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ABSTRACT

MICHIGAN ZONING ENABLING LEGISLATION:

A REVIEW AND CRITIQUE

By

Daniel A. Schultz

The subject of this thesis is Michigan zoning enabling legislation. The object of the following inquiry is to analyze existing zoning statutes, identify problem areas, and make recommendations for the amendment or revision of this body of law. In the course of this inquiry, both substantive and procedural matters are considered as well as zoning's role in, and relationship to, evolving land use management policy.

Initial chapters are concerned with establishing the concept of zoning and the evolution of land use regulation models for planning and zoning developed during the 1920's as well as early Michigan statutes. Later chapters concern themselves with the functional analysis of Michigan zoning legislation in its present form and evolving state land use policy. In critiquing existing legislation, emphasis is placed upon court decisions, particularly those occurring within the last five years, and problems identified through a series of interviews with zoning administrators, lawyers, and other zoning practitioners.

The topic of evolving state policy is addressed through use of reports prepared by the Governor's Special Commission on Land Use and by the Office of Land Use, Michigan Department of Natural Resources. The final chapter addresses itself to assessing the overall situation and to offering a series of recommendations which would result in the amendment or revision of present zoning statutes.

The findings of the study confirm the need for comprehensive change within the zoning statutes, particularly in regard to basic procedural matters. Change is also called for in more substantive areas such as the relationship of planning to zoning and zoning to the main body of land use regulation and policy. In acknowledging the political nature of zoning, the above changes were divided into two groups: those advocating changes that could occur through amendment of existing statutes; and those advocating changes which could only occur through major revision of the entire body of zoning law. While Michigan legislation is singled out for study purposes, the recommendations which resulted from this study have much wider application given that the Michigan legislation bears considerable resemblance to zoning statutes in most other states.

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FOREWORD

The issues and problems raised in this thesis are currently being examined by the Office of Land Use, Michigan Department of Natural Resources with the assistance of the Zoning Advisory Committee. Present efforts to review and evaluate state zoning enabling legislation were first initiated in 1973. At that time, as a student assistant at the Office of Land Use, one of my primary responsibilities was to prepare an analysis of Michigan's zoning statutes. The research which resulted from this assignment has been incorporated into this thesis. Later research served to reinforce initial findings and to confirm the need for the revision of the main body of zoning law. Conclusions and recommendations found in this thesis are those of the author and are independent of those of the Office of Land Use or its Zoning Advisory Committee.

ACKNOWLEDGMENTS

Research leading to the preparation of this thesis was undertaken while I was a student assistant at the Office of Land Use, Michigan Department of Natural Resources. By working with staff members of this office, I became acquainted with some of the land use issues facing the state. One of these issues was, and continues to be, the adequacy of present zoning enabling legislation. Mr. Larry Folks, having an interest in this topic, was instrumental in providing the initial direction for the research incorporated in this thesis. His subsequent review of developing material and ensuing comments were of particular value.

Professor Keith Honey of the Department of Urban Planning was also an important asset in this effort. His guidance in developing the scope of this inquiry is appreciated as are his critical comments concerning its content.

It is hoped that the following pages adequately reflect the patient efforts and practical knowledge that both of these gentlemen so generously provided.

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CHAPTER I

INTRODUCTION

Since its inception, zoning has been a fundamental tool of land use regulation and planning. Starting as a purely urban phenomena during the early 1900's, zoning has subsequently spread both in terms of geography and application. However, the framework under which zoning is applied and administered (ie., zoning enabling legislation) has seen few major changes. Thus a fundamental conflict has been developing, especially during the last 25 years, in which the application of zoning to meet current needs has gone beyond the grant of power established in the enabling legislation. Both federal and state courts have been active in the area of zoning litigation, but their role in the resolution of basic conflicts has been limited by the letter of the law and the traditional separation of powers doctrine. Clearly, legislative action is necessary to bring the role of zoning, its application and administration, and enabling legislation into harmony. But more is involved here than just revision of existing state statutes to meet current practice. Consideration must be given to fundamental questions such as, what is the proper role of government in regulating private property, what

are the proper limits of this regulation, what is its proper form and what are the roles of different levels of government concerning this regulation? These questions predate zoning. Indeed, they have existed as long as land use regulation itself. They are basic to any form of regulation and demand constant reassessment as the needs of society change.

The subject of this thesis is a reassessment of zoning enabling legislation as it applies to the administration and application of the zoning power. The focus of this thesis is the enabling legislation of the State of Michigan. Admittedly, this is a complex undertaking, one which cannot be adequately addressed in its full scope. Therefore, the scope of this thesis will be confined to a series of tasks designed to accomplish the following objectives. These objectives include:

1. identification and analysis of problem areas in existing zoning enabling legislation;
2. recommendation of proposed changes in administrative procedure; and
3. recommendation of changes in substantive and policy areas in keeping with evolving state land use management policy.

Tasks necessary to achieve these objectives are as follows:

1. determination of the definition, purpose and scope of zoning;
2. inquiry into the evolution of the power to zone;

3. review and critique of past and present Michigan zoning enabling legislation; and
4. examination of Michigan land use legislation and evolving state land use policy.

In researching these tasks it became evident that certain of them could not be accomplished. Consider the task of establishing the definition, purpose and scope of zoning. As the reader progresses through the chapter allotted to this topic it becomes evident that zoning has no fixed, easily applicable definition except in the abstract. As for purpose and scope, these are addressed in enabling statutes, but do little to aid understanding. Richard Babcock in his assessment of the situation concluded that as zoning is a process it has no need of purposes of its own.¹ Further, Charles Rathkopf states in essence that the scope of zoning is variable and expands and contracts in direct relation to the police power and the needs of society.² Thus, from the outset, we are on uncertain grounds. To compound the situation, one has only to be reminded that above all zoning is a political process and as such is subject to the wisdom of elected officials at all levels of government.

What is to be concluded from all this is that there is no definitive answer to many of the problems raised in this inquiry. At best, a sense of direction can be gained. With this in mind, the following thesis has been written with the hopeful expectation that it may at least succeed

in offering an overview of the complex problems involved and a course of action which may lead to the partial resolution of some of these problems.

FOOTNOTES

1. Richard F. Babcock, The Zoning Game, (Madison: The University of Wisconsin Press, 1966)
2. Charles A. Rathkopf, The Law of Zoning and Planning, 3 vols., 3rd ed., (New York: Clark Broadman Co., 1968)

CHAPTER II

DEFINITION, PURPOSE AND SCOPE OF ZONING

Zoning is one of the several forms of property regulation commonly exercised by local government. Numerous definitions of zoning exist; however, the following one provided by Edward Bassett is often cited:

Zoning is the regulation by districts under the police power of the height, bulk and uses of buildings, the use of land and the density of population.¹

The principal attributes of zoning as exercised at the municipal level are contained in this definition. First, comprehensive zoning connotes the division of a community into districts. Second, within each district certain regulations apply to the height, bulk, placement and use of structures and the use of land. Third, zoning regulates population density. Fourth, such regulations are contained in zoning ordinances enacted under the police power delegated to counties and municipalities through state zoning enabling acts.

The power to zone is derived from the general police power. As such, any understanding of the purpose and scope of zoning is contingent upon an understanding of this power--the power of the state to regulate. Alfred Betteman in discussing the police power stated:

... the police power is necessarily nothing more or less than the general legislative power to regulate persons and things for the promotion of all those public benefits for which legislatures exist and for which legislation is enacted...²

Charles Rathkopf in addressing the question, "What is the police power?" cites the following:

Police power has said to be synonymous with the sovereign power... It is the power of the government to enact all manner of laws in furtherance of the public safety, health, morals, general welfare and prosperity of the body politic...³

The police power is the sovereign power or the general power of the state to legislate. As such it rests with the state and is not an inherent attribute of lesser political subdivisions. The Michigan Supreme Court in an early zoning case, Clements v. McCabe 210 Mich. 207 (1920), stated the following:

The governmental authority known as the "police power" is an inherent attribute of state sovereignty, and only belongs to subordinate governmental divisions when as conferred by the state either through its constitution or constitutionally authorized legislation.⁴

The Court went on to add:

There exists no inherent power in a city in this state nor can such power be implied from its mere incorporation as such, to provide by ordinance for zoning its territory...⁵

Recently the Michigan Supreme Court once more addressed the issue of zoning and the police power in Kropf v. Sterling Heights 391 Mich. 139 (1974) and stated:

The power of the city to enact ordinances is not absolute; it has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level but the state cannot confer upon the local unit

of government that which it does not have; for the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has sufficient interest in protecting or implementing the common good via its police power, that such private interests must give way to this higher interest.⁶

The power to zone as delegated to the political subdivisions of the state is circumscribed by the limits of the police power. Therefore, the purpose and scope of zoning must fall within these limits. Limits which according to the United States Supreme Court in Euclid v. Ambler 272 U.S. 365 (1926) expand and contract to meet new and different conditions as they develop.

Numerous explanations of the purpose of zoning can be found and several will be explored here. In the broadest context, the purpose of zoning is to limit the use of land in the interest of the public health, safety and welfare. Rathkopf considers zoning to have two purposes, namely:

... to preserve the existing character of an area by excluding or controlling uses prejudicial thereto, and to provide for the development of the several subareas within the greater area of the municipality in a manner consistent with the uses for which each is suited. Such regulations being related to the character of the district which they affect and being designed to serve not only the welfare of those who own and occupy land in those districts, but also the general welfare of the community.⁷

An explanation of both the purpose and scope of zoning is contained within the various state zoning enabling statutes. Most of these statutes were patterned after model legislation drafted by the U.S. Department of

Commerce in 1924, known as the Standard State Zoning Enabling Act. After fifty years, most state zoning statutes still bear a substantial resemblance to this act and the statements of purpose and scope of zoning found in the model act are still widely accepted. Section 3 of the model act includes the purpose of zoning:

... regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety ... to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of the land; to avoid undue crowding of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements.⁸

Section 1 of this same act defines the scope of zoning such that:

... the legislative body ... is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards ..., the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purpose.⁹

While purpose and scope are easily stated in the abstract, translation into actual regulation has been difficult as witnessed by the ever present flow of zoning litigation. As mentioned earlier, while the police power is finite, its limits are inexact changing to meet the needs of the times. This situation has lead Rathkopf to conclude:

... as the concept of the scope of the police power expands in relation to the demands put upon it by the increasing complexities of civilization, the concept of the purposes of zoning similarly expand.¹⁰

Richard Babcock in The Zoning Game addresses the issue of determining the purpose of zoning by asking the seemingly simple question, "Why do we have zoning anyway?" In answering his own question, Babcock quickly dismisses the purpose stated in the Standard State Zoning Enabling Act and similar legislation and goes on to say that there is no generally accepted answer.¹¹ He does however, submit for review two theories of the purpose of zoning: the property value theory and the planning theory, both of which are similar to those expressed by Rathkopf.

Under the former theory, zoning is a means of maximizing the value of property. Here, the purpose of zoning is to insure that every piece of property will be used in a manner that will assure its greatest value without causing a corresponding decrease in the value of other property.¹² Zoning does not determine value, but it does protect the market from imperfections in the natural operation of supply and demand. Apparently such a mechanism is necessary and zoning allows public regulation short of condemnation for which the owner would have to be compensated.

The planning theory is not as easily stated. In essence, it conceives of zoning as one of a number of planning tools instrumental in the implementation of the master plan. Under this theory, the validity of zoning (and thus its purpose) is measured by how nearly it conforms to the master plan and its stated objectives.

Babcock finds fault with both of these theories of purpose for expressly the same reasons: they are too narrow in their scope and too parochial in their interests. The first theory seeks to preserve property values on a neighborhood or community scale while the second would provide the municipal plan with more authority than it has. He concludes his discussion on the purpose of zoning by commenting: "Zoning needs no purposes of its own ... zoning is a process. It is part of a political technique through which the use of private land is regulated."¹³

If one thing is to be concluded from this brief discussion, it is that purpose, scope, and even the concept of zoning are not clear -- except perhaps in the abstract. It follows then that in the course of actual operation there has been much confusion and disagreement, particularly concerning the issues discussed above. Further, present difficulties in the application and administration of the zoning power (discussed in subsequent chapters) will only be compounded as existing and proposed land use and environmental legislation at both federal and state levels is implemented.

FOOTNOTES

1. Edward Bassett, Zoning, (New York: Russell Sage Foundation, 1940), p. 45.
2. Alfred Betteman, City and Regional Planning Papers, ed. by Arthur C. Comey (Cambridge: Harvard University Press, 1946), p. 44.
3. Charles A. Rathkopf, The Law of Zoning and Planning, 3 vols., 3rd ed. (New York: Clark Broadman Co., 1968) vol. 1, p. 2-1.
4. Clements v. McCabe 210 Mich. 207 (1920).
5. Ibid.
6. Kropf v. Sterling Heights 391 Mich. 139 (1974).
7. Rathkopf, The Law of Zoning and Planning, vol. 1, p. 2-2.
8. U.S. Department of Commerce, A Standard State Zoning Enabling Act, (1926 rev.), Section 3.
9. Ibid., Section 1.
10. Rathkopf, The Law of Zoning and Planning, vol. 1, p. 2-8.
11. Babcock, The Zoning Game, p. 115.
12. Ibid., p. 117.
13. Ibid., p. 124.

CHAPTER III

EVOLUTION OF THE POWER TO ZONE

Evolutionary Sources

Modern concepts of land use regulation have evolved from four principal sources; the common law of nuisance, restrictive covenants, eminent domain, and the police power. Of the four, the common law of nuisance is the oldest originating with the ancient maxim, sic utero tuo ut alienum non laedas, which forbid landowners of antiquity from using their property in a manner injurious to another's property.

Under the common law of nuisance as it was to evolve, a plaintiff in order to obtain judicial relief had to prove that the use of the defendant's land was unreasonable and substantially reduced the use value of the plaintiff's property. Usually, the plaintiff had to show that through the defendant's use of his land, either the physical condition of the plaintiff's property was adversely affected or that extremes of sound or smell were produced that severely reduced the plaintiff's comfort. However, the common law of nuisance did not require that the objectionable use be a nuisance per se, but only that it constitute a nuisance under particular circumstances -- the classic

example being the storage of gun powder in a residential district. The list of uses that the courts came to accept as nuisances under such conditions became quite lengthy. As Anderson points out though, the real value of nuisance cases is that they show "early judicial recognition of the fact that some uses are incompatible with others and that the rights of all landowners will be diminished unless the rights of all are subject to reasonable restraint."¹

The common law of nuisance provided relief where substantial injury was sustained, but it did not provide protection against those uses which had an undesirable influence upon an area but fell short of being nuisances. To provide protection against such near nuisance situations, restrictive covenants were written into property deeds to restrict land uses, building types, and establish minimum setbacks. Anderson notes that the use of restrictive covenants played a part in the judicial acceptance of public control of private land:

Judicial acceptance of zoning restrictions could not have developed without judicial understanding of the need for such legislation. Familiarity with private restrictions, and the rationale of their continued enforcement, may have rendered the courts more receptive to public restrictions under the police power. Certainly, the wide use of restrictive covenants which dealt with many of the same problems minimized the novelty of zoning regulations.²

A third source of land use regulation was developed during the last half of the nineteenth century in the form of zoning through eminent domain. The objective of this technique was limited to the prevention of blight by

creating residential zones subject to municipal land use restrictions. Property owners injured by the creation of these zones received compensation. While the use of this technique was piecemeal, short-lived and costly, it did point up the need for further public regulation.

In America, the use of the police power for public regulation of private property dates back to the 1600's. An example of such early regulation is found in an ordinance adopted by Cambridge, Massachusetts in 1632 which governed the height, construction, and placement of buildings within municipal boundaries. Another form of early regulation, the fire district, was established in 1692 in Boston.

In time, the police power was extended to allow other forms of municipal regulation including tenement house codes, building and sanitary codes, and height and nuisance ordinances. Where codes had a clear relationship to the health, safety and welfare of the community, they were upheld by the courts. In the area of pre-comprehensive zoning, height regulations for the City of Boston were upheld in Welch v. Swasey 214 U.S. 91 (1909) as were municipal nuisance regulations in Los Angeles in Hadacheck v. Sebastian 239 U.S. 394 (1915).

The affirmation of municipal regulation of private property by the Supreme Court stemmed from its acknowledgement of the expanded role that the police power had

come to assume. To quote from a 1907 decision of the Court, Bacon v. Walker 204 U.S. 311, the police power ...

is not confined to the suppression of what is offensive, disorderly, or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of the people.³

New York City Zoning Ordinance

Though various forms of municipal regulation existed previous to 1916 and had been sustained by the courts, it was not until the adoption of the New York City Zoning Ordinance that we have what Bassett calls, "the first comprehensive zoning of height, area and use in the country."⁴

The New York ordinance was the product of six years of study and reflected careful consideration of potential legal and constitutional problems.⁵ Its authors did not attempt to find the power to zone within the existing city charter; rather, they had a zoning enabling act passed by the state legislature. This legislation was specific as to the delegation of power; it authorized the division of the city into districts and the imposition of land use restrictions in each district. This left the courts free to examine the exact use of power without residual concern as to whether such power was extended to the municipal corporation. A specific enabling act also provided legislative recognition and approval of comprehensive zoning as an extended use of the police power.⁶

The relationship of zoning to the police power is critical. The courts had previously shown that they would uphold public regulation of private property, but only where such regulation bore a clear relationship to health, safety or welfare. Therefore, both the enabling act and the ordinance contained specific references to regulations "designed to secure safety from fire and other dangers and to promote the public health and welfare."⁷

Because the courts had declared earlier piecemeal ordinances discriminatory, the New York ordinance was constructed so as to be comprehensive in that it divided the entire city into districts, treated similar lands alike, and subjected all lands within each district according to the same restrictions. It was recognized however, that literal enforcement of the ordinance would result in hardships to certain cases; consequently, the authors provided a system of administrative relief. This system was also devised for the purpose of keeping zoning out of the courts, for it was felt that "zoning would be judged on the basis of hardship cases which unavoidably would result from imperfect zoning ... (and) that such cases would result adversely and that zoning would end during its infant years."⁸

Comprehensive zoning in the form of the New York ordinance was challenged and subsequently upheld in Lincoln Trust Co. v. Williams Building Corp. 229 N.Y. 313 (1920). Both the New York enabling legislation and the

city ordinance were to become "patterns for essentially all of the early zoning ordinances and enabling acts."⁹

Acceptance of comprehensive zoning as a legal use of the police power was not immediate. Indeed, for the next ten years following the adoption of the New York ordinance, state courts across the country were to remain divided upon the question of the constitutionality of zoning. During this time, it was frequently argued that zoning constituted a taking of property without due process or that zoning regulations had little or no relation to health, safety or welfare. State courts in Wisconsin, Minnesota, Illinois, Kansas, Connecticut, and Louisiana were to uphold zoning; but courts in Missouri, Georgia, Texas, Maryland, and Colorado struck it down on various grounds. What was needed to settle this controversy was a decision of the U.S. Supreme Court. Such a decision was forthcoming in Euclid v. Ambler Realty Co. 272 U.S. 365 (1926).

Euclid v. Ambler Realty Co. and Nectow v. Cambridge

Earlier decisions of the Supreme Court had upheld; area, bulk and height regulations; the right of a municipality to make regulations upon the basis of which building permits would be granted; and the division of a city into districts for certain purposes with different standards being applied to each district. The issue under consideration in Euclid was the constitutionality of use regulations and thus the legality of comprehensive zoning.

The Court found little difficulty in sustaining the Euclid ordinance where it excluded industry from residential areas since legal precedents had been established in cases such as Hadacheck.¹⁰ However, a serious problem was posed concerning the exclusion of businesses and apartments from some residential districts. The law of nuisance could not readily be applied here. Consequently the Court had to turn to state court decisions and the findings of various commissions and experts to establish a relationship between the exclusion of these uses and the health, safety and welfare of the public. The Court was sufficiently convinced that such a relationship did exist and concluded:

If these reasons ... do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, 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, morals, or general welfare.¹¹

The Court went on to add however:

It is true, that when, if ever the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, ..., or to particular conditions, ..., some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.¹²

Thus with the Euclid decision and earlier cases the Court affirmed the constitutionality of comprehensive zoning by determining that the essential elements of zoning were within the purview of the police power. However, it

also acknowledged that the actual application of specific regulations could be arbitrary and unreasonable. The Court did not pursue this latter point in the Euclid decision, saying only:

... it is enough for us to determine, as we do here, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority leaving other provisions to be dealt with as cases arise directly involving them.¹³

Two years later in Nectow v. Cambridge 277 U.S. 183 (1928), the Court was called upon to consider whether the provisions of an otherwise valid ordinance when applied to the plaintiff's property "deprived him of his property without due process of the law in contravention of the Fourteenth Amendment." In deciding the question, the Court relied upon Euclid and stated:

The government power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restrictions cannot be imposed if it does not bear a substantial relationship to the public health, safety, morals, or general welfare.¹⁴

The Court was not satisfied that such a relationship existed and invalidated the zoning classification of the plaintiff's property. However, it did so only after noting that the courts should not set aside the determinations of public officers in such matters unless their actions were arbitrary or irrational and had no substantial relationship to the proper objectives of the police power.

Euclid and Nectow were preeminent among a series of

zoning cases to be heard by the Supreme Court between 1926 and 1928. These early cases established the legal basis upon which all future zoning cases were to be judged. After Washington ex rel. Seattle Trust Co. v. Roberge 278 U.S. 116 (1928), the Supreme Court refused to hear any further zoning cases and only recently has the Court returned to the realm of zoning litigation.

Standard State Zoning Enabling Act

In the years immediately following the adoption of the New York City Zoning Ordinance, several states enacted zoning enabling legislation. As comprehensive zoning was a relatively new field, guidance was lacking. Therefore, the U.S. Department of Commerce under Herbert Hoover established the Advisory Committee on Zoning for the purpose of "investigating the possibilities of somewhat uniform methods of establishing zoning ordinances throughout the country." The committee spent three years studying existing zoning acts, ordinances, and practices as well as court decisions before issuing in 1924 the Standard State Zoning Enabling Act. The need for such a model was underscored by Hoover himself in a foreword to the act:

When the advisory committee on zoning was formed in the Department of Commerce in September 1921, only 48 cities and towns with less than 11,000,000 inhabitants, had adopted zoning ordinances. By the end of 1923, a little more than two years later, zoning was in effect in 218 municipalities, with more than 22,000,000 inhabitants, and new ones are being added to the list each month.¹⁵

Upon its completion the Standard State Zoning Enabling Act (SSZEA) was distributed to all state legislatures and municipalities. By 1925, 19 states had used the act in drafting zoning enabling legislation, and by 1930, 35 states had adopted it in whole or in part. Bassett in commenting on the importance of the act, credited it with being "one of the causes for the spread of zoning throughout the states." Today, 50 years later, the influence of the SSZEA is present in most zoning statutes, Michigan law not excluded. For this reason, the text of the model act and the supplementary notes of the authors merit consideration.

As published in 1924 and revised in 1926, the model act contained a series of notes, both preceding the text and supplementary to specific sections. The notes preceding the text set the tone of the act and offered the following advice. First, state legislatures were advised to adopt enabling statutes rather than rely upon home rule powers which might be too general to sustain zoning regulations. Next, the state legislatures were advised that in most cases constitutional amendments would be unnecessary as zoning was to be exercised under the police power and was "well within the powers granted to the legislatures by the constitutions of the various states." Further, the legislatures were advised to amend the act as little as possible, to avoid the addition of words and phrases, not to consolidate sections, and to avoid definitions. The

only changes which were encouraged were those necessary to have the act conform to local legislative custom and modes of expression.

Section 1 of the act is entitled "Grant of Power". Accordingly, after establishing a relationship between zoning and the health, safety, morals and general welfare of the community, the first and only sentence of this section authorized the legislative bodies of cities and incorporated villages to regulate:

... the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residences or other purposes.¹⁶

It should be noted that the first action of the authors was to tie the zoning power to the police power--not to the police power in general, but rather to the promotion of the four traditional, and therefore accepted, goals of the police power. A supplementary note explains the reason for this action:

The main pillars on which the police power rests are these four, viz, health, safety, morals and general welfare. It is wise therefore to limit the purposes of this enactment to these four. There may be danger in adding others, as "prosperity," "comfort," "convenience," "order," "growth of the city," etc. and nothing is to be gained thereby.¹⁷

Also, in enumerating the specific regulatory powers to be granted under zoning instead of generalizing, the authors hoped to avoid what Anderson calls "hazards of construction". As he further points out however, this action "may have

rendered it more difficult to broaden the power by a liberal construction of 'other purposes'".

Section 2 of the act authorizes the districting of municipalities for the purposes stated within the act, and further allows local legislative bodies to regulate the construction, alteration, repair and use of buildings, structures and land. This section specifies that regulations within a district must be uniform, but may vary from other districts. Surprisingly, the notes indicate that the provision concerning uniformity was added not so much as a legal precaution, but rather as assurance to property owners that discrimination would not occur.

Section 3 contains a recitation of purposes of zoning which include;

... to lessen congestion in the streets, to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.¹⁹

This section requires that regulations be made in accordance with a comprehensive plan, giving reasonable consideration to the character of each district and its suitability for particular uses, for the purpose of conserving the value of buildings and encouraging the "most appropriate use of land throughout such municipality."

The meaning of the provision "such regulation shall be made in accordance with a comprehensive plan" has been a source of continued litigation and debate. That the

authors intended some planning to precede zoning is apparent--the form and content of that planning is not. The notes pertaining to this section offer little enlightenment, stating only:

This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.²⁰

The question to be decided has come to be whether or not a written plan is required by this section. Nowhere is there explicit reference to a written comprehensive plan or even what should constitute a "comprehensive" plan. However, it can be argued that the necessity of one is implied. Consider what the authors wrote as an introductory note to the act concerning definitions:

No definitions are included. The terms used in the act are so commonly understood that definitions are unnecessary. Definitions are generally a source of danger. They give words a restricted meaning. No difficulty will be found with the operation of the act because of the absence of such definitions.²¹

In this instance, as in others, the absence of definitions has been a source of difficulty. However, this difficulty may be by design rather than by accident or oversight. Anderson notes that the members of the Advisory Committee were divided on the question themselves. Betteman favoring a "comprehensive and scientific study" while Bassett favored something much less.

In early cases, the courts found themselves in a somewhat tenuous position when it came to deciding this issue. By 1926, 425 municipalities, comprising more than

one half of the urban population of the country, had adopted zoning ordinances. Few of these communities had previously adopted or prepared anything resembling a written plan for development. If the courts had established that a written plan was necessary, then the bulk of these ordinances would have been invalidated. Consequently, the courts generally required something less. Today, the debate continues except in those few states that have specifically required adoption of a formal plan previous to the enactment of a zoning ordinance.

Sections 4, 5 and 6 of the model act concern the adoption and amendment of zoning regulations. Detailed procedures are lacking here with much being left to local discretion. However, certain procedures thought essential to zoning are included, though they are not elaborated upon. These requirements include the creation of a zoning commission, the holding of public hearings and provision for citizen protest over proposed changes to the ordinance.

The model act calls for the local legislative body to appoint a zoning commission "to recommend the boundaries of various original districts and appropriate regulations to be enforced therein." This body in the course of its work was to hold public hearings and submit a report of its findings to the legislative body. Supplementary notes to Section 6 indicate that the zoning commission was to be temporary in nature--not the permanent body it has come to be. Two reasons are given:

Some laws contain a provision to the effect that all changes in the ordinance shall be reported upon by the Zoning Commission before action can be taken by the legislative body. Such a provision has not been included here. In the first place, that involves continuing the Zoning Commission as a permanent body, which may not be desirable. In the second place, it is before a zoning ordinance is established that the necessity exists for that careful study and investigation which a Zoning Commission can so well perform. Amendments to the original ordinance do not, as a rule, require such comprehensive study and may be passed upon by the legislative body provided that proper notice and opportunity for the public to express its views have been given.²²

Despite its temporary nature, the authors considered the role of the zoning commission essential, stating:

Even though a committee of the legislative body might be entirely competent to undertake the painstaking, careful and prolonged detailed study that is ordinarily involved in the preparation of the zoning ordinance and map, the appointment of an outside body of representative citizens is most desirable as a means of securing that participation in and thorough understanding of the zoning ordinance which will insure its acceptance by the people of the particular municipality. One of the most important functions of such a commission is the holding of numerous conferences in all parts of the city with all classes of interests. No zoning ordinance should be adopted until such work has been done.²³

Recognizing the close relationship of zoning to planning, the authors provided for the optional use of the planning commission to perform the duties of the zoning commission. While only offered as an option in the text of the act, the use of the planning commission to draw up the zoning plan was strongly suggested in the supplementary notes.

It is highly desirable that all zoning schemes should be worked out as an integral part of the city plan. For that reason the city plan commission, preferably should be entrusted with the making of the zoning plan.²⁴

In addition to the public hearings held by the zoning commission, the act requires the legislative body to hold at least one hearing after the receipt of the commission's report. At this hearing any person could be heard, whether or not he was a landowner. The authors noted, "It is right that every citizen should be able to make his voice heard and protest any ordinance that might be detrimental to the interests of the city."²⁵ The legislative body is further required to advertise and hold a public hearing each time the ordinance is to be amended. If a protest is lodged by the owners of 20 percent or more of the area where the proposed change is to take place, then the SSZEA requires that the amendment (in order to be adopted) be passed by no less than a three-fourths vote.

Section 7 considers the powers, duties, and composition of the board of adjustment (appeals) in considerable detail. Unlike previous sections of the act which deal with adoption and amendment, little here is left to local discretion. The powers delegated to the board make it an essential administrative device with responsibility: to hear and decide appeals from decisions of administrative officials and the enforcement of the ordinance; to hear and decide requests for special exceptions as authorized by the ordinance; and to grant variances to the terms of the ordinance where literal enforcement would result in unnecessary hardship. As important and powerful as this board appears, it is not a mandatory device. The authors do not provide

any notes on this point so their intent is unclear.

The act provides the board with both original and appellate jurisdiction. Its decisions however are not final and are subject to review by the courts upon the filing of an appeal by an aggrieved party. In this case, the act provides for broad standings:

Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustments, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, ..., setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality.²⁶

This section, as mentioned, is quite detailed and comprises almost one-half of the text of the act. Surprisingly, unlike previous sections there are few if any supplementary notes to provide guidance or give explanation. Anderson, however, does provide some insight into the authors' intentions by commenting:

Apparently, the draftsmen of the Standard Act felt that the board of adjustment was at once an essential component of the administrative machinery, and a device so novel as to require minute description of both its organization and powers ... Delegations of power were suspect, and such delegations by municipal corporations without specific authority were predictably hazardous. Accordingly, they prescribed in some detail the composition, appointment, procedure, and jurisdiction of the board. This removed the potential doubts as to the authority of municipalities to delegate the power, and it provided standards, as well as a fair procedure, for the application of standards to specific circumstances.²⁷

Section 8 concerns the legal remedies available to local officials in the enforcement of zoning ordinances. In effect, the act makes it a misdemeanor to violate the

provisions of an ordinance and authorizes the use of both civil and criminal penalties to prevent unlawful construction, alteration, repair or use of buildings, structures and land. Supplementary notes indicate that the authors felt it vital for officials to have a wide range of remedies including the power to:

... sue the responsible person for a penalty in a civil suit,... arrest the offender and put him in jail; ... stop the work in the case of a new building and prevent it going on; prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; ... evict the occupants of a building when the conditions are contrary to law, and prevent its occupancy until the conditions have been cured.²⁸

The authors reasoned that without such penalties, zoning ordinances would be subject to continued violation wherever doing so would result in substantial profit.

The concluding section of the act provides for the resolution of conflicts between local zoning ordinances and other laws. Essentially, conflicts are to be resolved so that the more stringent regulation will prevail. Thus, if zoning regulations are stricter than state housing codes, for example, then the zoning regulation will prevail; but, if other laws have higher standards than those imposed in the zoning ordinance, then they will prevail. The authors considered such provisions necessary as municipalities were limited to adopting ordinances not inconsistent with general law. Where conflicts occurred between local zoning ordinances and statewide restrictions, it was felt that the courts would resolve the conflict in favor of state law if

such a provision was not included here.

Standard City Planning Enabling Act

In 1928, the Advisory Committee on City Planning and Zoning (formerly the Advisory Committee on Zoning) published the Standard City Planning Enabling Act (SCPEA). This act had the effect of further institutionalizing the relationship between planning and zoning established in the SSZEA.

Simply stated, the SCPEA established that it was the duty of the planning commission to make and adopt a master plan. Notes explain that this plan is to be a "general design of the city's development, so that development may take place in a systematic, coordinated and intelligently controlled manner."²⁹ Section 6 of the act considers the component parts of the plan--one of which is a "zoning plan for the control of height, area, bulk, location and use of buildings and premises."

Section 11 of the model act outlines the role of the planning commission in the zoning process when it transfers the duties of the zoning commission to the planning commission, stating:

The commission shall have all powers heretofore granted by law to the zoning commission of the municipality, and, from and after the creation of a planning commission in such municipality, all powers and records of the zoning commission shall be transferred to the planning commission.³⁰

This is a mandatory transfer, and only in the case where the zoning commission is nearing completion of a zoning

plan can the transfer be delayed, but then only for a six month period.

Also, while the notes to Section 11 indicate that the board of appeals, being a distinct body from the zoning commission, is to remain unaffected by this act, earlier notes suggest that a link should be established between the board and the planning commission. In explaining a provision of Section 3 which states, "... the appointed members (of the planning commission) shall hold no other municipal office, except that one of such appointed members may be a member of the zoning board of adjustments or appeals." a supplementary note adds:

The exception of a member of the zoning board of adjustment or appeals is required by the recognition of a fact that the zoning board is concerned with administering one of the most important parts of the city plan, namely, the zoning plan, and as this involves an understanding of the city plan, and as the need of amendments of the zoning plan must sooner or later be brought to the attention of the planning commission, it seems advisable, or at least permissible, that one member of the zoning board be also a member of the planning board.³¹

The Standard City Planning Enabling Act, although adopted by numerous states, did not gain the acceptance accorded to the earlier Standard State Zoning Enabling Act. Consequently, the strong relationship between planning, zoning and the planning commission incorporated in the city planning act was not universally adopted.

During the 1930's after reviewing the problems associated with planning enabling legislation, Bassett, Betteman and others drafted several additional model acts.

Bettelman's model closely approximated the earlier planning act drafted by the Advisory Committee and included provisions for a zoning plan. The Bassett-Williams model however, contained no such provision.

Issues and Questions

The past several pages have briefly outlined the origin and evolution of the power to zone in the United States. Admittedly, the material neglects the last forty years of zoning practice; however, this will be considered in the following chapter. What the material covered thus far succeeds in doing is to introduce most if not all of the major issues and questions fundamental to zoning. It should be noted that over the last forty years, these issues have not changed significantly nor have many of them been resolved.

The gradual extension of public regulation over private property has been noted, but always the question has remained as to how far this regulation should extend and what should be its proper purpose. The Standard State Zoning Enabling Act provided a necessary framework for the exercise of the zoning power, but it too created questions in that the framework was incomplete and imprecise. It was incomplete in such areas as explicitly establishing the relationship of zoning to planning and of the zoning ordinance to the city plan. The relationship of the board of appeals to other governing bodies involved in the zoning

process is not well defined either, nor are the powers of the board. Finally, while the text of the act states certain things, the introductory and supplementary notes may suggest something else, as in the case of replacement of the zoning commission by the planning commission.

While time has identified the defects in the SSZEA and legislation patterned after it, little has been done to solve inherent problems. An early attempt was made in the drafting of the Standard City Planning Enabling Act with its provisions that: the zoning plan be a part of the comprehensive plan; that the planning commission function as the zoning body; and that a member of this commission be allowed to sit as a member of the board of appeals. However, as mentioned, the SCPEA was not universally accepted and zoning practices already in effect, continued.

FOOTNOTES

1. Robert M. Anderson, American Law of Zoning, 4 vols., (Rochester, New York: The Lawyers Co-operative Publishing Company, 1968), vol. 1, p. 37.
2. Ibid., p. 39.
3. Bacon v. Walker 204 U.S. 311 (1907).
4. Edward Bassett, Zoning, (New York: Russell Sage Foundation, 1940), p. 23.
5. Anderson, American Law of Zoning, vol. 1, p. 44.
6. Ibid.
7. Ibid., p. 45.
8. Ibid., p. 46.
9. Ibid.
10. Hadacheck v. Sebastian 239 U.S. 394 (1915).
11. City of Euclid, Ohio v. Ambler Realty 272 U.S. 365 (1926).
12. Ibid.
13. Ibid.
14. Ibid.
15. U.S. Department of Commerce, A Standard State Zoning Enabling Act, (1926 rev.), Forward.
16. Ibid., Section 1.
17. Ibid., Footnote 3.
18. Anderson, American Law of Zoning, vol. 1, p. 144.
19. Standard State Zoning Enabling Act, Section 3.
20. Ibid., Footnote 23.

21. Ibid., Introductory Note 7.
22. Ibid., Footnote 43.
23. Ibid., Footnote 39.
24. Ibid., Footnote 41.
25. Ibid., Footnote 28.
26. Ibid., Section 7.
27. Anderson, American Law of Zoning, vol. 1, p. 149.
28. Standard State Zoning Enabling Act, Footnote 46.
29. U.S. Department of Commerce, A Standard City Planning Enabling Act, (1928), Footnote 31.
30. Ibid., Section 11.

CHAPTER IV

MICHIGAN ZONING ENABLING LEGISLATION:

A REVIEW AND CRITIQUE

Early Michigan Legislation 1921--1937

The first of Michigan's zoning enabling statutes was enacted in 1921 as a response to the Clements v. McCabe decision handed down one year earlier by the Michigan Supreme Court. The Michigan Court in this decision made it clear that municipalities within the state lacked the inherent power to regulate land use through zoning and that to do so would require a grant of power from the State Legislature in the form of an enabling act. This enabling act was the City and Village Zoning Act, PA 207, 1921.

Although PA 207, 1921 predated the Standard State Zoning Enabling Act by three years, there were definite similarities found throughout the acts in terms of duties, powers and responsibilities. Perhaps more importantly though, there were definite dissimilarities. While the SSZEA required the formation of a temporary yet essential zoning commission for the purpose of determining initial zoning districts and regulations, the Michigan act did not. Provisions within the Michigan act pertaining to a zoning commission were (and still are) confusing at best and

seemingly permissive. Further, they applied only to cities having a population of 25,000 or more. Overall, the legislative body of the city or village was given responsibility for determining the manner in which zoning regulations and boundaries were to be determined.

As mentioned, the zoning commission as envisioned by the authors of the SSZEA was to be a temporary body whose duties extended to only preparation of the original ordinance. Subsequent amendments to the ordinance were to be considered by the legislative body. In the case of the Michigan statute, zoning commissions were to participate in the amendment process (where such commissions were formed).

Differences also occurred with respect to the board of appeals. The SSZEA outlined the powers, duties and composition of a board of appeals but did not make the board a mandatory device. The Michigan act provided for a board in similar terms, but went on to allow the legislative body to sit as the appeals board. Another difference existed with respect to the role of the courts in the appeals process. The SSZEA specified that the decision of the board and evidence leading up to its decision were reviewable by the court upon petition. The decision of the board under the Michigan act was also subject to court review; however, Section 5(d) states, "The decision of such board shall be final so far as it involves discretion or

the finding of facts."¹

Although the City and Village Zoning Act has been amended several times, it remains much the same today as it was 54 years ago when it was enacted. A closer look at specific provisions of the act will be taken later in this chapter.

The power to zone was extended to Michigan townships by PA 79, 1929. The wording of this act was derived from that of PA 207, 1921. There were however, several areas where these two acts differed. A significant difference was found in Section 9 of the township act which called for a vote of the township residents to determine whether or not the township would proceed under the provisions of PA 79, 1929 and adopt zoning. This vote was not a referendum over the provisions of a zoning ordinance as it has now become; but rather, pertained to the more general question of whether or not the residents would accept zoning as a form of land use regulation.

Another area of difference occurred in Section 3(a) of the township act which allowed property owners fronting highways to petition the township board to establish a residential district. The act provided that such a district would be established after a public hearing if the petitioners held two-thirds or more of the frontage of the proposed district. The act safeguarded the interests of established businesses by providing that commercial property could not be included in such a zone unless the owner of

the property had been one of the petitioners.

Other differences between the acts are found concerning the zoning commission, board of appeals and funding. Section 4 of the township act gave the township board wide latitude in determining the method by which zoning regulations were to be adopted and amended. No mention was made of a zoning commission, but presumably the act did not preclude its creation. Section 5 of the township act specified that the township board would act as a board of appeals. Here there was no option concerning composition or whether such a board was mandatory. Finally, Section 8 of the township act stated that taxes would provide the source of funding for carrying out the provisions of the act, no similar provision was found in PA 207, 1921.

Act 79 of 1929 was amended by PA 44, 1935 such that the unit of government responsible for rural zoning was changed from the township to the county. With this shift came several basic changes in the general provisions of the act. The amended version of PA 79 now empowered the county board of supervisors to zone for all unincorporated portions of the county. Further, recognizing the rural character of Michigan counties, the board was allowed to regulate the use of land for recreation, agriculture, forestry, soil conservation and water supply in addition to more traditional urban uses.

The most significant changes involved the roles of county, regional and state planning organizations. Section

3 of the revised act required the creation of a county planning committee in those counties undertaking zoning. It further stated that the chairmen of these county committees could form a regional planning committee for the purposes of integrating the plans of the various counties. And finally it required that:

The county and regional planning committees shall with the aid and cooperation of the state planning commission formulate a tentative zone map and county zoning ordinance for submission to the county board of supervisors.²

The role of the state planning commission in what was previously a local function was specifically outlined.

The state planning commission shall assist in determining the validity of the land classifications and zoning proposals submitted by the county planning committee, shall suggest if necessary, any such additional data and inventory as may be needed to provide adequate basis for effective and valid land classification and zoning, and shall assist with its own facilities and other facilities or agencies available, in carrying out necessary inventory essential to sound zoning procedures.³

But this is not the end of state involvement. Section 4 provided that county zoning ordinances were not to become effective until after approval of the state planning commission. Also, in this same section, amendments and supplements were to be adopted in the same manner as the original ordinance. Consequently, the state would have a final say not only in the adoption of the ordinance, but also in its amendment. Finally, the state was involved in the appeals process. Section 5 of the revised act stated:

The county planning board of any county and an equal number of members of the state planning commission or

representatives designated by said state planning commission shall act as a board of appeals...⁴

The 1935 version of PA 79, 1929 represents a significant departure from earlier zoning law and practice. The function of planning in the zoning process was not only reaffirmed, but for the first time it was coordinated among various units of government. Also, with the revised act, the state moved to actively participate in and guide what had previously been a local concern.⁵

Act 302 of 1937 reestablished township zoning in Michigan on a limited basis. The act did not extend the power to zone to all townships, rather only to those with populations of 5,000 or more and to those immediately adjacent to cities of 40,000 or more. This act was similar to earlier Michigan legislation in many respects. The relationship of planning and zoning was stressed through the requirement of the formation of a permanent four man planning board. This body, selected by the probate judge(s) for the township, was required to formulate recommendations for the township plan and for a zoning ordinance. The zoning ordinance was to be based upon the provisions of the plan.

Several other provisions of the act are worth noting. Section 5 provided for the township board to designate certain officials within the township to enforce the ordinance. This was the first Michigan act to specify that an official would be responsible for the ordinance's

administration though earlier acts had implied as much. As with the earlier township act, Section 5 of Act 302 provided for the township board to act as a board of appeals. Section 10 of Act 302 contained a referendum provision similar to the one found in both versions of Act 79.

Sections 9 and 12 of Act 302 contain provisions unique to it up to this point in time. Section 9 authorized townships to charge fees for building permits for the dual purpose of obtaining advanced information of proposed construction and use of structures and to defray part or all of the cost of enforcing the zoning ordinance. Section 12 provided for resolving potential conflict between PA 79, 1929 and PA 302, 1937 by providing that any township enacting zoning under PA 302, 1937 was exempt from county regulation under PA 79, 1929.

Act 302 was significant for three reasons. First, it recognized the particular needs of urbanizing townships which were distinct from those of cities and rural counties. Second, it established a definite relationship between planning and zoning not found in the earlier township act. Third, and perhaps most importantly, it openly acknowledged the political nature of planning and zoning by requiring a bi-partisan planning board. This last feature, novel to Act 302, had not appeared before not has it since.

Present Legislation 1943 to Date

Currently there are three primary zoning enabling acts in Michigan: PA 207, 1921, the City and Village Zoning Act; PA 184, 1943, the Township Rural Zoning Act; and PA 183, 1943, the County Rural Zoning Enabling Act. In addition, there are numerous acts related to planning and the environment which also delegate the zoning power.

The City and Village Zoning Act has already been discussed in general terms. As originally enacted in 1921 it bore a strong resemblance to other zoning legislation of this era. Despite amendment it has changed little since then. Both the township and county zoning acts were adopted in 1943 replacing Acts 302 of 1937 and 79 of 1929. While there was a definite resemblance between past and present acts, both PA 183 and 184 are more moderate than their predecessors. Neither of the newer acts incorporated the strong planning-zoning relationship developed in earlier acts. The concept of a planning commission being primarily responsible for zoning was dropped in favor of a zoning commission, as originally instituted in PA 207, 1921. Townships were once more included as the basic unit of rural zoning by Act 184, while Act 183 greatly curtailed the role of the state in county planning and zoning matters. A final change involved the referendum provisions of earlier acts. No longer would township and county residents vote on whether or not enabling legislation was to be operative within the county (eg. as in

PA 79, 1929) or whether zoning was to take effect in a particular district (eg. as in PA 302, 1937). Now, the referendum, if called, would be township-wide and determine whether the zoning ordinance or an amendment to the ordinance would be adopted or rejected.

As enacted in 1943, the township and county acts were almost identical. Since then, both have been amended with some regularity, as has the city-village act. Amendment, however has not succeeded in clearing up numerous problems and short-comings inherent in all these acts. This is an unfortunate situation and a source of confusion and error in the adoption and administration of local ordinances. The courts, while active in zoning matters from the start, have purposely limited their role in deference to the separation of powers. Consequently, many questions requiring legal clarification have never received proper attention. Administrative rules are lacking and consequently, guidance is hard to find. In summary, after 53 years of zoning practice, many questions remain unanswered and many problems remain unresolved.⁶

Despite the above situation, the role of zoning as a planning tool has been expanding as a result of new land use and environmental legislation. This same legislation, for example the Shorelands Protection Act and the Natural Rivers Act, has also provided a vehicle for the active re-entry of the state into the field of zoning. Such actions while speaking to specific needs have resulted in further.

fragmentation of the zoning power and have added to the confusion surrounding zoning as to its particular purpose and regulatory powers.

Michigan, however, is attempting to put its house in order by developing a state land use policy program. In 1970, the Governor created a Special Commission on Land Use for the purpose of identifying land use issues of concern to the state. One of these issues involves the role of zoning as a planning and regulatory tool and the deficiencies of existing zoning enabling legislation.

The commission concluded that changes in the zoning statutes were in order. Any change, however, should be consistent with overall state land use policy and should have the effect of improving the implementation and administration of the zoning power. Internal weaknesses within the statutes can be easily identified, but the difficulty lies in finding solutions which will be consistent with a state policy which as yet has not sufficiently evolved. Guiding principles have been suggested by the Land Use Commission and more recently by the Office of Land Use, Department of Natural Resources. However, principles are of little value until they are turned into legislation and gain the force of law.

Presently the internal weaknesses of the enabling statutes will be reviewed. Later, recommendations will be offered given the present and proposed framework of state policy and law.

Functional Analysis of Michigan
Zoning Enabling Acts

The purpose of undertaking a functional analysis is to determine where internal weaknesses exist in terms of interpretation, implementation and administration of the power to zone as expressed in the various zoning statutes. Criteria and underlying assumptions upon which this analysis is based have been developed from the recommendations of various zoning practitioners who were interviewed during the preparation of this thesis.

The zoning statutes will be reviewed and critiqued for the purpose of determining problems resulting from:

1. differences in statutory requirements;
2. vagueness in statutory wording;
3. failure of a statute or statutes to address certain issues or topics; and
4. overlapping statutes and lack of coordination.

This criteria is based upon the following assumptions:

1. where legislation exists, it should be concurrent as to jurisdiction and to powers--differing or conflicting requirements or procedures should not exist;
2. where a statute addresses a topic, the language should be concise, non-conflicting and explicit;
3. where possible, the statutes should address all topics properly within the domain of the subject of zoning; and,

4. where possible, overlapping and duplication of powers, responsibilities and procedures should be eliminated.

For the purposes of review and critique, the Michigan statutes will be analyzed in terms of the three functions or processes involved in the exercise of the zoning power, namely:

1. preparation and adoption of an interim or permanent zoning ordinance;
2. amendment of an interim or permanent ordinance;
and
3. appeal from an administrative decision.

As an analysis of this type proves rather lengthy, the following matrices are included as a summary of issues and problems raised. Matrix I corresponds to those parts of the analysis concerned with the preparation and adoption of an ordinance. Matrices II and III cover issues found within subsections of the text dealing with amendments and appeals. The matrices are to be used as a reference aid, but they cannot be properly interpreted unless the appropriate subsections of the analysis are read.

I. PASSAGE OF ORIGINAL AND INTERIM ORDINANCES

		PROBLEMS/ISSUES IN GENERAL	RESOLUTION OF INTENT	CREATION OF ZONING BODY	CREATION AND ADOPTION OF TENTATIVE ZONE PLAN	PUBLIC HEARING	REVIEW AND APPROVAL	ADOPTION BY LEGISLATIVE BODY	REFERENDUM	FILING AND PUBLICATION	INTERIM ORDINANCE
			Differing provisions governing petition requirements Absence of provision requiring public notice of passage of resolution	Differing provisions govern membership	Provisions vague with respect to relationship between planning, master plan, zone plan, and the zoning ordinance	Question as to number of hearings to be held and who should properly hold them	No criteria given for review Question of utility of review where reviewing agency has no power	Legislative body may amend proposed ordinance without holding further public hearings. Amended version may differ substantially from version reviewed at public hearings	Differences in provisions of county and township acts	Differing publication requirements	Absence of procedural safeguards to protect local property owners Use of interim ordinance easily abused
PROBLEMS, INCONSISTENCIES, OMISSIONS, ETC. BY STATUTE	PA 183, 1943 COUNTY RURAL ZONING ENABLING ACT		Petition — signed by registered voters ; number required greater than or equal to 8% of total vote cast for governor . . . Public Notice — absence of requirement for public notice under option (B)	5-11 members; one member of legislative body may be a member of the zoning body	Fails to specify form or content of plan on which zoning ordinance is to be based	Specifies 1 hearing before zoning board	Review by state agency after adoption by board of commissioners	Amended proposed ordinance must be sent to zoning board for comment — no requirement for further hearings however	Petition signed by property owners outside incorporated cities and villages equal to or greater than 15% of total vote cast for governor . . .	No provisions for publication of zoning ordinance (except interim ordinance)	Most of provisions governing adoption of regular zoning ordinance can be side stepped including provisions for public hearings
	PA 184, 1943 TOWNSHIP RURAL ZONING ACT		Petition — signed by property owners — equal to 8% or more of total vote cast for governor . . .	4-7 members; no elected officer of the township or employees of the legislative body may serve on the zoning body	Same as above	1 hearing before zoning board — in certain instances a 2nd hearing will be held before the legislative body	Review by county agency before adoption — no criteria for review — township may ignore disapproval	Same as above — except under certain circumstances an additional hearing must be held when a protest is lodged	Petition signed by registered voters in unincorporated portion of township equal to or greater than 8% of total vote cast for governor . . .	Follow provisions of PA 191, 1939 — charter townships follow provisions of charter township act	Same as above
	PA 207, 1921 CITY AND VILLAGE ZONING ACT		No similar provision in this act	Legislative body may assume duties except in certain instances — where zoning body created — no limit on membership — planning commission may assume duties	Same as above	1 hearing before legislative body — where there is a zoning body, then 1 or more additional hearings required	No provision for review and approval	Amended proposed ordinance need not be sent to zoning body for comment — also no hearings need be held concerning changes	No provision for referendum	No provisions in act — 4th class cities must follow M.S.A. 5.1722 — villages must follow M.S.A. 5.1274	No provision for interim ordinance

II. AMENDMENT AND/OR SUPPLEMENT TO EXISTING ORDINANCE

III. APPEAL FROM AN ADMINISTRATIVE DECISION

		A. ADMINISTRATIVE AND PROCEDURAL MATTERS			B. THE COURT AND THE ZONING BODY	A. ADMINISTRATIVE AND PROCEDURAL MATTERS			B. POWERS, DUTIES AND RESPONSIBILITIES	
		In general — Procedures governing the passage of amendments or supplements to existing ordinances are similar to those required for passage of an original ordinance; therefore, problems identified in Matrix I (passage of original and interim ordinances) are equally valid here. Additional problems concern:			In general: — statutes provide a mechanism for a amendment/supplement of zoning ordinance but fail to provide guidance for its use — no statutory standards or criteria are given on which to base rezoning decisions — where courts have provided standards, they have been ignored by zoning bodies					
PROBLEMS/ISSUES IN GENERAL		NOTICE REQUIREMENTS FOR HEARINGS	PUBLIC HEARINGS	PROTESTS		COMPOSITION OF BOARD OF APPEALS	REVERSING AN ADMINISTRATIVE DECISION	NOTICE REQUIREMENTS FOR HEARINGS	SPECIAL EXCEPTIONS AND VARIANCES	SITE PLAN REVIEW
		Differing provisions govern notice requirements for rezoning hearings	Differing/confusing provisions govern number of hearings to be held on proposed amendments and supplements	Minimum required vote for passage of rezoning amendment where abutters have lodged a protest		Differing provisions govern membership	Differences in minimum vote required to reverse an administrative decision	Differing provisions govern notice requirements for appeals hearing	Insufficient standards required for granting of special exceptions — existing minimal standards set by court Question as to whether all statutes authorize the granting of use variances	Absence of statutory provisions authorizing site plan review
PROBLEMS, INCONSISTENCIES, OMISSIONS, ETC. BY STATUTE	PA 183, 1943 COUNTY RURAL ZONING ENABLING ACT	Same notice provisions as those required for passage of original ordinance — no provisions governing direct notice to abutting property owners or residents	1 hearing before zoning body	No provision in this act. Majority vote is sufficient	Same as above	3-7 members; — must be residents and electors in unincorporated area of county — no county officials or employees may serve simultaneously — one member shall be a member of the zoning body	Concurring vote of majority of board required	Act requires notice to be given to "parties". However act fails to specify who is included under this designation	Insufficient standards Question as to whether use variances are permitted under this act	Absence of statutory provisions authorizing site plan review
	PA 184, 1943 TOWNSHIP RURAL ZONING ACT	Same provisions as for passage of original act, plus: — property must be posted — direct notice must be given to all property owners and residents of 1 and 2 family homes within 300'	1 hearing before zoning board — in certain instances a 2nd hearing will be held before the legislative body	Same as above	Same as above	3 or 5 members; — 1st member is the chairman of the zoning body — 2nd member is a member of the legislative body — members 3, 4, and 5 are chosen from electors in unincorporated area of township	Same as above	Same as above	Same as above	Same as above
	PA 207, 1921 CITY AND VILLAGE ZONING ACT	Same as PA 183, 1943 above	1 hearing before legislative body — Where there is a zoning body 1 or more additional hearings are required	Where a protest has been lodged by 20% of the abutters, a 3/4 vote is required for passage of a rezoning amendment	Same as above	Legislative body may act as board of appeals or may appoint board of 5 or more members	2/3 vote required	Notice must be given to all property owners and residents of 1 & 2 family homes within 300'	Insufficient standards Use variances are permitted	Same as above

ADOPTION BY LEGISLATIVE BODY	REFERENDUM	FILING AND PUBLICATION	INTERIM ORDINANCE
Legislative body may amend proposed ordinance without holding further public hearings. Amended version may differ substantially from version reviewed at public hearings	Differences in provisions of county and township acts	Differing publication requirements	Absence of procedural safeguards to protect local property owners Use of interim ordinance easily abused
Amended proposed ordinance must be sent to zoning board for comment — no requirement for further hearings however	Petition signed by property owners outside incorporated cities and villages equal to or greater than 15% of total vote cast for governor . . .	No provisions for publication of zoning ordinance (except interim ordinance)	Most of provisions governing adoption of regular zoning ordinance can be side stepped including provisions for public hearings
Same as above — except under certain circumstances an additional hearing must be held when a protest is lodged	Petition signed by registered voters in unincorporated portion of township equal to or greater than 8% of total vote cast for governor . . .	Follow provisions of PA 191, 1939 —charter townships follow provisions of charter township act	Same as above
Amended proposed ordinance need not be sent to zoning body for comment — also no hearings need be held concerning changes	No provision for referendum	No provisions in act —4th class cities must follow M.S.A. 5.1722 —villages must follow M.S.A. 5.1274	No provision for interim ordinance

FROM AN ADMINISTRATIVE DECISION

PROCEDURAL MATTERS		B. POWERS, DUTIES AND RESPONSIBILITIES	
REVERSING AN ADMINISTRATIVE DECISION	NOTICE REQUIREMENTS FOR HEARINGS	SPECIAL EXCEPTIONS AND VARIANCES	SITE PLAN REVIEW
Differences in minimum vote required to reverse an administrative decision	Differing provisions govern notice requirements for appeals hearing	Insufficient standards required for granting of special exceptions —existing minimal standards set by court Question as to whether all statutes authorize the granting of use variances	¹ Absence of statutory provisions authorizing site plan review
Concurring vote of majority of board required	Act requires notice to be given to "parties". However act fails to specify who is included under this designation	Insufficient standards Question as to whether use variances are permitted under this act	Absence of statutory provisions authorizing site plan review
Same as above	Same as above	Same as above	Same as above
2/3 vote required	Notice must be given to all property owners and residents of 1 & 2 family homes within 300	Insufficient standards Use variances are permitted	Same as above

Passage of original and interim ordinances

This function can be broken down into a number of steps, including: the passage of a resolution of intent by the legislative body (if applicable), the creation of a zoning body, the creation and adoption of a tentative zoning plan, the holding of public hearings, review and approval (if applicable), adoption of the plan by the legislative body, review and approval (if applicable), referendum (if applicable), and filing and publication of the ordinance. The passage of interim ordinances requires a similar but abbreviated version of this procedure and is considered at the end of this subsection.

Resolution of intent

Problem statement

1. Qualifications for petitioners differ in the county and township zoning acts.
2. There is an absence of provisions for public notice in the County Rural Zoning Act where action is initiated through petition.

Statutory construction and judicial interpretation

Acts controlling county and township zoning require legislative bodies to pass a resolution declaring their intent to proceed under the provisions of the controlling act. This resolution can be passed at the discretion of the local legislative body or after receipt of a petition containing a certain number of signatures. Differences

in these acts arise over the latter method of initiating action. Section 2 of the county act calls for:

... a petition signed by a number of qualified and registered voters residing in that portion of the county outside of the limits of incorporated cities equal to not less than eight percent of the total vote cast for all candidates for governor ...⁷

On the other hand, Section 2 of the township act calls for:

... a petition signed by 8% of the persons who are residents and property owners in the unincorporated portion of the township ...⁸

While the county act requires that only registered voters may be petitioners, the township act specifies that petitioners must be both residents and property owners. These statutes also differ in terms of relative numbers of signatures required, in one case the number being determined by votes cast for gubernatorial candidates and in the other by number of property owners. Finally, the township act specifically requires that where action is initiated through petition, public notice of passage of a resolution must be given by the township board. Such a provision for public notice is absent from the county act in this instance, though it could easily be inferred.

Creation and membership of a zoning body

Problem statement

1. The three zoning statutes differ as to who may act as a zoning body, the composition of such a body, and the qualifications of members.

Statutory construction and judicial interpretation

The county act calls for a permanent zoning commission composed of five to eleven members while the township act calls for a body composed of four to seven members. The city-village act calls for a commission of undetermined number for cities of 25,000 or more; otherwise the legislative body may perform the role. In terms of constraints governing membership, the county act in Section 4 specifies:

No elected officer of the county nor any employee of the board of supervisors shall serve simultaneously as a member or as an employee of the zoning commission.⁹

However, the next sentence states:

One member of such commission may be a member of the board of supervisors.¹⁰

The township act contains a similar provision but without the last sentence quoted. As has been indicated, the city-village act provides that the legislative body may assume the role of zoning board in most instances.

The membership provision quoted in the county act has proved troublesome. At first it seems a clear statement prohibiting dual membership; however, it then seems to reverse itself and condone it. The Attorney General has addressed the issue in an informal opinion dated March 31, 1970 which stated that the conflict is resolved if the rule of statutory construction is applied. This rule states:

Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus

conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision ...¹¹

Regardless of the conflict in wording, the question of primary concern is whether or not it is desirable to have a member of the legislative body or any other local governmental body sit as a member of the zoning body. The county act says yes, the township act says no, and the city-village act says maybe. The Michigan Supreme Court in Brown v. Shelby Tp. 360 Mich. 299 (1960) ruled that:

... provision of township zoning act barring an elected officer of a township or a township employee from serving simultaneously as a member or employee of the zoning board is construed as a declaration of public policy that employees should not serve in a dual capacity and possibly in antagonistic positions and must be construed in conjunction with another provision of the same statute directing the zoning board to make use of pertinent information and counsel which may be furnished by appropriate public officials, departments or agencies.¹²

The purpose of this provision in the township act is to prevent possible conflict. There is indeed this possibility where dual membership is allowed, however, this arrangement can also be extremely beneficial. In an interview with a zoning administrator, the point was made that having one of the county commissioners on the zoning board greatly enhanced communication, understanding and cooperation between these two bodies.

The city-village act presents special problems of its own on the subject of zoning commission membership. The act provides for various options depending on whether the governmental entity is a city or a village, and how

large it is. Section 4 of this act provides that:

The legislative body of any city or village may provide by ordinance for the manner in which such regulations and boundaries of districts or zones shall be determined ...¹³

Also,

In cities having a population of 25,000 or more ..., the legislative body may appoint a commission to recommend ... the boundaries of districts and appropriate regulations to be enforced therein ... said legislative body shall not ... determine the boundaries nor impose regulations until after the final report of a commission so appointed.¹⁴

Finally,

Where a city has a city plan commission or corresponding commission the legislative body may appoint such commission to perform the duties above specified.¹⁵

The statutory wording is confusing in Section 4 if the complete section is read. In essence, it allows the legislative body to assume the powers of a zoning commission in villages, and those cities under 25,000. For those cities over 25,000 there is a statutory provision for a zoning commission. The question here, however, is whether or not this is a permissive or mandatory provision. To date, the courts have not been called upon to resolve the question, though municipal attorneys interviewed generally construed the provision to be mandatory, based upon such decisions as Haven v. City of Troy 39 Mich. Ap. 219. One such attorney interviewed, however, was quick to add that this particular section was hopelessly confusing.

Creation and adoption of a tentative zone plan

Problem statement

1. The relationship between planning and zoning is not clear. In particular, the relationship between planning, the master plan, the zoning plan and the zoning ordinance is ill-defined.

Statutory construction and judicial interpretation

All three zoning enabling statutes specify that the zoning ordinance is to be based upon a plan. Further, both the county and township acts require the zoning board/commission to adopt and file with the legislative body recommendations as to: a zone plan for unincorporated areas based upon an inventory of conditions; the establishment of zoning districts; the text of a zoning ordinance including maps and regulations; and, the manner of administering and enforcing the zoning ordinance.

All this seems fairly explicit and straight forward; however, it has proved to be quite the opposite, for we are faced with the problem of what constitutes the plan and what form is it to take. Whereas the planning statutes (in particular PA 168, 1959 and PA 285, 1921) relate the "plan" to the master plan, the zoning statutes provide no such explicit connection. The courts have not required the existence of a master plan to validate zoning; however, they have placed increasing reliance upon the existence of such documents in the determination of zoning litigation.

The current judicial attitude on this issue is perhaps best summarized in Raabe v. City of Walker 383 Mich. 165 (1970) where it was declared:

Absence of a formally adopted municipal plan ... does not invalidate municipal zoning or rezoning but it does weaken the presumption of validity which attends a regular municipal zoning ordinance or its amendment.¹⁶

In questions of reasonableness, the courts will often turn to the existence of a master plan. Examples of such cases include: Biske v. City of Troy 6 Mich. Ap 546 (1967);

... the reasonableness of a particular zoning must be considered in the light of planned area development of a political body having the authority to plan and influence such future development.¹⁷

Parkdale Homes Inc. v. Clinton Township 23 Mich. Ap 682;

A master plan adopted in compliance with statutory requirements by a responsible political body is of itself evidence of the reasonableness of a zoning ordinance.¹⁸

and Cohen v. Canton Charter Township 38 Mich. Ap 680 (1972);

Finding of reasonableness of zoning ordinance could be predicated on recommendation of master development plan.¹⁹

Though the courts look favorably upon planning and master plans, there is a limit to their admiration, especially when it comes to invoking the Present Use Rule which states:

... all zoning in order to be reasonable, must not use as a test of validity whether the prohibition against a particular use will at some time in the future bear a real and substantial relationship to the public health, safety, morals, but whether it does so now.²⁰

This rule requires that zoning classifications reflect

present probable uses rather than those specified in a long range plan. In essence, use of this rule severely limits attempts to base zoning upon master or comprehensive plans. The courts, however, have not been consistent in the use of this rule. The Present Use Rule was invoked in deciding Christine Building Co. v. Troy 367 Mich. 508 (1962). However, in two later decisions, Padover v. Farmington Township 374 Mich. 622 (1965) and Rottman v. Township of Waterford 13 Mich. Ap 271 (1968) the courts seemed to reverse their earlier stance. In Padover v. Farmington Township, zoning based upon a year 2000 plan was upheld and in Rottman v. Township of Waterford it was ruled that the township had the right to consider probable future development in its zoning. More recently, however, the Present Use Rule has been reinvoked in such decisions as Biske v. City of Troy 381 Mich 611 (1969). Thus at best it seems that this question remains unsettled.

Public hearings

Problem statement

1. It is unclear as to how many public hearings are necessary before the adoption of a zoning ordinance and who is required to hold them.

Statutory construction and judicial interpretation

All three statutes specify that at least one public hearing shall be held before the adoption of the zoning ordinance. Both the county and township acts specify that

this hearing shall be held by the zoning body, "before submitting its recommendations of a tentative zone plan" to the legislative body.

The city-village act is not entirely clear on who should hold public hearings, or for that matter how many hearings should be held. Section 4 of the act specifies that "a public hearing shall be held before any such regulations shall become effective". It further provides:

In cities having a population of 25,000 or more ... the legislative body may appoint a commission ... Such commission shall make a tentative report and hold public hearings ... as the legislative body shall require ...²¹

This same section goes on to say:

In cities having a population of 25,000 or more ... the hearings as above provided before the legislative body shall not take place until such final report of such commission has been received ...²²

It should be noted that the question of whether or not a zoning commission is required under the city-village act has already been raised. Now the question is, where such a commission exists, which body or bodies are required to hold hearings? It would appear from such rulings as Haven v. City of Troy 39 Mich. Ap 219 (1972), Boron Oil v. City of Southfield 18 Mich. 135 (1969), and Bingham v. City of Flint 14 Mich. Ap 377 (1968) that hearings before both bodies are necessary even in the instance of cities under 25,000.²³ These rulings have raised protests from municipal lawyers who question the necessity of performing the same function twice.

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The township act has an additional provision regarding hearings that should be mentioned. Section 11 of this act specifies:

After receiving the report, the township board shall grant a hearing on any proposed ordinance provision to any property owner who, ..., requests to be so heard and shall request the zoning board to attend such hearing.²⁴

The question to be asked is, after receiving what report? The only place where the word "report" is specifically used is in respect to the report required of the zoning board in the instance that the township board desires to make changes or additions to the tentative zone plan and texts submitted by the zoning board. Is this, then, the only occasion when a property owner may request to be heard by the township board--perhaps not? The situation is further clouded, though, by Section 14 concerning amendments which state:

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, except that the public hearing conducted by the township board shall not be necessary unless a request is made ... by a property owner.²⁵

So, just how many public hearings are required to satisfy the procedural due process requirements?

Review and approval

Problem statement

1. County and township acts provide for a review and approval function. No such provision exists in the city-village act.

2. The county and township acts do not provide adequate criteria upon which the review is to be based.
3. The powers of the reviewing agency vis-a-vis a township submitting a zoning ordinance, amendment or supplement are not clearly defined.

Statutory construction and judicial interpretation

Both county and township zoning acts provide for a review and approval function. The city-village act does not contain a similar provision. The county act requires that all county zoning ordinances, amendments and supplements be forwarded to a state agency (now the Department of Natural Resources) for approval. The township act likewise requires review and approval, but this time by a county review agency--either the zoning commission, planning commission or a zoning coordinating committee, if any one of these exists.

Two primary questions can be asked with respect to the review and approval function. First, what is the criteria upon which the review is to be based; and second, what are the powers of the reviewing agency vis-a-vis the zoning body and the legislative body submitting the proposed ordinance?

Regarding the first question, criteria is noticeably absent within the statutes. The county act ignores the question altogether while the township act provides only

for the creation of a "coordinating zoning committee of the county" for the purpose of:

... coordinating the zoning ordinances proposed for adoption under the provisions of this act (PA 184) with the zoning ordinances of any township, city or incorporated village having a common boundary with the township.²⁶

Purpose, at least, has been established here, but not criteria.

The question of criteria has been overshadowed by decisions of the courts with respect to the second question. The relationship of county review agencies to townships has been fairly well established through such decisions as Temple v. Portage Township 365 Mich. 474 (1962) and Davis v. Implay Township Board 7 Mich. Ap 231 (1967). The Temple decision held that while county review agencies had the power to approve or disapprove township ordinances and amendments, the township board had the power to override the county's disapproval. The Davis decision further spoke to the issue by declaring that the function of the county zoning commission or county coordinating zoning commission is advisory only.

The Davis decision reiterated a point that needs to be remembered, namely that the statutory provision for county review is mandatory and failure to submit a proposed ordinance to an existing review agency provides sufficient grounds to void the ordinance. Thus a curious state of affairs exists. Review is mandatory, yet no standards or criteria exist and disapproval of an ordinance by the

reviewing agency can easily be overridden. The court succinctly summarizes the situation by saying:

We recognize the desirability of an effective means of coordinating zoning ordinances within a county, particularly in situations such as involved in the case at bar where amendment effects property abutting the boundary between townships. It is also quite certain that the legislature likewise considered coordination of such matters to be desirable. However, the fact remains that the legislature has not specified the powers to be exercised by such committees nor has it given such committees the power to thwart action by township boards.²⁷

The situation existing between counties and the state reviewing agency parallels that of the townships and county review agencies with one important exception. Whereas the courts have ruled that a township can overturn county disapproval, no case exists which allows a county to overturn state disapproval. State review, however, has been limited because the enabling legislation has failed to define the scope of the review function.

Adoption by the legislative body

Problem statement

1. The legislative body may amend a proposed ordinance before its initial adoption without having to hold additional public hearings. Where the legislative body makes substantial changes to the version originally presented at public hearings, the value of these hearings is nullified.
2. The city-village act allows the legislative body to amend the proposed zoning ordinance without

submitting the changes for review and comment to the zoning body.

Statutory construction and judicial interpretation

All three statutes require adoption of the ordinance by the legislative body. Before adoption, yet after public hearings, the legislative body is given the option of amending or changing the proposed ordinance. In the case where amendments or changes are made, the county and township zoning acts require that the proposed changes be submitted to the zoning body for review and comment before the modified ordinance is adopted. The city-village act has no such requirement, stating only (Section 4):

... the legislative body may adopt such ordinance and maps with or without amendments, or refer same again to the commission for further study.²⁸

Section 11 of the township act contains a provision for an additional public hearing in the case where the legislative body amends the proposed ordinance. This provision reads:

After receiving the report, the township board shall grant a hearing on any proposed ordinance provision to any property owner who ... requests to be so heard and shall request the zoning board to attend any such hearings.²⁹

No similar provision is found in any other of the zoning statutes.

At first glance, these may not seem like important differences. However, what is at stake is the people's right to be heard concerning proposed legislation. This

right is safeguarded in all three zoning statutes by provisions for public hearings. However, when the legislative body makes substantial changes to the proposed ordinance after these hearings have been held then the value of these hearings is largely nullified. Some municipalities have recognized this problem and have adopted a policy of holding new hearings where significant changes are made by the legislative body. Yet, this is a voluntary practice, not one that is required by the enabling legislation.

Referendum

Problem statement

1. County and township zoning acts contain provisions for a referendum while the city-village act does not.
2. County and township acts differ with respect to the qualifications of petitioners.
3. In its present form, there is danger that the referendum can be misused.

Statutory construction and judicial interpretation

Provisions for referendum concerning both the original ordinance and amendments to it are found in both the county and township zoning acts. There are no provisions for referendum within the city-village act.

Differences are apparent in the provisions of the county and township acts. Both acts require a petition to initiate a referendum, but provisions differ as to

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relative number of signatures required and the proper qualifications of petitioners. Section 12 of the county act requires:

... a petition signed by a number of persons residing in and owning property assessed for taxes located in that portion of the county outside the limits of incorporated cities and incorporated villages equal to not less than 15% of the total vote cast for all candidates for governor, ...³⁰

In comparison, Section 12 of the township act requires:

... a petition signed by a number of qualified and registered voters residing in the unincorporated portions of the township equal to not less than 8% of the total vote cast for all candidates for governor, ...³¹

Further differences can be found regarding those eligible to vote in the referendum. The county act continues to state:

Upon the filing of such petition, such ordinance shall not be invalidated until the same shall have been rejected by a majority of the voters residing in and owning property assessed for taxes located in that portion of the county outside the limits of incorporated cities and incorporated villages ...³²

Whereas the township act specifies:

Upon the filing of such petition, and ordinance passed by the township board shall not be invalidated until the same shall have been rejected by a majority of the registered voters located in the unincorporated portion of the township ...³³

It should be noted that the constitutionality of the property qualification has been raised in various quarters. Previous to a 1972 amendment this qualification was also included in the township act.

Filing and publication

Problem statement

1. Filing and publication requirements concerning zoning ordinances vary at county, township, city and village levels.

Statutory construction and judicial interpretation

Zoning ordinances must be adopted in ordinance form as opposed to being adopted via resolution of the legislative body. As such, they are subject to filing and publication requirements found within organic law as well as those found specifically in the enabling statutes.

Filing and publication requirements vary greatly among county, township, city and village levels of government. The county act makes no mention of publication requirements except in the case of interim ordinances. But, Section 11 of the county act does state the following filing requirements:

The county clerk shall cause the ordinance as adopted and approved including any zoning maps, ..., to be deposited with the secretary of state. The county clerk shall maintain a copy in the office of the county clerk for public use.³⁴

The township zoning act provides that ordinances shall be published in accordance with PA 191, 1939. This statute, governing the publication of all township ordinances specifies:

Publication of such ordinance shall be made by causing a true copy thereof to be inserted once in some newspaper circulating within said township, which

insertion shall be made within 10 days after the passage thereof.³⁵

The city-village act makes no provisions for either the filing or publication of a zoning ordinance.

Statutes other than the enabling acts have a bearing upon the publication of zoning ordinances. Zoning ordinances for fourth class cities and for villages must be published within one week of their passage in accordance with MSA 5.1722 and MSA 5.1274 respectively. Charter townships are required to publish their ordinances twice, once in accordance with MSA 5.46(20) and a second time in accordance with MSA 5.46(22). There appear to be no requirements concerning the publication of ordinances at the county level other than those found in MSA 5.331, the organic law concerning all county ordinances. This section reads:

All the laws, ordinances, regulations ... provided for in this paragraph shall not take effect until notice of such adoption has been published at least once in a newspaper of general circulation in the county.³⁶

Zoning ordinances must be published at township, charter township, city and village levels of government. At the county level only notice of passage of a county zoning ordinance is required.

Interim ordinances

Problem statement

1. County and township zoning acts provide for the creation and adoption of emergency interim

ordinances during the period required for the preparation and passage of the zoning ordinance. The city-village act does not contain a similar provision.

2. The process involved in the preparation and passage of an interim ordinance is largely lacking in safeguards for the individual property owner.

Statutory construction and judicial interpretation

Both the county and township zoning acts provide for the preparation and adoption of emergency interim zoning ordinances. The purpose of such a measure, as stated in Section 15 of the County Rural Zoning Enabling Act is:

To protect the public health, safety, morals and general welfare of the inhabitants of the county, and the lands and resources of the county during the period required for the preparation and enactment of a (zoning) ordinance ...³⁷

Once adopted, this interim ordinance is valid for a period of one year but may be renewed for two more years at the discretion of the legislative body. During this period (maximum of three years) it has the full force and effect of any zoning ordinance.

Problems have arisen over the use or misuse of the interim zoning ordinance. It is essentially conceived of as an emergency stop-gap measure and therefore sidesteps most of the procedural requirements for the adoption of a normal zoning ordinance. To be specific, the preparation and adoption of the interim ordinance may ignore statutory

requirements concerning; the adoption and filing of a zone plan; the requirement that the zoning body seek information and counsel in the creation of a tentative zoning ordinance; the holding of public hearings; any provisions concerning changes the legislative body may wish to make; and any provisions for a referendum. The only requirement that the interim ordinance must satisfy is the one pertaining to review by either the county or state agency, whichever is appropriate. Following review by the appropriate agency, the statutes authorize the legislative body to enact the ordinance and give it immediate effect. As such, the process involved in the preparation and adoption of an interim zoning ordinance is almost totally lacking in safeguards for the individual property owner. The specific omission of public hearings runs counter to the spirit of the law. To quote Corpus Juris Secundum:

... it is generally held that the constitutional prohibition against deprivation of property without due process of law demands that persons having interests or rights in property be given adequate notice and an opportunity for hearing before passage of zoning laws or regulations affecting their rights and interests.³⁸

Real problems have arisen over the use of interim ordinances. In many instances they are hurriedly created and ill-conceived. In a number of instances the prime motivation for their creation has been to stop a specific development within the community. Where this has happened confrontation has been an unavoidable by-product. This initial confrontation has often been sufficient to

preclude the adoption of a permanent zoning ordinance. While some instrument is desirable to preclude land use abuses during the period in which the permanent ordinance is being prepared, this instrument must itself contain built-in safeguards to preclude its misuse.

Amendment and/or supplement
to existing ordinances

The subject of amendment will be considered in two parts. The first part will deal with procedural matters designated by statutes, while the second part will consider the impact of the courts upon the granting of rezoning amendments.

Procedural matters

Problem statement

1. Enabling acts state that amendments to zoning ordinances are to be made in the same manner provided for the enactment of the original ordinances. But, in practice, there are differences.
2. The enabling statutes contain differing provisions containing notice of public hearings.
3. The enabling statutes contain differing provisions concerning the number of public hearings to be held.
4. The city-village zoning act requires a three-fourths affirmative vote by the legislative body for adoption of a rezoning amendment over the protest of abutters. Neither the county nor the township act

has a similar provision.

Statutory construction and judicial interpretation

All three zoning enabling statutes deal with the subject of amendment. The county act offers the most succinct treatment in one sentence (Section 14) which reads:

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.³⁹

The township act and the city-village act offer slightly more elaborate variations upon this theme; but, in essence, they too prescribe that the procedures involved in the enactment of the original ordinance shall be followed in the passage of an amendment. However, not all procedures that are required for the passage of the original ordinance are applicable to the passage of an amendment; for example, the necessity of passing a resolution of intent. Also, the statutes fail to adequately answer the question of who may initiate an amendment. In addition, those criticisms which were valid concerning the preparation and passage of the original ordinance are also applicable to the preparation and passage of amendments and supplements.

The statutes contain differences on several issues involving amendment provisions. One variation of particular importance concerns giving notice of hearings on proposed amendments. Concerning this issue, the township zoning act, as recently amended, provides:

If an individual property is proposed for rezoning, the property shall be conspicuously posted. The township zoning board shall also give notice thereof to the owner of the property in question, to all persons to whom any real property within 300 feet of the premises in question is assessed and to the occupants of all single and 2 family dwellings within 300 feet. The notice shall be delivered personally or by mail to the respective owners and tenants at the address given in the last assessment roll. If the tenant's name is not known, the term occupant may be used. If the notice is delivered by mail, an affidavit of mailing shall be filed with the zoning board prior to the hearing.⁴⁰

Additional requirements concerning notice are also found in Section 9 of this same act.

Notice requirements for amendments to ordinances enacted under the county and city-village zoning acts are not as stringent or comprehensive as those found in the township act. Both acts specify that notice provisions for the passage of an original ordinance be adhered to in the passage of an amendment. As such, any question of direct notice to abutters or other interested parties is ignored.

Another issue to be considered is the proper number of public hearings that should be required concerning an amendment or supplement. The county act requires one hearing, while the city-village act requires two (in the case where the legislative body does not act as the zoning board). The precise number required by the township act is not clear. Section 4 reads in part:

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, except that the public hearing conducted by the township board shall not be necessary unless a request is

made in writing by a property owner.⁴¹

This provision seems explicit when isolated from the remainder of the statute, yet the point has previously been raised that this clarity is lost when the passage is read in conjunction with Section 11 of the same act.

Of final interest is the city-village act provision (Section 4) governing amendments which states in part:

... amendments or supplements ... may be made from time to time as above provided, but in case a protest against a proposed amendment, supplement or change be presented, duly signed by the owners of 20 percent or more of the frontage proposed to be altered, or by the owners of 20 percent or more of the frontage immediately in the rear thereof, or by the owners of 20 percent of the frontage directly opposite the frontage proposed to be altered, or by the owners of 20 percent or more of the frontage immediately in the rear thereof, or by the owners of 20 percent of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the three-fourths (3/4) vote of such legislative body.⁴²

Neither the county nor the township zoning act contains a provision similar to the one quoted above. In the past, this particular provision has been challenged as a "delegation of legislative power to private individuals" but the Michigan courts have upheld it in Northwood Properties Co. v. Royal Oak City Inspector 325 Mich. 419 (1949). Clan Crawford, in Michigan Zoning and Planning mentions that such provisions governing the protests of abutters are common in zoning statutes of other states.⁴³

Influence of the courts

Problem statement

1. Zoning enabling statutes fail to provide guidance for the amendment of zoning ordinances, especially with respect to rezoning amendments.
2. Where the courts have been called upon to decide rezoning matters, they have established strict criteria. This criteria, however, has not been adopted in practice by zoning bodies.

The courts versus the zoning board

While the zoning statutes provide a mechanism for the amendment of zoning ordinances, they do not provide guidance for its proper application. Amendments or supplements to ordinances involve either changes in zoning regulations or changes in property classification (i.e., rezoning). It is this latter case that will briefly be considered here.

As in other areas of zoning law, the courts have been called upon to establish standards and criteria -- this time, the governing of rezoning of parcels of land. Concerning this issue, the courts of some states have ruled:

A zoning regulation or classification may be changed only when such action is in the public interest, in that it has a reasonable relation to the health, safety, welfare or prosperity of the community.⁴⁴

The Michigan courts have not adopted as stringent a view but have stated in Raabe v. City of Walker 383 Mich. 165

(1970):

Amendment or repeal of zoning laws should be carefully considered and prepared, for the purpose of zoning is stabilization of existing conditions subject to orderly development and improvement of the zoned area, and amendments not made cautiously and only when required by changing conditions destroy the purpose of zoning.⁴⁵

It is apparent that the courts, including the Michigan courts, see rezoning as a serious task not to be undertaken capriciously.

In contrast to the courts' position, attention should be directed to the findings of Bronstien and Erickson regarding the practices of zoning boards in Michigan regarding rezoning. To quote:

In rural areas, apparently, property is rezoned virtually at the request of the owner. In unincorporated metropolitan areas, four out of five rezonings requested are granted. In incorporated metropolitan areas, one out of two rezonings requested is granted ...⁴⁶

Thus it would appear that the practices of zoning boards regarding rezoning amendments differ greatly from the policy or standards adopted by the courts.

Appeal from an administrative decision

Provisions concerning the board of appeals and the appeals process are common to all three zoning enabling statutes. These provisions will be critiqued in the following sections. The first section will consider variations found in the statutes with respect to appeals while remaining sections will consider the subject of appeals in general.

Problem statement

1. The enabling statutes differ with respect to the composition of the board of appeals, especially on the issue of whether or not members of the legislative body should also be members of the board.
2. The statutes differ concerning the vote required to reverse an administrative decision.
3. The requirements of the city-village act concerning public notices differ from those of the county and township acts.

Statutory construction, interpretation and implications

The various sections of the three zoning statutes concerning the board of appeals and the appeals process are similar except for variations in three areas. The first area concerns the composition of the board of appeals. Section 18 of the county act specifies that such a body shall have three to seven members each of whom shall be "electors residing in and having property assessed for taxes located in the unincorporated area of the county".

This same section goes on to stipulate:

No elected officer of the county nor any employee of the board of supervisors may serve simultaneously as a member of or as an employee of the board of appeals. One member shall be a member of the county zoning commission.⁴⁷

Whereas, a similar section of the township act requires that the township zoning board of appeals have three or five members and specifies:

The first member of such board of appeals shall be the chairman of the township zoning board, the second member shall be a member of the township board appointed by the first two members from among the electors residing in the unincorporated area of the township. No elected officer of the township nor any employees of the township board may serve simultaneously as the third member of or as an employee of the township board of appeals ...⁴⁸

And,

The township board may provide that the township board of appeals shall have five members. The additional members shall be selected and appointed by the first 2 members from among electors residing in the unincorporated area of the township. An additional member shall not be an employee of the township board. The member who is a member of the township board appointed by the township board shall not serve as chairman of the township board of appeals.⁴⁹

Finally, the city-village act in addressing the same issue provides in Section 5 that the legislative body of any city or village may act as a board of appeals. As an option to this arrangement, the statute also provides:

In the event that the legislative body of any city or village so desires, it may appoint a board of appeals consisting of not less than 5 members ...⁵⁰

Thus, it would appear that there is a lack of consensus concerning the proper number of members to form an appeals board--the county act requiring three to seven, the township act, three or five, and the city-village act providing an option of five or more. More importantly there seems to be an unresolved question as to the propriety of elected officials and municipal employees serving on the appeals board. The county act forbids members of the legislative body from serving in such a dual capacity while the township act provides for one member of the

township board to serve on the appeals board. The city-village act goes further and authorizes the legislative body itself to function in the capacity of an appeals board. This last action, however, has been challenged on constitutional grounds as a violation of the separation of powers doctrine. The issue was discussed by the Michigan Supreme Court in Detroit Osteopathic Hospital v. Southfield 377 Mich. 128 (1966) but the Court refused to give a definitive answer.

Differences also arise regarding the requirements concerning the vote required to reverse an administrative decision. Both the county and township acts state:

The concurring vote of a majority of the members of the board of appeals shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which they are required to pass under any such ordinance or to effect any variation in such ordinance.⁵¹

The city-village act differs here in that it requires the concurring vote of two-thirds of the members of the board. A municipal attorney who was questioned on this point was of the opinion that the two-thirds requirement was too stringent. He argued that in some instances where some board members must disqualify themselves from voting on conflict of interest grounds, or where some members were absent from a hearing, that the two-thirds majority was literally impossible to obtain.

Finally, differences occur in notice requirements. Both the county and the township acts state:

The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within a reasonable time.⁵²

In contrast, the city-village act is more specific and requires:

The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to all persons to whom any real property within 300 feet of the premises in question shall be assessed, and to the occupants of all single and 2-family dwellings within 300 feet, such notice to be delivered personally or by mail addressed to the respective owners and tenants ...⁵³

The provisions of the county and township acts are very brief. The term "parties" in this instance is not defined or elaborated upon and therefore could be construed quite narrowly. In contrast, the provisions of the city-village act are quite explicit. The importance of notice and hearing requirements in the appeals process should not be underestimated. The board of appeals has considerable powers, especially in terms of granting variances and exceptions. Their actions often affect not only the property owner making the appeal, but also his neighbors and the community at large. For this reason, it is imperative that all concerned and interested parties be given an opportunity to air their views. This can only be accomplished when adequate notice is given and proper hearings are held. However, what constitutes "adequate notice" remains to be determined.

Powers, duties and responsibilities

Problem statement

1. The statutes have failed to adequately define the relationship of the board of appeals to other governmental bodies.
2. The exact powers of the board of appeals have not been established.
3. The enabling statutes do not reflect present planning and zoning concepts such as site plan review.

Statutory construction, interpretation and implications

The zoning statutes provide a considerable grant of power and responsibility to the board of appeals. This grant provides:

the ... board of appeals shall act upon all questions as they may arise in the administration of the zoning ordinance, including the interpretation of the zoning maps ...⁵⁴

It shall hear and decide appeals from and review any order, requirements, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the provision of this act.⁵⁵

It shall also hear and decide all matters referred to it or upon which it is required to pass under any ordinance adopted pursuant to this act.⁵⁶

The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal was taken and may issue or direct the issuance of a permit.⁵⁷

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have power in passing upon appeals to vary or modify any of

its rules, regulations or provisions so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.⁵⁸

The enabling statutes charge the board with responsibility for: interpreting the zoning map and the language of the zoning ordinance; reviewing administrative decisions; deciding questions or matters specifically referred to it by the ordinance; and, granting variances and exceptions when necessary. Such a broad grant of authority was originally vested in this body by the legislature as a precaution against the denial of property rights. Where the general language of a zoning ordinance creates "practical difficulties" or "unnecessary hardship" when applied to a particular parcel of land, the owner or an aggrieved party may seek relief from the ordinance through the board of appeals. Where relief is denied by this body, the aggrieved party can further seek relief through the courts.

The board of appeals and other governmental bodies. The board of appeals occasionally comes into conflict with other governmental bodies because the statutes fail to provide definite limits upon the board's powers. Questions have arisen as to whether the board's powers actually extend to overruling the legislative body regarding rezoning decisions. There are no Michigan cases that directly resolve this question; however, McTaggart in his Handbook of Michigan Township Zoning and Planning draws upon the Tireman-Joy-Chicago Improvements Assn. v. Chernick decision

for guidance. Here the court stated the general principle that a zoning ordinance is:

Comparable to a boiler and that provisions permitting variances by the board of appeals are intended as a safety valve, but not as a leak.⁵⁹

From this quote and inferences drawn from the Township Rural Zoning Act, McTaggart states:

It would appear that the Tireman case, as well as the statute, establishes the principle that the township board is responsible for the policy of the zoning ordinance and the board of appeals must take its direction from the township board. The word "appeals" in this instance means appeal from the decision of the building inspector or other administrative official--not appeal from clear and unequivocal action of the township board.⁶⁰

McTaggart's conclusion regarding the relationship of the board of appeals to the township board is also applicable at the county and city-village levels, given the similarity of wording in each of the three statutes. Whether his conclusion is valid or not, remains to be determined.

While the courts have not addressed the question as to whether the board of appeals can overrule the legislative body, they have ruled upon the converse. In Shulman v. Hamtramck City Council 5 Mich. Ap 399 (1966) the court ruled that the legislative body (i.e., city council) does not have the power to overrule the board of appeals. In a subsequent decision, Burch v. Building Inspector of Bloomfield Hills 30 Mich. Ap 246 (1971), the court affirmed this decision and went on to add that a planning commission exercising the duties of a zoning board lacked the power to

overrule a board of appeals decision. Further, the same court stated, "A zoning board of appeals decision can be set aside only by the courts, ..." Thus it appears that the courts have sustained the powers granted to the board of appeals--at least in its relations with other administrative bodies. Any question of the board's powers vis-a-vis the legislative body will have to be determined on constitutional as well as statutory grounds.

Variances and exceptions. A primary function of the zoning board of appeals is the granting of variances and exceptions. A request for a variance normally follows the denial of a building permit by an administrative officer charged with enforcing the zoning ordinance. Special exceptions, on the other hand, are usually provided for within the ordinance with the board of appeals having original jurisdiction. Confusion exists over the exact meaning of these terms. The following definitions and distinctions are recognized by the Michigan courts.

A special exception is an exception to a general rule which is provided for by the terms of a zoning ordinance, although it may be provided that certain conditions must exist to make it applicable in any given case and may provide for the board of appeals to determine whether or not these conditions exist.

A variance, on the other hand, is a deviation from the terms of the zoning ordinance, not mentioned in the text thereof, which is authorized by the appropriate enabling legislation upon the finding of practical difficulties and unnecessary hardships.

The distinction is sometimes important because where a special exception is involved, it is not necessary that practical difficulties and unnecessary hardships

be shown, but the property owner must establish the existence of the conditions set forth in the ordinance.⁶¹

A special exception then may be thought of as a conditional or special use that is permitted once the terms of the ordinance are met. If they are met, the board issues a special permit or a special use permit or a conditional use permit or a special exception--all of which terms are or may be synonymous.⁶² Over the years, the Michigan courts have sustained the use of the special exception technique where the zoning ordinance has provided the board of appeals with adequate standards for determination. Complete lack of standards has resulted in the voiding of ordinances. However, the courts have sustained board of appeals' decisions based upon such minimal standards for determination as:

The use is injurious to the surrounding neighborhood or contrary to the spirit and purpose of the ordinance.⁶³

This standard was established in Florka v. City of Detroit 369 Mich. 568 (1963) and has been upheld in more recent cases such as Mobile Oil v. City of Clawson 30 Mich. Ap 46 (1971).

McTaggart in commenting on the special exception technique has called it "a practical necessity in every workable zoning ordinance ..."⁶⁴ The validity of its use is grounded in the statutes and has been upheld by the courts. It is apparent, however, that such a necessary tool requires more explicit standards than the Michigan

Supreme Court is currently willing to impose.

The topic of variances has proven quite controversial in Michigan as well as in other states. Because variances may allow uses not otherwise permitted in a district, the courts have required strict standards for their granting. Variances are generally of two types: height, bulk, and placement variances; and use variances. The former have been allowed by the courts on the showing of "practical difficulties" while the latter may only be granted where "unnecessary hardship" can be proven (among other required conditions).⁶⁵

Of the two types of variances, the use variance has proven to be the most controversial. In Puritan-Greenfield Assn. v. Leo 7 Mich. Ap 659 (1967) after reviewing standards and tests established by other states for the granting of use variances, the court came up with strict criteria of its own, including:

Difficulties or hardships shared with others go to the reasonableness of a municipal zoning ordinance generally and will not support a variance as to a single parcel upon the ground of hardship.

A use variance under a municipal zoning ordinance may not alter the essential character of the locality, be contrary to the public interest, or inconsistent with the spirit of the ordinance.

A use variance may not be granted to a property owner by a board of zoning appeals unless such board can find, on the basis of substantial evidence, that the property cannot reasonably be used in a manner consistent with existing zoning.

The grant of a variance by a board of zoning appeals on the basis of unnecessary hardship must be reversed, where there is insufficient evidence to support

findings made by the board of zoning appeals in granting such variance.⁶⁶

In this decision, the court emphasized that the hardship must be unique or peculiar to the property for which the variance is sought. If a general condition exists, then a zoning amendment is in order.

It would appear from the Leo case that the court had dealt rather neatly with at least one problem area of the statutes. Unfortunately, this is not true. Hagman in Urban Planning and Land Development Control Law states:

The criteria for obtaining variances is rigorous. If the courts really superintended their issuance, upwards from ninety percent of the variances granted would probably be found invalid. Where courts do superintend their issuance, administrative bodies may eventually limit the issuance of variances, but the educational effort involved is considerable when there are hundreds of boards in the state and the boards are composed of a changing body of laymen. Where the courts do not superintend the issuance of variances, one would expect many to be granted illegally ... Illegal issuance is a widespread phenomenon nationwide.⁶⁷

For Michigan, another important question exists apart from the question of standards and criteria involved in the issuance of use variances. This question is whether or not the county and township enabling statutes authorize use variances at all. Compare the county and township provisions to those of the city village act. Both county and township acts read:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have power in passing upon appeals to vary or modify any of its rules, regulations or provisions so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.⁶⁸

The city-village act includes the above, but goes on to say:

... the board of appeals shall have power in passing upon appeals to vary or modify any of its rules, regulations or provisions relating to the construction, structural changes in, equipment, or alteration of building or structures, or the use of land, buildings or structures, ...⁶⁹

While the Leo case and the statutory language contained in PA 207, 1921 support use variances at the city-village level, no such support can be found at the county and township levels. Clan Crawford addressing this issue states:

The statute authorizing cities and villages to adopt zoning ordinances contains language which authorizes the board of appeals to grant use variances. However, this language is missing from the statute authorizing county zoning ordinances and the right of the board of appeals to grant use variances is extremely doubtful.⁷⁰

The questions to be resolved at this point pertain to whether or not this power should be extended to the counties and township or whether use variances should be allowed at all.

In conclusion, special exceptions and variances are powerful tools for use by the board of appeals. They can be used effectively to protect the property rights of the individual, or they can be used to the detriment of the community. For this reason, statutory guidance is necessary where it is now lacking.

Site plan review. As pointed out earlier, one of the required functions of the board of appeals is to "hear and decide all matters referred to it or upon which it is required to pass under any ordinance ..."⁷¹ Seizing upon this requirement, professional land use planners and others have incorporated provisions within zoning ordinances for site plan review. More often than not this function has been delegated to the board of appeals or else to the planning commission or the zoning board. Nevertheless, no matter where this function falls, or regardless of its merits, it is clear that there exists no direct authorization of the procedure by the enabling acts.⁷²

It is not surprising that such a situation has arisen. The zoning statutes have remained largely unchanged since their inception while planning and zoning concepts have changed. The enabling acts make no provisions for such things as planned unit development, yet with increasing frequency such concepts are being included in individual zoning ordinances.

As for the present state of Michigan zoning statutes, at least in the area of zoning appeals, Clan Crawford in commenting upon Detroit Osteopathic Hospital v. Southfield 377 Mich. 17 (1966) states:

The decision serves, as it was intended to do, to point up the confusing state of the law regarding zoning boards of appeals and the need for statutory and constitutional clarification.⁷³

What more need be said?

Summary

The analysis has shown that while the statutes agree in general terms concerning the grant of the zoning power, there exist numerous differences concerning procedural and administrative matters. Examples of these differences are found throughout the statutes; they touch upon subjects such as the composition and qualifications of zoning bodies and boards of appeals, the number of public hearings to be held in conjunction with the passage or amendment of an ordinance, notice requirements for hearings, and publication requirements to name a few. The wisdom and desirability of this situation can be seriously questioned. Differences in statutory procedures do not reflect specific needs of various levels of government so much as testify to amendments of individual acts instead of amendment of the entire body of zoning law. Such a practice has served to only confuse zoning practice and to raise serious questions concerning requirements of procedural due process. Zoning practitioners and municipal lawyers who were queried about this situation were fully supportive of providing uniform zoning procedures and administrative requirements for all levels of government.

The zoning enabling statutes may also be faulted for failure to clearly speak to certain basic issues. The relationship of planning to zoning provides the best example. The statutes require that planning precede zoning and that zoning must be based upon a plan, but the

form or content of this plan is not specified within the statutes. As a result, there has been continued debate over this requirement and while the courts have looked favorably upon the existence of a comprehensive plan in zoning cases, they have never declared it a necessity. What is clearly needed is a definite statement in the statutes clarifying this and other controversial issues.

The vagueness found within the statutes has proven to be an issue of much concern to local zoning practitioners. The combination of vague and differing requirements has in the past led to confusion and error which has resulted in the invalidation of ordinances and amendments on the grounds that statutory requirements were not followed. Some practitioners, wary of having ordinances and amendments challenged on procedural grounds, have taken the precaution of exceeding requirements as found in the statutes. While such practices are good in themselves and are in keeping with the spirit of the law, they also testify to the inadequacy and mistrust of the letter of the law.

Particular sections of the statutes are vague to the point of being almost unintelligible. Perhaps the best (or worst) example of such faulty wording is found in Section 4 of the City and Village Zoning Act. This section concerns the role and existence of a zoning body for villages, cities with less than 25,000 population and cities of more than 25,000. A reading of this section shows it to be nearly impossible to determine in all instances who is

or may function as a zoning body. When asked to explain the provisions of this section, the legal counsel for the Michigan Municipal League commented that the passage was hopelessly confusing. This is indeed a severe indictment.

The statutes have attempted to establish a functional relationship between various levels of government in terms of review, comment/approval and coordination of ordinances. The attempts have largely failed due to lack of detail outlining these relationships. Clearly administrative rules would be in order in this situation; but the statutes do not provide for any.

The statutes fail to address other issues, provide guidance and specify relationships. In particular:

1. the statutes fail to provide guidance and criteria for amending ordinances, especially with respect to considering rezoning requests;
2. the statutes fail to adequately define the relationship of the board of appeals to other governmental bodies involved in zoning, nor do they specify the exact powers to be exercised by this board; and
3. the statutes fail to provide needed flexibility to accommodate newer planning and zoning techniques.

Finally, certain provisions of the statutes are either clearly or potentially unconstitutional; for example;

1. property restrictions concerning petitioning for consideration of a resolution of intent or for a referendum;

2. the city or village legislative body sitting as both the zoning commission and the board of appeals; and
3. lack of provision for a public hearing on an interim zoning ordinance.

Clearly problems exist with the present zoning statutes that require considerable attention. Change is in order. The question that remains however, is how extensive is this change to be and what form and direction will it take? This question must be considered in the context of existing land use legislation and evolving state policy, the topic of the next chapter.

FOOTNOTES

1. State of Michigan, City and Village Zoning Act, Act No. 207 of the Public Acts of 1921, Section 5(d).
2. State of Michigan, Act No. 44 of the Public Acts of 1935, Section 3.
3. Ibid. (Provisions for a State Planning Commission are no longer valid).
4. Ibid., Section 5.
5. The role of the State in county and local zoning was subsequently reduced by present zoning acts.
6. The reader is referred to the Functional Analysis (pp. 45-90) for a detailed discussion.
7. State of Michigan, Act No. 183 of the Public Acts of 1943, Section 2.
8. State of Michigan, Township Rural Zoning Act, Act No. 184 of the Public Acts of 1943, Section 2.
9. Act No. 183 of the Public Acts of 1943, Section 4.
10. Ibid.
11. Informal Opinion, Department of the Attorney General, dated March 31, 1970.
12. Brown v. Shelby Township 360 Mich. 299 (1960).
13. Act No. 207 of the Public Acts of 1921, Section 4.
14. Ibid.
15. Ibid.
16. Raabe v. City of Walker 383 Mich. 165 (1970).
17. Biske v. City of Troy 6 Mich. Ap. 546 (1967).
18. Parkdale Homes Inc. v. Clinton Township 23 Mich. Ap. 682.

19. Cohen v. Canton Charter Township 38 Mich. Ap. 680 (1972).
20. Christine Building Co. v. Troy 367 Mich. 508 (1962).
21. Act No. 207 of the Public Acts of 1921, Section 4.
22. Ibid.
23. Haven v. City of Troy 39 Mich. Ap. 219 (1972).
24. Act No. 184 of the Public Acts of 1943, Section 10.
25. Ibid., Section 14.
26. Act No. 184 of the Public Acts of 1943, Section 10.
27. Temple v. Portage Township 365 Mich. 474 (1962).
28. Act No. 207 of the Public Acts of 1921, Section 4.
29. Act No. 184 of the Public Acts of 1943, Section 11.
30. Act No. 183 of the Public Acts of 1943, Section 12.
31. Act No. 184 of the Public Acts of 1943, Section 12.
32. Act No. 183 of the Public Acts of 1943, Section 12.
33. Act No. 184 of the Public Acts of 1943, Section 12.
34. Act No. 183 of the Public Acts of 1943, Section 11.
35. Act No. 191 of the Public Acts of 1939.
36. Michigan Statutes Annotated (MSA) 5.331.
37. Act No. 183 of the Public Acts of 1943, Section 15.
38. 101 Corpus Juris Secundum (CJS) 85.
39. Act No. 183 of the Public Acts of 1943, Section 14.
40. Act No. 184 of the Public Acts of 1943, Section 14.
41. Ibid., Section 4.
42. Act No. 207 of the Public Acts of 1921, Section 4.
43. Clan Crawford, Michigan Zoning and Planning, (Ann Arbor: Institute of Continuing Legal Education, 1965), p. 3-5.

44. 101 CJS Zoning 85.
45. Raabe v. City of Walker 383 Mich. 165 (1970).
46. Daniel A. Bronstein and Donald E. Erickson, "Zoning Amendments in Michigan", Journal of Urban Law, vol. 50 (May 1973), p. 733.
47. Act No. 183 of the Public Acts of 1943, Section 18.
48. Ibid.
49. Act No. 184 of the Public Acts of 1943, Section 18.
50. Act No. 207 of the Public Acts of 1943, Section 5.
51. MSA 5.2961(20); 5.2963(20).
52. MSA 5.2961(23); 5.2963(23).
53. MSA 5.2935.
54. MSA 5.2961(20); 5.2935(a).
55. Ibid.
56. Ibid.
57. MSA 5.2961(23); 5.2963(23); 5.2935(c).
58. Ibid.
59. William R. McTaggart, Handbook of Michigan Township Zoning and Planning, (Lansing, Michigan: Michigan Township Association, 1972), Section 21.10.
60. Ibid.
61. Crawford, Michigan Zoning and Planning, pp. 6-15.
62. Donald C. Hagman, Urban Planning and Land Development Control Law, (St. Paul, Minn: West Publixhing, 1971), p. 195.
63. Florka v. City of Detroit 369 Mich. 568 (1963).
64. McTaggart, Handbook of Michigan Township Zoning and Planning, Section 21.11.
65. Puritan-Greenfield Assn. v. Leo 7 Mich. Ap. 659 (1967).
66. Ibid.

67. Hagman, Urban Planning and Land Development Control Law, p. 197.
68. MSA 5.2961(23); 5.2963(23).
69. MSA 5.2935.
70. Crawford, A Guide to the Administration of the Zoning Ordinance of the County of Alger, Michigan.
71. MSA 5.2961(23); 5.2935(c).
72. McTaggart, Handbook of Michigan Township Zoning and Planning, Section 21.07.
73. Crawford, Michigan Zoning and Planning, 1972 Supplement, p. 23.

CHAPTER V

LAND USE LEGISLATION AND EVOLVING STATE POLICY

The previous chapter identified internal weaknesses and differences within the various zoning statutes. However, identifying a problem is not the same as solving it. Problems must also be viewed in the proper context--in this case the role of zoning in relation to state land use legislation and policy. Ideally, zoning laws should be viewed as an integral part of a comprehensive state land use program--a program composed of land use legislation and programs designed to implement state policy. In this context, legislation embodies policy and gives it the force of law while policy adequately reflects both present and future needs and interests. Michigan has both legislation and policy, but legislation has not in most instances embodied policy and policy has not until recently adequately reflected need, present or future. Consequently, a comprehensive land use program does not exist in Michigan as an accomplished fact.

What does exist is a sizable body of law, dealing with various aspects of planning, zoning, natural resources and the environment. This law however has developed over

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the years in the absence of an overall state policy and for the most part has been directed at solving specific problems on a piecemeal basis. Thus, in the absence of one state land use program there are many, administered by state agencies and departments as diverse as Public Health, Commerce, Highways, Treasury, Natural Resources and Management and Budget. Fragmentation of responsibility for land use matters has fostered a spirit of competition rather than coordination and has virtually precluded the state from providing leadership and direction. As a consequence, local communities have been left to establish their own goals and policies.

An overview of the situation is gained by a brief examination of Michigan planning and zoning statutes. Both functions are clearly related; yet the functions are separate, each governed by different statutes. Statutes are not only separate as to function, but also as to level of government. Present legislation includes three primary zoning statutes and four planning statutes, with separate planning and zoning statutes for counties, townships and municipalities. Little attempt is made to coordinate either planning or zoning functions at one level of government with those at another.

The statutes are neither consistent as to their respective delegation of planning or zoning powers nor in their functional relationship to one another. In the former case, the review of zoning statutes undertaken in

the previous chapter served to highlight numerous differences. In the latter case, consider the example of differing provisions concerning the transfer of the zoning power to the various planning commissions. The Municipal Planning Commission Act requires the transfer to be made, the Rural Township Planning Commission Act allows it to be made, and before 1972, the County Planning Act made no allowance for a transfer.

A further problem is fragmentation of the zoning power itself, in terms of both statutes and agencies involved. In addition to the six acts cited above, at least six other statutes impact zoning. These acts include: the Village Zoning of Annexed or Incorporated Areas Act; Natural Rivers Act; Shoreland Protection Act; Airport Zoning Act; Tall Structures Act; and the Highway Advertising Act. Not only are these acts administered by different state agencies, but also as in the case of the Department of Natural Resources by different divisions within the same department. The results are the same, however; lack of communication and coordination.

Recognizing that a fragmented and disjointed approach to increasingly complex land use problems was inadequate, Governor Milliken created the Special Commission on Land Use in 1970. The purpose of this commission was to identify deficiencies in the State's approach to land use control and to recommend policies and programs which would lead to a comprehensive plan for land management.¹

The following problems were specifically cited by the commission as requiring resolutions.

1. Though certain controls are exercised on a state-wide basis, present statutes contribute to fragmentation and duplication in policy and action at the state level. This pattern of multiple departmental involvement and lack of positive links to local authorities contributes to a lack of comprehensive planning and control in the urbanization process.
2. State laws and institutions have, in many respects, failed to implement adequately coordinated local capital improvement spending programs. This results in overall inefficiency of land use, and developmental patterns which achieve neither a satisfactory community environment, nor the preservation of open space and unique areas for future generations.
3. The granting of permissive, often overlapping, planning and zoning powers to local units of government, without a defined hierarchy of responsibility has proven inadequate. With no state requirement for action and without a clear division of responsibility among the various governmental levels, there remains no assurance that plans will be instituted or implemented. This void of state control has resulted in an inadequate means for a coordinated-comprehensive approach to handling problems common to adjacent or overlapping jurisdictions.
4. The present property tax provisions cause problems in land utilization. A high assessment increases the problems of maintaining low-tax-yield open space land uses such as agriculture, forestry and extensive recreation in the face of high-tax-yield, intensive urbanized uses. Also, the high dependence of local units of government on the property tax stimulates their efforts to obtain high-tax-yield commercial and industrial uses where open space land uses may be more appropriate to the characteristics of the land and the needs of the larger community.
5. The state has not fully exercised its responsibility to extend leadership, direction, financial assistance, enforcement and advisory expertise in many fields where authority to act is delegated to local units. There is a need for adequate guidelines to establish standards of performance and design, and to require conformance to these standards.
6. Local units are, on the whole, incapable of

adequately funding programs and actions to guide and control land utilization and the processes of urbanization. Federal grant programs have demonstrated that local units can be responsive to the needs for action when funds are available, but the funding must be provided by state or federal revenues.

7. Enforcement of existing laws, such as the subdivision control statutes and local zoning ordinances, is frequently seriously inadequate. The burden for enforcement falls largely on local units. They frequently demonstrate reluctance or incapacity to prosecute violations or lack of conformance, and even fail to implement adequate surveillance.

8. The aggressive and effective use of land use controls, such as zoning, is frequently inhibited or limited by the anticipation or actuality of adverse court decisions. Such decisions arise because legislation fails to strongly define and assert the general public interest.

9. There is an over-dependence on zoning, which is often inadequate, and upon public ownership, which is expensive, to protect the public interest in land usage and to preserve open space. There has been little exploration or application of new methods of utilizing the police and proprietary powers of the state through public acquisition of easements or development rights. Public purchase of land and resale or lease with limitations or requirements as to future development patterns or open-space use is a tool not available for use under present legislation.

10. The pressure of increasing population and changing technology has created land use demands which cannot be effectively accommodated within the present system of land use planning and control. Such needs as garbage and refuse disposal facilities, wastewater treatment facilities, nuclear power plant sites and mobile home sites, although necessary, are unwelcome in many jurisdictions.²

The commission concluded that long term resolution of land use issues facing the State would depend upon implementation of a comprehensive land management program.³ Essentially, such a program would consist of long term management objectives coupled with short term measures,

both positive and restrictive. To develop a program capable of resolving the issues cited above, the commission recommended that:

1. ... a state land use agency be created to provide a comprehensive review of all state land use programs.
2. ... the state develop, adopt, and map open space districts.
3. ... legislation be enacted which places the responsibility on all counties to prepare and adopt comprehensive land use plans. The legislation should further require that these plans be approved by the state upon determination that the plan properly protects state designated land uses and adheres to state land use policies.
4. ... the state land use agency be required to review all state programs that impact upon state land use policy and to transmit its recommendations to the Governor and to the appropriate department. This agency should further be responsible for the development of guidelines for major state investments which influence evolving state land use patterns.
5. ... enforcement of state and local laws be strengthened.
6. ... the present property tax law be modified to reflect use-value assessment rather than potential value assessment.
7. ... there be a shift from local property taxes as the major source of local government revenue.
8. ... the legislature broaden the authority of existing state agencies to designate and control development in areas with unique natural characteristics.
9. ... the state develop an inventory of significant mineral deposits and include consideration of these areas in the state land use policy.
10. ... a state designated solid waste management plan be developed, and the proposed open space districting authority be used to provide for the sites recommended in this plan.
11. ... the Michigan State Housing Development

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Authority be expanded by legislation. This should include the authority to develop commercial, industrial and office facilities and the supporting infrastructure for these facilities where they are elements of a housing program or new town development.

12. ... the state initiate an immediate review program of all major land sales including those that do not fall under existing subdivision regulations. It is further recommended that the state adopt a land sales act to regulate the sale of land within real estate developments.⁴

The commission's report stresses three concepts:

1. a dramatic increase in the state's involvement in land management through the creation of a state land use agency;
2. revision of present planning and zoning statutes in line with policies to be developed by the land use agency; and
3. creation of a clear hierarchy of powers, duties and responsibilities to be exercised at each level of state government concerning land use and land management.

In the report, it was determined that a comprehensive land use management program was necessary for the welfare of the state and that the first step in developing such a program was the creation of a land use agency.

If Michigan is to achieve an effective land resource management program, consolidation of existing state land use planning and plan implementation functions within a single land resource agency would be the most meaningful first step.⁵

Considering the importance that the commission attached to this agency, the bulk of their recommendations were to

be implemented by it. The land use agency was to be directly responsible for:

1. conducting a comprehensive review of existing state land use programs;
2. review and approval of all local planning and zoning actions;
3. review of all programs of other state agencies which impacted land use;
4. designation of unique and critical lands for the purpose of preservation or management;
5. conducting an inventory of state mineral lands; and
6. preparation of a state solid waste plan.

In addition to these specific duties, the land use agency was to be responsible for: preparing a comprehensive state land use policy; developing guidelines to define functional responsibilities and ensure coordination among state agency programs; preparation of legislation to implement state level programs; and providing a system for state assurance of plan compliance by local governments.

The commission was particularly critical of existing land use legislation for many of the same reasons stated at the beginning of this chapter. The commission concluded that existing legislation, "has failed to provide a mechanism for the solution of multi-jurisdictional issues and effective control of land use by local units of government ..."⁶ As an alternative, the commission proposed the

restructuring of planning and zoning authority by adoption of an omnibus land use control act. Key to this proposal was a clear definition of hierarchial responsibilities.

As proposed, responsibilities for the state, counties and local governments would be as follows:

The state should develop policies, objectives, programs and implementing techniques which incorporate all land use elements of critical concern to the state. The state should further provide the framework within which to maximize the use of governmental powers to coordinate public spending and to insure optimum developmental patterns, environmental protection and unique area preservation.

The state land use agency should be provided with the authority to review and approve all plans promulgated by county planning agencies as to their compliance with state-established guidelines. It should be mandatory that all local units of government comply with the adopted land use plan and implement effective enforcement controls.

The role of regional planning bodies as a mechanism for planning responsibilities can be included in the county structure. The functions of these agencies should center on developmental coordination between counties of a region and between the region and the state.

The county should be required to develop a comprehensive county land use plan that effectively coordinates the planning efforts of the local government within the framework of regional considerations and state land use objectives and criteria. The county should be provided with the necessary enforcement powers to assure that all local units of government comply with the provisions of the county land use plan.

Local governments should be given the option of developing and adopting a comprehensive land use plan which is coordinated with the county plan or of adopting the county land use plan. The necessary implementation controls should be explicitly set forth in this revised legislation. In order to overcome the shortcomings of the present systems of land use control, it should be mandatory that all local units of government adopt the necessary zoning acts and other land use controls to implement this plan.

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Various attempts have been made to implement the recommendations contained within the commission's report. One such attempt was the drafting of an omnibus land use and development act by the Governor's Interim Office of Land Use. Known as the Taylor bill, it sought to create a state land use commission with power to:

1. prepare a state land use plan;
2. designate and provide for regulation of areas of critical state concern;
3. regulate "development of state impact";
4. review and approve municipal planning and zoning;
and
5. coordinate land use plans and programs amongst the various state agencies.

Under the Taylor proposal, planning and zoning would be mandatory. Each county, township, city and village would be required to form a municipal planning commission, hire a professional staff (or consultant) and draft a municipal development plan for adoption by the local legislative body. Following approval of this plan by the state land use commission, townships, cities and villages would be further required to form a zoning administrative council and adopt zoning in accordance with the plan.

The bill came under attack for numerous reasons. Merit was seen in its provisions but it was opposed by powerful political groups. The following year (1973) Bruce Brown and Clan Crawford attempted to have a revised

revised version of the Taylor bill submitted for consideration. However, this attempt also failed.

During 1973 and 1974, serious consideration was given to a third proposal to establish a state land use commission. House Bill 5055, the Mastin bill, was as originally introduced similar in many respects to its predecessors. After much amendment however, the final version of the bill provided for:

1. creation of a state land use plan based upon county plans drawn up in accordance with state guidelines;
2. creation of a state land use commission to be housed in the Department of Natural Resources; and
3. designation of critical land areas, promulgation of interim regulations, and provision for state regulations in the absence of local action.

The final version of the Mastin bill differed from its predecessors in that it was essentially a critical lands act and not a true state land use planning act as its name implies. Although the bill did call for a state land use agency with considerable responsibilities, its only real power was in the area of designating critical lands and promulgating development regulations. The bill required that a land use plan be prepared for each county, but it did not require either mandatory planning or zoning. Mechanisms were provided for local input into the state plan, but they were to be exercised at the option of local

government. Failure to exercise the option however, would result in state action.

The Mastin bill was defeated on a critical floor vote, but only by one vote. The narrow margin of defeat is significant and even the bill's opponents admit that a bill similar to HB 5055 would be enacted within the next several years.

A state land use agency as recommended by the Governor's Special Commission on Land Use has not as yet been created. However, Executive Order 1973-2 did consolidate and transfer to the Department of Natural Resources responsibility for environmental functions, one of which is land use planning. Section 8 of the executive order reads in part:

The Department of Natural Resources and the Natural Resources Commission are hereby ordered to assume complete responsibility for the development of a State Land Use Plan and to prepare legislative proposals to effectuate that program within one year of the effective date of this Executive Order.⁸

As a result of Executive Order 1973-2, the Office of Land Use was created within the Department on April 1, 1973.

The energies of the Office of Land Use were immediately directed toward developing a state plan. This plan would not be a comprehensive land use plan in the traditional sense, but rather would more closely resemble a policy-program plan. The position was taken that:

A state land use plan should not dictate how every parcel of land in the state will be used; rather it should establish the basis for broad policy development guidelines, and provide a sense of direction for

decision-making at all levels in shaping the future growth of society.⁹

The plan as completed in 1974 was an outline for an inclusive land use planning program, complete with principles, objectives and actions necessary to achieve objectives. Fourteen principles were established to serve as parameters within which the land planning program was to be developed. These include:

1. Private property rights must be recognized and respected.
2. Local units of government should have the responsibility and opportunity to shape the planning of all aspects of land use which are essentially local in character.
3. The resolution of conflicts and the performance of regulatory functions should occur at the level of government closest and most responsive to all people affected.
4. The land use program should provide for the economic and social well-being of the people--in other words, for the orderly growth and development of the state--as well as for the physical well-being of both man and his environment.
5. Local planning bodies should be permitted to exercise freedom in selecting methods of planning local matters, so that local plans reflect local objectives.
6. Skills and experience of all existing levels of government and the private sector should be employed in a partnership approach in developing and implementing the state land use program.
7. Existing or new mechanisms for obtaining public participation in the governmental decision-making process should be utilized, ensuring that a balanced range of options is heard and considered.
8. Planning and programming efforts of state agencies which affect land use should be integrated into the total program to avoid costly duplication and conflict.

9. Uniform procedures should be established so that all levels of government abide by the same rules to reach common objectives.
10. The state should have the responsibility to exercise its inherent land management authority to ensure protection of essential land resources of concern to all Michigan citizens and resolution of issues that have more than local significance.
11. Innovative and creative programs affecting land use in general and particularly areas of critical public concern should be encouraged through efforts of the private sector and all governmental entities.
12. There should be provision for periodic review of the state land use plan and program.
13. The land use program should respect land as a resource, not as a chattel, and should combine planning with management at all levels.
14. The Department must maintain a visible and accountable land use process and program.

The program itself contains nine objectives as well as steps necessary to achieve them. Briefly, the objectives are as follows:

1. Develop criteria and procedures for identifying natural resource determinants to increase understanding of land capabilities and tolerances; illustrate the finite nature, physical attributes, and productive attributes of the resource and develop a process of planning to minimize adverse impacts; and use all opportunities to encourage full understanding and awareness of the environmental effects of our actions.
2. Delineate special environments and establish land use and development guidelines to identify compatible and non-compatible use patterns; relate basic considerations such as essential land, energy, air and water needs; and suggest consistent standards, applicable equally to all levels of government and the private sector, to reach agreed-upon developmental objectives.
3. Establish a statewide system for land use guidance to fully account for local, regional, and statewide resource, economic and social values and needs,

and government's capability to provide essential services; and to provide guidelines for the protection and utilization of designated critical land areas, accepting the principle that such regulation and enforcement guidelines should be accomplished by the level of government most appropriate to the level of public interest involved and the importance of the impact.

4. Refine the store of information on resource associations such as soil capability, geology, ground water, etc., and develop uniform data retrieval and analysis systems for use by federal, state and local agencies; facilitate the broad exchange of land resource knowledge among public and private interests; provide all possible technical assistance to local governments, business and individuals to ensure sound development and development patterns; coordinate, cooperate in and disseminate research efforts, both into specific problems and into the interrelationship among problems; and encourage the testing of innovative solutions.
5. Assist in plan implementation by modernizing land planning and management techniques at all levels of government; re-examine the present property tax system for use and maintenance considerations; using public facility expenditures to encourage sound developmental patterns; and by identifying procedures and institutional arrangements which foster prevention of land use conflicts rather than later costly corrective actions.
6. Promote an environment which provides all residents an equal opportunity to live, work, and recreate; encourage construction of a variety of housing types and patterns, in desirable locations convenient to employment and commercial centers and in varying price ranges; encourage efforts to modernize legislation on property taxes which will tend to stimulate property maintenance.
7. Maintain and enhance the long-term productive potential of essential agricultural, forest and mineral-bearing lands through sound management and protection from damaging or premature development.
8. Provide direction and encouragement for the placement, restoration, or protection of those attributes which contribute to a totally livable environment, while at the same time providing for reasonable development costs.

9. Protect the citizen's basic democratic right of access to government by developing and maintaining effective two way communication; inform Michigan citizens and others of land use issues, opportunities, problems and progress; and encourage greater coordination among all units of government by joining in cooperative approaches for the identification and solution of land use planning and management problems.¹¹

Both principles and objectives give a clear indication of the direction and intent of the land use program. Several concepts seemed to be stressed throughout. Local government will retain responsibility for local affairs; but the state will increasingly exercise its inherent land management prerogative. The concept of management is key to the entire program and implies implementation of direct measures whereas planning, at least in the past, has not. Coordination and cooperation among the various levels of state and local government are also stressed, particularly in the preparation of criteria, procedures and guidelines for development or protection of critical, unique and productive lands. It can easily be inferred that these procedures and guidelines will more than likely be regulations and carry the force of law with the state reserving the right to enforce them where local units fail to do so. Finally, it cannot be doubted that the state intends to reassert its leadership role by developing unified land policy and legislation which establish a hierarchy of regulatory powers and responsibilities among units of government.

Steps have been taken to implement the management program through the creation of advisory committees and the publication of technical and informative working papers on topics such as taxation, land subdivision, classification systems, and identification of unique and critical lands. Further, responsibility for administration of the County Rural Zoning Act and the Farmland and Open Space Preservation Act has been given to the Office of Land Use in keeping with the policy of consolidating and integrating land use planning functions at the state level.

Land Use regulation has until recently been largely a local issue. It has always been a political one. Now with the advent of environmental concerns, increased population pressures, and the need for efficient food, fiber and mineral production, land use regulation has become a state and national concern.

This chapter has touched upon some of the shortcomings of existing land use legislation and past state policy and has briefly outlined a recent land management program developed by the Office of Land Use, Department of Natural Resources. Such a program will take time to implement, especially as certain interest groups perceive it as a threat. However, since 1970 and the creation of the Governor's Special Commission on Land Use, efforts to develop a land use program have been continuous. There is little question of the need for such a program; but there is much debate over its proposed form and content. These questions

will be resolved in the public arena. Precisely for this reason, the following and concluding chapter will outline a direction and framework for revised state zoning enabling legislation. It will not, however, dwell on particulars. The purpose of this final chapter and the thesis as a whole is to present recommendations for zoning legislation that is consistent with evolving state policy and that remedies the short-comings of existing statutes that have been previously identified.

FOOTNOTES

1. Governor's Special Commission on Land Use Report,
(Lansing, Michigan: State of Michigan, 1972), p. 4.
2. Ibid.
3. Ibid., Summary, p. 1.
4. Ibid., Summary, pp. 2-6.
5. Ibid., p. 10.
6. Ibid., p. 17.
7. Ibid., p. 18.
8. Office of the Governor, State of Michigan, Executive Order 1973-2, Section 8.
9. Office of Land Use, Michigan Department of Natural Resources, Michigan's Future Was Today ..., (Lansing, Michigan: 1974), Introduction.

CHAPTER VI

SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

Summary

Previous chapters have briefly outlined concepts central to the zoning power, past and present zoning enabling statutes, and state land use policy. At this point, several points are worth restating, so that recommendations made within this concluding chapter may be viewed in the proper context.

The zoning power is derived from the sovereign or police power of the state--that power which enables the state to enact legislation to provide for the health, safety and welfare of its inhabitants. In the past, the state has delegated the zoning power to its various political subdivisions in the belief that this form of regulation could best be administered at the local level. As society has grown more complex and interdependencies have become more apparent, the state has had to re-examine this delegation, and is now reentering the area of land use regulation. It is unlikely that the state is moving in the direction of completely removing responsibility for land use regulation from local government; however, over time it is likely that the regulatory powers exercised by local

government will be restricted to essentially local matters.

Neither the police power nor the zoning power are without limits. Though the boundaries are inexact they are finite. Regulation must always be viewed in the light of the needs of society and the rights of the individual as guaranteed in the Constitution and as have evolved through common law. The exercise of the police power has expanded over the years in response to the growing needs of society. Accordingly, use of the zoning power has found wider application. There are several dangers here. Continued expansion of regulatory powers must at some point impinge upon individual rights. But also, over use or over reliance upon a single regulatory tool (i.e., zoning) which has a limited application is in fact misuse. Zoning is not a cure all nor is it a substitute for effective land use planning or realistic taxation policy. Any attempt at revamping zoning legislation must contain a realistic appraisal of what zoning can effectively accomplish.

The zoning power has been delegated to the various political subdivisions of the state by means of enabling legislation. The bulk of this legislation in the fifty states has been patterned after the Standard State Zoning Enabling Act developed by the Hoover Commission in the 1920's. As such, state legislation still contains many of the weaknesses found in the model act. One weakness is that the SSZEA is void of definitions, preferring instead

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to rely upon the acceptance of commonly used terms. This action has created numerous problems in interpretation. Also, the model act as designed was oriented toward the urban needs of developed areas; consequently, its application to underdeveloped suburban and rural areas has not proven effective. More importantly, the SSZEA was created at a time when the nation, though rapidly urbanizing, was still largely rural. Thus, no mechanisms were included which provided for interjurisdictional cooperation on development which might have interjurisdictional impacts. Finally, the act can be faulted for failing to definitively institutionalize the relationship of planning to zoning. Though an attempt to do so was made in the Standard City Planning Enabling Act, it was too late.

Michigan has had a succession of zoning enabling acts since 1921. Though past and present statutes are similar in many respects, there are and have been numerous areas of difference. Past differences have revolved around issues such as the proper role of the state in zoning, cooperation and coordination among jurisdictions on zoning matters, and the unit of government to be responsible for rural zoning. Fifty years of zoning experience have not settled these and other issues.

Present differences are largely though not exclusively procedural in nature and stem from the piecemeal enactment and amendment of individual zoning statutes over time. Regrettably, these statutes have been viewed as individual

pieces of legislation and not as composing a complementary body of law. What has resulted is a series of laws which are similar, but not the same. Differences which were noted in the Functional Analysis section of Chapter IV while seemingly insignificant in themselves, when considered as a whole are important and have been responsible for a good deal of the confusion presently surrounding zoning administration.

The above mentioned Functional Analysis in addition to citing the lack of procedural uniformity in the state enabling legislation also criticized the zoning statutes for: failure to definitively address certain basic issues; vagueness of statutory provisions; and failure to establish a clear hierarchy of zoning responsibilities among various units of government. Other problems of a more specific nature which were identified in this section included: lack of administrative rules to govern review and comment/ approval functions; failure to provide guidelines for amendment of ordinances; lack of a clear definition of the relationship of the board of appeals to other zoning bodies; lack of flexibility to accommodate newer planning and zoning techniques; and inclusion of provisions of questionable constitutionality. A summary of issues and problems has been provided in matrix form on page 47.

Chapter V provided a critical appraisal of Michigan's land use legislation viewed in the context of state land use policy. Numerous problem areas in both legislation

and policy were cited. More importantly though, the establishment of a new direction in land use regulation and management was noted. The action of creating the Office of Land Use within the Department of Natural Resources and the land use program that this office has proposed, while not being as stringent as the measures proposed by the Governor's Commission on Land Use, still show a commitment to resolving the issues brought up in the commission's report.

The program suggested by the Office of Land Use has been approved by Governor Milliken and adopted by the Department of Natural Resources. If in time the program is implemented, Michigan will achieve a coordinated, comprehensive system of land management and regulation. Success will depend upon accomplishing the nine stated objectives in accordance with the guiding principles of the program.

A significant step in implementing this program would be the revamping of existing zoning legislation. The need for change has been established--the principles and objectives of the land use program provide the necessary direction. Of the fourteen principles, the following would have particular application in guiding legislative change:

1. Private property rights must be recognized and respected.
2. Local units of government should have the responsibility and opportunity to shape the planning

of all aspects of land use which are essentially local in character.

3. The resolution of conflicts and the performance of regulatory functions should occur at the level of government closest and most responsive to all people affected.
4. Uniform procedures should be established so that all levels of government abide by the same rules to reach common objectives.
5. The state should have the responsibility to exercise its inherent land management authority to ensure protection of essential land resources of concern to all Michigan citizens and resolution of issues that have more than local significance.¹

Revision of the zoning statutes would fall primarily under Objective 3 which concerns developmental guidelines and intergovernmental cooperation. However, revision should impact and be influenced by several other objectives, such as:

1. design of a system to permit evaluation of potential land uses in terms of suitability to a given set of physical resource factors (Objective 1, Step 3);
2. delineation of special environments and areas of critical public concern and establishment of land use and development guidelines to identify compatible and non-compatible use patterns (Objective 2, Step 1);

3. assistance in plan implementation by modernizing land planning and management techniques at all levels of government ... (Objective 5);
4. promotion of an environment which provides all residents an equal opportunity to live and work and recreate; encourage construction of a variety of housing patterns and types, in desirable locations convenient to employment and commercial centers in varying price ranges (Objective 6); and
5. maintenance and enhancement of long-term productive potential of essential agricultural, forest and mineral-bearing lands through sound management and protection from damaging or premature development (Objective 7).²

Finally, any proposal to revise the state's zoning statutes must, in addition to considering what is necessary or desirable, also consider what is possible. Sound arguments can be made for the need to revise existing statutes and to revise them in accordance with the aforementioned planning program; but, in the final analysis, the decision to accept or reject such proposals will be largely a political one. Therefore, a serious proposal to revise Michigan's zoning law must fall well within the realm of the politically possible.

Mindful of this limiting condition, the following series of recommendations are offered for consideration.

The first series concerns itself with procedural and nonsubstantive problems identified in the Functional Analysis in Chapter IV. Revisions here are dictated to a large extent by common sense and could be enacted by a series of amendments to the existing legislation. The second series of recommendations concern matters relating to substantive and policy matters. These recommendations concern more controversial and far reaching issues and would conceivably require the total revamping of present zoning enabling legislation. As with the first series of recommendations, the framework for change has been established, this time in Chapter V. Because political issues are involved--some which are long overdue for consideration and others which are relatively new--change will not be easy, but eventually it will be seen as necessary.

Recommendations Concerning Procedural and
Nonsubstantive Matters

The following recommendations are derived from analysis of existing Michigan zoning enabling legislation critiqued in the Functional Analysis portion of Chapter IV. To simplify matters, it is suggested that the reader refer to the three matrices (page 47) developed for Chapter IV. Recommendations touch upon four areas of concern, namely:

1. differences in statutory requirements;
2. vagueness in statutory wording;

3. failure of a statute or statutes to address certain issues or topics; and
4. overlapping statutes and lack of coordination.

In order that a coherent presentation may be made, the following format will be used. First there will be a brief statement of the problem; second is a recommendation or recommendations concerning the problem area; and, third is a discussion of the problem, recommendation(s) and implications.

1. Problem

While both township and county zoning acts require a resolution of intent to be adopted by the local legislative body, no such provision is found in the city-village act. Provisions in the township and county acts differ from one another in areas such as requirements governing citizen initiated actions via petition and giving public notice of intent to proceed under the appropriate enabling statute.

Recommendation

Requirements concerning resolutions of intent should be standardized for counties and townships and extended to cities and villages. Specific areas of differences should be resolved as follows:

1. qualifications for signing a petition should require only that a person be a resident of the jurisdiction and a registered voter; no property

- qualifications should be allowed;
2. the number of signatures on a petition required to make it valid should be based upon a percentage of registered voters, not based upon a percent of total votes cast for gubernatorial candidates;
 3. public notice should be mandatory upon adoption of a resolution of intent by the local legislative body.

Discussion

The rationale for differing requirements concerning resolution of intent provisions of the enabling statutes has long since become obscure. The object of the provision is to initiate the process of undertaking zoning and to make this intent known. Citizens wishing to have the local legislative body initiate this process should have a means to do so. In this case, the petition is a most suitable means. There is no reason why it should be complicated by needlessly complex regulations as it only initiates the process and does not automatically assure that zoning will be adopted.

2. Problem

All three zoning enabling statutes differ concerning who may act as the zoning body, the composition of this body and the qualifications of its members.

Recommendation

A zoning body separate from the local legislative body should be established to carry out the responsibilities enumerated in the enabling legislation. Numerical composition of this body should be established as a function of population size, the minimum number of members to be three, the maximum to be eleven. One member and only one member of the local legislative body should be a member of this body. Where a planning commission exists, the zoning function should be transferred to it.

Discussion

The provisions of the City and Village Zoning Act are both complex and vague at the same time. The product of this mixture is confusion. Rewriting Section 4 (MSA 5.2934) along the lines suggested above would be a major improvement. Township and county zoning statutes specify upper and lower limits on zoning board membership but give no guidance as to establishing a specific membership number. It is suggested that in the case of all three statutes that a membership range be established (ex. 3 to 11 members) and that the specific number be established according to population size. This number would, of course, vary in relation to local growth. With respect to concurrent membership of one member of the zoning board and local legislative body, this arrangement has merit. It would insure that at least one member of the legislative

had some expertise in the area of zoning as well as a first hand understanding of the issues involved in any particular zoning amendment request.

3. Problem

The zoning enabling statutes differ with respect to the number of public hearings that are necessary to be held prior to the adoption of an ordinance. They also differ concerning the bodies that are responsible for holding these hearings.

Recommendation

There is no apparent reason why it should be necessary to hold multiple public hearings before different bodies over the same issues. Therefore, it is recommended that only one such hearing be held (except in the case noted in Problem Number 4) and that the zoning body be responsible for this hearing. It is also recommended that administrative rules be promulgated to regulate the conduct and record keeping of this hearing.

Discussion

Multiple hearings would not appear to be productive, especially if no new information is to be presented. The conduct of the hearings and faithful recording of its contents should be regulated under a set of administrative rules to be established by the state. The transcript of the hearing should be available to the legislative body

previous to their acceptance or rejection of the proposed ordinance or amendments to it. Having one member of the legislative body serve on the zoning board would assure that additional input needed to clarify issues would be available.

4. Problem

After the public hearing(s), the legislative body receives the proposed ordinance for consideration. At this time it can adopt it as is or make any changes. The zoning statutes differ as to the responsibility of the legislative body if it opts to make changes. Under the township and county acts, the amended version of the proposed ordinance must be returned to the zoning body for review and comment. Under the city-village act, the referral is optional. More importantly though, only the township act provides for additional public hearings and then only at the request of a property owner.

Recommendation

It is recommended that a second public hearing be held by the zoning body upon receipt from the legislative body of amendments to the proposed ordinance. The subject of this hearing would be limited to consideration of these amendments.

Discussion

While the changes proposed by the legislative body can be relatively minor, they can just as well be major. In the latter case, there is a danger that the value of the first public hearing could be negated in that the ordinance discussed at the first hearing could bear little resemblance to the amended version. A second hearing, held only on the changes, would preclude this danger.

5. Problem

Referendum provisions in the township and county zoning acts are inconsistent. No provision for referendum exists in the city-village act.

Recommendation

The provision for a referendum should be extended to all three statutes and be consistent throughout. Specifically:

1. qualifications of petitioners should be limited to requiring that a person be a resident of the jurisdiction and that he be a registered voter;
2. the number of signatures necessary to validate a petition should be keyed to a percentage of the total number of registered voters in a jurisdiction;
and
3. eligibility to vote in the referendum should extend to all registered voters in the jurisdiction and not to just those who are property owners.

Discussion

Referendums concerning the adoption and implementation of zoning ordinances present thorny problems to those who advocate zoning. In the past, these referendums have been misused by small but locally powerful interest groups to defeat zoning. However, the threat of a possible referendum also provides an incentive to those drafting the ordinance to be especially careful in their work. On balance, the referendum is a useful tool and should be retained; but, as in other areas of zoning, provisions regarding this tool should be standardized.

6. Problem

Zoning ordinances must be adopted in ordinance form as opposed to being adopted via resolution of the legislative body. As such, they are subject to filing and publication requirements found within organic law as well as those found in the enabling statutes. Requirements vary greatly in this area at county, township, city and village levels.

Recommendation

It is recommended that common requirements be established at all levels for the filing and publishing of zoning ordinances. Specifically:

1. upon adoption by the legislative body, the ordinance and accompanying maps should be forwarded to the county (township, city or village) clerk. The

clerk should maintain at least one copy for public use and forward a second copy to the Secretary of State;

2. the ordinance should be published in a newspaper of general circulation within the jurisdiction within ten days of its passage; or
3. notice should be published in a newspaper of general circulation at least twice, stating that the ordinance has been adopted and that copies are available to the public at the clerk's office.

Discussion

The recommendations suggested above are intended to satisfy the requirements of organic law concerning ordinances in general. They are also intended to standardize procedures at all levels of local and county government. Mindful that the publication of a zoning ordinance in a newspaper can run into the thousands of dollars, an option is suggested whereby it would be sufficient to print only a notice that the ordinance had been adopted. Under this option however, the jurisdiction would still have required to print sufficient copies of the ordinance to satisfy public demand.

7. Problem

Enabling statutes state that amendments to zoning ordinances are to be made in the same manner provided for the enactment of the original ordinance. In practice there

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Recommendations

It is recommended that the procedures for amending zoning ordinances at local and county levels be standardized, particularly in the area of public notice, number of hearings required and level of majority needed to adopt an amendment over the protest of abutting landowners. With respect to the above areas, it is recommended that:

1. in addition to publishing notice of a hearing to consider a zoning amendment, direct notice be sent to abutting landowners where the amendment would result in rezoning;
2. one public hearing be sufficient to consider a zoning amendment and that the zoning body be given responsibility for holding this hearing; and
3. that a simple majority of the legislative body be sufficient to adopt a zoning amendment.

Discussion

The process of amending an ordinance should be consistent with that of adopting the original ordinance. Therefore, all changes suggested with respect to ordinance adoption would apply to ordinance amendment. Since zoning amendments dealing with rezoning are of particular interest to adjacent landowners, direct notice to these owners is

appropriate. One public hearing should be sufficient especially since most zoning amendments are requests for rezoning and do not constitute major changes to the ordinance. Finally, if a simple majority was adequate to adopt the original ordinance, there is no reason why it should take a three-fourths majority to adopt an amendment.

8. Problem

The enabling statutes differ as to the composition of the board of appeals; the propriety of having a member of the legislative body sit on the board, or of the legislative body acting as the board; the level of majority necessary to reverse an administrative decision; and notice requirements for the hearing of appeals.

Recommendation

It is recommended that provisions concerning the board of appeals be consistent among all three zoning enabling statutes. With respect to present areas of difference it is recommended that:

1. the board of appeals be composed of between three and seven members, the exact number to be determined in accordance with a sliding scale based upon population size;
2. the board of appeals be a distinct body separate from the legislative body except that one member of the legislative body would be a member of the appeals board;

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3. a second member of the appeals board would be a member of the zoning body, but the third and/or other members appointed to the appeals board could not be elected officials or employees of the jurisdiction.
4. a simple majority be required to reverse an administrative decision of the zoning body; and
5. notice be given to adjacent and abutting property owners as well as being published in a newspaper of local circulation.

Discussion

The board of appeals should be separate and distinct from both the zoning body and the legislative body. However, it is advantageous to have a member of each of these bodies sit with the board to provide continuous and consistent input into decisions affecting the implementation of the plan implicit in the zoning ordinance. It is conceivable that a two-thirds vote necessary to reverse an administrative decision may be impossible to obtain especially in the case where the appeals board has only three or four members and one or more of them do not vote or are unable to be present. Therefore, a simple majority vote seems more appropriate. Finally, zoning appeals decisions are of primary interest to adjacent and abutting landowners. It is these people who will usually be impacted the most by changes in land use. Therefore, special

efforts are necessary to advise them of hearings which might result in change.

9. Problem

A primary function of the board of appeals is to grant variances and exceptions. It is unclear, however, if use variances can be legally made under present enabling legislation or whether they should be permitted at all.

Recommendation

Enabling legislation should be amended to clearly allow for the granting of use variances. Further, administrative rules should be promulgated clearly delineating the criteria for the issuance of such variances.

Discussion

The use variance can be a useful tool in addressing problems that arise through the application of the zoning ordinance to specific sites. In some instances amendments would not be applicable or would result in spot zoning. The use variance, as applied to specific sites with unique conditions under rigorous criteria, would allow the use of these sites for acceptable purposes while not running counter to the spirit or intent of the ordinance.

Recommendations Concerning Substantive and

Policy Matters

The recommendations included here are of a more basic and far reaching nature than those that precede this

section. Previous recommendations could be implemented by amending existing legislation. Implementation of the following recommendations would require major revamping of present legislation and significant policy changes. In general, these recommendations are concerned with three fundamental issues: the basic relationship of planning to zoning; the hierarchy of power and responsibility among various levels of state government; and, present and evolving state policy. As in the previous section, each recommendation will be considered in three parts: problem statement, recommendation, and discussion.

1. Problem

Zoning is acknowledged to be a planning tool, but the relationship between the two has remained ill-defined. One area of contention has long been the requirement that planning precede zoning or that the zoning ordinance be based upon a plan. It has been advocated that a comprehensive plan precede the zoning ordinance, but judicial interpretation of existing statutes has stated that this is unnecessary. Use of the zoning power without due consideration for planning has often proven counter-productive, ineffective and invalid. It remains to be determined how much and in what form this planning should occur.

Recommendation

A zoning ordinance should be based upon a written plan which effectively considers physical factors

influencing present and anticipated growth within the community. Such a plan need not be as all inclusive as a comprehensive plan, but it must be a written plan including assumptions, objectives and analysis. This plan should be adopted by the zoning body and filed with the municipal or township clerk.

Discussion

What has been lacking to date in most zoning ordinances is concrete evidence that rational land use planning has preceded and is the basis of the ordinance. It has been argued that the zoning map itself is sufficient evidence, but yet this is only a picture subject to immediate change and void of identifiable planning objectives. On the other hand, those people who advocate use of the comprehensive plan as the basis for drafting a zoning ordinance overlook a fundamental difference in nature between the two. The zoning ordinance must reflect present land use or use expected to occur in the near future while the comprehensive plan by its nature is concerned with future land use twenty to thirty years away. To base a zoning ordinance on a future land use map of the community certainly violates the Present Use Rule. However, to completely disregard future land use is impractical. The solution to this problem lies in the middle ground. A written plan with identifiable objectives based upon the probable short-term growth of the community is

essential. The planning horizon line for such a plan should be five to ten years and it should provide a rational and factual basis for the ordinance. Such a plan is less than a community comprehensive plan but more than the zoning map. It provides guidance in drafting the original ordinance and is essential to the consideration of subsequent amendments. Its existence also substantially reinforces the presumption of validity traditionally given such ordinances.

2. Problem

Michigan has three primary zoning statutes for counties, townships, cities and villages. While these statutes are substantially the same in scope, they have been enacted and amended as separate pieces of legislation. Differences, primarily in procedural matters, exist and have been noted in Chapter IV. The result of these differences and the unnecessary duplication of statutes has been administrative confusion.

Recommendation

It is recommended that the three principal zoning enabling statutes be consolidated into one, the content of which mirrors the recommendations previously suggested in this thesis.

Discussion

The benefits which would accrue from implementing this recommendation are procedural in nature. Confusion and concern over what constitutes procedural due process would be eliminated by having only one zoning act supplemented by administrative rules governing record keeping, public hearings, and other functions. Present acts are deficient in this area and differ as to basic requirements concerning hearings, notice, filing, publication, etc. These differences have led some zoning administrators to comply with procedural requirements not only found in enabling statutes applicable to their jurisdictions but also to those applicable to other levels of government where these are more stringent. Having one common statute would make such practice unnecessary.

3. Problem

Planning and zoning are functionally related yet are governed by different statutes. The transfer of the zoning power to the planning body is suggested by some statutes and required by others. Integration of these functions is desirable.

Recommendation

A mandatory transfer of the zoning power to the planning body (where one exists) should be made. Further study should be given to revision of current planning enabling legislation for the purpose of integrating

planning and zoning functions into one combined statute.

Discussion

The necessity of preceding zoning with proper planning has already been discussed. The obvious question to be raised is who will do this planning? It cannot be argued that a group of lay citizens who sit as a planning commission are any more competent than those who sit as a zoning board. However, as the former group has already been entrusted with the responsibility of planning for the community, it is only logical that they should also perform the planning duties associated with zoning. The plan upon which the zoning ordinance is to be based has been differentiated from the comprehensive plan, but while they are different, they still must be compatible. Administration of the zoning ordinance and its amendments should also be consistent with the objectives and policies found in both plans. Based upon this criteria, the planning body would appear to be better suited to carry out the zoning function. If this conclusion is valid, then the need for separate zoning and planning statutes no longer exists. Most if not all of the arguments supporting a single zoning statute readily apply to creation of an integrated planning and zoning statute.

4. Problem

No clear hierarchy of responsibility exists between levels of state government concerning the exercise and

administration of the zoning power. This lack of structure is evident in numerous areas, including: the inadequacies of existing statutory provisions concerning review and comment/approval functions; the nonexistence of mechanisms to resolve inter-jurisdictional zoning questions; and the absence of administrative rules seemingly necessary to the conduct of zoning. Most of these deficiencies can be traced to the state's nonexercise of its traditional policy making role.

Recommendation

It is recommended that the powers and responsibilities of the state and its political subdivisions be clearly established in zoning enabling legislation. This legislation is to be supplemented by rules governing the administration of the zoning power at all levels of government. It is further recommended that the hierarchy of powers and responsibilities include the following:

1. the state should; reassert its policy making role and establish planning and zoning guidelines, promulgate administrative rules, establish use regulations governing lands established as having regional or statewide significance, and establish a zoning board of appeals responsible for resolving inter-jurisdictional zoning problems and for reviewing county decisions to reject township ordinances and amendments.

2. the county should; assume responsibility for zoning only in those townships unable or unwilling to do so themselves, provide zoning and planning assistance to townships requesting it, assume principal planning responsibility for all townships except where the township opts to undertake its own planning, and provide review and approval of township zoning ordinances and plans.
3. townships, cities and villages should; establish and administer zoning ordinances in accordance with local or county plans, except where the county has been requested to do so by the local jurisdiction.

Discussion

In the hierarchical framework established above, the state is cast in primarily policy making and administrative roles. Through a designated agency, policy, guidelines and administrative rules would be established for the exercise of the zoning power by lesser civil jurisdictions. The state's role in regulating land use would be limited to identifying lands critical, unique or otherwise having statewide or regional significance. County or local jurisdictions would be required to zone these lands accordingly and to regulate their use. The state would serve an essential administrative role by acting as an appeals board in cases involving inter-jurisdictional impacts or in the case where the county, during its review and

approval function, had disapproved a township ordinance or amendment. As conceived, this board would be responsible for establishing the facts in any dispute submitted to it and determining the validity of the decision based upon the facts. The plaintiff in any case would still have recourse to the courts for decisions concerning procedural due process or other points of law. The objective of this board would be twofold, to provide an arbitrator of inter-jurisdictional disputes and to limit the necessity of entering into costly litigation.

The county would no longer have zoning responsibility except in those townships unwilling or unable to adopt and administer zoning. Its primary role would be to provide planning and zoning assistance and to review and approve township ordinances. The review and approval function is placed at the county level rather than at the state level because the county agency could better assess the merits of a proposed ordinance given a familiarity with regional growth and development. State guidelines would be issued to assist the county in this task.

Local jurisdictions (townships, cities and villages) would be required to adopt zoning. Failure to do so would lead to zoning by the county. Local units of government would have the option of developing their own plans or having the county do so. All plans and ordinances would have to reflect state guidelines, including appropriate regulation of areas designated as critical or unique

and those identified as having regional or statewide significance. As the total amount or extent of these lands would be limited by statute, land use decisions would still be primarily a local concern.

5. Problem

Zoning has evolved in the absence of a state land use policy. Only now is a coherent policy being developed to replace the fragmented, uncoordinated system of land use controls that exist at present. As this policy takes form an important question will be that of determining zoning's proper role.

Recommendation

It is recommended that the Advisory Committee on Zoning formed by the Office of Land Use, Michigan Department of Natural Resources consider the question of defining the role of zoning in state land use management policy. It is further recommended that basic aspects of zoning touched upon in these recommendations be considered part of that role.

Discussion

Zoning has variously been described as a tool and a process. In essence it is a form of regulation designed to achieve various goals set down in the enabling legislation. Other statutes such as the Shorelands Protection Act and the Natural Rivers Act have been passed which

impact upon the use of the zoning power. More such legislation is being contemplated at both the state and federal levels which would further extend the use of zoning.

It has been realized that zoning as it is now practiced has definite limits in its application--that other forms of regulation are available and perhaps more suited to the tasks zoning is being called upon to perform. If the enabling legislation is examined it will be noted that zoning may be applied to both urban and rural uses for all purposes designated to promote the health, safety and welfare of the populace. In practice however, zoning is most effective in stable, urban areas; in changing areas or in rural areas it is less effective. The task remains to determine zoning's role in the state land use management policy. As this policy is still evolving, perhaps it is still too early to fully define zoning's role. As a start however, the following thoughts are offered:

1. zoning should be mandatory at local levels of government. Zoning's primary benefit will be to give growth and change a rational form.
2. zoning itself should be guided through the use of adequate local planning and the establishment of guidelines reflecting state land use policy.
3. zoning should be viewed as a short-term device whose usefulness in achieving long-term objectives of comprehensive plans is limited.
4. zoning should be used in conjunction with other

implemental tools such as effective tax policy, public acquisition of critical or unique lands, and obtaining easements and development rights.

Conclusions

In attempting to significantly revise present zoning legislation, some consideration should be given to an ideal concept of zoning, both as to role and to practice. Such an ideal concept is implicit, in part, in the substantive recommendations of this thesis. In essence, this ideal system would bring the regulation of land as close to the people as possible without jeopardizing the common welfare for the sake of parochial interests. Along these same lines, local political boundaries would be recognized as would different levels of government; however, regional and inter-jurisdictional interests must also be acknowledged. The state is assumed to be able to provide the impartiality to settle disputes of a larger than local concern. Also, the state in order to effectively carry out its leadership role in land use management affairs would be required to develop a technical and administrative expertise that could be drawn upon by local governments in both planning and zoning matters. Finally, all zoning regulations should be firmly ground in technically sound practices that truly reflect considerations of health, safety and welfare. With the advent of heightened environmental concerns, quantitative analysis techniques have come into more or less

common usage. These same techniques should be applied to zoning. Where community goals and objectives can not be justified through the use of these analytical techniques, these goals and objectives should be considered to fall outside the proper domain of zoning. Other tools such as taxation policy, capital improvements planning, and public acquisition of lands would still be available.

Nevertheless, the chief value of this thesis is not that it suggests solutions but rather that it identifies problems long known to exist, but all the same largely ignored. The recommendations which are offered are considered reasonable, but by no means definitive or conclusive. Their value is seen in offering a course of action and serving as a springboard for debate. Finally, statements advocating policy are intended to indicate direction, but direction in which there are numerous avenues.

Most of the problems noted in the previous pages can be remedied--but only after careful consideration. It is sincerely hoped that this thesis will be of some value in any attempt to address these problems.

FOOTNOTES

1. Office of Land Use, Michigan Department of Natural Resources, Michigan's Future Was Today ..., (Lansing, Michigan: 1974), p. 20.
2. Ibid., pp. 23-43.

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