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Removing Spot Zoning From the Fabric of Zoning Practice

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Without a doubt, few terms are uttered by both proponents and opponents of zoning actions more frequently than "spot zoning." Spot zoning stands alongside takings as one of the most frequently advanced, yet generally misunderstood concepts of planning and zoning law. In December 2003, the Michigan Court of Appeals revisited the spot zoning issue and attempted to harmonize two seemingly contradictory lines of cases.[1] This article will review the Michigan cases addressing spot zoning and provide guidance to land use decision-makers on how to remove spot zoning from the list of problematic land use issues. This guidance should be applied liberally to all areas of your community; no need to pre-test on a small, inconspicuous area.

The Problem with Simplicity

The one-sentence definition of spot zoning most frequently cited by Michigan courts was first stated in *Penning v. Owens:*[2]

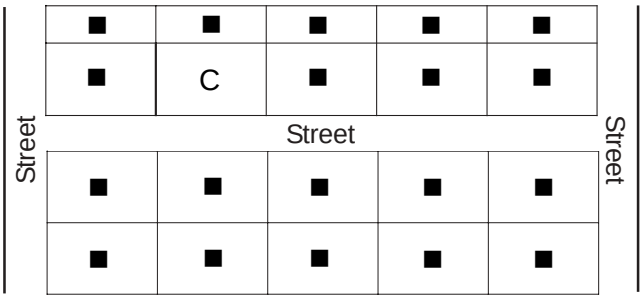
> "A zoning ordinance or amendment…creating a small zone of inconsistent use within a larger zone is commonly designated as spot zoning."

The site plan at the right (Fig. 1) provides a visual description of this one-sentence definition.

Parcel "C" has been rezoned commercial. The surrounding uses (and zoning) is residential. The one-sentence definition supplied by the court in *Penning* implies a purely spatial, neighborhood character-type of analysis, and would indicate that the rezoning of Parcel C is illegal. Clearly, commercial zoning is out of place in this context.

The definition found in *Penning* is simple and easily conceptualized. It is also the source of much of the misunderstanding surrounding the spot zoning issue. If the analysis actually ended with this single sentence, many neighborhood commercial uses or downtown apartments could be characterized as illegal spot zoning. Commercial zoning to accommodate uses that predate an area's residential development also would be illegal, and mixed use developments and cluster zoning would be more difficult to implement. An island of inconsistent use on a zoning map creates a suspicion by the casual observer that a landowner is being singled out for favorable treatment, but to fully understand whether a small zone of inconsistent use is actually contrary to law we must dig deeper.

Fig. 1 - Site Plan



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Spot Zoning in Other States

Other state courts have adopted varying definitions of spot zoning. Some of these definitions are useful starting point for the discussion of spot zoning in Michigan because they focus more on an analysis of the problems associated with spot zoning than simply on a description of the zoning map. For example, the state courts of Texas have recognized that simply looking at the state of the zoning map, without further analysis, is insufficient. In *Burkett v. City of Texarkana*,[3] the Texas Sixth District Court of Appeals observed:

> "It has frequently been said that *spot zoning* is arbitrary and void. However, the term is not a word of art, rather it is descriptive of the process of singling out a small parcel of land for a use classification different and inconsistent with that of the surrounding area, for the benefit of the owner of such property and to the detriment of the rights of other property owners."

Texas courts imply improper motives are the root of evil in spot zoning. To find illegal spot zoning they look not only at the neighborhood, but also make an analysis of whether preferential benefits resulted for one, or a small number of landowners. The Texas Supreme Court has viewed spot zoning as "preferential treatment which defeats a pre-established comprehensive plan. It is piecemeal zoning, the antithesis of planned zoning."[4]

Massachusetts courts take a slightly different approach. To determine whether illegal spot zoning exists, Massachusetts courts apply a balancing test that weighs the benefits *to the public* of spot zoning against its detrimental effects on neighboring landowners.[5] In Massachusetts, then, a small parcel of inconsistent use that confers benefits to the owner of the parcel could be upheld, so long as the public benefits as well, and to a greater degree than that to which neighboring landowners are harmed.

Washington state courts have emphasized the importance of comprehensive plans and land use regulations by adopted what has come to be known as the "change-mistake rule" for assessing the validity of all zoning amendments, including spot zoning situations. The rule holds that a court will uphold a zoning map amendment only if it is based on a change in conditions in the surrounding neighborhood since the zoning was adopted, or a mistake in the original zoning classification.[6] An exception exists if, regardless of consistency with neighborhood character, the rezoning brings the zoning into line with the comprehensive plan. The change-mistake rule shifts the burden of proof to the proponent of the zoning change. This rule obviously makes it more difficult for an individual landowner to secure a change in zoning that is inconsistent with neighborhood character. It also disregards the inquiry into motives and favorable treatment that can be difficult to prove in administrative or judicial proceedings. It is worth noting that comprehensive planning is mandated by Washington state statute, and that zoning must be consistent with the plan.

The Real Criteria for Spot Zoning in Michigan

Why this recitation of case law from other states? The reality is that Michigan courts implicitly have employed, at various times in various cases, many of the criteria found in these cases from other states in deciding spot zoning questions here. Michigan courts, in fact, do not stop with the one-sentence definition from *Penning*. The courts will weigh all the "facts and circumstances"[7] of a case in deciding the validity of an isolated zoning amendment. The trick is to distill from the fifteen or so Michigan appellate court decisions on spot zoning what the courts *really* consider to be the important facts and circumstances. A breakdown of these considerations follows.

Important Considerations

Zoning presumed valid. Michigan courts have sent mixed messages on whether the presumption of validity afforded to communities on other zoning matters can be relied on with the same confidence when spot zoning is asserted in a challenge to a decision. *Brae Burn v. Bloomfield Hills*[8] is the most frequently cited case for the proposition that "the zoning ordinance is clothed with the presumption of validity, and it is the burden of the party attacking the

ordinance to prove affirmatively that it is arbitrary and reasonable." Courts have cited this language in spot zoning cases.[9] The courts have also noted that this presumption is strengthened by the existence of a formally adopted master plan.[10] However, the appellate courts also occasionally have been led astray by language from *Penning* that seems to place the burden on the zoning authority. Immediately after stating the one-sentence definition of spot zoning set forth above, the *Penning* court went on to say:

> "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.*"[11] [emphasis added].

Subsequent spot zoning cases cited with approval this language from *Penning* and seemed to require municipalities to affirmatively prove the reasonableness of their zoning decisions in spot zoning cases in order for them to be upheld.[12]

In *Essexville* the Court of Appeals squarely faced the question of the presumption of validity of spot zoning decisions. After a lengthy review of the relevant cases, the Court of Appeals concluded that, in fact, *Penning* and *Anderson* say the same thing as *Brae Burn* concerning the presumption of validity:

> "In neither *Penning* nor *Anderson* did the courts disavow the deferential standard of review forcefully declared in *Brae Burn* and other cases. Moreover, both *Penning* and *Anderson* denounced 'haphazard,' 'piecemeal' zoning decisions that were contrary to existing zoning plans, which is consistent with the reasonable and arbitrary' test set forth in *Brae Burn* and other cases."[13]

Essexville, then, should clear up any questions about whether the burden of proof shifts in spot zoning cases. Land use decision-makers should take comfort in the knowledge that the presumption of validity accompanies their decisions, even when spot zoning is alleged.

"Small zone..." The first part of the *Penning* definition focuses on the geographic size of the parcel in question. An examination of other cases shows that size is relative. In *Raabe v. City of Walker,*[14] the Michigan Supreme Court determined that rezoning a 180-acre tract of land to heavy industry, when surrounding uses were predominantly agricultural, constituted spot zoning. Similarly, in *Trenton Development Co. v. Trenton Village,*[15] the zoning of a three-block area for duplexes was considered spot zoning when the surrounding neighborhood was zoned multi-family. Perhaps it is more accurate to say that size matters when the parcel in question is *comparatively* small relative to the surrounding area.

Single Parcel or Landowner. The vast majority of spot zoning cases involve a single parcel or landowner. *Essexville* confirmed that rezoning a single parcel owned by a single landowner to an inconsistent use, standing alone, is an insufficient legal basis upon which to conclude that illegal spot zoning has taken place. This conclusion makes perfect sense in the big-picture of zoning practice, for the vast majority of rezoning requests are made by a single landowner for a single parcel. This is not a unique identifier of spot zoning. However, it is a factor that will raise a red flag for the courts if it is accompanied by the other listed considerations.

"Inconsistent use." The character of the area has appeared in various cases as an important consideration, particularly when the municipality cannot point to a master plan or "plan of zoning" to justify rezoning to an inconsistent use. In *Raabe v. City of Walker,*[16] the court specifically noted that a decision "purposed toward contradictory rezoning, after years of original zoning upon which concerned persons have come to depend" is substantially weakened by the absence of a master plan that justifies the change in policy. In *Michaels v. Village of Franklin*[17]*,* the refusal to rezone a parcel to commercial, when all surrounding uses were commercial, was found to be unreasonable.

It is worth noting that *Raabe* cites, with approval, a Maryland case that utilized the change-mistake rule in saying that a rezoning is appropriate "only when there was some mistake in the original zoning, or when there are genuine changes in the character of the neighborhood." *Penning* also calls on the change-

mistake rule in deciding against the rezoning. According to Clan Crawford, the change-mistake rule has not been consistently followed in other Michigan cases.[18] In communities without master plans, then, the red flag should go up when a proposed rezoning would be particularly out-of-character with its surrounding uses.

Purpose and motive. As stated above, the vast majority of spot zoning cases involve a single parcel or landowner. This would seem to imply that one of the concerns surrounding spot zoning is favorable treatment of a single individual. The cases, however, never articulate this concern. The courts tend to focus instead on the inconsistency of land uses resulting from spot zoning. Several cases have used language similar to that found in *Anderson*, that

> "The legislative intention in authorizing comprehensive zoning is reasonable uniformity within districts having the same general characteristics and not the marking off, for peculiar uses or restrictions of small districts essentially similar to the general area in which they are situated."[19]

Essexville, however, raises the possibility that *unfavorable* treatment of a single individual by the city could be illegal if the city's motives are improper. In *Essexville* the landowner asserted that his land was placed in a zone permitting parks and recreational uses, when the vast majority of the surrounding land was industrial, in order to depress the property value for later acquisition by the city for public parkland. The Court of Appeals remanded *Essexville* to the trial court to take further evidence on this issue. Likewise, the court in *Michaels* considered the possibility (without deciding the specific question) that the village was refusing plaintiff's rezoning request in order to depress the market value for eventual purchase.

In many of the cases when the public derides a particular decision as spot zoning, the public is really voicing a belief that "something fishy is going on here." The courts, however, seem more concerned with consistency in land uses. Absent a showing of actual fraud, a legal challenge solely on the basis of improper motive is not likely to succeed if the decision is supported by the master plan.

Key Consideration: Consistency With Plans

The *Essexville* decision confirms that consistency with the plan is probably the most critical factor a court will consider today in deciding whether a "small zone of inconsistent use" constitutes illegal spot zoning. The court placed heavy reliance on the fact that the ordinance was based on a reasonable development plan "and constituted the elected representative's decision regarding how the city landscape…should be developed in the future."
The existence (or absence) of a master plan has essentially decided the outcome of several spot zoning cases. In *Essexville,* for example, the court upheld the city's creation of an essentially small (4.37 acres) and isolated nonindustrial district in the middle of industrial uses because the plan called for greater recreational riverfront access. In *Raabe* the court overturned the rezoning of a 180-acre parcel to industrial from agricultural because it was not part of any general plan. In *Penning* the court overturned the rezoning of a small parcel to commercial from residential, even though it neighbored an existing commercial use that predated the ordinance, because the rezoning was "inconsistent with the basic plan of zoning."

These cases bring to light another important point. The astute reader will have noticed that the courts have not always articulated (or even recognized) the distinction between the terms "master plan" and "the basic plan of zoning." However, the parties to spot zoning litigation know the difference, and use those differences to their respective advantage. The master plan is usually used to justify a rezoning, while "the basic plan of zoning" will more than likely be used to overturn a rezoning. The master plan text and map are the instruments for articulating a change in land use policy. In contrast, a municipality generally cannot find justification for a change in policy in the very document (the ordinance) the municipality is trying to amend. The single best piece of advice for local governments in the general arena of land use is also the best advice for avoiding spot zoning problems: *Make plans. Make decisions that are consistent with plans*.

Is Spot Zoning Really Different?

This was really the central question addressed by *Essexville.* The court felt it necessary to decide "whether the *Penning* and *Anderson* cases contain separate zoning principles apart from those set forth in *Brae Burn*..., and if so, which line of cases controls."[20] In other words, are the facts and circumstances of spot zoning cases so different from other zoning cases that they warrant a separate set of rules? The ultimate response of the Court of Appeals was a qualified "no." The Court read *Pinning* to be consistent with *Brae Burn* in giving local zoning decisions the presumption of validity. However, it went on to say:

> "But, when a discrete zoning decision is made regarding a particular parcel of property – typically a decision involving an amendment or variance that results in allowing uses for specific land that are inconsistent with the overall plan as established by the ordinance – the courts will apply greater scrutiny. Those isolated or discrete decisions are more prone to arbitrariness because they are micro in nature, i.e., the decisions are based on the particular land and circumstance at issue in the request for amendment or variance."

Much of the confusion and misunderstanding surrounding spot zoning over the years has come about because of the belief that "small zones of inconsistent use" described the complete legal test for spot zoning (in the words of Texas courts, treating spot zoning as a "term of art,") rather than the set of facts in a particular situation. *Essexville* provides land use decision-makers with a holding that takes us beyond a one-sentence legal standard for spot zoning. It emphasizes that a small zone of inconsistent use deserves "greater scrutiny" (the qualifier), but that a court must still look at the overall reasonableness of the governmental interest being advanced, consistent with *Brae Burn*, *Kropf* and other key Michigan zoning decisions.

Summary and Checklist

Spot zoning does describe a situation that, by its very nature, draws closer scrutiny to the actions of the zoning authority; however, rather than define different rules for determining the legality of a particular spot zoning situation, a more appropriate approach is to analyze such cases under traditional analyzes of zoning validity. If you are charged with making land use decision on behalf of your community and a claim of spot zoning is raised, you should run though the following list of considerations:

- ✓ Is the "spot" in question small and discrete compared to the surrounding area?
- ✓ Does the "spot" involves one landowner or one parcel?
- ✓ Is the "spot," whether on the map as initially adopted or a request for rezoning, a use inconsistent with surrounding uses or the surrounding zoning?

If some or all of these characteristics are present the court will give "greater scrutiny" to the decision of your local government. You should then consider how you would be able to answer the following questions related to the requested use:

1) Is the requested use consistent with your master plan map? Does the plan's text present justifications for this use in this location?
2) In the absence of a master plan, does the requested use make sense in light of "the overall plan of zoning?"
   i) Can your community articulate a reasonable basis for the requested use in the requested location?
   ii) Can your zoning accommodate the request through a special use permit or PUD?
3) Would the *denial* of the request (i.e., refusal to create a "spot") preclude the property's use for any purposes to which it is reasonably adapted?

If you can answer “yes” to (1) or (2), and “no” to (3) then you have successfully removed any legitimate claim of illegal spot zoning.

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[1] *City of Essexville v. Carrollton Concrete Mix, Inc.,* ___Mich. App. ___, 2003 WL22494267 (2003). See case summary on page ****
[2] 340 Mich. 355, 65 N.W.2d 831 (1954).
[3] 500 S.W.2d 242 (Tex. App. 1973)
[4] *Thompson v. City of Palestine*, 510 S.W.2d 579, 582 (Tex.1974).
[5] *Rando v. Town of North Attleboro*, 692 N.E.2d 544 (Mass. App. 1998).
[6] *SORE v. Snohomish,* 99 Wash. 2d 363, 662 P.2d 816 (1983).
[7] *Penning,* 340 Mich. 355 at 367.
[8] 350 Mich. 425, 86 N.W.2d 166 (1957). See also *Kropf v. Sterling Heights,* 391 Mich. 139, 215 N.W.2d 179 (1974)
[9] See *Lanphear v. Antwerp Township,* 50 Mich.App. 641, 214 N.W.2d 66 (1973); *Bruni v. Farmington Hills,* 96 Mich.App. 664, 293 N.W.2d 609 (1980).
[10] *Biske v. Troy*, 81 Mich. 611, 166 N.W.2d 453 (1969).
[11] 340 Mich. 355 at 367.
[12] See, e.g. *SBS Builders v. Madison Heights,* 389 Mich. 323, 206 N.W.2d 437 (1973); See also *Anderson v. Highland Township,* 21 Mich.App. 64, 174 N.W.2d 909 (1969).
[13] Id., at 6.
[14] 383 Mich. 165, 174 N.W.2d 789 (1970).
[15] 345 Mich. 353, 75 N.W.2d 814 (1956).
[16] 383 Mich. 165, 174 N.W.2d 789 (1970).
[17] 58 Mich.App. 665, 230 N.W.2d 273 (1975)
[18] Crawford (1988). *Michigan Zoning and Planning (3rd ed.).* Ann Arbor: Institute of Continuing Legal Education, p. 87.
[19] *Anderson*, 21 Mich.App. 64 at 75.
[20] *Essexville*, WL22494267 at p. 3.

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