ZONING FROM THE LEGAL PERSPECTIVE
OPPORTUNITIES FOR EFFECTIVENESS
THROUGH SYNTHESIS

Thesis for the Degree of M. U. P.

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ABSTRACT

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by

Gregory Alan Lyman

Zoning represents a very basic and traditional tool employed by planners to achieve objectives formulated to enhance the welfare of our communities. Over the years this frequently used planning instrument has been the subject of continuing criticism for its inability to produce results equal to the visions of the planning profession. Perhpas, this reoccurring criticism contains elements of validity because the planning profession has failed to concisely and creatively view the true nature of the creature called zoning.

As a legal instrument, zoning by virtue of its basis in legal theory as wedded to our system of government, contains inherent constraints which establish how it may properly be used to accomplish goals properly defined as within its purpose. While such parameters on purpose and use may be subject to change, they do indeed exist and must be recognized by individuals involved in applying zoning to

attainment of public objectives. It is the purpose of this thesis to propose that more effective and realistic application of the zoning power may result from greater sensitivity to legal parameters, and the merits of a creative synthesis between planning theories and legal doctrines. This proposition is presented through discussion of the following subjects:

1. The practice of planning may benefit from an approach which systematically focuses on the development of strategies to resolve specific problems, real or anticipated. Such an operational framework for planning practice is consistent with the use of zoning in a strategy configuration.

2. An essential element of understanding the legal parameters inherent in the use of zoning is sensitivity to the nature of law itself.

3. A review of Michigan court decisions related to zoning reveals the legal constraints present in Michigan with regard to the zoning power, and provides the framework for development of zoning strategies.

4. The concepts expressed in a recent Michigan Supreme Court Decision, West v. City of Portage, indicate the need for planners

to entertain a positive, interactive and creative posture with regard to legal pronouncements. This decision also reveals opportunities, derived from the legal perspective for more effective planning and zoning practice.

In conclusion, this thesis suggests to planners that a positive awareness of the legal doctrines involved in the use of the zoning power, when synthesized with planning concepts, can result in more effective and beneficial use of this planning tool. In a broader sense, this thesis calls for greater interaction between planners and all professions, offering the opinion that a focus on specific problems in an atmosphere of cooperation and an awareness of comprehensive impact, can contribute greatly to making our future visions tomorrow's realities. A strategy-oriented approach to the use of zoning represents one illustrative component of such a planning framework.

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Gregory Alan Lyman

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Acknowledgement is also due the Office of Land Use, Michigan Department of Natural Resources, for the opportunities it created for intensive study of the practice of zoning in Michigan. The staff of the Office of Land Use and the members of the Zoning Advisory Committee provided perspectives of zoning which contributed greatly to the content of this thesis.

As I reflect on this thesis and the past few years of graduate education, I am reminded of the irreplaceable experiences I have shared with my family during this respite from the world of gainful employment. My wife, Susan, and son, Bret, deserve my deepest thanks for their very

important contributions. From a very practical standpoint, Susan has served as the breadwinner, and I the "househusband," while my desire for higher education has been fulfilled. And, without Susan's agreement to type into the early hours of the morning, I would still be trying to meet deadlines for research papers. More importantly, Susan has patiently shared this experience with me, offering needed criticism, affection and moral support. To my son, Bret, I must say thank you for the curiosity and mischievousness which help an adult maintain a proper perspective of what life is really about.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd.)

LIST OF FIGURES

AN INTRODUCTORY COMMENT

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The law, as embodied in our state and Federal constitutions, the enactments of legislative bodies and the decisions of our courts, represents society's overt statement on the proper conduct of human activities. Prohibitions are delineated restraining actions, while basic freedoms are guaranteed. Incentives are institutionalized to promote achievement of implicit and explicit goals. Programs and operational mechanisms are created, symbolizing a societal recognition of a common need or desire, and the determination to initiate responsive action. The law defines the relationships of citizen to citizen, corporation to corporation, employer to employee, and attempts to balance public and private interests as it defines the rights and duties of government in relation to the individual. As population increases and social relationships become more complex, the pervasive influence of the law becomes greater and its impact on the form, content, and structure of society becomes more far reaching. Increasingly, the law has become more than the adjudicator of conflicts between individuals. It has become the instrument through which society

collectively establishes its goals and implements actions which are deemed necessary to promote and achieve common welfare.

Since its inception in the United States, the planning profession has focused its efforts on the achievement of a high quality of life for all citizens. Acting out of concern for the public interest, planners have urged that decisions on behalf of society be made based on foresight and a knowledge of future direction. It is in the desire to achieve social stability and equity, the resolution of public problems and the promotion of society's future welfare that law and planning interface. Planning strives to anticipate and resolve problems afflicting society, while the law increasingly represents the mechanism through which the public collectively effects action to insure common welfare, as well as protect individual rights.

Although it may not be commonly recognized by either entity, law and planning exist in reciprocal relationships. The practice of planning in the absence of a positive, interactive relationship with law reduces the impact of subsequent studies, plans and recommendations. On the other hand, the formulation and practice of law may suffer in substance and effect if it is not based upon an adequate knowledge of the problem it purports to avert, the objective it should serve, and the future repercussions implementation may cause. To attain an optimum level of performance in our efforts to shape and enhance the quality

of human existence, law and planning must enjoy a supportive relationship with the disciples of each sensitive to the goals and tenets of the other's discipline, and willing to strive to effect a meaningful interface.

The objective of the document which follows is to describe the essence of the area of interface between law and planning, explaining the directions and constraints each discipline is offering the other and the potential for society which a proper synthesis can bring. Of course, such nebulous terms as interface and synthesis, as well as planning, can have very elusive meanings in the absence of reality and a point of reference. Thus, the process of zoning will serve as a catalyst bringing the professions of law and planning together in an overlap situation where study can be succinctly focused.

Zoning, since its contemporary introduction just after the turn of the century in New York City, has continually represented a field of interest entertaining a high level of participation by members of both the legal and planning professions. As a technique embodied in law, attorneys and members of the judiciary have maintained a keen interest in insuring that its powers are restrained within constitutional limits. As a tool for guiding land development, planners have viewed zoning as an implementation technique to be used to effect planning objectives and recommendations. Quite obviously, planners and lawyers have viewed

zoning from different perspectives with different interests in mind. It is also apparent that if the object of their interest, zoning, is to be used at anywhere near an optimum level the members of each profession must open their eyes and understand the objectives each hold as well as the benefits which will accrue to society if zoning is structured and practiced from a position of synthesis rather than separation. Perhaps the problems and potentials revealed by this narrow investigation of zoning will stimulate thought on other areas of professional synthesis in addition to law and planning, where greater understanding, interaction and cooperation between disciplines could result in a larger collective benefit to society; a benefit greater than that achieved within the narrow confines and limited perspectives of distinct professional categories.

The pages which follow in the broadest sense serve to illustrate the need for greater interprofessional awareness and understanding. In a more specific, detailed vein, improvements in the process of zoning will be suggested as indicated by an analysis of the constraints and directions present in the decisions of the courts. In an attempt to bridge the gap between law and planning, a planner with planning objectives in mind will attempt to understand the role of the courts and members of the bar, develop a sensitivity to their concerns and relate the legal perspective of man and his world to that held by planners.

This description of the legal system will be followed by review of Michigan court decisions relating to planning and zoning. The purpose of the court decision review is to analyze and identify in specific terms the constraints and directions the judiciary has indicated for the use of the zoning power. This analysis will then provide the fuel for illustrations recommending to planners the ways in which an understanding of the legal perspective can be used to advantage to increase the effectiveness of planning and zoning practice.

The conclusion of this thesis will consist of an analysis of the decision of Michigan Supreme Court Justice Levin in West v. City of Portage. The conclusions reached by Justice Levin indicate directions for zoning and planning practice with far reaching implications. The reasoning exhibited by Levin illustrates in a precise manner the interface concept between law and planning and provides a new framework for zoning radically different from traditional concepts. Justice Levin has not been alone in his advocacy of a new approach to zoning. Courts in other states, most notably Oregon, have reached similar conclusions. Thus, out of the law/planning interface described in West v. City of Portage, recommendations will be presented which may indicate the dynamics involved in a new approach to zoning and planning; an approach stimulated and framed by the law, and adapted and used to the advantage of society by the planning profession.

TURNING VISIONS INTO REALITY

A PLANNING CHALLENGE

Chapter I

TURNING VISIONS INTO REALITY

A PLANNING CHALLENGE

> The urban planner in the 20th century must lead people from the world of the practical into the realm of dreams and then back again in a way that makes dreams possible.
>
> --John Alan Stock

As America has shifted from a country dominated by rural settings and agrarian perspectives to an intense industrialized society, an increasing awareness of the problems inherent in unconsidered growth, population concentration, and urban expansion has surfaced. Now, more than ever before, the "growth is good at any expense" ethic which has dominated American history is being questioned. Faced with expanding metropolitan complexes, balkanized local governments unable to grapple with complex social problems and deteriorating physical infrastructures, and a wave of urban development which is consuming vital agricultural land, essential natural resources, and significant environmental features, citizens are voicing their concerns over the quality of life. However, in their search for solutions they have been caught in a feeling of inevitability and helplessness. In many cases, they have adopted a defensive posture, exhibiting skepticism in the ability

of government to solve problems, displaying apathy at the polls, becoming involved in public problems only out of negativism, running to the suburbs and beyond, erecting privacy fences, and buying handguns--the list of symptoms could go on. Americans are now realizing that there are problems with the patterns of growth, the operations of society, and the quality of the environment--physical, social and economic. The average citizen, existing in daily contact with environmental problems, can readily list a multitude of dysfunctions which he or she observes and feels during daily travels through a unique social network of relationships. These simple observations tend to indicate that the frustration of modern urban life emanates not from an inability to point to problems, but from a lack of ability to make succinct problem descriptions, assessments of interrelated variables, and the translation of descriptive information into effective resolution strategies. In the absence of effective solutions, the defensive attitudes of the American public grows, the ability to dream is lost, and the task of problem resolution becomes more and more difficult.

At a recent planning and zoning seminar for local government officials, the need for problem solutions became very evident.[1] As a planner and a lawyer conducted separate workshop sessions, participation in both revealed the same general tone of discussion. Questions invariably centered on specific local problems with requests for how

to solve those problems. For example, a township official from southeastern Michigan explained that rapid new development was consuming prime agricultural land and asked what they could do to guide this development elsewhere. From southcentral Michigan came the description of a problem involving isolated mobile homes without proper sanitary facilities and the request for a solution. For over two hours, questions were posed by over 100 local officials without hesitation. They seemed to be repeatedly saying, "We know our problems; give us solutions." The need for solution strategies was readily apparent.

While the experience described above occurred within the context of land use and zoning, the pattern is not unique. Consider the situation faced by the police chief of a small city in central Michigan who was experiencing the increasing use of bicycles and corresponding increases in accidents and thefts. This gentleman recognized his problems and asked for assistance in devising such solutions as the drafting of a bicycle ordinance and the establishment of a licensing program.[2] Or, the township supervisor seeking design standards for bikeways and methods of financing a bikepath system.[3] Or, the police detective from southwestern Michigan seeking ways to curb a growing influx of pornography stores.[4] These examples illustrate on a small specific scale the existence of a large insatiable desire for techniques, tools and strategies which will solve a multiplicity of

problems facing the American citizenry. As these questions go unanswered or are poorly answered, those who have exhibited the concern to ask for solutions may feel the frustration which leads to defensive attitudes. Correspondingly, those who are repeatedly and continually exposed to the adverse impacts of societal dysfunctions will become more firmly entrenched in a defensive posture.

Since the days of the City Beautiful Movement, just after the turn of the century, the observance of the increasing magnitude and complexity of problems afflicting America's ubanized society has strengthened the planner's belief in planning as a solution. And, perhaps in a situation analogous to an architect designing a building, the science of city planning could produce a smoothly functioning urban community. Planning could serve at least as the solution to the physical problems of urban growth. However, the realities of American society, its institutional arrangements, values and social networks seem to indicate that the ability of the planner to operate as the architect in designing a city may be no more than a theory at the present time. The pressure of existing problems is so great, the complexity of governmental, business and individual relationships is so intricate, and social cohesion so fragmented that the traditional plan as a "grand scheme" or solution can only be described as impotent in the American context. There is a need apparent for a redefinition

of the planning process, its components, and the dynamics of operational emphasis in its application.

The planner of the 70's is faced with a unique and difficult challenge. The planner must realistically listen to the queries and requests for help voiced by the public official, understand the reasons for the defensive posture assumed by the citizenry, and proceed to question his planning traditions while developing a new configuration for the planning process. The planner today must do more than create a master plan. He must do more than complain of the day-to-day distractions which hinder his preparation of documents describing the state of his city 20 years hence. The planner must recognize his strengths and weaknesses, and seek to build a planning process sensitive to human needs, aware of the realities of modern society, and based upon the contributions which planning can make to social progress. The planner must understand that it is today's problems which help create tomorrow's realities and without an intricate understanding of how to resolve our short-range difficulties, designs for the future will soon be covered with dust and forgotten. The planner must instill enthusiasm for visions of the future. But, equally important, he must bring reality to those visions by painstakingly building a bridge to the future through the resolution of individual tangible problems. The planner must be willing to change his profession, and, equally important,

be unafraid to fight for changes he, as a professional, feels will benefit society.

The point of this discussion is not new. The inadequacies of the traditional master plan approach to planning have been analyzed many times before. The frustrations of the planner being unable to effectively influence the events which determine a city's growth pattern have been discussed by many authors. And, it would be grossly unfair to say that planners themselves have not recognized their weaknesses, and applied many new approaches to public problems. Yet, these general comments serve as contextual material for the remainder of this thesis. The comments, observations and opinions which follow illustrate one component of planning strategy which can transform the traditional process of planning into a configuration which takes aim at specific problems, and tackles the realities of today while keeping an eye on what tomorrow should be like. This process deemphasizes the traditional plan and depends upon action plans derived from the continual cycling of the steps presented in the following diagram, with a general policy framework providing guidance to promote directional consistency.[5] Plans are not scrapped, they are reformulated as documents characterized by realism, and the strategic use of information to combine planning and implementation into blueprints for action--strategies cognizant of long-range goals, sensitive to comprehensive repercussions, and capable of progress.

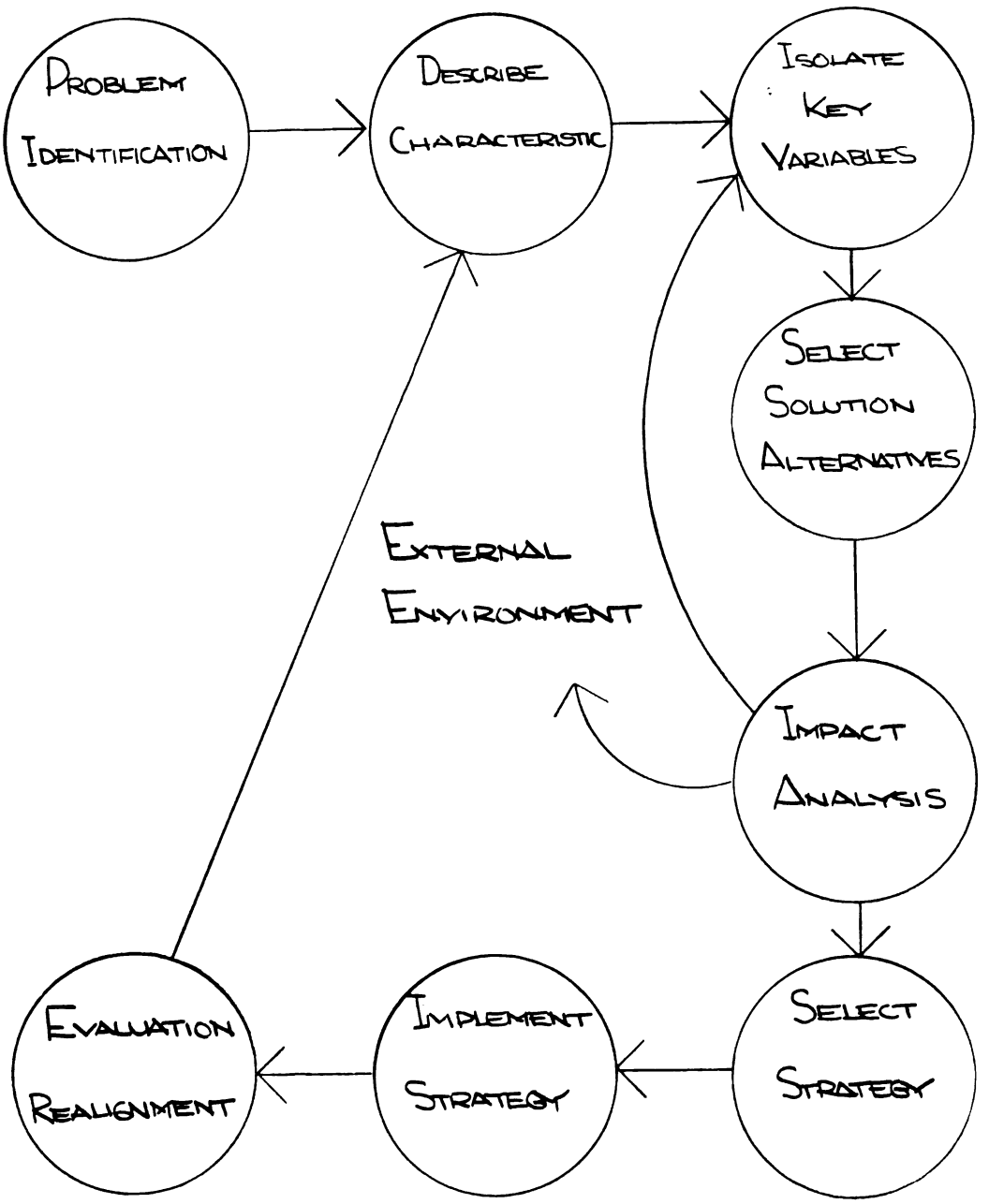

Figure 1

A PROBLEM-ORIENTED MODEL

This model of a planning process differs from traditional planning theories not so much in the logic of its steps, but rather in its scale, points of emphasis and the dynamics of operation. For example, under traditional doctrines the problems of a community would be analyzed, its future potentials would be quantified and a future plan derived for how the community should appear in 20 years. The plan was advanced as a vision of the community's future. It was then assumed that all decisions would have as their objective the realization of this plan. This method could be called the architectural model of planning.

In the planning process configuration to which this thesis contributes, planning attention becomes problem specific. The planner narrows his focus to identified or anticipated specific dysfunctions. Rather than reacting to problems in an isolated manner, the planner identifies key problems influencing the present and future state of the community environment, and formulates a positive program or set of action plans for dealing with these problems. In looking at specific key problems, effort is focused on description of the essential characteristics of the problem. The key elements or variables describing its character are isolated and resolution alternatives created to ameliorate the problem. At this point, the planner reassumes his comprehensive perspective and measures the various impacts of his solution array

on (1) the problem as originally defined, (2) other identified key problems, (3) the external environment of which the problem is interdependently linked, and (4) the policy guidelines which provide the general parameters designed to lead human action toward desired goals. On the basis of this impact analysis depicting alternative visions of the future, a solution strategy would be selected and implemented. Following implementation, evaluation and realignment would be essential to adjust the strategy to changes in the character of the problem, changes in the character or relative influence of other problems, altered policy parameters, or alterations in the external environment caused by uncontrolled outside variables or the unforeseen impacts of other solution strategies. The important features of this process are its separate but concurrent focus on specific problems which have been identified and prioritized as influential in determining the environment of the community, and its emphasis on an affirmative program composed of complementary action plans realistically addressing the resolution of critical problems. Comprehensiveness is achieved through impact analysis and evaluation, and realignment. Effectiveness and relativity are imparted through its focus on producing solutions. Thus, visions of the future are put into a tangible, operational, framework which the mind can comprehend as attainable, and toward which progress can be discerned.

Typically, the traditional planning process focuses, and indeed places its greatest emphasis on a desired end state predictably 10, 20, or 30 years in the future. It may then describe general implementing actions which will lead to this desired result, and then hope that the multitude of individual public and private decisions will be calculated to support the planner's vision of the future. While such an approach is quite rational and truly reflects what the reasonable man should do in decision-making decisions, it is not a model for public decision making which is congruent with the realities of human behavior. The immediacy of "here and now" problems creates demands for solutions which easily overshadow the well thought out generalities of a planner's vision for the future. In terms of the hard cold probability, the vast number of public and private decisions made each day affecting the future form of the city and the quality of life defeats any hope that they will all adhere to the principles of a master plan. The rapid pace at which society moves, changes and evolves introduces a time element capable of quickly outdating the premises of any well considered comprehensive plan. Each of these factors--immediacy, multiplicity and pace--acting interdependently creates a dynamic context for human action rendering the comprehensive plan, as a major solution to societal problems, an unrealistic venture. Rather, it may be more realistic for the planner to overtly concentrate

his skills on specific critical and influential problems while implicitly achieving comprehensiveness and an improved future quality of life through greater attention to impact analysis and policy formulation.

It can be readily seen that a shift in the planner's role in public decision making from the preparation of long-range planning documents, characterized by their generalized comprehensive nature, to short-range problem-specific analyses characterized by specificity, detailed solution strategies and impact analyses, would most certainly require the planner to assume new skills and working relationships. Should the reorientation in the planning process previously discussed be accepted as an alternative or a supplement to traditional doctrines, a planner facing a specific complex dysfunction could easily find he lacks the specific knowledge needed to truly understand the specifics of the problem, and to formulate an effective solution strategy. A strategy of problem specific attack requires problem specific knowledge. However, for the planner to acquire the detailed knowledge necessary to confront a specific difficulty endangers his comprehensiveness. In addition, in today's society of complexity, the accumulation of detailed expertise in all areas relative to public problems would be impossible. Thus, in view of these constraints, the elements or skills of a professional planner engaged in the problem-specific model

of planning hypothesized in this contextual material could be constructed as illustrated in the following diagram:

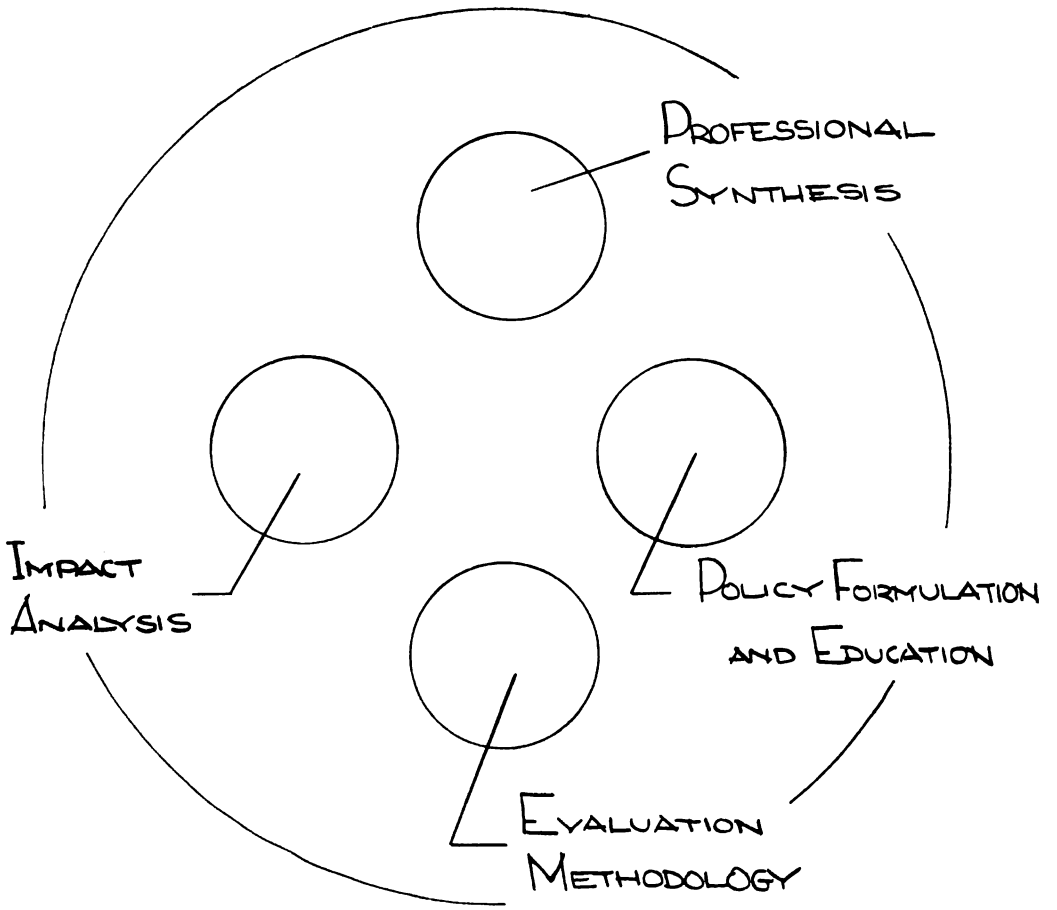

Figure 2

ELEMENTS OF PROBLEM-SPECIFIC PLANNER

The planner engaged in the problem-specific mode of planning would need to be skilled in policy formulation--the slow frustrating process of educating the public, encouraging future vision, goal formulation policy articulation. As a part of policy formulation, the planner would need to be humanistic in his viewpoint and truly recognize the value of citizen input and participation in decision making. The humanistic characteristic of the planner involved in policy formulation is essential for it sets the tone for later use of evaluation methodologies which can pose the distinct danger of failure to include human considerations. The problem-specific planner would also need a working knowledge of the principles and perspectives of the other major disciplines with potential for solving public problems. Such skills in professional synthesis would require that the planner understand what knowledge another profession can bring to bear on the problem, possess sensitivity to the perspective of the other professions, develop an awareness of when specific technical knowlege is needed, and be capable of working closely with other professionals in an interdisciplinary setting. It is through professional synthesis that the planner will gain access to information providing the basis for creative solution strategies.

The problem-specific planner would primarily induce comprehensiveness and future vision in his work through his efforts in policy

formulation and development of impact analyses. The techniques of impact analysis employed by the planner would require creative use of evaluation methodologies applied to determine the impact of proposed actions on overall policy, other operational problem solution strategies, and the current state of the community environment. The policy framework, creating a commonly-held vision of the future, imparts comprehensive direction for individual decisions, while impact analysis provides continual awareness of the effect specific actions will have on other variables affecting an ability to realize the vision of the future deemed desirable.

The planner's ability to employ evaluation methodologies serves a three-part function. First, evaluation methodologies assist in the identification of problems and the assessment of their relative influence on the state of the community. Secondly, they provide the basis for developing impact assessments. And, thirdly, they enable the planner to monitor the success of the strategies applied, recognize the changing character and influence of problems, and apply corrective measures designed to realign strategies.

The planner of the 70's who possesses these components and is able to apply them to the problems and policy choices we face will perhaps enjoy a greater opportunity to enhance the livability of community environments.

With a sensitive and humanistic ability to induce visions of the future through policy formulation, combined with the capability to blend professional skills into effective problem solution strategies, the planner of the 70's can become the catalyst who can "lead people from the world of the practical into the realm of dreams and then back again in a way that makes dreams possible."

Against this contextual background suggesting a hypothetical model for planning divergent from traditional modes, the remainder of this thesis will be devoted to the discussion of one aspect of this strategy. Consideration will be focused on the synthesis between planning and the law, illustrating one dimension of the component referred to as professional synthesis. A look will be afforded at how greater sensitivity by planners to the nature and principles of law--the practice of a complementary profession--can provide the planner of the 70's with important knowledge and perspectives for creating effective problem-specific strategies for making future visions attainable.

FOOTNOTES

[1]Observations of the author at a Planning and Zoning Seminar conducted in Ann Arbor, Michigan on May 23, 1975 by the Michigan Township Association.

[2]Based on a telephone conversation with the Police Chief of the City of Dewitt, Michigan, October, 1974. Assistance was requested from the writer.

[3]Based on telephone conversation and subsequent interview with Supervisor Dale Emerson of Dewitt Township, Michigan, October, 1974. Assistance was requested from the writer.

[4]Based on telephone conversation and personal interview with Detective Lieutenant Ronald Smith of the Benton Harbor Police Department, Benton Harbor, Michigan, September, 1971. Assistance was requested from the writer.

[5]For additional discussion of traditional planning theories and new planning frameworks see: Robert B. Mitchell, "The New Frontier in Metropolitan Planning," Journal of the American Institute of Planners, XXVII, No. 3 (1961), 169; Martin Meyerson, "Building the Middle-Range Bridge for Comprehensive Planning," Journal of the American Institute of Planners, XXII, No. 2 (1956), 58; Peter H. Nash and Dennis Durden, "A Task-Force Approach to Replace the Planning Board," Journal of the American Institute of Planners, XXX, No. 1 (1964), 10; Edward C. Banfield and Martin Meyerson, Politics, Planning and the Public Interest (Glencoe, Illinois: The Free Press, 1955), chapters 10, 11 and Supplement; Richard S. Bolan, "Emerging Views of Planning," Journal of the American Institute of Planners, XXXIII, No. 4 (1967), 233; Ira M. Robinson, "Beyond the Middle-Range Planning Bridge," Journal of the American Institute of Planners, XXXI, No. 4 (1965), 304; American Law Institute, A Model Land Development Code, Proposed Official Draft No. 1 (Philadelphia: American Law Institute, 1974);

Fred P. Bosselman, "The Local Planner's Role Under the Proposed Model Land Development Code," Journal of the American Institute of Planners XLI, No. 1 (1975), 15; Norman Krumholz, Janice M. Cogger, and John H. Linner, "The Cleveland Policy Planning Report," Journal of the American Institute of Planners, XLI, No. 5 (1975), 298; Herbert J. Gans, "Planning for Declining and Poor Cities," Journal of the American Institute of Planners, XLI, No. 5 (1975), 305; T. J. Cartwright, "Problems, Solutions and Strategies: A Contribution to the Theory and Practice of Planning," Journal of the American Institute of Planners, XXXIX, No. 3 (1973), 179.

AN INTRODUCTION TO AMERICAN LAW

Chapter II

AN INTRODUCTION TO AMERICAN LAW

Law represents an essential and fundamental social framework within which planners and other professionals, and all members of society must operate. It is in law that society embodies the parameters which define the roles of government, institutions and individuals; assigns responsibilities; balances individual freedom against public needs; and restrains and allows the exercise of power. For the planner an understanding of law is essential, for in devising strategies to resolve problems he will inevitably become involved in shifting the balance between individual rights and collective benefit, redefining roles of government, individuals, and institutions, and using power in new and different ways. Even the planner who chooses to function passively as advisor, using persuasion as his implementing tool, must understand the role and perspective of law if his recommendations are to appear conceivable as well as desirable.

The groundrules for action are present in law. It is law which grants and removes power. A key element of effective solution

strategies is the creative use of law. For the planner desiring to translate dreams into reality, this imparts a responsibility to understand the principles of the legal framework, the perspectives of its practitioners, and the specific doctrines which constrain or offer potentials for a specific implementation strategy. While a general discussion of American law may appear as a diversion, it serves two essential functions. It serves to illustrate the type of background information important to the planner utilizing the planning model described in the previous chapter, and it serves in a practical sense as a necessary foundation for understanding of the discussion of zoning law which follows. As Archibald Cox suggested in 1961, progress toward goals we deem desirable can only be made with an intelligent understanding of our system of justice.[1]

Law has developed because men have wanted their relationships between other men and government to conform to defined standards. Each person wants to know what conduct he can reasonably expect from others; as well as what conduct others can expect from him. With such rules of conduct established, a citizen is able to make intelligent decisions in terms of commonly understood legal rights and obligations. The legal rules, or laws, which have been adopted for this purpose express the social, economic, and moral desires, standards and aspirations fo society.[2]

There is no doubt that in the absence of man-made law, persons would impart certain moral principles or natural laws. However, in the absence of an organized or institutionalized legal framework, a common understanding of legal rights and duties would be difficult to achieve. In addition, those who did not assume moral principles of responsibility in relation to others would present difficult problems for society--particularly in a complex, contemporary society.

Thus, man-made law is necessary not only to define responsibilities and establish rules of conduct, but, also to create the machinery for enforcing proper conduct, punishing wrongful acts, and settling disputes. The substance of law could be described as a body of principles, contained in statutes, constitutions, local ordinances, court decisions and amdinistrative rules, which govern conduct and provide means of enforcement.

In its broadest sense, law is present to provide order, stability and justice. It represents a crystallization, into relatively fixed rules, of those patterns of behavior for individuals, institutions and government which society deems desirable. Yet, in spite of its embodiment into fixed rules of conduct, law is not static. It represents an institution which is not an end unto itself, but an instrumentality for obtaining social justice. While law is thought of in terms of statutes, ordinances and court decisions,

its nature is more like a process; a system within which all participants are performing seemingly conflicting roles in pursuit of a common objective: justice. In actuality, law the substance is continuously being used and tested within law the process, each insuring in a dynamic way that equity and justice are being maintained in accord with accepted social desires and beliefs. The truth then is that law has been evolving, and by necessity will continue to grow, change and evolve, rejecting old principles and adopting new standards.[3] Law the rule and law the process will cease to grow and become static only when society ceases to grow and becomes static.

It is apparent therefore that civilized coexistence depends to a great extent on the proper functioning of our legal system. And, as society becomes increasingly urban and interpersonal relationships become more complex, our legal system will most assuredly shoulder more and more responsibility for insuring an ordered society in which individual freedom is maintained while public welfare is promoted. Recognizing that for society to grow, improve and progress requires that law--our contextual framework defining conduct--remain dynamic, reveals the delicate nature of law. While it must be sensitive to social change, law cannot bend with the changing winds of popular will. Law must remain a stabilizing force focusing its processes insistently on the objectives of justice and equity. And, as new social problems arise,

innovative solutions, changes in social policy, and redefinitions of responsibility, freedom and power will ultimately be considered by the legal system to assure a congruent fit between changing social needs and the consistent evolution of society's concepts of what is right, just and fair for its members. Law changes as social needs become evident, but only in a consistent restraining manner. In fact, at times law is so consistent in its responses to the needs of society, that the popular will is forced to move in directions it seemingly does not want to go, in spite of the fact that justice supports the viewpoint of the legal system.

Thus, it is evident that as law embodied in constitutions, statutes and ordinances defines responsibilities, allocates power, and regulates conduct, so too law as a process applies these rules, insures their fair application, and maintains their appropriateness in light of social needs.

Certainly, these general comments concerning the nature and purpose of law are common knowledge. Indeed, every individual who has had a high school government course has picked up a rudimentary understanding of what the American system of justice stands for, and how it operates. We all know that each man "has his day in court"; will be tried by jury composed of his peers"; is presumed innocent until proven guilty"; and "is entitled to life, liberty, and the pursuit of

happiness." We understand that trials occur in an advocacy setting; that a prosecutor presents the case against the defendant for the public; that a jury determines guilt or innocence; and that appeal is possible to a higher court called a supreme court. Yet, when faced with a legal obstacle, or when involved in designing implementing programs or tools to promote a planning goal, do planners remember basic lessons in what law is all about? Furthermore, do planners understand not just the basic principles and components of our legal system mentioned above, but the objectives they exist to support? Unfortunately, it appears that planners, like everyone else, can easily become engrossed in a specific goal and entertain the narrow perspective which leads to that goal. When it happens that a law, or a judgment of the court, is on their side, they rejoice. When they become entangled in legal obstacles, they become derogatory. As an alternative, it would be beneficial for planners--particularly if they intend to become problem-oriented and solution-intent--to understand and entertain a sensitivity to the purpose, role, operations and perspective of law.

It is essential that planners understand that the operational objectives of law--equity and justice for all citizens--cannot be met through shortcuts, inconsistency, or speculation as to what might have been or may be. A stable and consistent system of laws is necessary.

Procedures must be used in a systematic attempt to insure that we accomplish goals, exercise power, determine truth, or settle disputes in a manner that insures that each party will have an opportunity to be heard; relevant facts will be identified; legal principles reflecting accepted rules of social conduct will be applied, and just decisions will be made. It is only through such a seemingly tedious system emphasizing equity and justice that we can assure that such traditional goals as life, liberty and the pursuit of happiness can be insured. Planners could benefit from an intimate understanding of this perspective--its origins, its participants and its procedures--for it is the framework of implementation.

An Historical Perspective of American Law

As the early colonists settled the North American continent, their primitive lifestyle did not demand a complex system of rules for the regulation of interpersonal or community affairs. However, as the population of the early colonies grew and commercial ties with England became more intricate, there grew a corresponding need for a more sophisticated body of law. Quite expectedly, as the need for doctrines of law became apparent, the colonists turned to England for the basic framework of colonial codes. In looking to England for a system of law,

the colonists did not transplant English legal doctrines without change. Rather, the developing law of the colonies was adapted from the doctrines of late 17th century English law.[4] On the basis of this adaptation of contemporary English law existing at that time the law of the colonies, and later the United States, evolved into the American system of justice we know today.

At the time the colonists referred to English law for models to create their new legal systems, the English legal system and its doctrines had been developing for several centuries. The English system, unlike those prevalent in other countries on the European continent, was not based on Romanesque law--the "civil law" of Roman origin derived from the Justinian Code. Rather, England, from a fragmented beginning, had developed a unique legal system and body of principles which had grown on a case-by-case basis, with its substance substantially defined by the judiciary. This distinct product of England has been referred to as "common law," and can be best understood through a brief look at its development.

Prior to the 14th century in England, the law and judicial system was extremely fragmented. Early courts were not viewed as a public service, but were conceived of as private property. Just as an individual would operate a ferry and through the excellence of his service exclude others from competition, so courts were established

in various settlements each with their own peculiar form of justice. In the free enterprise style, the courts which dispensed the best justice grew, while those which could not offer competitive redress disappeared. Eventually, the laws of competition resulted in many small individual courts being surplanted by the King's Court simply because it could offer a better form of justice.[5]

By the 14th century, the fragmented system of local courts operating on free enterprise principles evolved into a comprehensive legal system. The feudal and communal courts gave way to justice emanating from the county level with points of law argued at Westminster.[6] This shift in the English system of law has been described in terms of the viewpoint of English judges of that era. While 13th century judges were considered to be empowered to do what justice demanded, English judges in the 14th century considered their duty to be an application of the law.[7] Thus, it is significant that in the 14th century, recognizable doctrines of law began to emerge as part of the English legal system.

The body of law emerging during the 14th century was in fact a growing base of principles and rules developed by the judges themselves as they administered the "law and custom of the realm."[8] During the early years of English law development very little statutory law existed. Thus, judges in solving controversies adopted the use of

precedents--the reasoning and conclusions exhibited by judges in deciding similar cases. The early use of precedents depended on word of mouth as attorneys would describe similar cases in other jurisdictions with bearing on the controversy under adjudication for the benefit of the judge. However, as this process became more formalized, cases which raised points of interest to lawyers and judges were reported, with each report containing the facts of the case, the arguments put forth and the reasoning of the decision.[9] Consequently, on a case-by-case basis various doctrines of law became established and were applicable in similar factual situations.

During the 14th century a doctrine of law began to appear which was nationwide in application rather than fragmented. As a result the term "common law" became descriptive of English law.[10] This turning point away from the predominance of local law and custom signaled the beginning of the body of legal principles which would later be referred to by the colonists to form American law. By the end of the 17th century the common law of England had evolved into a highly elaborated body of doctrine, particularly in the fields of real property, torts and criminal law.[11] Thus at the point when the American colonists turned to England for a system of law they were viewing a distinct body of principles developed apart from the legal tradition of the European continent. They were drawing upon a unique experience, a

body of legal doctrines derived at a minimum from statute, and to a large extent from the decisions of judges drawing upon an accumulation of past precedents. The English legal doctrine represented a rational set of principles governing human interaction in various areas of concern developed over a period of several centuries on a case-by-case basis.

In large part, the colonies established their principles of law through enactment of statutes--a practice which was more expedient than waiting for precedents to develop and which allowed them to adapt English doctrines to their needs. Yet, despite variances from colony to colony, the substance of colonial law remained rooted in English tradition. This consistency was not totally by chance or choice, however. The Crown, acting through the Privy Council, retained the power of veto over colonial enactments in order to maintain consistency between colonial law and English law. Additionally, the colonists in looking for models upon which to base their judicial procedure quite naturally turned to England and copied acts of Parliament for establishing American legal procedure.[12]

Following the American Revolution, the states established the judiciary as a separate branch of government--a change from the colonial practice of vesting judicial authority in the governor or the legislature. By 1800, most states then in existence had established a court

of last resort.[13] With a judicial framework established, culminating in a supreme court, the machinery was set for establishing a distinct body of American law.

During the early 1800's, state legislatures devoted a great deal of time to the repeal of archaic colonial statutes, and the passage of new laws suitable to the growing commercial society emerging in the United States. However, the widespread legislative reform which might be expected did not take place. Apparently, there was not present in America the large body of professional individuals skilled in accomplishing large legislative reform projects, and, as a result, sweeping changes in the basic framework of law were not initiated. Additionally, it has been observed that at that point in history it was difficult to foresee the needs of a growing country, and thus difficult to construct with certainty a new legal system.[14] As a result the English influence in traditional legal doctrines remained woven in the American legal fabric, and the courts, rather than the legislatures, became the institutions responsible for molding American law to the needs of its citizens. By the 1850's the task of laying America's legal foundation was complete. The period following 1850 was one of elaboration by the courts and the legislatures.[15]

It is interesting to note, however, that while the courts were assigned by default the task of molding the essense of American law,

they were hesitant to assert this responsibility at both state and federal levels during the early years of the United States. As will be pointed out with regard to the federal courts later, the state courts accepted the supremacy of the legislature; partly because they were usually appointed or approved by the legislative body. Thus, since it often was the legislative body which drafted the constitution for a state in those early years, the fact that the constitution was supreme over statutes was not as readily apparent as it is today. As a result, state courts were hesitant during the 18th and early 19th century to void state laws. It was not until after the Civil War--a time coincident with increased federal court activity--that states began to actively check legislative excesses, and thus play an important role in shaping the form and direction of law.

As the states were establishing their legal frameworks, concurrent efforts were underway at the federal level to institute a system of laws. Of course, at the federal, as well as state levels of government more is needed than the simple passage of laws. A system for administering, interpreting and enforcing the laws enacted by a legislative body is necessary. And, it is this system which through its machinations creates law itself.

Contrary to popular belief, the United States Constitution at Article III states "The judicial power of the United States, shall be

vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Thus, while the Constitution gives life to Congress and the President, it is Congress which must act to create a federal judicial system. (A judiciary, or system for interpreting and enforcing law, needed to be created.)

Through the Judiciary Act of 1789, Congress created "one Supreme Court" and a system of "inferior" federal courts. Thus, through its power not only to create the substance of law, but to establish the system giving the law life, Congress enjoyed an influential role in determining the nature of our legal system. In addition, Congress through legislative action determined which cases the inferior federal courts had jurisdiction over. As a result, the role of the federal system of laws was to a large part determined by Congress, and was distinctly separate from the state legal systems.

The sovereignty of the states continued unimpaired by the federal judicial system until 1868 when a provision was added to the United States Constitution which had the effect of subjecting state courts to the supervision of the United States Supreme Court. The 14th Amendment provided that "no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law." The words "due process" and "equal protection of the law" proved over time to be the most important part of this amendment.

The reason this phrase became important lies more in the impact it has had than its original intent. The words "due process of law" were not new. They had appeared in English law during the 14th century, and in colonial law. Since the words also had appeared in the 5th Amendment, and were repeated in many state constitutions, it is assumed that the original intent was to reinforce federal authority in the states at a time when the Negro was not receiving equal justice. Apparently, the phrase originally meant that established legal procedure would be followed in their case--thus protecting the Black man from discriminatory justice. It did not mean--as later extrapolated--that the legal procedure followed must be fair or rational, for the 14th Amendment existed at a time when the accused was denied the right to testify in his own behalf, and for decades no one suggested a different interpretation.[16] In fact, it was not until 1927 that a state court conviction was set aside for unfair procedure which violated the due process clause. Tumey v. Ohio, 273 US 510 (1927).[17]

However, it did not take until 1927 for the effect of the 14th Amendment to be felt in state courts. During its first 100 years of existence, the United States Supreme Court voided only 175 statutes. Yet, interestingly enough, 100 of those decisions occurred during the 20 years following the Civil War and the adoption of the 14th Amendment. Since 1889, the number of statutes declared void has been estimated at

over 500.[18] This marked increase in the frequency of intervention into the affairs of state legislatures by the Supreme Court has been attributed primarily to the existence of the "due process" and "equal protection" clauses in the 14th Amendment. Although it should be pointed out that two additional acts enacted by Congress contributed to the increasingly active role played by the Supreme Court in state legal affairs, and thus the entire American legal system. In 1876 Congress expanded the jurisdiction of the federal courts permitting suit solely on the ground that a federal question concerning a state enactment of law was involved. And, in 1914, Congress acted again enabling the Supreme Court to review state court decisions on the validity of state legislative action. As a result of these two enactments and the 14th Amendment, the Supreme Court has assumed an important role in determining the nature and essence of our legal system. Contrary to the situation which existed following the American Revolution where the American legal system was growing uncertainly through separate state and federal activity based on colonial experiences, today the function of state courts, and indirectly state legislatures, is simply preparatory, subject to final approval or disapproval by the United States Supreme Court.

The Supreme Court has in essence assumed a twofold role: (1) an arbiter between federal power and the states; and (2) an umpire

between the citizen alleging governmental invasion of constitutionally protected rights of property or person, and the governmental authority exercising that power. It is perhaps this second role which is more pronounced, and more readily discernable by the citizenry. It is also this second role which has led to integration of state and federal legal systems into one system of American law.

During the first 100 years after the United States Supreme Court established its right to declare federal enactments void, it did not invalidate a single act of Congress for invading the rights of individuals. Even today, with respect to federal law, the protection of individual rights by the Court is insignificant.[19] However, the opposite is true with regard to state legislation. While there was little constraint on state legislative and judicial activity prior to the adoption of the 14th Amendment, state activities were closely scrutinized following its adoption. As previously mentioned, particularly after the 1927 case of Tumey v. Ohio, the phrase "due process" became extremely important as a vital ingredient of our legal system. As one author has stated the phrases "due process" and "equal protection" fixed the framework for constitutional revolution.[20] In the criminal law field, the words "due process" became synonymous with fundamental fairness. "Due process" and "equal protection" also became the key concepts to prevent unreasonable invasion by government on the use of

private property, with the court being the arbiter of reasonableness. During the years since the 1920's these two phrases have been applied to public issues which the original drafters could not have conceived of. For example, noteworthy precedents based on these concepts have occurred in the areas of economic regulation, freedom of expression, religion, racial discrimination, and representation in state legislatures.

It is perhaps these principles enunciated in the 14th Amendment denoting ultimate fairness in the law and its application which act as the cohesive element of our legal system influencing its shape, form and effect at every level of the American legal system. While statutes, ordinances, administrative rules and court decisions--the tangible pieces of script which constitute the law--can address a multiplicity of subjects and appear in various forms and degrees of detail, it is adherence to and respect for the principles of "due process" and "equal protection" which maintains focus on our collective objective of social justice.

A Look at Legal Procedure

The law, whether in the form of statutes or in case law, merely sets forth guidelines for the conduct of human behavior, and for our

judicial tribunals to make decisions. The significance of our body of laws can only be completely understood through an understanding of the way in which our legal system operates as it applies the guidelines to the particular facts present in specific situations.

It was noted in "Two Views from the 1830's: Alexis de Tocqueville and a Critic" that there is probably no single thing that our government does with less efficiency than administer law. The operations are expensive to government as well as the litigant. The work of interpreting and applying law is done with great dilatoriness, and yet, miscarriages of justice still occur.[21] These observations of the American legal system made over 100 years are probably still true. Justice is not accomplished efficiently or cheaply. At times it does not even seem that the results of such a lengthy, involved process are just or fair. Yet, it is this method of determining truth and obtaining justice that we operate under, and despite the fact that it may be inefficient and produce results we don't agree with, it is the system we must understand if we are to use law as a creative implementor of our public objectives. A discussion of the merits and deficiencies of the legal system, while certainly important, is inappropriate in the context of this discussion.

If we step back a moment, the context within which our legal system operates can be quickly visualized. The scenario goes something

like this. We are a country of laws. Our legislative bodies at federal, state and local levels have been delegated the responsibility for formulating the rules under which we will all live, relate to each other, relate to our government, and accomplish collective goals. The resulting statutes, ordinances, administrative rules--laws--provide the guidelines defining permissible human behavior. Yet, it is not enough to simply have the rules established. A means must be available for determining how these abstract rules relate to the facts of everyday human action; the resolution of disputes in light of interpretative decisions; and methods for enforcing the objectives of the law. Of course such interpretations will necessarily review the validity of the guidelines themselves--a check on the legislative authority which has been delegated by the citizens--and will by virtue of the ability to enforce decisions become law themselves. Thus, we have as the basic framework of law a dynamic situation where the abstract principles spelled out in statute become operational through the work of the courts. As a consequence the process of interpreting and enforcing law becomes a major contributor to its substance, as well as its changing nature. It is therefore just as necessary to understand legal procedure and the relative importance of its products, as it is to understand the meaning of words placed in a statute. Without a comprehension of the manner in which law becomes real and displaces impact on human

activity, it is impossible to creatively use law to achieve public objectives.

The forms in which law is expressed can be categorized as: constitutional, statutory, ordinance, administrative regulation and case law. Case law differs from the previous mentioned categories in that rather than being succinct policy statements adopted by a legislative body, or administrative agency under legislative approval, it is composed of principles expressed in court decisions which through the doctrine of stare decisis become precedent to be followed in similar cases. Within these categories of law it is possible to discern substantive law which defines legal rights and responsibilities--guidelines for human activity--and procedural or adjective law. Adjective law specifies the procedures which must be followed to exercise a power, resolve a dispute, or interpret and enforce substantive law.[22]

As a practical matter, law becomes operational in light of the facts present in a given situation. In a criminal context, certain fact situations describe behavior which is prohibited by law, and when such fact situations are present, applicable penalties can be invoked. In a civil context, it is the factual situation present which determines how and when a specific power may be exercised, or when one party has infringed upon the legal rights held by another. In either sphere--

civil or criminal--the guidelines defining proper human action exist for application to specific factual situations.

Thus, law only has meaning to the layman within his ability to relate it to the reality of his behavior. In its most rudimentary form, a citizen knows that if he drives his car through a stop sign without stopping, this factual situation will violate the principles embodied in the motor vehicle code and applicable penalties will be applied. In a more sophisticated sense, a citizen desiring to acquire a parcel of property and build a housing development will become involved in a complex exercise, analyzing and manipulating the facts inherent in his activities in order to use as well as satisfy the legal principles which permit and control the reaching of his objective. As a consequence, the creator of a statute or ordinance attempts to frame his guidelines in language that will result in the desired mode of human behavior, while encompassing the widest range of factual situations which could arise with respect to that desired mode of behavior. In the case of stopping at intersections this will be relatively easy. However, with respect to property rights and responsibilities this task could be considerably more difficult. As a result, statutory wording to be brief will generally be vague when dealing with a complicated issue, while to be concise necessitates length and detail. By its nature, brief and vague or lengthy and complex,

statutory law to be relevant to everyday activities--particularly in complex situations--often results in the need for: (1) attorneys to advise the layman on how legal principles relate to a particular fact situation, and to advocate the layman's position on this relationship; and (2) courts to act as the arbiter to finally establish the facts in the issue at hand and apply the applicable legal guidelines accordingly.

It is out of this need to consistently and fairly apply our laws to the specific circumstances of everyday life that legal procedure evolves. Through the cycling of this procedure, on a case-by-case basis, we gain a firmer understanding of the intent of our laws, the relationships between uncodified principles and statutes, and the impact that law has on our daily activities. We also are enabled through the process of interpretation and application to maintain a flexibility in law which allows adaptation to changing social needs.

Legal procedure has as its objective the attainment of justice, and attempts to reach this objective through the use of formalized procedures focused on equity--a process founded upon fundamental fairness and objectivity. This emphasis on procedure is often criticized as unnecessary. Yet, mechanisms for resolving disputes are necessarily of human design, and human weaknesses being what they are, particularly in stressful situations, artificial procedures consistently applied to

all parties represents the only way to insure an equitable process of adjudication. When both parties to a dispute are desirous of a quick and equitable solution, procedure will pose little difficulty. However, when the parties are in serious conflict and inclined to abuse the rights of others in order to attain their concept of the proper solution, procedure will act to prevent abuse and produce fair resolution of the conflict. Of course, procedure itself is not pure. It can be manipulated. It may be archaic and unsuited to new forms of contemporary problems. By virtue of its long-range insistence on consistency, it can produce seemingly immediate injustices, commonly referred to as "getting off on a technicality." However, our purpose in this discussion is to understand the need for procedure and not to criticize its characteristics.

The procedures of our legal system are aimed at the resolution of disputes--conflicts over how power should be exercised, or in a criminal context whether an individual has violated rules of acceptable social behavior. This goal is reached by first ascertaining the true facts present in the case or dispute under consideration, and then applying the relevant principles of law. In a criminal context the ascertainment of the correct facts will be for the purpose of determining whether the person accused is guilty of violating certain statutes. In civil cases the proper factual context is determined in order to

apply the applicable legal principles, thus reaching a decision as to which party has exceeded the parameters of its legal rights and responsibilities.

The determination of the facts present in a case is a very important element of the legal process, for only 1 in 5 of the cases which reach court turn on "what the law is"; the usual dispute is over the true facts present in the case. Once the facts are set, the result is usually foreordained by the applicable principles of law. When injustice occurs it is usually because of an error in ascertaining the correct facts present.[23] The importance of facts in legal procedure is a key factor to be remembered by planners. If a planner is to develop creative strategies for implementation and use law innovatively to accomplish public objectives, he must understand the essentialness of relating facts to legal principles. He must have the foresight to visualize the specific factual environment into which he is injecting a legal strategy to accomplish his goals, and be prepared on a case-specific basis to present the factual information to support the reasonableness of his actions in accord with applicable legal concepts. These words of Judge Frank directed to attorneys are equally applicable to planners intent on using legal tools for implementation:

> Trained lawyers know the "jurisprudence" relevant to murder trials of automobile accident trials and can prophesy with a high degree of reliability what rules will be applied in

> such litigation. But what of it? The layman wants to know whether these rules will be applied to actual facts . . . . If a man, defeated in a suit because of a mistake about the facts goes to jail or the electric chair or loses his business will it solace him to learn that there was no possible doubt about the applicable legal principles?[24]

The legal mechanism can be said to begin its movement at that point when a potential party to a legal action mulls over a given set of factual circumstances and believes that an injustice has occurred. This can result intuitively, spontaneously, through extended reflection, or as a result of an overt action as in criminal situation. Generally, this feeling of injustice will be followed by contact with an attorney to determine the proper course of action to obtain redress. The attorney will critically establish the facts present in the case and apply principles evident in statute or case law to determine if redress is warranted, and the proper strategy to be followed to obtain a resolution to the problem. Once the appropriate legal principles have been identified and their relationship established within the facts present, appropriate actions will be taken to obtain redress. In a criminal case this would mean the bringing of charges against the individual believed to be responsible for the infraction of law. Civilly--the area of law probably of more interest to planners--contact may be made with the other party to the dispute to determine if a solution may be consumated. If such informal overtures are not successful,

the plaintiff will bring suit in the court with the appropriate jurisdiction, identifying the facts present, the legal issues involved and the redress desired. Even at this point though, when it would seem that the commitment has been made to enter formal adjudication procedures, the parties to the dispute through negotiation may arrive at a solution agreeable to both without intervention of the courts.

Historically, once a controversy entered the courtroom, the objective has been to obtain redress, rather than the prevention of an act or the mere declaration that one party is right and the other wrong. To obtain redress facts must be established and legal principles applied. To accomplish this task, the American system of law has utilized an adversary process which proceeds on the theory that since each party is intent on discovering all facts present and favorable to its contentions, and disproving allegations, no fact will be overlooked, or false claim allowed to stand. While simple in theory, this concept can be intricate and subject to abuse. There is an incentive to discover all facts; however, there is also the temptation in arguing one side of a case to fabricate or discolor, to forget facts or even suppress certain facts.[25] In other words, two parties locked in a competitive battle can often be tempted to use facts in selective and directed manners. Thus, trial proceedings often assume

the character of a forensic duel, rather than a disinterested investigation. Essentially, combat occurs between two attorneys with the judge acting as a referee to announce the victor. If a jury is present its purpose is to listen to arguments and establish the true facts in the case; yet, interestingly enough the individuals who must evaluate the testimony are not permitted to ask questions.[26] The adversary approach to determine the facts present in a case--a key characteristic of the American system--is termed an accusatorial proceeding. This method of obtaining justice differs from that on the continent where the court takes a distinct lead in conducting an investigation to determine the true facts present. This approach has been termed inquisitorial.[27]

It is this characteristic of the American system--the adversary process--which has been pointed to as responsible for less than perfect judgments. As we have noted, establishment of the facts is a key element of applying the proper legal principles and resolving a controversy. It has also been noted that where miscarriages of justice occur, it is usually because of an inaccurate ascertainment of the facts present in a situation. Thus, a heavy responsibility falls on the adversary process, for it is the mechanism by which facts are sorted and a true picture of the situation in contention is constructed. Yet, it is the adversary type of proceeding which places great

emphasis on the roles of two competing attorneys intent on scoring a win, reduces participation by the judge to that of a referee, prohibits inquiries from the jury, and reduces witnesses to subordinate roles subject to great control by the attorneys. In such a setting each side to a controversy led by its advocate can orchestrate a strategy designed to array facts in a manner supporting its ultimate objective. It is not surprising that as we encounter increasingly complex and technical questions which under our system can only be ultimately resolved through litigation, there are suggestions from legal scholars that the court take a more active role in investigation. Additionally, it has been suggested there is a need for access by the court to experts on technical issues which are not employed by either side to a controversy.[28] These suggestions recognize the merits of the adversary approach, while also entertaining cognizance of the deficiencies of traditional legal procedure in an increasingly complex society.

Recognizing the adversary nature of our legal system, it is easier to understand the steps followed in litigation once the decision to bring suit is made. Since civil proceedings are more relevant to the concerns of planners than criminal, the remarks which follow are descriptive of the procedures followed in civil litigation.

Generally speaking, in a civil proceeding the court will be asked to (1) declare that a certain party possesses certain rights;

(2) prevent a threatened wrong; (3) undo a wrong already accomplished; or (4) award monetary compensation.[29] For the planner, it is the first two types of redress which will be most relevant. In the first, it is not improbable that a planner employed by a governmental unit will find himself associated with the defendant in zoning litigation where a plaintiff seeks to establish that he possesses certain rights denied by governmental action. In the second, the planner may assume the position of plaintiff seeking to block an activity damaging to the environment. In any case, as plaintiff or defendant in any form of civil litigation it is important that the planner understand the dynamics of the lawsuit process once the commitment to enter the courtroom has been made. Advance knowledge of the process as well as applicable legal doctrines may assist the planner in using implementation strategies which avoid the courtroom, and, when unavoidable, increase the probability of success.

Once the preliminary attempts to resolve a dispute have failed and the decision to institute a lawsuit has been made there are several stages to civil litigation which must be traversed; (1) the acquisition of jurisdiction; (2) provisional steps; (3) the framing of issues; (4) proceedings preparatory to trial; (5) trial; (6) proceedings following trial.[30] As can be readily seen there are several stages to a legal action before the controversy is brought to trial. And, at any of these points the controversy could be resolved.

Once the lawsuit has been filed in the proper court which has legal jurisdiction to consider the controversy in question, several provisional remedies are available to the plaintiff while the proceeding is pending. These remedies, such as a temporary injunction, are designed to immobilize the defendant until a full review of the situation can be made by the court. When a request for an injunction is received, typically a judge will review affidavits from both parties and decide whether the facts present warrant an order restraining the defendant from doing certain acts. Since formal proceedings subjecting the affidavits to cross examination are not held, the issues should be very clear to justify issuance of an order. In some cases a hearing will be held.[31]

In commencing the lawsuit, the plaintiff prepares an initial pleading which contains a statement of the facts and a demand for the judgment that he believes he is entitled to. It is an important element of the American legal system that the petitioner state exactly the form of redress he is seeking. Thus, in the subsequent stages of the litigation the question posed is not what the rights of the petitioner and defendant are, but whether the plaintiff is entitled to the redress he is seeking.[32] This element of the legal process is important for the planner to remember for it is a very human tendency to view a controversy from a general perspective of who is right and

who is wrong, while the legal process will be focused in a very case specific way on the manner in which specific facts relate to specific legal principles. This perspective may create a disadvantage for the planner which he must realize and compensate for. The planner typically operates on a generalized scale in line with his concept of the public interest; yet his actions will be legally challenged from a case specific perspective, questioning whether individual rights have been violated.

Once the initial pleading of the plaintiff has been received by the court, and certain technical questions, such as whether the court petitioned can grant the redress requested, have been answered, the defendant is permitted to file an answer to the pleading. The defendant, in his answer, will typically establish his version of the controversy and deny the facts which have been alleged. In addition, the defendant may mount an affirmative defense which will reveal matters which would have the effect of nullifying the plaintiff's right to the redress he seeks.

The plaintiff may then reply to the defendant's version of the controversy, and if it appears to the court that there is no necessity for a trial to determine the facts present, a summary judgment may be rendered. However, if the pleadings do not establish the facts, they serve as the basis for identifying the issues of fact which will have

to be resolved by trial. Since every allegation in a complaint should be answered by the plaintiff and subsequently addressed by the plaintiff and subsequently addressed by the plaintiff in his reply, it should be possible to identify the allegations which are at issue between the parties. The trial will then be confined to consideration of the facts at issue.

The trial itself is held in an adversary atmosphere with each side presenting proof supporting its version of the facts present in the case. While several issues may be involved in a trial, they are not taken sequentially. The plaintiff, who normally has the burden of proof, will present his entire case first. Then the defendant will have the opportunity to present proof in rebuttal, and evidence supporting any matters he may be taking the initiative on. As the evidence supporting the contentions of each side is presented, the judge acts as the umpire, ruling on the admissibility of evidence, the competency of witnesses, motions for dismissal and directed verdicts, and finally instructs the jury as to the points of law to be applied to the factual situations presented. In a high percentage of civil cases, a jury is not used.[33]

Following the presentation of the case by attorneys for the plaintiff and defendant, the jury, or in its absence, the judge, must decide if the redress requested is warranted. To accomplish this a

decision must be reached on what factual configuration is actually present in the case, and against these facts applicable legal principles must be applied to determine if redress should be granted.

Once a decision has been reached at the trial level, our system of law permits either party to appeal to a higher court for a review of the judgment. Upon review, appellate courts generally will not review the finding of facts established at the trial court level. Although, many states do provide for "trial de novo" which permits the appellate court to conduct a retrial of the case with the same freedom of action enjoyed by the lower court. Usually, the appellate court on appeal is concerned with issues of law. It is looking for errors of law which may be procedural--mistakes were made in the conduct of the trial--or substantive--legal principles were not correctly applied to the facts present in the case. A common procedural error in civil cases is the admittance of improper testimony, or the failure to admit proper testimony.[35]

Once the appellate court receives a case, it has great latitude in how it will treat the controversy. The court may find other legal issues present in the facts to address, ignore other issues present, order additional briefs from the parties, and solicit the filing of amicus curiae briefs--arguments from persons who are not parties to the suit, but "friends of the court."[36] Yet, in spite of this

latitude the appellate court is very much in a dependent relationship. It has no power of initiative. It must rely on parties to a controversy to appeal and thus bring the issues under its purview. The appellate court is very dependent on outside circumstances with regard to the type and timing of the cases it hears.[37] Additionally, as previously mentioned, that very important aspect of each case--the facts--will have been determined at the trial level.

Once the preliminary steps of bringing an appeal have been taken, a date for oral argument before the court is assigned. Normally the time allowed for presentation of arguments will be strictly circumscribed. The United States Supreme Court has a 1 hour limit. Many state supreme courts limit each party to one half hour.[38] In light of the fact that the oral argument will be brief, the burden of proving a case rests with the written brief which is presented to the court.

The brief is a distinctive feature of the American legal system. It represents a written document which sets forth the facts of the case, the pertinent statutes, regulations, constitutional provisions and case law, and then makes carefully arranged legal arguments on the issues involved. A good brief has been described as a document which embodies a good combination of learning, logic and literary qualities.[39]

Prior to the oral argument, the case is generally assigned to a judge who prepares a preliminary memorandum on the case. This memorandum will summarize the case, outline the parties' contentions and indicate the major or most difficult issues to be resolved. This document is circulated to the other judges to assist in their review of the case and participation during the oral arguments.

The oral arguments consist of presentations by both parties to the case with the court asking questions to probe for weaknesses and resolve issues. Following the argument the court will hold a private conference during which the issues will be discussed and general agreement reached. A judge will then be assigned the task of drafting a majority opinion which will be circulated among the other judges for criticism, amendment and signature.[40] At the conclusion of a case there may be one opinion signed by the entire court or several opinions discussing various viewpoints of the justices either concurring or dissenting from the result.

Once a decision enters the appeal process the steps it will follow before a final decision is reached will vary. Court structures in states will vary. However, generally speaking, there is an intermediate level of appeal before reaching the highest state appellate court. The same is true with the federal court system where the Court of Appeals hears cases prior to consideration by the United States

Supreme Court. Whether cases reach the supreme court level is dependent upon the initiative of the parties, and also the court itself, for with the exception of certain controversies defined by law, the court itself decides if it will accept and hear the case being appealed.

To the parties to an appeal, a decision by the appellate court, just as with the trial court, means one position will be vindicated and the other party will lose. Yet, within the system of law the outcome has a distinctly different meaning at the appellate court level as opposed to the trial court. The function of the trial court is to dispose of specific controversies--a very utilitarian purpose. However, the decisions of appellate courts have more far reaching implications. Their actions serve to shape the development of law and create new law. This result occurs because of the doctrine of stare decisis--the rule that courts will follow the rule or doctrine which has been established in previous cases exhibiting similar factual situations. Thus, when a decision is made with regard to a specific controversy, everyone is put on notice that when similar facts arise again the law will be applied in the same manner as it was applied in the case in point. As a consequence, while it may be difficult to find cases with factual situations which are exactly the same, the reports of the appellate court decisions are very important as sources of reasoned doctrine. Commentaries are presented on statutes, constitutional provisions, and legal doctrines, refining

them and explaining how they apply to the realities of life. In this way, the appellate courts slowly reexamine and reevaluate the law, adjusting it to meet new social needs.

It should be noted that in the American legal system the rule of stare decisis is not firm. The decisions of American courts, though following precedent, are never beyond challenge in a new lawsuit. In fact our courts have not shown the hesitancy displayed in England to overrule themselves. Thus, a precedent can be said to be controlling only until it is reversed. Because of this feature of the American system, lawyers need not only argue precedent in presenting their cases, they may also argue principle.

Concluding Comments

Against the advocacy of a planning framework which can be described as problem-oriented, and solution-intent, this discussion has revealed the nature of one major implementing tool--the law. Sincere in the belief that specific problem resolution strategies can become part of the planner's arsenal only through a sensitivity to the creative use of professional synthesis, an attempt has been made to lay the foundation for one such synthesis--planning and law.

Although there are many subject areas in which planners and other professions could share knowledge and realize a net increase in social benefit, law has been chosen as a suggestive model because of its pervasive influence in our society and profound effect on public policy, and the affairs of each citizen's life. With an understanding of the nature of law, its purpose and the manner in which it is used, planners can increase the effectiveness of their actions--find ways to develop potent strategies for transforming visions into realities.

As the preceding discussion has illustrated, planners and lawyers may not find themselves at odds as they each attempt to implement their objectives because they hold different values or ascribe to different concepts of justice. Their conflict may very well result from the holding of different perspectives necessitated by the nature of their professions with a total lack of understanding of what motivates the other's viewpoint. Since each advocates a function in society which is essential to the beneficial existence of all citizens, a sensitivity to the merits of the other's task, an awareness of why the planner performs the function he does and its importance, as well as a reciprocal feeling by the attorney, can only serve to assist society with its increasingly complex problems. With the blending or synthesis of perspectives can come problem solutions impossible to attain from a position of separation.

While it is equally important for the lawyer to understand the planner, it is the purpose of this thesis to sensitize the planner to the law and its potential when placed in a complementary relationship to enhance planning objectives. With a general understanding of the nature of law, its administration, the manner in which it is formulated and evolves, and its ultimate purpose, the planner can more specifically place his objectives in an implementation framework. With the adoption of such a stance, the planner can develop visions for the future and develop strategies to turn such visions into reality.

As we move to look in greater depth at law and its relationship to zoning, it is important to keep the contextual material discussed in the preceding pages in mind. It is equally important to remember that while law and planning are both interested in collective social benefit, the American legal system places heavy emphasis on justice and equity from the standpoint of the individual citizen, while the perspective of the planner may be considerably broader, and neglect to adequately weigh public need against individual rights. Additionally, planners must remember that while they form their objectives and programs with broad brush strokes, their actions will be tested for legality on a case specific basis. The importance of facts cannot be ignored, for one of the basic operations of the legal system is to determine the

factual environment of a situation, and relate this environment to the legal guidelines which prescribe proper social action. The planner who undertakes an implementation strategy without consideration for the factual configuration which must be present to substantiate his activities invites disaster. Just as certainly, the planner who ignores, or fails to establish a strong factual basis for his opinions risks disapproval of his viewpoints by the courts, should his actions be subjected to litigation.

The law is interested in maintaining a proper balance between needs and individual rights. Using the guidelines society establishes for itself through legislation, and concepts of justice and equity, the law will judge individual controversies in line with its perspective of the public interest. The planner must understand the stance of the law in defining the public interest if he is going to also seek to transform his visions of what is in the future public interest into reality. The perspectives of law and planning need not be divergent, they can be complementary.

FOOTNOTES

[1]Archibald Cox, "The Nature of Supreme Court Litigation," Constitutional Law in the Political Process, ed. John R. Schmidhauser (Chicago: Rand Mc Nally, 1963), p. 520.

[2]Ronald A. Anderson, Business Law Uniform Commercial Code, (7th ed.; Cincinnati: South-Western Publishing Co., 1964), p. 1.

[3]Oliver Wendell Holmes, Jr., "Law and Policy: How Judges Make Law," Constitutional Law in the Political Process, ed. John R. Schmidhauser (Chicago: Rand McNally, 1963), p. 455.

[4]Lewis Mayers, The American Legal System (New York: Harper and Row, 1964), pp. 339-340.

[5]R. M. Jackson, The Machinery of Justice in England (London: Cambridge University Press, 1960), pp. 2-5.

[6]Ibid., p. 5.

[7]Ibid., p. 11

[8]Ibid., p. 11.

[9]Ibid., p. 11.

[10]Mayers, p. 341.

[11]Ibid., p. 341.

[12]Ibid., p. 344

[13]Ibid., p. 345.

[14]Ibid., p. 345.

[15]Ibid., p. 346.

[16]Ibid., p. 15.

[17]Ibid., p. 16.

[18]Ibid., p. 321.

[19]Ibid., p. 330.

[20]Ibid., p. 332.

[21]William Willoughby, "A Contrary View of the Role of the Bar," Constitutional Law in the Political Process, ed. John R. Schmidhauser (Chicago: Rand McNally, 1963), p. 253.

[22]Anderson, p. 14.

[23]Harry Jones, ed., The Courts, The Public, and the Law Explosion (Englewood Cliffs, New Jersey: Prentice Hall, 1965), p. 132.

[24]Ibid., p. 135.

[25]Mayers, p. 100.

[26]Ibid., p. 101.

[27]Ibid., p. 102.

[28]Ibid., p. 258.

[29]Ibid., p. 151.

[30]Ibid., p. 229.

[31]Ibid., p. 236.

[32]Ibid., p. 240.

[33]Ibid., p. 261.

[34]Ibid., p. 272.

[35]Ibid., p. 275.

[36]Jones, p. 67; planners could make more effective use of amicus curiae briefs to promote public goals.

[37]Ibid., p. 68.

[38]Ibid., p. 73.

[39]Frederick Wiener, "The Conduct of an American Appeal," Constitutional Law in the Political Process, ed. John R. Schmidhauser (Chicago: Rand McNally, Rand McNally, 1963), p. 237.

[40]Jones, p. 71.

A REVIEW OF MICHIGAN COURT DECISIONS

GUIDELINES FOR EFFECTIVE ZONING

STRATEGIES

Chapter III

A REVIEW OF MICHIGAN COURT DECISIONS--GUIDELINES FOR EFFECTIVE ZONING STRATEGIES

> ...both the law and the planning profession need to improve tools and techniques.
>
> --Padover v. Township of Farmington 374 Mich 622 (1965) at 642

Zoning represents a legal instrument which planners have traditionally and frequently used to implement plans for communities in their attempts to guide future growth and development. Since it does permit legally enforceable control over private property, it also represents an area of interface where planners and lawyers will find themselves either working together, or in conflict. As one of the oldest and more basic tools available for implementation by governmental units, it is vitally important that planners understand what the purpose of zoning is, and how it can be used creatively for the benefit of the public. This understanding must emanate not only from the perspective of planning, but also from the law--an understanding derived from synthesis. Deficiency in this area of planning practice can greatly reduce the effectiveness of planning programs.

In the context of a problem-specific approach to planning, the value of a working knowledge of zoning law is readily apparent. As one of the tools available to planners to avert or resolve problems relating to land usage, the planner should have the ability to call this tool to bear on specific development problems when appropriate. This capability necessitates an intimate knowledge of zoning law--an awareness of the principles of our legal system, sensitivity to legal doctrines applicable in zoning matters, and the ability to work effectively with members of the legal profession. Since zoning is an obvious area of interface between law and planning, it serves as an excellent example of the benefits which can be derived from planning based on professional synthesis.

In the pages which follow a look will be afforded at zoning law, particularly as practiced in Michigan, providing a distinct legal perspective of zoning for the planner. This review of court cases involving zoning controversies, when viewed against the contextual material presented previously on the general nature of law in substance and as a process, should reveal considerations for the practice of zoning which can help the planner use this tool more effectively and with more benefit to the general public.

Background

Zoning is an instrument traditionally used by local units of government to regulate the use and development of privately owned land. It represents one tool available to government for encouraging pleasing, healthful, and safe community environments, by insuring proper use of land and protecting essential resources. More specifically, zoning is a means for insuring that the land uses of a community are properly situated in relation to one another; adequate space is provided for each type of development; land uses will be efficiently served by public utilities, facilities, and services; natural resources protected; and individual residents will be secure from the potential of an adverse impact by an adjacent use of land. As a community recognizes its development problems and visualizes its future character, zoning represents one power available to local governments which will assist in creating pleasing urban and rural environments.

It was not until 1916 that a zoning ordinance, as we know them today, was enacted.[1] This ordinance, passed by New York City, contained features common to modern zoning ordinances, including the division of the city into land use zones and the establishment of height and bulk regulations.

Following the New York City enactment, interest in zoning increased but a great deal of uncertainty concerning its constitutionality

persisted. It was not until 1926 with the Supreme Court's decision in City of Euclid v. Ambler Realty that questions regarding the basic constitutionality of zoning as a valid exercise of the police power were answered. This event combined with the release of the Standard State Zoning Enabling Act by the United States Department of Commerce in the same year, resulted in the adoption of zoning legislation by states throughout the country. Today, all 50 states have zoning enabling acts designed to authorize local units of government to regulate the use of land.[2]

Since recognition of the validity of the zoning power and the creation of statutory authority to adopt zoning ordinances, this technique of land development control has gained widespread usage. It may be accurate to say that it is more prevalent in governmental units than any other planning technique and in many governmental units zoning is planning. For example, in Michigan 40% of the townships have zoning ordinances, yet only 24% have planning commissions.[3]

Due to the popularity of zoning among government units--81% of Michigan cities have zoning ordinances--it has been used and abused frequently.[4] While the planner has viewed zoning as a tool to implement plans and create better future environments for a community, this has not always been the perspective adopted by public officials. In some cases zoning has been used to exclude certain so-called undesirable

land uses, such as mobile homes, or socio-economic classes. It has been used to create a small segment of population's image of a desirable lifestyle. There are many documented cases, particularly on the east coast of the United States where it has been used to obtain monetary gain--both by the developer and the public official. In some instances zoning hasn't been abused as much as misused. For seemingly noble intentions, zoning has been applied in ways inconsistent with its legal basis. Perhaps, because of its convenience and familiarity, zoning has often become the catch-all tool with which communities attempt to reach their implicit, as well as explicit, legitimate, as well as illegitimate development objectives. This factor, combined with the fact that by its nature zoning invokes a confrontation between the rights of the individual property owner and the powers of government, has produced an enormous history of litigation.

A glance backward over the history of zoning reveals a propensity for zoning to become a battleground for classic confrontations between competing public and private interests. Units of government, using zoning to implement legitimate community objectives, have found their intentions challenged and their goals frustrated within a transitional area where planning concepts and objectives must fit legal principles defining the role of government and the rights of individuals--principles which are essential to prevent the abuses which zoning

may have a tendency to encourage. On the other hand, individuals attempting to exercise property rights have found that when zoning is exercised fairly with proper cause, they must yield to the public interest. It is in this zone of confrontation--the area of zoning litigation--that the essence of the zoning power and how it may be used to promote planning objectives is found.

In light of the history of zoning litigation--an endless series of legal challenges based overwhelmingly on the application of zoning, and not the concept itself--there is apparently a need for the users of the zoning power--planners and public officials--to understand in greater detail the proper functions of zoning, and the parameters which define the limits of its application to private property. Perhaps, with a better understanding of the delicate balance zoning must maintain between public objectives and private interests, zoning can be used more effectively to improve community environments, while respecting and enhancing the privileges of individual citizens.

In the pages which follow, the decisions of Michigan courts relating to zoning are briefly summarized. The intent of this presentation is not to engage in a lengthy, detailed and comprehensive discussion of Michigan case law. Rather, the objective is to create an overview of the positions taken by the Michigan judiciary on the use of the zoning power. It is anticipated that this material can be read

from two perspectives: 1) informatively as to the legality of zoning in concept and as applied; and 2) problematically as background indicating constraints and directions for solutions improving the effectiveness of zoning as a land use guidance technique. For the informative reader, the court case narratives will only act as guidelines for further research. Specific legal opinions should only be formed after reading the cases of interest in detail. In terms of problematic review, this material will simply indicate litigation patterns and suggest subject areas deserving detailed study. In any case, when faced with a specific situation needing legal interpretation, it is best to ultimately consult with legal counsel.

It should not be expected that a review of Michigan zoning cases will reveal clearcut legal parameters on zoning use. It is a peculiar characteristic of zoning case law that precedents and rules of law are not easily formed. As with other areas of law, the opinions and attitudes of the courts swing like a pendulum, evolving over time as society changes. In addition, zoning cases are each heard on their own merits, with the specific facts peculiar to each case becoming key variables affecting the outcome. For this reason it is difficult to find similar cases which can establish firm precedents. Consequently, the pattern of the judicial attitude toward zoning may appear conflicting in some areas. In many cases it may be a difference of opinion

between two judges. However, in other instances, there may be a difference in the facts present in the cases, or the issues the judges chose to base their opinion on. Therefore quick conclusions as to the judiciary's opinion on a specific subject usually must be abandoned in favor of more detailed study into the issue at hand.

In presenting this review of Michigan court cases relating to zoning an attempt has been made to keep the format and contents concise and uncomplicated. Thus, the cases have been arranged under descriptive headings which easily convey the essence of the issues under discussion to public officials, planners, and zoning administrators as well as attorneys. In the majority of instances, major and minor headings, as appropriate, will be followed by a short narrative briefly providing background information on the subject matter being presented. The introductory remarks may contain comments on Federal court cases relating to the subject under consideration, the judicial position in other states, or appropriate historical data. Against the contextual background of the introductory narrative, relevant Michigan court cases will be cited and the decisions summarized. If specific Federal cases, or court decisions in other states are particularly noteworthy in relation to the issue being considered, they will also be cited and the decision summarized.

It is anticipated that the approach used to review Michigan court cases related to zoning will provide a generalized feel as to the Michigan judiciary's stance on numerous aspects of zoning and its use to control land development. Thus the planner can more readily ascertain the legal perspective of zoning, and by synthesizing this perspective with planning objectives create strategies for implementation which will result in improvement of our rural and urban environments.

The Constitutionality of Zoning

In the United States

While control over use of the land was not uncommon prior to adoption of the first comprehensive zoning ordinance by New York City in 1916, the drafters of the New York ordinance took specific steps to avoid constitutional challenges. It was their opinion that the ordinance would stand only if a firm relationship could be established with the police power. This they accomplished through repeated, specific references to health, safety and welfare, and detailed statements of purpose. The early drafters of the New York ordinance were also aware of the danger of discriminatory treatment under a zoning ordinance,

and were careful to ensure that all lands within a zoning district were treated alike. And finally, they attempted to keep zoning out of the courts by providing a system of administrative relief where the ordinance might impose hardship on a landowner. The authors of the New York ordinance felt that without the administrative safeguard, their ordinance would be immediately challenged and the chances of a successful defense were slim.[5] The efforts of the drafters of the New York ordinance were rewarded in 1920 when in Lincoln Trust Co. v. Williams Bldg. Corp., 128 NE 209 (1920), its constitutionality was upheld by the New York Supreme Court.

The New York City ordinance aroused considerable interest throughout the United States with numerous cities attempting to implement similar ordinances. Yet, the question of the legality of zoning remained unsettled, even after the New York City ordinance was upheld, with contrasting opinions and court decisions arising in state after state.

Prior to 1920, the courts usually held zoning ordinances invalid whenever non-nuisance uses were prohibited.[6] In a number of states challenges to ordinances were based on the due process clause of the United States Constitution and similar clauses in state constitutions, using the argument that private property could not be taken for public use without just compensation.[7] The results of these

challenges were varied, with doubts as to legality lingering to inhibit widespread adoption of zoning ordinances. The uncertainty over the validity of the zoning power led in some jurisdictions to its use by eminent domain, paying compensation where development rights were restricted.[8]

During the ten years following adoption of the New York City ordinance, the constitutionality of ordinances was reviewed in a dozen states with mixed results. Even though courts in Wisconsin, New York, Minnesota, Illinois, Kansas, and other states had upheld zoning as a valid exercise of the police power, it became obvious that the ultimate validity of zoning could only be established by the United States Supreme Court.[9] In 1926, in the case of Euclid v. Ambler Realty Co. 272 US 365 (1926), the Supreme Court settled the controversy and answered the questions of the preceding ten years by upholding zoning as a valid exercise of the police power. The Euclid case became the foundation establishing the constitutionality of zoning in principle, and was recognized ultimately by all state courts.

Case Review

Euclid v. Ambler Realty Co. 272 US 365, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926)

The zoning ordinance of the Village of Euclid, Ohio, was challenged on the grounds that it unconstitutionally deprived the plaintiff

of property without due process in violation of section 1 of the 14th Amendment to the United States Constitution. The plaintiff argued that his property was in the path of industrial development and worth $10,000 per acre for industrial use, while worth only $2,500 per acre as residential. Another portion of the parcel would be worth $150 per front foot if unrestricted, but worth only $50 per front foot as residential.

In answering this challenge, the Court noted that a zoning ordinance to be valid must find its justification in some aspect of police power asserted for the public welfare, and that a definite line between legitimate and illegitimate exercises of the police power cannot be drawn. This decision will vary with the circumstances.

In searching for criteria to define the proper exercise of the police power, the Court suggested the common law of nuisance as an indicator and stated:

> In solving doubts, the maximum "si utere tuo ut alienum non laedas" (use your own property in such a manner as not to injure that of another), which lies at the foundation of so much of the common law of nuisances ordinarily will furnish a fairly helpful cue.[10]

In following this reasoning, the court suggested that the determination as to whether the power to regulate exists, just "like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of a building . . . but

by considering it in connection with the circumstances and the locality."[11]

Reliance on the nuisance rationale provided an adequate basis for upholding the exclusion of industrial uses from residential areas, but did not seem adequate to justify the exclusion of commercial uses and apartments. In answering this more difficult question, the court relied upon the relationship between the exclusion of the use and the promotion of health, safety and welfare. Citing such factors as improved fire protection, reduced street congestion, decreased noise and a better environment for raising children, the Court determined that the Euclid ordinance was a reasonable exercise of the police power and thus constitutional. In establishing the constitutionality of zoning, the court concluded:

> the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, moral, or general welfare.[12]

In Michigan

Prior to Euclid v. Ambler Realty Co., zoning in Michigan was viewed with the same uncertainty as existed throughout the nation. Units of government desiring to use the zoning power relied upon the authority granted by Public Act 279 of 1909, the Home Rule Act, which

permitted cities to provide "for the public peace and health, and safety of person and property."[13] However, in 1920, in the case of Clements v. McCabe 210 Mich. 207 (1920), the Michigan Supreme Court struck down the zoning ordinance of the City of Detroit on the grounds that cities derive their police powers from the state, and neither the Constitution, nor the statutes, authorize a city to enact a zoning ordinance. This line of reasoning is based on the fact that zoning was unknown at common law, and thus the general grant of police power cannot be presumed to include the intent to authorize zoning.[14] The Michigan Legislature responded to the court's action by passing Public Act 207 of 1921, the City and Village Zoning Enabling Act, which expressly permitted cities to exercise the zoning power.

Passage of the City and Village Zoning Enabling Act, while answering the questions raised in Clements, did not resolve the constitutional issues raised by zoning generally during this pre-Euclid era. It was not until 1928, in the case of Dawley v. Ingham Circuit Judge 242 Mich. 247 (1928), that the constitutionality of zoning was established by a Michigan court. Following the decision in Dawley, the Michigan Supreme Court has repeatedly reaffirmed its position in a great number of cases over the intervening years.[15]

Case Review

Clements v. McCabe; 210 Mich. 207 (1920)

The plaintiff desired to erect in compliance with the Detroit Building Code a building to be used as an automobile battery station. In accord with the provisions of a residential zoning ordinance passed by the Detroit Common Council, the City refused to issue the necessary permits allowing the defendant to build the structure.

In challenging the action of the City, the plaintiff's chief contention questioned the right of the municipality to impose zoning restrictions. In considering this challenge, the court stated

> this is a larger issue than the validity of the ordinance before us which is not to be "tested merely by its effect upon relator's piece of property," and "involves its effect on the entire community." The controlling test is whether by any adequate, definite provision in the Constitution or general act . . . cities have been vested with . . . comprehensive police power of zoning

The Court concluded that neither the Constitution nor the Legislature had conferred the right to zone upon cities, and invalidated the Detroit ordinance.

Dawley v. Ingham Circuit Judge, 242 Mich. 247 (1928)

The City of Lansing under the provisions of the City and Village Zoning Enabling Act, Act No. 207 of 1921, had enacted a zoning ordinance. When the plaintiff attempted to erect a building in

violation of the ordinance, the City had obtained an injunction. In an attempt to dissolve the injunction, the Supreme Court considered two questions posed by the plaintiff: 1) has the city power under statute, without a charter amendment, to enact a zoning ordinance? 2) is the City and Village Zoning Enabling Act unconstitutional?

In regard to the first question, the court concluded that a charter amendment was not necessary. However, from a historical perspective, the second question is probably the most important. It was the plaintiff's contention that the Act was unconstitutional because it had more than one object or purpose; specifically that it (1) permitted both cities and villages to adopt zoning ordinances; and (2) it attempted to permit the regulation of occupations and businesses, as well as subjects covered by building codes. The Court very simply concluded:

> We have discussed the questions considered . . . and find no occasion to direct the circuit judge to dissolve the injunction.

The Interpretation of Provisions of the Zoning Enabling Acts

As a general rule, the courts strictly construe the delegation of zoning power. As evidenced by Clements v. McCabe, 210 Mich. 207

(1920), the power to zone must be expressly conferred on the local unit of government in Michigan. This is not the rule in all states. Courts in Ohio and California have upheld zoning under the home rule powers granted by their constitutions.[16] Additionally, the courts view the scope of authority and the procedural steps contained in the zoning enabling acts as mandatory. Failure to substantially comply with the procedures specified in the enabling act can void the ordinance.[17] Invalidity can also result when zoning power is exercised outside the scope of the enabling act.[18] In Michigan, the courts, as evidenced by the decision in Korash v. City of Livonia, 388 Mich. 737 (1972), have repeatedly reaffirmed the position that zoning must be exercised in compliance with the procedural requirements contained in the zoning enabling acts.

The procedural requirements of the enabling acts are considered vitally important by the courts. It is common for challenges to be based on procedural irregularities, and the courts will carefully review the legislative procedures followed during ordinance adoption.[19] In some jurisdictions substantial compliance may not be sufficient to ensure the validity of the ordinance. The courts may insist on strict adherence to statutory procedures. The reason for such stringent supervision by the courts, lies in the basic relief that the procedural requirements established by the Legislature

represents safeguards against the arbitrary use of power. Failure to comply may be regarded as a denial of the due process rights constitutionally guaranteed to citizens.[20]

Adoption and Amendment

Ordinance Formulation

The statutes in a majority of states require zoning to be based on a comprehensive plan. Yet, definition of this term has elicited a great deal of controversy, with even the earliest authorities differing as to the amount of planning needed to support an ordinance.[21] In light of the fact that only a few of the 423 cities which had adopted zoning ordinances by 1926 had based their efforts on a formal plan, it is not surprising that the courts were initially reluctant to require a master plan as a prerequisite to zoning.[22] Accordingly, it is generally found throughout the United States that the courts have usually made modest estimates of the plan requirement. The words of a New Jersey court typify the court's attitude toward the plan requirement. In Ward v. Montgomery Twp., 147 A2d 248 (1959), at 252, the plan required by statute was defined as:

> an integrated product of a rational process revealing a physical partition of the municipality reasonably designed to produce a homogeneous pattern of location and uniform development of variant land uses. The zoning ordinance itself may bespeak the scheme, there need be no extrinsic guide.

Without a specific statutory requirement, the courts have not required that zoning be predicated upon the adoption of a plan. The view of the courts, evidenced by numerous decisions in many jurisdictions, is that zoning can be accomplished in one step with the ordinance being the plan.[23] However, the courts have not looked upon the comprehensive plan requirement as a mere technicality. Rather, they view this requirement as an element which brings rationality to the zoning process, and in determining whether an ordinance meets the plan requirement the courts consider whether forethought has been given to the community's land use problems.[24]

The view that the statutory requirement that zoning be based on a plan can be met by the ordinance itself when based on proper consideration of a community's problems is apparently so widespread that this question seldom arises currently with regard to the basic ordinance. However, in reference to ordinance amendments the issue of the plan enters a great deal of litigation.[25] This pattern is also present in Michigan.

Clan Crawford notes that Michigan statutes reveal that the Legislature intended the freedom of local units to establish different zoning classifications on different tracts of land to be limited by consistency with a general plan. Crawford finds it surprising that basic zoning ordinances are challenged so rarely in Michigan

for lack of a general plan.[26] More frequently the challenge is focused on the reasonableness of an ordinance amendment with reference to a general plan.

Case Review--Michigan

Bloomfield Twp. v. Beardslee, 349 Mich. 296 (1957).

The plan requirement of the statute was met when zoning map was approved by a group of real estate experts prior to ordinance adoption.

Bzovi v. Livonia, 350 Mich. 489 (1957).

The Supreme Court recognized that because of prior existing uses, a city is not always able to produce a completely consistent zoning plan and refused to void zoning which was inconsistent with surrounding areas.

Padover v. Farmington Twp., 374 Mich. 622 (1965).

In upholding the validity of a zoning classification, the Supreme Court placed great emphasis on the relationship between planning and zoning in determining reasonableness.

Biske v. Troy, 381 Mich. 611 (1972).

The Supreme Court noted that it would not give evidentiary value to a master plan which had not been formally adopted.

Raabe v. Walker, 10 Mich. App. 383 (1968) reversed 383 Mich. 165 (1970).

The Appeals Court stated that while the statute calls for a plan, it does not require a written plan before ordinance amendments can be made. All that is necessary prior to zoning is "evidence of some rational procedure to insure that the property in question will be put to its best use . . . ."

The Supreme Court reversed this decision apparently being of the opinion that a major rezoning was improper in the absence of an adopted plan calling for the change.[27] The court stated that the absence of a formally adopted plan does not invalidate zoning, but it does weaken substantially the presumption which attends any ordinance or amendment.

Baker v. Algonac, 39 Mich. App. 527 (1927).

In approving a contested rezoning, considerable mention was made of testimony that the rezoning was in accord with a master plan, and based on advice of a professional planner.

Dunk v. Brighton Twp., 52 Mich. App. 143 (1974).

A township ordinance as applied to the plaintiff's property was unreasonable when shown that the refused zoning was consistent with an adopted master plan.

Sabo v. Monroe Township, decided by Michigan Supreme Court August 19, 1975.

The plan referred to in the enabling statute as the basis for a zoning ordinance may emanate from the ordinance itself.

Case Review--United States

Appeal of Township of Upper Darby, 198 A2d 538 (Pa.).

The statutory requirement of a plan does not contemplate a rigid "master plan." On the other hand it should not consist of ad hoc legislative determinations.

Bartlett v. Middletown Township, 51 NJ 239 (N.J. 1958). The governing body, like the planning board, considered the views of the citizenry and the merits of the rezoning proposal. "The ordinance presents a clearly defined comprehensive plan, as called for by the statute."

Udell v. Haas, 288 NY S2d 888 (N.Y.)

"No New York case has defined the term comprehensive plan. Nor have our courts equated the term with any particular document." By examining the evidence, the court determined that the plan could "be found both in the village's zoning ordinance and in its zoning map."

Fasano v. Board of County Commissioners, 507 P2d 23 (Or. 1973).

Zoning and planning are integrated. The courts will review changes to be certain they conform to the comprehensive plan.

Jean Baker v. City of Milwaukee, April, 1975 decision of the Oregon Supreme Court (citation unavailable).

The court held that zoning ordinances must conform to comprehensive plans, even if adopted subsequent to the zoning ordinance.

Public Hearings

A public hearing concerning general legislative action by a governmental unit is usually permissive and has no relation to the validity of the legislation.[28] However, public hearings in regard to the adoption of a zoning ordinance are required by statute and thus mandatory to insure the validity of the ordinance.

Coincident with the public hearing requirement is the need for adequate notice apprising the public of the impending hearing. Such a notice may be inadequate if not given in an appropriate, timely manner, and sufficient in content to apprise the public of the nature and scope of the regulation being considered. While nearly all states require publication of the notice, a few also require posting. Mail notice or personal service is usually not required.[29]

The courts strictly superintend the conduct of public hearings and the adequacy of notice. Usually, beyond the question of whether the hearing was held, the nature of the hearing is not an issue. In those cases where the nature of the hearing has been challenged, the court usually emphasizes "basic fairness" and the ability of the citizen to be heard.[30] On the other hand, the adequacy of notice is litigated frequently, and where there is doubt, it will usually be resolved against the notice. Since the purpose of the notice is to warn the public, the courts use the requirement of "fair" notice; granting the average reader considerable warning that land in which he has an interest may be affected by a proposed regulation.[31] Generally, this measure will require three elements present in the notice: 1) the identity of the land affected, 2) the nature and scope of the restriction proposed, and 3) the date, time, and place of the hearing. Of course, "fair notice" also implies compliance with the publication

or posting time requirements contained in the statute. Failure to provide adequate notice will render the ordinance invalid.[32]

Case Review--Michigan

Krajenke Buick Sales v. Hamtramck City Engineer
322 Mich. 250 (1948).

The notice and public hearing requirements of the zoning enabling acts are mandatory and must be complied with before a valid ordinance can be adopted.

Baura v. Thomasma, 321 Mich. 139 (1948).

Failure to state the time of the public hearing in the notice invalidated the ordinance.

Brown v. Shelby Twp., 360 Mich. 299 (1960).

The fact that the meeting hall was too small did not invalidate the ordinance where everyone received a chance to be heard, and there was no claim of bad faith in selecting the hall.

Edel v. Filer Twp., 49 Mich. App. 210 (1973).

Although there were several procedural errors in conflict with statutory requirements, the ordinance was not set aside because it had been relied upon without challenge for 18 years.

Bingham v. Flint, 14 Mich. App. 377 (1968).

The duty to hold a hearing cannot be delegated. A public hearing must be held before the city council.

Lamphear v. Antwerp Twp., 50 Mich. App. 641 (1973).

If the notice is reasonably calculated to apprise interested parties of the pending action and affords them an opportunity to be heard, the constitutional requirements of due process are met.

Haven v. City of Troy, 39 Mich. App. 219 (1972).

The right to a hearing imports an opportunity to be heard. Implicit in that right is the companion right to reasonable notice not only of the time and place of the meeting, but also that a particular question will be considered and those interested will have the opportunity to be heard.

Keating International Corp. v. Orion Twp., 51 Mich. App. 122 (1974).

An amendment adopted after public hearing notice which failed to state time, place and date is invalid.

Boron Oil Co. v. Southfield, 18 Mich. App. 135 (1969).

A public hearing before the city planning commission must be held to comply with the enabling act.

Case Review--United States

Hyson v. Montgomery County Council, 217 A2d 578 (Md. 1966).

Where the action contemplated was administrative and not legislative, the court required a quasi-judicial hearing with the opportunity of cross-examination.

Hart v. Bayless Investment and Trading Co., 346 P2d 1101 (Ariz. 1959).

Notice requirements are "no mere legal technicality, rather [they] are a fundamental safeguard assuring each citizen that he will be afforded due process of law."

Bell v. Studdard, 141 SE2d 536 (Ga. 1965).

A statute or ordinance which fails to require notice and hearing prior to enactment may be invalid for failure to require procedure affording due process.

Village of Riverwoods, v. County of Lake, 237 NE2d 547 (Ill. 1968).

The rezoning of land in excess of that described in the notice of public hearing will invalidate the ordinance amendment.

Ordinance Adoption

Case Review--Michigan

Parr v. Lansing, 9 Mich. App. 719 (1968).

A resolution is not a sufficient means of amending a zoning ordinance; an amendatory ordinance is required.

Schrier v. Kalamazoo, 380 Mich. 626 (1968).

A rezoning can only be accomplished by ordinance adoption.

Northwood Properties Co. v. Royal Oak, 325 Mich. 419 (1949).

The provision of the City-Village Zoning Enabling Act requiring a 3/4 vote of the legislative body on an amendment when protested by 20% of nearby property owners was upheld against a challenge that it was an improper delegation of legislative authority.

Joseph v. Grand Blanc, 5 Mich. App. 566 (1967).

A township resident, who is not a member of the board, has no right to vote on an ordinance amendment.

Initiative

Several states, including Michigan, except with reference to cities, and villages, authorize zoning by initiative.[33] In those

states where initiative is not authorized, the usual reason is that the use of initiative would make it impossible to comply with the procedural requirements contained in the zoning enabling acts.[34]

Case Review--Michigan

Korash v. City of Livonia, 388 Mich. 737 (1972).

A city zoning ordinance cannot be ammended by initiative. The zoning enabling act establishes enactment procedures incompatible with the initiative power under charter authority.

Referendum

A number of states including Michigan except with regard to cities, authorize referendum on zoning in the zoning enabling acts. In states where it is not authorized in the zoning enabling acts, it may be exercised under general referendum authority.[35] However, this is not the case in Michigan.

Typically, the power of referendum can only apply to legislative acts.[36] Therefore, administrative actions such as variances and special permits are not subject to referendum. Currently, the issue of what constitutes a legislative action has been brought to the forefront by the decision of Justice Levin in West v. City of

Portage, 392 Mich. 458 (1974). In a 3-3 split decision, the court deadlocked on the issue of whether a rezoning of a specific parcel was an administrative act. The opinion of Justice Levin indicated that a rezoning is an administrative act and thus not subject to referendum. Should this viewpoint gain support in future decisions, the validity of referendum on zonings in townships and counties may be in doubt.

Case Review--Michigan

Elliott v. Clawson, 21 Mich. App. 363 (1970).

A provision of home rule city charter allowing referendum on legislation is not applicable to a zoning ordinance amendment.

Parr v. Lansing, 9 Mich. App. 719 (1968).

Township officials may not void the referendum provisions of the zoning enabling act by attempting to rezone property by resolution instead of by ordinance.

Mohave Plantations v. Rose Twp., 23 Mich. App. 232 (1970).

A referendum vote cannot legitimize unreasonable zoning.

Stadle v. Battle Creek Twp., 346 Mich. 64 (1956).

The referendum provision of the zoning enabling act for townships applies to amendments as well as the original ordinance.

Renne v. Oxford Twp., 5 Mich. App. 415 (1966).

The right to vote on a referendum cannot be limited to property owners.

Reva v. Portage Twp., 356 Mich. 381 (1959). A township referendum cannot be held for the purpose of challenging all of one and part of another amendment to a zoning ordinance. There is no statutory authority for a referendum on two amendments or part of one amendment.

Interim Ordinances

During the early years of zoning interim ordinances were not authorized in the enabling statutes. As a result, early interim or emergency ordinances were found invalid by many courts either for lack of basis in statute or for lack of relationship to a comprehensive plan.[37] On the other hand, where the delay until a permanent ordinance would become effective was reasonable, interim ordinances were upheld.[38]

In some cases, a freeze on the issuance of building permits has been combined with the interim ordinance. In these instances the courts have both upheld and condemned this approach. Where the ordinances were upheld, the court found that the suspension on building permits was for a reasonable time.[39] In Walworth County v. Elkhorn,

133 NW2d 257 (Wisc. 1965), the court upheld a 2 year freeze on building permits as reasonable while a land use plan was being prepared. A New Jersey court, in Campana v. Clark, 197 A2d 711 (N.J. 1964) upheld a 31 month freeze.

Today, a number of states have authorized interim zoning ordinances in their enabling statutes. Michigan authorizes interim ordinances in counties and townships. The granting of statutory authority for this device usually reduces the probability of extensive litigation.

Case Review--Michigan

Lake Twp. v. Sytsma, 21 Mich. App. 210 (1970).

The zoning enabling act does not authorize the adoption of an interim ordinance when a permanent ordinance is in effect and when there is no new ordinance in the process of preparation.

Miscellaneous Considerations

Case Review

Gundersen v. Village of Bingham Farms, 372 Mich. 232 (1964).

The township zoning enabling statute does not authorize the placing of an entire township in one zone.

Brown v. Shelby Twp., 360 Mich. 299 (1960).

The township zoning enabling act does not prevent the township attorney and engineer from assisting the zoning board, if they are not paid, and not considered employees.

Temple v. Portage Twp., 365 Mich. 474 (1962).

In enacting a zoning ordinance, the township board need not follow the recommendations of the zoning commission or the county zoning coordinating committee.

Brown v. Shelby Twp., 360 Mich. 299 (1960).

The adoption of a resolution of intent is not necessary before passing an ordinance amendment.

Ordinance Administration

Board of Appeals

Each of the zoning enabling acts provides for the establishment of a zoning board of appeals for the purpose of (1) interpreting the zoning map and language of the zoning ordinance, (2) reviewing administrative decisions, (3) deciding questions on matters specifically referred to it by the ordinance, and (4) granting variances and

exceptions when necessary. Although the statutes provide for the board of appeals and its organization and general powers, questions continue to be litigated concerning its power relative to the legislative body, the zoning commission and planning commission, appropriate record keeping, proper notice and public hearing, and the limits of the board's authority.

Case Review--Michigan

Tireman-Joy-Chicago Improvement Assn. v. Chernick, 361 Mich. 211 (1960).

The court considered the issue of whether the power of the zoning board of appeals to modify the provisions of the zoning ordinance was an improper delegation of legislative power to an administrative body. The court upheld the statute's grant of authority to the board of appeals to vary ordinance provisions. The majority opinion also required that board of appeals set forth the factual basis of their decisions.

Shulhan v. Hamtramck, 5 Mich. App. 399 (1966).

A city council does not have the power to overrule a decision of the board of appeals.

Burch v. Bloomfield Hills, 30 Mich. App. 246 (1971).

The court held that a planning commission cannot overrule a decision of the board of appeals. Furthermore, "a zoning board of appeals decision can be set aside only by the courts . . . ."

Jones v. DeVries, 326 Mich. 126 (1949).

The court hints that such formalities as sworn testimony and a stenographic record are not necessary in board of appeals hearings.[40]

Thomas v. Busch, 7 Mich. App. 245 (1967).

The court suggests that some of the formalities normally associated with a trial may be necessary in board of appeals hearings.[41]

Sitz v. General Motors Corp., 24 Mich. App 119 (1970).

The court held that the failure of the board of appeals to keep minutes of a meeting at which a variance was granted was a denial of due process to persons opposing the variance.

Lafayette Market Co. v. Detroit, 43 Mich. App. 129 (1972).

The court cited Article VI, section 28 of the Michigan Constitution in holding that a court is limited to a review of the evidence on the record in determining the validity of a board of appeals decision.

Teglund v. East Lansing, 316 Mich. 185 (1946).

The board of appeals has no authority to impose conditions on a property owner building in conformance with the ordinance even if it created hardships for the neighbors.

Baura v. Thomasma, 321 Mich. 139 (1948).

The zoning board of appeals cannot authorize a variance longer than requested.

Variances

A primary function of the zoning board of appeals is the granting of variances. The board of appeals also grants special exceptions and it is not uncommon for confusion to arise over the difference in definition of these two terms. Michigan courts have defined a variance as a deviation from the terms of the zoning ordinance, as authorized by the enabling statute upon findings of practical difficulties and unnecessary hardship. On the other hand, a special exception is an exception to the general rule provided for in the ordinance under specified conditions. The distinction between these terms is important because to establish a variance practical difficulties and unnecessary hardship must be shown, while to justify a special exception it is only necessary to establish the conditions set forth in the ordinance.[42]

In creating the variance procedure, the early drafters of zoning ordinances intended to create a safety valve to permit equitable treatment of property owners in unusual circumstances where conformance to the letter of the ordinance could create unnecessary hardship. Terms such as "unnecessary hardship" and "practical difficulties" were chosen as standards for the issuance of variances in order to give the board of appeals maximum discretion. At first, a number of courts held that these standards were too vague; but, as time passed they became the accepted language in enabling statutes and ordinances.[43]

The term "practical difficulties" has not been used as widely as "unnecessary hardship" in zoning enabling acts. And, in some jurisdictions, the terms have been used interchangeably, although it would appear that they connote different sets of circumstances.[44] Several zoning enabling acts have attempted to add greater specificity to the standards for issuance of a variance, requiring its use only where hardship results from unique circumstances, or only where conditions affect the parcel and not the whole district.[45] Since these terms, used in various forms, have become the standard upon which variance decisions are based, their interpretation as applied to specific parcels of property has been the subject of discussion and a great deal of litigation.

Hagman notes that while the court has established rigorous criteria for justifying a variance, this is largely ignored by zoning boards of appeal and as a result the variance procedure is extremely abused in zoning practice. If the courts strictly enforced variance issuance, close to 90 percent would be declared invalid.[46]

The grounds for issuance of a variance hinge on interpretation of the terms "practical difficulties" or "unnecessary hardship." Hagman has stated that the variance does not confer a privilege and goes on to establish 3 basic standards: 1) the absence of adverse impact on the public, 2) the absence of adverse effect on neighbors, and 3) the presence of the property characteristics which make it eligible for a variance.[47] The courts have been repeatedly asked on a case by case basis to definitively delineate the grounds for a variance. Generally, the crucial issue lies in Hagman's third standard: are the proper characteristics present to make a parcel eligible for a variance in accord with the court's interpretation of "practical difficulties" or "unnecessary hardship?"

Case Review--Michigan

Badanek v. Schroskey, 21 Mich. App. 582 (1970).

The court held that the inability to obtain financing for a development which would satisfy the provisions of the zoning ordinance

was not sufficient grounds for granting a variance. The reason being that this problem affected the entire district and was not unique to the property.

Farah v. Sachs, 10 Mich. App. 198 (1968).

A variance was declared invalid because the record failed to show that the property couldn't be used in a manner consistent with the zoning classification. The court stressed that a determination that the proposed development was consistent with the spirit of ordinance did not provide proper grounds for issuing a variance.

Puritan and Greenfield Assn. v. Leo, 7 Mich. App. 659 (1967).

The court held that the term "practical difficulties" refers to dimension variances, while the term "unnecessary hardship" refers to a use variance. A use variance cannot be granted unless it is found that the property cannot be used in a manner consistent with the zoning classification. This decision also appears to support the idea that a use variance cannot be granted unless the condition is unique to the property and not a general neighborhood condition. The theory is that if the condition is general, an amendment should be made to the ordinance.[48]

O'Keefe v. E. Grand Rapids BOA, 35 Mich. App. 583 (1971).

The court upheld the issuance of a variance on a parcel where practical difficulties and unnecessary hardships were shown based upon inability to use existing structure for a conforming use. The variances on the adjoining two parcels were invalidated for lack of showing practical difficulties and unnecessary hardship, despite the fact that it was not practical to develop the first parcel in the absence of variances for the second and third.

George v. Harrison Twp., 44 Mich. App. 357 (1973).

The fact that granting a variance would render a parcel usable under the zoning ordinance, will not validate an unreasonable classification.

Indian Village Manor Co. v. Detroit, 5 Mich. App. 679 (1967).

Once practical difficulties have been shown, it is not necessary to show, in addition, unnecessary hardship where the variance does not authorize a change in use.

Special Exceptions

As previously mentioned, the Michigan courts have defined a special exception, or conditional or special use, as an exception to the general rule as set forth in the ordinance which can be authorized

if certain conditions specified in the ordinance are met.[49] Generally, it is the board of appeals which makes the determination whether the applicant for special use permission has complied with the conditions set forth in ordinance. Yet, many ordinances delegate this function to the planning commission or the zoning commission. In these instances, it is generally held that the board of appeals still retains final jurisdiction in the matter as a result of its statutory charge.[50]

While the Michigan courts have never specifically addressed the validity of the special exception technique, they have considered so many cases where its use was at issue without invalidating it, that it can be assumed that it has the court's implicit approval at the present time.[51] However, the courts have refused to uphold the special exception when the ordinance failed to provide the board of appeals with adequate standards to make a determination. Evidently, these standards need not be elaborate though, for in Florka v. City of Detroit, 369 Mich. 568 (1963) the court upheld a standard as minimal as:

> The use is injurious to the surrounding neighborhood or contrary to the spirit and purpose of the ordinance.

McTaggart, in commenting on the special exception technique, has called it "a practical necessity in every workable zoning ordinance . . . ."[52] Hagman has observed the widespread use of special exceptions and called it one of the fundamental changes in the

evolution of zoning. It is his opinion that the special exception can be a valid zoning technique where the standards are adequately established in the ordinance and the conditions imposed are reasonably related to the valid use of the zoning power.[53] In all probability it is these two areas of the special exception which will generate litigation.

Case Review--Michigan

Mitchell v. Graval, 338 Mich. 81 (1953).

A special exception is an exception to the general rule provided by the terms of ordinance which can be authorized if specified conditions are met. A variance is a deviation from the terms of the ordinance which is not mentioned in the text, but which is authorized by the enabling legislation upon finding that practical difficulties or unnecessary hardships exist.

Lyon Sand and Gravel Co. v. Oakland Twp., 33 Mich. App. 614 (1971).

An ordinance imposed permit requirement for mineral extraction was held invalid for lack of standards to guide an administrative decision.

Lakewood Estates, Inc. v. Deerfield Twp. Zoning Board of Appeals 37 Mich. App. 184 (1972).

The court ruled invalid the special use provision of an ordinance where adequate standards for administrative decision were not specified.

M. Company v. Detroit, 49 Mich. App. 136 (1973).

The court upheld a standard for exception to the terms of the ordinance worded:

> that such modification is necessary to secure an appropriate development of a specific parcel of land; provided, that any such modification will not be inconsistent with the spirit and purpose of this Ordinance, with public safety, and with substantial justice.

Smith v. Plymouth Twp., 346 Mich. 57 (1956).

Where the zoning ordinance permitted special exceptions upon approval of the township board, the court held that the board of appeals is the proper body to make special exceptions, and that the enabling statute does not authorize the township board to vary the ordinance.

Additional cases discussing the need for standards guiding administrative decisions include: Marathon Oil Co. v. Plymouth Twp., 25 Mich. App. 399 (1970); Mobile Oil Corp. v. Clawson, 36 Mich. App. 46 (1971); Commercial Auto Wrecking v. Boyle, 20 Mich. App. 341 (1969);

Osius v. St. Clair Shores, 344 Mich. 693 (1956); Florka v. City of Detroit, 369 Mich. 568 (1963).

Nonconforming Uses:

Planners and lawyers have long understood the problems which nonconforming uses impose upon the effectiveness of zoning and a city's ability to implement a master plan. However, for legal, as well as political reasons, the true nature of the problem has never been confronted head on. Rather, the philosophy from the beginning of comprehensive zoning has been to permit the continuance of nonconforming uses, while limiting their right to expand or repair, anticipating that their life expectancy would be reduced and through attrition they would vanish.[54]

In retrospect, early expectations as to the nonconforming use problem have not been realized. Despite limits on extension and repair, nonconforming uses have been notably tenacious. Numerous reasons have been advanced for their resistance to extinguishment, including the lack of enforcement, the unwillingness of cities to seek termination through condemnation or purchase, and the attitude of the courts. In this context, we are primarily interested with the legal framework which has evolved in regard to nonconforming uses, and its restraints, as well as potentials for resolving this problem.

As zoning developed, the right to continue a nonconforming use seemingly rose to the dignity of being a constitutional principle. While it was permissible for zoning to impair value in undeveloped land where value was viewed as speculative, it was viewed as improper to impair the value of improved property.[55] While the distinction appears to be breaking down somewhat, the mainstream of judicial decisions have moved toward protection of vested rights in property. An ordinance which summarily seeks to destroy an existing use will most likely be ruled invalid because it is retroactive and destroys a vested right.[56]

While a consistent pattern of protecting existing buildings and uses has developed in judicial decisions, it cannot be said that the courts have failed to recognize the problems created by nonconforming uses. Repeatedly, in a number of states the courts have affirmed the need to discourage nonconforming uses.[57] In South Central Improvement Assn. v. St. Clair Shores, 348 Mich. 153 (1957), the Michigan Supreme Court recognized the problem of nonconforming uses, noting that zoning policy requires the gradual elimination and not expansion of nonconforming uses. However, it appears that while sympathetic to planning and zoning goals, the courts will insist that the problem of nonconforming uses must be resolved within the limits set by statute and such constitutional doctrines as due process.

Establishment of a Nonconforming Use

Since a nonconforming use is inconsistent with the land use pattern established by the ordinance, most courts require the property owner to prove that he is entitled to nonconforming status.[58] In general terms, he must prove that his use existed prior to the enactment of the ordinance. More specifically, this proof usually is composed of the elements of time, legality, and the nature and extent of the use.

The element of time requires that the use be in effect before enactment of the ordinance. In some instances a date may be specified in the ordinance; in other cases, varying by jurisdiction, the date the ordinance was passed or the ordinance effective date may be the deadline.[59]

The element of legality requires that the use be legally established before enactment of the ordinance. While this requirement seems fairly straightforward, it has been the issue of extensive litigation, revolving around such issues as valid permits and licenses necessary for operation of a use.[60]

Finally, the extent of the use will be investigated to determine if it qualifies as a nonconforming use. Since the statutes fail to define what constitutes an existing use, the courts have adopted definitions on a case-by-case basis. Usually, the courts require

that the use must have been substantially established at the time the ordinance was enacted. Thus not every use is entitled to nonconforming status; only uses substantially established. And, in some cases courts have added the criteria that eligibility depends upon whether the termination would cause serious financial results.[61]

While the criteria of time, legality and substantialness may be easy to describe, extensive litigation has proven they are not easy to apply on a case-by-case basis. This is particularly true when a race develops between the city attempting to gain ordinance adoption and the landowner hastening to substantially establish a nonconforming use.

Case Review--Michigan

Rodd v. Palmyra, 42 Mich. App. 434 (1972).

The landowner did not obtain nonconforming status by virtue of the fact that substantial sums had been paid for plans, legal fees and engineering fees when work had not commenced on the land.

Fruitport v. Baxter, 6 Mich. App. 283 (1967).

An individual who moved truckloads of parts onto his property shortly before the effective date of the ordinance did not establish a nonconforming use. The court held that it was necessary to establish nonconformance in a reasonably substantial manner.

Dusdal v. Warren, 387 Mich. 354 (1972).

A landowner who had started construction on a cement block building had established a vested interest.

Dingeman Advertising, Inc. v. Algoma Twp., 393 Mich 89 (1974).

Where the landowner had staked the site, erected a power pole, completed an advertising contract and begun off-site construction of a billboard, the Court ruled that nonconforming use status had been acquired.

Detroit Edison v. Wixom, 382 Mich. 673 (1969). A utility had acquired 40 miles of right-of-way and started construction on certain portions when an ordinance took effect prohibiting the use on a four mile segment where actual construction had not begun. The court ruled that a vested interest had been acquired by the utility, strongly suggesting that in multi-staged projects the dependency of one phase on another will determine if a vested interest in a future phase has been acquired.[62]

Wyoming Twp. v. Herweyer, 321 Mich. 611 (1948)

A vested interest was not obtained by the owner of a trailer which was located on property in violation of a township ordinance.

Drysdale v. Beachman, 359 Mich. 152 (1960).

Where a use was lawful but operated in violation of county health regulations prior to ordinance passage, the court permitted a vested interest since the county had never complained of the violations and the owner had made prompt corrections when notified. However, the court reiterated the point that if the use itself had been illegal, a nonconforming use would not have been established.

Willingham v. Dearborn, 359 Mich. 7 (1960).

An owner applied for a building permit to which he was entitled under an existing zoning ordinance. He was refused on the grounds that his plans showed inadequate setbacks. After he brought suit, the city amended its ordinance to require the setback it had demanded. The court refused to consider the new amendment since the pre-trial conference had been held, and permitted the owner to build. The result was that the owner obtained a nonconforming use without actual construction being under way.

Franchise Realty v. Detroit, 368 Mich. 276 (1962).

The pre-trial conference had not been held when the amendment to an ordinance had been passed in a situation similar to Willingham and the court permitted consideration of the amendment. It indicated that it was proper to consider the case in accordance with the law in effect at the time the case is heard.

Restriction of Nonconforming Use

Commonly, statutes and ordinances restrict the expansion and repair of nonconforming uses under the assumption they will eventually fade away. Not only has this assumption generally been proven false, but without the ability to make repairs or remodel, the nonconforming use has the propensity to become increasingly disreputable, further damaging the area in which it is situated.[63]

The basic notion of nonconforming use precludes a change to another use and most ordinances prohibit such a change.[64] However, some ordinances will permit a change in use, if the change is in the direction of conformity. While this approach may improve a situation, it has been pointed out that if it is economically feasible to change, the new use, which may still be nonconforming, will likely be in existence for a substantially longer time than the original use.[65]

When the issue of a change in use is litigated, the focus generally is on whether the change contemplated is sufficient to constitute a change under the terms of the ordinance. Occasionally, questions of use volume or intensity are brought into change of use litigation. However, these issues can lead to questions of expansion or structural changes.[66] In the absence of specific ordinance provisions, the courts generally will not permit the expansion of a nonconforming use.[67]

The restrictions on expansion do not normally preclude alteration or repair of a nonconforming use. However, ordinance provisions on this point can vary greatly from a complete prohibition except where necessary to secure health and safety, to the more common provision which establishes a maximum amount which can be spent on alteration or repair.[68]

The issue of nonconforming use repair is difficult, for if the objective is to eliminate the use, a prohibition on repair will speed the result. However, while waiting for this process of attrition to run its course, the effects of dilapidation may endanger attempts to create viable neighborhoods.

Case Review--Michigan

Dustin v. Older, 283 Mich. 667 (1938).

The court upheld an ordinance preventing expansion of a nonconforming use even though the addition was necessary for the use to remain competitive.

Fredal v. Forster, 9 Mich. App. 215 (1968).

In considering a nonconforming gravel pit, the court held that the existing holes could be worked and expanded as long as they remained productive, but no new diggings could be started.

Cole v. Battle Creek, 298 Mich. 98 (1941).

The court upheld ordinance provision forbidding structural alterations where the owner proposed to tear down some dilapidated buildings and build new additions. This project would have freed land for conforming uses and not increased size of nonconforming use.

Paye v. Grosse Pointe, 279 Mich. 254 (1937).

The installation of a new store front across two adjoining stores was held not to be a structural alteration and in violation of the ordinance since it didn't change the form, character or size of the building.

Madison Heights v. Manto, 359 Mich. 244 (1960).

The court permitted the owner of a nonconforming trailer park to replace a worn out septic tank field since this constituted normal maintenance.

Horowitz v. Dearborn Twp., 332 Mich. 623 (1952).

The owner of a nonconforming carnival building was permitted to replace the canvas covering with aluminum.

White Lake Twp. v. Lustig, 10 Mich. App. 665 (1968).

Where owner had expanded a five-car, part-time junk yard to a 200-car full time operation and introduced new processing procedures,

it was held that the owner had waived his defense of a nonconforming use.

Hillsdale v. Hillsdale Iron and Metal Co., 358 Mich. 377 (1960).

The court held that an area used for the storage of scrap metal could not be used for the crushing and processing of the metal even if it was necessary to remain competitive.

Hanson v. Huetter, 339 Mich. 130 (1954).

The court held that a conforming addition could be added to a nonconforming structure which was a conforming use.

Termination of Nonconforming Uses

A nonconforming use generally can be terminated through destruction, the act of the owner, or by action of the city.

Normally, the right to a nonconforming use includes the right to restore the use in event of destruction.[69] However, this right is qualified when an ordinance provides otherwise. Many ordinances restrict the right to rebuild a nonconforming use by providing that the use cannot be rebuilt if substantially destroyed. The term substantially is often defined in terms of a percentage of the value of the use. It is the percentage formula which is often the subject of litigation.[70]

Since a nonconforming use qualifies only if it is lawfully established when the ordinance becomes effective, logic follows that the nonconforming use can remain valid only if continued in an unbroken sequence. Accordingly if the continuation of the use is interrupted by a voluntary act of the owner, the right to continue is ended.[71] Many ordinances recognize this logic and provide for termination of the nonconforming use upon "abandonment" or "discontinuance" for a prescribed period of time. While this appears to be a simple approach to termination, the courts usually require that the owner's action be voluntary and that the intent to abandon be present.[72] Litigation often centers upon the proof of intent to abandon, and on the conditions which may have created involuntary abandonment such as war, mortgage foreclosure or depression.[73]

While it seems established as public policy that nonconforming uses are injurious to the objectives of zoning, the enabling acts often fail to address the termination issue adequately. The answer provided by the statutes in many states, including Michigan, is to permit termination through condemnation or purchase by the city.[74] Since this technique may be distasteful because of cost, many units of government have sought their own devices. Most notably, the technique of amortization has been tried in many jurisdictions.

Amortization provisions have become common in ordinances throughout the United States, with varying degrees of complexity.

Its use is based upon the assumption that nonconforming uses are contrary to public health, safety and welfare and must cease; but, summary termination is unlawful. A middle ground is adopted where the use is permitted for a specified period of time, then required to cease. This is based on the notion that the owner can use the specified time period to amortize his investment, thus dulling the economic shock.[75]

Amortization has been used since 1929 when the Louisiana Supreme Court upheld this technique in State ex rel. dema Realty Co. v. Jacoby, 123Sol4 (La. 1929). However, other jurisdictions have not been as receptive, often expressing disapproval except where the use constituted a nuisance.[76] Of course, where a use constitutes a nuisance, the courts generally will uphold summary termination.[77] While amortization has gained increasing approval in recent years, it is still not universally accepted. Those jurisdictions approving the technique usually focus upon the reasonableness of the power as applied, using such tests as whether the hardship to the owner over balanced the benefit to the public.[78] When the technique has been struck down the decisions are usually based on a lack of statutory authority or the unreasonableness of the amortization period.[79]

Case Review--Michigan

DeMull v. Lowell, 368 Mich. 242 (1962).

The court voided a 3-year amortization period because it was not authorized by statute.

Dusdal v. City of Warren, 387 Mich. 354 (1972).

In ruling that there had not been an abandonment of a nonconforming use, the court stated that abandonment can only be shown where there is nonuse combined with an intention to abandon the right to nonconforming status. The burden of proof is on the city to prove abandonment.

Rudink v. Mayers, 387 Mich. 379 (1972).

In ruling that there had not been an abandonment, the court construed the term "discontinued," used in the ordinance, to mean abandoned, and found that the facts did not indicate that the owner had willfully abandoned his nonconforming status. The necessary elements of abandonment are "intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon."

Fredal v. Forster, 9 Mich. 667 (1938).

The court held that nonuse does not constitute abandonment.

Austin v. Older, 283 Mich 667 (1938).

An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional, but an ordinance prohibiting the enlargement of a nonconforming use is proper.

Howell v. Kaal, 341 Mich 585 (1954).

The court noted approval of an ordinance provision providing for the termination of a nonconforming use after a 1-year period of abandonment.

Case Review--United States

State ex rel. Dema Realty Co. v. Jacoby, 123 So 314 (La. 1929).

The court upheld an amortization period of one year.

City of Los Angeles v. Gage, 274 P2d 34 (Cal. 1954).

The court upheld a 5-year amortization period on a plumbing business.

Grant v. Baltimore, 212 Md. 301 (1957).

In upholding an amortization provision the court stated that the difference between restricting past use and future use is one of degree and not of a kind.

Edmonds v. Los Angeles County, 255 P2d 772 (Cal. 1953).

An amortization provision whereby the period was set by agreement between the county and the owner was upheld.

The Reasonable Application of the Zoning Power

In Euclid v. Ambler Realty Co., 272 US 365 (1926), the United States Supreme Court upheld the constitutionality of zoning in principle, but admitted that while valid on its face, an ordinance could be unconstitutional as applied in a specific situation. The court at 395 stated:

> It is true that when if ever, the provisions set forth in tedious and minute detail come to be concretely applied to particular premises . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

In this statement, the court forecast cases where specific provisions could be examined for constitutional defects or challenged for unreasonableness as they affect specific property.

In 1928, the prediction in Euclid became reality when in Nectow v. Cambridge, 277 US 183 (1928), the court held that an ordinance which rendered a plaintiff's land of "little value" and did not bear a substantial relationship to public health, safety and welfare was unconstitutional as applied. The Nectow case represented the last

time, until recently, that the United States Supreme Court became heavily involved in zoning litigation. However, the effect of the Nectow case was to initiate a great volume of litigation at the state level which continues today, challenging the constitutionality of specific ordinance provisions and their application to specific parcels of property. The volume of this type of litigation would seem to indicate a high probability of success for the landowner.[80]

Zoning to be valid must represent a reasonable exercise of the police power. As a consequence, the pivotal question in this type of litigation is whether the ordinance is a reasonable exercise of police power. If the objective is beyond the scope of the police power, the courts will generally invalidate, even if the impact of the regulation is slight. In cases where the objective is within the police power, but its relationship is slight, the courts may also invalidate. However, where a regulation substantially advances the public interest, bearing a strong relationship to the police power, the court will uphold the regulation, even where it imposes a severe limitation.[81]

In making decisions on the reasonableness of a zoning regulation, the courts often become implicitly involved in balancing public and private interests, although few courts will admit that this is the case. Exceptions include the courts in Illinois and New York.[82]

In LaSalle National Bank v. County of Cook, 208 NE2d 430 (1965), at 436, the Illinois Court described the factors to be described in balancing public and private interests:

> The validity of each zoning ordinance must be determined on facts applicable to the particular case, but certain general lines of inquiry have been regarded as relevant, to wit:
>
> 1. existing uses and zoning of nearby property;
> 2. the extent to which property values are diminished by particular zoning restrictions;
> 3. the extent to which the destruction of the property values of the plaintiffs promotes the health, safety, morals or general welfare of the public.
> 4. the relative gain to the public, as compared to hardship imposed on the individual property owner;
> 5. the suitability of the subject property for the zoned purposes; and
> 6. the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property.

In determining reasonableness and balancing the public and private interests, the courts generally have indicated appreciation of the need to bring order to chaotic community development. However, while hesitating to deny communities the right to zone and plan, they have insisted that the rights of the property owner be respected. Thus, it is not surprising in reviewing court decisions to find the courts attempting to accommodate both interests.[83]

In Michigan, it is the general policy of the courts to refrain from invalidating an ordinance where there is a debatable question as

to reasonableness. A clear showing of unreasonableness must be made.[84] In line with this policy, Michigan courts have generally attempted to resist deep involvement in zoning issues, assuming the role stated in Brae Burn Inc. v. Bloomfield Hills, 350 Mich. 425, at 430 (1957):

> this Court does not sit as a superzoning commission. Our laws have been wisely committed to the people of a community themselves the determination of their municipal destiny . . . with the wisdom or lack of wisdom of the determination we are not concerned. The people of the community . . . govern its growth and its life.

The role defined for the courts in Brae Burn coincides nicely with the principle generally accepted in Michigan and other states that a zoning regulation is presumed valid. The burden of proof rests with the plaintiff to show that the regulation is unreasonable. Once the plaintiff has made an adequate showing the burden then shifts to the municipality to rebutt the evidence.[85] Of course, the objective of proof is to demonstrate that the ordinance or its specific application is unreasonable.

The principles of presumed validity and burden of proof, described in the previous paragraph, have recently been challenged in Michigan and other states. As Crawford points out, the courts will on occasion require the governmental unit to show that the ordinance bears a substantial relationship to public health, welfare and safety. Consequently, he points out that burden of proof principles may be unimportant in actual practice.[86] The courts have also upset the

normal allocation of litigation responsibility. Until recently overturned in Kropf v. City of Sterling Heights, 319 Mich. 139 (1974), the preferred use doctrine, established in Bristow v. Woodhaven, 35 Mich. App. 205 (1971), shifted the burden of proof under certain circumstances to the unit of government. The case of West v. City of Portage, 392 Mich 458 (1974), also has raised issues regarding presumed validity and burden of proof, taking the position that rezonings of specific property should be heard in an administrative forum with each side presenting its case as to the reasonableness of the rezoning request. A similar conclusion was reached in Fasano v. Board of County Commissioners of Washington County, 507 P2d 23 (Or. 1973) and Oregon's zoning enabling legislation was amended to comply. Recently, in decisions handed down on August 19, 1975, the Michigan Supreme Court in Sabo v. Monroe Township, Smookler v. Wheatfield Township, and Nickola v. Grand Blanc Township, used the administrative theory of rezonings advanced in West and Kropf to invalidate refusals to rezone land for mobile home parks.

While these disagreements over traditional concepts of presumed validity and burden of proof do not affect the essence of the reasonableness requirement, they do involve changes in the way we judge the validity of zoning. Particularly with regard to West, Fasano, and more recently Sabo, Smookler, and Nickola, under certain

circumstances, the traditional perspectives used to adjudicate reasonableness would be changed and the actual mechanisms for determining validity would be altered accordingly. In rezoning matters considered administrative actions, the traditional presumption of validity enjoyed by units of government would fall, the court would determine whether the zoning decision was supported by the evidence presented in the record and according to Michigan Supreme Court Justice Levin the question would change from whether the present zoning is reasonable to whether the proposed use is reasonable.[87]

Returning to traditional concepts of presumed validity and burden of proof, the question can be asked: What degree of proof is required to show that a zoning regulation is unreasonable? As previously stated, Michigan courts generally will not set aside an ordinance if there is a fairly debatable question as to the reasonableness of the regulation. There must be a clear showing that it is unreasonable.[88] However, the "fairly debatable question" rule does not provide an adequate test for determining the adequacy of proof. Feeling this inadequacy, the Court in Alderton v. Saginaw, 367 Mich. 28 (1962), stated that there must be more than just a "difference of opinion." Yet, this test seems hardly an improvement. Perhaps the recommendation offered by Crawford offers the most practical solution to the degree of proof question. Noting that the courts decide each case

on its own merits, and a reasonableness proof can be very complicated, he suggests that cases containing similar factors should be consulted to determine the degree of proof necessary.[89] Crawford observes that the justices seem to look at the record presented and form their opinions without regard to standards of proof.

> If they find the zoning unreasonable they say that the City has failed to show that the ordinance restriction bears a substantial relationship to the public health, safety, and welfare. If they reach the opposite conclusion, they mention that the person attacking the ordinance has the burden of proof and that the ordinance is presumed to be reasonable.[90]

In considering the reasonable application of zoning power, there are two areas in which reasonableness may be judged: 1) the reasonableness of a regulation in general; or 2) the reasonableness of a regulation as it is applied to specific property. For the purposes of this discussion, the emphasis will be placed on the reasonableness of regulations in general, defined in two categories: 1) according to such community objectives as aesthetics and floodplain control; and 2) in relation to zoning techniques such as site plan approval and PUD's. The reasonable use of zoning as applied to specific property will be given brief attention, except in relation to the requirement of uniformity, confiscation, spot zoning, and the impact of a master plan.

According to Communicty Objectives

Exclusion

Exclusion can be thought of in two respects: 1) the total exclusion of a lawful use from a jurisdiction; or 2) the use of zoning regulations to implicitly exclude a race or class of individuals from living within a governmental unit. The judiciary generally looks with disfavor on both types of exclusion.

While Michigan courts have not ruled that total exclusion of a legitimate use is unreasonable, the Supreme Court in Kropf v. Sterling Heights, 391 Mich. 139 (1974) at 155, stated:

> an ordinance which totally excludes from a municipality a use recognized by the Constitution or other laws of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use.

Trailer parks and multiple dwellings are two uses which governmental units often seek to exclude. As the court suggests, such practices enjoy a high probability of being declared invalid in the absence of compelling arguments.

While the courts recognize that the objective of zoning is to control development, they will not condone its use to exclude people seeking a place to live. Such a purpose is not within the police power.[91] However, since the court is reluctant to examine the motivations of public officials, zoning which obtains exclusionary

objectives is often accomplished.[92] Yet, courts are becoming increasingly aware of this impact of zoning, and particularly in states other than Michigan, exclusionary ordinances using such techniques as large minimum lot sizes have been struck down. Additionally, the State of Massachusetts has recently enacted an "anti-snob" law to effect more balanced communities, and the New Jersey Supreme Court has voided an ordinance which failed to promote a reasonably balanced community, recognizing regional housing needs.[93] The issue of exclusion in this context poses difficult problems for zoning for it pits the right of a community to chart its destiny against the rights of a larger public to travel and settle in a community of a citizen's choice.

Case Review--Michigan

Green v. Lima, 40 Mich. App. 655 (1972).

The right of citizens to suitable housing within their means in aesthetic areas is basic to a free people and encompassed within the general welfare phrase. Yet, an ordinance which excludes population may still be in furtherance of the general welfare, where the exclusion is the undesirable side effect of a legitimate community policy, such as where evidence establishes that construction would constitute a health hazard. There is no economic justification for exclusionary zoning. "To allow the first 600 people in an area to

exclude all but certain kinds of people . . . subverts the idea of zoning promoting the general welfare."

Tocco v. Atlas Twp., 55 Mich. App. 160 (1974).

The court invalidated an ordinance which provided for mobile homes but had not zoned any land for such a use; had no mobile home parks in the township; and had denied a request for a mobile home park.

Smookler v. Wheatfield Township, 46 Mich. App. 162 (1973).

The court rejected an economic justification for excluding mobile homes. The Michigan Supreme Court on August 19, 1975, affirmed the Court of Appeals decision on the grounds that the proposed use was reasonable.

Bristow v. Woodhaven, 35 Mich. App. 205 (1971).

In speaking of general welfare, the court stated

> that term is not a mere catchword to permit the translation of narrow desires into ordinances which discriminate against or operate to exclude residential uses deemed beneficial. Citizens of the general community have a right to decently placed, suitable housing within their means and such right must be a consideration in assessing the reasonableness of local zoning . . . .

This case went on to establish the preferred use doctrine which was recently invalidated in Kropf v. Sterling Heights.

Case Review--United States

Southern Burlington County NAACP v. Township of Mount Laurel, decided March 24, 1975, New Jersey Supreme Court.

The court held that the township zoning ordinance was invalid to the extent that it failed to provide a realistic opportunity for the development of a variety and a choice of housing for its regional fair share of all classes of persons wishing to live in the township.

Warth v. Seldin, 95 S. Ct. 2197 (1975).

The United States Supreme Court ruled that certain residents and organizations of Rochester, New York, who had brought suit against an adjacent town claiming that its zoning ordinance was exclusionary lacked standing to bring the suit. The Court stated that to have standing, the plaintiffs must show that they personally have been injured, and not that the injury has been suffered by other, unidentified members of a class to which they belong.

Aesthetics

Evident throughout the history of zoning has been the general recognition by the courts that general welfare includes more than health, safety and morals. It is this gradual broadening of what constitutes the general welfare which provides the basis for

aesthetics becoming a legitimate purpose of zoning. Without recognition that aesthetics can be encompassed within the general welfare aspect of the police power, courts will continue to strike down purely aesthetic controls.

Judicial endorsement of aesthetics as a legitimate end of the police power has been infrequent. Where it has been validated, the regulation is usually rationalized because it also relates to public health, safety or welfare.[94] A good example of this reasoning is the setback requirement which has an aesthetic purpose, but is also related to public safety.

Recently, optimism has been expressed that aesthetic purposes will be recognized as a reasonable exercise of the police power. This otpimism occurred in the wake of Berman v. Parker, 348 US 26 (1954), an eminent domain case which established that it was within the power of the Legislature to determine that a city should be beautiful, and People v. Stover, 191 NE2d 272 (NY 1963), which held that land uses could be regulated for solely aesthetic purposes. However, this optimism has been tempered by the lack of precedents in most jurisdictions.[95]

Case Review--Michigan

Wolverine Sign Works v. Bloomfield Hills, 279 Mich. 205 (1937).

"Aesthetics may be incident, but cannot be the moving factor."

Jourden v. Wyoming Twp., 359 Mich. 496 (1960).

The court upheld the refusal of the township to permit a junkyard near a residential area because of appearance, noise and smell.

Superior Twp. v. Reimel Sign Co., 362 Mich. 481 (1961).

The court held valid a provision which did not permit the painting of a sign on a barn in an agricultural zone.

McClain v. Hazel Park, 357 Mich. 459 (1959).

The court upheld an ordinance provision that a 30 foot setback must be beautiful and landscaped against the argument that it was aesthetic in nature.

Edison Co. v. Wixom, 382 Mich. 673 (1969).

The court reiterated the rule stated in Wolverine Sign Works v. Bloomfield Hills.

Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47 (1972).

The court upheld a restriction on freestanding signs not only for traffic safety reasons but also because it prevented visual pollution, noting that aesthetic well-being is a valid part of public welfare.

Case Review--United States

Welch v. Swasey, 214 US 91 (1909).

The court suggested that aesthetic controls may lie outside the police power.

State ex rel. Saveland Park Holding Corp. v. Wieland, 69 NW 2d 217 (Wis. 1955).

The court upheld an ordinance provision that a building permit could not be issued for a building so at variance with surrounding structures that a depreciation in property values would result.

Maher v. City of New Orleans, La. (1974).

The state supreme court upheld an architectural control ordinance against challenge that it bore no relationship to the police power.

Mineral Extraction

The Michigan Supreme Court has taken the position that the removal of valuable mineral deposits should be given special consideration unless serious consequences are shown.[96]

Case Review--Michigan

N. Muskegon v. Miller, 249 Mich. 52 (1929).

The court stated that an ordinance cannot forbid mineral extraction unless serious consequences can be shown.

Certain-Teed Products Corp. v. Paris Twp., 351 Mich. 434 (1958).

Even where there are potential surface manifestations of underground operations which are not compatible with surface land uses, such uses can be conducted unless they create a nuisance.

Buckley v. Bloomfield Hills, 343 Mich. 83 (1955).

A city can prevent the operation of a sand and gravel business in a residential zone. Where sand and gravel are being removed to prepare for residential use it is reasonable to set a time limit on gravel removal.

Lyon Sand and Gravel Co. v. Oakland Twp., 33 Mich. App. 614 (1971).

The court ruled invalid performance standards and depth limits so strict that they prevented removal operations. Court noted approval of the principle that where needed natural resources are known to exist in usable quantities, their utilization should be permitted in a manner compatible with adjacent uses of land.

James v. Shelby Twp., 41 Mich. App. 461 (1972).

The court refused to permit a sand and gravel operation where testimony did not establish the existence or amount of sand and gravel, or how it could be removed without injury.

Floodplains

While floodplain zoning has been invalidated as confiscatory, it is generally felt that floodplain zoning can be validated where the risk of flooding is substantiated and reasonable use of the land is permitted.[97]

Case Review--Michigan

Keller v. Farmington Twp., 358 Mich. 106 (1959).

In a case where the floodplain was zoned residential, the court permitted the owner to fill his site in order to make it usable despite the argument that this action would cause flooding elsewhere.

Sturdy Homes, Inc. v. Bedford Twp., 30 Mich. App. 53 (1971).

A floodplain regulation restricting use to single family and allowing no human habitation was regarded as unreasonable with regard to land where flooding had never occurred, although the area had

suffered from 2 floods. However, the court did not hold that flood-plain regulations were unreasonable per se.

Adequacy of Services, Facilities and Tax Revenues

In recent years, units of government have increasingly tried to use zoning to arrest development which would overtax its services and facilities. This purpose was recognized in the Standard Zoning Enabling Act and the courts have been willing to validate this use of zoning when clearly related to public health, welfare and safety. However, the courts have noted that cities cannot assume that present levels of service will remain unchanged forever. Problems usually arise when such uses of zoning become exclusionary or new techniques to control development are introduced which are so restrictive they deny property owners a profit on their land.[98]

Case Review--Michigan

Stevens v. Royal Oak Twp., 349 Mich. 548 (1956).

The court upheld the exclusion of a trailer park in residential area which would have overburdened the school and overtaxed sewer and water facilities.

See also Scholnick v. Bloomfield Hills, 350 Mich. 187 (1957); Lamb v. Monroe, 358 Mich. 136 (1959); VanArodel v. Addison Twp., 37 Mich. App. 613 (1972).

Smookler v. Wheatfield, 46 Mich. App. 162 (1973).

Although a proposed trailer park would double the size of the township and no police and fire protection was available, the court held that the increase in burden on the township would not justify its refusal to zone. Economic reasons cannot justify exclusion. The Michigan Supreme Court on August 19, 1975, affirmed the decision of the Court of Appeals on the grounds that the rezoning request was reasonable.

Wilkins v. Birch Run, 48 Mich. App. 57 (1973).

Given the existence of a master plan, land zoned for mobile homes, and the absence of an adequate water supply, the legislative body was entitled to consider the impact of rapid growth. The refusal to rezone was not unreasonable.

Cohen v. Canton Twp., 38 Mich. App. 680 (1972).

Where the jurisdiction had large areas zoned for mobile homes and there were inadequate services in the area proposed, the refusal to rezone was justified.

Mulias v. City of Trenton, 31 Mich. App. 535 (1971).

Where the refusal to grant a special use permit was based on the desire to obtain more tax revenues from another use, the action was declared unreasonable.

Case Review--United States

Molino v. Mayor and Council of the Borough of Glassboro, 281 A2d 401 (1972).

An ordinance which excluded children because more schools would be needed was declared unconstitutional.

Golden v. Planning Board of Ramapo, 285 NE 2d 291 (1972).

Where the city combined a master plan, a zoning ordinance and a capitol improvements program to phase growth in timing with the availability of services, the court upheld the ordinance.

Construction Industry Association v. Petaluma; Case No. 74-2100, U.S. Court of Appeals, August 13, 1975.

The court ruled that Petaluma, a city concerned with its growth rate, may use zoning to limit the amount of development which may be permitted each year.

Control Over Public Property

Case Review--Michigan

State Highway Commission v. Redford Twp., 4 Mich. App. 223 (1966).

The court held that local zoning of land owned by the State of Michigan is invalid.

Haring Twp. v. Cadillac, 35 Mich. App. 260 (1971).

The court permitted a township to enforce its zoning ordinance against the use of state-owned land by the City of Cadillac for a sanitary landfill. The decision was based upon a statute requiring compliance with local zoning ordinances.

Benshaw v. Coldwater Housing Commission, 381 Mich. 590 (1969).

The courts held that a housing commission created under the authority of state statutes could ignore zoning ordinances in the location of housing facilities.

Taber v. Benton Harbor, 280 Mich. 522 (1937).

The court held that the city could not erect a water tower on land zoned for another use.

Detroit Edison v. Wixom, 10 Mich. App. 218 (1968).

The court held that a city can regulate the location of electrical transmission lines, but the reasonableness of the regulation

would be considered in light of how service outside jurisdictional boundaries would be affected.

Natural Areas

In order to protect agricultural land, and unique and valuable natural areas, the use of zoning regulations is often proposed. However, the very nature of the land to be protected precludes permitting extensive or intensive use, and thus the problem with zoning controls emerges. If use of the land is restricted to a great degree, as it must be to preserve agricultural or natural areas, the issue of confiscation becomes a reality. Zoning to preserve natural areas must show a reasonable and substantial relationship to the police power and specifically overcome questions of confiscation to be valid.

The Taking Issue comprehensively discusses the confiscation problem in relation to the preservation of natural areas, and while admitting that it presents a serious problem for land use control, states that "the popular fear of the taking clause is an even more serious problem than actual court decisions."[99] Particularly during the 70's the courts have been increasingly willing to recognize environmental purposes particularly where the regulations serve broad multi-purpose goals.[100] While new legislation, or a landmark court decision would help clear the chaotic scene caused by the taking

issue, Bosselman feels that a great deal can be done now to use land use controls to preserve natural areas by basing ordinances on "persuasive scientific evidence." Facts are important in any litigation, but they are particularly important when a taking issue is involved. The court becomes involved in a balancing test where it must weigh public need against private loss.[101] In this situation a strong factual basis for the land use regulation in question can help immensely in establishing a reasonable relationship to the police power and the absence of a taking.

Case Review--Michigan

Van Arsdel v. Addison Twp., 37 Mich. App 613 (1972).

The court upheld agricultural zoning as reasonable.

Sturdy Homes Inc. v. Township of Redford, 30 Mich. App. 53 (1971).

The court refused to uphold a floodplain zoning ordinance where the township failed to prove that the land was subject to flooding.

Case Review--United States

Potomac Sand and Gravel Co. v. Governor of Maryland
293 A2d 241 (1972).

In upholding an environmental regulation, the court extensively summarized the scientific evidence upon which the control was based.

Zoning Techniques

Anderson, in The American Law of Zoning, believes that the extensive amount of zoning litigation over the years has resulted because of three factors: 1) the willingness of the courts to decide each case on its merits and hold a regulation invalid as applied to a specific parcel; 2) the innovation of planners and lawyers in developing new zoning techniques which raise arguable questions; and 3) the fact that zoning restrictions place a rigid pattern of land use on a dynamic community.[102] It is quite probable that the bulk of litigation has resulted because of the first factor in response to the effects of the third, while a smaller proportion has involved the innovative efforts of planners and lawyers. It can also be reasonably concluded that the efforts of innovative planners and lawyers

have been directed toward inducing greater flexibility into a rigid system, recognizing the problems presented to the courts under Anderson's first factor. The merits and deficiencies of such techniques deserve detailed discussion. However, in the context of this paper, review will be limited to the court's viewpoint on the use of various new zoning techniques. An understanding of the legal framework into which innovation in zoning must fit should assist in reducing the propensity of each of Anderson's three factors to generate litigation.

Contract and Conditional Zoning

It has been generally held by the courts that when a municipality enters into a contract to zone property in a certain manner in exchange for valuable consideration, the contract is invalid as being against public policy.[103] The most obvious form of contract zoning appears when a city provides in its ordinance that in return for a property owner recording a specific deed restriction the property will be rezoned. This type of ordinance provision is declared invalid on the theory that a unit of government cannot contract away its future use of the police power.[104]

The issue of contract zoning becomes mixed with conditional zoning as a result of the increasing tendency of local units of government to grant rezonings in return for certain actions by the

petitioner, such as roadway improvement or a grant of open space. Situations such as these raise the question of whether such actions constitute contract zoning. Additionally, where such requirements are imposed, which are not stated in the zoning ordinance, a challenge based on uniformity may be valid.

Rathkopf states that conditions such as the grant of an easement or the posting of a bond are not permissible as a condition of site plan approval. However, if the ordinance sets forth standards which development must comply with, it would not be inappropriate for a planning board to suggest conditions which should be imposed by the enforcing authority.[105] Since Michigan courts have not definitively ruled on this question, Crawford advises units of government to refrain from granting approval in return for certain actions by an applicant. Such procedures have been invalidated in other states.[106]

Case Review--Michigan

Genessee Land Corp. v. Allen, 50 Mich. App. 296 (1973).

The court invalidated an ordinance amendment which changed the classification of a parcel of land subject to a construction and use restriction.

Case Review--United States

Battaglia v. Wayne Township Planning Board, 236 A2d 608 (N.J. 1957).

The court held that a planning board could not impose conditions on the approval of a site plan because of lack of statutory authority.

Site Plan Approval

It is common for zoning ordinances to provide for systems of site plan review and approval. Rathkopf finds that where site plan review is required by statute or zoning ordinance, the requirement is mandatory and failure to comply will invalidate the action contemplated.[107] However, a site plan is not the same as a subdivision plat, and in the absence of specific statutory authority, it is invalid to grant a planning board the power to approve a site plan. The recommendations derived from review can be advisory only, for consideration by the enforcing authority.[108]

Again, Michigan courts have not ruled on the validity of site plan review procedures. It is Crawford's opinion that as an administrative technique used to ensure compliance with the provisions of the zoning ordinance, it would be upheld in the courts. However, when site plan approval is used as a lever to gain concessions from

the applicant, the courts may consider the technique contract zoning and illegal.[109] Of course, in the absence of court rulings we are also lacking a determination as to who may finally pass upon site plan approval. The case of Smith v. Plymouth Twp. suggests that while the planning commission may perform a preliminary review, it is the prerogative of the board of appeals to make the final decision.[110]

Case Review--Michigan

Keating v. Orion Twp., 51 Mich. App. 122 (1974).

The court held that a property owner was entitled to superintending control to compel issuance of building permits where rejection of a site plan was not based on competent and substantial evidence.

Planned Unit Development

Planned unit development provisions of zoning ordinances have proliferated greatly in recent years. Since this technique varies significantly from the traditional theory and practice of zoning, concern has been expressed over its legality. Early commentators had serious reservations that planned unit development provisions lacked

statutory authority, represented an invalid delegation of power to administrative bodies, would violate uniformity provisions of state enabling acts, and be subjected to challenge as contract or conditional zoning.[111] To overcome these problems, several states enacted enabling legislation for planned unit development ordinances or amended their zoning enabling acts. Yet, it was found that even in the absence of these actions designed to validate PUD's, local units of government continued to add PUD provisions to their ordinances. This lack of hesitation can be explained by the popularity of PUD and the fact that the basic validity of the PUD concept is rarely litigated; not for lack of issues, but for lack of willing plaintiffs.[112]

In retrospect it is now acknowledged that the theoretical objections to PUD's have not been a major obstacle to successful implementation. While specific enabling acts can be very helpful, they are not considered a prerequisite for legality. The greatest problems, and the bulk of litigation, arise in respect to the process element of PUD approval. Indeed, the aspects of PUD's which have drawn the greatest disapproval from the courts have been provisions which vest unfettered discretion in the approving body, or actions by the approving body which violate the discretion allowed by the ordinance or the principles of due process.[113]

Michigan appears to have followed the pattern set nationwide: PUD's have increased greatly in the absence of statutory authority without challenge as to concept. Crawford had expressed confidence that if the issue arises, Michigan courts will find an argument to validate the use of PUD's. Yet, specific statutory authorization would certainly eliminate speculation and confusion.[114]

Case Review--United States

Orinda Homeowners Committee v. Board of Supervisors
11 Cal. App. 3d 786 (Cal. 1970).

The court upheld a PUD provision against the challenge that it violated the uniformity requirement of the enabling act.

Floating Zones

This technique where a zone is provided for in the ordinance, but not mapped until approved, has been generally approved by the courts in other states, but remains controversial. Perhaps the most noteworthy rejection occurred in the case of Eves v. Zoning Board of Adjustment, 401 Pa 211, 164 A2d7 (1960), where the Pennsylvania Supreme Court invalidated the floating zone technique for failing to be based on the comprehensive plan.[115] Since this decision,

Pennsylvania courts have softened their viewpoint.[116] The floating zone technique has also been challenged as spot zoning.

In Michigan, floating zones have not been specifically validated by the courts. In addition to the arguments of spot zoning and noncompliance with the comprehensive plan, Michigan courts are highly suspicious of this technique because of its tendency to be used for exclusionary purposes.[117]

Case Review--Michigan

Prevost v. Macomb Twp., 6 Mich. App. 462 (1967).

The court indirectly approved the floating zone technique.

Anderson v. Highland Twp., 21 Mich. App. 64 (1969).

The court disapproved a floating zone in a situation where it was used to exclude mobile homes.

Case Review--United States

LaRue v. East Brunswick, 172 A2d 691 (NJ).

The court upheld an amendment which had been characterized as a "floating use" since it permitted development of multiple dwellings in five of a township's eleven zoning districts.

Rodgers v. Village of Tarrytown, 96 NE2d 731 (NY).

In a case where an ordinance which established the boundaries of a zone upon application by a landowner, was challenged as not being in accord with the comprehensive plan, the court upheld its validity.

Rogers v. North American Philips Co., 236 NY S2d 744 (1962).

The court upheld two-step zoning which is sometimes referred to as a floating zone.

As Applied to Specific Property

Since Nectow v. City of Cambridge, 277 US 183 (1927), which struck down an ordinance as it applied to a specific parcel, a large percentage of the zoning litigation has involved the unreasonableness of an ordinance as it affected a single piece of property. Since generally the ordinance enjoys presumed validity, it is the plaintiff's responsibility to present proof of unreasonableness. In regard to a specific parcel this has been accomplished in a number of ways, with the most common being the charge of confiscation. Other arguments include spot zoning, relationship to the plan and factors unique to the property in question. Since the courts hear cases in this type of litigation on their own merits, it is difficult to find

with similar facts to form precedents. Often it is only possible to discern trends in judicial opinion.

Factors Influencing Unreasonable Zoning

Since it is outside the scope and intent of this thesis to describe in detail the many factors and related cases which have affected the reasonableness of a zoning classification, only a cursory examination will be presented. Certain common factors which seem to reappear with appropriate case citations are summarized. It is also noteworthy to mention that often more than one factor must be present to make a zoning classification unreasonable as applied to a parcel.

Traffic

White v. Southfield Twp., 347 Mich. 548 (1956).

Lamb v. Monroe, 358 Mich. 136 (1959).

Burrell v. Midland, 365 Mich. 136 (1961).

Nuisances--Noise, Smoke, Odors

Grand Trunk W. R. Co. v. Detroit, 326 Mich. 387 (1949).

West Bloomfield Twp. v. Chapman, 351 Mich. 606 (1958).

N. Muskegon v. Miller, 249 Mich. 52 (1929).

Nearby Uses

Pringle v. Shevnock, 309 Mich. 179 (1944).

Janesick v. Detroit, 337 Mich. 549 (1958).

Site Suitability

N. Muskegon v. Miller, 249 Mich. 52 (1929).

Keller v. Farmington Twp., 358 Mich. 106 (1959).

Jurisdictional Boundaries

Commerce v. Bayberg, 5 Mich. App. 554 (1967).

Population Density

Krause v. Royal Oak, 11 Mich. App. 183 (1968).

Lot Size, Shape

Korby, v. Redford Twp., 349 Mich. 193 (1957).

Improvement Costs

Baker v. Algonac, 39 Mich. App. 527 (1972).

Building Restrictions

Northwood Properties Co. v. Royal Oak, 325 Mich. 419 (1949).

Abrams v. Shugar, 336 Mich. 59 (1953).

Lamb v. Monroe, 358 Mich. 136 (1959).

Property Values

West Bloomfield Twp. v. Chapman, 351 Mich. 606 (1958).

Senefsky v. Huntington Woods, 307 Mich. 728 (1943).

Moreland v. Armstrong, 297 Mich. 32 (1941).

Availability of Services

Jamens v. Shelby Twp., 41 Mich. App. 461 (1972).

Stevens v. Royal Oak Twp., 342 Mich. 105 (1955).

Lack of Demand

Frendo v. Royal Oak Twp., 342 Mich. 105 (1955).

Wenner v. Southfield, 365 Mich. 563 (1962).

Discriminatory Enforcement

Blackman Twp. v. Koller, 357 Mich. 186 (1959).

Unreasonable Grouping

Shell Oil v. Livonia, 30 Mich. App. 454 (1971).

Mobile Oil Corp. v. Clawson, 36 Mich. App. 46 (1971).

Reliance on a Zoning Classification

June v. Lincoln Park, 361 Mich. 95 (1960).

Raabe v. Walker, 383 Mich. 165 (1970).

Uniformity

The zoning enabling statutes generally require that the regulations within a district must be uniform. The intent of such provisions is to ensure that the zoning power will not be applied in a discriminatory manner, ensuring that all citizens will receive equal protection of the laws. The uniformity rule can become an issue in spot zoning, conditional zoning, or in regard to the planned unit development provisions of an ordinance. In each of these instances, zoning regulations may be established which do not apply

uniformly throughout the zoning district and thus become the object of a uniformity challenge.

The question of what uniformity refers to has been raised. Some argue that the uniformity rule means that all uses within a district must be the same. However, it has been substantiated that the real point of the uniformity provision is to ensure that property owners having similar circumstances will be treated equally.[118] Thus, under this interpretation, different uses as well as different regulations could be permitted within a district without violating the uniformity requirement.

This reasoning appears to be supported by Crawford, who points out that while site plan approval could violate the uniformity rule, conditional uses are valid since they are established by ordinance and the regulations applicable to that use apply uniformly throughout the zoning district.[119]

Case Review--Michigan

Pennings v. Owens, 340 Mich. 355 (1954).

The court invalidated the spot rezoning of two lots stating that it was a means of circumventing the uniformity rule.

Spot Zoning

The term "spot zoning" appears frequently in zoning law; however, it is infrequently litigated in Michigan.[120] Anderson has defined spot zoning as generally an amendment which reclassifies a small parcel in a manner inconsistent with existing zoning patterns, for the benefit of the owner and to the detriment of the community.[121] While the size of the parcel frequently comes to mind when spot zoning is mentioned, the courts frequently point out that size alone is not a controlling factor.[122] The decision as to whether spot zoning has occurred can be complex, involving such factors as:

1. compliance with a master plan;
2. size of the parcel;
3. the development and classification of adjacent land;
4. relationships to existing zoning patterns;
5. the history of the amendment; and
6. the benefits or detriments which may accrue to the owner, neighbors and the community.[123]

Crawford has pointed out the spot zoning issue illustrates a basic problem in attempting to regulate land use through zoning. It may be beneficial in residential areas to permit a small commercial establishment for the benefit of the residents. However, this may be challenged as spot zoning. Even if such an action is found reasonable,

then the unit of government runs the risk that another property owner may request commercial rezoning and to refuse would subject the city to charges of discrimination.[124] The spot zoning problem seems to indicate yet another aspect of zoning where the technique has precluded a flexible response to the realities of living patterns.

Case Review--Michigan

Penning v. Owens, 340 Mich. 355 (1954).

In a case where a parcel in a residential area was rezoned commercial, the court stated that any spot zoning is to be regarded with suspicion, closely scrutinized and sustained only under rather unusual facts. The court noted that a zoning ordinance or amendment creating a small zone of inconsistency in land use within a larger zone is commonly designated spot zoning.

Case Review--United States

Jones v. Zoning Board of Adjustment, 108 A2d 498 (NJ 1954).

The court stated that spot zoning was the singling out of a small parcel for a totally different use classification for the benefit of a landowner. Spot zoning is the antithesis of planned zoning.

Wiley v. Town Council of Barrington, 261 A2d 627 (1970).

The validity of spot zoning does not turn on size but on consistency with the plan.

Confiscation

The United States Constitution in Amendment V contains the words "nor shall private property be taken for public use without just compensation." It is these words which have formed the basis for the argument that a zoning regulation has resulted in a "taking" of property and thus is unlawful, and an unreasonable exercise of the police power. Based upon the rule set down by Justice Holmes in Pennsylvania Coal Company v. Mahon, 260 US 393 (1922) the courts are agreeable to this argument when they find that the regulation is so severe that reasonable use, and thus the property value, of the land has been significantly lowered. The rule established by Justice Holmes is stated as:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[125]

In line with the reasoning set forth by Justice Holmes, the courts have used a balancing test in determining when a taking has occurred. The public benefit is weighed against the extent of loss of property values.[126] Since this process is less than precise and

can vary immensely from court to court and case to case, the decisions involving the taking issue have been described as "chaotic."[127] The interpretations vary from state to state and the thresholds at which takings occur do not follow a discernible pattern. Yet, it has been pointed out that the courts show a general tendency to be more supportive of regulations with a strong factual basis which serve multi-purpose goals.[128]

The situation in Michigan is no different. An ordinance which renders property valueless will be invalidated. However, if the property retains value the question is how much can that value be reduced as a result of zoning before a taking occurs. There are no monetary guidelines.

Case Review--Michigan

Reibel v. Birmingham, 23 Mich. App. 732 (1970).

The court upheld a residential zoning classification despite the fact that the land value would be ten times higher for office use. The fact that a zoning regulation confiscates a segment of the value of property does not make it confiscatory. Zoning of a particular property, though rational, which prevents any reasonable use is confiscatory and invalid.

Industrial Land Co. v. Birmingham, 346 Mich. 667 (1956).

The court struck down residential zoning where the land value was 3 times higher for business use.

Drummer v. Avon Twp., 51 Mich. App. 21 (1973).

The court did not accept confiscation argument where owners had paid more for the land than it was worth under existing zoning hoping to have it rezoned. When property is being used and is of substantial value when put to that use, the confiscation argument is not valid.

Patchak v. Lansing Twp., 361 Mich. 489 (1960).

A showing of highest and best use for a parcel may not be sufficient to establish reasonableness. The test of reasonableness is not the fact that property would be worth more under another zoning classification.

Impact of the Plan

As discussed in a previous section, the enabling statutes require zoning to be accomplished in accord with a comprehensive plan. This requirement would appear to reveal a legislative intent to limit the freedom of units of government to arbitrarily establish districts and regulations.[129] Since the plan requirement exists in statute it would appear probable that a logical challenge as to the reasonableness

of zoning as applied to specific property would be lack of, or inconsistency with a plan.

Anderson finds that as a general issue, the plan has not assumed the importance in litigation that the statutory authority would suggest. Usually the courts recognize that communities are constantly changing and the plan may well be out of date or inappropriate. Rather than consider whether an amendment is consistent with a plan, the courts will inquire whether the proposed change will serve the public health, safety and welfare. If they are satisfied that the amendment meets this test, they consider it adopted in accord with the plan.[130]

In Michigan, several court cases have considered the plan in determining the reasonableness of a zoning classification. Particularly noteworthy in this state is the "present use" rule established in Gust v. Canton Twp., 337 Mich. 137 (1955), where the court held that zoning must be reasonable under present conditions. The court stated:

> The test of validity is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals, or general welfare, but whether it does so now.[131]

The decision in Gust has been interpreted as greatly restricting a unit of government's ability to base zoning on a plan. Yet, a number of court decisions have subsequently used the plan as a basis

for finding zoning reasonable, specifically when the plan has been adopted by the units of government. Crawford suggests that the decision in Padover v. Farmington Twp., 374 Mich. 622 (1965) signaled the beginning of greater attention by the courts to the existence of an adopted plan as a test of reasonableness. And, while the Gust rule still remains in effect, the courts are willing to consider the plan as evidence of reasonableness, provided they find the plan accurate and realistic. Crawford speculates that a future test used by the courts in determining the reasonableness of a plan may be evidence of its implementation.[132]

Case Review--Michigan

Gust v. Canton Twp., 337 Mich. 137 (1955).

The court held that zoning must be reasonable under present not future conditions.

Padover v. Farmington Twp. , 374 Mich. 622 (1965).

In upholding large lot zoning, the court placed great weight on an adopted master plan as evidence of reasonableness.

Bisek v. Troy, 381 Mich. 611 (1969).

The court found that an unadopted master plan was too speculative to support a zoning decision.

Baker v. Algonac, 39 Mich. App. 527 (1972).

In approving a contested rezoning, the court made mention that the rezoning was in accord with a master plan.

FOOTNOTES

[1]Donald G. Hagman, Urban Planning and Land Development Control Law (St. Paul: West Publishing Company, 1971), p. 68.

[2]Ibid., p. 71.

[3]State of Michigan Executive Office, Michigan Planning and Zoning Survey (Lansing, Michigan: State Planning Division of the Executive Office, 1972).

[4]Ibid.

[5]Robert M. Anderson, American Law of Zoning, I (Rochester, New York: The Lawyers Co-operative Publishing Company, 1968), p. 45.

[6]Hagman, p. 68.

[7]Anderson, p. 46.

[8]Hagman, p. 68; zoning through eminent domain was used in Minnesota and some parts of Kansas City are still zoned in this manner. The approach used in Kansas City was recently upheld in City of Kansas City v. Kindle 446 SW2d 807 (MO 1969).

[9]Anderson, p. 47; cases upholding zoning prior to 1926 included State ex rel. Carter v. Harper 196 NW451 (1923), State ex. rel. Beery v. Hougton 204 NW 569 (1925), Aurota v. Burns 149 NE 784 (1925), Ware v. Wichita 214 P 99 (1923).

[10]Euclid v. Ambler Realty Co. 272 US 365 (1926), at 387.

[11]Ibid., at 388.

[12]Ibid., at 395.

[13]R. S. D'Amelio, Origin of City and Village Zoning in Michigan (unpublished report, n.d.), p. 1.

[14]Anderson, p. 140.

[15]Clan Crawford, Michigan Zoning and Planning (Ann Arbor: Institute of Continuing Legal Education, 1967), p. 1-2.

[16]Anderson, p. 133.

[17]Ibid., p. 158; see Ellison v. City of Ft. Lauderdale 183 So2d 193 (1966).

[18]Hagman, p. 81; see Albrecht Realty Co. v. Town of New Castle 167 NYS 2d 843 (1957).

[19]Anderson, p. 155.

[20]Ibid., p. 159.

[21]Ibid., p. 230.

[22]Ibid., p. 233.

[23]Ibid., p. 234.

[24]Arden H. Rathkopf, The Law of Zoning and Planning (New York: Clark Boardman Company Ltd., 1974), p. 9-2.

[25]Ibid., p. 9-9.

[26]Crawford, p. 8-51.

[27]Ibid., 1974 Supplement, p. 66.

[28]Anderson, p. 168.

[29]Anderson, p. 170.

[30]Anderson, p. 182.

[31]Ibid., p. 175.

[32]Ibid., p. 175.

[33]Hagman, p. 82; other states include Arizona and Ohio.

[34]Hagman, p. 82; see Hurst v. City of Burlinghame (Cal) 277 P 308 (1929).

[35]Ibid., p. 83; see Johnson v. Oaremont (Cal) 323 P2d 71 (1958).

[36]Ibid., p. 83; see Aller v. Humboldt County Bd. of Supervisors (Cal) 50 Cal Rptr 444 (1966).

[37]Ibid., p. 85; see Alexander v. City of Minneapolis, 125 NW 2d 583 (1963), and State ex rel. Kramer v. Schwartz (Mo), 82 SW2d63 (1935).

[38]Ibid., p. 85; see Miller v. Board of Public Works (Cal), 234 D 381 (1925), Mettu v. County Commissioners of Howard County (Md) 129 42d 136 (1957), Rockaway Estates v. Rockaway Twp. (NJ) 119A2d 461 (1955).

[39]Anderson, p. 284.

[40]Crawford, p. 6-8.1

[41]Ibid., p. 6-8.1

[42]Crawford, p. 6-15.

[43]Anderson, II, p. 608.

[44]Ibid., p. 613.

[45]Ibid., p. 668.

[46]Hagman, p. 197.

[47]Ibid., p. 197.

[48]Crawford, 1974 Supplement, p. 6-11.

[49]Mitchell v. Graval, 338 Mich 81 (1953).

[50]Smith v. Plymouth Twp. 346 Mich 57 (1956), Shulhan v. Hamtramck, 5 Mich App 399 (1966), Burch v. Bloomfield Hills, 30 Mich App 246 (1971).

[51]Clan Crawford, remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[52]William R. McTaggart, Handbook of Michigan Zoning and Planning (Lansing, Michigan: Michigan Township Association, 1970), sec. 21.11.

[53]Hagman, pp. 207-208.

[54]Anderson, p. 308.

[55]Hagman, p. 154.

[56]Anderson, p. 323.

[57]Anderson, p. 326.

[58]Ibid., p. 327.

[59]Ibid., p. 328.

[60]Ibid., p. 341.

[61]Ibid., pp. 343-344.

[62]Crawford, 1974 Supplement, p. 5-10.

[63]Anderson, p. 376.

[64]Ibid., p. 377.

[65]Hagman, p. 150.

[66]Anderson, p. 381.

[67]Hagman, p. 149.

[68]Anderson, pp. 419-420.

[69]Ibid., p. 429.

[70]Hagman, p. 152.

[71]Anderson, p. 434.

[72]Hagman, p. 153.

[73]Anderson, p. 437.

[74]Ibid., p. 446.

[75]Ibid., pp. 446-447.

[76]Ibid., p. 447.

[77]Hagman, p. 160.

[78]Seattle v. Martin, 342 P2d 602 (1959).

[79]Anderson, p. 450.

[80]Ibid., p. 60.

[81]Ibid., pp. 80-81.

[82]Ibid., p. 82.

[83]Anderson, p. 60.

[84]Crawford, p. 7-2.

[85]Anderson, p. 70, 71.

[86]Crawford, p. 7-6.

[87]Kropf v. City of Sterling Heights 391 Mich 139, 147, concurring opinion by Justice Levin.

[88]Brae Burn, Inc. v. Bloomfield Hills 350 Mich 425 (1957).

[89]Crawford, p. 7-5.

[90]Ibid., p. 7-7.

[91]Anderson, p. 552.

[92]Ibid., p. 552.

[93]"Should the Courts Control Growth," Planning, November, 1974, p. 17.

[94]Anderson, p. 498.

[95]Ibid., p. 499.

[96]Crawford, p. 8-105.

[97]Hagman, p. 115.

[98]Anderson, p. 543.

[99]Fred Bosselman, The Taxing Issue (Washington, D.C.: U.S. Government Printing Office, 1974), p. 328.

[100]Ibid., p. 323.

[101]Ibid., p. 284.

[102]Anderson, p. 31.

[103]Crawford, p. 2-11.

[104]Hagman, p. 174.

[105]Rathkopf, pp. 30-18 and 30-19.

[106]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[107]Rathkopf, pp. 30-8 and 30-9.

[108]Ibid., pp. 30-13 and 30-15.

[109]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[110]Ibid.

[111]Frank S. So, David Mosena, and Frank S. Bangs, "Planned Unit Development Ordinances," The Planning Advisory Service, Report No. 291 (May, 1973), 45.

[112]Ibid., p. 47.

[113]Ibid., p. 54.

[114]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[115]Anderson, pp. 285-287.

[116]So, p. 49.

[117]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[118]So, p. 48.

[119]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

[120]Crawford, p. 8-55.

[121]Anderson, p. 242.

[122]Ibid., p. 255.

[123]Ibid., p. 244.

[124]Crawford, p. 8-56.

[125]Pennsylvania Coal Company v. Mahon, 260 US 393 (1922), at 415.

[126]Bosselman, p. 321.

[127]Ibid., p. 322.

[128]Ibid., p. 323.

[129]Crawford, p. 8-51.

[130]Anderson, p. 237.

[131]Gust v. Canton Twp., 337 Mich. 137 (1955), at 442.

[132]Clan Crawford; remarks at Conference on Zoning and Planning sponsored by the Institute for Continuing Legal Education, January 24-25, 1975, Southfield, Michigan.

THE VALUE OF THE LEGAL PERSPECTIVE IN ZONING

Chapter IV

THE VALUE OF THE LEGAL PERSPECTIVE IN ZONING

As the preceding review of Michigan court cases related to zoning indicates, failure to understand the case law relating to zoning leaves the planner with only a partial picture of how the zoning power may be used. The planner who reads the enabling statute and attempts to use zoning, applying planning perspectives unenlightened with knowledge of applicable legal doctrines, runs the risk of either not using zoning to its full potential, or abusing the use of the power in a manner which may be invalidated in a legal proceeding, or go unchallenged, but violate principles of fairness and equity. An awareness of the case law related to zoning is just as important to the creative use of this power, as a sensitivity to the planning objectives which give the power meaningfulness, purpose, and usefulness.

Case law in a dynamic sense provides guidelines for the use of zoning, derived on a case specific basis, which sets contemporary parameters defining a balance between public needs and individual rights, as well as limits on how the power may be exercised, achieving this balance in an equitable manner. The planner should be

interested in these guidelines not only because he wants to ensure that his actions will be legally valid, but also because he recognizes that his objectives will only have meaning if reached within an atmosphere of fairness and justice.

The question can now be asked, how does the planner incorporate a knowledge of case law on zoning into his planning practice? Quite obviously, the most overt manner occurs when a planner is involved in the most rudimentary aspects of zoning--the adoption, amendment, and administration of a zoning ordinance. During these most basic zoning activities the planner must know how to properly perform a series of procedural functions in order to validly complete a zoning action. Failure to complete the basic procedural requirements contained in the enabling statute and relevant court cases will invalidate the zoning activity. For example, how many public hearings on the amendment of the zoning ordinance must be held? Should notice of the public hearing be given? How should the notice be given? Who should it be given to? What information should be contained in the notice of public hearing? In Michigan, a planner confronted with these elementary questions would have to be cognizant of a number of variables. He would first have to know which enabling act to consult --city-village, county, township. The proper act would tell him how many hearings are required, and how and to whom notice should be given; except if he were operating in a city or village. The

City-Village Enabling Act is not clear as to how many hearings are required. Thus, to avoid an error with respect to public hearing, an awareness of the Supreme Court Decisions in Bingham v. Flint, Haven v. City of Troy, and Boron Oil v. Southfield would be necessary. These decisions require cities and villages to hold two public hearings--a practice different from that required for Michigan counties and townships. With respect to what must be contained in the notice of public hearing, the enabling acts would not offer answers to the planner. However, were he simply to make up a notice he would run the risk of improper notification. The courts are very concerned that citizens receive an opportunity to be heard and have been careful to insure that adequate notification has been given. The planner would benefit from an awareness of various court decisions which taken together indicate the need for a proper notice to indicate: 1) the type of zoning action contemplated; 2) the geographic area affected by the zoning proposal; and 3) the date, time, and place of the hearing.

Thus, it is evident that with regard to such a basic function as holding a public hearing on a zoning matter, the planner must have more than the desire to use zoning effectively and a copy of the zoning ordinance. In the situation described above, he would be required to consult the appropriate enabling statute, and have a knowledge of

relevant case law. No matter how noble his planning objectives may be, in the absence of adequate legal knowledge his actions might not only fall short of their potential effectiveness, they could be legally invalid.

While the procedural concern expressed above appears very fundamental and of little consequence, it is important to the validity of zoning actions and cannot be overlooked or improperly accomplished. These procedural concerns also become more important and more difficult to deal with when the planner becomes involved in more sophisticated zoning techniques such as planned unit development, site plan review and approval, bonus zoning, and special use approval. New zoning techniques, such as those mentioned, often lack a statutory basis to define if they can be legitimately used, or how they may be used. Thus the planner involved in implementing such techniques shoulders a heavy responsibility not only to insure that they support planning objectives, but that the actions of the governmental unit will be conducted in a lawful manner and will be safe from legal challenge. It would be extremely unfortunate for worthwhile development goals to be blocked by an avoidable legal infraction.

By way of example, let's look at the planned unit development technique--a zoning procedure used extensively in Michigan zoning ordinances. Aside from the fact that there is no specific

authorization for the use of this approach to zoning in the enabling acts, there are several legal pitfalls which could result in invalidation of planned unit development approvals. Potential legal problems for planned unit development approval systems involve the principles of substantive and procedural due process, and equal protection, which spawn arguments such as uniformity, spot zoning, floating zones, contract zoning, improper delegation of administrative authority, and lack of relationship to a plan. Assuming that a PUD can be legitimized under existing enabling acts, each of the legal arguments mentioned above could be used to seek invalidation of PUD provisions. And, while each of these legal arguments connote a slightly different objection, and thus a different factual situation for support, they all deal with the manner in which PUD provisions are structured in the zoning ordinance, and, as a consequence, exercised in response to specific development requests. A planner with a knowledge of these potential legal pitfalls would be able to construct ordinance provisions for PUD's with a high degree of effectiveness, and a lower probability of legal challenge.

For example, it is not uncommon in Michigan ordinances to find that the PUD stands as a separate zoning district which is not mapped on the zoning district map. A developer seeking to build a PUD requests that his land be zoned as a PUD district. Upon approval of his request,

a PUD zoning district is placed on the zoning map, geographically defined by the boundaries of the applicant's property. This approach to PUD's requiring rezoning of property, runs the risk of potential legal challenge based on the charge that it is:

1) spot zoning, if the development encompasses a small area of land, is inconsistent with surrounding land use patterns, and was approved for the benefit of one landowner without necessarily being in the public interest; or

2) a floating zone, where the zoning district is only mapped upon the request of a landowner, and lacks a basis in a predetermined zoning plan as required by statute; or

3) violative of the uniformity rule which requires similarly situated land uses of the same type within a zoning district to be subject to the same requirements; or

4) contract zoning, where the legislative body bargains away future law-making powers by granting a rezoning--a legislative act--in return for certain concessions given to the governmental unit by the landowner, such as parks or streets.

As an alternative, ordinances which permit PUD's as special uses within predetermined and mapped zoning districts defuse the legal

arguments raised above, and provide an administrative basis for decision which is less likely to violate the principles of due process, and equal protection, or raise the arguments of contract zoning, and improper delegation of administrative authority. This assumes of course that legally correct administrative procedures, complete with decision criteria, have been built into the zoning ordinance.

In addition to the ability to complete zoning procedures and design zoning techniques with a greater assurance of legal validity, a knowledge of the legal perspective of zoning permits this tool to be applied more effectively to resolve specific development problems. For a planner adopting the problem-specific model of planning, this capability is a vitally important ingredient to the creative and effective use of zoning to support planning objectives.

The problem-specific focus in the use of zoning may result because of the need to react to a specific development request, or in response to an observed community development problem and the desire to use zoning, either alone or in concert with other tools, to resolve the dysfunction. The use of zoning in a problem response situation requires an ability to interrelate the characteristics of the problem, solution objectives, community planning policies, the capabilities of the zoning power, and the legal parameters on use of zoning into a strong and effective solution strategy. Of course,

this strategy, or strategy alternatives, would be plugged into the problem-specific model of planning utilizing other appropriate forms of professional synthesis, impact analysis and solution evaluation and realignment.

The manner in which knowledge of the legal perspective of zoning can assist in developing a strategy to confront a development problem can best be illustrated by considering a situation which occurred in southwestern Michigan. In this instance, zoning did not represent the total solution to the problem, but it did provide one element of a strategy to prevent further aggravation of an unfortunate situation.

A parcel of property near Lake Michigan was platted during the 1920's into over 1200 residential lots measuring 20 by 100 feet. Over the intervening years scattered development of substandard seasonal homes occurred in this plat. At the present time, growth pressures from the adjacent metropolitan area are being felt in the township and there is concern among public officials that this plat, unserved by sewer and water, will become densely populated with greater numbers of substandard structures. The question posed is can zoning be used to encourage more suitable housing development in this area.

Of course there are a number of other tools which could be used to resolve this problem, including building codes, health codes,

acquisition, community renewal, and plat revision. However, when you consider the fact that this previously rural township has limited financial resources, such costly approaches as acquisition or community renewal become rather unrealistic. Since a diverse ownership pattern is present in the plat, and those large areas which are in single ownership are being held for speculation, plat revision would require great township initiative and should there be resistance, extremely high legal fees could result. Thus, it is understandable why the township would resort to zoning as a solution, although other tools such as building codes should not be neglected. They should be positively arrayed in complementary roles.

In looking at zoning as a method to ameliorate the problems this plat may cause for the township, several characteristics should be isolated:

1) Which, and how many parcels of property have already been developed?

2) What are the ownership patterns; single lot or several lots; contiguous or scattered?

3) Are public utilities serving the plat?

4) What is a suitable type and intensity of development, considering natural determinants, as well as the presence of

adjacent development, and the capability of existing public facilities and services serving the plat?

5) What land use needs are present in the township and surrounding area? Are housing opportunities for a wide range of socio-economic groups available in the township?

6) What land use is recommended for the platted area in light of township plans and future development objectives?

In this situation the existing residential use of the plat was appropriate. The question of desirable and reasonable residential density requirements had been faced by the planners dealing with the township after considering housing needs, the diversity of housing types permitted by the zoning ordinance, the lack of public utilities, and the environmental character of the area. The remaining question was how can zoning be legally applied to promote better development.

After a review of relevant court cases, the following legal guidelines were uncovered to help shape a strategy which would not only be effective, but rest on sound legal ground:

1) Existing developed lots must be considered nonconforming. This principle is established in the enabling acts. Provisions can be built into an ordinance requiring conversion

to a conforming use and structure upon abandonment or destruction. Meanwhile, building and health codes must be relied upon to insure healthful living conditions.

2) Where zoning provisions leave the owner of a lot with a buildable area which is impossible to use, the ordinance provision is unreasonable and invalid. Bassey v. Huntington Woods, 344 Mich. 701 (1956); Ritenour v. Township of Dearborn, 326 Mich. 242 (1949).

3) Where several contiguous lots are owned, it is reasonable to expect the landowner to combine them to meet zoning ordinance requirements. Korby v. Redford Township 348 Mich. 193 (1957); Highland Oil Corporation v. Lathrup Village, 349 Mich. 650 (1957); Roberts v. Three Rivers, 352 Mich. 463 (1958).

4) Where the owner of contiguous lots is situated in an area already developed on substandard lots, it would be unreasonable to force compliance with the zoning ordinance. This practice would be analogous to spot zoning. SBS Builders v. Madison Heights, 389 Mich 323 (1973).

With these legal parameters in mind, it is possible to recommend a zoning strategy which will require the owners of contiguous

lots to build in compliance with the zoning regulations, except where there has already been extensive development on substandard lots. Where there are single lots, or even several lots involved which cannot meet the requirements of the ordinance, the township will have to declare these nonconforming and permit their development. To enforce ordinance provisions with regard to these lots would prohibit their use and justify a legal challenge on the grounds that reasonable use of the property was forbidden. Of course, health and building codes can be used with regard to the nonconforming lots, and in many cases, lacking public utilities, building a dwelling unit may be an impossibility.

The zoning ordinance can also provide an incentive to a more complete resolution of the problem. In addition to the ordinance provisions described above, planned unit development by special use approval could be built into the ordinance for the district encompassing the plat. Thus, provision is made for the undeveloped portions of the plat to be developed as a complete unit. In this manner the plat would be revised to meet contemporary standards, with the burden of plat revision transferred to the developer.

As the example described above illustrates, a knowledge of zoning law combined with planning perspectives and specifically applied to the factual situation surrounding a problem, can result

in a sound resolution strategy. To attempt to resolve this problem without consideration for the characteristics of the problem an understanding of how zoning can properly be applied to the problem as defined, and an awareness of future development objectives, would invite either a less than effective solution, a legally invalid approach, or undesirable results. All too often, when zoning is applied as a solution to a problem these considerations are not analyzed and a proper approach constructed. It is much easier to adopt model language that has been used elsewhere. Yet, the effort saved may only bring short-term benefit when it comes time to pay the costs associated with this approach which come due in legal fees, invalidation and unsatisfactory or unexpected results.

Zoning should be conceived as a problem resolution strategy. It may be used in a comprehensive sense to implement a range of planning objectives and avert anticipated problems expressed in a development plan, or in a focused sense to resolve specific problems. In either case it represents a tool to be applied, and it can only be applied well if particular attention is concentrated on the fine tuning of the various elements which contribute to successful use. This means the planner must isolate the characteristics of the problem in question, determine the relative impact of future development objectives, relate legal guidelines to specific problem characteristics,

and develop a strategy accordingly. To perform this task well, and achieve beneficial results requires the planner to sharpen his tools not only in terms of being able to specifically determine and describe the impacts of problems, but also in terms of his ability to design implementation strategies recognizing legal principles. An understanding of the legal parameters on use of the zoning power illustrates in a specific sense how strategy-oriented planning, applied to specific problems, can assist the planner in developing relevant responses to community dysfunctions.

WEST V. CITY OF PORTAGE

THE JUDICIARY PROVIDES PROVOCATIVE THOUGHTS ON ZONING PRACTICE

Chapter V

WEST V. CITY OF PORTAGE--THE JUDICIARY

PROVIDES PROVOCATIVE THOUGHTS ON ZONING PRACTICE

> The time has come . . . to cast aside old slogans and catchwords . . . zoning as long range planning based on generalized legislative facts without regard to the individual facts has proven to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances--reflecting, generally, decisions made on individual grounds--brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts, governmental needs, and, as important as any, market and consumer choice.
>
> Reality is not what a master plan shows, but how it is implemented.
>
> --Justice Levin in Kropf v. Sterling Heights (concurring opinion) 391 Mich 139 (1974), at 168.

As the courts consider and resolve specific controversies, the doctrine of stare decisis operates to build a body of interpretative reasoning defining rights and responsibilities, and establishing constraints, as well as directions, for public and private action. Since American courts are not strictly bound by the rule of precedent, the perspectives adopted by the court's change slowly over time in tune

with the needs and desires of society. Theoretically, the dynamics of the American system of justice are such that judicial digression from strict compliance with stare decisis occurs in a well reasoned atmosphere of stability and recognition of social need. As a result, it is possible to ascertain the direction of American law and determine the limits of rights, responsibilities and power, while permitting change in accord with new social interests.

In Michigan, zoning law appears to be divergent from the theoretical. In Turkish v. Warren, 61 Mich App 435 (1975), at 438, a judge of the Michigan Court of Appeals observed:

> The law of zoning is a hodgepodge of confusion. It is possible to find authority in support of practically any position one desires to take in a given fact situation.

Clear legal direction is difficult to chart on the basis of zoning litigation in Michigan. The immense diversity in factual situations which can arise contributes to this dilemma. However, this characteristic of zoning litigation is compounded by the inconsistent perspectives adopted by the judiciary and the lack of direction imparted by the statute. The presence of this situation is of course contrary to the theory and spirit of our legal system. Equally important, the performance of zoning, as a legitimate instrument of government, suffers.

Although this observation may evoke frustration--particularly in a thesis which advocates a closer relationship between law and

planning--a basic point can be emphasized again. The practice of zoning and planning can increase in effectiveness and relevancy through more concise attention to, and understanding of the legal perspective and the stance of our courts. And, where the courts appear unsettled on a direction--cases point in varying directions--the responsibility becomes heavier for the positive planner. Rather than express the same uncertainty exhibited by the courts, the planner should seek to understand the reasoning behind the conflicting legal opinions, and form a strategy for attainment of planning objectives which will seize the lead and lend support and direction for one or both of the opinions in conflict. Quite basically, planners must learn to understand that while the courts represent the final word on the validity of an action, their rulings react on a case-by-case basis and their decisions have a definable basis in reason and precedent. It is advantageous for the planner to learn to recognize legal constraints and most importantly their reasons for existence, while fostering the ability to perceive opportunities and formulate strategies which will create the interface between law and planning; a synthesis which will creatively and positively apply law as a framework for effective and sensitive planning. In the immediacy of day-to-day decision making such an approach involves the use of zoning strategies which are legally defensible, equitable and responsive to public goals. In the

long run, a closer relationship between law and planning will necessitate involvement in litigation and concerted efforts to structure statutory reform.

The recent Michigan court case of West v. City of Portage, 392 Mich. 458 (1974) serves to illustrate the dynamics involved in effectuating a planning and law synthesis. In this instance it is a synthesis which suggests new directions for planning and zoning, as envisioned by a member of the Michigan Supreme Court. Justice Levin, breaking from traditional assumptions in zoning law, has examined the nature of the rezoning process and quite logically reached certain conclusions which though at variance with common opinion, have support in law, as well as common sense. Since the Levin reasoning does depart from the known and accepted, it is to be expected that a segment of the legal and planning professions, and many public officials will voice opposition, even though the Levin observations support what has been apparently known about the rezoning process by planners for years. Additionally, the lack of majority concurrence in the Levin viewpoint, tempts the observer to express frustration and prompts him to ignore the decision for lack of a concise and clear mandate. However, for the planner who reads the decision closely and understands the interface between planning objectives and the problems inherent to the zoning process, this decision may indicate

new directions and potentials. The opportunity may be present for planners and attorneys, working in concert, to forge a new and improved process of regulating land usage.

Background

In March of 1971, the City Commission of Portage, Michigan, a home rule community of 33,590 residents, adopted an amendment to their zoning ordinance, rezoning 150 acres of single family residential property to permit construction of commercial, multiple family and office structures.[1] In considering and approving the rezoning amendment, the City Commission complied with the procedures specified in the City-Village Zoning Enabling Act, including the 3/4 vote requirement when the amendment was challenged by abutting property owners.[2]

Following adoption of the rezoning amendment, landowners adjacent to the property rezoned filed a petition with the Portage City Clerk seeking repeal of the amendment or a referendum. The petition also requested Commission adoption or initiative passage of a new zoning proposal. The petition was based upon the City of Portage Charter which grants the right of initiative or referendum on "any ordinance."[3]

Subsequently, the City Commission failed to take the steps requested by the landowners and, as a consequence, the petitioners filed suit in April of 1971.[4]

The suit asked the court to enjoin the issuance of building permits for the project and order a referendum held on the rezoning amendment, if it was not repealed. The plaintiffs also asked the court to require the defendant to accept the initiative request for rezoning the property, and declare the present rezoning invalid. On March 6, 1972, the trial court granted a summary judgment to the defendants, holding that the plaintiffs did not have a right to referendum or initiative on a rezoning amendment. The Michigan Court of Appeals on March 2, 1973, in an unreported opinion affirmed the trial court's decision.[5] In reaching their decision, both the trial court and the Court of Appeals based their decisions on the holding in the case of Elliott v. Clawson, 21 Mich. App. 363 (1970), where the Court of Appeals ruled that provisions of a home rule charter allowing referendum on legislation do not apply to zoning ordinance amendments. The Michigan Supreme Court in Korash v. City of Livonia, 388 Mich. 737 (1972), has also ruled that a city zoning ordinance cannot be amended by initiative, as this would be incompatible with adoption procedures specified in the enabling act.

Following adverse rulings in both the trial court and the Court of Appeals, the plaintiffs appealed to the Michigan Supreme

Supreme Court. Having heard the arguments on both sides, the Supreme Court issued its opinion in the case of West v. City of Portage on March 4, 1974.

The Decision

West v. Portage resulted in two written opinions: one written by Justice Levin, signed by Justices Fitzgerald and Thomas G. Kavanaugh, and the other written by Justice Williams and signed by Justices Swainson and Thomas M. Kavanaugh. When the court's decision was originally issued, Justice Coleman's signature appeared on the Levin decision, making it, by a 4-3 vote, the opinion of the court. Subsequently, Justice Coleman removed her signature, simply indicating her concurrence in the result indicated by the Levin decision. As a result of this chain of events, a 3-3 tie occurred, and Michigan missed by one vote having the Levin doctrine become law.

Before looking at the Levin decision in detail, it is noteworthy to consider the findings of Justice Williams. The Justice addressed the issue of whether there was the right to referendum on a zoning ordinance in a home rule city. Finding that the power of referendum did not conflict with the intent of the zoning enabling act, and in the absence of statutory prohibitions, Justice Williams

decided that the right of referendum on zoning amendments existed. However, in this specific case, since a referendum had been combined with initiative, which is invalid in regard to zoning ordinances by virtue of Korash v. Livonia, the petition submitted by the plaintiffs to the City Clerk was not legal. Thus, Justice Williams affirmed the lower court in part, and reversed the lower court in part.[6]

Justice Levin in his opinion also addressed the question of whether the right to referendum a zoning ordinance existed in a home rule city. However, in reasoning distinctly different from that exhibited by Justice Williams, Justice Levin held that a zoning ordinance amendment rezoning specific property is not subject to referendum, since the right of referendum extends only to legislative acts. A rezoning, traditionally thought of as a legislative action, is in substance an administrative act. It is in this distinction between legislative and administrative actions drawn by Justice Levin with regard to rezonings that raises the possibility of fundamental change in zoning practice extending beyond the original issue of referendum. The question of the right to referendum has simply become the precipitator of more basic and sweeping reform.

After briefly considering the history of initiative and referendum in Michigan and discussing the opinions of courts in other states, Levin concluded that the powers of initiative and referendum

apply only to legislative actions, and not to the administrative, executive or even judicial functions a local legislative body may exercise. Quoting from American Jurisprudence, and the Stanford Law Review, Levin supported his conclusion pointing out:

> Actions of a legislative body which are administrative or executive in nature are generally not subject to initiative and referendum. The question arises generally in connection with municipal assemblies whose enactments may be either legislative or executive. Resolutions and ordinances of municipal bodies if not in fact legislative, are not subject to referendum.
>
> --42AmJur 2d, Initiative and Referendum, 659

> Another major limitation on initiative and referendum arises from the distinction drawn by the courts between administrative and legislative action. Only legislative action is subject to initiative and referendum. This exception applies only to actions of local governments in which the administrative and legislative functions are combined in one body. The courts look to the substance of the matters passed by the governing units and not to the form in which they are passed. An "ordinance" might be either legislative or administrative.
>
> --Limitations on Initiative and Referendum, 3 Stan L Rev 497, 502-503 (1951)

Levin also pointed to Rollingwood Homeowners Corp., Inc. v. City of Flint, 386 Mich. 258 (1971) where the Court stated: "There is nothing inherently legislative about a decision to acquire real estate." And, to Brazell v. Zeigler, 26 Okla. 826, 110P1052 (1910), where an Oklahoma court held that the action of a county board of commissioners ordering its clerk to advertise for bids for the construction of a bridge was administrative and not subject to referendum.

Upon this basis, Levin concluded that:

> For reasons historical and practical and in implementation of the apparent intent of the Legislature, the rights of initiative and referendum . . . are limited to legislative measures.

With this premise in hand, Levin moved on to tackle the question of zoning ordinances and their amendment. Drawing upon Rathkopf, Levin quoted:

> Some states provide for legislation through referendum. The question arises as to the propriety of enacting zoning ordinances or amendments thereto by such means. The general rule is that such referendum provisions apply only to the question of whether a comprehensive zoning ordinance should be enacted, i.e., whether the legislative body is to be permitted to zone the community at all and has no reference to the detailed manner in which it is to be zoned nor to the modifications or amendments thereof.
>
> --1 Rathkopf, The Law of Zoning and Planning, 31

Levin then discussed the various jurisdictions which are in agreement with Rathkopf that zoning ordinance amendments should not be subject to referendum. Specifically he noted:

> . . . zoning decisions may be either administrative or legislative depending upon the nature of the act.
>
> --Fleming v. Tacoma, 81 Wash. 2d 292, 298-299; 502 P 2d 327, 331 (1972)

> . . . ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority . . . . On the other hand, a determination whether the permissible use of a

> specific piece of property should be changed is usually an exercise of judicial authority . . . .
>
> --Fasano v. Board of County Commissioners of Washington County, 264 Or. 574, 580-581; 507 P 2d 23, 26 (1973)

> An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities. . . . [in] carrying out the purposes of the comprehensive zoning ordinance [and] in putting this ordinance into effect the city council acts administratively.
>
> --Bird v. Sorenson, 16 Utah 2d 1, 2; 394 P 2d (1964)

On the basis of the reasoning that administrative acts of a local legislative body are not subject to referendum, and that the rezoning of property or amendment of the zoning ordinance, is an administrative action, Levin concluded that the rezoning action by the City of Portage was not subject to a referendum.[7]

However, it is not the referendum issue which draws our attention to Justice Levin in West v. City of Portage. It is his reasoning. By defining a rezoning as an administrative action by a local legislative body, Levin opens the doors for basic change in not only the law of zoning, but its practice as well. It is this distinction between legislative and administrative actions as applied to rezonings, and its implications which is of interest to planners.

The Impact of the Levin Reasoning

Justice Levin in the West opinion does not expand upon the ramifications of his determination that the rezoning of a specific parcel of property is an administrative rather than a legislative determination. However, in observing that the City of Portage amended its zoning map 128 times in 8-1/4 years, Levin quotes his concurring opinion in Kropf v. Sterling Heights, 391 Mich 139, at 169 (1974):

> When a local legislative body decides to grant a change in zoning, it has in fact determined the merits of the individual grounds. So, too, unless the local body in fact rejects all applications for a change in zoning without reaching the merits, when it denies an application after entertaining the merits, it also in fact decides the merits of the individual grounds advanced.
>
> Such a determination on individual grounds is administrative, not legislative.

Thus, in Kropf, in an opinion written by Levin and signed by Justice T. G. Kavanagh, the administrative-legislative distinction with regard to rezonings was also drawn. It is in Kropf that Levin discussed the nature of the rezoning process and reveals the outline of the impact inherent in a shift to an administrative connotation for rezonings.

Justice Levin asserts that "the typical zoning ordinance represents particularized applications of administrative power,

reflecting choices made over an extended period of time between particular properties and proposed development, ad hoc . . . ." He concludes that it is time to face reality and acknowledge the zoning process for what it is, not for what it was supposed to be. Levin states:

> . . . zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances--reflecting, generally, decisions made on individual grounds--brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and, as important as any, market and consumer choice.[8]

There are many in the planning profession who would not disagree with the Levin assessment. In many instances, only a few years need elapse before the actual pattern of development in a dynamic community begins to digress from the well reasoned recommendations of the original zoning ordinance or master plan. While the reasons for this phenomenon result from the interplay of many factors--economic, public policy, human nature and otherwise--they manifest themselves in rezoning decisions based on individual considerations and cumulatively can negate even the best ordinances and master plans. As Levin notes quite accurately, with the passage of time and the advent of development pressure the basis for a rezoning

decision by the legislative body subtlely changes from the reasonableness of the use permitted in the ordinance and plan--the original consideration--to whether the applicant proposes a better, more reasonable use.[9] Thus, on an ad hoc, case-by-case basis, the development pattern of a community becomes formed through reactive decision making, occurring behind the guise of comprehensive, uniform zoning and long-range master planning.

On the basis of his analysis of the realities of the rezoning process, Levin concludes in Kropf that the vast majority of rezoning decisions are administrative in nature; they are based on individual and not general grounds as required for an act to be deemed legislative.[10] As such, the traditional assumptions in zoning law accorded zoning decisions are negated. Specifically, the presumption of validity which surrounds a legislative action placing the burden of proof upon the property owner to prove that legislation is irrational is forfeited.

As stated in the Zoning Digest, the practical effect of this presumption of validity has been that "municipalities have been able to sit comfortably behind . . . [a] judicially-created wall, . . . safe in the knowledge that the disappointed applicant for a rezoning or the irrate neighbors of a rezoned tract would have a difficult time sealing the presumption."[11] In other words, the zoning

classification could only be challenged on such constitutional grounds as being violative of procedural or substantive due process, or contrary to equal protection principles. Such challenges, with the burden of proof placed on the property owner, represent a very difficult way to challenge rezoning decisions for either the property owner or the neighbors of a rezoned tract. Justice Levin, by deeming rezonings administrative in nature, removes the significance of this "wall" which normally protects legislative actions. Although he does indicate that the plaintiff must still bear the burden of proving that the use he proposes is reasonable.

In addition to removing the presumption of validity, an administrative label attached to rezonings requires that they comply with procedures legally mandated for administrative decisions. Levin noted in Kropf, at 171, that:

> Proceedings based on individual grounds are quasi-judicial. The local authority must grant a hearing. The determination of the local authority must be based on evidence. The determination, granting or denying alike, is subject to judicial review on the record made at the hearing . . . .

Thus, we can extrapolate from Justice Levin's comments the elements of the procedure which would be required under administrative rezonings:

1) a formal hearing on rezoning requests;

2) the opportunity for all applicants to be heard;

3) the opportunity for the applicant to present and rebut evidence;

4) an impartial decision-making body;

5) a record of the proceedings;

6) a statement of the findings at the hearing.[12]

In many governmental units in Michigan the imposition of such procedures would not increase the procedural burden or represent a drastic change from existing practice, for many local rezoning processes already contain the elements described above. In other units of government, particularly in rural, less populous areas, such changes could impose financial burdens and create a severe departure from their present rezoning procedures--a procedure derived from enabling act requirements and local convenience which utilizes one public hearing, ex parte contacts, and a vote of the legislative body which may or may not be based on factual information and supported by evidence.

In addition to the mechanics of a formal hearing, the keeping of a record, the presentation of evidence and the statement of findings, administrative rezonings would involve certain decision-making dynamics required by Michigan's Constitution and further described by Levin. Under the provisions of Michigan's Constitution:

> All final decisions, findings, rulings and orders of any administrative officer or agency . . . which are judicial or quasi-judicial and affect private rights

> or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantive evidence on the whole record.[13] [emphasis supplied]

In accord with this constitutional requirement, Levin has asserted that an administrative rezoning would be subject to direct judicial review on the record made at the hearing. Hence, the importance of an accurate record and a complete statement of findings is very evident. Upon review by the courts, the question would no longer be whether the rezoning was constitutional--as is currently the case with legislative rezonings--but "whether the grant or denial is 'supported by competent material and substantial evidence.'"[14] Levin further states that the question in judging the evidence would be whether the proposed use is reasonable.

It should be noted that the test of validity suggested by Levin--whether the proposed use is reasonable--is a crucial part of the Levin approach and does not necessarily follow from the conclusion that a rezoning is an administrative action and subject to the previously mentioned constitutional requirements. The determination that rezonings are administrative does require procedural modifications recognizing due process principles, and upon judicial review a decision would be scrutinized to determine whether it was supported

by competent, material and substantial evidence on the record. It could also be argued that as administrative actions, the decisions must be consistent with specific standards explicitly stated either in enabling legislation or the zoning ordinance. The test advanced by Levin regarding the reasonableness of the proposed use is not necessitated by an administrative view of rezonings, although some test or criteria must be articulated.

The total effect of Levin's reasoning is a strong shift in the mechanics and dynamics involved in making a rezoning decision. The removal of the presumption of validity restricts a governmental unit's ability to approve or deny a rezoning on the basis of political considerations secure in the knowledge that challenge will be difficult. The hearing requirement with its attending provisions for the presentation of evidence, a record, and statement of findings, helps insure the opportunity for fair consideration of a property owner's request and focuses the decision-making on the factual evidence supporting or opposing a proposal. The fact that direct review by the courts is possible on the basis of the facts presented, and not abstract constitutional questions, generates pressure to insure that the local rezoning decision is correct in light of the evidence presented. The use of an impartial decision-making body, free from ex parte contacts, could reduce the incidence of political bias entering the basis for rezoning decisions.

Justice Levin, in shifting to administrative rezonings, attempts to generally insure that the zoning process will be fair and equitable through emphasizing procedural due process and decisions based upon the applicable facts revealed. These objectives are laudable and worthy of support by planners, attorneys and all parties to the zoning process. The element of the Levin reasoning which represents an unknown variable is the test of validity--whether the proposed use is reasonable.

Departure from Current Rezoning Practice

Having reviewed the Levin decision, we can ask whether the process envisioned by Levin is different from our current rezoning practice. Most certainly. Current rezonings, considered as legislative amendments to the zoning ordinance, are adopted in much the same manner as the original ordinance. In fact, enabling acts commonly contain language such as this extracted from the Michigan County Rural Zoning Enabling Act:

> Amendments or supplements to the zoning ordinance may be made from time to time in the same manner provided in this act for the enactment of the original ordinance.[15]

In accord with this statutory requirement, or similar requirements in other enabling acts, a rezoning amendment is normally referred

to the planning or zoning commission for recommendation, subjected to a public hearing and acted on by the legislative body. There are no requirements as to the basis for the decision, and as a consequence it may or may not be based upon the recommendations of the planning commission, be congruent with the master plan of the community, or even be sensitive to the impacts it may generate.

Admittedly, the current rezoning procedures are vague enough that the process depicted by Levin could be initiated, although statutory revision would be preferrable. The question of the reasonableness of the proposed use is apparently already the implicit basis for decision, despite our emphasis on the reasonableness of the ordinance; thus Levin's conclusion that rezonings are administrative. However, for economic and political reasons we have not always, in the absence of compulsion, conducted the rezoning process in an atmosphere of factual rationality. The Levin decision, by applying new legal interpretations to the rezoning process, requires the process (1) to enter a structured forum where each case will be heard on its merits; and (2) to base its decision on supporting facts and evidence. While current rezoning procedures do not prevent these characteristics from being present, there is little assurance that they will be consistently present. The Levin approach would greatly assist in insuring consistently rational decisions.

Of course, the reasoning applied by Levin imposes costs on both parties: the municipality and the applicant. To the municipality, administrative rezonings could impose greater financial burdens resulting from increased administrative procedures. For example, the production of hearing minutes and the addition of personnel to administer rezoning cases. It also removes that "wall" of validity and may require the municipality to expend greater effort justifying its decisions. Communities with master plans may argue that they now will have their planning efforts attacked on a case-by-case basis, making it more difficult to follow the recommendations of 20-year master plans, particularly in the absence of a definition for the phrase "reasonableness of the proposed use." Incremental and piecemeal decisions may result in random rather than well planned development patterns. The community without a planning staff may find itself unable to counter the rezoning arguments advanced by well-prepared developers, and thus find themselves in a position of being forced to grant all rezoning requests.

The applicant may complain that the Levin reasoning would make it more difficult to obtain a rezoning, since he can no longer rely on negotiation. He may protest the added expense of obtaining detailed factual information to support his proposal. The administrative process may create a greater time lag to obtain approval

for a rezoning, raising the argument that the economic costs to start development are being increased, hurting the consumer. To the small, individual property owner, the administrative process may appear formidable, creating a reluctance to initiate legitimate rezoning requests.

Each of these concerns is legitimate to some degree, and would certainly be appropriate to consider in deciding whether the innovations suggested by Levin should be implemented. Of course, the basis for such a judgment would vary depending upon the observer's perspective. To the lawyer, the validity of Levin's reasoning hinges on questions of law. To the municipal official, procedural efficiency may be the crucial question. But, in the context of this paper, we must ask what impact does the Levin reasoning have on the planning profession and its objectives. What are the costs and what are the benefits? More importantly, returning to the original premise of this paper, does Levin through his interpretations of the law offer directions of constraints which should be analyzed, understood and seized by the planner? Has the legal issue of the right to referendum on a zoning ordinance amendment revealed an opportunity where a synthesis between law and planning could creatively and positively contribute to more effective and sensitive planning?

The Levin Decision and Planning

In many instances the reaction of the planning profession to a court decision is quiet adaptation. Duly recognizing new requirements, the planner may rejoice and continue on his way if his objectives were supported; or express disgust and negatively adapt if an adverse decision was the result. As previously pointed out, the planners' reaction in the wake of all court decisions should be one of positive strategy. What are the constraints? What are the directions? What was the basis for the reasoning? Are there discernable trends? How can planning strategies be developed to use these decisions to advantage in solving development problems and achieving planning objectives? How can public goals be fairly and equitably achieved?

Traditionally, planners have argued that zoning should be viewed as one implementing tool used to bring reality to the recommendations of a community's master plan. Apparently, with this objective in mind the majority of states contain the requirement in their zoning enabling acts that zoning be based upon a plan.[16] In Michigan's County Rural Zoning Enabling Act the requirement takes this form:

> The provisions of the zoning ordinance shall be based upon a plan designed to promote the public health, safety, morals and general welfare, to encourage the

> use of lands in accordance with their character and adaptability and to limit the improper use of land, to avoid the overcrowding of population, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation and other public requirements and services to conform with the most advantageous uses of land, resources and properties . . . .[17]

However, in spite of this link between planning and zoning, planners have seen their attempts to use zoning to implement a master plan frustrated by two positions taken by the courts in Michigan: 1) the plan referred to in the zoning enabling acts is not the traditional master plan but can be the ordinance itself; and 2) zoning cannot be speculative.

The first position is typified by the words of a New Jersey court which defined a plan, as required by the zoning enabling act, as:

> . . . an integrated product of a rational process revealing a physical partition of the municipality reasonably designed to produce a homogeneous pattern of location and uniform development of variant land uses. The zoning ordinance itself may bespeak the scheme, there need be no extrinsic guide.
>
> --Ward v. Montgomery Twp., 147 A2d 248 (1959), at 252.

Michigan courts have not digressed from this viewpoint, as evidenced by the recent decision in Sabo v Monroe Twp., 394 Mich. 531 (1975). In Raabe v Walker, 10 Mich App 383 (1968), reversed 383 Mich 165

(1970), the court stated that while the statute calls for a plan, it does not require a written plan. Yet, while Michigan courts have not required a plan, they have indicated a willingness to rely on it as evidence of reasonableness in recent years. In reversing Raabe, the Michigan Supreme Court stated that while the absence of an adopted plan does not invalidate zoning, it does weaken substantially the presumption of validity which attends any ordinance. The case of Padover v Farmington Twp., 374 Mich 622 (1965), is often pointed to as an example of the court's positive attitude toward a plan. In this case the Michigan Supreme Court upheld large lot zoning, placing great weight on an adopted master plan as evidence of reasonableness.

Michigan courts have also been cautious in regard to the speculative nature of plans as a basis for zoning. The case of Gust v Canton Twp., 337 Mich 137 (1955) is cited as damaging to the use of plans as a basis for zoning. The Supreme Court held that zoning must be reasonable under present conditions. Specifically, the Court, at 442, stated:

> The test of the validity is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals, or general welfare, but whether it does so now.

Thus, the raison d'etre of the planning profession--the master plan--was apparently dealt a death blow, or at least given an immobilizing wound.

To summarize, in spite of statutory wording calling for a plan, the courts generally will not require such a document to substantiate zoning. Additionally, the courts appear to view plans as speculative and a weak basis for substantiating current regulations on the use of property. Yet, there appears to be a crack in the door indicating the beginning of a rennaissance in judicial thinking. Decisions such as Padover and Raabe indicate a willingness to look at plans and their relationship to zoning.

As a consequence of these decisions, including West, it is imperative that the planner critically review the legal perspective of his plan. For, if his desire is to promote the plan as a strong instrument for beneficial public decision-making, West and the other decisions may reveal the essence of a strategy which can assist in promoting this most basic planning objective. In terms of the problem-oriented planning model described earlier in this thesis, the West approach to rezonings holds many important implications, even if the term "plan" may have a different connotation.

For the planner, the essence of West lies in its requirement--derived from the administrative view of rezonings--that zoning decisions be based on the facts presented. The fact that the possibility of court review of the local decision based on the facts of the case looms, places great pressure on local officials to deemphasize

political reasoning and individual motivations in zoning decisions in favor of factual objectivity. Is this not what planners have complained of for years? Zoning has not resulted in the urban form desired by planners for many reasons, but a primary complaint is that individual zoning decisions are not based on the plan for the community, and often are made for political reasons, ignoring factual reality and long-term repercussions. In West the opportunity for change appears. Justice Levin has laid bare the real nature of the rezoning process, and advocated a decision-making structure stressing impartiality and factual rationality. The planner, if he desires to take the initiative, could find his words assuming a new posture in municipal government. Because of the necessity for reasons behind each zoning decision, the information provided by the planner could be elevated from an advisory role to that of an essential ingredient of a community's development strategy. Of course this legal recognition of the value of information not only reduces the tolerance for arbitrary, unsubstantiated decisions by members of local legislative bodies, it also forces planners to back up their intuition with competent evidence. For the planner interested in a problem-oriented approach, rezonings would indicate the need for exacting impact assessments, with sophisticated application of professional synthesis in situations requiring rechnical analysis.

In Michigan, court decisions would appear to indicate that planners operating within the West framework would want to reevaluate the substance of their plans and planning studies, including definition of what a plan is. Such planning documents create the foundation for zoning decisions within the West guidelines, and in any community where there was the desire to pursue effective strategies intent upon shaping the future development of the community, the content of planning documents would assume a critical role. While the advocacy setting envisioned in West does not require the presence of plans and planning information, it is these very elements which would contribute to a positive zoning process, and a community would be remiss if it did not develop a strong planning capability. Certainly, builders, developers, and real estate interests will foresee the elements of success with a development approval system based on the West decision, and they will be prepared to offer the evidence necessary to justify their development requests. Perhaps, it is this fact which presents the greatest argument against the West approach. No longer safe behind the wall created by the presumption of validity, cities and planners must sharpen their tools and be prepared in an impartial setting to justify their decisions and actions. The equity involved in theoretically placing the city and developer on equal grounds to argue the reasonableness of a request could result in an

ill prepared party suffering defeat because they could not factually reveal the merits of their proposal. Yet, despite this initial tendency for the West system to work against the unprepared party, either the city or the developer, it does represent a fairer system for adjudicating public versus private interests in land development decisions. And, it does represent an opportunity for the planner to assume a leadership role in influencing the outcome of individual decisions.

Following the reasoning exhibited by Michigan courts in Gust, Raabe, Padover, and other cases, the planner would be well advised to critically review the reasonableness of his plans, planning studies, and recommendations. It is critically important in carrying out a planning and implementation strategy that the plans and recommendations have a strong realistic relationship to the factual evidence which has been assembled to describe problems and opportunities facing a community. Secondly, implementation devices, such as zoning, should be directly tied to this information. Lastly, a consistent decision-making pattern should be built which indicates a commitment by the legislative body and the community to implement the planning recommendations upon which zoning and other development control techniques are based.

In the problem-oriented model of planning, the term "plan" could denote a document or set of documents, probably short-range

in nature, which describe the development objectives of the community, indicate environmental constraints and potentials for development; locate the existing and anticipated infrastructure; describe growth trends; and identify development dysfunctions. Such a document would thus form the policy framework--a plan--for specific problem resolution strategies, as well as a base for analysis of rezoning requests consistent with the West doctrine.

With this strategy as a foundation it will then be possible for a community to use its plan and planning program as a rational basis for making decisions within the setting envisioned in West. The plan, based on a reasonable assessment of current and expected community conditions with its reasonableness further evidenced by actual implementation, establishes the reasonableness of the zoning regulations. Thus, a plan is created for a community which is more than an advisory dream, it is a realistic assessment of community condition with future directions charted and community commitment visible through a record of implementation. When such a plan is tied to zoning regulations, or other development control techniques, the public as well as the individual citizen can be assured that the regulatory control being exerted is founded on a factual objective assessment of community need. In the eyes of the court, the regulations are reasonable and not arbitrary or capricious.

With initial regulatory control through zoning based upon a realistic plan, be it traditional or problem-oriented in a policy framework, a basic framework or a set of guidelines for future growth is created. As requests for rezoning are received and deliberated within a West setting, the basic plan grants a sense of direction, while current and immediate impacts of a proposal are measured and assessed in light of contemporary community circumstances and needs. Such assessments may take into account specific planning studies completed as a basis for the development of a problem-resolution strategy developed and applied to a previously identified dysfunction--such as a scarcity of agricultural land. The planner for a city operating in the setting being described here may find a number of decision possibilities when faced with a rezoning request:

1) The development proposal may be coincident with the provisions of the plan, and its impact compatible with the immediate surroundings and the community as a whole. Approval would be forthcoming.

2) The development proposal may not be consistent with the plan, and its impact detrimental to surrounding areas and the community as a whole. Disapproval would result, with the reasons documented both in terms of specific inconsistencies with the plan and the detrimental impacts which would result.

3) The development proposal may not be consistent with the plan; however, its impact is beneficial to the surrounding area and the community. Such a finding would create strong indications that circumstances have changed indicating a public need for a change in the plan. If there is a public need present for change in the plan, approval would be forthcoming with plan

adjustments made supported by the factual data which indicated the need for a change.

4) The development proposal may be consistent with the plan, but, its impact is detrimental to the surrounding area. Again, there may be a public need present arguing for a change in the plan. Or, it could conversely mean that some incompatibility can be tolerated if conditions are attached to approval which will safeguard the integrity of surrounding land uses.

Of course, the four decision possibilities described above are indicative of generalized situations. Great variations in consistency with a plan and degrees and scope of impact could be experienced. And while these same decision possibilities are experienced in current zoning practice, they are not usually considered as would be required under West. Within the dynamics of zoning decisions in accord with West, the realization that the factual arguments presented by the property owner supporting the reasonableness of his proposal will be given official recognition must be contended with. Accordingly, the planner for a community must be sure that (1) the current zoning regulations have a sound factual basis which is relevant to current conditions, and (2) that he has formulated a position on the development proposal, be it approval or disapproval, which can be factually justified. It is in the attainment of this posture that the planner for a community needs a planning strategy based on a realistic, factually supported planning framework, linked to development regulations and a capability for development impact assessment both in relation

to the plan and contemporary community circumstances. The assessment capability is not only important to measure the impact of individual development requests but also to build currency into the plan, insuring that independent impact analyses will maintain interdependent integrity within a common development framework which is maintained in a context reflective of current community circumstances.

Thus, in response to a rezoning request, the planner for a community would commence an iteritive process of evaluation, beginning with reference to the zoning regulations and the plan. Having noted points of consistency and inconsistency, the focus of the planner would narrow to the specifics of the proposal and its impact on immediate surroundings. Such an impact analysis would be comprehensive in terms of social, economic, physical and environmental effects. However, to avoid extraneous study, concentration should be quickly centered on specific benefit and conflict points. The promulgation by a community of social, economic, physical, and environmental effect guidelines for development would assist in focusing the impact analysis, and would provide developers with advance knowledge of a community's development policies used in decision-making. The impact analysis should also be extended to consideration of the development request in relation to current community-wide needs and objectives. In the case of large developments, it would be wise to

extend this analysis beyond jurisdictional boundaries, considering the region within which the community is located.

Once the analysis of the relationship of the request to the plan and zoning regulations, as well as its impact has been completed, the planner can concisely and systematically recommend disapproval, approval, approval with conditions on the basis of specific, concrete facts. It is these facts, revealing the effect of the development proposal on current community circumstances, and the future intentions of the community embodied in a plan designed to promote the health, safety and welfare of its residents, that must stand as the reasonable basis for approving or denying the rezoning request. Since the basis for decision under West is the reasonableness of the use requested in light of the facts presented, and since obviously the applicant will certainly build a favorable case supporting his request, the information gathered by the planner cannot be ignored; it must stand on its merits in relation to the request and a decision rendered accordingly.

Of course, a favorable view of Justice Levin's concepts regarding rezonings, presumes the presence of planners and adequate financial resources in communities using the zoning power. It is also anticipated that the judiciary, in applying the "reasonableness of the proposed use test," will view favorably the plans and impact

oriented evidence submitted by planners. The previous strategy suggestions are advanced to prepare the planner to positively use the administrative forum for rezonings, assuming that properly conceived and adopted plans will be accorded great weight by the judiciary as they further define what is meant by the reasonableness of the proposed use. These assumptions could prove to be fatal in small communities which lack a planning staff, or have an inadequate planning capability. In the battle of expert witnesses within the courtroom, the ill-equipped governmental unit could easily become a consistent loser. Also, in the absence of strong Michigan Supreme Court recognition of the merit of planning documents in administrative rezonings and an expedient, corresponding definition of the reasonableness of the proposed use test, the ability to rationally and effectively use planning and zoning powers in coordination may be subjected to prolonged lower court battles and an extended period of uncertainty. Thus, in spite of the fact that West does provide a framework for zoning practice within which the planner can take the initiative and forge a more equitable and effective zoning and planning practice, it is incumbent upon planners to proceed with the next step. Based upon an understanding of the merits of the administrative approaches to rezonings, stimulated by thoughts advanced by Justice Levin, planners in concert with attorneys, citizens and public

officials should take the initiative and develop a reformed zoning process. Rather than wait for additional judicial intervention and definition, efforts should be commenced to amend the zoning enabling statutes based upon the concepts brought to light in Kropf, West, Sabo, Smookler, and Nickola. The following elements should form the framework for statutory revision:

1) The land development requests which should be considered in an administrative context should be defined.

2) Administrative hearing procedures should be established. Such procedures should delineate proper notification, parties eligible to participate in the proceeding, the necessity of a verbatim hearing record, and the preparation of written decisions for each request which (a) summarize the case including evidence presented, (b) state findings and conclusions, and (c) render a decision. The procedures should establish the principle that the parties to development request may present and rebut written and verbal testimony.

3) A hearing examiner should be authorized for the purpose of conducting administrative hearings and rendering decisions on development requests.

4) An appeal process should be established which permits parties to the hearing to appeal the decision of the hearing examiner to the legislative body of the government unit, followed by appeal to circuit court.

5) The tests or standards upon which the development request should be judged by the hearing examiner, and the legislative body and courts upon appeal should be defined in order to avoid the uncertainty involved in a test such as "the reasonableness of the proposed use." The standards for decision should include:

   a) consistency with the development policies and plans adopted by the legislative body of the governmental unit; except when evidence appearing on the hearing record reveals a public need for change in the policies or plans, and the request under consideration would meet the need identified; and

   b) the presence of a conclusionary relationship between the decision and the evidence appearing on the hearing record.

The approach to rezonings embodied in the opinion of Justice Levin in West v. City of Portage, should it become the basis of zoning practice in the future, presents an opportunity and a challenge to the planning profession. The opportunity reveals itself in legal recognition that the facts surrounding a rezoning request must logically support the resulting decision. A community cannot exercise power over the property and well-being of its residents on the basis of intuition, personal favor or political bias, it must rely on impartial, factual analyses of its problems and opportunities, as well as sensitivity to the desires and objectives of its residents. This is the decision-making process planners have advocated with mixed success for years. Legal recognition of this process based on factual rationality recognizes the position advocated by planners, and creates the need in every community for systems which will translate information concerning the character of a community into problem descriptions, solution strategies and statements of future aspirations and goals. And, here emerges the challenge. Should the West concept become reality, can the planning profession meet the need created by the rezoning system envisioned by Justice Levin? Will planners be capable of providing the development strategies, impact analyses and specific factual information which can withstand assault in a rigorous advocacy setting? Can planners become a community's

agent in a decision-making process for zoning which is based on factual rationality, or will other professions assume leadership roles, or will such a process completely put the community at a disadvantage? And, lastly, can planners take the initiative and translate the concepts of Justice Levin into legislation creating a workable, effective and fair zoning process. As they consider West and questions posed above, they should remember that the objectives of planning must coincide with the promotion of public health, safety and welfare objectives, and the process of planning must be directed to this objective in a manner respecting the proper balance between public and private rights and privileges. Thus, the ultimate question posed by the opinion of Justice Levin, is not only whether West offers opportunities to enhance the stature and effectiveness of planning, but whether it enables planning, as a technique, to pursue valid objectives in a more effective and equitable manner.

The Lessons of West

The opinion of Justice Levin in West v. City of Portage has brought to the surface in Michigan judicially suggested changes in zoning practice which were originally discussed in Kropf v. Sterling

Heights, and recently presented as the grounds for decision in Sabo v. Monroe Township, Smookler v. Wheatfield Township, and Nickola v. Grand Blanc Township.[18] The discussion of this decision in detail has illustrated how law and planning in a zoning context inevitably interface. In this situation, a court case regarding referendum powers with regard to zoning ordinances has spawned a train of legal thought--a perspective of the zoning process--with profound implications for planning practice and an ability to determine the future course of community development. For the planner, three courses of action are available. He may ignore the decision and its impacts, and continue to practice his trade as before. Or, he may recognize the problems the West approach could cause to ill-prepared communities and long-range master plan techniques and attempt to reverse this judicial train of thought through compelling arguments in future court cases or statutory revision. The third alternative is to recognize the merits as well as problems inherent in the position advanced by Justice Levin, and attempt to develop a constructive planning strategy which capitalizes on the positive aspects of the doctrine, decreases adverse impacts, and hopefully gives birth to planning techniques which will effectively promote attainment of public welfare objectives. It is the intent of this thesis to create a sensitivity for the need to reach for the third alternative--an option of open-mindedness and constructive response.

The synthesis of law and planning presents the opportunity for planners to create more effective strategies for specific problem solutions, as discussed earlier, as well as improved planning techniques, as demonstrated by an analysis of West v. Portage, which will lead to relevant confrontation and resolution of societal problems. Not only does professional synthesis--as illustrated here by a planning-law interface--permit planners to insure that they are addressing problems in the proper way--in this case a legally valid manner--but, also it allows a planner to view his activities from a different perspective, analyzing the relevancy of his approach, techniques and end-products. In an age of rapid change and complex decision-making, planners to fulfill their objectives need the advantages of additional perspectives, and a willingness to adapt techniques to needs of society and the nature of problems.

FOOTNOTES

[1]West v. Portage, 392 Mich. 458 (1974), at 473.

[2]Ibid., at 473; the necessary 3/4 vote by the City Commission was achieved by votes of 7-0, 6-1, 6-1 on the three properties involved in the rezoning; see section 4 of Public Act 207 of 1921, MCLA 125.584.

[3]Ibid., at 476.

[4]Ibid., at 473.

[5]Ibid., at 473.

[6]Ibid., at 479.

[7]Ibid., at 472.

[8]Kropf v. Sterling Heights, 391 Mich 139 (1974), at 168.

[9]Ibid., at 168.

[10]Ibid., at 169.

[11]25 Zoning Digest 48

[12]Memorandum to writer from Avern Cohn, Attorney, Detroit, Michigan, entitled "Some Reflections on West v. City of Portage, February 18, 1975, p. 5.

[13]Michigan Constitution of 1963, Article 6, Section 28.

[14]Kropf v. Sterling Heights, 391 Mich. 139 (1974); at 170.

[15]Michigan Public Act 183 of 1943, Section 3.

[16]Robert M. Anderson, American Law of Zoning, I (Rochester, New York: The Lawyers Co-operative Publishing Company, 1968), p. 230.

[17]Michigan Public Act 183 of 1943, Section 3.

[18]On August 19, 1975 the Michigan Supreme Court affirmed the decisions of the Court of Appeals in Sabo v. Monroe Township, Smookler v. Wheatfield Township, and Nickola v. Grand Blanc Township. These actions voided attempts by the respective townships to maintain a zoning classification which would prohibit the development of specific mobile home parks which had submitted rezoning requests. The grounds upon which the Supreme Court based its decision were presented by Justice Levin, and constituted a restatement of the doctrine expressed in West and Kropf--the proposed use was reasonable and should be permitted. The opinion of Justice Levin became the majority opinion apparently because only 5 members of the Court heard the cases. The Levin opinion contained 3 signatures. Those involved in zoning practice are left to speculate as to what impact these cases will have on future zoning cases.

REFLECTIONS

Chapter VI

REFLECTIONS

> The urban planner in the 20th century must lead people from the world of the practical into the realm of dreams and then back again in a way that makes dreams possible.
>
> --John Alan Stock

The objectives which planning promote are necessary to a modern society. The practice of planning is needed, and can contribute greatly to the resolution of dysfunctions we currently face, as well as promote the future welfare of all citizens. The question planners face is whether they can develop and apply skills which will make the quality of life tomorrow better than that experienced today. Throughout the spectrum of environmental categories we use to describe our existence--land use, health care, housing, transportation, employment, recreation--can planners not only visualize what the future should be like, but, creatively, actively and effectively show us how to get there?

In the opening chapter of this paper, one suggested perspective for planners to adopt was presented. This approach called upon the planning professional to build the bridges between reality and visions

of the future through a concerted focus not only on the identification of problems, real and anticipated, but also on the development of solution strategies to resolve these problems. The premise of this approach is based on the observation that while grand plans may be very effective in controlled environments where the scale and duration of an endeavor are such that all variables can be controlled centrally, such is not the case in American society with regard to public planning. American planners are faced with a diverse, decentralized society composed of a complex array of variables operating in an environment of rapid change and resistance to comprehensive manipulation. To operate effectively in such a society, it was suggested that planners reexamine the performance of the planning mode which depended for success on all current activities and decisions acting in concert to reach a detailed design for the future 20 years hence. As an option, the long-range future should be conceived in terms of goals--future visions descriptive of desirable end-states --while detailed plans focus on specific problem areas and assume the characteristic of being solution-oriented and short-range. Such short-range plans would be supplemented by the ability to systematically formulate and carry out specific, immediate problem resolution strategies guided by the objectives of relevant short-range plans and long-term goals. The emphasis in this model of planning as

explained earlier, is on strategy formulation, evaluation and realignment; specific problem resolution; and comprehensiveness achieved through impact analysis.

Of course such a planning methodology requires planners to possess more than a philosophy of comprehensive sensitivity. They must sharpen their tools and gain greater specific knowledge in subject areas particularly relevant to the resolution of public problems, as well as the ability to bring professional disciplines together for strategy formulation. The merits of greater professional synthesis --one aspect of the problem-oriented planning approach--were demonstrated in this paper with respect to law and planning within a zoning context.

As the review of Michigan court decisions illustrated, the practice of zoning--a primary planning instrument--has been circumscribed by the law. For the law to control the practice of zoning without the benefit of planning objectives and purposes simply insures that it will be fairly applied. For planners to use zoning without knowledge of legal parameters risks legal challenge, improper use or ineffective use. Zoning, just one instrument available to the planner, can be used more effectively for public benefit through a synthesis between law and planning--a relationship which should be recognized by lawyers, as well as planners. As the

discussion in this thesis demonstrated, greater knowledge of legal perspectives and principles relating to zoning can not only increase the effectiveness of its use in terms of technique--the best methods and procedures for equitably controlling land usage--but also in applying zoning as an element of a strategy to resolve specific problems. It is this creative use of zoning, or any other tool, rather than the mechanistic adoption of a model ordinance with zoning districts arranged to match future land use categories, which makes the difference between static and dynamic planning.

The synthesis illustrated in this paper should serve as an example of other professional and technical areas where greater reciprocal awareness of perspectives and principles, and willingness to cooperatively work toward solutions of public problems would result in greater common benefit both today and tomorrow. Planning is but one aspect of the thought process guiding human activity. Action, or implementation is the other. Planners should recognize that the two are inseparable if progress toward an improved quality of life is the desired goal. By working in close contact with other professionals seeking answers to specific problems and imparting an awareness for comprehensive impact, perhaps those realities of today which will spawn the more complex dysfunctions of tomorrow can be effectively addressed, making our future visions tomorrow's realities.

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