Michigan Law Review

Volume 63 | Issue 7

1965

Zoning Law in Michigan and New Jersey: A Comparative Study

Roger A. Cunningham
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Land Use Law Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

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

Available at: <https://repository.law.umich.edu/mlr/vol63/iss7/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ZONING LAW IN MICHIGAN AND NEW JERSEY: A COMPARATIVE STUDY

Roger A. Cunningham*

I. INTRODUCTION

RECENT decades have been marked by a formidable expansion of land-use controls based upon the police power and upon other powers of state and local governments.¹ The most important form of land-use control under the police power is undoubtedly zoning, which is defined as follows by one of its leading early exponents:

"Zoning is the regulation by districts of building development and uses of property. A typical zoning ordinance divides the territory covered by the ordinance, usually the whole territory of a single municipality, into districts, in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. By use regulation is meant a statement of the permitted or prohibited uses of property and buildings, as, for instance, residential, business, and industrial. Use districts are often further sub-classified, as, for instance, residential districts into those restricted to single-family houses and those in which multiple-family or apartment structures are permitted; business districts into central and local and those in which light manufacturing is permitted or excluded; industrial districts for light manufacturing, for heavy but non-nuisance types of industry, and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Area regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts and the extent and location of open spaces, such as building setbacks, side yards, rear yards. The typical comprehensive ordinance includes all these types of regulations."²

The concept of private property in land as a "bundle of sticks" comprising legal rights, powers, privileges, and immunities is now a familiar one.³ It is increasingly apparent that, by means of zoning, local governments have abstracted many of the "sticks" which formerly made up the "bundle" labelled "private property" and that these withdrawn "sticks" are now in public rather than private

* Professor of Law, The University of Michigan.—Ed.

1. See Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367 (1965).

2. BETTMAN, *CITY AND REGIONAL PLANNING PAPERS* 156, 158 (1946), reprinting Bettman's amicus curiae brief in *Euclid v. Ambler Realty Co.*, 272 U.S. 265 (1926).

3. See RESTATEMENT, PROPERTY, ch. 1, Introductory Note, §§ 1-5 (1936).

hands. This process of abstraction may be viewed from various perspectives. As Professor Cribbet has recently pointed out, "The lawyer tends to see zoning as a restriction on the private property of his client, conflicting frequently with the views of property he learned in law school; the planner tends to see zoning as one weapon in the battle for a better society and the private landowner as a cantankerous individual who is always objecting about his rights and cares little for his duties."⁴

Since the United States Supreme Court placed its imprimatur on the principle of zoning in *Village of Euclid v. Ambler Realty Co.*,⁵ development of the law of zoning has been almost entirely the responsibility of the several states. Some state courts, including those of New Jersey, have gone very far in recognizing the broad sweep of the "general welfare" component of the police power and in according to local governments great latitude in using zoning to implement comprehensive land-use plans designed to protect and promote the general welfare. Other state courts, including those of Michigan, have been very slow to extend the "general welfare" concept beyond protection of public health, safety, and morals and have kept a tight rein upon local governmental exercise of the zoning power. Courts which fall into this group tend to assume the role of "super zoning commissions" as they exercise their power of judicial review.

It is one thesis of this article that the "lawyer's view" has generally prevailed in Michigan and that the "planner's view" has generally prevailed in New Jersey. Since the zoning law of these two states is thus fairly representative of the opposing judicial attitudes set forth in the preceding paragraph, they are especially suitable for comparative study. This study begins with a look at the constitutional bases and statutory provisions for zoning. It then proceeds to examine judicial attitudes toward zoning determinations in general and continues by focusing on specific current zoning problems. The conclusions to be drawn from these inquiries may have utility not only for Michigan and New Jersey, but also for other states concerned with problems of land use control.

A. *The Constitutional Basis of Zoning*

Village of Euclid v. Ambler Realty Co.,⁶ decided in 1926, established the general validity of comprehensive zoning regulation under

4. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 260 (1965).

5. 272 U.S. 365 (1926).

6. *Ibid.*

the fourteenth amendment. The Court held that the provisions of the ordinance assailed by the plaintiff, which totally excluded certain uses from residential districts, were justifiable under the police power. The opinion relied mainly on the health and safety components of the police power and the Court was clearly impressed by the analogy to nuisance law, concluding that in a one- or two-family residence district uses which might even be desirable in a different setting come close to being nuisances.

With federal constitutional questions thus disposed of, Michigan and New Jersey attempted to eliminate any problems that might arise with their own constitutions. In Michigan this was accomplished by a 1928 state supreme court decision⁷ which held that the 1921 Zoning Act⁸ was constitutional and that home rule cities were subject to the act.⁹ In New Jersey, since 1927,¹⁰ the state constitution itself has provided that the legislature may enact general laws enabling municipalities to adopt zoning ordinances.¹¹ The constitutions of both states direct that all constitutional and statutory provisions concerning local governments shall be liberally construed.¹²

B. *The Statutory Basis of Zoning in Michigan and New Jersey*

The current New Jersey Zoning Act,¹³ which applies to all municipalities (including townships), is essentially the original 1928 Zoning Act. New Jersey has no statutory provision for zoning at the county level. In Michigan, the current City and Village Zoning Act¹⁴ has undergone no important changes since its adoption in 1921, but the zoning power was extended to counties in 1929¹⁵ and to unin-

7. *Dawley v. Ingham* Circuit Judge, 242 Mich. 247, 218 N.W. 766 (1928).

8. Mich. Acts 1921, No. 107.

9. The latter holding was reaffirmed in *Krajenke Buick Sales v. Hamtramck City Eng'r*, 322 Mich. 250, 33 N.W.2d 781 (1948).

10. N.J. CONST. art. IV, § 6, ¶ 5 (1927).

11. "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, *and the nature and extent of the uses of land*, and the exercise of such authority shall be deemed to be within the police power of the State." N.J. CONST. art. IV, § 6, ¶ 2. The italicized phrase was added in 1947; otherwise, the language is the same as that of the 1927 amendment to the constitution of 1844. The addition of the italicized phrase made it clear that open land uses, as well as buildings and structures and their uses, could be regulated by zoning. In *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 94 A.2d 332 (1953), open land use regulations adopted prior to 1947 were held valid from the date of adoption. Cf. *Lappas v. Board of Adjustment*, 23 N.J. Super. 553, 93 A.2d 406 (App. Div. 1952).

12. MICH. CONST. art. VII, § 34; N.J. CONST. art. IV, § 7, ¶ 11.

13. N.J. STAT. ANN. §§ 40:55-30 through -51 (1940).

14. MICH. COMP. LAWS §§ 125.581-.590 (1948).

15. Mich. Acts 1929, No. 79, formerly Mich. Stat. Ann. §§ 5.2951-2961. This enabling

corporated townships in 1937.¹⁶ Conflict between county and township zoning is precluded by a provision that no township having its own zoning ordinance shall be subject to a prior or subsequent county zoning ordinance.¹⁷

The New Jersey Zoning Act authorizes any municipality, by ordinance, to "limit and restrict to specified districts and . . . regulate therein buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land," including regulation and restriction of "the height, number of stories, and sizes of buildings and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes."¹⁸ The basic grant of zoning power to Michigan cities and villages is substantially the same, although it is embodied in three separate sections¹⁹ authorizing, respectively, regulation of "the location of trades and industries and . . . of buildings designed for specified uses," of "the height and bulk of buildings . . . and . . . the area of yards, courts, and other open spaces," and of "the maximum number of families which may be housed in dwellings hereafter erected or altered." Although it may be inferred that Michigan cities and villages are authorized to adopt three separate zoning ordinances, the usual practice has been to enact a single ordinance containing all the regulations.

Both the Michigan and New Jersey enabling acts empower the local legislative body to divide the municipality into "districts of such number, shape, and area as may be deemed best suited to carry out the purposes" envisaged by the enabling acts.²⁰ The New

act was repealed by Mich. Acts 1943, No. 183, the current County Rural Zoning Enabling Act, MICH. COMP. LAWS §§ 125.201-232 (1948).

16. Mich. Acts 1937, No. 302, formerly Mich. Stat. Ann. §§ 5.2962(1)-(12). This enabling act was repealed by Mich. Acts 1943, No. 184, the current Township Rural Zoning Act, MICH. COMP. LAWS §§ 125.271-301 (1948).

17. MICH. COMP. LAWS § 125.297 (Supp. 1961).

18. N.J. REV. STAT. § 40:55-30 (Supp. 1964).

19. MICH. COMP. LAWS §§ 125.581-583 (1948).

20. *Ibid.*; N.J. STAT. ANN. § 40:55-31 (Supp. 1964). Although this basic statutory grant of power seems to envisage the division of a municipality into more than one "district," it seems unlikely that the New Jersey courts will interpret the statutory grant of power so literally as to preclude, where reasonable, the inclusion of an entire municipality in a single zoning district. See *Duffcon Concrete Prods. Co. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949), sustaining a zoning ordinance which substantially limited an entire municipality to residential use. In Michigan, however, it was recently held that the City and Village Zoning Act "does not authorize one-use zoning of an entire city or village." Although there need not be "any great or stated

Jersey Zoning Act broadly declares that all regulations "shall be uniform for each class or kind of buildings or other structures, or uses of land throughout each district, but the regulations in one district may differ from those in other districts."²¹ The Michigan City and Village Zoning Act contains similar provisions with respect to regulations limiting the height and bulk of buildings, determining the area of yards, courts, and other open spaces, and limiting the maximum number of families to be housed in dwellings;²² but there is no such provision with respect to regulations restricting the location of trades and industries and buildings designed for specified uses.²³

In New Jersey, all zoning regulations must "be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population."²⁴ Such regulations must also "be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."²⁵ The Michigan City and Village Zoning Act includes similar provisions,²⁶ although the "plan" is not expressly required to be "comprehensive."

The Michigan Township Rural Zoning Act²⁷ and County Rural Zoning Act²⁸ grant substantially the same powers to township boards and county boards of supervisors, respectively, along with some powers which seem especially appropriate for regulation of land use in rural areas.²⁹

number of use districts," there must be more than one. *Gundersen v. Village of Bingham Farms*, 372 Mich. 352, 126 N.W.2d 715 (1964).

21. N.J. STAT. ANN. § 40:55-31 (Supp. 1964).

22. MICH. COMP. LAWS §§ 125.582-583 (1948).

23. See MICH. COMP. LAWS § 125.581 (1948). It might also be noted that § 3 of the Home Rule Act, MICH. COMP. LAWS § 117.4(i)(3) (1948), contains the following provision: "[Each city may in its charter provide:] . . . For the establishment of districts or zones within which the use of land and structures, the height, the area, the size and location of buildings and required open spaces for light and ventilation of such buildings and the density of population may be regulated by ordinance. . . . Such regulations in 1 or more districts may differ from those in other districts. . . ."

24. N.J. STAT. ANN. § 40:55-32 (Supp. 1964).

25. *Ibid.*

26. MICH. COMP. LAWS §§ 125.581-583 (1948).

27. MICH. COMP. LAWS § 125.271 (1948).

28. MICH. COMP. LAWS § 125.201 (Supp. 1961).

29. *E.g.*, to create districts within which "the use of land for agriculture, forestry,

II. JUDICIAL LIMITATIONS UPON THE ZONING POWER IN MICHIGAN AND NEW JERSEY

A. *The Police Power and the Test of Reasonableness*

The plaintiff's attack in *Euclid*³⁰ was based on both the due process and equal protection clauses of the fourteenth amendment, but the Court did not explicitly refer to either in sustaining the principle of zoning. Instead, it simply said that, since the *Euclid* zoning ordinance as a whole was not clearly arbitrary or unreasonable or outside the police power and since the validity of the zoning classification was fairly debatable, the legislative judgment must be accepted by the courts. But specific warning was given that, upon later review of particular zoning provisions as concretely applied, such provisions might be held invalid as clearly arbitrary or unreasonable.

A year after *Euclid* the Supreme Court sustained a municipal setback ordinance in terms which clearly indicated that area restrictions in a zoning ordinance would be upheld if reasonable.³¹ And in *Zahn v. Board of Public Works*,³² the Court reiterated the rule that a zoning classification will not be held to violate the fourteenth amendment if the reasonableness of the zoning classification is "fairly debatable." But in *Nectow v. City of Cambridge*,³³ decided the next year, a zoning regulation which placed a small part of plaintiff's land in a residential district was invalidated. The Court relied almost wholly upon the findings of the trial master that (1) no practical use could be made of the land in question because there would not be adequate return on any investment for development of the land, and (2) that the residential zoning would not promote the health, safety, convenience, and general welfare of the city's inhabitants. It is not clear whether the court would have held the zoning invalid on the basis of either finding alone.

The Supreme Court thus seemed to have embarked on the course foreshadowed in *Euclid*: close supervision of the municipal zoning power in specific applications. In fact, however, after *Nectow* the Court retired from the zoning field. Since 1928 it has consis-

recreation, residence, industry, trade, soil conservation, water supply conservation and additional uses of land may be encouraged, regulated or prohibited." See notes 27-28 *supra*.

30. 272 U.S. 365 (1926).

31. *Gorrie v. Fox*, 274 U.S. 603 (1927).

32. 274 U.S. 325 (1927).

33. See Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955).

tently refused to undertake detailed review of zoning cases—most recently in dismissing the appeal in *Consolidated Rock Products Co. v. Los Angeles*³⁴ for lack of a substantial federal question, although the latter case squarely presented the constitutional issue whether a zoning ordinance which has “altogether destroyed the worth of valuable land by prohibiting the only economic use of which it is capable effects a taking of real property without compensation.”³⁵ While the result was technically “on the merits,” the real significance of *Consolidated Rock Products* is far from clear.³⁶ At the very least, it would seem that the per curiam disposition casts doubt on the continued vitality of the “extent of the economic harm” test laid down by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*³⁷ to determine when regulation of the use of property amounts to an unconstitutional deprivation—a test which the Supreme Court had purported to reaffirm only a short time before in *Goldblatt v. Town of Hempstead*.³⁸

Without any continuing supervision by the United States Supreme Court, state courts have been forced to develop their own rules for determining the validity of zoning regulations. In general, they have attempted to apply the test suggested in *Euclid*: Is the regulation clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals, or general welfare? But state court opinions—including those of Michigan and New Jersey—frequently fail to indicate clearly whether the court is applying a constitutional or a statutory test or, if the test is constitutional, whether the decision is based on the state or federal constitution. In the case of New Jersey, however, it is clear that ordinarily only the fourteenth amendment to the federal constitution is involved when a zoning case is decided on constitutional grounds, since the

34. 57 Cal. 2d 515, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962), noted in 50 CALIF. L. REV. 896 (1962).

35. Brief for Appellant, Jurisdictional Statement, p. 5.

36. See discussion in Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 43-44 (1964).

37. 260 U.S. 393 (1922).

38. 369 U.S. 590 (1962). The challenged ordinance prohibited mining below the water table and imposed an affirmative duty to refill any excavation presently below that level. Appellants owned a tract of land on which they had mined sand and gravel for more than twenty years. It was apparently conceded that the regulation completely destroyed the mining utility of the land, but the record did not show what value the land would have for other uses. Since the court found the record barren of any evidence of economic detriment as a result of the regulation, it was sustained; the court's extended discussion of the “taking” issue technically constituted mere dicta. See discussion of *Goldblatt* in Sax, *supra* note 36, at 42-43, concluding that the opinion “leaves some doubt whether the Court is following, or repudiating, the Holmesian doctrine.”

New Jersey Constitution contains neither a due process nor an equal protection clause. The same is true with respect to Michigan zoning cases (at least prior to 1964) since the due process clause in the Michigan constitutions of 1908 and 1963 is clearly concerned only with procedural due process³⁹ and an equal protection clause was included for the first time in the constitution of 1963.⁴⁰

A zoning regulation may, of course, be invalid simply because it is *ultra vires*;⁴¹ it may at the same time be invalid on constitutional grounds. Moreover, it is widely held that any unreasonable exercise of police power delegated to a municipality by enabling legislation is *ultra vires*.⁴² Thus it is easy to see why courts so frequently fail to indicate clearly whether a zoning regulation is invalid on statutory or on constitutional grounds, and why the Michigan court so often repeats the cliché that zoning must be reasonable and that "reasonableness becomes the test of its legality."⁴³ But what does "reasonable" mean as applied to zoning regulations? It is obvious that it includes several closely related, but distinguishable, tests of validity.⁴⁴

(1) Is the regulation substantially related to legitimate police

39. Both MICH. CONST. art. I, § 17, and MICH. CONST. art. II, § 16 (1908) contain the following provision: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

40. MICH. CONST. art. I, § 2 provides as follows: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. . . ."

41. See, e.g., *Gundersen v. Village of Bingham Farms*, 372 Mich. 532, 126 N.W.2d 715 (1964); *Rockhill v. Chesterfield Township*, 23 N.J. 117, 128 A.2d 473 (1956). It should be noted that forms of land use regulation not authorized by the New Jersey Zoning Act may nevertheless be valid under N.J. STAT. ANN. § 40:48-2 (1940): "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." See *Morris County Land Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 546 n.1, 193 A.2d 232, 236 n.1 (1963); *L. P. Marron & Co. v. Mahwah Township*, 89 N.J. 74, 187 A.2d 593 (1963); *Fred v. Old Tappan Borough*, 10 N.J. 515, 92 A.2d 473 (1952); *Wulster v. Borough of Upper Saddle River*, 41 N.J. Super. 199, 124 A.2d 323 (App. Div. 1956), *certification denied*, 22 N.J. 268 (1956).

42. See STASON & KAUPER, *CASES ON MUNICIPAL CORPORATIONS* 123-24 n.4 (1959).

43. See, e.g., *McHugh v. City of Dearborn*, 348 Mich. 311, 315, 83 N.W.2d 222, 224 (1957); *McGiverin v. City of Huntington Woods*, 343 Mich. 413, 417, 72 N.W.2d 105, 107 (1955); *Redford Moving & Storage Co. v. City of Detroit*, 336 Mich. 702, 707, 58 N.W.2d 812, 813-14 (1953).

44. Compare the analysis and discussion in Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1124-30 (1964).

power objectives, *i.e.*, "public health, safety, morals, or general welfare"? If not, the regulation is both *ultra vires*⁴⁵ and a violation of due process, even though it may impose only slight restrictions on land use.⁴⁶ When a zoning regulation is held invalid for lack of a substantial relation to legitimate police power objectives, however, it usually is found to be confiscatory or discriminatory as well.

(2) Is the regulation confiscatory? In New Jersey, a zoning regulation will not be held confiscatory unless it practically destroys the value of the land in question by preventing any economic use of it;⁴⁷ but, if the regulation is confiscatory in this sense, it appears to be irrelevant that it also bears a substantial relation to legitimate police power objectives.⁴⁸ In many of the Michigan cases, the court uses the term "confiscatory" in the same strict sense.⁴⁹ In other cases, however, the court has labelled zoning regulations as "confiscatory" although it is clear that the land in question retained substantial value.⁵⁰ In these cases, the Michigan court apparently uses the term "confiscatory" to mean that it believes the public benefit to be derived from enforcement of the zoning regulation is outweighed by the economic loss to the landowner,⁵¹ although the court has consistently stated that "depreciation in value is not a definite yardstick by which to measure the reasonableness of a zoning ordinance."⁵² Moreover, the Michigan court has frequently in-

45. Mich. COMP. LAWS §§ 125.581-583 (1948); N.J. STAT. ANN. § 40:55-32 (Supp. 1964).

46. See, *e.g.*, *Comer v. City of Dearborn*, 342 Mich. 471, 70 N.W.2d 813 (1955); *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 118 A.2d 824 (1955).

47. *E.g.*, *Morris County Land Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963); *Glen Rock Realty Co. v. Board of Adjustment*, 80 N.J. Super. 79, 192 A.2d 865 (App. Div. 1963). See also *Ascione v. Union City*, 77 N.J. Super. 542, 187 A.2d 193 (App. Div. 1962).

48. The classic case is *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938). But *Consolidated Rock Prods. Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962), indicates that the "confiscation" issue will not be reviewed by the United States Supreme Court when the regulation arguably bears a substantial relation to police power objectives. For general discussion, see 1 RATHKOPF, ZONING AND PLANNING ch. 6 (3d ed. 1956).

49. *E.g.*, *Alderton v. City of Saginaw*, 367 Mich. 28, 116 N.W.2d 53 (1962); *Burrell v. Midland*, 365 Mich. 136, 111 N.W.2d 884 (1961); *Schaefer v. East Detroit*, 360 Mich. 536, 104 N.W.2d 390 (1960); *DeQuindre Dev. Co. v. Warren Township*, 359 Mich. 634, 103 N.W.2d 600 (1960).

50. *E.g.*, *Smith v. Wood Creek Farms*, 371 Mich. 127, 123 N.W.2d 210 (1963); *Lincolnhol v. Village of Shoreham*, 368 Mich. 225, 118 N.W.2d 289 (1962); *Wenner v. City of Southfield*, 365 Mich. 563, 113 N.W.2d 918 (1962).

51. This is articulated in *Pere Marquette R.R. v. Muskegon Township*, 298 Mich. 31, 36, 298 N.W. 393, 397 (1941). But see *Consolidated Rock Prods. Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

52. This statement or its equivalent will be found in *McGiverin v. City of Huntington Woods*, 343 Mich. 413, 72 N.W.2d 105 (1955); *Long v. City of Highland Park*, 329 Mich. 146, 45 N.W.2d 10 (1949).

validated zoning regulations in cases where, in New Jersey, the proper remedy would have been a zoning variance.⁵³

(3) Is the regulation discriminatory—*i.e.*, does it arbitrarily impose greater restrictions upon some landowners than upon others similarly situated? If it does, there is a denial of equal protection,⁵⁴ and there may also be a violation of the statutory requirement that zoning regulations “shall be made in accordance with a [comprehensive] plan.”⁵⁵ In New Jersey, complaints based on alleged zoning discrimination have usually asserted that nearby land has been “spot zoned” for uses less restrictive—and more profitable—than the uses permitted to the plaintiffs.⁵⁶ In Michigan, on the other hand, zoning has rarely been attacked on the ground that it constitutes preferential “spot zoning.”⁵⁷ But many of the cases in which the plaintiff alleges the zoning is “confiscatory” with respect to his land also, of necessity, involve discrimination—*e.g.*, when it is argued that all or much of the nearby land along a major highway is zoned for

53. See, *e.g.*, *Oschin v. Redford Township*, 315 Mich. 359, 24 N.W.2d 152 (1946).

54. “The equal protection clause of the Fourteenth Amendment secures equality of right by forbidding arbitrary discrimination between persons similarly circumstanced. Classification is consistent with this principle if it be reasonably based in the public policy to be served.” *Schmidt v. Newark Bd. of Adjustment*, 9 N.J. 405, 418, 88 A.2d 607, 613 (1952) (Heher, J.).

55. MICH. COMP. LAWS §§ 125.581-583 (1948); N.J. STAT. ANN. § 40:55-32 (Supp. 1964).

56. See *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954); *Conlon v. Paterson Bd. of Pub. Works*, 11 N.J. 363, 94 A.2d 660 (1953); *Speakman v. Borough of No. Plainfield*, 8 N.J. 250, 84 A.2d 715 (1951); *Zaehring v. Long Beach Township*, 56 N.J. Super. 26, 151 A.2d 425 (L. Div. 1959); *Cassinari v. Union City*, 1 N.J. Super. 219, 63 A.2d 891 (App. Div. 1949). Preferential “spot zoning” was held invalid in these cases. See also discussion in *Kozesnik v. Montgomery Township*, 24 N.J. 154, 172-74, 131 A.2d 1, 10-11 (1957). The New Jersey cases all emphasize that preferential “spot zoning” is invalid unless it is “in accordance with a comprehensive plan” designed to further Zoning Act objectives; and that if it is not in accordance with such a plan, it is in effect “a special exception or variance, . . . thereby circumventing the board of adjustment to which it is committed by our Zoning Act . . . the quasi-judicial duty of passing upon such matters, at least initially, in accordance with prescribed standards.” *Speakman v. Borough of No. Plainfield*, *supra*, at 257, 84 A.2d at 718, quoted in *Conlon v. Paterson Bd. of Pub. Works*, *supra*.

“Spot zoning” which is more restrictive than the zoning of surrounding land has also been held invalid in New Jersey, with more or less emphasis on the discriminatory character of the zoning. *Zampieri v. River Vale Township*, 29 N.J. 599, 152 A.2d 28 (1959); *Glen Rock Realty Co. v. Glen Rock Bd. of Adjustment*, 80 N.J. Super. 79, 192 A.2d 865 (App. Div. 1963). See also *Ascione v. Union City*, 77 N.J. Super. 542, 187 A.2d 193 (App. Div. 1962).

For discussion of “spot zoning,” see 1 RATHKOPF, *op. cit. supra* note 48, ch. 26; Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 397-99 (1965); Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1166-70 (1955).

The zoning classification may also be discriminatory and therefore invalid, although there is no “spot zoning” at all. See, *e.g.*, *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 118 A.2d 824 (1955) (exclusion of retail business from light industrial zone was arbitrary and discriminatory); *Marie's Launderette v. City of Newark*, 35 N.J. Super. 94, 113 A.2d 190 (App. Div. 1955).

57. It appears that the only case on point is *Penning v. Owens*, 340 Mich. 355, 65 N.W.2d 831 (1954).

commercial use, while plaintiff's land is restricted to residential use.⁵⁸

(4) Does the regulation really constitute a taking of private property for public use, which is necessarily a deprivation of property without due process unless just compensation is paid? By one view, of course, any zoning regulation which is confiscatory is also an unconstitutional taking.⁵⁹ By another view, however, there is no taking unless the regulation is designed to produce community benefits rather than to prevent a use which would cause harm to the community by burdening it with external costs.⁶⁰ And, by a third view generally similar to that last stated, there is a taking *only* "when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise."⁶¹ Under either of the latter two views, a confiscatory reduction in land value through zoning is not necessarily a taking;⁶² but there may be a taking even though the reduction in land value is not confiscatory.⁶³ The New Jersey courts have clearly recognized taking as a separate ground for invalidating a zoning regulation;⁶⁴ and it would seem that the Michigan court has also done so when inappropriate zoning has been used for the purpose of depressing land values in advance of condemnation.⁶⁵

B. *The Scope of Judicial Review in Zoning Cases*

As previously indicated, zoning regulations may be attacked on the ground that they are ultra vires, or on the ground that

58. See, e.g., *Schaefer v. City of E. Detroit*, 360 Mich. 536, 104 N.W.2d 390 (1960). See also *James S. Holden Co. v. Connor*, 257 Mich. 580, 241 N.W. 915 (1932) (setbacks in zoning ordinance were invalid because "arbitrary, discriminatory, and without basis of general welfare").

59. This would be so under the view enunciated by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

60. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

61. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964). For other views, see Heyman & Gilhool, *supra* note 44, at 1126-30; Sax, *supra* at 46-60.

62. This may be the basis of *Consolidated Rock Prods. Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962), which is criticized in 50 CALIF. L. REV. 896 (1962), but is apparently approved by Sax, *supra* note 61, at 69.

63. See *United States v. Causby*, 328 U.S. 256 (1946), in which the extent of the damage was only a moderate proportion of the total value of the land.

64. *Morris County Land Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963); *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945) (also ultra vires); *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961).

65. See, e.g., *Grand Trunk W.R.R. v. City of Detroit*, 326 Mich. 387, 40 N.W.2d 195 (1949).

they are violative of constitutional limitations upon the police power. Typically, the plaintiff alleges that the regulation is "arbitrary and unreasonable," without clearly separating statutory and constitutional grounds of attack. But the presumption that an act of a legislative body is a constitutional exercise of its legislative power is generally extended to municipal ordinances, including zoning ordinances,⁶⁶ and consequently the burden of proving the ordinance invalid is upon the person attacking it.

Practically every Michigan⁶⁷ and New Jersey case⁶⁸ involving the validity of a zoning regulation contains a statement of the basic presumption that a zoning ordinance is valid. But the courts of the two states have often demonstrated a significantly different attitude toward this presumption and toward the scope of judicial review of zoning in general.

Prior to 1949, the New Jersey courts took a rather dim view of zoning. With the adoption of a new constitution in 1947 and the creation of a new court system in 1948, however, there came a dramatic change in the judicial attitude. Relying heavily upon the 1947 constitution's express direction that all constitutional and statutory provisions concerning local governments shall be liberally construed in their favor,⁶⁹ the New Jersey Supreme Court, in a series of landmark decisions between 1949 and 1958, gave its blessing to an enormous expansion of the municipal zoning power.⁷⁰ *Kozesnik v. Montgomery Township*⁷¹ expressed the standard for judicial review which prevails today:

"The zoning statute delegates legislative power to local government. The judiciary of course cannot exercise that power directly, nor indirectly by measuring the policy determination by a judge's private view. The wisdom of legislative action is

66. See generally 1 RATHKOPF, *op. cit. supra* note 48, ch. 21.

67. See, e.g., *Padover v. Farmington Township*, 132 N.W.2d 687 (Mich. 1965); *Christine Bldg. Corp. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962); *Burrell v. City of Midland*, 365 Mich. 136, 111 N.W.2d 884 (1961); *Fass v. City of Highland Park*, 321 Mich. 156, 32 N.W.2d 375 (1948).

68. See, e.g., *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963); *Napierkowski v. Gloucester Township*, 29 N.J. 481, 150 A.2d 481 (1959); *Oliva v. City of Garfield*, 1 N.J. 184, 62 A.2d 673 (1948).

69. N.J. CONST. art. IV, § 7, ¶ 11.

70. *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952); *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952); *Duffcon Concrete Prods. Co. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

For a general discussion of the New Jersey decisions from 1948-59, see Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 42-48 (1959).

71. 24 N.J. 154, 131 A.2d 1 (1957). The case is discussed at length in Cunningham, *Real Property*, 12 RUTGERS L. REV. 218, 246-50 (1957).

reviewable only at the polls. The judicial role is tightly circumscribed. We may act only if the presumption in favor of the ordinance is overcome by a clear showing that it is arbitrary or unreasonable."⁷²

Since *Kozesnik*, although the total volume of zoning litigation in the New Jersey courts has been large, relatively few zoning ordinances have been challenged on substantive statutory or constitutional grounds. Zoning ordinances attacked on such grounds have been upheld by the New Jersey Supreme Court in ten cases⁷³ and held invalid in only two.⁷⁴ During the same period, in cases decided by the Appellate Division of the Superior Court and not reviewed by the Supreme Court, zoning regulations have been sustained in eight cases⁷⁵ and invalidated in only three cases.⁷⁶

Prior to *Brae Burn, Inc. v. City of Bloomfield Hills*, decided in

72. 24 N.J. at 161, 131 A.2d at 8.

73. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *Morris v. Postma*, 41 N.J. 354, 196 A.2d 792 (1964); *Gruber v. Raritan Township*, 39 N.J. 1, 186 A.2d 489 (1962); *Hohl v. Readington Township*, 37 N.J. 271, 181 A.2d 150 (1962); *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963); *Allendale Congregation of Jehovah's Witnesses v. Grosman*, 30 N.J. 273, 152 A.2d 569 (1959); *Napierkowski v. Gloucester Township*, 29 N.J. 481, 150 A.2d 481 (1959); *Ward v. Montgomery Township*, 28 N.J. 529, 147 A.2d 248 (1959); *Wollen v. Fort Lee*, 27 N.J. 408, 142 A.2d 881 (1958); *Fanale v. Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958); *Bogert v. Washington Township*, 25 N.J. 57, 135 A.2d 1 (1957).

See also *Wilson v. Borough of Mountainside*, 42 N.J. 426, 201 A.2d 540 (1964) (residential zoning held generally reasonable, though perhaps unreasonable as applied to highway frontage); *Roman Catholic Diocese v. Ho-Ho-Kus Borough*, 42 N.J. 556, 202 A.2d 161 (1964) (private schools held subject to zoning power since public schools are subject thereto); *Saint Cassian's Catholic Church v. Allen*, 40 N.J. 46, 190 A.2d 667 (1963) (zoning regulations applicable to private schools were not discriminatory in fact).

74. *Morris County Land Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963); *Zampieri v. River Vale Township*, 29 N.J. 599, 152 A.2d 28 (1959). See also *Shaw v. Wayne Township*, 65 N.J. Super. 461, 168 A.2d 84 (App. Div. 1961), *aff'd*, 35 N.J. 595, 174 A.2d 474 (1961) (holding part of zoning amendment invalid, but separable from the rest, which was sustained). Recently, however, a dissenting minority of the supreme court vigorously asserted that the court has been exercising too much restraint in its review of zoning cases. *Vickers v. Gloucester Township*, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (dissenting opinion). The case is criticized in a note in 61 MICH. L. REV. 1010 (1963). Whether the *Vickers* dissent will have any effect on the majority's standards for judicial review remains to be seen.

75. *Borough of Northvale v. Blundo*, 85 N.J. Super. 56, 203 A.2d 721 (App. Div. 1964); *Tidewater Oil Co. v. Mayor & Council*, 84 N.J. Super. 525, 202 A.2d 865 (App. Div. 1964); *LaRue v. East Brunswick*, 68 N.J. Super. 435, 172 A.2d 691 (App. Div. 1961); *Leonia v. Fort Lee*, 56 N.J. Super. 135, 151 A.2d 540 (App. Div. 1959); *Brundage v. Randolph Township*, 54 N.J. Super. 384, 148 A.2d 841 (App. Div. 1959); *L. P. Marron & Co. v. River Vale Township*, 54 N.J. Super. 64, 148 A.2d 205 (App. Div. 1959); *Finn v. Wayne Township*, 53 N.J. Super. 405, 147 A.2d 563 (App. Div. 1959); *Bartlett v. Middletown Township*, 51 N.J. Super. 239, 143 A.2d 778 (App. Div. 1958).

76. *Glen Rock Realty Co. v. Glen Rock Bd. of Adjustment*, 80 N.J. Super. 79, 192 A.2d 865 (App. Div. 1963); *Ascione v. Union City*, 77 N.J. Super. 542, 187 A.2d 193 (App. Div. 1962) (*semble*); *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 150 A.2d 63 (App. Div. 1959).

1957, the Michigan Supreme Court seems generally to have given little real weight to the presumption of validity, despite frequent lip service to it. Indeed, in some cases the court seems really to have placed upon the municipality the burden of proving that the challenged zoning regulation bore a substantial relation to the public health, safety, or general welfare.⁷⁷ Most of the cases were what one writer has called "wrong district" cases; *i.e.*, plaintiff claimed that his land was improperly classified and should have been included in a less restricted district.⁷⁸ In a great majority of the cases, the plaintiff's challenge was successful.⁷⁹ Although the court often said, particularly when it struck down a zoning regulation, that each case must be determined on its own facts and circumstances,⁸⁰ the basic ground on which zoning classifications were held invalid in most cases was that the zoning was confiscatory.⁸¹ In reaching such a conclusion, the court has emphasized both direct testimony (usually from real estate brokers) as to the reduction in value resulting from the zoning classification of the land in question⁸² and the situational factors which allegedly made the zoning unreasonable.⁸³

With the increase in zoning litigation in Michigan in the 1950's, it became increasingly clear that the court was giving weight to ex-

77. See, *e.g.*, *Clark v. Lyon Township*, 348 Mich. 173, 82 N.W.2d 433 (1957); *Industrial Land Co. v. City of Birmingham*, 346 Mich. 667, 78 N.W.2d 656 (1956); *McGiverin v. City of Huntington Woods*, 343 Mich. 413, 72 N.W.2d 105 (1955).

78. See Andrews, *Whatever Happened to the Brae Burn Rule?*, Mich. S.B.J., March 1964, pp. 34-35. See also the detailed analysis of Michigan zoning cases in the period 1949-57 in 9 Municipal League Briefs, No. 6, June 1958, reprinted in MICHIGAN MUNICIPAL LEAGUE, TECHNICAL TOPICS, No. 21 (1958).

79. See 9 Municipal League Briefs, No. 6, *supra* note 78, indicating that during the period from 1949 until the decision of *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 86 N.W.2d 166 (1957), challenged zoning regulations were invalidated in twenty-nine cases and sustained in only nine. In twenty-six cases, the lower court held the zoning regulations invalid; in twenty-two of these, the Michigan Supreme Court affirmed and in four it reversed. In twelve cases, the lower court sustained the zoning regulation; in six of these, the supreme court affirmed and in six it reversed, but one of the affirmances was on other grounds, with an opinion indicating that four of the justices were doubtful of the validity of the zoning. In many of the cases in which zoning was invalidated, it would seem that the hardship to the plaintiff was unique and that a variance was the proper remedy. See case cited note 53 *supra* and accompanying text.

80. See, *e.g.*, *Redford Moving & Storage Co. v. City of Detroit*, 336 Mich. 702, 58 N.W.2d 812 (1953); *Hitchman v. Oakland Township*, 329 Mich. 331, 45 N.W.2d 306 (1951); *Ritenour v. Dearborn Township*, 326 Mich. 242, 40 N.W.2d 137 (1949).

81. See authorities cited notes 49 and 50 *supra*.

82. See authorities cited notes 49 and 50 *supra*.

83. *E.g.*, *Spanich v. City of Livonia*, 355 Mich. 252, 94 N.W.2d 62 (1959) (zone boundary cutting across the land in question); *McHugh v. City of Dearborn*, 348 Mich. 311, 83 N.W.2d 222 (1957) (proximity of many incompatible land uses); *Anderson v. City of Holland*, 344 Mich. 706, 74 N.W.2d 894 (1956) (changes in the character of the neighborhood making the zoning classification inappropriate); *Janesick v. City of Detroit*, 337 Mich. 549, 60 N.W.2d 452 (1953) (lack of construction in the area over a substantial period of time).

actly the same factors local governing bodies should take into account when they enact a zoning ordinance. In short, the court was acting as a "super zoning commission," despite the fact that it was normally able to consider only one parcel of land at a time. *Brae Burn, Inc. v. City of Bloomfield Hills*⁸⁴ marked an attempt to re-examine and to limit the judicial function in reviewing zoning cases. In the course of the opinion the traditional rule that a zoning ordinance comes before the court "clothed with every presumption of validity" was vigorously reasserted. In addition, the reasons for limiting judicial review of zoning were stated as follows:

"[T]his Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned.

* * *

"This Court is not equipped to zone particular parcels of land. We do not see the land, we do not see the community, we do not grapple with its day-to-day problems.

* * *

"The function of the courts, with respect to these cases, lies largely in 2 broad areas: (a) has the legislative body the authority to act? (b) have the requirements of administrative due process been observed with respect to adoption, interpretation, and administration of the ordinance in question?"⁸⁵

Consistent application of the views thus stated would clearly bring the Michigan Supreme Court in line with the planner's view as to the proper scope of judicial review in zoning cases. At least eight decisions⁸⁶ during the next four years clearly took this approach in sustaining zoning regulations. In three other cases⁸⁷ de-

84. 350 Mich. 425, 86 N.W.2d 166 (1957).

85. *Id.* at 430-31, 436-37, 86 N.W.2d at 169.

86. *Paka Corp. v. City of Jackson*, 364 Mich. 122, 110 N.W.2d 620 (1961); *Hungerford v. Dearborn Township*, 362 Mich. 126, 106 N.W.2d 566 (1960); *Patchak v. Lansing Township*, 361 Mich. 489, 105 N.W.2d 406 (1960); *Lamb v. City of Monroe*, 358 Mich. 136, 99 N.W.2d 566 (1959); *McClain v. City of Hazel Park*, 357 Mich. 459, 98 N.W.2d 560 (1959); *Uday v. City of Dearborn*, 356 Mich. 542, 96 N.W.2d 775 (1959); *Cook v. Bandeen*, 356 Mich. 328, 96 N.W.2d 743 (1959); *Roberts v. City of Three Rivers*, 352 Mich. 463, 90 N.W.2d 696 (1958). See also *Spanich v. City of Livonia*, 355 Mich. 252, 44 N.W.2d 62 (1959), in which a unanimous court held the zoning classification invalid, even under the *Brae Burn* rule.

87. *Hoffer v. Fred L. Kircher Co.*, 363 Mich. 391, 109 N.W.2d 768 (1961); *June v. City of Lincoln Park*, 361 Mich. 95, 104 N.W.2d 792 (1960); *West Bloomfield Township v. Chapman*, 351 Mich. 606, 88 N.W.2d 377 (1958).

cided during the same period, the court sustained zoning regulations without citing *Brae Burn*. But it also twice⁸⁸ invalidated zoning regulations in cases where, although the majority believed its actions were consistent with *Brae Burn*, several justices, including the author of the *Brae Burn* opinion, contended that the majority had ignored the rule of that case. Since 1961, the court has held municipal zoning regulations invalid in eight of the twelve cases in which the validity of zoning regulations has been decided on the merits.⁸⁹ This does not, of course, mean that the eight cases were wrongly decided. But the court's approach to zoning cases from the latter part of 1961 until the early part of 1964 certainly supports the assertion that, while the court had not formally renounced the *Brae Burn* rule, it had "either ignored it or completely misinterpreted it" during that period.⁹⁰

The recent decision in *Padover v. Farmington Township*⁹¹ clearly represents a swing back toward *Brae Burn*, although the multiplicity of opinions in that case makes it difficult to ascertain the exact position of the majority of the court. In *Padover*, the court affirmed the lower court's judgment by a six-to-two vote, and opinions concurred in by four of the justices strongly reaffirmed the presumption of validity and the *Brae Burn* doctrine.⁹²

C. Zoning, Planning, and the [Comprehensive] Plan

The relationship between zoning and planning is recognized in the zoning enabling legislation of both Michigan and New Jersey. The Michigan City and Village Zoning Act requires zoning regulations to "be made in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare" and to "be made with reasonable consideration,

88. *Schaefer v. City of E. Detroit*, 360 Mich. 536, 104 N.W.2d 390 (1960); *DeQuindre Dev. Co. v. Warren Township*, 359 Mich. 634, 103 N.W.2d 600 (1960).

89. *Invalid*: *Gundersen v. Village of Bingham Farms*, 372 Mich. 352, 126 N.W.2d 715 (1964); *Smith v. Village of Wood Creek Farms*, 371 Mich. 127, 123 N.W.2d 210 (1963); *Roll v. City of Troy*, 370 Mich. 94, 120 N.W.2d 804 (1963); *Lincolnhol v. Village of Shoreham*, 368 Mich. 225, 118 N.W.2d 289 (1962); *Christine Bldg. Corp. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962); *Alderton v. City of Saginaw*, 367 Mich. 28, 116 N.W.2d 53 (1962); *Wenner v. Southfield Township*, 365 Mich. 563, 113 N.W.2d 918 (1962); *Burrell v. City of Midland*, 365 Mich. 136, 111 N.W.2d 884 (1961).

Valid: *Farmington Township v. Scott*, 374 Mich. 536, 132 N.W.2d 607 (1965); *Double I Dev. Co. v. Taylor Township*, 372 Mich. 264, 125 N.W.2d 862 (1964); *White Lake Township v. Amos*, 371 Mich. 693, 124 N.W.2d 803 (1963).

90. *Andrews supra* note 78, at 34, 37. But see *Libby, Whatever Happened to the Theory of Reasonable Zoning?*, Mich. S.B.J., May 1964, p. 10, for an answer to the *Andrews* article.

91. 132 N.W.2d 687 (Mich. 1965).

92. See the opinions of *Adams, J.*, 132 N.W.2d at 692, and *Otis Smith, J.*, 132 N.W.2d at 696.

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."⁹³ The Michigan County Rural Zoning Act and Township Rural Zoning Act contain similar provisions,⁹⁴ as does the New Jersey Zoning Act,⁹⁵ which, in addition, expressly states that the plan shall be comprehensive. But the exact nature of the required plan is not clear in either jurisdiction.

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,⁹⁶ the lot-size regulations 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.⁹⁷ The decisions were supported by a line of cases beginning with *Gust v. Canton Township*,⁹⁸ 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."⁹⁹

In *Padover*, however, at least four of the members of the court¹⁰⁰ clearly rejected the restrictive *Gust* formula.¹⁰¹ Since two other justices concurred in the result,¹⁰² it seems probable that a majority of the court is now prepared to view with favor zoning geared to future needs.

Unlike the Michigan courts, the New Jersey courts have quite consistently recognized the close relationship between planning and zoning. In *Kozesnik v. Montgomery Township*,¹⁰³ the New Jersey Su-

93. MICH. COMP. LAWS §§ 125-581-582 (1948). See also MICH. COMP. LAWS § 125.583 (1948).

94. MICH. COMP. LAWS §§ 125.273 (townships), 125.203 (counties) (1948).

95. N.J. STAT. ANN. § 40:55-32 (Supp. 1964).

96. MICH. COMP. LAWS §§ 125.31-.45 (1948).

97. *Roll v. City of Troy*, 370 Mich. 94, 120 N.W.2d 804 (1963); *Christine Bldg. Corp. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962).

98. 342 Mich. 436, 70 N.W.2d 772 (1955).

99. *Id.* at 442, 70 N.W.2d at 775.

100. Justices Adams, Souris, Otis Smith, and O'Hara.

101. 132 N.W.2d at 697.

102. Justices Kavanagh and Black.

103. 24 N.J. 154, 131 A.2d 1 (1957).

preme Court asserted that, while zoning has in the main preceded municipal planning, zoning is properly an implementing tool of sound land use planning. And, in the recent cases of *Napierkowski v. Gloucester Township*¹⁰⁴ and *Vickers v. Gloucester Township*,¹⁰⁵ the New Jersey court emphasized that zoning must subserve long-range as well as immediate needs. Moreover, in the *Vickers* case, the court expressly disapproved the restrictive rule of *Gust v. Canton Township*.¹⁰⁶

A few statements as to the nature of the comprehensive zoning plan in New Jersey may be made with confidence. The comprehensive plan is not identical with the master plan provided for in the New Jersey Planning Act¹⁰⁷ and it need not "exist in some physical form outside the ordinance," but may "readily be revealed in the end-product," the zoning ordinance.¹⁰⁸ Moreover, the comprehensive plan is to some extent a regional plan rather than just a municipal plan, for the New Jersey Supreme Court has expressly recognized the extraterritorial impact of zoning.¹⁰⁹ Beyond this, however, it would appear that the "comprehensive plan" requirement in New Jersey really means only that the zoning ordinance must meet the basic constitutional test of reasonableness.

In general, the Michigan zoning plan requirement appears to be similar to the New Jersey comprehensive plan requirement; but it is less well defined and seems to have no regional overtones.¹¹⁰

D. A Few Current Zoning Problems

Several current problems on the frontiers of zoning illustrate particularly well the divergent attitudes of the two states selected for comparative study. If the uses of zoning involved in these areas are to be effective, a liberal (New Jersey type) judicial attitude is required. From these particular applications some conclusions hopefully may be drawn respecting the extent to which judicial interference in the zoning process is desirable.

104. 29 N.J. 481, 150 A.2d 481 (1959).

105. 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963).

106. 342 Mich. 436, 70 N.W.2d 772 (1955).

107. *Kozesnik v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957). The "master plan" is described in N.J. REV. STAT. 40:55-1.10 to 1.12 (Supp. 1964).

108. *Kozesnik v. Montgomery Township*, *supra* note 107.

109. *Duffcon Concrete Prods. Co. v. Borough of Cresskill*, 1 N.J. 509, 513-14, 64 A.2d 347, 349-50 (1949).

110. See generally Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Comment, 38 N.Y.U.L. REV. 161 (1963).

1. *Total Exclusion of Uses From the Community*

Here, again, the Michigan Supreme Court seems much more inclined to circumscribe the municipal zoning power than the New Jersey Supreme Court. The New Jersey court has sustained a zoning ordinance which completely excluded industry from a small residential community¹¹¹ and an ordinance which totally excluded trailer parks from a predominantly rural and largely undeveloped community.¹¹² In the latter instance, the majority relied heavily upon the presumption of validity applicable to all zoning ordinances, and concluded as follows:

"It must be remembered that once a use is legally established, even though conditions impel a revision of the zoning ordinance and the use strikes a jarring note, it cannot be eliminated by such a revision under existing law. . . . If through foresight a municipality is able to anticipate the adverse effects of particular uses and its resulting actions are reasonable, it should be permitted to develop without the burdens of such uses."¹¹³

In Michigan, no zoning regulation which totally excludes a "lawful" land use has yet been sustained.¹¹⁴ But it would appear that total exclusion of some uses may be held valid if the municipality is largely developed and if the excluded uses would be incompatible with those already established.¹¹⁵ Indeed, the recent *Padover* decision may signal the adoption of a more permissive attitude toward total exclusion of some uses from largely undeveloped communities, although the case did not specifically deal with this problem.¹¹⁶

2. *"Noncumulative" Zoning and "Exclusive" Industrial Districts*

Most zoning ordinances enacted prior to the 1950's adopted the cumulative use zoning technique sustained in the *Euclid* case, excluding so-called "lower" uses (*e.g.*, commercial and industrial uses) from "higher" use districts (*e.g.*, single-family, two-family, and gen-

111. *Duffcon Concrete Prods. Co. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

112. *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963).

113. *Id.* at 248-49, 181 A.2d at 138.

114. *E.g.*, *Bzovi v. City of Livonia*, 350 Mich. 489, 87 N.W.2d 110 (1957) (drive-in theatres); *Smith v. Plymouth Township Bldg. Inspector*, 346 Mich. 57, 77 N.W.2d 110 (1956) (trailer parks); *Gust v. Canton Township*, 342 Mich. 436, 70 N.W.2d 772 (1955) (trailer parks).

115. *June v. City of Lincoln Park*, 361 Mich. 95, 104 N.W.2d 792 (1960) (substantially total exclusion of trailer parks from "city, with adjacent residential and industrial areas," valid).

116. See text accompanying notes 91 & 92 *supra*.

eral residence districts), but not excluding "higher" uses from "lower" use districts. Since World War II, however, local governing bodies have become increasingly conscious of the disadvantages which result from permitting the intrusion of residential land uses into areas where commercial and industrial uses are allowed and the advantages to be secured by the creation of exclusive industrial districts.¹¹⁷ It is obvious, of course, that, if commercial and industrial uses have an adverse effect on residential neighborhoods, similar adverse effects upon residential land uses will result from the intrusion of the latter into commercial or industrial districts. Moreover, there is reliable evidence that modern industry prefers to locate in areas zoned exclusively for industrial use.¹¹⁸

Although the number of Michigan and New Jersey appellate decisions involving noncumulative use zoning is still small, it is clear that the courts agree that "there is no rule of law, statutory or constitutional, which ordains that any use has an exalted position in the zoning scheme entitling it to move everywhere as of right."¹¹⁹ In Michigan, however, the supreme court has so far recognized only health and safety factors as a justification for exclusive industrial zoning,¹²⁰ while the New Jersey courts have recognized that the zoning power "may also be invoked to serve the public convenience and general prosperity and well-being" and hence that exclusive industrial districts may properly be established for the purpose of attracting industry and providing additional tax revenue to help support the expansion of necessary municipal services.¹²¹ Exclusive industrial zoning is clearly valid in New Jersey so long as it does not preclude all reasonable use of the land for an unreasonable length of time.¹²² And there is no reason to doubt the validity of exclusive commercial zoning, provided it meets the test of reasonableness.

117. See Mott & Wehrly, *The Prohibition of Residential Developments in Industrial Districts*, 1948 URBAN LAND INST. TECHNICAL BULL. No. 10. See also 1 RATHKOPF, *ZONING AND PLANNING* 14 n.6 (3d ed. 1957), for a list of cities that have ordinances creating "exclusive" nonresidential districts.

118. See authorities cited note 117 *supra*.

119. *Kozesnik v. Montgomery Township*, 24 N.J. 154, 169, 131 A.2d 1, 9 (1957). *Accord*, *Lamb v. City of Monroe*, 358 Mich. 136, 99 N.W.2d 566 (1959).

120. *Lamb v. City of Monroe*, *supra* note 119.

121. *Gruber v. Raritan Township*, 39 N.J. 1, 186 A.2d 489 (1962); *Ward v. Montgomery Township*, 28 N.J. 529, 147 A.2d 248 (1959); *Kozesnik v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957); *Newark Milk & Cream Co. v. Parsippany-Troy Hills Township*, 47 N.J. Super. 306, 135 A.2d 682 (L. Div. 1957). See also *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 129, 118 A.2d 824, 832 (1955) (Brennan, J., dissenting).

122. See *Gruber v. Raritan Township*, *supra* note 121; *cf.* *Corthouts v. Town of Newington*, 140 Conn. 284, 99 A.2d 112 (1953); *Comer v. City of Dearborn*, 342 Mich. 471, 70 N.W.2d 813 (1955).

3. Minimum Lot-Size Requirements and "Acreage Zoning"

In the early days of zoning, one of the principal devices for controlling the intensity of land use in residential districts was the fixing of a minimum lot size—usually five or six thousand square feet in single-family districts, with a minimum of fifty or sixty feet of street frontage. Coupled with these requirements, there frequently were requirements that the location of the principal structure should leave specified front, side, and rear yards open and that only a stated percentage of the lot might be occupied by structures.¹²³ Restrictions of this type—which sometimes required that as much as seventy per cent of the lot should remain open—were clearly authorized by the zoning enabling acts¹²⁴ and were not difficult to justify on health and safety grounds, since the required open space could be considered reasonably necessary to provide adequate light and air, to lessen congestion in the streets, to avoid undue concentration of population, and to provide safe play areas for children. But the current practice of creating several single-family residence districts with a graduated scale of minimum lot-size and open space requirements is much more difficult to justify on health or safety grounds, particularly when the top "minimums" go as high as three to five acres. It is arguable that substantial differentials in minimum lot-size requirements are *prima facie* discriminatory and that they raise a serious equal protection question.¹²⁵ Yet a one-acre lot minimum covering a substantial part of a suburban community was sustained in *Simon v. Town of Needham*,¹²⁶ the first appellate decision on the validity of "acreage zoning." The Massachusetts court did not indicate the minimum lot-size requirement in the other residence zone in *Needham*, nor did it discuss the equal protection question.

Despite the rather shaky legal foundation of *Needham*, many suburban and exurban communities have followed its lead and have established single-family residence districts with lot minimums as high as three to five acres. Surprisingly, the courts have generally been willing to sustain such "acreage zoning,"¹²⁷ although few of the

123. See HORACK & NOLAN, *LAND USE CONTROLS* 138 (1955).

124. See MICH. COMP. LAWS § 125.582 (1948); N.J. STAT. ANN. § 40:55-30 (Supp. 1964).

125. If the higher minimum lot-sizes make land development less profitable in some districts, the landowners may have an equal protection argument. But more significant is the discrimination against prospective purchasers who cannot afford to buy lots in the districts having the higher "minimums."

126. 311 Mass. 560, 42 N.E.2d 516 (1942).

127. See, e.g., *Demars v. Zoning Comm'n*, 142 Conn. 580, 115 A.2d 653 (1955) (40,000 square foot minimum valid); *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 54 (1957) (five-acre minimum valid); *Dilliard v. Village of No. Hills*, 276 App. Div. 969, 94 N.Y.S.2d 715 (1950) (two-acre minimum upheld); *Bilbar Constr. Co. v.*

opinions have articulated a satisfactory justification for graduated minimum lot-size requirements or for the very high minimums approved in many cases.

a. *New Jersey*

The New Jersey courts have uniformly upheld minimum lot-size requirements and have found no violation of equal protection in the usual graduated scale. In the leading case of *Fischer v. Bedminister Township*,¹²⁸ an ordinance establishing a five-acre minimum throughout the greater portion of a rural community was sustained. Although a substantial minimum lot-size requirement was justifiable because of the lack of public sewerage and public water supply systems, it was clear that the primary purpose behind the five-acre minimum was to limit the growth of population and to obviate any need to supply urban services throughout the major portion of the community. But, despite the fact that the zoning ordinance was especially vulnerable to attack on the ground that it bore no reasonable relation to legitimate police power objectives and was discriminatory with respect to all persons who might wish to move into the community except those who could afford expensive homes,¹²⁹ the plaintiff failed to rebut the strong presumption of validity which attaches to zoning regulations in New Jersey.¹³⁰

In a later case involving a sizeable minimum lot-size requirement,¹³¹ the confiscation argument was rejected and the discrimination argument seems to have been answered, in part at least, by reference to a rather vague concept of community balance, as well as considerations of health, safety, and community attractiveness.¹³²

b. *Michigan*

Until *Padover* the Michigan Supreme Court had invalidated minimum lot-size requirements in every case challenging their

Easttown Township, 395 Pa. 62, 141 A.2d 851 (1958) (sliding scale of lot minimums from 5,000 square feet to one acre was valid). *But cf.* DuPage v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1956) (two and one-half acre minimum invalid); Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951) (three-acre minimum invalid); Board of Supervisors v. Carper, 200 Va. 653, 107 N.E.2d 390 (1959) (two-acre minimum invalid).

128. 11 N.J. 194, 93 A.2d 378 (1952).

129. See Comment, 106 U. PA. L. REV. 292 (1957).

130. Plaintiff's expert witness testified that "the township could have avoided any future health problems by a minimum plot size of 15,000 to 20,000 square feet," but he also testified that, because of the "extremely open character of the area" he considered *ten* acres, rather than five, a proper minimum in the "B" zone, and that he would have reduced the permissible number of half-acre lots to less than half of those provided in the ordinance!

131. Clary v. Borough of Eatontown, 41 N.J. Super. 47, 124 A.2d 54 (App. Div. 1956).

132. *Id.* at 68, 124 A.2d at 64.

validity. The court, in effect, treated the minimum lot-size requirements as *prima facie* unreasonable and placed upon the municipality the burden of justifying them on health and safety grounds.¹³³ In *Padover*, however, the court upheld minimum lot-size and frontage requirements based upon a zoning plan designed to create residential neighborhood units of thirty-five hundred to four thousand persons. There was evidence (1) that such neighborhoods would support an elementary school of an ideal size and permit it to be placed in an ideal location, (2) that proper location of schools would result in safer conditions for children, and (3) that deviation from the plan might adversely affect the entire community.

At minimum, *Padover* surely indicates a friendlier judicial attitude toward minimum lot-size zoning in Michigan. Its emphasis on planning considerations is to be commended, as is the majority's recognition that the consequential loss to the developer from forced adherence to relatively high lot-minimums must be placed in the context of the value to the community of the comprehensive land-use plan. In short, *Padover* would seem to give some guaranty that comprehensive community planning in Michigan will no longer be "subject to destruction because a property viewed separately, even though it is an integral part of [the] whole, would create no immediate hazard to health and welfare if developed with . . . minimum lot sizes [smaller than required by the zoning ordinance]." ¹³⁴ But the Michigan Supreme Court, like the New Jersey Supreme Court, has yet to face squarely the vexing problem of equal protection implicit in any graduated scale of minimum lot-size requirements.

4. *The Minimum-Size House*

Although establishment of minimum standards for living space in multiple-family dwellings has traditionally been a feature of state or municipal housing codes, zoning ordinances have sometimes been used to establish such standards for single-family dwellings. Each time such standards have been challenged in Michigan they have been held invalid,¹³⁵ but not invalid *per se*. In each case, the minimums were so high as to make it clear that they bore no reasonable relation to public health or safety and that they were designed solely to compel construction of larger and more expensive houses.¹³⁶

133. *Roll v. City of Troy*, 370 Mich. 94, 120 N.W.2d 804 (1963); *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962).

134. Judge Adams dissenting in *Christine Bldg. Co. v. City of Troy*, *supra* note 133.

135. *Elizabeth Lake Estates v. Waterford Township*, 317 Mich. 359, 26 N.W.2d 788 (1947); *Frischkorn Constr. Co. v. Redford Township*, 315 Mich. 556, 24 N.W.2d 209 (1946); *Senefsky v. Huntington Woods*, 307 Mich. 728, 12 N.W.2d 387 (1943).

136. In *Elizabeth Lake Estates v. Waterford Township*, *supra* note 135, only five

In *Lionshead Lake, Inc. v. Wayne Township*,¹³⁷ however, the New Jersey Supreme Court sustained a zoning ordinance which required not less than 768 square feet for a one-story dwelling, a minimum of one thousand square feet for a two-story dwelling having an attached garage, and twelve hundred square feet for a two-story dwelling not having an attached garage. The court took "notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein" and concluded that the minimum space requirements of the ordinance were reasonable since they were not large for a family of normal size and were necessary to prevent the erection of shanties, which would deteriorate land values generally. The decision thus rests partly upon considerations of public health and partly upon a broad concept of the general welfare taking into account the effect of substandard dwellings upon property values.

Although the decision has been vigorously criticized as upholding "snob zoning" and encouraging "economic segregation" in housing,¹³⁸ the present writer is in agreement with those who believe that it was clearly justified on public health grounds¹³⁹ so far as the 768 square foot minimum is concerned. But the one thousand and the twelve hundred square foot requirements for two story houses must be justified, if at all, by reference to property values and aesthetic considerations.¹⁴⁰ Whether aesthetic considerations may properly play a paramount role in zoning is, of course, a most controversial question.

5. *Aesthetic Considerations in Zoning*

Despite the obvious connection between appearance of structures and conservation of property values, courts have been slow to accept the view that zoning regulations may serve the general welfare when based entirely or mainly on aesthetic considerations. The position of the Michigan Supreme Court is still accurately reflected in the fol-

hundred square feet on the first floor level was required, but ten thousand cubic feet over all was required; in *Frischkorn Constr. Co. v. Redford Township*, *supra* note 135, only eight hundred square feet of floor space on the first floor level was required, but fourteen thousand cubic feet over all was required; and in *Senefsky v. Huntington Woods*, *supra* note 135, thirteen hundred square feet of usable floor space was required.

137. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

138. See Haar, *Wayne Township—Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Haar, *Zoning for Minimum Standards—The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

139. Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

140. See concurring opinion of Judge Jacobs in *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 176, 89 A.2d 693, 698 (1952).

lowing statement: " 'Aesthetics may be an incident but cannot be the moving factor,' in determining the validity of building restrictions under the police power."¹⁴¹ It seems likely, however, that the present Michigan court would accept the use of zoning to control billboard advertising, despite the fact that the basis for such control is largely aesthetic.¹⁴² It also seems likely that the court would sustain zoning controls designed to achieve aesthetic objectives in historic areas and in areas of substantial scenic importance.¹⁴³

No doubt adherence to the generally accepted formula that the police power cannot be used to accomplish purely aesthetic objectives is based largely upon healthy judicial skepticism as to the possibility of framing reasonable and generally acceptable aesthetic standards.¹⁴⁴ But the difficulty of formulating proper standards has not prevented the development of an increasingly friendly attitude toward zoning based on aesthetic considerations by the New Jersey courts.¹⁴⁵ Recently, the New Jersey Appellate Division approved the "intangible but . . . respectable [zoning] objective of community attractiveness"¹⁴⁶ and has also said that "no doubt under present-day zoning concepts, and in an appropriate factual setting, a zoning ordinance may properly bring into play aesthetic considerations in regulating the use of property."¹⁴⁷ And, very recently, the New Jersey Supreme Court upheld a zoning ordinance provision completely prohibiting outdoor advertising signs other than those related to a business conducted on the premises.¹⁴⁸ The majority opinion emphasized the close relationship between aesthetics and other proper objectives of zoning, especially in "areas where aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound."¹⁴⁹

141. *Frischkorn Constr. Co. v. Redford Township Bldg. Inspector*, 315 Mich. 556, 563, 24 N.W.2d 209, 212 (1946).

142. See *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

143. See *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955) (advisory opinion).

144. Most of the aesthetic controls actually tried in various communities inspire little confidence. See AM. INST. OF ARCHITECTS & AM. INST. OF PLANNERS, *PLANNING AND COMMUNITY APPEARANCE* (1958).

145. See *Point Pleasant Beach v. Point Pleasant Pavilion*, 3 N.J. Super. 222, 225, 66 A.2d 40, 41 (App. Div. 1949). See also concurring opinion of Justice Jacobs in *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 176, 89 A.2d 693, 698 (1952).

146. *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 124 A.2d 54 (App. Div. 1956).

147. *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 150 A.2d 63 (App. Div. 1959).

148. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964).

149. Justice Hall dissented because he thought the prohibition of advertising signs was unreasonably discriminatory in excepting "on premise" business signs; but he would

6. *Regulation of Nonconforming Uses*

Both the New Jersey¹⁵⁰ and Michigan¹⁵¹ zoning enabling acts affirm the right of a landowner to continue lawful nonconforming uses established prior to the adoption of a zoning ordinance. And the Michigan and New Jersey courts agree that the right to continue a nonconforming use arises only if it is already established and not merely contemplated when the zoning restriction becomes effective,¹⁵² except in cases where a landowner has gained the right to initiate a nonconforming use after the effective date of the ordinance through having incurred substantial expense in reliance upon a legally issued building permit. In the latter case, the landowner is permitted to complete the structure for which the permit was issued and to engage in the use for which the structure was designed.¹⁵³ As a general rule, a use must have been completely lawful when the zoning restriction became effective in order to acquire a protected non-

have gone further than the majority in recognizing aesthetic considerations alone as a proper basis for zoning. *Id.* at 8, 198 A.2d at 450. As indicative of the general trend toward greater acceptance of aesthetic considerations as a basis for zoning, see *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955). Agnor, *Beauty Begins a Comeback—Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260 (1962); see generally Dukeminier, *Zoning for Aesthetic Objectives—A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Comment, 64 COLUM. L. REV. 81 (1964); Comment, 15 SYRACUSE L. REV. 33 (1963); Comment, 32 U. CINC. L. REV. 367 (1963).

150. N.J. STAT. ANN. § 40:55-48 (1940).

151. MICH. COMP. LAWS §§ 125.216 (counties), 125.286 (1948) (townships).

152. See, e.g., *Penning v. Owens*, 340 Mich. 355, 65 N.W.2d 831 (1954); *Civic Ass'n v. Horowitz*, 318 Mich. 333, 28 N.W.2d 97 (1947); *Pringle v. Shevnock*, 309 Mich. 179, 14 N.W.2d 827 (1944).

153. See, e.g., *De Mull v. Lowell*, 368 Mich. 242, 118 N.W.2d 232 (1962); *Sandenburgh v. Michigamme Oil Co.*, 249 Mich. 372, 228 N.W. 707 (1930); *Tremarco Corp. v. Garzio*, 32 N.J. 448, 161 A.2d 241 (1960), and cases cited therein.

If the landowner has not changed position substantially in reliance on the building permit, he acquires no "vested right" to proceed in violation of a subsequently enacted zoning ordinance, and the permit may be revoked. A fortiori, a refusal to issue a permit for a use that is lawful under the existing ordinance will be upheld if the ordinance is properly amended so as to prohibit the intended use before suit is brought to compel issuance of the permit. *Franchise Realty Interstate Corp. v. City of Detroit*, 368 Mich. 276, 118 N.W.2d 258 (1962); *Lamb v. City of Monroe*, 358 Mich. 136, 99 N.W.2d 560 (1959); *Socony-Vacuum Oil Co. v. Mount Holly Township*, 135 N.J.L. 112, 51 A.2d 19 (Sup. Ct. 1947); *Tice v. Borough of Woodcliff Lake*, 12 N.J. Super. 20, 78 A.2d 825 (App. Div. 1951). In Michigan the trial judge has discretion to allow amendment of the pleadings and pretrial statement to take account of a zoning ordinance or amendment enacted after the landowner starts suit to compel issuance of a building permit. *Franchise Realty Interstate Co. v. City of Detroit*, *supra*; *Willingham v. City of Dearborn*, 359 Mich. 7, 101 N.W.2d 294 (1960). In New Jersey, on the other hand, an appellate court *must* give superseding effect to any zoning ordinance or amendment adopted in the interim between the trial judgment and the appellate determination. *Socony-Vacuum Oil Co. v. Mount Holly Township*, *supra*; *Roselle v. Borough of Moonachie*, 49 N.J. Super. 35, 139 A.2d 42 (App. Div. 1958).

conforming status,¹⁵⁴ although Michigan appears to follow a *de minimis* rule in this regard.¹⁵⁵

A lawful nonconforming use carries with it a right to customary accessory uses.¹⁵⁶ In New Jersey, however, the zoning statute does not authorize the local legislative body to allow any extension of a nonconforming use, and the courts have generally been quite hostile to any extension or enlargement.¹⁵⁷ The only exception is when the nonconforming use consists of quarrying or removing sand and gravel from a tract only a portion of which was utilized for that purpose when the zoning restriction became effective.¹⁵⁸ A substantial increase in the volume of trade or business conducted as a nonconforming use is generally permissible, so long as the character of the use is unchanged and substantially the same facilities are used.¹⁵⁹

In Michigan, of course, since the zoning statutes expressly authorize the local legislative body to provide for extension of nonconforming uses and structures, an authorized extension is valid. But when the ordinance does not permit extension of a nonconforming use, any extension will be unlawful as contrary to the spirit of the zoning statutes.¹⁶⁰

The New Jersey courts have followed the general rule that a nonconforming use is protected only if it is substantially the same use as that existing when the zoning restriction became effective,¹⁶¹ although "a nonconforming use is not restricted to the identical particular use which was in existence at the time of the enactment of

154. See, e.g., *Drysdale v. Beachnau*, 359 Mich. 152, 101 N.W.2d 346 (1960); *Township of West Bloomfield v. Chapman*, 351 Mich. 606, 88 N.W.2d 377 (1958); *Gross v. Allan*, 37 N.J. Super. 262, 117 A.2d 275 (App. Div. 1955); *Baris Lumber Co. v. Town of Secaucus*, 20 N.J. Super. 586, 90 A.2d 130 (L. Div. 1952).

155. "We do not believe that a violation of a provision of a regulatory ordinance necessarily destroys the lawfulness of the basic use where compliance with the regulation can be had on demand and where such compliance actually follows." *Drysdale v. Beachnau*, *supra* note 154, at 155, 101 N.W.2d at 347.

156. See, e.g., *Crompton & Co. v. Borough of Sea Girt*, 1 N.J. Super. 607, 63 A.2d 834 (L. Div. 1949).

157. See, e.g., *Pieretti v. Town of Bloomfield*, 35 N.J. 382, 173 A.2d 296 (1961); *Hay v. Board of Adjustment*, 37 N.J. Super. 461, 117 A.2d 650 (App. Div. 1955); *Grundlehner v. Dangler*, 29 N.J. 256, 148 A.2d 806 (1959); *Frank v. Luther*, 18 N.J. Super. 193, 87 A.2d 17 (App. Div. 1952).

158. *Lamb v. McKee*, 10 N.J. Misc. 649, 160 Atl. 563 (Sup. Ct. 1932); *Moore v. Bridgewater Township*, 69 N.J. 1, 173 A.2d 430 (1961).

159. See, e.g., *Black v. Town of Montclair*, 34 N.J. 105, 167 A.2d 388 (1961); *Kramer v. Town of Montclair*, 33 N.J. Super. 16, 109 A.2d 292 (App. Div. 1954); *Lamb v. McKee*, *supra* note 158.

160. *Austin v. Older*, 283 Mich. 667, 278 N.W. 727 (1938); *Hillsdale v. Hillsdale Iron & Metal Co.*, 358 Mich. 377, 100 N.W.2d 467 (1959).

161. See, e.g., *North Bergen Township v. Thomas S. Lee Enterprises, Inc.*, 75 N.J. Super. 17, 182 A.2d 137 (App. Div. 1962); *Arkam Mach. & Tool Co. v. Lyndhurst Township*, 73 N.J. Super. 528, 180 A.2d 348 (App. Div. 1962); *Miller v. Boonton Township Bd. of Adjustment*, 67 N.J. Super. 460, 171 A.2d 8 (App. Div. 1961).

the zoning ordinance.”¹⁶² In borderline cases, the change in use is usually disapproved in New Jersey,¹⁶³ pursuant to the state’s general policy of restricting nonconforming uses in the hope that they will gradually be eliminated.

Michigan, however, expressly authorizes ordinances providing for substitution of nonconforming uses of structures.¹⁶⁴ Under this broad statutory authority, Michigan zoning ordinances often provide either that a change is permitted (a) only to uses in a “higher” (more restrictive) classification, or (b) to uses in the same or a “higher” classification, often with a further provision that the Board of Appeals must approve such changes.¹⁶⁵ Even where the zoning ordinance makes no provision for substitution of another nonconforming use, the Michigan Supreme Court has twice¹⁶⁶ held that substitution of a less objectionable use, not involving any structural changes or additions, must be permitted because, “if the ordinance is construed so as to prevent such a use . . . it is not reasonable.”¹⁶⁷ But the Michigan court has been willing to recognize the statutory power of the local legislative body to prohibit any structural alterations in a building devoted to a nonconforming use, even when such alterations are necessary for the continuance of the nonconforming use.¹⁶⁸

Neither immediate termination of a nonconforming use nor termination after an amortization period can be compelled under the Michigan or New Jersey zoning statutes.¹⁶⁹ But, in view of the sustained hostility of the New Jersey courts toward nonconforming uses, one would expect the courts to be astute in finding that termination

162. *Arkam Mach. & Tool Co. v. Lyndhurst Township*, *supra* note 161, at 532, 180 A.2d at 351.

163. *Grundlehner v. Dangler*, 29 N.J. 256, 148 A.2d 806 (1959); *Heagen v. Borough of Allendale*, 42 N.J. Super. 472, 127 A.2d 181 (App. Div. 1956).

164. MICH. COMP. LAWS §§ 125.216, 125.286 (1948).

165. *E.g.*, ANN ARBOR, MICH., CODE ch. 55, § 5.86(1) (1963) provides: “A *non-conforming use* may be continued and shall be maintained in good condition, but it shall not be: (a) Changed to another *non-conforming use*, except, after approval of the Zoning Board of Appeals, to those permitted uses which are contained in the Zoning District wherein the *non-conforming use* first appears in the SCHEDULE OF USE REGULATIONS. Before granting such approval, the Board shall determine that such change in use will have a less detrimental effect on neighboring property than the existing *non-conforming use*.”

166. *Palmer v. City of Detroit*, 306 Mich. 449, 11 N.W.2d 199 (1943); *Redford Moving & Storage Co. v. City of Detroit*, 336 Mich. 702, 58 N.W.2d 812 (1952).

167. *Palmer v. City of Detroit*, *supra* note 166, at 455-56, 11 N.W.2d at 202. This statement was repeated in *Redford M. & S. Co. v. City of Detroit*, *supra* note 166.

168. *Cole v. City of Battle Creek*, 298 Mich. 98, 298 N.W. 393 (1941); *Austin v. Older*, 283 Mich. 667, 278 N.W. 727 (1938). ANN ARBOR, MICH., CODE ch. 55, § 5.86(1)(b) (1963), prohibits structural alteration “so as to prolong the life of the *building*.”

169. *De Mull v. Lowell*, 368 Mich. 242, 118 N.W.2d 232 (1962); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952).

by abandonment has occurred. Yet it has been held that non-use of premises for three and one-half years because of inability to obtain a tenant did not amount to abandonment;¹⁷⁰ that closing down a retail lumber yard for three years because of financial difficulties did not constitute abandonment;¹⁷¹ and that periods of interruption of the nonconforming use of a building as a hotel because of financial difficulties engendered by the depression, inability to obtain a tenant, and war-time exigencies, did not amount to abandonment.¹⁷² Moreover, an ordinance provision that discontinuance of a nonconforming use for a period of one year shall preclude resumption of the use has been held to violate the zoning enabling act.¹⁷³ In Michigan, on the other hand, the content of the abandonment doctrine is not yet clear.

III. CONCLUSION AND SUGGESTIONS

The experience of the Michigan and New Jersey courts with zoning during the past four decades has resulted in some striking contrasts. In general, the New Jersey courts have recognized and applied a strong presumption that zoning regulations are valid; and they have increasingly recognized that zoning is properly a tool for regulation of land use in accordance with a community development plan and that the reasonableness of particular zoning regulations as applied to particular tracts of land depends very largely upon their relevance to the community's development plan, if any. The Michigan courts, on the other hand, have generally given less weight to the oft-stated presumption of validity; until quite recently, they have largely ignored the role of zoning as a land-use planning tool and have been inclined to ignore the community's land use plan and the purposes it is designed to serve. Consequently, the Michigan courts have tended to act as "super-zoning commissions" to a far greater extent than have the New Jersey courts. Whether *Padover v. Farmington Township* represents a definite and permanent reversal of attitude in these respects still remains to be seen.¹⁷⁴

Although this writer, generally speaking, favors the New Jersey approach with regard to the matters mentioned in the preceding paragraph, it is arguable that the New Jersey Supreme Court has car-

170. *Campbell v. South Plainfield Bd. of Adjustment*, 118 N.J.L. 116, 191 Atl. 742 (Sup. Ct. 1937).

171. *National Lumber Prods. Co. v. Ponzio*, 133 N.J.L. 95, 42 A.2d 753 (Sup. Ct. 1945).

172. *Haulenbeck v. Borough of Allenhurst*, 136 N.J.L. 557, 57 A.2d 52 (1948).

173. *State v. Acera*, 36 N.J. Super. 420, 116 A.2d 203 (App. Div. 1955).

174. Cf. text accompanying notes 100-02 *supra*.

ried the presumption of validity too far in validating such regulations as the one requiring five-acre minimum lots in the major portion of an undeveloped rural community¹⁷⁵ and the one completely excluding trailer parks from a large, relatively undeveloped rural township.¹⁷⁶ In cases of these types, it may well be preferable to reverse the usual presumption of validity and to place upon the municipality the burden of showing that the zoning regulation is reasonable.¹⁷⁷ This would be consistent with the traditional attitude of the Michigan courts toward exclusionary zoning.

The New Jersey courts have now fully accepted municipal fiscal planning as a proper consideration in the framing of a zoning ordinance.¹⁷⁸ Michigan courts have not. To the writer, the New Jersey position seems preferable. There is no doubt that the rapid migration from central cities to suburban and exurban communities poses very difficult problems. New schools, streets, and sewers are required. More police and firemen must be employed. New recreation areas are needed. Unfortunately, new housing on small lots does not "pay its way" (*i.e.*, it does not increase the assessed value of the real estate enough to yield the taxes necessary to offset the additional expense to the community for new schools and other facilities). Older residents must pay a higher tax bill at the very time when their way of life, in many cases, is drastically altered by the influx of new residents. Furthermore, construction of new schools and other community facilities in a hurried and haphazard manner may have serious adverse effects upon the health and safety of the community, in addition to being uneconomical and wasteful. It therefore seems proper to attempt through zoning to achieve a planned, orderly, and balanced growth without a confiscatory increase in the local tax rate.

Although *Padover*¹⁷⁹ perhaps points toward increased judicial acceptance of municipal fiscal planning as a proper zoning consideration in Michigan, an amendment of the Michigan zoning statutes to compel such acceptance would seem to be in order. In addition, the Michigan and New Jersey zoning statutes ought to be amended to provide that, before a zoning ordinance or any substantial amendment thereto can be adopted, there must be a map of present land

175. *Fisher v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952). *Cf.* text accompanying notes 128-32 *supra*.

176. *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962).

177. This was suggested by Justice Hall in his dissent in *Vickers v. Gloucester Township*, *supra* note 175, at 259, 181 A.2d at 144. It has also been suggested in a perceptive law review comment dealing with "acreage" zoning. Comment, 106 U. PA. L. REV. 292 (1957).

178. See, *e.g.*, *Gruber v. Raritan Township*, 39 N.J. 1, 186 A.2d 489 (1962).

179. 132 N.W.2d 687 (Mich. 1965).

uses and that the planning board or commission or governing body, as the case may be, must have adopted a land use plan containing provisions for the future development of the community.¹⁸⁰ Indeed, the writer would like to see legislation adopted *requiring* that land use planning for metropolitan regions be carried out either at the state or regional level, and *requiring* municipal (and county) zoning ordinances to comply therewith. Such a requirement would give some real meaning to the concept that zoning should be in accordance with a "comprehensive plan" and would provide an additional check upon arbitrary or exclusionary exercise of the zoning power.

The New Jersey courts have gone much farther than the Michigan courts in recognizing aesthetic objectives as proper considerations in zoning.¹⁸¹ Perhaps the Michigan Supreme Court's attitude toward aesthetic considerations will evolve in the same direction as the New Jersey Supreme Court's. But it might well be desirable to amend the zoning statutes in both states to provide for the inclusion of "community appearance regulations" in zoning ordinances, in recognition of the legitimacy and importance of aesthetic considerations in zoning.¹⁸²

The writer would also like to see both Michigan and New Jersey

180. The proposed New Local Land Use Law, prepared by the County and Municipal Law Revision Commission of New Jersey, contains the following provision:

"Every municipality may, by ordinance, adopt zoning requirements and standards for the use of land within its borders . . . provided that it has first adopted a land use plan, and there is in existence a map of present land uses, and that all of the provisions of the proposed zoning ordinance are either substantially consistent with such map or are designed to effectuate such plan or a preliminary stage thereof.

* * *

"Every zoning ordinance adopted prior to the effective date of this chapter shall continue in full force and effect and every such zoning ordinance may be amended without compliance with the requirements of this section, provided such amendment does not alter the boundaries of an existing zone, and provided, further, that such amendment does not make a substantial change in the permitted uses within any existing zone." (Proposed new N.J. REV. STAT. § 40A:7-38.)

181. See, e.g., *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964).

182. The proposed new Local Land Use Law of New Jersey states, *inter alia*, that one of the purposes of the law is to "promote improved community appearance through good civic design and arrangement." (Proposed N.J. REV. STAT. § 40A:7-2.) It further provides:

"After the adoption of a zoning ordinance which contains community appearance regulations denominated as such in the ordinance, the governing body shall appoint an advisory committee of at least 3 persons, none of whom shall be a member of the board of adjustment. Where such a community appearance advisory committee exists, the board of adjustment shall not act on any appeal or application for relief from the community appearance regulations until it had referred such appeal or application to the community advisory committee and has received a written report thereon or 30 days shall have elapsed from date of referral without such a report having been filed. A duly authorized representative of the community appearance advisory committee shall be considered a party in interest at any hearing before the board of adjustment involving regulations affecting community appearance." (Proposed N.J. REV. STAT. § 40A:7-57.)

eliminate statutory protection of nonconforming uses and empower municipalities to impose reasonable requirements for their termination.¹⁸³ There is no reason to suppose such requirements violate the federal due process clause, and the current trend in the state courts is to sustain reasonable provisions for termination of nonconforming uses if the zoning enabling acts do not prohibit this.¹⁸⁴

183. A number of states now have zoning statutes which authorize termination of nonconforming uses. See Katarincic, *Elimination of Non-Conforming Uses, Buildings, and Structures by Amortization—Concept v. Law*, 2 DUQUESNE L. REV. 1 (1963). The proposed new Local Land Use Law of New Jersey provides:

"Any municipality may, by zoning ordinance, provide that any of the following nonconforming uses, structures or activities in any district zoned for residential use shall cease or be converted to a conforming use. The municipality shall provide a reasonable formula, including amortization of investment in the property, to determine the period within which such nonconforming use shall cease or be converted to a conforming use, but in no event shall such period exceed 5 years:

"a. any such nonconforming use involving the use of land only or involving the use of land and accessory improvements which aggregate an assessed valuation for tax purposes of not more than \$2,000;

"b. any such nonconforming use consisting of a sign or billboard;

"c. any such nonconforming use consisting of a junk yard, auto wrecking or dismantling establishment.

"Such ordinance shall provide that the board of adjustment or an appropriate official designated therein shall select the use or uses to be eliminated and shall, after notice and hearing, compute the time within which such use or uses shall be eliminated in accordance with the formula contained in this section and in the zoning ordinance. The board or officer shall serve notice on the owner or owners of the property in question which notice shall commence the running of the period within which such use or uses shall be eliminated." (Proposed N.J. REV. STAT. § 40A:7-45.)

184. See, e.g., *Livingston Rock & Gravel Co. v. Los Angeles County*, 43 Cal. 2d 121, 272 P.2d 4 (1954); *Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); *Spurgeon v. Board of Comm'rs*, 181 Kan. 1008, 317 P.2d 798 (1957); *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42 (1958); *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34 (1952).

For general discussion of nonconforming uses, see Anderson, *The Nonconforming Use—A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214 (1959); Katarincic, *supra* note 182; Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955); Comment, 30 IND. L.J. 521 (1955); Comment, 26 U. CHI. L. REV. 442 (1959); Comment, 102 U. PA. L. REV. 91 (1953).