ORDINANCES vol. 3, art. IV (1997) (lacking procedures for variances).

the procedures for issuing variances will withstand judicial scrutiny under Texas law is still an open question.[54]

IV. Use Variances Under Texas Law

A. *Background*

Early Texas cases prohibited the board of adjustment from authorizing use variances on the assumption that the power to determine legitimate property uses is a nondelegable legislative function that the Texas Zoning Enabling Act[55] grants only to the governing body of a municipality.[56] This delegation problem is seldom taken seriously in current administrative law[57] and, in fact, has all but

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54. *See generally* City of San Marcos v. R.W. McDonald Dev. Co., 700 S.W.2d 674 (Tex. App.—Austin 1985, no writ) (referring to an interim ordinance that allowed the planning commission to authorize variances, but not deciding its validity under state law).

55. Tex. Loc. Gov't Code Ann. § 211.003 (Vernon 1988). This enabling act confers power upon the "governing body" to regulate building size, the percentage of a lot that a building may occupy, population density, and the location of certain structures among other matters. *See id.*

56. *See* Board of Adjustment v. Stovall, 218 S.W.2d 286, 288 (Tex. Civ. App.—Fort Worth 1949, no writ) (noting that the city ordinances and state statutes vest the legislative authority in the city council, not the board of adjustment); Terry v. City of Dallas, 175 S.W.2d 97, 100 (Tex. Civ. App.—Dallas 1943, no writ) (concluding that the Board lacked the authority to determine the existence of a nonconforming use); Harrington v. Board of Adjustment, 124 S.W.2d 401, 406 (Tex. Civ. App.—Amarillo 1939, writ ref'd) (stating that the legislature did not intend to grant the city council the power to delegate the council's authority); *see also* Tuttle v. Wood, 35 S.W.2d 1061, 1065 (Tex. Civ. App.—San Antonio 1930, writ ref'd) (acknowledging that the Texas Legislature may not delegate the power to create a law which prescribes a penalty to an agency); *cf.* Hunt v. State, 22 Tex. Ct. App. 396, 399, 3 S.W. 233, 235 (1886) (stating that "[w]e can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law"). This strict adherence to the non-delegation doctrine has gradually eroded over the years. *See* Land v. State, 581 S.W.2d 672, 673 (Tex. Crim. App. [Panel Op.] 1979) (observing that subsequent to *Tuttle*, "courts have steadily retreated from the 'no delegation doctrine' to the point that rule-making and regulation by administrative agencies pursuant to specific delegated authority is permitted").

57. *See* Kenneth Culp Davis, Administrative Law Text § 2.01, at 26 (3d ed. 1972) (noting that the nondelegation doctrine is rarely argued successfully because, although it "lingers on in some opinions of federal courts, . . . it seldom enters into judicial motivation"). *See generally* Loving v. United States, 517 U.S. 748, 758 (1996) (explaining that delegation of powers is necessary, because "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framer's design of a workable National Government"); Mistretta v. United States, 488 U.S. 361, 372 (1989) (recognizing that because our society is becoming increasingly complex, Congress is becoming powerless to perform its duties without the ability to delegate legislative power); *Land*, 581 S.W.2d at 673 (noting that courts have been abandoning the nondelegation doc-

disappeared from federal jurisprudence.[58] Given this development, the Texas position seems anachronistic by today's standards; nevertheless, it is an anachronism that has a long record of affirmance in the courts.[59]

One of the first Texas cases to address the issue of a board of adjustment's power to issue use variances was *Lombardo v. City of Dallas*.[60] In *Lombardo*, a landowner filed suit contesting a zoning board of adjustment's determination that it lacked jurisdiction to overturn a building inspector's denial of a building permit for a use not authorized by the city's zoning ordinance.[61] In upholding the refusal to overturn the denial, the Dallas Court of Appeals agreed with the board's assertion that it lacked the power to authorize a permit for a land use prohibited by the city's zoning ordinance.[62]

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trine and that promulgation of rules and regulations by administrative agencies is now allowed when performed pursuant to specifically delegated authority).

58. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 6 (3d ed. 1994) (noting that no congressional enactment has been struck down as unconstitutional on the basis of improper delegation of legislative authority to an administrative agency since 1935); BERNARD SCHWARTZ, ADMINISTRATIVE LAW at § 2–1, at 44 (asserting that rigid application of the nondelegation doctrine "has been bypassed by the need for administrative agencies to exercise rulemaking and adjudicatory authority"). Despite this trend toward liberal delegation of legislative powers to administrative agencies, the prospect of improper delegation has served as a basis for restrictive interpretations of administrative authority under federal statutes in at least one case. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 662 (1980) (plurality opinion) (narrowing OSHA's authority to regulate toxic substances in the workplace).

59. *See* Swain v. Board of Adjustment, 433 S.W.2d 727, 730–31 (Tex. App.—Dallas 1968, writ ref'd n.r.e.) (discussing restrictions on the delegation of legislative powers in the context of use variances). In *Swain*, the court of appeals noted that "[b]y empowering a Board of Adjustment to make variances or exceptions from the zoning regulations it is not intended that the board take over legislative functions. . . . The board in such cases acts as a quasi-judicial body . . . [and thus, their action] would be invalid as constituting an unlawful delegation of legislative powers." *Id.* at 731; *see also* Texas Consol. Theatres v. Pittillo, 204 S.W.2d 396, 399 (Tex. Civ. App.—Waco 1947, no writ) (affirming the inability of local governments to delegate authority to grant use variances to boards of adjustment); Harrington v. Board of Adjustment, 124 S.W.2d 401, 403–04 (Tex. App.—Amarillo 1939, writ ref'd) (holding that boards of adjustment cannot be delegated the authority to grant use variances).

60. 47 S.W.2d 495 (Tex. Civ. App.—Dallas 1932), *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (1934).

61. *See Lombardo*, 47 S.W.2d at 499 (holding that the denial of a use variance was valid).

62. *See id.* (explaining that the board did not have legislative power to vary the ordinance in favor of complainant).

A few years later the issue of use variances was raised once again in the case of *City of Amarillo v. Stapf*.[63] In *Stapf*, the Texas Supreme Court held that the Amarillo Zoning Board of Adjustment lacked the authority to authorize foundries in a district in which such structures had not previously been authorized by the city council.[64] While the court noted that the state's enabling act expressly bestowed zoning authority on the governing bodies of municipalities, it inferred that delegation of such authority to the nonlegislative board of adjustment was not authorized by state law.[65]

Shortly thereafter, the Amarillo Court of Appeals upheld this principle in *Harrington v. Board of Adjustment*,[66] ruling that the city's attempt to empower the zoning boards of adjustment to allow business uses of land in residential districts was invalid under the variance power.[67] The court reasoned that the variance power could only authorize those deviations that yielded substantially the same land-use outcome that the ordinance was designed to allow.[68] This rationale stemmed from the court's finding that the variance power existed merely to lessen the hardship that could result in certain instances from "a literal, a rigid, an absolute toe-the-mark interpretation" of the zoning ordinance.[69] A use variance, the court noted, would in effect "destroy the ordinance and substitute for its provisions those enacted by the board."[70]

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63. 129 Tex. 81, 101 S.W.2d 229 (1937).

64. *See Stapf*, 129 Tex. at 86–87, 101 S.W.2d at 232 (holding that the board of adjustment could not exercise the power to grant a use not authorized by the municipality in ordinance).

65. *See id.* at 234 (ruling the board's action to be void).

66. 124 S.W.2d 401 (Tex. Civ. App.—Amarillo 1939, writ ref'd).

67. *See Harrington*, 124 S.W.2d at 404 (concluding that the board could not have granted a use variance to the landowner).

68. *See id.* at 403 (striking down a variance grant which allowed a gas station to be built in a residential district).

69. *Id.*

70. *Id.*

B. *The Seeds of Change—Or Possible Confusion: Texas Cases Requiring an Application for Variance As a Ripeness Requirement*

1. *City of El Paso v. Madero Development & Construction Co.*

Despite the Texas rule forbidding boards of adjustment from granting use variances, Texas courts have recently required claimants seeking compensation for excessive regulation to apply for a variance as a condition precedent to bringing suit.[71] For example, in *City of El Paso v. Madero Development & Construction Co.*,[72] Madero Development Company sued the city and its planning commission, alleging that the city's rezoning of its property constituted an act of inverse condemnation.[73] The trial court ruled in favor of Madero, but the El Paso Court of Appeals reversed and rendered judgment, dismissing Madero's claim for want of jurisdiction.[74]

The court of appeals explained that Madero's claim was not ripe for review because the company had not sought any variances to the zoning ordinance.[75] El Paso's zoning ordinance included provisions for the granting of variances by the city's board of adjustment,[76] but, as noted earlier, the Texas rule forbids the board from granting use variances. Notably, the court never drew a fine distinction between what type of regulations were at issue, so it is not clear whether Madero would have had to seek a zoning use variance, a zoning area variance, or a variance to the city's subdivision regulations. Instead, the court simply explained that because Ma-

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71. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 247 (Tex. App.—Dallas 1994, writ granted) (holding that the failure of a landowner to apply for a variance prevented the claim from ripening), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 400–01 (Tex. App.—El Paso 1991, writ denied) (requiring the party to apply for a variance before the claim would ripen).

72. 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied).

73. *See Madero*, 803 S.W.2d at 398.

74. *See id.*

75. *See id.* at 399.

76. *See* EL PASO, TEX., ORDINANCES ch. 2.16, § 2.16.030 (1989) (empowering the board to authorize variances that are not contrary to the public interest when a literal enforcement of the city's zoning laws would otherwise prevent any reasonable use of the property); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 400 (Tex. App.—El Paso 1991, writ denied) (analyzing the ordinance).

dero had not sought a variance, it had no way of determining whether the city had left open any opportunity for Madero to proceed in developing its land according to its original plat or with minor modifications.[77] Thus, the court considered itself unable to determine whether the ordinance had "gone too far" as applied to Madero's land.[78]

2. *Town of Sunnyvale v. Mayhew*

One of the most recent cases to address the issue of use variances in the context of a regulatory takings claim is *Town of Sunnyvale v. Mayhew*.[79] In *Mayhew*, the town had a zoning ordinance that limited land development to large lots designed for single-family use.[80] However, the town provided a procedure through which landowners could apply for a zoning amendment to allow higher density planned developments.[81] The Mayhews initially applied for a planned development of up to 5,025 dwelling units on 1196 acres of land,[82] but the town's planning and zoning committee recommended against approval, citing concerns over the density of the proposed development, among other factors.[83] The Mayhews then submitted a new application for 3,600 units after negotiating with town officials.[84] Despite this compromise, the council voted not to

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77. *See Madero*, 803 S.W.2d at 400.

78. *Id.* at 399–400; *cf.* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (holding that a court determines if a taking has occurred by ascertaining whether or not a land-use regulation "goes too far"); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (establishing that an examination of whether a regulation "goes too far" into land owner's rights, thereby constituting a taking, can only be completed upon the denial of a variance); Eide v. Sarasota County, 908 F.2d 716, 725 (11th Cir. 1990) (noting that only upon the application and denial of a variance can the court determine if a restriction "goes too far").

79. 905 S.W.2d 234 (Tex. App.—Dallas 1994), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).

80. *See Mayhew*, 905 S.W.2d at 241 (explaining that the town only allowed one building unit per acre).

81. *See id.* at 257 (citing Article XX of the town's zoning ordinance).

82. *See id.* at 242. This proposal could have required between three and five units per acre, as opposed to the one unit per acre the town's ordinance allowed.

83. *See id.* (referring to committee memo which said that "a proposal with less density would be 'preferred'").

84. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 242 (Tex. App.—Dallas 1994) (noting that this proposal would only require a little over three units per acre), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).

adopt the zoning amendment.[85] The Mayhews did not submit any further applications or attempt to obtain a variance under the town's zoning ordinance,[86] convinced that any such action would have been futile.

Shortly thereafter, the city passed the second of two temporary moratoria on planned developments in general.[87] The Mayhews then sued the town for rejecting the proposed planned unit development, alleging both a regulatory taking and various other constitutional claims.[88] They won a substantial judgment in the trial court.[89] However, the Dallas Court of Appeals later reversed the judgment, declaring that the Mayhews' claim was not ripe for review because they had not applied for a variance before bringing suit, and they had not established a case of futility.[90] Furthermore, in a supplemental opinion, the appeals court found that even if the Mayhews' claim was ripe, the evidence was factually insufficient to support the trial court's findings that the town's action amounted to a taking.[91] Subsequently, the Texas Supreme Court held that the Mayhews' constitutional claim was ripe, but rendered judgment for the town nonetheless.[92] In reaching this conclusion, the supreme court failed to define the precise relationship between ripeness and use variances, holding simply that, on the facts of this particular

85. *See id.* (finding that the town rejected the Mayhews' application roughly one month after submission).

86. *See id.* at 242, 248 (noting that the trial court agreed with the Mayhews that any further action would have been futile).

87. *See id.* at 242 (noting that the moratorium was to last for four months).

88. *See id.* at 241 (citing substantive due process and equal protection claims).

89. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 241 (Tex. App.—Dallas 1994) (recounting that the Mayhews won some five million dollars in damages), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).

90. *See id.* at 249–53 (noting that the Mayhews could have submitted a modified application for a development with less density, and that the town's moratorium on development might have still been flexible). The court also noted that despite the moratorium, the town had continued to review applications by the Mayhews and other developers. *See id.* at 253–54.

91. *See id.* at 261–62 (ruling that "[t]he evidence does not show that the Mayhews lost all economically viable use of their property").

92. *See* Town of Sunnyvale v. Mayhew, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927, at *16 (Mar. 13, 1998) (holding that the town's refusal of the Mayhews' application did not deprive them of all economical use of their land).

case, the Mayhews had reached a point of final denial and that any further effort would have been futile and therefore unnecessary.[93]

Because the supreme court determined that any further effort on the Mayhews' part would have been futile,[94] it did not address the issue of whether a claimant in an ordinary case would have to apply to the zoning board of adjustment for a use variance as a condition of ripeness. However, the supreme court did reinforce the general variance requirement by explaining that "[n]ormally, [the Mayhews'] failure to reapply or seek a variance would be fatal to the ripeness of their claims."[95] Thus, absent some alternative explanation, both *Madero* and *Mayhew* either: (1) illogically require developers to apply for a variance that the board of adjustment cannot grant; (2) change Texas law on the power of boards of adjustment to grant use variances; or (3) use the term "variance" in a different context than is usually meant. This third scenario will now be considered in further detail.

V. CONFRONTING THE CONFUSION

A. *What Is a Use Variance?*

The regulations at issue in *Madero* could have been classified as either subdivision or zoning regulations, but the regulations at is-

93. *See id.* at *9 (noting that the Mayhews had already gone through "a year of negotiations and $500,000 in expenditures"). The Mayhews had negotiated with the town's committee for various possible levels of development, but they took a final stance that the development required a minimum of 3,600 dwelling units in order to be successful, and that any lesser amount would deprive the land of its economic viability. *See id.* (restating the Mayhews' allegations that the town's actions constituted a regulatory taking). The Texas Supreme Court inferred from the case of *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), that claimants such as the Mayhews, who allege that *only* the grant of the requested permit at issue could avert a regulatory taking, are entitled to litigate that issue without seeking permission for development below the level of the trial court. *See Mayhew*, 1998 WL 107927, at *9 (explaining that "[t]he ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable."). Because both parties had taken firm positions on what was an acceptable level of development, the supreme court stated that further applications for any relief would be futile, thereby placing the case firmly within well-established federal ripeness principles. *See id.* (finding that "a property owner is 'not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination'" (citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352 n.7 (1986))).

94. *See Mayhew*, 1998 WL 107927, at *9 (noting that "[t]he town clearly was not going to approve the Mayhews' development proposal for 3,600 units").

95. *Id.* at *8.

sue in *Mayhew* were clearly zoning regulations. Determining the regulation at issue is important because it remains unclear whether a use variance can be granted in the case of subdivision regulations, while it is clear that a use variance cannot be granted in the case of zoning regulations.

Madero challenged the legislative rezoning scheme that reduced the number of lots which could be developed on its land under the prior zoning scheme and a prior plat which had already been approved, but which had lapsed due to inaction on Madero's part.[96] Although more restrictive, this rezoning scheme did not alter the basic use to which the land could be put.[97] Therefore, the ability to grant the required variance may very well have been within the zoning board of adjustment's traditional power as defined by Texas law.[98]

In contrast, any variance the Mayhews might have obtained from the board of adjustment would probably be classified as a use variance because of the substantive change from one-acre zoning to small-lot zoning.[99] Arguably, one could classify the case as an area variance case. Sunnyvale's underlying zoning allowed detached single-family houses on one-acre minimum lots, but the developer wanted to build at a much higher density.[100] Accordingly, at a superficial level the developer only needed a density and area relaxation, a variance that arguably lies within the board of adjustment's power even under the Texas rule.[101] This analysis would not, of course, allow the developer to construct apartments, which clearly occupy a different use category, nor would such an intended use

96. *See* City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 398 (Tex. App.—El Paso 1991, writ denied) (reviewing a judgment against the City of El Paso for inverse condemnation by rezoning).

97. *See id.* (describing the 1986 rezoning scheme).

98. *See id.* at 399–400 (implying that if Madero had applied for variances he might have been successful because the local code of ordinances permitted the zoning board to grant such variances).

99. *See* Town of Sunnyvale v. Mayhew, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927, at *1 (Mar. 13, 1998) (seeking approval to build a much greater number of units on an acre of land than currently permitted by the zoning ordinance).

100. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 241 (Tex. App.—Dallas 1994) (explaining that the planned development was not acceptable under the current zoning scheme which allowed a maximum of one dwelling unit per acre), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).

101. *See id.* at 255 (noting that the city had the authority to allow different densities in its review of permit applications).

meet the ordinary requirements for establishing a case of unnecessary hardship.[102]

Even if the Mayhews could have successfully argued that they only needed an area variance, their application to a board of adjustment for approval of anything near the desired 3600 housing units (at three units per acre) would not pass a reasonableness test.[103] Nevertheless, there is a certain rationality in requiring a developer like the Mayhews to make an application for a variance so that even the obviously appropriate denial can be accomplished.

B. *Is a Mayhew Variance a Variance or Something Else?*

Certain language in the court of appeals' opinion in the *Mayhew* case offered the tantalizing possibility that the term "variance" does not always mean variance as defined by zoning law.[104] The

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102. *Compare* Southland Addition Homeowner's Ass'n v. Board of Adjustments, 710 S.W.2d 194, 195–96 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (holding that the preservation of trees was a special circumstance making the terms of a zoning ordinance more than mere financial hardship and resulting in unnecessary hardship to the landowner), *and* Board of Adjustment v. McBride, 676 S.W.2d 705, 709 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (finding that the board of adjustment abused its discretion in failing to grant a variance to a homeowner to build beyond the zoning ordinances's setback requirement), *with* Troth v. City of Dallas, 667 S.W.2d 152, 157 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (upholding height restrictions because an unnecessary hardship was not found), *and* Reiter v. Keene, 601 S.W.2d 547, 549 (Tex. Civ. App.—Waco 1980, writ dism'd w.o.j.) (deciding that a literal enforcement of the zoning ordinance's setback requirement would not work an unnecessary hardship on the landowner).

103. *Cf.* Board of Adjustment v. Willie, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (holding that the power to relax height restrictions would not allow the board to authorize a ten story building in an area zoned for 35 feet maximum height).

104. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 245 n.5 (Tex. App.—Dallas 1994) (explaining that "[t]he term 'variance' is not definitive or talismanic. If other types of permits or actions are available and could provide similar relief, a landowner must seek them." (citing Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990))), *rev'd*, 41 Tex Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998). Therefore, the court may have intended to require the landowner to seek, not a board of adjustment action, but a reconsideration of the request for a planned development by the city's governing body. *See id.* at 250 (making reference to the Town Council as a governing body that might approve a formal application for a variance). There is some authority for this position. *See* Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981) (reviewing a regulatory taking claim). According to the *Hernandez* court,

> [I]n cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely

Texas Supreme Court echoed this sentiment, noting that "the term 'variance' is 'not definitive or talismanic;' it encompasses 'other types of permits or actions [that] are available and could provide similar relief.'"[105] The court noted further that "[t]he variance requirement is therefore [to be] applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to 'grant different forms of relief or make policy decisions which might abate the alleged taking.'"[106] Finally, the court observed that *normally*, a claimant's failure to reapply (presumably for legislative reclassification of the area of land at issue), or seek a variance "would be fatal to the ripeness of their claims."[107]

One interpretation of *Mayhew* is that (absent a showing of futility) the supreme court is ready to overturn prior authority and allow boards of adjustment in Texas to approve use variances. However, another more intriguing interpretation is that, in an ordinary case, the court might require a "reapplication" to the governing body for legislative reclassification of the area of land at issue, instead of requiring a claimant to apply to the board of adjustment for a use variance. This interpretation opens up the possibility that Texas courts may adopt an alternative path for a landowner to achieve ripeness in cases in which boards of adjustment lack the power to grant any meaningful relief. This reapplication approach would represent a realistic option for a landowner to pursue, and will now be considered in more detail.

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seek relief from such a classification [citation omitted], we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-á-vis the particular property and to correct the inequity.

Id. The court goes on to outline what steps a landowner could take to "timely seek" such relief in a footnote. *See id.* at 1200 n.27 (explaining that "[t]his would be accomplished either by petitioning the city council or other appropriate body for a rezoning of the property that would allow the owner an economically viable use thereof, or by contesting the initial general zoning regulation prior to its passage."). There is even some sense to the requirement as a matter of policy as long as the final review process observes the required adjudicative formalities.

105. Town of Sunnyvale v. Mayhew, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927, at *6 (Mar. 13, 1998) (citing *Southern Pac.*, 922 F.2d at 503).

106. *Id.* (citing *Southern Pac.*, 922 F.2d at 503).

107. *Id.* at *8.

VI. Resolution of the Use Variance Problem

A. *Follow the Reapplication Path*

1. Introduction

A claimant's reapplication to the governing body would not necessarily involve a simple rehashing of the rejected application for a zoning amendment. Instead, the proceeding might resemble action by a board of adjustment considering an application for a variance, but any corrective action would take the form of legislative revision of the ordinance. A question exists as to how this alternative of reapplying for legislative change in the ordinance would work.

One possible model to follow would channel all applications for zoning variances, use or otherwise, to the board of adjustment. The board would be given specific instructions to identify any claim of taking or unconstitutional action that might require legislative action, and to immediately forward such a claim to the governing body. Once the governing body received notice that a landowner was making such a claim, the governing body or a designated hearing examiner would then conduct a hearing on the matter to address: (1) whether the challenged regulation substantially advanced a legitimate public interest; (2) whether the claimant was left with an economically viable use of land; and (3) whether there were any other similar constitutional claims. If convinced that the regulations were sound, the governing body would adhere to them; otherwise, it would exercise its legislative power and correct them.

This approach requires that the final hearing take on an adjudicative character, much as if the governing body were a board of adjustment considering whether to approve a regular zoning variance. Is such a role possible? The answer appears to be yes.

2. Distinguishing Between Legislative and Adjudicative Actions

The governing body has the legislative power to both adopt[108] a zoning ordinance and amend it[109] as long as it does not disregard

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108. *See* Tex. Loc. Gov't Code Ann. § 212.003 (Vernon 1988) (granting governing bodies the power to regulate location of certain types of buildings, structures, and residences); *see also* City of Pharr v. Tippitt, 616 S.W.2d 173, 175 (Tex. 1981) (stating that "[z]oning is an exercise of a municipality's legislative powers").

109. *See Tippitt*, 616 S.W.2d at 177 (finding that the power to amend exists "as long as the action is not arbitrary, capricious and unreasonable"); Weaver v. Ham, 149 Tex. 309,

the general zoning plan already in place.[110] The governing body may also act in an adjudicative capacity even when the form of the action it takes is legislative in nature.[111] The distinction between the two is important because legislation focuses on the general welfare and is guided by concerns of public policy,[112] whereas adjudication focuses on specific individuals.[113] Consequently, adjudicative actions must satisfy certain requirements of procedural fairness,[114] while legislative actions generally do not.[115]

317, 232 S.W.2d 704, 708 (1950) (ruling that "[t]he City [of San Antonio] had the power to enact the basic ordinance, and to amend it, if a public necessity demanded it.").

110. *See Tippitt*, 616 S.W.2d at 176–77 (noting that the governing body cannot "disregard . . . the preestablished zoning ordinance [or] long-range master plans and maps"); Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971) (finding that all zoning regulations "shall be made in accordance with a comprehensive plan") (citations omitted).

111. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (characterizing the city's requirement that a landowner donate a portion of her land to be used as a public "greenway" before it would approve her application to remodel her property as an adjudicative, rather than a legislative, action); Nasierowski Bros. Inv. Co. v. Sterling Heights, 949 F.2d 890, 896 (6th Cir. 1991) (finding that a city council's zoning amendment constituted an adjudicatory act and not a legislative act); County Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142, 1145 (5th Cir. 1988) (recognizing that, in some instances, the actions of a governing body in deciding a zoning issue may exude adjudicative characteristics); *see also* Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in* Dolan v. Tigard, 71 N.Y.U. L. REV. 1301, 1318 (1996) (discussing the Supreme Court's characterization of the city's grant of a land permit as an adjudicative decision).

112. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1511 (1978) (explaining that general legislation does not single out any particular individuals).

113. *See id.* (contrasting legislative actions with administrative ones, which are "taken against specific, identifiable people").

114. *See* Richardson v. Perales, 42 U.S. 389, 401 (1971) (reinforcing the long established rule that adjudicative and administrative proceedings require procedural due process); *Nasierowski Bros.*, 949 F.2d at 896 (deciding that, since the city council's zoning amendment was an adjudicatory act, the landowner was entitled to certain procedural due process protections, including the right to notice of the action and a hearing prior to the council's vote); *County Line*, 839 F.2d at 1145 (noting that some zoning decisions are adjudicative in nature, thereby triggering procedural due process protections); Fasano v. Board of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (en banc) (noting that adjudicative decisions are "subject to an altogether different test" on review than legislative actions); Daniel R. Mandelker, *Procedural Due Process*, C629 ALI-ABA § 3.02, at 349, 356 (1991) (explaining that "minimal standards of fairness" must be followed "in administrative and quasi-judicial decision-making in land-use regulation"), *available in* WL ALI-ABA Database; Peter M. Shane, *Back to the Future of the American State: Overruling* Buckley v. Valeo *and Other Madisonian Steps*, 57 U. PITT. L. REV. 443, 455 (1996) (observing that "procedural due process attaches only to the government's adjudicatory processes and not to legislative-style decisionmaking, even when conducted by an administrative agency"); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1511 (1978) (distinguishing administrative or adjudicative acts from legislative acts by noting that the former "single out specificable individuals and affect them differently from others"). While the proce-

Given the importance of this distinction, it warrants further scrutiny.

When a governing body adopts its initial zoning ordinance, it acts in a purely legislative capacity.[116] Its actions are classified as legislative because the ordinance applies generally throughout the city and does not focus on the situation of any particular landowner.[117] When acting legislatively, the governing body need not make a record of the reasons for its decision nor limit its considerations to the points made in a public hearing.[118] Furthermore, legislative actions are entitled to a presumption of validity.[119] If, for

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dural protections that an adjudicative body must afford a claimant vary with the importance of the liberty or property interest at stake, basic due process law dictates that a claimant is at a minimum entitled to notice and "a hearing appropriate to the nature of the case" prior to the deprivation of liberty or property. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

115. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (observing that a requirement of recognition of procedural due process protections such as the right to be heard in the context of legislative actions "would suggest that the [Fourteenth] Amendment [is] violated unless every person affected [by a new law is] allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power"); National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 746 (1st Cir. 1995) (expressing "doubt that the concept of procedural due process is applicable in respect to the legislative enactment of a generally applicable statute or ordinance").

116. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (noting that land-use regulations are essentially legislative acts); Dennis v. Village of Tonka Bay, 156 F.2d 672, 674 (8th Cir. 1946) (stating that the "enactment of a zoning ordinance is an exercise of the police power and is legislative in character"); City of Pharr v. Tippitt, 616 S.W.2d 173, 175 (Tex. 1981) (characterizing the power of zoning as "an exercise of a municipality's *legislative* powers") (emphasis added).

117. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1508 (1978) (examining the distinguishing characteristics of legislative and administrative action). Courts generally consider the following three factors in determining whether the challenged action is legislative or administrative: (1) the nature of the decisionmaking body, (2) the nature of the regulation, and (3) the nature of the people affected. *See id.*

118. *See* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) (recognizing that the existence of supporting facts is presumed when the legislature acts within the scope of its authority); Assigned Car Cases, 274 U.S. 564, 583 (1927) (asserting that the legislature does not need to provide specific supporting evidence to back up its conclusions when drafting generally applicable regulations).

119. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (establishing the amount of deference to be given to a zoning legislation); *Dennis*, 156 F.2d at 674 (noting that because the enactment of zoning ordinance is a legislative act, it is presumed that the legislature investigated the situation and deemed the legislation necessary; therefore, the burden of proving that the ordinance would not promote the "general welfare" of the community rests upon the party attacking the validity of the ordinance); City of Beaumont v. Bond, 546 S.W.2d 407, 409–10 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (ex-

example, a municipality adopts a zoning ordinance classifying certain land as industrial and this classification is contested by a landowner, it will be reviewed under a legislative standard, which only requires that the ordinance "substantially advance[ ] viable legitimate state interests" and not "deny an owner economically viable use of his land."[120]

However, if a governing body adopts zoning regulations that are aimed at a particular individual, and, for example, requires that a landowner convey land to the city as a condition of development approval, its actions are adjudicative in nature.[121] In such cases, the court will apply a more rigorous review and require a higher level of justification.[122]

When a board of adjustment considers an application for a variance, it acts adjudicatively.[123] As an adjudicative body, the board must afford procedural due process to claimants.[124] Furthermore, lacking legislative power, the board can function only within the

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plaining that there is a presumption of validity in the enactment of zoning ordinances absent a showing that it is "contrary to or inconsistent with any constitutional provision, statute, or the charter provision of the city"). *But see* Fasano v. Board of Commr's, 507 P.2d 23, 26 (Or. 1973) (deciding that "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"). The *Euclid* court held that a zoning ordinance is constitutional if it was enacted to serve the "public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 383.

120. *Dolan*, 512 U.S. at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

121. *See id.* at 385 (classifying the city's decision to condition a land owner's application for a building permit on an individual parcel of land as an adjudicative action); *Fasano*, 507 P.2d at 26 (distinguishing between "[o]rdinances laying down general policies without regard to a specific piece of property" and "a determination whether the permissible use of a specific piece of property should be changed").

122. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (advocating a higher scrutiny "rough proportionality" test).

123. *See* Terry v. City of Dallas, 175 S.W.2d 97, 99 (Tex. Civ. App.—Dallas 1943, no writ) (noting that the board acts in a semi-judicial nature when considering an application for a variance); Swain v. Board of Adjustment, 433 S.W.2d 727, 731 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (stating that the board acts "as a quasi-judicial body" when considering an application for a variance); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1512 (1978) (asserting that "[c]ourts have generally held that a decision whether to grant or deny a variance is administrative for due process purposes.").

124. *See* Daniel R. Mendelker, *Procedural Due Process*, C629 ALI-ABA § 3.02, at 349, 356 (emphasizing the need for adjudicative bodies to provide for at least "minimal standards of fairness" of procedural due process).

authority delegated to it.[125] Ideally, a board of adjustment would already have a legislative declaration of standards prepared that it could apply to matters that came before it. The board would then decide the issues involved on the basis of the record made in a hearing at which the interested parties were able to make their case.

As noted previously, a city's governing body ordinarily acts in a legislative capacity, but it may also act adjudicatively.[126] Furthermore, the product of a legislative body's adjudicative action may be legislative in form, but adjudicative in effect. A great deal of zoning law has emerged over the past twenty years focusing on this often difficult distinction, particularly in rezoning cases.[127] For example, zoning amendments that reclassify specific parcels have been characterized as adjudicative although enacted by a legislative body and incorporating legislative form as an ordinance amendment.[128] The Texas Supreme Court rejected this characterization of zoning amendments in *City of Pharr v. Tippitt*.[129] How-

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125. *See* West Texas Water Refiners, Inc. v. S&B Beverage Co., 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ) (limiting the scope of the board's power to specific legislative authority granted under the statute); City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex. App.—Beaumont 1973, writ ref'd n.r.e.) (holding that a judgment that exceeds the quasi-adjudicative power of the board of adjustment is void).

126. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (indicating that the city, in conditioning the approval of a landowner's application to expand her store and pave her parking lot upon her agreement to dedicate part of her land to public use, was acting adjudicatively rather than legislatively); Fasano v. Board of Commr's, 507 P.2d 23, 26 (Or. 1973) (classifying decisions "to grant permits, make special exceptions, or decide particular cases" as "quasi-judicial, or judicial in character") (citations omitted); *see also* Peter M. Shane, *Back to the Future of the American State: Overruling* Buckley v. Valeo *and Other Madisonian Steps*, 57 U. PITT. L. REV. 443, 445 (1996) (observing that a governing body may act adjudicatively as well as legislatively).

127. *See Fasano*, 507 P.2d 23, 26 (explaining that "we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts").

128. *See* Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 896 (6th Cir. 1991) (holding that a zoning amendment affecting "a relatively small number of persons . . . on individual grounds" constituted an adjudicatory act requiring notice and a hearing); Harris v. County of Riverside, 904 F.2d 497, 502 (9th Cir. 1990) (holding that a zoning amendment that targeted particular parcels of land could "not be insulated from notice and hearing requirements by application of the 'legislative act' doctrine"); Dean Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 772–79 (1976) (concluding that rezoning decisions involve an exercise of judgment that is adjudicative rather than legislative in nature).

129. 616 S.W.2d 173, 176 (Tex. 1981) (treating an amendatory zoning ordinance as a legislative action). The court stated that there are four important criteria against which a

ever, recent action at the federal level indicates that when the focus of government attention shifts from the general public to a specific landowner, the action becomes adjudicative.

3. *Dolan v. City of Tigard*: A Case Study

In *Dolan v. City of Tigard*,[130] the United States Supreme Court indicated that, when a municipality imposes an exaction as a condition of development approval, it acts adjudicatively.[131] In *Dolan*, the city attempted to condition the grant of a building permit to a small business owner upon dedication of a tract of her land as a public greenway to minimize flooding and for a pedestrian or bicycle pathway intended to relieve traffic congestion.[132] The Court determined that "the city made an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel."[133] Accordingly, the Court held that the city was bound to "make some individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[134]

The approach taken by the Supreme Court in *Dolan* is a sharp departure from the standard of review it uses in cases of generally applicable zoning regulations in which "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."[135] It is also important to note that the majority in *Dolan* reached its conclusion that the

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zoning ordinance should be tested: (1) the existence of a comprehensive zoning ordinance that binds the legislative body, but still allows it to make amendments when the action would not be arbitrary, capricious, and unreasonable; (2) "[t]he nature and degree of an adverse impact upon neighboring lands;" (3) "[t]he suitability or unsuitability of the tract for use as presently zoned;" and (4) the degree to which "[t]he amendatory ordinance [bears] a substantial relationship to the public health, safety, morals or general welfare [and] protect[s] and preserve[s] historical and cultural places and areas." *Id.* at 176–77. As long as an amendment satisfies these criteria, it is deemed to be a legislative act within the legislature's power and not an act of "spot zoning," which is "an unacceptable amendatory ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land without proof of changes in conditions." *Id.* at 177.

130. 512 U.S. 374 (1994).

131. *See Dolan*, 512 U.S. at 385 (noting that the city's decision was not a legislative act, but an adjudicative one).

132. *See id.* at 377–79.

133. *Id.* at 391 n.8 (emphasis added).

134. *Id.* at 391.

135. Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994); *see* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that since the landowner neither alleged nor proved

sufficient facts to challenge the constitutionality of the ordinance, legislative judgment should be upheld).

The Supreme Court's action in *Dolan* is also notable in that it arguably effects a shift between paradigms of economic efficiency. The Kaldor-Hicks model and the Pareto optimality model constitute two key models of economic efficiency. *Compare* Claire Moore Dickerson, Symposium, *Cycles and Pendulums: Good Faith, Norms, and the Commons*, 54 WASH. & LEE L. REV. 399, 405 n.15 (1997) (stating that the Kaldor-Hicks efficiency test is met when the benefit to winners exceeds the harm to losers), *with* G.M. Hunsucker, *The European Database Directive: Regional Stepping Stone to an International Model?*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 778 n.275 (1997) (asserting that a social change is Pareto efficient only when it makes one individual better off without also making another worse off). Both theories purport to provide a measure of whether a proposed policy is efficient. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 12–13 (4th ed. 1992) (discussing Pareto optimality and Kaldor-Hicks concepts and how each model measures utility). Under the Kaldor-Hicks model of efficiency, state of affairs Y is more efficient than state of affairs X if the increase in welfare of those who benefit from the shift from X to Y would allow them to fully compensate those who lose as a result of the shift and still have a net gain in welfare. *See* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 98 (1988). Notably, under this model, Y may be more efficient than X *regardless of whether those who lose as a result of the shift from X to Y are actually compensated for their loss. See id.* Therefore, the only relevant consideration is whether the winners have the *ability* to compensate the losers. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 14 (4th ed. 1992).

In contrast, under the Pareto model of efficiency, state of affairs X is superior to state of affairs Y if, and only if, some parties are made better off by the shift and no parties are made worse off. *See id.* Thus, Pareto optimality exists when a reallocation of resources cannot make anyone better off without making someone else worse off. *See id.*

One might argue that a deferential standard of judicial review of land-use regulation constitutes an attempt to facilitate Kaldor-Hicks efficiency. Assuming that when the government restricts land use without compensating the land owner, the net gain in wealth for society is sufficient to fully compensate the landowner for the loss and still leave a net gain in wealth for society, such regulation is Kaldor-Hicks efficient.

In contrast, the requirement of an individualized showing of the need for an application of a land-use regulation in a particular circumstance results in outcomes that are Pareto superior to those that result from the more deferential stance that the Court has taken in evaluating land-use regulations generally. *See id.* (noting that the greater the scrutiny applied to a land-use regulation, the more likely it is to be struck down, thus protecting a landowner from being forced to bear a burden for which he is not compensated). These different outcomes can be illustrated through an examination of the court's reasoning in the *Dolan* case.

In *Dolan*, the reason advanced by the state for requiring the plaintiff to dedicate a strip of land as a greenway as a condition to the issuance of the building permit was to ensure that no flooding problems developed as a result of the increase in impermeable surface area that would ensue from the plaintiff's intended construction. *See* Dolan v. City of Tigard, 512 U.S. 374, 388–89 (1994). The Court noted that this goal could just as easily be achieved by requiring the plaintiff to agree not to build anything at all on that particular strip of land. *See id.* at 393. The Court acknowledged the validity of the city's goal of decreasing the burden on the creek; however, the Court noted that forcing the petitioner to dedicate her land for a recreational easement was not the only adequate alternative. *See id.* Consequently, the requirement that this land be dedicated to the city carried with it no

extra benefit in offsetting the risk of flood problems that would result from increased construction. *See id.* The plaintiff in *Dolan* would unquestionably prefer the less invasive restriction of simply preventing her from building on part of her land to a requirement of public dedication of that same strip of land because her net welfare gain from the issuance of the building permit would have been higher. At the same time, the city would have been no worse off in terms of flood risk with a requirement that a certain tract of land remain undeveloped than with a requirement that the land be dedicated to the city as a public greenway.

The requirement of an individualized showing of need more closely approximates Pareto optimality than the absence of such a requirement on two levels. First, as *Dolan* demonstrates, land-use regulation based on an individualized showing of need generally results in less restriction of the landowner's property rights. In *Dolan*, the shift from Kaldor-Hicks efficiency to Pareto optimality is evidenced by the court's recognition of the plaintiff's expected loss of the right to exclude others by being forced to dedicate her property to public use. *See Dolan*, 512 U.S. at 375. Using the Kaldor-Hicks criteria, the land-use restriction could be upheld if the expected gain from the restriction would be enough to compensate the plaintiff for the easement, regardless of whether the city actually provided such compensation. *See* Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 240 (1997). Conversely, the *Dolan* court held the land-use restriction invalid because, although the flood prevention objective would be advanced, the plaintiff would be left worse off by opening her property to public use. *See Dolan*, 512 U.S. at 394–95; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 13 (4th ed. 1992). Again, the landowner would much prefer a requirement that she not build on a particular tract of land than a requirement that she turn the land over for public use. Thus, while a narrowly tailored land-use regulation leaves the landowner worse off than she would have been in the absence of any regulation, it leaves her worse off *by a smaller margin* than under a requirement that she dedicate the land to the public.

Second, the requirement of compensation to the landowner in the absence of an individualized showing of need more closely approximates Pareto efficiency than the absence of a requirement of compensation. *Ceteris parabis*, the landowner is certainly better off if she is compelled to dedicate her land to public use and receives compensation for it than she is if she is compelled to dedicate her land to public use and receives no compensation for it.

Of course, the effort at individualized compensation may only be construed as a shift toward Pareto optimality, rather than a guarantee of Pareto optimality because the amount of compensation actually paid to the landowner under the *Dolan* approach is still a product of judicial determination rather than voluntary bargaining. Thus, there is no way of knowing in a particular case whether the amount of compensation received by a landowner would be equal to the amount of the loss of utility to her occasioned by the taking. However, the payment of some compensation to the landowner obviously places the landowner closer to being as well off as she was before the taking than the payment of no compensation at all. Notwithstanding judicially determined compensation, the plaintiff in *Dolan* would obviously have been better off if the city had compensated her for the fair market value of the recreational easement in the first place rather than merely conditioning issuance of the permit on compliance with the regulatory mandate. In this limited sense then, the Court's approach in *Dolan* may be construed as a shift away from a goal of Kaldor-Hicks efficiency toward a goal of Pareto optimality. The shift was facilitated by the Court's recognition of the need to reconcile the underlying goal of making the city better off (by allowing it to take steps to decrease flooding potential) with the goal of ensuring that the landowner was not made worse off (by providing adequate protection for the landowner's

City of Tigard was engaged in an adjudicative act[136] despite the fact that the city's action was limited to the application of a comprehensive land-use plan.[137] This rationale implies that procedures for making final, "variance-type" decisions to grant or deny building permits such as those at issue in *Madero* and *Mayhew* can be adjudicative in nature although legislative in form.

A governing body acting adjudicatively possesses a dual incentive to be especially thoughtful in making decisions as to the application of land-use regulations. First, its adjudicative decisions are subject to a higher standard of review, as evidenced by *Dolan*'s requirement of an "individualized showing" of the need for application of a regulation to a particular piece of property.[138] Second, any suggestion of arbitrariness in adjudicative decisionmaking raises the specter of municipal liability for denial of procedural due process.[139]

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property rights). *See* NICHOLAS MERCURO & STEVEN G. MEDENA, ECONOMICS AND THE LAW 14 (1997) (noting that Pareto optimality is achieved by allocation of resources that makes one individual better off without making another worse off). This focus on achieving Pareto optimal outcomes is unquestionably beneficial to the landowner, who would otherwise be expected to sacrifice his or her property rights for the good of the public without any compensation whatsoever.

Either a municipality's governing body or its board of adjustment is capable of putting into practice the theoretical shift effected by *Dolan*. If the governing body makes the decision, it must adjust its Kaldor-Hicks legislative attitude and assume a Pareto focus. *See* AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 82 (1988); ROBIN PAUL MALLOY, LAW AND ECONOMICS—A COMPARATIVE APPROACH TO THEORY AND PRACTICE 39 (1993); THOMAS J. MICELI, ECONOMICS OF LAW 6 (1997).

136. *See Dolan*, 512 U.S. at 385 (distinguishing the case at bar from prior cases on the grounds that this case involved "an adjudicative decision").

137. *See id.* at 378 (explaining that the ordinance in question required all new developments near open spaces to dedicate a portion of land for public use); *see also* Catherine Buchanan Lehman, Note, Dolan v. City of Tigard*: A Heightened Scrutiny of the Takings Clause of the Fifth Amendment*, 32 HOUS. L. REV. 1153, 1178 (1995) (explaining that "courts have generally found that decisions of whether to grant a variance are administrative acts and that the adoption of a comprehensive plan comprises a legislative act").

138. *Dolan*, 512 U.S. at 391; *see also Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1547 (1978) (observing that nonlegislative decisions are more easily overturned and more closely scrutinized than legislative decisions).

139. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690–91 (1978) (concluding that municipalities may be held liable in certain circumstances for violations of due process); *cf.* Hernandez v. City of La Fayette, 643 F.2d 1188, 1200 (5th Cir. 1988) (acknowledging that when a municipality takes property without just compensation, the aggrieved property owner may recover damages under 42 U.S.C. § 1983); Blancard v. City of Ralston, 549 N.W.2d 652, 658 (Neb. Ct. App. 1996) (noting that a municipality must afford a property owner due process before exercising its police power to condemn property or the

4. Resolution of a *Mayhew*-Type Case

As applied to the facts in the *Mayhew* case, the legislative and adjudicative analyses would categorize both adoption of the general zoning ordinance and rejection of the Mayhews' application for a planned development amendment as legislative actions. Absent application of the futility doctrine, the next step required for ripeness would have been for the Mayhews to apply to the governing body for an adjudicative hearing on the claim that the underlying low-density zoning scheme denied them the economically viable use of their land, and that the only solution was to authorize the 3,600 acre development.

The town would then have scheduled a hearing on the issue, either before the governing body or an appropriate delegate, and given notice of the hearing to all interested parties.[140] A designated hearing examiner might have also been employed to take evidence and make a report.[141] At the hearing, the body would have heard evidence offered by the Mayhews and the city.[142] Then, on the basis of the evidence adduced at the hearing,[143] and without taking into account off-the-record positions of other citizens, the governing body would have decided whether the regulation was unduly restrictive. If the governing body decided the regulation exceeded the level at which it can be applied without compensation, the governing body would have either relaxed the regulation by an appropriate zoning amendment or calculated the compensation due for a taking. The governing body would then have prepared a formal statement that justified its decision on the basis of evidence taken at the hearing and the policies expressed in its zon-

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municipality will face liability for a taking); Sheerr v. Township of Evesham, 445 A.2d 46, 70–71 (N.J. Super. Ct. Law Div. 1982) (explaining that "[s]uits for zoning violations of the Fifth and Fourteenth Amendments' Due Process and Equal Protection Clauses are maintainable under § 1983").

140. *Cf.* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280–81 (1975) (adding that such notice should "be timely and clearly inform the individual of the proposed action and the grounds for it").

141. *See* Proctor v. Andrews, 41 Tex. Sup. Ct. J. 934, 940, 1998 WL 288749, at *9 (June 5, 1998) (holding hearing examiner procedures constitutional in Civil Service Act cases).

142. *Cf.* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281 (1975) (characterizing the right to present reasons in favor of one's position as "fundamental").

143. *Cf. id.* at 1282 (listing this right as the sixth of ten that should apply to an adjudicative hearing).

ing ordinance and comprehensive plan.[144] The town's final position, thus established, would have satisfied the ripeness requirement for judicial review.

The primary reason to have the governing body involved in considering and approving variances in response to claims of excessive regulation would be to ensure that they make a carefully thought-out decision in a setting in which the landowner has been afforded procedural due process and the city attorney has had a chance to assess the downside of continued adherence to the status quo. The reapplication route would appear to be an appropriate, and even necessary, alternative if Texas boards of adjustment are not given the power to authorize use variances. Furthermore, the legislative and adjudicative reapplication alternative would conform the existing law of variances in Texas with the newly established rules of ripeness, in that it produces a final local adjudication on the claim by the only body empowered to provide relief. Such an approach might best be incorporated into legislation by an amendment to the Texas Zoning Enabling Act, but it could emerge from judicial decision as well if future cases spell out the appropriate procedures to follow with enough specificity.

B. *Legalize Use Variances*

1. Supreme Court Declaration

An alternate procedure to the reapplication route is for the Texas Supreme Court to hold that zoning boards of adjustments can grant use variances. The Texas Supreme Court has not recently taken a firm stand on the constitutional limits of the zoning board of adjustments' variance power.[145] Conceivably, the current

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144. *Cf.* CG & T Corp. v. Board of Adjustment, 411 S.E.2d 655, 660 (N.C. Ct. App. 1992) (emphasizing that administrative decisions made by a town board should be supported by "competent, material, and substantial evidence in the . . . record"); West Old Town Neighborhood Ass'n v. City of Albuquerque, 927 P.2d 529, 532 (N.M. Ct. App. 1996) (applying an administrative standard of review to a quasi-judicial act and indicating that the decision must be supported by the law and substantial evidence).

145. The last statement found on the issue was *Board of Adjustment v. Stovall*, 216 S.W.2d 171, 147 Tex. 366 (1949). In *Stovall*, the Texas Supreme Court reversed a Court of Civil Appeals decision that took a strong position against the board's exercise of legislative power, explaining that:

> In determining whether a permit applied for under the quoted ordinance shall be granted or denied, the board is engaged in a delegated policy-making function, and it is not merely adjudicating private rights. The functions of the Board of Adjustment

confusion could lead to a judicial change of heart about use variances. If so, then a clear declaration is in order. Texas could join other jurisdictions in authorizing their boards of adjustment to issue use variances, and then require an application for a variance as a condition of ripeness. This approach would help effectuate the primary purpose behind the development of the variance: to "safeguard against the unconstitutional taking of an individual's property under local zoning ordinances."[146]

As previously noted, the Texas rule forbidding use variances was formulated in a day when courts were very suspicious of any delegation of power to administrative agencies, particularly when the power might be classified as "legislative."[147] Today, broad delegations of power to federal[148] and state administrative agencies[149] are

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are an integral part of the system of zoning regulations. In order that zoning may work fairly, the zoning ordinance authorizes the granting of permits for variances, and the determination of the question whether such permits shall be granted or denied is an essential part of the proper administration of the zoning ordinance. The public, as well as the affected private parties, has an interest in upholding the order of the Board if it is valid, and the Board itself is the proper party to represent this public interest where its order is under review.

Id. 216 S.W.2d at 173, 147 Tex. at 371. While far from authorizing use variances, the court's attitude did not reflect a strong antagonism toward delegation of legislative function to the board of adjustment.

146. Ann Martindale, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 669 (1988).

147. *See* Swain v. Board of Adjustment, 433 S.W.2d 727, 731 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (noting that the delegation of any legislative functions from a city to a board of adjustment would be an invalid grant of legislative powers); Board of Adjustment v. Rich, 328 S.W.2d 798, 799 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.) (stating that "[b]oards of [a]djustment do not have legislative power"); Board of Adjustment v. Stovall, 218 S.W.2d 286, 288 (Tex. Civ. App.—Fort Worth 1949, no writ) (recognizing that a board of adjustment is not established in order to take control of the city government's legislative functions). The court in *Stovall* goes on to state that "[i]f such ordinance did . . . confer legislative functions on the board of adjustment it would constitute an invalid delegation of legislative powers." *Id.*

148. *See* Mistretta v. United States, 488 U.S. 361, 371–74 (1989) (holding that a delegation of the power to promulgate federal sentencing guidelines to an independent sentencing commission was constitutional); FCC v. Schreiber, 381 U.S. 279, 290 (1965) (acknowledging the Supreme Court's tradition of upholding broad delegations of legislative power to administrative agencies); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600–01 (1944) (holding that a delegation of the power to determine just and reasonable rates to the Federal Power Commission was constitutional); National Broad. Co. v. United States, 319 U.S. 190, 226–27 (1943) (holding that a delegation of the power to regulate broadcast licensing was constitutional).

149. *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 740 (Tex. 1995) (acknowledging that administrative agencies may be delegated powers from the legislature);

commonplace and seldom questioned. If the issue were litigated for the first time today, and if it were clear that both the legislature and the local government tried their best to give Texas boards of adjustment the power to approve use variances, the judiciary would not likely stand in their way.[150]

One way for the Texas Supreme Court to resolve the ripeness issue would be to overrule the ancient line of cases preventing boards of adjustment from granting use variances and change the rule to allow boards of adjustment to grant the sought-after relief. The court obviously chose not to take advantage of this opportunity in *Mayhew*, but it still could do so at a later date. In the meantime, however, the Texas Legislature might decide to act on the matter.

2. Amending the Zoning Enabling Act to Authorize the Board of Adjustment to Issue Use Variances

The orderly way to authorize boards of adjustment to issue use variances would be for the Texas Legislature to amend the zoning enabling act to grant boards of adjustment this power. Presumably, as indicated, Texas courts would apply today's more relaxed rules concerning delegation of power to administrative agencies[151]

Railroad Comm'n v. Lone Star Gas, 844 S.W.2d 679, 689 (Tex. 1992) (holding that the state can delegate authority once it establishes reasonable standards to guide an administrative agency); State v. Municipal Power Agency, 565 S.W.2d 258, 273 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd) (holding that the state is not required to provide "every detail" and "anticipate unforeseen circumstances" when delegating authority to agencies). It is the duty of the legislature to expand an administrative agency's power because "Texas courts will imply no additional authority to an administrative agency by judicial construction without ascertaining the Legislature's intent." State v. Montgomery, No. 14-96-01091-CR, 1997 WL 528615, at *3 (Tex. App.—Houston [14th Dist.] Aug. 28, 1997, pet. filed) (citing Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref'd n.r.e.)); *see* State v. Johnson, 376 S.W.2d 341, 344 (Tex. 1964) (recognizing an agency as a "creature" of the legislature, possessing only those powers given to it by the rule-making body); *cf.* Central Educ. Agency v. Sellhorn, 781 S.W.2d 716, 718 (Tex. App.—Austin 1989, writ denied) (identifying the legislature's ability to withdraw power delegated to an agency).

150. *See* City of Austin v. Quick, 930 S.W.2d 678, 684 (Tex. App.—Austin 1996, writ granted) (holding that the delegation of a legislative function "is limited only by the Constitution and is not subject to de novo review by any other branch"); *cf.* Currey v. Kimple, 577 S.W.2d 508, 512 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (discussing the duty of a board of adjustment to decide whether strict application of an ordinance should be followed when a request for a variance has been made).

151. *See supra* note 149.

and uphold the change. A more serious question, though, is whether the board of adjustment is actually the appropriate body to review serious constitutional challenges to zoning designations. Although ripeness law suggests the answer should be yes, the concerns discussed below suggest the answer might be no.

First, the performance of zoning boards of adjustment has been the subject of much criticism.[152] Studies have shown that boards of adjustment are not especially fair in granting variances.[153] Second, use variances, unlike variances relating to height, sideyard, and area restrictions, may have a tendency to disrupt zoning

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152. *See* Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 323–33 (1962) (opining that boards of adjustment operate inequitably and exceed their legal limitations); Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 9–19 (1969) (detailing the disparity between the theory behind variances and their legal restraints); Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1068–69 (1990) (criticizing boards of adjustments for granting more variances than permitted by law). The problem of local zoning boards using their power in a less than democratic manner has been documented in a number of studies over the years. *See* Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 3–9 (1969) (criticizing zoning boards in Boston and Baltimore, whose misuse of legislative authority and ignorance of harmful consequences caused the "safety valve" variance exception to "rupture . . . into a steady 'leak'"). Even though "the power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised," local zoning boards, unable to separate the necessary from the inconvenient, have often made so many exceptions to the ordinances that they were rendered ineffective. Norcross v. Board of Appeal, 150 N.E. 887, 890 (Mass. 1926); *see also* RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 254–63 (1985) (describing problems arising from the amount of legislative authority given to local zoning boards); RICHARD F. BABCOCK, THE ZONING GAME 7 (1966) (identifying inappropriate uses of power by local zoning boards around the country); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 277 (1962) (providing examples of confusion caused by local zoning boards wavering in their decisions under improper influences).

153. *See* CURTIS J. BERGER, LAND OWNERSHIP AND USE 820–22 (2d ed. 1975) (describing methods used by boards of adjustment to determine applicability of variances); Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 1, 18–19 (1969) (setting out the pros and cons of land variances); David H. Cook & Robert D. Trotta, Note, *Syracuse Board of Zoning Appeals—An Appraisal*, 16 SYRACUSE L. REV. 632, 636–42 (1965) (commenting on boards of adjustment and their behavior); *see also* Thomas B. Donovan, Comment, *Zoning: Variance Administration in Alameda County*, 50 CAL. L. REV. 101, 107–08 (1962) (describing in detail the local rules of variance use); Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 552–53 (1955) (comparing the Pennsylvania courts' decisions regarding when to apply variances with the practical operations of the Zoning Board of Adjustment).

schemes.[154] Because the injection of unauthorized uses into a neighborhood is traditionally a political decision, it is not an appropriate matter to be assigned to a board of adjustment.

As noted, conventional variances relate to local, neighborhood matters that do not have much impact on overall city growth and development.[155] The fact that Texas boards of adjustment cannot lawfully approve variances for use leaves them with power to dispense justice on only a very small scale. Therefore, they are not the appropriate body to decide cases of large-scale development, such as those which were at issue in *Mayhew* and *Madero*.[156]

To avoid wholesale subversion of the legislative zoning scheme through excessive use variances, enabling legislation might limit the board's power to authorizing use variances only in those cases in which a variance is required to prevent claims for compensation. Such a solution would mitigate some of the risk of arbitrary decisionmaking, and at the same time place another potential yes-sayer in the line of governmental authorities empowered to grant relief from a questionable regulation.

However, a more serious problem with allowing the board of adjustment to issue use variances may then arise because those cases involving major developments are the ones most likely to raise a takings issue, and the board is not equipped to handle the public policy and procedural issues that are typically at stake. This danger exists because boards of adjustment are ordinarily comprised of unpaid citizens without any particular training in law or zoning

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154. *See* Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 725 (1980) (implying that the power of a board of adjustment to grant variances tends to subvert zoning schemes); Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based on Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 308 (1995) (discussing the threat to the integrity of zoning schemes posed by upholding use variances).

155. *See supra* note 5.

156. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 241–43 (Tex. App.—Dallas 1994) (discussing background and findings of fact from lower court), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998). The city ordinance limited land development to one unit per acre, but the Mayhews wished to build at a density of roughly three units per acre. *See id.* at 241–42. In addition to requesting a massive change in the ordinance concerning the unit-per-acre limit, the Mayhews also sought to build residences on land zoned for agricultural use. *See id.* Similar to the Mayhews, Madero wanted to use its land in a manner not authorized by the ordinance. *See* City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 398 (Tex. App.—El Paso 1991, writ denied) (noting that land was rezoned by the city for "Planned Mountain Development" use).

practice.[157] Contrary to conventional wisdom, the fact that these citizens are less political than members of the governing body does not necessarily mean that they are automatically better qualified to make land-use policy decisions.

Furthermore, boards fearing liability under statutes such as the Civil Rights Act[158] may end up caving in to each and every request for relaxation. On the other hand, boards unaware of these types of statutes may unknowingly impose liability on the municipality or on themselves.[159] Questionable regulations and potential liability are important to taxpayers because they are the ones who must foot the bill if a taking is adjudged. Given all of the potential pitfalls that may result from giving the board of adjustments the power to issue use variances, the reapplication route should be revisited.

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157. *See* Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 335 (1962) (referring to the board of adjustment as "a lay board"); *see also* Cozi Auto Parts, Inc. v. Board of Standards and Appeals, 155 A.D.2d 539, 539 (N.Y. 1989) (explaining that under the city of New York's rule, a nonprofessional is qualified to act as the board of adjustment's chairperson). Despite the lack of any concrete professional requirements, courts often make the assumption that boards of adjustment are composed of persons with some training and experience. *See* Chapmald Realty Corp. v. Board of Standards and Appeals, 76 N.Y.S.2d 296, 298 (1948) (stating that "[t]he Board is an expert body entrusted by the legislature to enforce the provisions of the Zoning Law"); *see also* 83 AM. JUR. 2D *Zoning and Planning* § 727 (1992) (finding that courts typically treat boards of adjustment as "an expert body").

158. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1997). Section 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding in redress.

Id.; *see* City of Edmunds v. Oxford House, Inc., 514 U.S. 725, 725 (1995) (considering claims brought under the Fair Housing Act and the Civil Rights Act, alleging that a zoning ordinance setting a maximum number of unrelated occupants for single-family residence was violative of these acts); Warth v. Seldin, 422 U.S. 490, 490 (1975) (reviewing a case in which petitioners brought a suit under the Civil Rights Act against a town and its zoning, planning, and town board, claiming that a zoning ordinance precluded people of lower incomes to live in the town).

159. *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (noting that there is no need to bring suit against local government officials because local government entities can be sued directly); John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 URB. LAW 675, 679 (1988) (describing how the personal assets of the members of boards of adjustment and municipalities are threatened by civil rights suits).

C. *Have The Governing Body Authorize Variances in an Adjudicative Proceeding*

Should requests for relief from land-use regulations beyond a certain threshold be considered by the governing body with the assistance of its zoning and planning commission(s)? A suggestion that these "variances" be approved by the governing body appears at once totally illogical and, at the same time, totally logical. The suggestion appears to be illogical because the governing body is the very entity that imposed the use category being challenged as an excessive regulation in the first place. Thus, it is counter-intuitive to give this body the power to hear and decide an application for a use variance authorizing a specific departure from its own general ordinance provisions.

As illogical as it may seem, however, assigning power to the governing body to hear and decide claims that existing regulations, as applied to specific landowners, take property or amount to an unconstitutional regulation does make some sense, particularly if the proposed development or the claimed deprivation is as large as that alleged in *Madero* and *Mayhew*. The only way to respond to such claims is by changing the ordinance itself by an act that is legislative in form. Such decisions are best made by the planning and political officials who are directly responsible for land-use policy and the city treasury,[160] not by a board of adjustment.[161]

Conventional wisdom holds that when zoning administration cases are at issue, the governing body should not be involved in specific applications of the ordinance.[162] This view is based on the

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160. *See* Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 1, 21 (1969) (suggesting that legislatures "eliminate the board of appeals and . . . confer its functions on the local planning board" or "empower local planning commissions or state zoning authorities to appeal or to veto board decisions"). According to Shapiro, this restructuring would provide a check on the board's power "by an authority with a broader perspective of land-use needs and the overall public interest." *Id. But see* RICHARD F. BABCOCK, THE ZONING GAME 40 (1969) (referring to planning commissions as "a dodo . . . neither expert [n]or responsible").

161. *See* Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 1, 18 (1969) (citing the board's lack of expertise as its major flaw).

162. Involvement by the governing body could lead to cases of "spot zoning." Spot zoning is defined as "an unacceptable amendatory ordinance that singles out a small tract [of land] for treatment that differs from that accorded similar surrounding land without proof of changes in conditions." City of Pharr v. Tippitt, 616 S.W.2d 173, 177 (Tex. 1981). As at least one court has noted, "[s]pot zoning is widely condemned." Hunt v. City of San

fact that the governing body's task, guided and advised by the zoning commission, is to think about the overall land-use policies of the community *as a whole* and adopt legislation that carries out a rational plan for the future.[163] If the governing body acts as an appellate body with the power to reverse a board of adjustment, it totally confuses legislative, administrative, and adjudicative processes.

Despite these concerns, however, there is at least one very compelling reason for involving the governing body directly in the variance approval process—it is the one ultimately responsible for the town treasury.[164] A legislative decision to impose a restrictive classification on a piece of land, and to retain that restriction in response to a specific rezoning request may properly reflect voter preferences. However, facing a developer who is threatening to sue for an enormous amount of money if the city refuses to approve his zoning amendment requires both courage and a sober look at the substantive allegations of excessive regulation.

D. *Another Approach: A Land-Use Court*

It may be that neither the board of adjustment nor the governing body is the appropriate entity for granting variances. A seldom-explored option for determining whether local land-use regulations

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Antonio, 462 S.W.2d 536, 539 (Tex. 1971) (citations omitted). The *Tippitt* court referred to spot zoning as "preferential treatment" and "piecemeal zoning, the antithesis of planned zoning." *Tippitt*, 616 S.W.2d at 177 (citations omitted). The Texas Supreme Court has struck down attempts by a city's governing body to engage in so-called spot-zoning when the latter attempted to rezone a particular strip of land, absent a showing that there has been "a material change of condition" in the use to which the land is put. *See Hunt*, 462 S.W.2d at 540 (finding "no evidence of a 'tremendous' increase in traffic"); Weaver v. Ham, 149 Tex. 309, 317, 232 S.W.2d 704, 708 (1950) (striking down an amendment to the zoning ordinance on the grounds that it was arbitrary and discriminatory).

163. *See* TEX. LOC. GOV'T CODE ANN. § 211.001 (Vernon 1988) (stating that the purpose of zoning regulations is to promote "public health, safety, morals, or *general welfare*") (emphasis added).

164. *See* David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1248 (1997) (discussing the influence of monetary concerns on local regulators' zoning decisions). Municipalities can regulate land-use by prohibiting new development in certain areas or imposing conditions on new developments. *See id.* at 1250 (listing three primary forms of development conditions: on-site developer dedications, off-site developer dedications, and impact fees). As a result of their close ties to the city budget, zoning board members often give serious consideration to which regulations are likely to produce lawsuits and which regulations are likely to bring in capital. *See id.* at 1250–52.

"go too far" is the creation of a state land-use adjudicatory body specially empowered to make that determination.[165] The ALI's Model Land Development Code provides for a land-use adjudication court,[166] and a later proposal for such a court to resolve excessive regulation claims[167] has been commented on,[168] but never adopted. This state body could be staffed by experts who understand the legal standards and are capable of bringing some sort of state-wide order to the excessive regulation issue without sending disputes into the courts prematurely. Members could even serve only part-time and be drawn from a list of qualified experts, such as retired judges and former city attorneys.

A legislatively created land-use adjudicatory body could travel from place to place as required. In addition, this body could hear evidence, assess whether regulations can legally be imposed without compensation, and make findings of fact that afford the local government the following options: (1) allow the landowner to use the property without unconstitutional infringement; (2) set a level of compensation to be paid if the local government decides to continue its regulation; or (3) elect to take its chances defending the regulation in court.

VII. CONCLUSION

The confusion surrounding the power of a Texas board of adjustment to grant land-use relief to a claimant who challenges the constitutionality of a zoning use classification needs to be resolved.

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165. *See* MODEL LAND DEV. CODE § 7-501 (Proposed Official Draft 1975) (detailing the structure of an appeals board that could consider the validity of local land-use regulations); *cf.* Barry T. Woods, Comment, *Environmental Land Use, Indirect Source Controls and California's South Coast Plan; Is the Day of Attainment Coming?*, 23 ENVTL. L. 1273, 1280 (1993) (discussing how states have greater political independence than municipalities, and are therefore better able to respond to land-use problems).

166. *See* MODEL LAND DEV. CODE §§ 7-501 to 7-503 (Proposed Official Draft 1975) (providing for the creation of a State Land Adjudicatory Board). This land-use adjudication board would be vested with the jurisdiction to review land development agency decisions and empowered with all the authority that the land development agency enjoyed. *See id.*

167. *See* John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 URB. LAW. 675, 694–95 (1988) (describing a land-use court as a means of deciding cases of damages for excessive regulations).

168. *See* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 62–63 (1995) (discussing the benefits of creating a state land-use court).

Some solution, either legislatively enacted or judicially declared, should emerge so that Texas municipalities can have the flexibility to grant use variances, when appropriate. Any such solution must ensure that municipalities are not disadvantaged by a rule that enables developers to speed an excessive regulation case into court without first being forced to submit their dispute to an administrative body as a condition of ripeness. One application for development approval, as the court of appeals pointed out in *Mayhew*, is simply not enough to work out the various private interests and public concerns at play.[169]

If the governing body emerges as the final decision maker, it should operate in a clearly adjudicative setting, following specific guidelines for action. The adjudicative characterization should not apply at an earlier stage, such as when an initial application for development is decided. A decision whether to approve a new development that would, for example, quadruple the number of dwelling units in a town is a legislative decision by any test. Accordingly, the decision makers must remain sensitive to political issues. However, if the applicant then makes a substantively different claim, namely that the zoning classification is so strict that it amounts to a taking or otherwise violates a constitutional right, that issue and that issue alone should be the subject of inquiry.

169. *See* Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 245 (Tex. App.—Dallas 1994) (explaining that "[o]ne application may be enough . . . if it clear the regulatory body will deny all further application for use or development"), *rev'd*, 41 Tex. Sup. Ct. J. 517, 1998 WL 107927 (Mar. 13, 1998).