

A Short History of Zoning
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I. The Development of Zoning Regulation

Local governments have no inherent power to adopt zoning ordinances; their power to do so in Michigan is authorized by the zoning enabling act and limited to the authority granted in statutes that Michigan and other states adopted in the 1920's.

A review of the development of zoning regulation is useful for understanding zoning rules and decisions as well as the change in the nature of zoning regulation over its one hundred year history. In that time, zoning regulation grew from the creation of broad categories of land use designed to screen out particular uses to a system of layers of decision-making that focus on the particular use of a particular piece of property. Over the same time, judicial review of zoning decisions shifted from applying regulations and the rights of property owners to favor the free use of property to reading regulations to favor the broadest understanding of municipal power over the use of property.

A. Before Zoning: Building Regulations

Early building regulations in the late 19th and early 20th Centuries, regulating the physical characteristics of buildings were upheld by the courts, and by 1926, the Supreme Court could say:

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926)

Height, bulk, setback, and other physical characteristics could more readily be tied directly to health and safety. In *Euclid*, the Supreme Court considered a different type of regulation, further removed from immediate health and safety concerns.

B. Separation of Uses by Broad, General Categories

In *Euclid*, the general exclusion of broad categories of *uses* from some areas was the issue.

Zoning – in the sense we think of it now -- was first upheld by the U.S. Supreme Court as the exclusion in general terms of a *use* for property B in that case, all industrial establishments B even though

it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves.

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926)

The Court described the concept in nuisance terms -- and allowed broad scope to the legislative determination of the separation of uses into zones:

A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926).

C. Cumulative Zoning

Euclid, Ohio's ordinance created overlapping *use* districts (U-1 through U-6), height districts (H-1 through H-3), and area districts (A-1 through A-3).

Early ordinances followed a cumulative or pyramid type of organization, with single-family districts at the top:

Class U-1 is the only district in which buildings are restricted to those enumerated [single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries, and truck gardening]. In the other classes the uses are cumulative - that is to say, uses in class U-2 include those enumerated in the preceding class U-1; class U-3 includes uses enumerated in the preceding classes, U-2, and U-1; and so on.

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 381, 47 S.Ct. 114, 116 (1926).

In other words, uses remained mixed in all districts except the top – invariably the single-family district. The justification for that separation, in fact, still lies in large measure in that desire to separate the single-family house:

. . . the residential nature of a neighborhood is a proper subject for legislative protection. As stated by the United States Supreme Court in *Belle Terre [v Boraas]*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797]:

“A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* [348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”

Charter Twp of Delta v. Dinolfo, 419 Mich. 253, 272-273, 351 N.W.2d 831, 841 (1984)

D. Exclusive Districts and Transitional Zoning

In later ordinances, however, the separation of uses applied to all use districts. Each district allowed only a narrow range of related uses. The typical ordinance today includes at least a range of separate single-family residential districts with varying densities, multi-family residential districts with different density levels, office districts with only accessory commercial uses, commercial districts divided into local, community, downtown, and highway districts, and separate light and heavy industrial zones.

The arrangement of zones on the map serve to further isolate the high-end zones by creating a transition of uses from industrial to commercial to office to multiple-family residential to single-family residential areas of the lowest density.

E. Zoning Rules Reinforce Separation

The classic rules of zoning reinforce the separation of uses:

1. **The Rule of Uniformity** ensures equal benefits and obligations:

MCL 125.3201 (2) Except as otherwise provided under this act, the regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.

2. **Spot zoning** is prohibited:

A zoning ordinance or amendment of the present type creating a small zone of inconsistent use within a larger zone is commonly designated as >spot zoning.= See annotations in 128 A.L.R. 740 and 149 A.L.R. 292, and the cases cited therein. Such an ordinance is closely scrutinized by a court and sustained only when the facts and circumstances indicate a valid exercise of the zoning power. Economic gain to the landowner is insufficient reason for invoking the amending power of the township board when the property is capable of full use within the limitations for which it is zoned. We find no other grounds justifying the creation of a two-lot commercial district almost entirely surrounded by a residential area. It is evident that the amendment creating the commercial district was a means of circumventing the statutory requirement that the provisions within a zoning district be uniform.

Penning v. Owens, 340 Mich. 355, 367-368, 65 N.W.2d 831, 836 (1954)

3. **Variances**, by supplying a relief valve for property that cannot meet absolute uniformity, allow general rules to be legislated without conceiving every possible variation. They are regarded as spot zoning if misapplied, however:

If an individual wishes to use his property in a manner not permitted by the ordinance, a procedure is provided whereby he may obtain a variance, *i.e.*, relief from compliance with the literal terms of the ordinance. Thus if the corner lot on a street has an irregular shape, because of confluence of streets, rather than the normal rectangular shape of the rest of the lots, a variation might conceivably be justified if the ordinance prohibits attached garages. But in such case, it will be noted, there is a hardship unique to this particular lot, not shared by all others. The power to grant the variance, as has been said, acts as a safety valve in such situations.

Tireman-Joy-Chicago Improvement Ass'n v. Chernick, 361 Mich. 211, 215-216, 105 N.W.2d 57, 59 (Mich.1960)

F. Specialized Treatment of Particular Uses and Addition of Subjective Elements

1. Site Plans

Site plans provide the local government with an illustration of a proposed use, to determine whether it meets the requirements of the zoning ordinance as to use, area, setback, height, parking, and other requirements, or to evaluate an application for a variance or special land use.

Accordingly, the courts concluded that the power to require site plans was inherent in the zoning authority under the enabling act, in a way analogous to the power of administrative agencies to adopt procedures to implement the substantive authority that the Legislature has specifically delegated to the agency. *Charter Twp of Harrison v Calisi*, 121 Mich.App. 777, 783-784, 329 N.W.2d 488, 491 (Mich.App.,1982).

The zoning enabling act now provides express authority for site plan review:

Sec. 501. (1) The local unit of government may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body or official responsible for reviewing site plans and granting approval.

* * *

(4) A decision rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents, other applicable ordinances, and state and federal statutes.

(5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the conditions imposed under the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents, other applicable ordinances, and state and federal statutes.

M.C.L.A. 125.3501

Site plan review is rarely so simple now. When specific provision is made in many zoning ordinances for site plan review, that section almost always adds separate, additional, and often subjective requirements. For example (from Meridian Township, Ingham County),

New or existing structures shall be constructed or renovated in a manner that is compatible with the surrounding neighborhood when adjacent to a residential zone.

. . . Proposed buildings shall be adapted to the terrain and the size and shape of the lot.

. . . New buildings shall be compatible with the architectural character of surrounding buildings.

. . . Building materials shall be compatible with, or complementary to, neighboring sites and structures.

. . . The design of a building, its location on the site, and the site layout shall respond to specific site conditions, such as topography, solar and wind exposure, privacy, views, access, drainage, and noise.

. . . The landscape should be preserved in as natural a state as possible by minimizing tree and soil removal. Sensitive areas, such as steep slopes, wetlands, and shore areas, as well as resource areas such as forests, wooded lots, and open space shall be preserved where practical.

2. Special Land Uses (Formerly "Exception Uses")

Early ordinances, as in Euclid, Ohio, specified where uses, described in general terms, could be built. Within that district, the use was permitted by right. The special land use describes a use which might be located in a particular district, subject to an administrative decision that the particular use fits in a particular location. A classic example is a church in a residential area. Generally, churches are regarded as compatible with surrounding residential uses, but a large church may be out of place at the end of a residential subdivision cul-de-sac, where traffic must wind through narrow residential streets to reach it. As authorized by statute in Michigan,

Sec. 502. (1) . . . The zoning ordinance shall specify all of the following:

(a) The special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval.

(b) The requirements and standards for approving a request for a

special land use.

(c) The procedures and supporting materials required for the application, review, and approval of a special land use.

* * *

(4) The body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. The decision on a special land use shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.

M.C.L.A. 125.3502

The standards for decision must be specified in the ordinance, and if the application meets those standards, it must be approved. MCL 125.3504

As with site plan review, this statutory language might lead one to believe that specific, verifiable, objective standards will be employed. The courts, however, have approved standards that are not very precise:

The following generalized standards in local ordinances have been found sufficient to guide boards in granting or withholding a conditional or special use permit: “determine [and vary the application of the use district regulations] **in harmony with their general purpose and intent**” (*Holy Sepulchre Cemetery v. Town of Greece*, 191 Misc. 241, 246, 79 N.Y.S.2d 683 [1947]); “will not interfere with the general purposes for which the Flood Plain districts have been established and **will not be detrimental to the public health, safety or welfare**” (*Turnpike Realty Co., Inc. v. Town of Dedham*, 362 Mass. 221, 225, 284 N.E.2d 891 [1972]); “**not injurious to the surrounding neighborhood and not contrary to the spirit and purpose of this ordinance**” (*Florka v. City of Detroit*, 369 Mich. 568, 570, 120 N.W.2d 797 [1963]); “may recommend conditions be attached which it (Board of Adjustment) finds are **necessary to carry out the purpose of this ordinance**” (*Schultz v. Board of Adjustment of Pottawattamie County*, 258 Iowa 804, 809, 139 N.W.2d 448 [1966]). Of course, if the Scio Township ordinance had provided no more than that the board “shall impose such conditions as it deems necessary”, the ordinance would be fatally defective for lack of standards. **However, the ordinance is not so vague. The language “to protect the public interest of the Township and the surrounding property, and to achieve the objectives of this**

Ordinance” is added. Further, the purposes of the ordinance are spelled out in detail in the eight subsections of section 1.03. We find section 6.08 of the Scio Township ordinance no less specific than the comparable sections of ordinances found sufficient in *Florka, supra* , and in the other cases cited above. Accordingly, we reject the argument that the ordinance is invalid for want of standards.

Whittaker & Gooding Co v. Scio Twp, 122 Mich.App. 538, 555-556, 332 N.W.2d 527, 535 (Mich.App.,1983) (Emphasis added.)

3. Planned Unit Developments

The **planned unit development or PUD** trades the rule of uniformity for an individual design of the use or uses proposed.

Sec. 503. . . .

(2) The legislative body may establish planned unit development requirements in a zoning ordinance that permit flexibility in the regulation of land development, encourage innovation in land use and variety in design, layout, and type of structures constructed, achieve economy and efficiency in the use of land, natural resources, energy, and the provision of public services and utilities, encourage useful open space, and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of this state. The review and approval of planned unit developments shall be by the zoning commission, an individual charged with administration of the zoning ordinance, or the legislative body, as specified in the zoning ordinance.

(3) Within a land development project designated as a planned unit development, regulations relating to the use of land, including, but not limited to, permitted uses, lot sizes, setbacks, height limits, required facilities, buffers, open space areas, and land use density, shall be determined in accordance with the planned unit development regulations specified in the zoning ordinance. The planned unit development regulations need not be uniform with regard to each type of land use if equitable procedures recognizing due process principles and avoiding arbitrary decisions are followed in making regulatory decisions. Unless explicitly prohibited by the planned unit development regulations, if requested by the landowner, a local unit of government may approve a planned unit development with open space that is not contiguous with the rest of the planned unit development.

* * *

(10) In establishing planned unit development requirements, a

local unit of government may incorporate by reference other ordinances or statutes which regulate land development. The planned unit development regulations contained in zoning ordinances shall encourage complementary relationships between zoning regulations and other regulations affecting the development of land.

M.C.L. 125.3503

4. Conditional Zoning and Development Agreements

The zoning and approval for a proposed use may be made even more specific by conditional rezoning, authorized by statute in Michigan.

Sec. 405. (1) An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.

M.C.L. 125.3405

The conditional zoning statute addressed a technique already used in many jurisdictions. Without specific authorization under the statute or ordinance, a developer and local government would enter into a development agreement or a consent judgment, incorporating specific terms and conditions for a development.

The conditional zoning statute permits the simple offer of written conditions, incorporated in the rezoning, to narrow the proposed use within the broader zoning district. It could be as simple as a letter from the property owner or a statement of conditions incorporated into the rezoning ordinance. The Michigan Townships Association model ordinance and many local governments, however, require a detailed development agreement to accompany the conditional rezoning.

5. Crossover into Ownership - Restrictions on Size, Shape, and How Property May be Held

Recent regulations cross the traditional outer boundary of zoning, that it regulates uses, not users.

As argued in the Real Property Law Section brief to the Michigan Supreme Court in *Pavlovskis v East Lansing* (Supreme Court Docket No. 135742; Court of Appeals Docket No. 275236):

The general purpose of zoning is the regulation of land and not landowners. *FGL & L Prop Corp v City of Rye*, 66 NY2d 111 (1985). In other words, zoning regulates *use* and not the ownership, status, or identity of the person who occupies the land.

Michigan law is clear on this point. This Court has definitively declared:

The entire statutory scheme of the zoning enabling act... is concerned with regulating the uses of land and structures, not ownership.

Dearden, Archbishop of the Roman Catholic Archdiocese of Detroit v Detroit, 403 Mich 257, 267; 269 NW2d 139 (1978) (emphasis added).

Michigan's view is in accord with the generally accepted view that:

Zoning restrictions or conditions that limit the use of land based on the identity or status of the owner or occupant of the land generally are held invalid by the courts. Zoning regulation that limits the use of land based on race, economic status, age, blood relationship, or identity of the user or owner may be held invalid on either due process or equal protection grounds as an arbitrary restriction unrelated to any legitimate public purpose.

5 Ziegler, Rathkopf's The Law of Zoning and Planning, (4th ed) § 81:04 (2001-2008) (citations omitted)(emphasis added).

The East Lansing ordinance challenged in *Pavlovskis*, and upheld by the Court of Appeals, creates single-family districts within which only owner-occupancy is permitted. The Michigan Supreme Court declined to grant leave to appeal, and the *Pavlovskis* decision stands.

Some zoning ordinances, Clinton County's for example, now specify maximum lot sizes as well as depth-to-width requirements. In other words, if you purchase a parcel of property that is 2 acres in size and exactly 4 times deeper than it is wide, you cannot purchase or own any additional land. These regulations say that an owner cannot own or buy outside of a predetermined ideal size and shape without violating the law. The validity of that type of restriction has not yet been considered in a reported Michigan decision.

Both of these types of regulation cross the line between use and ownership.

II. Form-Based Zoning -- a Return to Building Regulations or Single-Use Specific Approval?

Form-based zoning focuses on the physical characteristics of development, with less emphasis on control of uses, primarily in urban areas. It could represent a return to the pre-

Euclid era in which building forms were specified and uses left to the desires of the owner and the market. Form-based codes could also simply be an additional discretionary requirement added to all of the regulatory features previously developed, requiring new development to meet the standards for the district, special land uses, site plan review, ownership, setback, size, landscaping, building material, form, shape, function, and design criteria.

III. Zoning in the Courts

Administrative actions: Site plan review, special use permits, and variances, as well as decisions by zoning administrators, are all administrative decisions. Review by the courts is limited. Circuit court review of a final administrative decision determines whether the decision is authorized by law and whether the findings are supported by competent, material and substantial evidence on the whole record. Const 1963, art VI, sec 28; *Barak v Oakland County Drain Commissioner*, 246 Mich App 591, 602; 633 NW2d 489 (2001); and in the case of an appeal from the zoning board of appeals, represents the exercise of reasonable discretion granted by law to the board of appeals. MCL 125.3606. The court may then affirm, reverse, or modify the decision.

Challenge to legislation: The adoption or amendment of zoning ordinance – including the rezoning of property -- by the city council, township board, or county board of commissioners is a legislative act. It is not subject to an appeal. It is, however, subject to challenge as contrary to or outside of the zoning enabling act, or as unconstitutional on its face or as applied to particular property.

As a practical matter, a property owner will first ask the local government to rezone the property for the desired use. The interest and focus of the proceedings before the local government are on the classification or permissible uses sought in the rezoning. The owner need not propose a specific use although in most cases the proposed use will be the focus of the discussion. The change from a residential to a commercial zone, for example, opens a range of business uses; a rezoning from one residential zone to another changes the permissible density.

If the city council or township board will not amend the ordinance, the property owner's only alternative is usually circuit court. In court, the focus shifts to the effect of the existing ordinance, not the ordinance as it might have been amended or the proposed use. In other words, the owner must show that the existing ordinance unreasonably restricts the use of the property.

The court does not review the decision of the legislative body to determine whether its legislative action rested upon sufficient evidence or whether it was done for the proper motives. Both are irrelevant. *See, e.g., Pythagorean, Inc v Grand Rapids Township*, 253 Mich App 525, 528; 656 NW2d 212 (2002) (The validity of a law has nothing to do with the motivation of the legislators who enact it@). *Arthur Land Co v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002) (overturning trial court's appellate review of county rezoning action on the record; plaintiff was entitled to a hearing and to produce evidence in support of its claims). , not that the A challenge to the zoning ordinance can include a claim that as applied to its

property, the zoning ordinance violates the owner=s right to substantive due process by unreasonably restricting the use of the property, or a facial challenge to the ordinance itself, as for example, a claim that the ordinance by its terms is exclusionary and will not allow the use or uses desired by the property owners. More rarely, the owner claims that as applied, the ordinance constitutes a taking of its property without compensation.

If the existing ordinance is declared unconstitutional, the Michigan courts may exercise their equitable power to order a remedy. *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986). Beyond enjoining the local government from enforcing the ordinance found to be invalid, the court may not order the local government to rezone the property; doing so would invade the legislative province and violate the constitutional separation of powers. Rather than leave the local government free to rezone the property to any other category of uses, the court may craft a remedy that directly addresses the use of the property. The owner may propose a use and offer proofs to show that it is reasonable. The court=s role is not to determine whether that use is the most reasonable among the range of theoretically possible uses; that would invade the legislative province and would make the court a superzoning commission. Rather, if the court finds it to be reasonable, the court may enjoin the local government from interfering with that reasonable use. *Schwartz, supra*. In rare cases, the court may find a taking and order money damages.

IV. Other Land Use Regulation

Other sources of land use regulation at the state and local level include land division and subdivision regulation, regulation of natural resources including wetlands, inland lakes and streams, dunes and shorelands, and stormwater, including drains.

Even where there have been no amendments in statutes or regulations, significant changes can be made in their enforcement through administrative actions and guidance documents.