

NOTES

ZONING: LOOKING BEYOND MUNICIPAL BORDERS

A municipality has been traditionally viewed as a self-contained, isolated unit whose powers and duties are limited to the confines of its geographic boundaries. This narrow concept of municipality has begun to break down, especially in the field of zoning, and the artificiality of boundaries is receiving recognition.¹ One subject of increasing professional comment² is legislation that empowers municipalities to control development in adjacent unincorporated areas.³ In addition, the judiciary has begun to depart from traditional views by considering extraterritorial factors when passing upon the validity of municipal zoning. This note analyzes this judicial tendency and considers future problems that will be faced by courts willing to view zoning in a regional context.

The courts have embraced extraterritoriality in two principal types of cases: (1) those recognizing extraterritorial factors in actions brought by residents challenging the validity of municipal zoning and (2) those upholding the standing of nonresidents to challenge zoning which affects them.

I. JUDICIAL CONSIDERATION OF EXTRATERRITORIAL FACTORS

There are three basic types of extraterritorial factors which courts have considered in determining the validity of local zoning: external zoning or

1. See generally SENGSTOCK, *EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA* (1962).

2. *E.g.*, SENGSTOCK, *op. cit. supra* note 1 at 66-69; Bartelt, *Extraterritorial Zoning: Reflections on its Validity*, 32 *NOTRE DAME LAW.* 367 (1957); Bouwsma, *Validity of Extraterritorial Municipal Zoning*, 8 *VAND. L. REV.* 806 (1955).

3. Although twenty-eight states have granted municipalities extraterritorial powers in exercising subdivision controls, only a few states have granted municipalities the power to zone extraterritorially. 1 *MANDELKER, MANAGING OUR URBAN ENVIRONMENT* 232 n.3 (1963). An example of the statutes which grant extraterritorial zoning power to municipalities is that enacted by the North Carolina legislature. It provides:

The legislative body of any municipality whose population at the time of the latest decennial census of the United States was one thousand two hundred fifty (1,250) or more, may exercise the powers granted in this article not only within its corporate limits but also *within the territory extending for a distance of one mile beyond such limits in all directions*; provided, that any ordinance intended to have application beyond the corporate limits of the municipality shall expressly so provide, and provided further that such ordinance be adopted in accordance with the provisions set forth herein. In the event of land lying outside a municipality and lying within a distance of one mile or more than one municipality, the jurisdiction of each such municipality shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities. No extraterritorial regulations shall affect bona fide farms, but any such use of such property for non-farm purchases shall be subject to such regulations. *N.C. GEN. STAT.* §§ 160-181.2 (1964). (Emphasis added.)

development, external facilities and regional needs. In many cases the zoning or development in an adjacent municipality has been asserted as evidence of the character of land located near the border of the zoning municipality.⁴ In other cases facilities provided in an adjacent community have been asserted to show that such facilities need not be provided within the zoning municipality.⁵ In still other cases the needs of a surrounding region have been asserted to help show the facilities which a local zoning scheme could provide.⁶

A. *Considering Extra-municipal Zoning and Development in Characterizing Land in the Zoning Municipality*

1. *Characterization in the Courts*

In determining the reasonableness of a zoning ordinance or amendment as it applies to a particular plot of land, courts have frequently *characterized*⁷ the plot according to the zoning classification and use of surrounding land within the zoning municipality.⁸ Moreover, in cases where the plot was located on the border of the zoning municipality, several courts have also questioned whether the character of land in an adjacent municipality could be considered. Without exception these courts have answered this question in the affirmative. Usually the extra-municipal zoning and development has been asserted as evidence that the ordinance or amendment was invalid,⁹ but the zoning and development of an adjacent community has

4. *E.g.*, *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963), in which the landowner contended that the zoning of his land should be affected, in part, by commercial development in an adjacent municipality.

5. *E.g.*, *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955), in which the village contended that it could exclude commercial and industrial development because there were adequate commercial and industrial facilities in adjacent municipalities.

6. *E.g.*, *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963), in which the landowner contended that a residential restriction was invalid because of the regional need for a shopping center.

7. "Characterization" is a process by which courts evaluate the environment in which land is located to determine whether it has been appropriately classified for zoning purposes. This process involves the examination of surrounding land uses, zoning classifications, traffic conditions and other relevant physical factors.

8. *E.g.*, *Robertson v. City of Salem*, 191 F. Supp. 604 (D. Ore. 1961); *People ex rel. Joseph Lumber Co. v. City of Chicago*, 402 Ill. 321, 83 N.E.2d 592 (1949); *Jenckes v. Building Comm'r*, 341 Mass. 162, 167 N.E.2d 757 (1960); *Kaplan v. City of Boston*, 330 Mass. 381, 113 N.E.2d 856 (1953).

9. Generally the zoning and development of land in an adjacent municipality has been asserted by the owner of the land in question as evidence that his land has been restricted to a use for which it is *unsuited*. *Liberty Nat'l Bank v. City of Chicago*, 10 Ill. 2d 137, 139 N.E.2d 235 (1956); *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N.E.2d 315 (1953); *Forbes v. Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932);

also been asserted by the zoning municipality as evidence that an amendment was valid.¹⁰

In *Huttig v. City of Richmond Heights*,¹¹ a property owner challenged the validity of a zoning ordinance which restricted his land to single-family residential use. The land lay within a residential subdivision of the zoning municipality but fronted a major traffic thoroughfare which was the municipality's boundary. Most of the surrounding plots fronting the thoroughfare in both the zoning municipality and the adjoining municipality contained commercial development. The Missouri Supreme Court found that the land in question was unsuited for residential development primarily because of the commercial uses in both municipalities.¹² On the basis of that finding and the fact that proposed commercial development

Louisville Timber & Wooden Prods. Co. v. City of Beechwood Village, 376 S.W.2d 690 (Ky. 1964); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963); *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931). But these factors have also been asserted by an adjacent property owner as evidence that land has been rezoned for a use which is *inharmonious* with surrounding development. *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). The rezoning of a relatively small parcel of land to an inharmonious use is popularly referred to as *spot zoning*. 1 YOKLEY, ZONING LAW AND PRACTICE § 90 (2d ed. 1953).

10. In two cases extra-municipal zoning and development has been asserted by the zoning municipality to show that a rezoning was *harmonious* with surrounding development. *Gartland v. Borough of Maywood*, 45 N.J. Super. 1, 131 A.2d 529 (1957); *Hochberg v. Borough of Freehold*, 40 N.J. Super. 276, 123 A.2d 46 (1956). In *Gartland* the rezoning of land located on the municipal border from residential to commercial was upheld primarily because of the erection of a shopping center on adjacent land in an adjoining municipality. In *Hochberg* a zoning amendment authorized business uses in an area which had previously been restricted to residential uses. This permitted the expansion of a race track that had theretofore been a non-conforming use. The court held the rezoning invalid because a member of the planning board who had a financial interest failed to disqualify himself, but it indicated that the amendment would otherwise have been upheld partially because of the commercial zoning and development of adjacent land in an abutting municipality.

In another case extra-municipal zoning and development was asserted by the zoning municipality to show that the owner's land was suitable for the use to which it had been restricted. *City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546 (Ky. 1956). In this case the municipality had rezoned land on the municipal border from commercial to residential. The court upheld the rezoning because of residential development on adjacent land in both the zoning municipality and the county.

11. 372 S.W.2d 833 (Mo. 1963).

12. The court expressly stated that the zoning municipality had a duty to consider the external zoning because "while defendants properly assert that they are not bound by the zoning in Clayton [the adjacent municipality], it is undoubtedly true that in its own zoning it must consider that matter, at least to some extent, from a *regional* standpoint." *Id.* at 842. The external zoning and development which the court considered in this case was limited to a strip of commercial development extending about three or four blocks. This is typical of the cases considering external zoning and development because the area considered is usually small in size and directly adjacent to the zoning municipality.

would not be detrimental to the zoning city, it held the restriction invalid.¹³

In *Borough of Cresskill v. Borough of Dumont*,¹⁴ the New Jersey Supreme Court sustained an adjacent property owner's contention that a rezoning was invalid because it authorized the land in question to be developed in a way that was inharmonious with the surrounding development. In this case a block located on the border of the zoning borough had been rezoned from residential to commercial. The primary reason for the holding was that the block was surrounded by residential development, although most of this development was in three adjacent municipalities. The court looked beyond the borders of the zoning municipality because the state legislature had manifested its intention that regional factors should be considered by local authorities.¹⁵

2. Suggested Tools for Characterization

For courts willing to consider factors external to the zoning municipality, there is a need for analytical tools to aid in the characterization process. It is suggested that three hypothetical situations, represented by Figures 1, 2 and 3 may serve as guides. It is assumed in each situation that an owner desires to use commercially a plot presently zoned residential.

These Figures are abstracted from a number of problems unique to each individual case. They are aids only to comparison of development types existing in a given region and therefore should be disregarded in those cases in which characterization may turn upon other considerations. (For example, it may turn upon a balancing of the desirability of a shopping center on a major traffic thoroughfare where it is accessible against the possibility that a peculiar traffic problem would be compounded by commercial development.¹⁶) Even if the facts of a case are such that charac-

13. *Id.* at 843. The court held that the ordinance did not bear a substantial relationship to the public health, safety, morals or welfare and that the residential restriction was so arbitrary that it violated the due process clauses of both the federal and state constitutions.

14. 15 N.J. 238, 250, 104 A.2d 441, 447-48 (1954). The court found that the amendment constituted "spot zoning." It also held that the plot was suitable for the residential use for which it was originally zoned, and that the rezoning could not be justified on any of the standards prescribed in the state enabling act.

15. The appellant in this case had contended that a municipality's zoning responsibility halts at its local boundaries regardless of its effect on adjoining and nearby land beyond those boundaries. *Id.* at 245, 104 A.2d at 444. The court's contrary holding was based on two factors: The first was the statutory language which prescribed that "the master plan may include in its scope *areas outside the boundaries of the municipality.*" The second was a legislative authorization for county and regional planning boards. *Id.* at 248-49, 104 A.2d at 447.

16. See *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 836-37 (Mo. 1963); *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963).

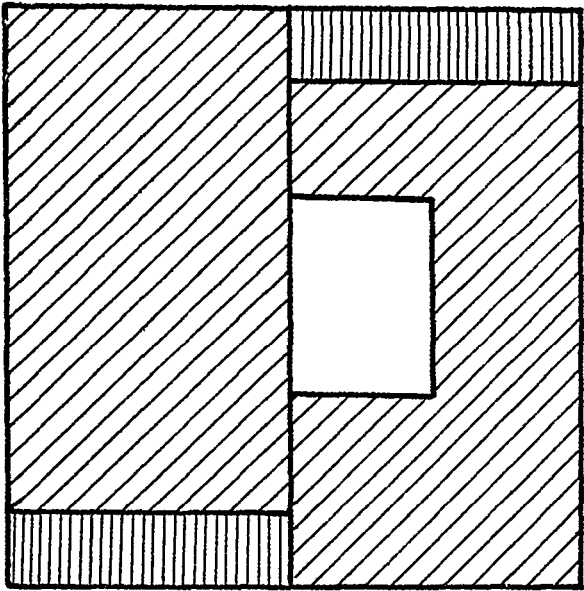
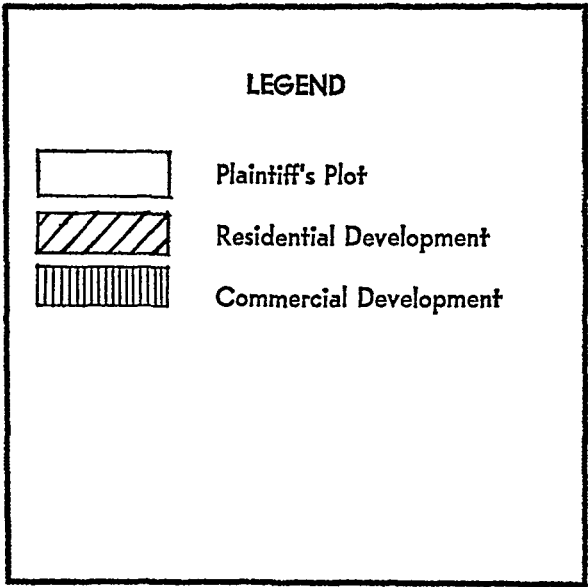


Figure 1

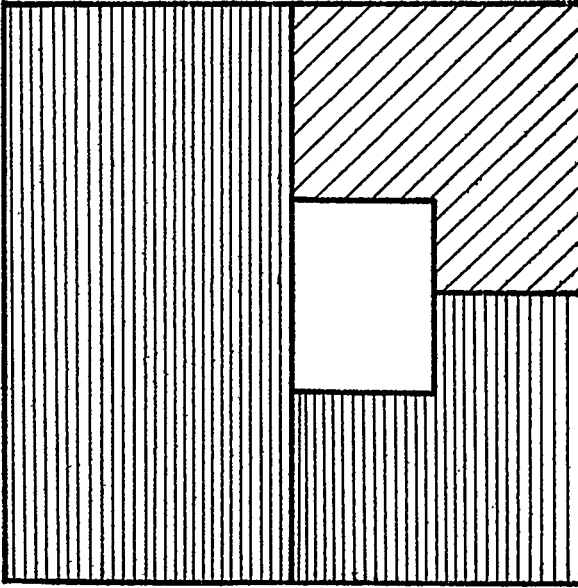


Figure 2

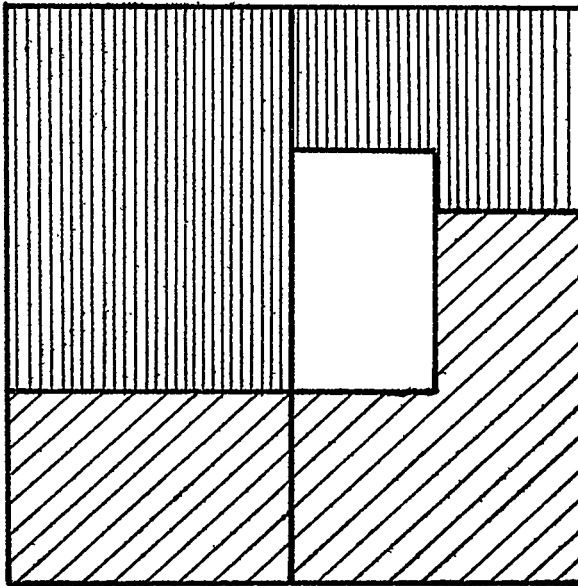


Figure 3

terization may be accomplished by reference to the predominant development, there remain variable factors which complicate comparative analysis. Such analysis may not proceed solely by simple addition of the number of commercial and residential units within a given region. For example, five units in one shopping center, strategically located with respect to traffic and accessibility may be given more weight than five separated units. Another variable is the size of the geographic region on which the court bases its characterization.

However, once a court has decided to proceed on the basis of comparative analysis, has worked out the initial problems in that process and has expressed a willingness to consider factors external to the zoning municipality, the hypothetical Figures serve as guides. Figure 1 describes the situation in which the prevailing development, both internal and external, is residential and therefore inharmonious with a proposed commercial use. In *Borough of Cresskill v. Borough of Dumont*,¹⁷ the New Jersey Supreme Court in a similar situation referred to external development to fortify a result that could have been reached by looking solely to internal development. The essential characteristic of Figure 1 is that no conflict exists between the prevailing internal and the prevailing external development. Therefore, an analogous situation may be classified with Figure 1. Suppose that the prevailing internal development is residential, but external land is interspersed with both commercial and residential uses and there is no preponderance of either. Because external development is inconclusive and therefore neutral, a court would be guided by the only preponderance that exists—the prevailing internal use.¹⁸

Figure 2 describes essentially the situation faced by the Missouri Supreme Court in *Huttig v City of Richmond Heights*.¹⁹ In Figure 2, reference to internal development is inconclusive because no preponderance of either commercial or residential exists. However, prevailing external development is commercial and consideration of it will establish a regional preponderance and a commercial characterization of the land in question. As in Figure 1 there is no conflict between the prevailing external and the prevailing internal uses and a court would consider external factors as an aid to a

17. 15 N.J. 238, 104 A.2d 441 (1954) (discussed notes 14-15 *supra* and accompanying text); *accord*, *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N.E.2d 315 (1953) (land found unsuited for residential use).

18. See *Louisville Timber & Wooden Prods. Co. v. City of Beechwood Village*, 376 S.W.2d 690, 692 (Ky. 1964). The court recognized that external factors should be considered, but in effect found those factors outweighed by a solid internal residential preponderance.

19. 372 S.W.2d 833 (Mo. 1963) (discussed notes 11-13 *supra* and accompanying text).

decision that could go the same way solely on the basis of internal considerations.

In Figure 3, however, there is a conflict between the prevailing internal and the prevailing external uses. A court presented with this situation would need to decide whether external considerations should dictate a result that could not be reached on internal considerations alone. Even if a court is willing to take this step there may be a necessity to make a corollary decision with respect to the relative weights to be given to internal and external factors. Suppose that internal development is sixty-five per cent residential and external development is seventy-five per cent commercial. By completely disregarding municipal borders and giving *equal* weight to internal and external factors, a court would decide in favor of a composite preponderance of commercial. There is language in the cases that would imply this result.²⁰ The implication of other judicial language, however, is that *less* weight should be given to external factors because they are external.²¹ Figure 3 depicts a close case on the facts in which a court might be reluctant to substitute its judgment for that of the local zoning authorities.²² Further, none of the cases suggests that a municipality retains no degree of autonomy in formulating local policies and that it cannot avoid having decisions dictated to it by neighboring municipalities.

In *Dowsey v. Village of Kensington*,²³ an owner contended that his land

20. See, e.g., *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N.E.2d 315 (1953); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 245-48, 104 A.2d 441, 445-46 (1954). The court in *Hannifin* stated that "the fact that much of the contiguous industrial use is in adjoining Cicero [an adjacent municipality] is of *no consequence*, as it is a question of existing conditions and not of geographical and territorial limits or of the powers of neighboring municipalities." *Id.* at 36, 115 N.E.2d at 319. (Emphasis added.) In this case an ordinance which restricted the land in question to residential use was held invalid. The court found that the land was located in a "pocket" of industrial uses and was not suited for residential development.

21. See *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 842 (Mo. 1963), in which the court stated that the zoning municipality had a duty to consider the matter from a regional standpoint but qualified this statement with the words "at least to some extent."

22. See *Liberty Nat'l Bank v. City of Chicago*, 10 Ill. 2d 137, 145-46, 139 N.E.2d 235, 240 (1956):

Under the evidence, the most that can possibly be said for the plaintiffs' case, is that it presents a fairly debatable question as to whether the property on the east side of Harlem Avenue should be characterized by the extensive residential area to the east [internal] or by the business uses on the west side of the street [external]. Under these circumstances, the question should be determined by the city council and not by the courts.

In *Huttig v. City of Richmond Heights*, *supra* note 21, at 839, the Missouri Supreme Court stated that local zoning is presumed to be valid.

23. 257 N.Y. 221, 177 N.E. 427 (1931); *accord*, *Gartland v. Borough of Maywood*, 45 N.J. Super. 1, 131 A.2d 529 (1957) (commercial use harmonious although all adjacent land within zoning municipality zoned residential). For a discussion of *Gartland*, see note 10 *supra*.

was unsuited for the residential use to which it had been restricted. The New York Court of Appeals held the ordinance invalid even though development within the zoning village was almost entirely residential. The court stated that the land, situated at a salient point on the village's border, was characterized by the overwhelming external commercial development surrounding that point. *Dowsey* is an extreme example of conflict between the prevailing internal and external uses. Because the regional preponderance was so greatly commercial, the court's decision to weigh external factors dictated its holding that the ordinance was invalid. Therefore, the case provides no insight into the problem of the relative weights to be given to the internal and external factors encountered in the close case depicted by Figure 3.

B. Considering Extra-municipal Facilities in Testing the Validity of Local Exclusions

Municipalities have traditionally been required to zone with regard to municipal needs.²⁴ If municipalities are viewed as isolated units, each is required to authorize some land within its borders for commercial and industrial development. These facilities would be necessary to provide its inhabitants with places to shop and work. But the courts apparently are beginning to depart from such a narrow view. They have indicated instead that both commercial and industrial development may be excluded if sufficient facilities are located in an adjacent community.²⁵ The cases discussed in this subsection differ from those in the previous subsection in two ways. First, while both groups of cases are concerned with land uses in an adjacent municipality, the land uses in these cases are considered in a functional rather than in a physical sense. Second, although in both groups of cases the land uses are located in an adjacent municipality, here land uses need not be located in an area immediately adjacent to the zoning municipality to be a relevant consideration.

In *Valley View Village v. Proffett*,²⁶ the zoning village, located within a large metropolitan area, had created a single-use residential district for the entire village. A resident challenged the ordinance on the ground that no industrial or commercial uses had been authorized. The Sixth Circuit recognized that public need was the only justification for requiring the

24. *E.g.*, *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949); *City of Waxahachie v. Walkins*, 154 Tex. 206, 275 S.W.2d 477 (1955); *Edge v. City of Bellaire*, 200 S.W.2d 224 (Tex. Civ. App. 1947).

25. *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

26. 221 F.2d 412 (6th Cir. 1955), *reversing* 123 F. Supp. 339 (N.D. Ohio 1953).

village to provide industrial or commercial development. Finding the need satisfied by industrial and commercial development outside the zoning village, but within the general metropolitan area, the court upheld the ordinance.

It would appear contrary to the very purposes of municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself. We think that it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, *so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.*²⁷

The court adopted this view even though it recognized that traditionally a municipality has been conceived as a self-contained unit providing for its own residential, commercial and industrial areas.²⁸

In a similar case, *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*,²⁹ the zoning ordinance divided the borough into four land-use districts—three residential and one commercial. A property owner challenged the ordinance partially on the ground that industrial uses could not be completely excluded. The court found that any local need for industrially-zoned land was adequately satisfied by the availability of extensive bottom lands in an area outside the borough's boundaries.³⁰ It strongly indicated that the extra-municipal area should be considered, stating that:

the effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often

27. *Id.* at 418. (Emphasis added.) The district court decision, which the court of appeals reversed, had held that the wording of the Ohio statute precluded municipalities from exercising their zoning power in a manner that would limit an area to a single use. The lower court had interpreted the statute as requiring the village council to divide the municipality into districts. *Proffett v. Valley View Village*, 123 F. Supp. 339 (N.D. Ohio 1953). But the court of appeals in reversing held that the statute was permissive and that "there is no requirement that in order to regulate and restrict it *must* divide the municipality into more than one district." 221 F.2d at 416. *Contra*, *City of Moline Acres v. Heidbreder*, 367 S.W.2d 568 (Mo. 1963).

28. *Valley View Village v. Proffett*, *supra* note 27.

29. 1 N.J. 509, 64 A.2d 347 (1949).

30. *Id.* at 515, 64 A.2d at 351. The court concluded:

And where, as here, there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development and sufficiently large to accommodate such development for years to come, the power of the municipality to restrict its territory to residential purposes with ample provision for such small businesses, trades and light industries as are needed to serve the residents, is clear.

prescribed decades or even centuries ago, and based in many instances on considerations of geography, or commerce, or of politics that are no longer significant with respect to zoning.³¹

It should be noted, however, that if the court upholds the exclusion or partial exclusion of a use on the basis of regional development, a superficial examination of the adequacy of regional development may lead ironically to the encouragement of municipal parochialism. Some municipalities have in the past sought to exclude uses such as hospitals, jails, sanitariums and trailer courts because they are unpleasant or unattractive. Such attempts have frequently been struck,³² although it is conceivable that an unwary court might permit a municipality to exclude these uses notwithstanding that from a regional standpoint the municipality is the most desirable location. For example, a court might be led into this decision by convincing evidence that land for these uses is provided in an adjacent municipality, even though that municipality's allocation may be sufficient to satisfy only its own needs. In such cases the court's role will be very difficult—at least until intercommunity objectives are evaluated and expressed in a comprehensive regional plan.³³

31. *Id.* at 513, 64 A.2d at 350. In this case, as in the *Valley View* case, municipal zoning ordinances were upheld primarily because of extra-municipal development which satisfied local needs. It is also possible, however, that a court will find for the municipality on the necessity question but hold the ordinances invalid on another ground. For example, in *Reynolds v. Barrett*, 12 Cal. 2d 244, 83 P.2d 29 (1938), a property owner challenged on two grounds an ordinance which restricted his land to a residential use. First, he contended that his land should be zoned for commercial development because there was an insufficient amount of commercially zoned land within the municipality. Second, he contended that his land was unsuited for residential development because of adjacent commercial development within the municipality. The court rejected the landowner's first contention after finding that the municipality was adequately served by business located outside its borders in an adjacent municipality. It found that the zoning city was primarily of residential character and that it was almost entirely surrounded by a second city in which many commercial uses were located which adequately served all parts of the zoning city. But the ordinance was declared invalid in its application to the owner's land on the basis that adjacent commercial development within the zoning municipality made his land unsuited for residential development. *Id.* at 250, 83 P.2d at 33.

In both the *Valley View* and *Duffcon* cases the zoning municipality had completely excluded the use for which there was an alleged need. In *Reynolds*, the zoning city had allocated land for business uses, but it was alleged that it had not provided enough. Although it was not indicated in the *Reynolds* opinion, it would seem that most courts would be less likely to interfere with the legislative judgment in this type of case. As a practical matter, courts would have a difficult time defining the point at which the land authorized for business use is "enough."

32. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 524 & n.26 (1957).

33. A conscientious determination of whether municipality "A" should be permitted to exclude a particular use when enacting its zoning scheme, demands more than a quick

C. *The Duty of a Municipality to Zone for Regional Needs*

The cases in which courts are asked to consider the duty of a municipality to zone in order to meet regional needs are distinguishable from those discussed in the previous two subsections. First, a regional need is a concept less tangible than either extra-municipal zoning and development or the availability of extra-municipal facilities. The court must make a subjective value judgment at the outset to determine that such a need exists.

A second and more fundamental distinction concerns the very scope of a municipality's power to zone, which is based on the state's police power to provide for the public health, safety, morals and welfare.³⁴ Traditionally, the "public" for whose health, safety, morals or welfare a municipality must zone has been conceived to include only the residents of the municipality itself. This concept is not altered either by a consideration of extra-municipal zoning and development in determining the validity of land-use classifications, or by a consideration of extra-municipal facilities in determining the validity of local land-use exclusions. In the first situation the courts extend marginally the area that will be considered in determining the validity of a local land-use characterization. In the second the courts merely extend the area that will be examined in determining whether *local* needs have been met. But to find a municipal duty to zone in order to meet *regional* land-use needs rests on an extension of the concept of "public" to include those who live outside as well as within the zoning municipality.

Whether a municipal duty to zone can be based on regional needs is a question that has been only partially answered. No court has directly faced the question whether the satisfaction of regional needs is a proper ground for upholding a zoning ordinance, and only two cases were found in which courts have considered whether a local ordinance could be held invalid because of its failure to satisfy a regional need.³⁵

look at an adjacent municipality (municipality "B") to ascertain whether "B" has allocated enough land within its borders to that use to supply the needs of both "A" and "B" for that facility. For example, although facilities in "B" are presently sufficient to satisfy the needs of both "A" and "B", they may be insufficient in the future because of prospective residential development in either municipality. Similarly, it may be that while the facilities in "B" are more than adequate for both the present and prospective needs of "A" and "B", those facilities must also be used by a third municipality ("C") which is less able to provide for its own needs than "A". In both of the above situations it would seem that "A" should not be permitted to exclude the use in question. This illustration points up only two of the many possible regional questions which the court should examine in deciding these cases. A comprehensive regional plan would serve as a guide for such decisions. In the absence of such a plan, the court must construct an *ad hoc* plan for the region each time the question arises whether a local need is satisfied by facilities in an adjoining municipality.

34. I YOKLEY, *ZONING LAW AND PRACTICE* § 15 (2d ed. 1953).

35. *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963); *Fanale*

Although no case has considered regional needs as factors in upholding an ordinance, *Andrews v. Board of Adjustment*,³⁶ upheld a variance to a zoning ordinance which could only be granted on the showing of "special reasons"³⁷ arising in an area outside the municipality's borders. A variance had been granted to permit the erection of a parochial school for residents living outside the municipal boundaries. The court found that "a municipality may provide cooperatively for the needs of neighboring communities as well as their own."³⁸ This language seems to indicate that the court would sustain a zoning ordinance on the same ground—the satisfaction of a regional need.

In both cases in which the courts were asked to find a zoning ordinance invalid because of a regional need, the need was found insufficient to justify overturning the ordinances. In *Wrigley Properties, Inc. v. City of Ladue*,³⁹ land located on the municipal border had been zoned residential and the landowner contended that the residential classification was not in the interest of the public welfare because of the regional need for a shopping center at that approximate location. The Missouri Supreme Court upheld the ordinance principally because of the detrimental effects a shopping center would have on local traffic conditions, water drainage and the value of surrounding residential land. The court found the regional need insufficient to overcome these local factors, noting that the shopping center could have been erected across the street in an adjacent municipality on land which had already been zoned for commercial use: "it does not sufficiently appear

v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958). In *Pierro v. Baxendale*, 20 N.J. 17, 118 A.2d 401 (1955), the court refused to consider regional needs in determining the validity of a local ordinance because the parties had neither offered evidence nor requested the court to take judicial notice of the characteristics of the surrounding territory.

36. 30 N.J. 245, 152 A.2d 580 (1959).

37. The state statute authorizing variances empowers the board of adjustment to:

Recommend in particular cases and for *special reasons* to the governing body of the municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use. Whereupon the governing body or board of public works may, by resolution, approve or disapprove such recommendation. 40 N.J. STAT. ANN. § 55.39 (Supp. 1963). (Emphasis added.)

Usually a variance may only be given for "unnecessary hardships." The New Jersey "special reasons" variance is unique. For a discussion of this variance see Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 77-81, 86-94 (1959).

38. *Andrews v. Board of Adjustment*, 30 N.J. 245, 251, 152 A.2d 580, 583 (1959).

39. 369 S.W.2d 397 (Mo. 1963). The principal argument advanced by the landowner was that the growth and development of the region outside the zoning municipality had been so extensive and had so changed conditions in the area that the rezoning of his land, located on the municipal border, was necessary to satisfy the physical and economic needs of the area.

that any need therefore of the entire region cannot be provided outside of Ladue but instead it reasonably could be found that there are available nearby larger commercially zoned areas to do so."⁴⁰ This leaves open the question of what the court would do if presented with a case in which the land within the zoning municipality was the only land available and adaptable to satisfy the regional need.

In *Fanale v. Borough of Hasbrouck Heights*,⁴¹ a landowner sought a declaration invalidating the supplement to a zoning ordinance which prohibited the erection of apartments for more than two families. The owner's theory rested partially on the ground that the county in which the borough was located needed more multiple dwelling units. Because of the comparative size of the two entities the New Jersey Court denied a municipal obligation to leave land available for the satisfaction of the county need. Although it previously had considered the inter-municipal aspects of zoning, the court concluded that "it is quite another proposition to say that a municipality of 960 acres must accept uses it believes to be injurious, in order to satisfy the requirements of a county."⁴² The court limited its holding by expressly pointing out that this was not a case in which the municipality was the "last hope for a solution" to the problem.⁴³ The opinion did not indicate whether the regional need would have been more decisive if the area in which it existed had been smaller in comparison to the zoning borough.

The *Wrigley* and *Fanale* cases imply a municipal duty to satisfy regional

40. *Id.* at 402. The court did not squarely face the question whether a municipality must provide for the needs, and therefore the welfare, of those who live outside its boundaries. In discussing the zoning authority of the city under the state enabling act, however, the court did state that "all this authority and these purposes are at least primarily related to conditions *within a city.*" *Id.* at 401. (Emphasis added.) This seems to indicate a reluctance by the court to expand the concept of "public" for which the municipality must zone. This conclusion is also supported by other language in the opinion. In stating the reasons which supported the city council's refusal to rezone, the court listed first "that the proposed use as a shopping center appears to be more for the benefit of other cities and towns than for the benefit of Ladue [the zoning municipality]" *Id.* at 402.

41. 26 N.J. 320, 139 A.2d 749 (1958).

42. *Id.* at 328, 139 A.2d at 753-54. This court also did not discuss the question of whether a municipality's zoning power had to be exercised for the welfare of those in the surrounding region as well as those within the municipality itself. But language in the opinion indicates that its power need not be so limited. In considering the borough's zoning authority, the court said that "although apartment houses were initially desirable, a municipality may later conclude that more of them would be inimicable to *its total welfare.*" *Id.* at 326, 139 A.2d at 752. (Emphasis added.)

43. *Id.* at 328-29, 139 A.2d at 754. The court further stated: "There, of course, is no suggestion that the county is so developed that Hasbrouck Heights [the zoning borough] is the last hope for a solution, and hence we do not have the question whether under the existing statute the judiciary could resolve a crisis of that kind."

needs, but offer equivocal answers to the question of what conditions must exist before that duty arises. The *Wrigley* case suggests that the municipality should provide for the regional need if in the adjacent region there is no available land with which the regional need can be satisfied. The *Fanale* case suggests that the sizes of the zoning municipality and the region in which the need exists should be compared. The implied duty therefore appears to be a severely qualified one which does not require the municipality to consider the best possible location for the needed facility. For example, in *Wrigley* evidence indicated that the land available in the zoning municipality was better suited for the shopping center than the commercially zoned land across the street. Also a "preliminary land-use plan" of the county in which the municipality was located indicated that a commercial use would be desirable.⁴⁴ Similarly, in *Fanale*, although land was available in the county for apartment building and the zoning borough was of comparatively small size, the zoning borough may have been the most suitable location for additional apartments from a regional standpoint because of its proximity to industry and major transportation arteries.

Although it appears that an *ad hoc* balance was struck between municipal autonomy and regional need, the role of the courts was no doubt hindered by the absence of a comprehensive regional plan delineating the weight of the factors to be weighed. Employment of a "rule of reason" or "balancing" test necessitates a systematic source of information to guide the courts.⁴⁵

II. THE STANDING OF A NONRESIDENT TO CONTEST LOCAL ZONING

Closely related to extra-municipal considerations in determining the validity of a zoning ordinance or amendment is the right of a nonresident to oppose a zoning amendment before its passage or to challenge its validity after it has been enacted. This question usually turns on the interpretation given to a state statute or rule prescribing the persons who may challenge a zoning amendment. These statutes typically authorize a challenge by "parties in interest" or "persons aggrieved."⁴⁶ A few recent cases have

44. *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397, 399 (Mo. 1963).

45. See note 33 *supra* and accompanying text.

46. State statutes specifying persons who are entitled to a hearing before the local legislative body usually employ the phrase "parties in interest and citizens." *E.g.*, Mo. REV. STAT. § 89.050 (1959):

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which *parties in interest and citizens* shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be pub-

rejected the view that these statutes were meant only to include residents of the zoning municipality. These cases have held that a nonresident may have a sufficient interest to entitle him to be heard when a proposed change is under consideration,⁴⁷ to have his protest counted when that procedure is authorized,⁴⁸ to challenge action taken by the local board or council in the district court⁴⁹ and to intervene as a matter of right in an action brought by a resident property owner.⁵⁰ They illustrate the attitude of some courts that a municipality's zoning responsibility extends beyond its borders.

lished in an official paper or a paper of general circulation in such municipality. (Emphasis added.)

State statutes specifying persons who are entitled to judicial review of local action in the circuit court usually employ the phrase "person or persons jointly or generally aggrieved." *E.g.*, Mo. REV. STAT. § 89.110 (1959):

Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, or any officer, department, board or bureau of the municipality, may present to the circuit court of the county or city in which the property affected is located a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. (Emphasis added.)

47. Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 247, 104 A.2d 441, 445-46 (1954).

48. Koppel v. City of Fairways, 189 Kan. 710, 371 P.2d 113 (1962).

49. Hamelin v. Zoning Bd., 19 Conn. Supp. 445, 117 A.2d 86 (1955); Koppel v. City of Fairway, *supra* note 48.

50. Roosevelt v. Beau Monde Co., 384 P.2d 96 (Colo. 1963). A landowner having contracted to build a shopping center sought to have declared invalid a zoning ordinance which restricted to residential use property located on the border of the zoning municipality. The court recognized the right of six nonresidents who owned property adjacent to the land in question to intervene on the side of the municipality. The state rule authorizing intervention by right provided:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. . . . COLO. R. CIV. P. 24(a).

In applying this rule the court found that the nonresidents had interests which might have been inadequately represented if intervention were not permitted because the attorney for the zoning municipality did not, and could not lawfully, represent their interests. Also it found that the rights of the nonresidents would be bound by a judgment in the case. In examining the interests of the nonresidents the court pointed out that the building of the proposed shopping center on the land in question "confers similar if not identical benefits, or imposes similar if not identical detriments on the owners of abutting property" whether they live in the zoning or in the adjacent municipality. Roosevelt v. Beau Monde Co., *supra* at 100. *But cf.* Horn Constr. Co. v. Town of Hempstead, 33 Misc. 2d 381, 226 N.Y.S.2d 134 (Sup. Ct. 1962), in which an adjacent village was not permitted to intervene in a suit contesting the validity of a zoning amendment which restricted land located on the border of the zoning municipality to industrial use. The adjacent village sought to intervene on the side of the zoning municipality because of the increased strain which residential development would impose upon the village's streets and services. The court found no evidence that the town would not adequately represent the interest of the village and that it was not clear that the village would be bound by the judgment in the action. On the basis of these findings, it held that the village had no *right* to intervene.

In *Koppel v. City of Fairway*,⁵¹ the protests of nonresidents had been ignored by the city council in passing a zoning amendment which rezoned land on the city's border from residential to commercial. The Kansas Supreme Court was faced with two questions: whether the nonresidents had the right to have protests considered by the council in the planning stages and whether nonresidents had standing to bring an action in the district court to have the council's action reviewed. The court answered both questions in the affirmative and sustained the lower court's overruling of the city's demurrer. The court interpreted the protest statute—authorizing those owning land directly in front or to the rear of the land being considered for rezoning to submit protests—to include all property owners within the prescribed areas regardless of residency.⁵² Similarly, the court interpreted the statute authorizing “affected property owners” to challenge the council's action in the district court to include nonresidents who owned adjacent property.⁵³

51. 189 Kan. 710, 371 P.2d 113 (1962).

52. The section of the Kansas statute which discusses the procedure for notice and hearings contains the following provision concerning protests:

If, however, a protest against such amendment, supplement, or change be presented, duly signed and acknowledged by the owners of twenty percent or more of any frontage proposed to be altered, or by the owners of twenty percent of the frontage immediately in the rear thereof, or by the owners of twenty percent of the frontage directly opposite a frontage proposed to be altered, such amendment shall not be passed except by at least four-fifths vote of the council or board of commissioners. KAN. GEN. STAT. ANN. § 12-708 (1949).

As can be deduced from the statute, the right of the nonresidents to have their protests considered may have a significant effect on whether the ordinance passes.

53. The section of the Kansas statute which authorizes property owners to contest ordinances in the courts provides:

That any ordinance or regulation provided for or authorized by this act shall be reasonable, and any taxpayer or *any other person having an interest in property affected*, may have the reasonableness of any ordinance or regulation determined by bringing an action, in the district court of the county in which such city is situated, against the governing body of said city. KAN. GEN. STAT. ANN. § 12-712 (1949). (Emphasis added.)

Three justices dissented in this case, two of whom wrote opinions. Justice Robb's dissent states that neither statute was meant to give any right to nonresidents to contest zoning ordinances. He disagrees with the majority both in regard to the nonresidents' right to have their protests considered and in regard to their right to contest the validity of the ordinance in the courts. In arriving at this conclusion he reasoned:

I do not believe that a municipality or the citizen of any municipality can exercise extra-territorial power over another municipality or the land contained therein. This is neither an injunction nor a nuisance action but is, in my opinion, an interference by the citizens of one municipality with a governmental function of another municipality, namely, its city planning. We cannot ignore the age-old rule that one city has no control over the government of another city which I think should be applicable not only to legislative functions but also to the executive and judicial function of a city. *Id.* at 716, 371 P.2d at 117.

It is not clear what the nature of a nonresident's interest must be before he will be allowed to challenge the zoning of an adjacent municipality. In most cases the nonresident owned property adjacent to that for which a zoning change was contemplated. Without exception, ownership of adjacent property has been held a sufficient interest to support the challenge.⁵⁴ But the holding of one case suggests that an interest less than that of an adjacent property owner may be sufficient. In *Hamelin v. Zoning Bd.*,⁵⁵ six non-residents sought to review the zoning commission's decision to extend the borough's business zone. The Connecticut court recognized the rights of all the nonresidents to be heard by the commission and to review the commission's action even though only one owned adjacent property. The only interest of the nonresidents mentioned by the court was their status as resident taxpayers of the adjacent town.

CONCLUSION

Most cases discussing extra-municipal problems in zoning, although such cases are as yet infrequent, indicate an increasing judicial awareness of both the physical and functional relationships of adjacent municipalities. This recognition of inter-municipal relationships will encourage municipalities to look beyond their borders in allocating or reallocating land uses and, in this sense, it is a step toward counteracting the effects of the fragmentation of metropolitan area. This step, however, has necessarily been a short one because the courts are limited to case-by-case determinations and hence they lack the capacity to develop a comprehensive zoning policy either in prohibiting conflicts at municipal borders or in providing proper balances of facilities throughout entire regions. If there is to be an adequate solution

Justice Fatzer, in his dissent, interpreted the protest statute as follows:

The only reasonable and feasible interpretation, in my opinion, is that effective protests may be made only by those owners of frontage affected, or frontage opposite or to the rear of the affected lands, where the frontage owned by the protesting party is *located within the city whose ordinance is proposed to be amended*. Any other result is contrary to settled concepts of government and law of this state. *Id.* at 717, 371 P.2d at 118.

Justice Fatzer declined to express an opinion on the question whether nonresidents had a right to have the council's action reviewed in the courts.

He said that it was "not necessary to now determine whether objecting plaintiffs have such an interest as would entitle them to seek judicial relief against unreasonable or arbitrary action by the governing body of the city of Fairway." *Id.* at 716, 371 P.2d at 118.

54. *Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 100 (Colo. 1963); *Koppel v. City of Fairway*, 189 Kan. 710, 714, 371 P.2d 113, 116 (1962); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 247, 104 A.2d 441, 445-46 (1954).

55. 19 Conn. Supp. 445, 117 A.2d 86 (1955).

to metropolitan zoning problems, it must be achieved through the adoption of a comprehensive regional plan encompassing the entire metropolitan area, and comprehensive zoning enacted either on a regional scale or by separate municipalities acting cooperatively. By these means an affirmative policy for the development of land at municipal borders can be legislated in advance, and facilities may be located in the most suitable areas irrespective of geographic boundaries.