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# THE EXTENSION OF JUDICIAL POLICY: ZONING PRACTICE AND EXHAUSTION OF REMEDIES

By RICHARD L. WEXLER\*

*Exhaustion is an occasional cause of death after  
severe operations.*

*Ericksen*

*The Oxford Universal Dictionary, 3rd Ed.*

*I strongly wish for what I faintly hope:  
Like the day-dreams of melancholy men,  
I think and think on things impossible,  
Yet love to wander in that golden maze.*

*John Dryden*

*1631-1700*

*Rival Ladies, III, i*

## INTRODUCTION

In the forty-three years following the landmark decision in *Village of Euclid v. Ambler Realty Co.*,<sup>1</sup> zoning practice has more and more become an administrative one. State courts have demonstrated an ever-increasing reluctance to make zoning decisions.<sup>2</sup> Illinois has been in the forefront of the development of the judicial policy requiring exhaustion of non-judicial remedies,<sup>3</sup> in all but a few situations, before legal process can be in-

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<sup>1</sup> 272 U.S. 365 (1926).

<sup>2</sup> See *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267, 148 P.2d 645 (1944); *West v. City of Wichita*, 118 Kan. 328, 234 P. 978 (1925); *State ex rel. Lieux v. Village of Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951). The following 1963 Associated Press news release is referred to in the book **THE ZONING GAME**:

Philadelphia, Nov. 30 (AP) — Chief Justice John C. Bell said today the Pennsylvania Supreme Court no longer will hear zoning and other cases of little significance.

The action is expected to cut the court's case load by 5 to 20 per cent.

Justice Bell said the action is aimed primarily at appeals on rulings by zoning boards governing establishments such as neighboring beauty shops.

R. BABCOCK, **THE ZONING GAME** 104 (1966).

<sup>3</sup> "Exhaustion of remedies" as used herein will refer to that doctrine which determines at what stage a person may secure review of administrative or legislative action. For definitions of the doctrine of a more complex, and therefore, perhaps more satisfying nature, see 2 AM. JUR. 2d Ad-

initiated. To the zoning practitioner, the question of when legal remedies can be invoked in zoning questions has become an ever more difficult conundrum. The following analysis of the developing law on exhaustion of remedies reveals the sources of confusion in zoning law. Hopefully, it also indicates possibilities for a higher plateau of practice in Illinois zoning.

#### EXHAUSTION: THE HISTORICAL PERSPECTIVE IN ILLINOIS

No area of technical and legal expertise produces more confusion in more areas of litigation than does zoning. Standing to sue,<sup>4</sup> highest and best use,<sup>5</sup> amortization,<sup>6</sup> and compatibility,<sup>7</sup> are but a few of the most obvious aspects of the difficulties involved in zoning litigation. Yet, the totality and complexity of issues that zoning produces will never be heard by a court of law unless the parties have exhausted their administrative and/or<sup>8</sup> legislative remedies.

It is appropriate to the present litigious confusion that the exhaustion doctrine arose in Illinois in an air of bewilderment. The first indication of the court's insistence upon complete "exhaustion" appeared almost immediately after the Illinois Supreme Court approved zoning as a proper exercise of the police power.<sup>9</sup> In *Deynzer v. City of Evanston*,<sup>10</sup> a property owner attempted to overturn an Evanston zoning ordinance as unconstitutional and to remove a cloud on title caused by an ordinance prohibiting development of the property for apartment use. Plaintiff had not attempted to have the ordinance amended or its application varied as to her property. The court required her to *first* seek relief from the city authorities: "[I]f appellant feels that she has been aggrieved by the classifications of the zoning ordinance her recourse is to the board of appeals. The action of that body is reviewable by the courts."<sup>11</sup> It was thus

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*ministrative Law* §595 (1966); 2 C. RATHKOPE, *THE LAW OF ZONING AND PLANNING* §2 (1969).

<sup>4</sup> 222 E. Chestnut St. Corp. v. Board of Appeals, 14 Ill. 2d 190, 152 N.E.2d 465 (1958); Garner v. County of DuPage, 8 Ill. 2d 155, 133 N.E.2d 303 (1956).

<sup>5</sup> Hartung v. Village of Skokie, 22 Ill. 2d 485, 177 N.E.2d 328 (1961).

<sup>6</sup> Douglas v. Village of Melrose Park, 389 Ill. 98, 58 N.E.2d 864 (1945); McCoy v. City of Knoxville, 41 Ill. App. 2d 378, 190 N.E.2d 622 (1963); People *ex rel.* Delgado v. Morris, 334 Ill. App. 557, 79 N.E.2d 839 (1948).

<sup>7</sup> Ward v. Village of Skokie, 26 Ill. 2d 415, 186 N.E.2d 529 (1962).

<sup>8</sup> As the discussion which follows will show there is confusion as to which "type" of remedy is being exhausted — legislative or administrative. In part, this confusion has been aided and abetted by the Illinois General Assembly in creating a plethora of methods for amending and varying municipal zoning regulations. See ILL. REV. STAT. ch. 24, §11-13-1, *et seq.* (1969).

<sup>9</sup> The landmark Illinois zoning opinion, *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925), was filed on the same day as *Deynzer v. City of Evanston*, 319 Ill. 226, 149 N.E. 790 (1925). See text at notes 10-12 *infra*.

<sup>10</sup> 319 Ill. 226, 149 N.E. 790 (1925).

<sup>11</sup> *Id.* at 234, 149 N.E. at 793.

with simplicity that the rule requiring exhaustion was born. It was to live for four years.

In 1926, the year of *Deynzer*, the Chicago City Council amended its zoning ordinance for a small portion of the city, changing the permitted uses from commercial and industrial to apartment and residential. This amendment was the subject of the 1930 opinion in *Phipps v. City of Chicago*.<sup>12</sup> While Chicago's then zoning ordinance required public hearings on zoning amendments by a board of appeals, none was held in *Phipps* prior to the passage of the amendment. Defeated in the trial court, the city urged reversal on the basis of plaintiff's failure to exhaust legislative and administrative remedies. Curiously, the Illinois Supreme Court distinguished *Deynzer* summarily:

The facts in that case are not identical with the facts here presented and that case is not conclusive of this question. *The question of the constitutionality and validity of an amendment to an original zoning ordinance involving only one piece of property where rights had become fixed was not in question in that case.*<sup>13</sup>

Yet this is exactly what Mrs. Deynzer had placed in issue four years earlier. The court in *Phipps* held:

If the amendatory ordinance was unconstitutional, null and void, appellees were not compelled to inferentially admit its binding force and effect by appeal to the board of appeals but they had the right to file a bill in equity. They had no adequate remedy at law, and equity had full and complete jurisdiction of the cause.<sup>14</sup>

Thus, *Deynzer* was forgotten. A quarter-century later *Phipps* was to meet a most curious fate.

### *Bright!!!*

The property owner, unhappy over the application of the general terms of the ordinance to his property, has been understandably perplexed over which source of relief, 'administrative' or 'legislative,' he should seek. For three decades his one source of comfort was the knowledge that he could avoid the uncertain, often distasteful, frequently tedious and repetitive efforts to obtain local relief by going directly to court . . . to ask that the ordinance be declared invalid insofar as his property was concerned.<sup>15</sup>

With *Bright v. City of Evanston*,<sup>16</sup> the Illinois Supreme Court

<sup>12</sup> 339 Ill. 315, 171 N.E. 289 (1930).

<sup>13</sup> *Id.* at 321, 171 N.E. at 291 (emphasis added).

<sup>14</sup> *Id.* at 324, 171 N.E. at 292-3.

<sup>15</sup> Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 521-22 (1959) [hereinafter cited as Babcock].

<sup>16</sup> 10 Ill. 2d 178, 139 N.E.2d 270 (1956).

The suddenness of *Bright* is possibly measured by the veritable flood of law review articles it produced almost contemporaneously with the filing of the opinion. The best of these include: Babcock, *supra* note 15, at 522-32; Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 40 CHI. B. REC. 119 (1958); Lawton, Jr., *Procedural Implications of Recent Zoning Decisions*, 40 CHI. B. REC. 15 (1958).

ended direct court review with unexpected suddenness. The plaintiff in *Bright* owned property in a zoning district restricted to single-family residences and on which he wished to erect a multiple-unit apartment structure. Apparently relying on the quiescence of the previous years, and not wishing to subject himself to the dangers of public hearing, he sought court relief alleging the Evanston ordinance's unconstitutionality as applied to his land. When the trial court held the ordinance void as to Bright, Evanston appealed directly to the Illinois Supreme Court. Totally ignoring its *Phipps* decision, the Illinois Supreme Court looked to the holdings of other jurisdictions<sup>17</sup> to support its surprising reversal:

In the case at bar the zoning ordinance has made provision for variation in particular cases by application to the board of appeals which is empowered to make recommendations to the city council with respect thereto. The plaintiff has not seen fit to apply for such a variation. He does not complain of the zoning ordinance as a whole, but claims only that the classification of his lot for residential rather than commercial uses infringes his constitutional rights. Under such circumstances he should apply in the first instance to the board of appeals, and if unsuccessful there he can seek judicial relief. His action for a declaratory judgment without first exhausting his administrative remedies will not lie.<sup>18</sup>

Thus the plaintiff was ordered to exhaust his administrative remedies prior to seeking court relief. As the preeminent zoning authority, Richard F. Babcock, analyzed:

Whatever questions this decision did not answer, however many new sources of uncertainty the opinion raised, the Court did appear to say unequivocally that a property owner had to make some effort to obtain local relief, where available, before he could go to court to challenge the ordinance as it applied to his property. Stripped of all unnecessary verbiage, that is what the *Bright* decision stands for.<sup>19</sup>

Unfortunately, "unnecessary verbiage" deposited a myriad of problems on the doorsteps of Illinois attorneys.

How did *Bright* become a paradigm of confusion? In ignoring *Phipps*, the court chose to rely on a series of decisions of foreign jurisdictions: "[I]nterestingly, in all of the out-of-state cases the administrative agencies had the final power to grant or deny the change being litigated while the Evanston Board did not."<sup>20</sup> Chief Justice Klingbiel, writing *Bright* for the court, makes five direct references<sup>21</sup> and many oblique ones to the

<sup>17</sup> *E.g.*, *Central Trust Co. v. City of Cincinnati*, 62 Ohio App. 139, 23 N.E.2d 450 (1939); *People v. Calvar Corp.*, 286 N.Y. 419, 36 N.E.2d 644 (1941); *City of South Bend v. Marckle*, 215 Ind. 74, 18 N.E.2d 764 (1939).

<sup>18</sup> 10 Ill. 2d 178, 186, 139 N.E.2d 270, 274 (1956).

<sup>19</sup> Babcock, *supra* note 15, at 522.

<sup>20</sup> Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 40 CHI. B. REC. 119 (1958).

<sup>21</sup> 10 Ill. 2d 178, 180, 182, 183, 185, 186, 139 N.E.2d 270, 272, 272-73, 274, 274, 274.

requirement of exhaustion of "administrative" remedies, even though the Evanston administrative board was merely advisory — all final decisions being vested in the Evanston City Council.<sup>22</sup> The *Bright* court left a minor gap by creating a *de minimus* exception:

A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. . . . Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy.<sup>23</sup>

Why did the court choose the *Bright* path? Zoning experts can only speculate retrospectively. The Illinois courts, with increasing vigor, have asserted their distaste for being imposed upon as "super zoning commissions."<sup>24</sup> The Illinois Supreme Court, with an over-burdened calendar, anticipated a flood of direct appeals since *most* zoning cases raised questions of the constitutionality of zoning ordinances. Yet, whatever the speculation, there can be no doubt that the Illinois Supreme Court sees zoning as a question of purely local concern:

In the absence of outrageous discrimination the court wants to avoid the hopeless task of weighing, from briefs and extracts filed in Springfield, the relative merits of a plea affecting a parcel of land at a street intersection in Carlinville, South Beloit, Chicago or Arlington Heights.<sup>25</sup>

Notwithstanding the criticism of local administrative and

<sup>22</sup> EVANSTON, ILL., ZONING ORDINANCE art. IV (1940).

<sup>23</sup> 10 Ill. 2d 178, 184-85, 139 N.E.2d 270, 274 (1956) *citing* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931).

<sup>24</sup> Audino v. Board of Appeals, 75 Ill. App. 2d 347, 221 N.E.2d 34 (1966) (Abstract Decision General No. 50,797); Miller v. Board of Appeals, 33 Ill. App. 2d 163, 178 N.E.2d 658 (1961) (Abstract Decision General No. 48, 272); Rosenfeld v. Zoning Bd. of Appeals, 19 Ill. App. 2d 447, 154 N.E.2d 323 (1958) (Abstract Decision General No. 47, 440).

<sup>25</sup> Babcock, *The New Chicago Zoning Ordinance*, 52 Nw. U.L. REV. 174, 176 (1957). Babcock's analysis is no doubt correct even thirteen years after its publication. The tragedy of such a state of supreme court mind was beautifully articulated by Mr. Justice Frederick Hall, dissenting in *Vickers v. Township Comm.* 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963):

The majority decides that this particular municipality may constitutionally say, through exercise of the zoning power, that its residents may not live in trailers — or in mobile homes, to use a more descriptive term. I am convinced such a conclusion in this case is manifestly wrong. Of even greater concern is the judicial process by which it is reached and the breadth of the rationale. The import of the holding gives almost boundless freedom to developing municipalities to erect exclusionary walls on their boundaries, according to local whim or selfish desire, and to use the zoning power for aims beyond its legitimate purposes. Prohibition of mobile home parks, although an important issue in itself, becomes, in this larger aspect, somewhat a symbol.

*Id.* at 252-53, 181 A.2d at 140. See also Note 59 Nw. U.L. Rev. 345 (1964).

legislative zoning actions,<sup>26</sup> local zoning decisions are given a court decreed respect as if the agencies making those decisions were expert bodies "entrusted by the legislature to enforce the provisions of the Zoning Law."<sup>27</sup>

Regardless of the "whys and hows," the areas of confusion are patent. In the thirteen years since *Bright*, the courts have failed to clear the air; and they have, in some instances, with the greatest of care, compounded the felony.

#### BEYOND *Bright* — CREATIVE CHAOS

In *Kennedy v. City of Chicago*,<sup>28</sup> the Illinois Supreme Court had its first opportunity<sup>29</sup> to return a zoning matter to either the trial court or the municipal legislative body under the *Bright* doctrine that "a determination of whether the ordinance is arbitrary and unreasonable is premature"<sup>30</sup> until "administrative" remedies are exhausted. In *Kennedy*, the property owner plaintiff, without seeking legislative relief as provided in the Chicago zoning ordinance,<sup>31</sup> filed a declaratory judgment action to hold the Chicago ordinance invalid as to his land. The court, while reversing for the municipality on other grounds, stated:

In entertaining the appeal as a matter within our jurisdiction, we note the record presented makes no disclosure of whether the ordinance in question provides appellee with an administrative remedy for the relief sought, or whether such remedy had not been exhausted, so as to bring the appeal within our recent decision in *Bright v. City of Evanston*.<sup>32</sup>

While it is axiomatic that a court may raise questions as to its own jurisdiction *sua sponte*,<sup>33</sup> and while the court herein could have taken judicial notice of the administrative provisions of the Chicago ordinance,<sup>34</sup> it was with some degree of disingenuousness that the *Kennedy* court chose to utilize the rubric of appellate law that the burden is on the appellant to raise *all* issues meriting

<sup>26</sup> See, e.g., Wexler, *A Zoning Ordinance Is No Better Than Its Administration — A Platitute Proved*, 1 JOHN MAR. J. PRAC. & PROC. 74 (1967); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962).

<sup>27</sup> *Chapmald Realty Corp. v. Board of Standards*, 76 N.Y.S.2d 296, 298 (1948); cf. *Behnke v. President & Bd. of Trustees*, 366 Ill. 516, 9 N.E.2d 232 (1937).

<sup>28</sup> 11 Ill. 2d 302, 142 N.E.2d 697 (1957).

<sup>29</sup> The court, in *Fox v. City of Springfield*, 10 Ill. 2d 198, 139 N.E.2d 732 (1957), had an apparent opportunity to apply *Bright* immediately, but overlooked the same. This decision has been described as "apparently contradictory, and certainly inconsistent." Fox, *Exhaustion of Administrative Remedies in Zoning Disputes*, 40 CHI. B. REC. 119, 120 (1958).

<sup>30</sup> *Bright v. City of Evanston*, 10 Ill. 2d 178, 180, 139 N.E.2d 270, 272 (1956).

<sup>31</sup> 11 Ill. 2d 302, 304, 142 N.E.2d 697, 698 (1957).

<sup>32</sup> *Id.*

<sup>33</sup> *Guttman v. Schiller*, 23 Ill. 2d 323, 178 N.E.2d 387 (1961); *Impey v. City of Wheaton*, 60 Ill. App. 2d 99, 208 N.E.2d 419 (1965).

<sup>34</sup> Cf. *Bank of Lyons v. County of Cook*, 13 Ill. 2d 493, 150 N.E.2d 97 (1958). See text at notes 37-41 *infra*.

reversal,<sup>35</sup> thus avoiding an opportunity to solidify its *Bright* holding. Yet *Kennedy* was to be a warning to municipalities to raise the issue of exhaustion whenever possible.

The next case of import<sup>36</sup> in the *Bright* syndrome was to be *Bank of Lyons v. County of Cook*.<sup>37</sup> In this 1958 case, the plaintiff was advised prior to a hearing by an agent of the Cook County Board of Appeals that the Board would recommend that his petition for a zoning change be rejected. Relying upon this *ex parte* advice, plaintiff initiated a declaratory judgment action. Commenting on *Bank of Lyons*, Babcock observed, "both parties urged the Court in their brief to mark a clear path through the *Bright* tanglewood."<sup>38</sup> The court refused, holding under *Bright*:

The necessity for making application before the board is not dispensed with because the application may be denied. The rule requiring resort to an administrative agency in the first instance is in the interest of orderly procedure. It cannot be avoided by evidence of an intent to deny the relief sought.<sup>39</sup>

As in *Kennedy*, the municipality in *Bank of Lyons* failed to raise the "ripeness" issue under its zoning ordinance administrative machinery. But curiously, this time the court dove in, examined the Cook County ordinance *sua sponte*, found an available "administrative" remedy, and required exhaustion.<sup>40</sup> As Babcock noted:

In neither the *Bright* case nor the *Bank of Lyons* case . . . did the Court endeavor to analyze the differences between the various methods of local relief, such as variations, amendments and special uses, and to explain the significance of the *Bright* decision in terms of these various sources of local relief. Consequently, the *Bright* and *Bank of Lyons* cases provide no Rosetta stone by which the multiplicity of local administrative-legislative remedies may be correlated into a logical method of procedure. If the Court chose to innovate with *Bright*, it should have sensed the duty to complete the job with *Bank of Lyons*.<sup>41</sup>

The first attempt by the Illinois Supreme Court to explain the *Bright* doctrine appeared in *Herman v. Village of Hillside*.<sup>42</sup> The plaintiffs in *Herman* sought to have an amendment of the

<sup>35</sup> *Perez v. Janota*, 107 Ill. App. 2d 90, 246 N.E.2d 42 (1969); *Libman v. Gipson*, 93 Ill. App. 2d 62, 235 N.E.2d 670 (1968).

<sup>36</sup> Other cases intervened between *Kennedy* and *Bank of Lyons* but added little to the *Bright* doctrine. These include: *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); *Payne v. Pullman Co.*, 13 Ill. App. 2d 105, 141 N.E.2d 83 (1957) (which was the first application of *Bright* in a non-zoning situation); *Sheridan Shores, Inc. v. City of Chicago*, 13 Ill. App. 2d 377, 141 N.E.2d 739 (1957); *East Maine Tp. Community Ass'n v. Pioneer Trust & Sav. Bank*, 15 Ill. App. 2d 250, 145 N.E.2d 777 (1957).

<sup>37</sup> 13 Ill. 2d 493, 150 N.E.2d 97 (1958).

<sup>38</sup> Babcock *supra* note 15, at 525.

<sup>39</sup> 13 Ill. 2d 493, 497, 150 N.E.2d 97, 98 (1958), *citing* 279 U.S. 159, 208-09 (1929).

<sup>40</sup> 13 Ill. 2d 493, 150 N.E.2d 97 (1958).

<sup>41</sup> Babcock, *supra* note 15, at 526.

<sup>42</sup> 15 Ill. 2d 396, 155 N.E.2d 47 (1958).



village zoning ordinance declared unconstitutional as to them and void as it prohibited expansion of their particular use of the property. Plaintiffs had already been denied an amendment by recommendation of the Village Board of Appeals and resolution of the corporate authorities, but, the village argued, under *Bright*, plaintiffs should have sought a variation from those same bodies before suit. The court affirmed for plaintiffs and explained *Bright* thusly:

The reason for the rule . . . is to give the municipal authorities an opportunity to correct invalid regulation before becoming involved in litigation. They [*Bright* and *Bank of Lyons*] are distinguishable from the case before us in that ample opportunity was given the village. . . . The same board of appeals would have had jurisdiction over a variation, and it is unreasonable to assume that it would reverse itself and grant practically the same relief. To insist on the additional useless step would merely give lip service to a technicality and thereby increase costs and delay the administration of justice, *which is the very thing we are trying to avoid*. The action here taken was a reasonable equivalent within the meaning and spirit of the cases above cited.<sup>43</sup>

The situation with respect to *Bright* remained static until the 1961 case, *Howard v. Lawton*.<sup>44</sup> The *Herman* sequence was reversed — the municipality arguing in *Howard* that plaintiff, who had been denied a variation by the Board of Appeals,<sup>45</sup> should have sought an amendment before seeking the court's aid. The late Justice House as he did in *Herman*, spoke for the Illinois Supreme Court in *Howard*, but in this case *Bright* was to be struck a seemingly severe blow:

Defendants [City] rely upon the rule laid down in *Bright* . . . in support of their theory. The *Bright* doctrine does not apply here because the Chicago zoning ordinance provides that all decisions of the board of appeals shall be final administrative determinations reviewable by a court, while under the Evanston ordinance all final decisions on variations were vested solely in the city council. The *Bright* case was a declaratory judgment action, not administrative review.<sup>46</sup>

Was the *Bright* rule to be restricted to suits growing out of legislative determinations only? One might get that impression. Yet Justice House, who had seemingly cleared the air with the *imprimatur* of a unanimous court, came full circle less than one year later in *Reilly v. City of Chicago*:<sup>47</sup>

<sup>43</sup> *Id.* at 408, 155 N.E.2d at 53 (emphasis added).

<sup>44</sup> 22 Ill. 2d 331, 175 N.E.2d 556 (1961). Again, intervening cases (between *Herman* and *Howard*) were less than edifying. See, e.g., *Dalkoff v. City of Rock Island*, 17 Ill. 2d 342, 161 N.E.2d 292 (1959); *Eckhardt v. City of Des Plaines*, 13 Ill. 2d 562, 150 N.E.2d 621 (1958); *Stemwedel v. Village of Kenilworth*, 14 Ill. 2d 470, 153 N.E.2d 79 (1958).

<sup>45</sup> Under the Chicago Zoning Ordinance, decisions of its Board of Appeals on zoning variations and variations in the nature of a special use are final decisions. CHICAGO, ILL., MUNICIPAL CODE, ch. 194A (1969).

<sup>46</sup> 22 Ill. 2d 331, 334, 175 N.E.2d 556, 558 (1961).

<sup>47</sup> 24 Ill. 2d 348, 181 N.E.2d 175 (1962).

The elementary doctrine laid down in the *Bright* case is that, except only where the validity of an ordinance as a whole is attacked, an effort must be made to obtain relief at the local community level before the plaintiff seeks relief from the courts . . . .

The requirement for seeking relief at the local level is equally cogent whether the appropriate remedy be through the board of appeals or the local legislative body, and has been so recognized by this court.<sup>48</sup>

While ruminating the House opinions, Illinois attorneys also faced the Illinois Supreme Court's last attempt to explain *Bright*.

#### "CURIUSER AND CURIUSER!"

In *County of Lake v. MacNeal*,<sup>49</sup> the court cleared the air as to the impact of *Bright* on zoning practice. The county brought suit to enjoin the MacNeals from allegedly violating the county zoning ordinance. The defendants had attempted to expand their recreational facility (a legal non-conforming use) to adjacent land zoned residential. The MacNeals counterclaimed, alleging that the zoning ordinance as applied to the second parcel was unconstitutional and void. The county responded to the counterclaim by invoking the *Bright* doctrine asking dismissal, "[i]n contending that the same rule applies where the property owner is the defendant to an action by the local authority to enforce its ordinance, plaintiff first reasons that the *Bright* rule is jurisdictional or quasi-jurisdictional."<sup>50</sup> To this argument the court responded: "This premise is not true, nor has the rule been so construed since its adoption."<sup>51</sup> The court further stated:

The *Bright* rule did not stem from legislative or constitutional command, but is no more than an expression of judicial policy prompted by the circumstance that zoning is legislative and administrative in nature, not judicial, and which is aimed at providing the local authority an opportunity to correct error and to settle disputes locally before there is judicial intervention.<sup>52</sup>

The court was again unequivocal — *Bright* was not meant to be jurisdictional; it was an "expression of judicial policy" and no more. Consequently, *Bright* would be applied on an *ad hoc* basis to all cases in the future — just as for every action there is an equal opposite reaction, with *Bright* for every forthright statement there is an equal and opposite equivocation.

After *MacNeal* in instances wherein municipalities had manifest an attitude through denial of variations<sup>53</sup> or amend-

<sup>48</sup> *Id.* at 349, 181 N.E.2d 175.

<sup>49</sup> 24 Ill. 2d 253, 181 N.E.2d 85 (1962).

<sup>50</sup> *Id.* at 259, 181 N.E.2d 85, 89 (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Horan v. Foley*, 39 Ill. App. 2d 458, 188 N.E.2d 877 (1963); *River Forest State Bank & Trust Co. v. Zoning Bd.*, 34 Ill. App. 2d 412, 181 N.E.2d 1 (1961).

ments<sup>54</sup> an aggrieved party could proceed to suit without further administrative or legislative action; however, in every instance the Illinois courts reserved the right to invoke *Bright*, on an apparently discretionary basis.<sup>55</sup> *Bright* has been applied by the Illinois courts on a case by case basis as if the "exhaustion" doctrine were a Siamese twin of that eternal aphorism of zoning practice: "[T]he validity of each zoning ordinance must be determined on its own facts and circumstances . . . ."<sup>56</sup>

Any rule that is applied in an *ad hoc*, discretionary manner creates a treacherous path for the litigant — open to costly abuse and unnecessary speculation. While the course of true exhaustion never does run true, it can and must be simplified in Illinois if the courts' interpretations of *Bright's* purpose are ever to be realized "to prevent delay in the administration of justice."<sup>57</sup>

#### A RULE OF JUDICIAL POLICY?

While there is little doubt that the legal rather than practical basis for the rule requiring "exhaustion of remedies" is that the rule constitutes a doctrine of self-limitation which the courts have evolved in marking out the boundary lines between the powers of the courts and those of administrative agencies, the pious cliché of *MacNeal* — that the *Bright* rule is one of judicial policy — is of little aid to the courts or litigants as to where and under what facts the rule will be applied.

At the federal level, the "exhaustion" rule "is to be considered a mandatory requirement — a rule of judicial administration, and not merely one governing the exercise of discretion."<sup>58</sup> Further, in instances where the statutory authority vests exclusive jurisdiction in the administrative agency, the federal courts have held the "exhaustion" rule to be jurisdictional.<sup>59</sup> It would appear that the federal rule, insofar as it delimits judicial discretion as to "exhaustion," would be welcomed by the Illinois courts which find the exercise of discretion in zoning matters an area more properly the concern of the local authorities.

<sup>54</sup> See, e.g., *National Brick Co. v. City of Chicago*, 92 Ill. App. 2d 192, 235 N.E.2d 301 (1968); *Fiore v. City of Highland Park*, 76 Ill. App. 2d 62, 221 N.E.2d 323 (1966).

<sup>55</sup> See, e.g., *Village of Bourbonnais v. Herbert*, 86 Ill. App. 2d 367, 229 N.E.2d 574 (1967) (wherein the court held the validity of the ordinance as a whole was in issue); *Westfield v. City of Chicago*, 26 Ill. 2d 526, 187 N.E.2d 208 (1962).

<sup>56</sup> *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 46, 145 N.E.2d 65, 69 (1957).

<sup>57</sup> *Sulzberger v. County of Peoria*, 29 Ill. 2d 532, 540, 194 N.E.2d 287, 291 (1963).

<sup>58</sup> F. COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* 322 (1951). See also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Berger, Exhaustion of Administrative Remedies*, 48 *YALE L.J.* 981 (1939).

<sup>59</sup> *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947).

A more reasonable suggestion, published earlier,<sup>60</sup> has been developed by Cornell University's John Reps.<sup>61</sup> Reps' scheme provides for review of all local administrative zoning decisions by a state review agency. This agency would consist of expert personnel, whereas today's local administrative agencies do not. Judicial review of the state agency's decisions would be restricted by statute to procedural discrepancies only.<sup>62</sup> Those who argue against the interposition of another agency in the zoning process must remember that courts apparently do not want to be involved in zoning questions;<sup>63</sup> nor are they technically prepared to resolve zoning questions. The Reps plan restricts the court's province to the procedural and constitutional issues that are its proper jurisdiction.

### CONCLUSION

*Bright v. City of Evanston* has been at one and the same time multifarious and nefarious. In too many instances *Bright's* fruits have been the bitter ones of chaos and uncertainty when the zoning process, which *Bright* was to help control, is supposedly a legal means of assuring order in urban life.

To some the *ad hoc* nature of determining whether "exhaustion" has been accomplished is a pleasant prospect.

[I]t is fair to conclude that the rules established by the Illinois courts regarding the doctrine of exhaustion of administrative remedies are well balanced and probably provide a maximum of administrative efficiency and judicial protection.<sup>64</sup>

It is submitted that a reading of the *Bright* line might tend to put in question such an amiable conclusion. Over two decades ago the Illinois Supreme Court's attitude toward zoning was aptly described as "a study in uncertainty."<sup>65</sup> Today, the court's attitude is more exact:

Of course there will be zoning cases that question the validity of particular provisions of the enabling statute, or that involve the use of new and unfamiliar techniques. A case of this type, that presents novel and substantial constitutional issues of concern to

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<sup>60</sup> Blucher, *Is Zoning Wagging the Dog*, AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1955, at 96, 100 (1956); Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 538 (1959).

<sup>61</sup> Reps, *Requiem for Zoning*, C. BERGER, LAND OWNERSHIP AND USE 823-36 (1968).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Grippo, *Exhaustion of Administrative Remedies: Need or Nuisance?*, 50 ILL. B.J. 474, 489 (1962); cf. Murphy, *Administrative Change and Judicial Relief in Zoning*, 46 ILL. B. J. 884 (1958).

<sup>65</sup> Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. CHI. L. REV. 37 (1947).

every community in the State, will sustain a direct appeal to this Court.<sup>66</sup>

From the fact that the Illinois Supreme Court has not reflected upon the impact of *Bright* for seven years — but has instead chosen not to do so<sup>67</sup> — one can only conclude that the court feels the issue of “exhaustion” is no longer a “novel and substantial” constitutional issue. Yet, as *Bright* has an impact upon administrative law issues other than zoning,<sup>68</sup> it is time that the court reexamine, reanalyze and rethink its position on this vital issue.

*With ruin upon ruin, rout on rout,  
Confusion worse confounded.*

*Milton, Paradise Lost*

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<sup>66</sup> *First Nat'l Bank v. City of Evanston*, 30 Ill. 2d 479, 486, 197 N.E.2d 705, 708-709 (1964). For two contrasting analyses of *First National Bank*, see Bosselman, *Substantial Constitutional Questions: Are Zoning Cases Sui Generis?* 53 ILL. B.J. 752 (1965); and Baum, *Substantial Constitutional Questions: The First National Bank Case in Perspective*, 53 ILL. B.J. 753 (1965).

<sup>67</sup> This is not to say that the Illinois courts have not applied *Bright*, e.g., *Westfield v. City of Chicago*, 26 Ill. 2d 526, 187 N.E.2d 208 (1962); *Van Laten v. City of Chicago*, 28 Ill. 2d 157, 190 N.E.2d 717 (1963).

<sup>68</sup> See, e.g., Illinois appellate court's opinion in *National Brick Co. 1. City of Chicago*, 92 Ill. App. 2d 192, 235 N.E.2d 301 (1968). *Village of Bourbonnais v. Herbert*, 86 Ill. App. 2d 367, 229 N.E.2d 574 (1967); *Fiore v. City of Highland Park*, 76 Ill. App. 2d 62, 221 N.E.2d 323 (1966).