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REZONING BY AMENDMENT AS AN ADMINISTRATIVE OR QUASI-JUDICIAL ACT: THE "NEW LOOK" IN MICHIGAN ZONING

Roger A. Cunningham*

THE traditional view in zoning law has been that the enactment of an original zoning ordinance and any amendments thereto by a local governing body is a "legislative" act,¹ as contrasted with the granting of a "special exception" or a "variance" by the zoning board of appeals (or board of adjustment),² which is an "adminis-

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1. *Fasano v. Board of County Commrs.*, 264 Ore. 574, 579, 507 P.2d 23, 26 (1973) ("The majority of jurisdictions state that a zoning ordinance is a legislative act and is thereby entitled to presumptive validity"). In *Fasano*, the court also cited *Smith v. County of Washington*, 241 Ore. 380, 383, 406 P.2d 545, 547 (1965), for the further proposition that "a challenged [zoning] amendment is a legislative act and is clothed with a presumption in its favor." 264 Ore. at 579, 507 P.2d at 26. See also 1 A. RATHKOFF, *THE LAW OF ZONING AND PLANNING* 27-13 to -14 (3d ed. 1974): "The mere enactment of the original [zoning] ordinance gives rise to certain presumptions, i.e., that the restrictions are reasonable and appropriate to cure [or] prevent an evil seen or reasonably to be apprehended; that they are adequate for this purpose; that the boundaries of the districts established are similarly reasonable. . . . Upon the amendment of the ordinance, either in the form of a complete revision or replacement or with respect to a particular case [or] piece of property, the presumption applies to the new legislation, in most jurisdictions without comment or disparity as to its weight." (Footnotes omitted.) See generally Freilich, *Fasano v. Board of County Commissioners of Washington County: Is Rezoning an Administrative or Legislative Function?*, 6 URBAN LAW. vii (1974); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972); 57 MICH. L. REV. 423 (1959).

2. All zoning ordinances provide some sort of administrative relief for persons severely disadvantaged by their impact. A few authorize a zoning administrator to make minor concessions where certain regulations are seriously injurious to an individual landowner and of little benefit to the community under the circumstances. . . . But most ordinances establish an administrative board with broad powers to review administrative rulings, to grant or deny exceptions and special permits, and to process applications for variances. The boards thus created are called boards of adjustment, appeal, or review. The term "board of adjustment" was used in the Standard State Zoning Enabling Act, and probably is the one most commonly employed.

. . . .
. . . The board of adjustment, with power to vary regulations in specific cases, became a standard feature of zoning administration in communities of all sizes.
2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 13.07, at 554-57 (1968).

In Michigan the statutory term for the administrative agency with the three principal powers mentioned by Anderson is "board of appeals." See MICH. COMP. LAWS ANN. § 125.585 (Supp. 1974). The power to grant or deny exceptions and special permits is conferred by the following statutory language: "They shall also hear and decide matters referred to them or upon which they are required to pass under any ordinance of the legislative body adopted pursuant to this act." MICH. COMP. LAWS ANN. § 125.585(a) (Supp. 1974). This language is much less definite than the corresponding language in the STANDARD STATE ZONING ENABLING ACT § 7(2) (U.S. Dept. of Commerce rev. ed. 1926), which gives the board of adjustment the power "[t]o hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance." In any case, the action of a board of adjustment or appeals is

trative" or "quasi-judicial" act. Recently, however, the Oregon³ and Washington⁴ supreme courts have challenged this view, concluding that, under some circumstances at least, the enactment of a zoning amendment should be considered an "administrative" or "quasi-judicial" act, and thus subject to more extensive judicial review. Although a majority of the Michigan supreme court has yet to embrace this new position, the Michigan court has been moving in that direction; in fact, five recent opinions by Michigan Supreme Court Justice Levin⁵ indicate that Michigan may be extending the "administrative or quasi-judicial act" doctrine even beyond its Washington and Oregon formulations.

In *Fasano v. Board of County Commissioners of Washington County*,⁶ plaintiffs challenged the Board's approval of a zoning ordinance amendment. The Oregon supreme court characterized the ac-

invariably characterized as "administrative" or "quasi-judicial." See, e.g., *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 90, 92 N.E.2d 903, 904 (1950) ("The board being an administrative and not a legislative body . . ."); *Lorland Civic Assn. v. DiMatteo*, 10 Mich. App. 129, 136, 157 N.W.2d 1, 5 (1968) ("It is a quasi-judicial body whose decisions affect private rights . . .").

3. See *Fasano v. Board of County Commrs.*, 264 Ore. 574, 507 P.2d 23 (1973). In rejecting the traditional view, the court said: "[W]e feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures." 264 Ore. at 580, 507 P.2d at 26.

4. See *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972); *Lillions v. Gibbs*, 47 Wash. 2d 629, 289 P.2d 203 (1955), where, although the court said, "When a board of county commissioners acts pursuant to a statute relating to zoning, it is a legislative body exercising legislative power," 47 Wash. 2d at 632, 289 P.2d at 205, the court apparently viewed the board's denial of a petition to rezone from a "residential" to a "business" classification as an "administrative act." See 47 Wash. 2d at 633-34; 289 P.2d at 205-06. But see *Durocher v. King County*, 80 Wash. 2d 139, 492 P.2d 547 (1972), where the court held that

there is a difference between an act of rezoning and the granting of a permit pursuant to an established zoning ordinance.

Rezoning contemplates the amendment of an existing zoning ordinance which changes the zoning classification of a previously zoned area. On the other hand, . . . the issuance of a special permit contemplates an exception granted pursuant to a previously existing zoning ordinance, subject to certain guides and standards laid down therein.

80 Wash. 2d at 153-54, 492 P.2d at 556. The clear implication of this is that "rezoning" by amendment is a "legislative act," while the granting of a special permit or exception is an "administrative act."

5. *Sabo v. Township of Monroe*, 395 Mich. —, 232 N.W.2d 584 (1975) (3-2 decision); *Nickola v. Township of Grand Blanc*, 394 Mich. —, 232 N.W.2d 604 (1975) (3-2 decision); *Smookler v. Township of Wheatfield*, 394 Mich. —, 232 N.W.2d 616 (1975) (3-2 decision); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (plurality opinion); See *Kropf v. City of Sterling Heights*, 391 Mich. 139, 164, 215 N.W.2d 179, 190 (1974) (Levin, J., concurring).

6. 264 Ore. 574, 507 P.2d 23 (1973).

tion of the commissioners as an exercise of "judicial" authority,⁷ and held that the landowner seeking the amendment bore the burden of proof that (1) the change in zoning was in accordance with the county's comprehensive land use plan, (2) there was a public need for a change of the kind in question, and (3) this need would best be served by changing the zoning classification of the particular piece of property in question. If the comprehensive plan previously designated other areas for the proposed type of development, the landowner would also have to show that it was necessary to introduce that development to a different area.⁸ The zoning amendment adopted by the county commissioners was held invalid on the ground that its proponent had failed to sustain his burden of proof.⁹

In *Fleming v. City of Tacoma*,¹⁰ the Washington supreme court was faced with a challenge to a zoning amendment based on the alleged conflict of interest of a city council member. The court stated that, while courts will generally not inquire into the motives of a legislative body acting in a legislative capacity, zoning ordinance amendments are basically "adjudicatory." This is so whether the amendment process is characterized as "legislative" or "administrative," since "the parties whose interests are affected are readily identifiable" and the amendments' applicability is "localized."¹¹

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7. 264 Ore. at 581, 507 P.2d at 26. "The characterization of 'judicial' is that of the Oregon supreme court. Ordinarily actions of a legislative body which address a specific set of facts and issuance of a license, approval or permit are denominated 'quasi-judicial,' or 'administrative.'" Freilich, *supra* note 1, at vii n.2. Professor Freilich went on to observe:

There can be no dispute that the original passage of comprehensive plans and zoning ordinances is a legislative function since these actions are classified as general policy decisions which apply to the entire community. However, a zoning amendment may be differentiated on the basis that such a determination is narrowly confined to a particular piece of property and the use will generally affect only a small number of people, thus approximating an administrative exercise.

Id. at ix.

8. The court further stated that although zoning changes may be justified without a showing of either mistake in the formation of the original comprehensive plan or changes in the physical characteristics of the area in question, both of these factors would be relevant. 264 Ore. at 587, 507 P.2d at 29.

The "original mistake or substantial change of condition" rule has been applied most rigorously in Maryland. *See, e.g., Helfrich v. Mongelli*, 248 Md. 498, 237 A.2d 454 (1968), and the numerous cases cited therein. *See also Jobar Corp. v. Rodgers Forge Community Assn.*, 236 Md. 106, 202 A.2d 612 (1964). *Accord, Zoning Commn. v. New Canaan Bldg. Co.*, 146 Conn. 170, 148 A.2d 330 (1959); *Roseta v. County of Washington*, 254 Ore. 161, 458 P.2d 405 (1969); *Smith v. County of Washington*, 241 Ore. 380, 406 P.2d 545 (1965). The "original mistake or change of condition" rule was expressly rejected in *Levitt v. Incorporated Village of Sands Point*, 6 App. Div. 2d 701, at 701, 174 N.Y.S.2d 283, 286 (1958), and in *Oka v. Cole*, 145 S.2d 233, 235 (Fla. 1962).

9. 264 Ore. at 588, 507 P.2d at 30.

10. 81 Wash. 2d 292, 502 P.2d 327 (1972).

11. 81 Wash. 2d at 298-99, 502 P.2d 330-31.

Thus, the court held, a municipal legislative body's hearing on a proposed rezoning amendment is subject on review to the Washington "appearance of fairness" doctrine, which applies in adjudicatory hearings both to the motives of the persons conducting the hearings and to the hearing procedure itself. Because there was evidence of a conflict of interest, the court invalidated the amendment even though the vote of the councilman in question was unnecessary for its passage.¹²

In *Kropf v. City of Sterling Heights*,¹³ the Michigan supreme court upheld the denial of a requested zoning amendment. In his concurring opinion in *Kropf*, Justice Levin adopted a much broader version of the "administrative or quasi-judicial act" doctrine set out in the *Fasano* and *Fleming* cases. Four subsequent cases¹⁴ make it clear that the new doctrine is now accepted by three¹⁵ of the seven justices who compose the Michigan supreme court.¹⁶

In his concurring opinion in *Kropf*, Justice Levin started with the factual assumption—no doubt correct—that "[i]n most communities, . . . especially the larger ones, there have been dozens,

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12. 81 Wash. 2d at 300, 502 P.2d at 331.

13. 391 Mich. 139, 164, 215 N.W.2d 179, 190 (1974).

14. See *Sabo v. Township of Monroe*, 394 Mich. —, 232 N.W.2d 584 (1975) (3-2 decision); *Nickola v. Township of Grand Blanc*, 394 Mich. —, 232 N.W.2d 604 (1975) (3-2 decision); *Smookler v. Township of Wheatfield*, 394 Mich. —, 232 N.W.2d 616 (1975) (3-2 decision); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (plurality opinion).

15. In *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974), only Justice T.G. Kavanagh signed the concurring opinion of Justice Levin. In the four subsequent decisions, cited at note 14 *supra*, however, they were joined by Justice Fitzgerald.

16. In *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974) (plurality opinion), Justices Williams, Swainson, and T.M. Kavanagh dissented in an opinion by Justice Williams. Justice Coleman originally signed Justice Levin's opinion in *West*, see Civ. No. 54764 (filed Sept. 6, 1974), but withdrew her signature before publication and merely concurred in the result. In *Sabo v. Township of Monroe*, 394 Mich. —, 232 N.W.2d 584 (1975) (3-2 decision), *Nickola v. Township of Grand Blanc*, 394 Mich. —, 232 N.W.2d 604 (1975) (3-2 decision), and *Smookler v. Township of Wheatfield*, 394 Mich. —, 232 N.W.2d 616 (1975) (3-2 decision), the Levin bloc was a majority because only five justices participated in the decision in these cases. Justice Swainson did not participate because of pending federal criminal charges. Presumably Justice Lindemer did not participate because he was not appointed to fill the vacancy created by the death of Justice T.M. Kavanagh until after *Sabo*, *Nickola*, and *Smookler* were argued. In each of the last three cases, however, Justice Coleman, in dissent, expressly rejected Justice Levin's new "administrative or quasi-judicial act" doctrine because, in her view, (1) the standard of "reasonableness" of the proposed use is not "workable," and (2) the new doctrine usurps the zoning power properly delegated to local governing bodies, makes the court "a super zoning board," and imposes the court's social policies on local communities "by judicial fiat." Justice Williams' rejection of the new doctrine was clearly indicated in *Sabo*, *Nickola*, and *Smookler*, as well as in *West*. The future of the new doctrine is not clear because Justice Lindemer's views are still unknown and Justice Swainson has recently resigned from the supreme court.

hundreds and, in some cases, thousands of zoning map changes, exceptions and variances granted.”¹⁷ He seems then to have assumed that the existing zoning regulations in these communities could not be justified as being “in accordance with a plan” designed to promote statutorily defined police power objectives as required by the Michigan zoning acts.¹⁸ This assumption could be correct, in a particular community, because no such plan was ever formulated, or the original zoning ordinance did not comply with the established plan, or, although the original ordinance complied with the plan, the present zoning regulations no longer comply due to “spot zoning” amendments, “special exceptions,” and “variances” granted over the years. In such communities, concluded Justice Levin, the process of passing upon applications for rezoning amendments should be treated, in substance, as a “licensing” process in which the criterion for enacting a rezoning amendment should be reasonableness “in light of all the circumstances.”¹⁹ This appears to be in essence a

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17. 391 Mich. at 168, 215 N.W.2d at 192.

18. Michigan's City or Village Zoning Act provides:

Such regulations shall be made *in accordance with a plan* designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development.

City or Village Zoning Act § 2, MICH. COMP. LAWS ANN. § 125.582 (1967) (emphasis added). The Township Rural Zoning Act provides:

The provisions of the zoning ordinance shall be *based upon a plan* designed to promote the public health, safety, morals and general welfare, to encourage the use of lands in accordance with their character and adaptability and to limit the improper use of land, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation and other public requirements, and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources and properties; and shall be made with reasonable consideration, among other things, to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building and population development.

Township Rural Zoning Act § 3, MICH. COMP. LAWS ANN. § 125.273 (1967) (emphasis added).

The STANDARD STATE ZONING ENABLING ACT § 3 (U.S. Dept. of Commerce rev. ed. 1926) also mandates that zoning regulations be promulgated according to a plan:

Such regulations shall be made *in accordance with a comprehensive plan* and designed 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 the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

(Emphasis added). The draftsmen's comment on this provision is that “[t]his will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.”

19. 391 Mich. at 172, 215 N.W.2d at 194.

sophisticated "nuisance" test that would take into account "availability of utilities and roads," "[a]esthetics," and the requirements of "sound communal development," as well as other factors traditionally considered in nuisance litigation.²⁰

While Justice Levin would, like the *Fasano* court, continue to assign the burden of proof of the "reasonableness" of the proposed use to the property owner seeking the change,²¹ he would hold that local legislative bodies making zoning decisions on individual grounds "are exercising administrative, not legislative, power and cannot claim for such determinations the presumption which shields legislative action."²² Once these determinations are characterized as administrative acts, "the reasonableness of the proposed use—the standard in fact generally followed by a local legislative body when granting or refusing a change—is, under [the Michigan] constitution, subject to judicial review. The question on review is whether the grant or denial is 'supported by competent, material and substantial evidence on the whole record.'"²³

The "administrative act" doctrine propounded by Justice Levin in *Kropf* goes far beyond the doctrine announced in *Fasano*, *Fleming*, or any other decision characterizing the grant or denial of rezoning applications as "administrative" or "quasi-judicial." The *Fasano*²⁴ opinion emphasized that Oregon county planning commissioners are required "to adopt . . . comprehensive plan[s] for the use of some or all of the land in the county,"²⁵ that "the purpose of the zoning ordinances . . . is to 'carry out' or implement [these] plan[s],"²⁶ and that "the plan[s] adopted by the planning commission[s] and the zoning ordinances enacted by the county governing bod[ies] are closely related . . ."²⁷ The Oregon court was principally concerned with preventing unwarranted changes in the zoning regulations, which might result from "the almost irresistible pressures that can

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20. 391 Mich. at 173, 215 N.W.2d at 194. For an interesting argument that zoning should be scrapped and replaced by "nuisance rules," at least in part, see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

21. 391 Mich. at 172, 215 N.W.2d at 194.

22. 391 Mich. at 171, 215 N.W.2d at 193.

23. 391 Mich. at 169-70, 215 N.W.2d at 192-93. The quoted standard is that prescribed by the Michigan constitution for judicial review of "judicial or quasi-judicial" administrative decisions affecting "private rights or licenses." See MICH. CONST. art. 6, § 28. See also text at notes 36-46 *infra*.

24. See text at notes 6-9 *supra*.

25. 264 Ore. at 582, 507 P.2d at 27.

26. 264 Ore. at 582, 507 P.2d at 27.

27. 264 Ore. at 582, 507 P.2d at 27.

be asserted by private economic interests on local government.”²⁸ Thus the court, in substance, recognized a strong presumption that the original zoning of an area pursuant to a comprehensive plan is reasonable and that it should not be changed unless the proponent of a rezoning amendment has successfully carried a very heavy burden of proof. *Fasano* certainly is not authority for Justice Levin’s proposition that, upon judicial review of a local governing body’s actions with regard to a rezoning amendment, the only question is whether the “proposed use is reasonable.”²⁹

Fleming provides even less support for Justice Levin’s proposition. This decision does support the general notion that a zoning amendment affecting a single tract is “administrative” or “quasi-judicial” rather than “legislative” in character. But *Fleming* does not deal either with the presumptions and burden of proof to be applied in the “administrative” or “quasi-judicial” hearing, or with the standard to be applied on judicial review of the governing body’s action in granting or denying the proposed change in zoning.

Justice Levin’s approach to the rezoning problem has apparent merit when applied to local governing bodies that have engaged in illegal “spot zoning”³⁰ over an extended period of time, and thus have made no real effort to keep their zoning regulations “in ac-

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28. 264 Ore. at 588, 507 P.2d at 30.

29. 391 Mich. at 171, 215 N.W.2d at 193 (footnote omitted). See text at note 23 *supra*.

30. For general discussion of “spot zoning” and zoning changes by amendment, see 1 A. RATHKOPF, *supra* note 1, chs. 26-27; 1 R. ANDERSON, *supra* note 2, chs. 4-5. Rathkopf has succinctly characterized “spot zoning” as follows:

“Spot zoning” is the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district . . . .

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The uniform rule as set out in all of the cases is that consistency between the treatment accorded the parcel rezoned and the scheme of zoning set out in the general or comprehensive plan is the essential test.

1 A. RATHKOPF, *supra*, at 26-1, 26-5.

Relatively few Michigan decisions have discussed challenged zoning amendments in terms of “spot zoning.” While varying considerably in their factual contexts and results, most of the decisions that have discussed the issue have used the term “spot zoning” at it has traditionally been used: to describe a rezoning that gives preferential treatment to a particular lot or lots. See, e.g., *Hungerford v. Township of Dearborn*, 362 Mich. 126, 106 N.W.2d 566 (1960); *Penning v. Owens*, 340 Mich. 355, 65 N.W.2d 831 (1954); *Yale Dev. Co. v. City of Portage*, 11 Mich. App. 83, 160 N.W.2d 604 (1968). In *Trenton Development Co. v. Village of Trenton*, 345 Mich. 353, 75 N.W.2d 814 (1956), however, the rezoning of a three-block area in a large multi-family district to a two-family classification, where the area rezoned adjoined a business district, was said to be unreasonable “spot zoning.” The problem with the *Trenton* court’s approach is that a rezoning that covers an area as large as three blocks may in fact represent a valid change in the land use plan, rather than an abandonment of that plan. See text at notes 47-48 *infra*.

cordance with" a comprehensive land use plan.³¹ It may also have merit when applied to a jurisdiction that has no such plan. If rezoning decisions are usually made without reference to the existing land use plan, a local governing body would act in an arbitrary and discriminatory manner if it should deny a particular application for rezoning that is "reasonable under all the circumstances" on the ground that the change would not comport with the plan; similarly, the denial of a "reasonable" application would be arbitrary in the absence of a land use plan. It can therefore be argued that in either of these situations the proponent should be entitled on judicial review to a court order requiring adoption of the proposed zoning amendment.

Despite its superficial attractiveness, however, Justice Levin's review standard presents a number of conceptual and practical problems. First, as Justice Levin noted in *Kropf*,³² a local governing body's action in refusing a proposed rezoning has traditionally been subject to attack only indirectly through a constitutional challenge to the validity of the existing zoning regulations as applied to the challenger's property.³³ A court order requiring adoption of a proposed zoning amendment involves an assumption of judicial power to dictate affirmative action by a local governing body that courts have traditionally been unwilling to assume.³⁴ In Michigan there

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31. At least one Michigan case has held that numerous "spot-zonings" destroyed a city's comprehensive area plan. See *Schaefer v. City of East Detroit*, 360 Mich. 536, 104 N.W.2d 390 (1960).

32. 391 Mich. at 164, 171 n.6, 215 N.W.2d at 190, 193 n.6.

33. The existing regulations have traditionally been held valid so long as they allow some "reasonable use" of the property in question. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

34. See 3 R. ANDERSON, *supra* note 2, § 22.08, at 612:

Mandamus is not available to compel the legislative authority of a municipality to amend a zoning ordinance. The amendment of the zoning ordinance is a matter committed to the legislative discretion of the municipal legislative body, and such action may not be compelled by prerogative writ. To compel legislative action through a writ of mandamus would be to interfere with an exercise of legislative discretion, and this may not be done short of an abuse of such discretion.

Courts are generally reluctant to conclude that a local governing body has abused its discretion in denying a proposed rezoning amendment. For example, in *Lillions v. Gibbs*, 47 Wash. 2d 629, 289 P.2d 203 (1955), the court said:

Mandamus will not lie to compel the performance of acts or duties which call for the exercise of discretion on the part of public officers . . . . Where courts do interfere, it is upon the theory that the action is so arbitrary and capricious as to evidence a total failure to exercise discretion, and therefore the act of the officer is invalid . . . .

Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious when

is a clear statutory basis for this reluctance. If a court on judicial review is to determine that the proposed use for which rezoning is sought is "reasonable under all the circumstances" and that rezoning must therefore be granted, the court would be usurping a legislative function delegated by the Michigan zoning acts to local governing bodies.³⁵

Second, even if Justice Levin's "administrative or quasi-judicial" characterization is accepted, his concurring opinion in *Kropf* leaves doubt as to precisely what standard of judicial review is being proposed. At one point Justice Levin states that the proper standard is the Michigan constitution's standard for judicial review of administrative agency "judicial or quasi-judicial" findings of fact—"whether the grant or denial is 'supported by competent, material and substantial evidence on the whole record.'"³⁶ Later, however, in

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exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Under the facts in this case, there was room for two opinions [regarding rezoning from "residential" to "business" use]. This was shown by the testimony that there were those who favored and others who protested the adoption of the commission's recommendation [to rezone to a "business" classification]. At the trial, the appellant had the burden of proof, and failed to establish that the board acted arbitrarily and capriciously, as above defined [in refusing to rezone].

47 Wash. 2d at 633-34, 289 P.2d at 205-06. *But see* *Aspen Hill Venture v. Montgomery County Council*, 265 Md. 303, 289 A.2d 303 (1972), where the court held the refusal to rezone to permit expansion of an existing shopping center arbitrary, unreasonable, and capricious. After a hearing, the County Council had found that there was sufficient change in the character of the neighborhood to justify rezoning, that the proposed rezoning was in accordance with the Master Plan, and that the proposed rezoning would not have an adverse effect on surrounding residential property or create traffic circulation problems or any additional nuisance factor in the area; nevertheless, the Council denied the application for rezoning from residential to commercial use solely on the ground that there was no need for additional commercial facilities in the area. The court noted that the Council's decision was really nothing more than "substituting an economic judgment of its own for that of the shopping center's entrepreneur, as to the financial success of the venture." 265 Md. at 314, 289 A.2d at 309. The court added that

while a zoning designation on a Master Plan may not support an immediate request for rezoning, as it is a guide for the future, yet, when, as here, it is accompanied by the dynamics of change, we think the designation on the Master Plan becomes most significant . . . . Thus, the ignoring of the Master Plan, under the facts and circumstances of this case, serves to emphasize the lack of substantial relationship between the exercise of the police power and the public interest.

265 Md. at 314-15, 289 A.2d at 309.

35. *See* City or Village Zoning Act § 4, MICH. COMP. LAWS ANN. § 125.584 (1967); Township Rural Zoning Act § 14, MICH. COMP. LAWS ANN. § 125.284 (Supp. 1974). This enlargement of judicial power would be particularly troublesome in cases where, pursuant to the "20 per cent protest" provision of the City or Village Zoning Act, a rezoning amendment "shall not be passed except by the $\frac{3}{4}$ vote of such legislative body." City or Village Zoning Act § 4, MICH. COMP. LAWS ANN. § 125.584 (1967).

36. 391 Mich. at 169-70, 215 N.W.2d at 193. *See* text at note 23 *supra*. The constitutional standard in full is as follows:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-

a footnote, Justice Levin seems to suggest that proper judicial review requires the reviewing court to substitute its own judgment for that of the local legislative body.³⁷ This is clearly improper if the rezoning issue before the court is characterized as "factual,"³⁸ but it may be that Justice Levin views rezoning as a "legal" issue.³⁹

Judicial substitution of judgment ("de novo review") is common in both federal and state courts when the issue for review is the propriety of an agency's application of the law to established or undisputed facts.⁴⁰ But the United States Supreme Court has often rejected the substitution-of-judgment approach in favor of a "rational basis" standard of judicial review—*i.e.*, the agency's decision will be sustained if it has "warrant in the record and rational basis in law."⁴¹ Many state courts have also adopted this approach.⁴² Although Professor Davis concludes that a court's choice of approach in a particular case is essentially discretionary,⁴³ the "rational basis" standard seems preferable when a Michigan court is reviewing local rezoning decisions. This is so because (1) whether it is viewed as a legislative or an administrative unit, the local governing body seems better qualified than a court to make individualized rezoning decisions involving the application of general propositions of zoning law

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judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

MICH. CONST. art. 6, § 28.

37. The note states:

Under existing precedent the question on judicial review varies depending on whether a change in zoning has been granted or denied: When a change is granted and an adjoining property owner . . . challenges the change, the question on review is whether the *newly permitted use*, the proposed use, is reasonable; when a change is denied and the owner of the property affected challenges the denial, the question on review is whether the *present use* is reasonable. Since the question on judicial review is in every case whether a proposed use should be *permitted*, it is anomalous for the scales to be weighted depending on who won or lost below.

391 Mich. at 171 n.6, 215 N.W.2d at 193 n.6 (emphasis original).

38. See Regents of University of Michigan v. Michigan Employment Relations Commn., 389 Mich. 96, 204 N.W.2d 218 (1973); Williams v. Arnold Cleaners, Inc., 25 Mich. App. 672, 181 N.W.2d 625 (1970).

39. In this connection, we need to keep in mind Professor Davis' admonition: "In the context of judicial review of administrative action the term 'question of fact' means an administrative question on which a reviewing court should not substitute judgment and the term 'question of law' means a question on which the reviewing court may properly substitute judgment." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.02, at 193 (1958).

40. *Id.* § 30.06 (1958, Supp. 1970).

41. *Id.* § 30.05, at 214.

42. *Id.* § 30.05, at 220-21.

43. *Id.* § 30.08.

to unique facts;⁴⁴ (2) the state legislature has clearly conferred power to make such decisions on the local governing body;⁴⁵ and (3) the Michigan constitution's judicial review standard for administrative agency "judicial or quasi-judicial" determinations indicates on its face that the "rational basis" standard applies.⁴⁶

Finally, and perhaps most importantly, if the "administrative or quasi-judicial act" doctrine announced by Justice Levin should become law in Michigan, the courts will be faced in many cases with the difficult problem of deciding when a community, by virtue of its past zoning practices, is subject to the new doctrine. In his concurring opinion in *Kropf*, Justice Levin said:

When in fact, as well as theory, zoning is legislative, the legislative body adopts on general, not individualized, grounds a plan of general application to all the land in the community and stops there—with variances granted only when constitutional *necessity* requires it—there are no determinations on individual grounds subject to . . . judicial review and the zoning choices of the legislative body are clothed with a presumption of constitutionality.⁴⁷

But surely a community's original zoning ordinance is not immutable. Comprehensive ordinance revisions based on changing conditions should be considered "legislative" and should not lose their traditional presumption of validity or subject the community to the new "administrative or quasi-judicial act" doctrine. Nor should an occasional instance of unwarranted "spot zoning" or an unjustified grant of a "variance" have that effect.⁴⁸ Thus, in many cases

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44. Professor Davis discusses in detail three major factors that guide courts in choosing between the "substitution of judgment" and the "rational basis" approaches: "the comparative qualifications of courts and agencies, the degree of legislative commitment of power to agencies, and the distinction between the enunciation of general principle and the application of legal concepts to unique facts." *Id.* §§ 30.09-11. See also *id.* §§ 30.01-04, 30.13, 30.14.

45. See note 35 *supra* and accompanying text.

46. See note 36 *supra*; text at note 23 *supra*.

47. 391 Mich. at 170-71, 215 N.W.2d at 193 (emphasis original).

48. The present writer has not found any empirical study that supports Justice Levin's suspicion that many variances are in fact improperly granted in Michigan; nor is the writer aware of any empirical study of "special exceptions" that would support an assumption that they are usually, or even frequently, granted on improper grounds. Moreover, it may not be fair to charge against the local governing body the derelictions of the zoning board of appeals in granting variances and/or special exceptions on improper grounds. In theory, of course, adequate standards for granting "special exceptions" will be set forth in the local zoning ordinance, and any "special exception" granted in accordance with such standards is deemed to be "entirely appropriate and not essentially incompatible with the basic uses" in the zone or zones where it is authorized by the ordinance. *Tullo v. Township of Millburn*, 54 N.J. Super. 483, 490, 149 A.2d 620, 624-25 (App. Div. 1959).

It is interesting to note that the Michigan Court of Appeals has only recently fol-

a court would have a difficult initial classification problem before it could apply the new doctrine.

It is rather ironic that the disregard by many Michigan local governing bodies of the statutory requirement that zoning regulations be "in accordance with a plan"⁴⁰ is in large part a result of the Michigan supreme court's historic bias in favor of "property rights" and against "planning" as a basis for governmental land use controls. As the present writer has previously pointed out:

Michigan courts have rarely referred to the statutory zoning plan requirement. In two cases in which the minimum lot-size regulations under attack were designed to carry out a comprehensive zoning plan based upon a full-blown "master plan" of the type envisaged in the Michigan Municipal Planning Commission Act, the lot-size requirements were held invalid primarily on the ground that it was unreasonable for the municipalities to plan so far ahead and to try to control the density of population by means of substantial lot minimums in the absence of a present direct threat to the public health, safety, and welfare. The decisions were supported by a line of cases beginning with *Gust v. Canton Township*,⁵⁰ in which the court concluded its opinion with the statement that "the test of validity is not whether the [zoning] prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals, or general welfare, but whether it does so now."⁵¹

The article quoted above expressed the hope that *Padover v. Township of Farmington*⁵² marked the final rejection of "the restrictive *Gust* formula" and the acceptance of "long-range planning" as a proper basis for zoning regulations.⁵³ Unfortunately, this hope has not been borne out by subsequent Michigan decisions. In *Biske v.*

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lowed the lead of New York in holding that, while an applicant for a "use variance" must show "unnecessary hardship," *i.e.*, that without a variance no "reasonable use" of the property is possible, so that there would be an unconstitutional deprivation of property unless the variance is granted, an applicant for a "nonuse variance" relaxing an area, height, bulk, or placement regulation need only show "practical difficulties" as a basis for the variance sought. *See, e.g.*, *Puritan-Greenfield Improvement Assn. v. Leo*, 7 Mich. App. 659, 153 N.W.2d 162 (1967). It is clear that the new "practical difficulties" standard for "nonuse variances" does not satisfy the test of "constitutional necessity" apparently assumed by Justice Levin in *Kropf* to be the only proper test. *See* 391 Mich. at 171, 215 N.W.2d at 193. But the use of the new "practical difficulties" test in Michigan can hardly be deemed an abuse of power by local zoning boards of appeals.

49. *See* note 18 *supra* and accompanying text.

50. 342 Mich. 436, 70 N.W.2d 772 (1955) (footnote renumbered).

51. Cunningham, *Zoning Law in Michigan and New Jersey: A Comparative Study*, 63 MICH. L. REV. 1171, 1187 (1965) (footnote omitted).

52. 372 Mich. 622, 132 N.W.2d 687 (1965).

53. Cunningham, *supra* note 51, at 1187.

City of Troy,⁵⁴ for example, the court recently echoed the distrust of "planning" that characterized *Gust* and many earlier Michigan cases. The tendency of the Michigan supreme court to discount "planning" as a proper basis for zoning regulations can hardly have encouraged Michigan local governing bodies to develop comprehensive land use plans and to make a serious effort to base their zoning regulations thereon. Justice Levin's new doctrine, which purports to be a response to the weakness of local planning, might actually have the effect (if not the intent) of further undermining Michigan communities' efforts at planned land use control.

Unfortunately, Justice Levin's concurring opinion in *Kropf* shows little understanding of the nature of comprehensive land use plans and their relation to zoning regulations. He appears to assume⁵⁵ that both a comprehensive land use plan and the zoning regulations based upon it can be static and immutable, so that rezoning of particular tracts would never be necessary or justified and the only changes in the zoning regulations would be those resulting from the granting of "hardship" variances⁵⁶ by the local zoning board of appeals. This assumption is unrealistic: No comprehensive land use plan should be as definite and precise as the zoning regulations based upon it, and even the best land use plan must be revised over time in response to population growth, dispersion of industrial and commercial activities, and other demographic and economic changes. A far better understanding of the nature of a comprehensive land use plan and its relation to zoning regulations is demonstrated in *Fasano*, where the Supreme Court of Oregon said:

The comprehensive plan might provide that its goal for residential development is to assure that residential areas are healthful, pleasant and safe places in which to live . . . [and list policies that] are to be pursued in achieving that goal . . . Under such a hypothetical plan, property originally zoned for single family dwellings might later be rezoned for duplexes, for garden apartments, or for high-rise apartment buildings. Each of these changes could be shown to be consistent with the plan. Although in addition we would require a showing that the county governing body found a bona fide need for a zone change in order to accommodate new high-density development which at least balanced the disruption shown by the challengers, that requirement would be met in most instances by a record which disclosed that the governing body had considered the facts relevant to this question and exercised its judgment in good

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54. 381 Mich. 611, 166 N.W.2d 453 (1969). *But see* *Sabo v. Township of Wheatfield*, 394 Mich. —, 232 N.W.2d 584 (1975) (Williams, J., dissenting).

55. *See* text at note 47 *supra*.

56. *See* note 48 *supra*.

faith. However, these changes, while all could be shown to be consistent with the plan, could be expected to have differing impacts on the surrounding area, depending on the nature of that area. As the potential impact on the area in question increases, so will the necessity to show a justification.⁵⁷

The *Fasano* approach suggests that the Michigan courts should continue to apply a presumption that a local governing body's action in either adopting or rejecting a proposed rezoning is valid, so long as the action purports to be based upon the community's comprehensive land use plan. Under *Fasano*, where such a plan has been adopted, a third party challenging the validity of a zoning amendment would have the burden of showing that the rezoning is not consistent with the plan, that the plan itself is not "reasonable," or that the disruption of existing land uses outweighs any asserted need for a zone change; a landowner challenging the denial of a proposed rezoning would have the burden of showing that the rezoning would be consistent with the plan or that the plan itself is unreasonable, and, in either case, that the need for the proposed zone change is at least great enough to balance the disruption of existing land uses that would result from the change.⁵⁸

One further aspect of Justice Levin's concurring opinion in *Kropf* should be mentioned, as he touched upon another area of Michigan zoning law that needs to be clarified to permit effective coordination of land use planning and control. By stating that "[a] property owner seeking a change" in zoning "may properly be required to show what he intends to build, to present site, floor and exterior design plans,"⁵⁹ Justice Levin indicated that he believes approval of a requested rezoning can be conditioned upon the applicant's adherence to these plans if they are presented to the local governing body at the time rezoning is sought. Unfortunately, however, while "contract" or "conditional" rezoning procedures have been judicially approved in a number of states,⁶⁰ no Michigan statute

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57. 264 Ore. at 586 n.3, 507 P.2d at 29 n.3.

58. But note that this standard is nevertheless stricter than the constitutional "no reasonable use" standard traditionally applied on review of "legislative" zoning. See notes 33 & 48 *supra*. In both *Fasano* and *Fleming* the "administrative" or "quasi-judicial" characterization was employed to allow the court to invalidate zoning amendments. The effect of the new standard might be even more striking on review of a denial of rezoning, which is virtually nonreviewable under the traditional standard.

59. 391 Mich. at 172-73, 215 N.W.2d at 194.

60. See, e.g., *Sylvania Electric Products Inc. v. City of Newton*, 344 Mass. 428, 183 N.E.2d 118 (1962); *Church v. Town of Islip*, 8 N.Y.2d 254, 259, 168 N.E.2d 680, 683, 203 N.Y.S.2d 866, 869 (1960); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d

or case law yet authorizes local governing bodies to condition zoning amendments upon compliance with such plans. Neither is it clear whether a landowner can be held to his representations, either by means of a covenant between the landowner and the local governing body or by an express condition embodied in the zoning amendment.⁶¹ Therefore, after obtaining a requested rezoning, a landowner could arguably scrap the plans he had presented and build in bare compliance with the zoning regulations applicable under the new classification. As an alternative to "contract" or "conditional" rezoning procedures, a local governing body might withhold building permits or certificates of occupancy for construction not in accordance with the plans submitted at the time of the rezoning request, but the validity of this practice is likewise unsettled in Michigan.

Notwithstanding the objections noted above, Justice Levin's "administrative or quasi-judicial act" doctrine as announced in *Kropf* may well become the law in Michigan. Should this be the case several changes in local zoning procedure will be necessary to increase the likelihood that the grant or denial of a requested zoning amendment will be upheld as being in accord with a comprehensive plan. For instance, the zoning body must ensure that there is a procedurally valid plan. The Michigan Municipal Planning Act,⁶² like most planning enabling legislation,⁶³ provides for formal adoption of the land use plan by the local planning commission. If the community has a planning commission, it would appear that the comprehensive land use plan must be formally adopted by the planning commission (no matter who was responsible for the plan's initial formulation) before it will be entitled to judicial deference. In *Biske v. City of Troy*,⁶⁴ the Michigan supreme court refused to give substantial weight to the city's "master plan" on the issue of the reasonableness of the city's zoning ordinance as it affected a particular tract of land, because the

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533 (1970). *Contra*, *Harxnett v. Austin*, 93 S.2d 86 (Fla. 1956); *Carole Highlands Citizens Assn., Inc. v. Board of County Commrs.*, 222 Md. 44, 158 A.2d 663 (1960). For general discussions of "contract" and "conditional" rezoning, see Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).

61. "At least where no fraud is shown, a property owner may use his land for any purpose permitted by its zoning, regardless of the fact that his predecessor in title had represented to municipal officials, when the zoning was enacted, that the property would be used for another purpose." C. CRAWFORD, MICHIGAN ZONING AND PLANNING § 12.10[1], at 12-21 (1967).

62. MICH. COMP. LAWS ANN. § 125.38 (1967).

63. See STANDARD CITY PLANNING ENABLING ACT § 6 (U.S. Dept. of Commerce 1928).

64. 381 Mich. 611, 166 N.W.2d 453 (1969).

plan had not been "adopted pursuant to the procedure required by section 8 of the [Municipal Planning Act]." ⁶⁵ On the policy issue, the court stated, "If a 'master plan' is going to be adopted by a community, such plan should at least be adopted formally by the community, and the community be given an opportunity to pass on it in accordance with the statute." ⁶⁶ The statute and case law leave open the question whether any community can have a comprehensive land use plan entitled to judicial deference in zoning litigation if the community does not have a planning commission. It is at least arguable that, in such a community, a comprehensive plan formally adopted by resolution of the local governing body should be entitled to judicial deference even though the plan was initially formulated either by the municipal planning staff or by a planning consultant. ⁶⁷

If Justice Levin's position is adopted, changes must also be made in the procedure for handling applications for rezoning at the local government level. Under his *Kropf* doctrine, "[t]he determination granting or denying alike is subject to judicial review on the record in accordance with the standard prescribed in the constitution." ⁶⁸ Since this would require that zoning amendments be granted upon the request of a property owner who can sustain his burden of proof on the issue of reasonableness, in communities not currently provid-

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65. 381 Mich. at 616, 166 N.W.2d at 456.

66. 381 Mich. at 615, 166 N.W.2d at 456. Presumably the court had in mind, in speaking of formal adoption "by the community," the provision in section 8 of the Municipal Planning Commission Act authorizing the planning commission to "adopt the [master] plan as a whole by a single resolution or . . . by successive resolutions adopt successive parts of the plan, said parts corresponding with major geographical sections or divisions of the municipality or with functional subdivisions of the subject matter of the plan . . . ." MICH. COMP. LAWS ANN. § 125.38 (1967). The court's statement that the community should have "an opportunity to pass on [the plan] in accordance with the statute" presumably refers to the requirement that "the commission shall hold at least 1 public hearing thereon," after notice, before the adoption of the plan or any part thereof. MICH. COMP. LAWS ANN. § 125.38 (1967).

67. Formal adoption by resolution of the local governing body should meet the requirement of community participation as stated in *Bishe*, see 381 Mich. at 615, 166 N.W.2d at 456, if adoption is preceded by at least one public hearing. In most jurisdictions the courts have concluded that the "comprehensive" zoning plan need not be embodied in a separate form outside the zoning ordinance itself. See, e.g., *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957) ("A plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by the statute"); *Joblon v. Town Planning and Zoning Commn.*, 157 Conn. 434, 254 A.2d 914 (1969) ("The comprehensive plan is found in the zoning regulations themselves and the zoning map"). For the classic discussion of the "comprehensive plan" requirement, see Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955).

68. 391 Mich. at 171, 215 N.W.2d at 193. The review standard is discussed in the text at notes 36-46 *supra*.

ing for initiation of rezoning proposals by landowner petition, the zoning ordinance would have to be revised to authorize such a procedure. In such communities, as well as those where the local zoning ordinance now provides for initiation of rezoning proposals by landowner petition,⁶⁹ adoption of Justice Levin's views would also require an administrative hearing on each landowner's petition for rezoning (if not already required by the local zoning ordinance)⁷⁰ and the preservation of a record of such a hearing, including findings of fact in every case.⁷¹

Other local procedural changes can be suggested in order to ensure that the grant or denial of zoning amendments will be accorded judicial deference, should Justice Levin's "administrative or quasi-judicial act" doctrine be adopted by a majority of the Michigan supreme court. One Michigan municipal attorney recently suggested that communities "update" their zoning ordinances every year or two to coincide with changes in their land use development plan, rather than acting on individual rezoning requests.⁷² He pointed out that "[t]here are six uses for every property which are not unreasonable" in suburban areas, and since reasonableness of the proposed use is all that must be shown to justify a zoning change under Justice Levin's approach, Michigan municipalities that persist in a case-by-case approach to the rezoning process may find that the initiative in zoning matters has been taken from them and placed in the hands of property owners and developers.⁷³

Action at the municipal level alone cannot solve the problems that currently beset Michigan zoning law, however. The Michigan legislature should thoroughly revise the state zoning enabling acts. The City or Village Zoning Act⁷⁴ and the current Township Rural

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69. See, e.g., ANN ARBOR CITY CODE, ch. 55 (Zoning), §§ 5.107-108 (1974). "Probably most petitions for amendment are filed by individual property owners who desire rezoning of their particular property. The enabling act [however] seldom refers to the right of the property owners to initiate such rezoning." 1 A. RATHKOFF, *supra* note 1, at 27-24. The Michigan zoning acts do not contain provisions authorizing property owners to initiate zoning amendments. Neither did the Standard State Zoning Enabling Act.

70. See, e.g., ANN ARBOR CITY CODE, ch. 55 (Zoning), § 5.107(5)(a) (1974), requiring a public hearing in all cases "before adoption of any proposed amendment," whether the amendment is initiated by the City Council, by the Planning Commission, or by petition.

71. See text at note 68 *supra*.

72. Joseph T. Brennan, attorney for West Bloomfield Township and Green Oak Township, quoted in Brighton Argus, Oct. 9, 1974, at 1, cols. 4-8; The Observer and Eccentric (W. Bloomfield, Mich.), Oct. 14, 1974, at 1, cols. 3-6.

73. See Brighton Argus, Oct. 9, 1974, at 1, cols. 4-8.

74. MICH. COMP. LAWS ANN. §§ 125.581-91 (1967), as amended, (Supp. 1974).

Zoning Act⁷⁵ have not been substantially amended since their enactment in 1921 and 1943, respectively. An extensive discussion of the needed revisions is beyond the scope of this article, but such revisions might profitably draw upon the American Law Institute's proposed Model Land Development Code.⁷⁶

In general, the Model Code would allow *all* local governments, without previously adopting a land use plan, to adopt "development ordinances," "requiring that development in their jurisdictions be undertaken in accordance with the terms of the ordinance and that it be undertaken only after grant of a development permit."⁷⁷ But the Model Code also creates an incentive for planning by granting to local governments that adopt Land Development Plans additional powers not available to other local governments.⁷⁸ Thus the Land

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75. MICH. COMP. LAWS ANN. §§ 125.271-.301 (1967), *as amended*, (Supp. 1974). The Township Zoning Enabling Act of 1937 was repealed when the current Township Rural Zoning Act was enacted in 1943. The current County Rural Zoning Act, MICH. COMP. LAWS ANN. §§ 125.201-.32 (1967), is not heavily used. Only 27 of the 83 Michigan counties currently have county zoning ordinances in effect, and none of these is in the populous southeast area of the state. Telephone interview with Lawrence Folks, Office of Land Use, Michigan Department of Natural Resources, July 17, 1975. Research disclosed only two reported cases dealing with county zoning in Michigan. *See* County of Barry v. Edmonds, 25 Mich. App. 589, 181 N.W.2d 599 (1970); Nelson v. Goddard, 43 Mich. App. 615, 204 N.W.2d 739 (1972) (Cheboygan County Interim [Short-Term] Zoning Ordinance). It should be noted that county zoning ordinances do not apply to incorporated cities or villages, *see* MICH. COMP. LAWS ANN. § 125.201 (1967), or to any township that has adopted a zoning ordinance under the Township Rural Zoning Act. *See* MICH. COMP. LAWS ANN. § 125.297 (1967).

76. ALI MODEL LAND DEVELOPMENT CODE (Proposed Official Draft No. 1, 1974). The comments to the Code describe its relevant features as follows:

1. It requires that zoning and subdivision regulations be combined in a single "development ordinance" (§ 2-101(1));

2. It requires that the development ordinance be administered by a single "Land Development Agency" (§ 2-102) but grants the local government great flexibility in designating who shall act as the Land Development Agency (§ 2-301(1)) and grants the Agency great flexibility in delegating functions to other officers, boards or committees (§ 2-301(2));

3. It establishes in some detail the administrative procedures to be used by the Land Development Agency (§§ 2-303-06);

4. It attempts to discourage the local legislative body from becoming involved in individual development proposals (§ 2-312).

ALI MODEL LAND DEVELOPMENT CODE, art. 2, Commentary, at 34 (Proposed Official Draft No. 1, 1974).

The Model Code also provides for state land development regulation, including appeals in certain cases from orders of any local Land Development Agency to a State Land Adjudicatory Board. *See* ALI MODEL LAND DEVELOPMENT CODE, art. 7 (Proposed Official Draft No. 1, 1974).

77. ALI MODEL LAND DEVELOPMENT CODE § 2-101 (Proposed Official Draft No. 1, 1974).

78. *See* ALI MODEL LAND DEVELOPMENT CODE § 2-210(1) ("A development ordinance may authorize the Land Development Agency to grant special development permission for a planned unit development by specifying the types or characteristics of development that may be permitted, which may differ from one part of the community to another"); § 2-211(1) ("A development ordinance may authorize the Land Devel-

Development Agency of a local government that has adopted a Land Development Plan may handle certain "special development" proposals through a permit procedure operating under preestablished guidelines conforming to the Land Development Plan.⁷⁹ The Land Development Agency may be either the "local governing body or any committee, commission, board or officer of the local government."⁸⁰

A uniform system of judicial review of local government land development decisions would also be established by the Model Code,⁸¹ which provides, *inter alia*, as follows: "In a proceeding concerning the relationship of an order, rule or ordinance, to the public health, safety or welfare, the court shall give due weight to the fact that the order, rule or ordinance was adopted by a local government having a Land Development Plan and to the consistency of the challenged action with the applicable state or local Land Development Plan."⁸² Enactment of this provision of the Model Code would appear to assure that where a Land Development Plan has been adopted, the local government's land use control decisions consistent with the Plan will be accorded a judicial presumption of validity.

Justice Levin's review standard would frequently deprive local zoning decisions of this presumption of validity. While this may be warranted on policy grounds where localities in fact engage in extensive "spot zoning," Justice Levin's proposed standard cuts too wide a swath. It might invalidate local zoning decisions in many cases in which the local bodies were responsibly reacting to changed conditions. The Michigan courts should instead recognize that local land use plans and zoning ordinances must be responsive to change, and continue to apply the legislative presumption of validity where a land use plan has been adopted. Judicial failure to adhere to this established doctrine would raise serious questions concerning sepa-

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opment Agency to designate by rule specially planned areas in which development will be permitted only in accordance with a plan of development for the entire area"); § 2-212 ("The development ordinance of a planning government may authorize the Land Development Agency to grant special permission for development which is consistent with the local government's Land Development Plan, but which is not permitted as a general development . . .") (Proposed Official Draft No. 1, 1974).

79. ALI MODEL LAND DEVELOPMENT CODE §§ 2-210 to -212 (Proposed Official Draft No. 1, 1974).

80. ALI MODEL LAND DEVELOPMENT CODE § 2-301 (Proposed Official Draft No. 1, 1974).

81. See ALI MODEL LAND DEVELOPMENT CODE art. 9 (Proposed Official Draft No. 1, 1974) (Appendix A).

82. ALI MODEL LAND DEVELOPMENT CODE § 9-109(3) (Proposed Official Draft No. 1, 1974) (Appendix A).

ration of powers, require extensive local procedural changes, and undermine local efforts to control land use.⁸³ The ultimate solution, however, must come through revision of state statutes governing both the exercise and judicial review of local land use control powers.

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83. See Justice Coleman's view, supporting the text, at note 16 *supra*.