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Cover Page Footnote

Chief City Planner, Cleveland City Planning Commission; Member of the New York and Ohio Bars

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THE ESSENTIAL INGREDIENTS FOR ZONING LITIGATION

*ALLEN FONOROFF**

ZONING legislation embraces a complex of ideas and philosophies. The very reason for its being strikes at the roots of some of our most cherished legal cliches. It represents restrictions and regulations over the use of land. If zoning is based upon prior comprehensive planning, as it should be, it then results in planning techniques put into legal language and based upon social, economic and legal foundations.

The test of reasonableness presented in any contest arising from the exercise of the state or local police power—prompted by public health, safety, morals, comfort, convenience, prosperity, and general welfare—must be supported by social and economic facts and theories. Where this can be done successfully, these facts and theories will become part of the law. An attempt to show reasonableness by using the ancient Anglo-Saxon rules of property law alone will in all probability fail. The law reports contain many decisions in which the zoning of a particular parcel of land has been held to be unreasonable. Many of these cases should not have been lost. Some who are "planning conscious" are too quick to blame the courts as well as the quality of some particular judge's intellectual processes for this "bad law." In those cases where a zoning classification which from a planning point of view was in the best interests of the community has been struck down, it is quite probable that the public interest was not properly presented to the court, if at all. If the legal and planning profession are to make "good law" in this field, they must understand their responsibility. The job is not finished after a land use plan has been prepared and the necessary ordinances have been fought through the local legislative bodies. The planners must supply the ammunition for the courtroom battle. It is just as essential that the municipality's attorneys understand that planning and zoning involve all the fields of learning that go into a comprehensive plan for people, such as, among others, economics, sociology, engineering and design. Such an understanding might be more easily accomplished if the planning rationale were included in the study materials of real property in our law schools. Zoning techniques and concepts cannot be isolated from planning for proper analysis.

SHAPING THE LAW

The case reports are full of judicial opinions involving various devices and techniques that are used in zoning legislation. Judicial acceptance of

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these devices and techniques as reasonable controls depends upon how accurately and palatably planning ideas and criteria are presented to the court within the framework of the law. It is not uncommon to find conflicting opinions among the lower courts of a state on similar issues. Often this can be traced to the way in which the cases were presented to the courts.

The bulk of zoning litigation today involves the application to diverse and complex sets of facts of well-established but vague principles stemming from the police power. Adjoining property owners parade before the court to offer their "opinion" with respect to the effect of a zoning change on their property, and expert real estate appraisers buttress both sides by offering their opinions as to the money value of the property if the zoning stands or falls. Only rarely does the court have the benefit of expert planning testimony. The real issues in most zoning cases seem to be lost or forgotten in the deluge of irrelevant testimony. Loss of value has become a dominant theme in the argument of those attacking a zoning change. But since the application of zoning does in fact restrict the use of land and buildings, it necessarily affects the values of all property. Except in the most obvious cases of unreasonable restrictions and classification, loss of value should have no bearing on zoning litigation.[1]

Zoning litigation is not confined to those cases in which a property owner attacks the zoning classification of his land. Also included are cases that involve statutory procedure, appeals from administrative review boards, and in a few instances, cases involving a particular zoning control such as the minimum building size regulation.[2]

The attorneys involved in all these types of cases have an opportunity to shape the law thereafter to be applied to planning.

Creative minds in the planning profession have, after careful study and testing, produced excellent techniques that serve to guide the development of a community. As soon as these ideas are reduced to writing, they are liberally used around the country. But this plagiarism for the "public good" creates a danger that the new techniques will first be subjected to judicial review in a jurisdiction having no planner available to supply the community's attorney with the reasons and criteria for using the technique in question. If the new concept is made an issue in a community that cannot legally support it, it might be lost when taken to the highest court of the state. This will result in its being lost as a usable technique for all the communities of that state unless the concept itself can be dis-

1. See Bettmann, Brief Amicus Curiae, in City and Regional Planning Papers 157, 162-64 (Comey ed. 1946).

2. See, e.g., Lionshed Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953).

tinguished from its application in the original decision. The same can be said of provisions requiring the elimination of nonconforming uses, controls over the spacing and bulk of buildings, and so forth.

An Ohio Supreme Court decision[3] on an ordinance requiring the removal of a particular type of business is illustrative of the problem. The ordinance was declared invalid because of the way in which it was written to operate. The decision does not rule out the possibility of a reasonable amortization requirement, should one come before the court.[4] But the opinion is full of the familiar phrases concerning one's rights in property. Although the decision was a proper one, limited as it was to the particular ordinance, these dicta are often cited in briefs and arguments involving a zoning change. From the planner's point of view this case might be considered bad law. But "bad law" does not always originate in the courtroom. It can be the result of ill-conceived legislation. Nevertheless, the effect of this decision has been to make local solicitors and legislators fearful of trying a reasonable procedure that would require the elimination of a nonconforming use.

Advances in technology have produced more efficient methods of controlling land use development. Every zoning technique or device that is invented or made over to remedy a particular inadequacy in present zoning controls involves a new regulation of private and public property. To achieve a more realistic control, to better provide for light, air, and ventilation, the planners are turning to devices other than the usual yard, height and court requirements. Although the principle of control is the same, the approach is new and must be justified, when challenged, as a *reasonable* exercise of the police power.

The status of planning and zoning has advanced considerably from a technical point of view at least, if not by accomplishment, since Mr. Ambler challenged the validity of the Village of Euclid's zoning ordinance.[5] Whether too much is expected of zoning or whether zoning is accomplishing the desired goal is something that will have to be examined elsewhere.

If the police power is to be expanded and a court expected to accept these controls over man's inalienable right to pursue property, the lawyer has to understand what he will be talking about. He needs to understand more than the Rule in Shelley's Case and the Rule Against Perpetuities to argue successfully the rights of a community to control the use and bulk of buildings that X may want to put on Blackacre. If the community's attorney has no understanding of the planning concepts

3. City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); see discussion in text accompanying notes 10-13 infra.

4. See 67 Harv. L. Rev. 1283 (1954).

5. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

he is called upon to defend and champion, he cannot hope to be effective. This is not to say that a competent attorney will not make a good argument. But he will make a better one if there is cooperation between his office and the planner. This is where the planner must function.

No lawyer would dare step into a courtroom to try a personal injury case without having at hand all the facts concerning the accident itself, and a complete analysis by a competent physician. The doctor's report will dissect the problem for the lawyer and, so armed, he will be able to present a clear case to the court, eliminating all extraneous matter. The planner can play a similar role in a zoning case. He too can dissect the problem for the lawyer, as no other professional can. The lawyer will then be able to make his presentation clearly and precisely.

By their very nature, law departments, corporation counsel offices, and similar groups are jealous of their jurisdiction. To some extent they resent being told how to prepare for the arena, and perhaps rightly so. But this by no means rules out cooperation. There are distinct areas of cooperation in this field. Few lawyers turn away a helping hand, especially in a field of law which is relatively new and in which they have little or no experience. When a man who takes up pipe smoking discovers that it does not make him look like an intellectual after all, he may find he still enjoys smoking it. Similarly, if a lawyer took up an association with a planner, he might discover that although it does not make him look like an intellectual, he will enjoy the association. It is extremely important to emphasize the need for a proper approach between planner and lawyer, because it is impossible to approach the subject of the role of a planner in preparing a zoning case without mentioning the necessity of guarding against the pitfalls of human behavior. The planner will have no part to play if he antagonizes the lawyer. The planner must adopt the approach of willingness to supply the concepts and the planning facts that justify them. At this point the problem must be left to the lawyer to weave these concepts into a legal fabric that the courts can accept.

Case Law Examples

Picking cases that may illustrate the point that unreasonable zoning produces unsound law is a subjective analysis. The Tarrytown floating zone case[6] is a good example. This decision of the New York Court of Appeals created a good deal of controversy among planners and lawyers. Some thought the ordinance improper zoning and the decision upholding it therefore unsound.[7]

6. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).

7. See, e.g., 100 U. Pa. L. Rev. 467 (1951); 9 Wash. & Lee L. Rev. 120 (1952); but see 65 Harv. L. Rev. 1467 (1952).

Poor draftsmanship of important legislation has been a contributing factor to decisions hobbling further planning. When zoning text amendments are written hurriedly, as happens all too often, errors are unavoidable. These errors can be the difference betwen winning and losing a court decision. Following are two cases and a generalization to illustrate this point.

First, the generalization. There exists a number of briefs and cases dealing with nonconforming uses and the validity of ordinances requiring their elimination or limiting their extension or enlargement. Reliance on the *status quo* and loss of value to property are almost always argued in an attempt to beat down the ordinance. The puzzling thing is that the defending attorneys usually overlook two basic cases to buttress their arguments: *Hadacheck v. Sebastian*[8] and *Ex parte Quong Wo.*[9] These cases involved the elimination of going businesses worth much more than the uses permitted by the ordinances. Both ordinances were upheld as valid exercises of the police power. These two cases are extremely important examples in this respect. To have omitted them seems to indicate incomplete preparation. Perhaps better zoning decisions on issues such as these would be forthcoming if there were better cooperation between lawyer and planner and more careful preparation.

The first case, *City of Akron v. Chapman*,[10] involved the validity of a section in the zoning ordinance requiring the removal of a nonconforming use. The original zoning ordinance, enacted in 1922, contained the following provision:

> A building, existing at the time of the passage of this ordinance, which does not conform to the regulations of the use district in which it is located may remain for a reasonable period and the existing use of such building may be continued or extended to any portion of such building which portion was arranged or designed for such use at the time of the passage of this ordinance, but a nonconforming use shall not be otherwise extended. *A nonconforming use shall be discontinued and removed when, in the opinion of the council, such use has been permitted to exist or continue for a reasonable time.*[11]

The defendant owned property which had been used as a junk yard since 1916 and was located in a residential use district. The city council passed another ordinance in January 1950, in which the defendant's property was specifically described by metes and bounds. The ordinance went on to state that as of January 1, 1951, the nonconforming use of defendant's property would have existed for a reasonable period of time and thereafter would have to conform to the provisions of the zoning ordinance. The defendant continued his junk yard operation on the

8. 239 U.S. 394 (1915), affirming 165 Cal. 416, 132 Pac. 584 (1913).
9. 161 Cal. 220, 118 Pac. 714 (1911).
10. 160 Ohio St. 382, 116 N.E.2d 697 (1953).
11. Id. at 384, 116 N.E.2d at 698. (Emphasis added by the court.)

property beyond that date, and the city brought a suit to enjoin the use. The lower court dismissed the suit and found the 1950 ordinance invalid because it showed on its face that it was directed against one individual and not against all individuals in like situations. The court of appeals reversed and granted the injunction. The Ohio Supreme Court reversed the court of appeals and provided the following syllabus:

1. A comprehensive zoning ordinance is a valid exercise of the police power, where such ordinance limits the future expansion of a lawful business conducted on property in a zoned area and which was in existence at the time of the passage of such zoning ordinance, or which ordinance limits the future addition, extension or substitution of buildings in which such business was being conducted at the time of the passage of such ordinance, and which ordinance has a substantial relationship to the public health, safety, morals or general welfare.

2. The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article XIV, Amendments, United States Constitution, and Section 16, Article I of the Ohio Constitution, providing that no person shall be deprived of life, liberty or *property* without due process of law.

3. The provision of a comprehensive zoning ordinance is unconstitutional as taking property without due process of law and as being an unreasonable exercise of the police power, where it grants to the city council discretion to discontinue and remove a lawful nonconforming use of property in a zoned area, which use existed at the time of the passage of the zoning ordinance and continued thereafter without interruption and without material change, when in the council's opinion *such nonconforming use has been permitted to continue for a reasonable time.*[12]

Judge Lamneck, in his opinion, wrote:

What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.

. . . .

The effect of the provisions of the 1922 ordinance and the 1950 ordinance, complained of in this case, is to deprive the defendant of a continued lawful use of his property and is in violation of the due process clauses of the state and federal Constitutions.[13]

As noted earlier, this particular ordinance probably was improper, and the case correct in its result. The court's opinion, however, was much broader than it had to be. As a result of its language, this case is frequently cited as holding that nonconforming uses cannot be eliminated in Ohio, that amortization is invalid.[14] This argument was successfully proposed

12. Id. at 382, 116 N.E.2d at 697.

13. Id. at 388-89, 116 N.E.2d at 700.

14. See, e.g., City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 457, 274 P.2d 34, 42 (Dist. Ct. App. 1954); Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 309 & n.2, 129 A.2d 363, 366 & n.2 (1957); Harbison v. City of Buffalo, 4 N.Y.2d 553, 571, 152 N.E.2d 42, 52, 176 N.Y.S.2d 598, 613 (1958) (dissenting opinion).

to the Ohio Legislature. Now there exists an amendment to the planning enabling laws which flatly prohibits municipalities from eliminating nonconforming uses.[15]

Jones v. Board of Adjustment,[16] a Colorado case, involved an application for a building permit to convert a residential building into a real estate office. One of the permitted uses in this particular district was an "office." The city maintained that the office use contemplated in the ordinance was to be in connection with a residence—an accessory use. The case turned on the interpretation of the word "office." The city, in a four-to-three decision, lost its case. The court's interpretation of the intent of the zoning ordinance was extremely narrow. The decision could easily have gone the other way. Nevertheless, the majority opinion was made possible only because of the loose language of the ordinance. Happily, Denver has since replaced the ordinance and, presumably, tightened the controls.[17]

These cases are illustrative of any number of cases that can be found all over the country. The errors in draftsmanship are not confined to the jurisdictions mentioned.

A zoning ordinance is one of the most difficult, technical and complex laws to draft. It must stand or fall by the test of reasonableness—due process. The line between reasonableness and unreasonableness will in certain cases of application become very faint and sometimes nonexistent. It must be admitted that legislation such as zoning that must be applied to each parcel of land in a community and still be reasonable in its application everywhere requires the most expert knowledge in planning and the most expert care in drafting.

How the Planner Can Participate

Uncertainty and ambiguity in the language of a zoning law can cause a court to render a decision adverse to planning and zoning that will have general application throughout a state. Such a decision can and will be used to oppose subsequent well-drawn solutions to the same problem.

1. *Drafting Legislation*

A planner can be extremely helpful at this point by giving the legal scribe the background and solid reasons for proposed legislation. The

15. Ohio Rev. Code Ann. § 713.15 (Page Supp. 1960).

16. 119 Colo. 420, 204 P.2d 560 (1949).

17. The ordinance was replaced in its entirety by a complete revision of the municipal zoning ordinance, effective November 8, 1956. The language of the revision "has no relevancy to and in no way is a continuance of the provisions of the 1925 ordinance." Letter From Earl T. Thrasher, Assistant City Attorney, Denver, Colo., to the Fordham Law Review, April 14, 1961.

lawyer can then write this purpose and intent into the law in such a way as to leave no doubt about it in the judge's mind. Cooperation between planner and lawyer at this level will do much in avoiding litigation. If the issue should be tried, the lawyer will then be prepared.

The planner should not try to be his own lawyer. As intelligent a group as planners may be, there are some things that they do not know and, because of a lack of training, cannot know.

The problem of legal draftsmanship is a very serious one. If special care is not taken in drafting new planning concepts into law, they will be lost in the courtroom. Inexperienced lawyers cannot write a good ordinance alone; experienced planners, with very few exceptions, cannot do it alone; those who blindly copy from other zoning ordinances and those who have had no training in either planning or law certainly cannot do it alone. There must be cooperation and "peaceful co-existence" between the two professions.

2. *Preparing Exhibits*

Where the zoning of a particular parcel or area is in issue, the planning staff can be most helpful in supplying:

(a) An existing land use map in bright colors that emphasizes the type of zoning classification that should be upheld by the courts.

(b) A land use plan for the neighborhood or community within which the land is located, or the general land use plan for the municipality or unincorporated area.

(c) The documentation necessary to support the land use plan. This will contribute to the "Brandeis brief" by including the economic analysis, population study, and other economic and social elements of planning necessary to document a plan.

The two visual props will help the attorney and the judge get a picture or a feeling of exactly what is involved. Having these exhibits takes the case out of the abstract realm of words and gives it real physical meaning. The planner must then relate the existing land use to the recommendations of the land use plan. The lawyer can then begin to visualize such things as residential amenities, street systems, traffic patterns, the relationship of land use development and traffic, the effect on the character of the neighborhood, and all the other "scientific" criteria for creating use, area, and height districts.

3. *Expert Testimony*

During the course of a trial the planner can give expert testimony. He has an opportunity to impress the court with the need and reasons for planning and zoning. This is the beginning, the first step, in making or

breaking planning law. Through questioning by the lawyer and in stating his own opinion the planner can detail the rationale of good zoning.

There is one pitfall which he must avoid, and that is in talking too much and not addressing himself to the questions asked. In this area there must also be complete cooperation between the planner and the lawyer.

4. *Brief Preparation*

When the results of a lower court's decision are appealed, the lawyer will rely a good deal upon his brief. If it is a good brief, it will find its way into the appellate court's written opinion. Here is the next step in incorporating planning concepts into the law. The planner can participate directly in preparing the brief by contributing the whys and wherefores behind the legal issues. The lawyer can weave this into the fabric of his brief, and can give the court the material it needs to decide that the issue before it is in the interest of the public's general welfare. He can supply the court with the facts necessary to determine whether the issues involved present a justifiable exercise of the police power.

These are some of the ways in which a planner can take an active role in preparing the zoning case and by so doing contribute to properly shaping the law in this field.

The Private Practitioner

As for the practitioner who is hired to challenge the validity of a zoning ordinance, its application to a particular parcel of land, or its interpretation, he too should have a background in planning so that his arguments will relate directly to the subject.

Any question involving the interpretation of ambiguous language in a zoning ordinance (and there are too many examples) necessarily involves an analysis of its purpose and intent. A successful interpretation of planning terms requires an understanding of these terms. The lawyer must know the planning definitions (not necessarily Webster's or Black's) of the concepts he seeks to interpret. Language is susceptible of distortion and especially so where it is used in a vague context.

Having the burden of proving the unreasonableness of a zoning ordinance, the advocate must know what was intended by the regulations. This he cannot do without some knowledge of the planning objectives sought to be attained by the various techniques found in a zoning ordinance. How is the lawyer to determine the point of measurement establishing a minimum lot width when the ordinance is silent on the subject? Is it to be measured at the street line, the property line, the building line, or any other line? The answer must be found in the intent of the

ordinance; the purpose of a minimum lot width regulation must be determined.

Most zoning litigation involves the application of one of the provisions of a zoning ordinance to a particular parcel of land, or the zoning classification of a particular parcel. The latter case raises an argument concerning the mapping of land for one of the several categories of land use—residential, commercial, or industrial. The property owner usually has in mind a higher financial use for his land and alleges that the more restrictive zoning classification is "arbitrary, confiscatory and therefore unconstitutional." In some cases, on the other hand, the zoning classification is clearly in error.

The fundamental question in these cases is whether the zoning classification is reasonable. The practitioner must show that the zoning of his client's land bears no substantial relationship to the purposes of zoning—the police power. He must demonstrate that the public interest is not served by the restriction and that the character of land use in the neighborhood reflects an incongruity with the zoning under attack. The resolution of these issues calls for more than the accepted "rules" of real property. These are planning issues and must be resolved on that basis within the framework of existing law.

This approach, however, does not appear to be the general rule of practice. Courts have been influenced by the "loss of value" argument in spite of evidence concerning the impact of the proposed use on the remainder of the neighborhood.[18] In many jurisdictions, however, the courts now rely more heavily upon a planning rationale in reaching a decision. In balancing individual property rights and the public interest, some courts have recognized the difficult task of planning and zoning the urban communities by requiring those attacking a zoning ordinance to bear the burden of proof beyond the real estate appraisal.

Where planning and zoning objectives are ignored by those attacking and those defending the land use control, the court is more likely to become its own planning commission by substituting its judgment for that of the legislative body. A recent case in Michigan[19] is illustrative of this point. The dissenting opinion of Justice Smith is a forthright statement of his view of the court's decision.

The case involved several vacant lots owned by the plaintiffs on the west side of Kelly Road, between Eight Mile and Nine Mile Roads. The lots vary in width from twenty to twenty-nine feet and all but one of the

18. See Curtiss v. City of Cleveland, 166 Ohio St. 509, 144 N.E.2d 177 (1957), on remand, 110 Ohio App. 139, 146 N.E.2d 323 (1957), modified, 170 Ohio St. 127, 163 N.E.2d 682 (1959).

19. Schaefer v. City of East Detroit, 360 Mich. 536, 104 N.W.2d 390 (1960).

plaintiffs own two or more contiguous lots. The land in question is zoned for one-family purposes. Kelly Road is a four-lane, heavily traveled divided highway. On the west side of the road, in this mile-long stretch, there are many businesses but only four houses. The frontage is zoned for both commercial and residential purposes. The majority of the property, however, is zoned for commercial use.

The lower court held the residential zoning of plaintiffs' lots unreasonable because of the mixture of land use and the existing zoning on Kelly Road. The Michigan Supreme Court affirmed, three justices (Smith, Edwards and Souris) dissenting.

The majority held that the residential zoning bore no reasonable relationship to the public health, safety, morals and welfare. In reaching this conclusion, it noted the heavy traffic, the zoning of a major part of the area for business, the existence of many businesses (some of them next to plaintiffs' lots), and testimony that any residences built on the property could not be profitably sold. The city did not contradict the testimony with respect to property values, and its planner testified that the best use of the land would be business rather than residential.

The city claimed that plaintiffs were guilty of laches because they had not attacked the ordinance until several years after its passage. Rejecting this claim, the court pointed out that there was no prejudice shown to the city as a result of the delay. The fact that plaintiffs purchased their lots with knowledge of the zoning did not stop them from later challenging the validity of the ordinance.

Dissenting, Justice Smith pointed out that three major highways intersect Kelly Road in the area in question. Commercial zoning on Kelly is near these intersections; the rest of the frontage is zoned residential. "What we have here, then, is a residential area, broken into by business at the intersection of 3 main traffic arteries."[20] He concluded that there was "nothing capricious" about the legislative decision to zone plaintiffs' properties as residential. Whether the decision was "wise or unwise is not for this Court, or, indeed, any court."

In ruling on the wisdom of the zoning, he stated, the court "misconceives its appellate function and misinterprets its relation to the legislative bodies of the communities of our jurisdiction." It was pointed out that the constitutionality of an ordinance requires more than "a fair difference of opinion." If the court continues to misconceive its function, he suggested, an administrative tribunal may be created to take its place:

There is an unhappy parallel in the law for the situation we face. It would be well to remember that when a court finds itself unable to cope with a new development in the

20. Id. at 542, 104 N.W.2d at 393.

law (and zoning is a relatively modern concept) the people do not hesitate to remove it, for all practical purposes, from the courts. With respect to industrial accidents the courts were so completely unable to deal with them on any save archaic concepts that the people, in desperation, vested administrative tribunals (the workmen's compensation commissions) with the judicial functions, softened only be the word "quasi," formerly exercised by the courts. For those who believe, as I do, that our courts are better equipped than administrative tribunals to adjust the differences between our citizens, such transfers of jurisdiction are depressing. It is to be hoped that in this field history need not repeat itself. We are only at the threshold of complex zoning problems. We may take judicial notice of the official census figures and of the magnitude of the suburban expansions taking place. If we persist in trying to decide from photographs and maps in Lansing, without even the benefit of a visit to the premises, what is the best use of the land in our growing communities, we may very well bring into our State still another administrative tribunal merely to keep our inept and unauthorized hands from meddling with a situation we have neither the knowledge, the skill, nor the jurisdiction to administer. These expanding coumunities must be permitted to govern themselves. It is possible that their judgment as to land use will not be of the best but there is no constitutional requirement that their judgment must be "correct," whatever that may be. If the separation of powers doctrine has any meaning at all it tells us that we cannot substitute our judgment for that of the legislative body.

Thus we are expressing no opinion as to whether the separation of business from residential properties at Sprenger street (or at the other lines of division) was wise or unwise. We are expressing no opinion as to whether this 10 or 11 block area largely devoted to residential purposes, between 8-Mile and 9-Mile Roads, was good land planning or not. We are expressing no opinion as to whether it is desirable zoning to permit commercial establishments to border on heavily-traveled highways, such as 8-Mile, Toepfer, and 9-Mile. What we are holding is that such uses of property are not merely whimsical. When we thus hold, our judicial function is exhausted.[21]

From time to time, some basic zoning device is challenged and the courts have an opportunity to examine the concept. These devices include minimum lot area requirements,[22] minimum building size regulations,[23] provisions requiring the elimination of nonconforming uses,[24] to mention a few. The practitioner would do well to seek the advice of a planner in preparing his case. Here again the important question is one of purpose. What is the planning justification for these regulations? Not until the lawyer knows the purpose is he in a position to attack it or probe for weaknesses. Even if the purpose for the regulation is valid and not subject to attack, it is possible to find and argue that the particular regulation does not accomplish the purpose for which it was created. Only with

21. Id. at 545, 104 N.W.2d at 394.

22. See Senior v. Zoning Comm'n, 146 Conn. 531, 153 A.2d 415 (1959) (four acres upheld); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (one acre upheld).

23. See Frischkorn Const. Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946) (invalid); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953) (upheld).

24. See Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930) (invalid); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (valid).

expert help can the lawyer prepare for this argument. To do otherwise is sheer negligence. Planners, like lawyers, disagree on the theory and use of some zoning controls. Thus, in this type of litigation, the practitioner will need competent planning consultation if he is to successfully try his case.

Success or failure in the courtroom, for either side, depends upon skillful preparation for the trial. An examination of the decisions indicates that most zoning cases are lost in the trial court. Whether or not the lower court decision will stand on appeal depends upon the thoroughness and care taken to build up a record for the appellate courts. This should surprise no one. An important element in the trial court is the effect of the community on the local judge. The most fair-minded and competent judge is influenced by local conditions. This is not necessarily true at the appellate level. It is at the appellate level that the planning evidence becomes important. The maps and statistics, surveys and analyses in the record introduce the facts in their proper context to a reviewing court which, in most cases, has no personal knowledge of the locale and its problems.

Since most courts tend to favor zoning controls, it is essential for the practitioner to develop his record at the trial level with all of the planning documentation he can gather with the aid of a professional planner. The lack of documentation by the city will help show an incomplete planning process and the lack of a comprehensive plan.

This type of an approach is essential for the private practitioner since his primary emphasis should be the development of proof that the particular zoning restriction is without public purpose. A case built on financial loss and "property values" is weak and incomplete. The essence of zoning litigation is the planning objective reflected in a zoning restriction. Zoning by its very nature will affect the value of all property, but that effect is only a by-product of the objectives of zoning. Thus the "property value" argument has importance only in relation to the purposes and objectives of the zoning regulation. The question which both sides must address themselves to, and which the court must answer, is whether a comprehensive plan exists which documents the *reasons* for the zoning restrictions. If the answer is in the affirmative, a court must uphold the ordinance. The court should be reminded that it is not concerned with the wisdom of the plan or whether it would have done otherwise if it were preparing the plan itself.[25] The community interest must prevail if supported by a comprehensive plan.

Finally, the private practitioner must know his courts. He should be

25. See text accompanying note 21 supra; see also Dequindre Dev. Co. v. Charter Township of Warren, 359 Mich. 634, 643, 103 N.W.2d 600, 604 (1960) (dissenting opinion).

sufficiently aware of the zoning decisions to detect a trend in the thinking of the judges. The law, especially in the field of zoning, is continually being shaped and changed. General rules and truisms of yesterday are constantly being challenged, studied, and re-evaluated. This sort of knowledge is another essential ingredient for the preparation of zoning litigation.