THE MICHIGAN PREFERRED USE DOCTRINE AS A STRATEGY FOR REGIONAL LOW-INCOME HOUSING DEVELOPMENT: A PROGRESS REPORT

In 1971 the Michigan Court of Appeals held that certain land uses must be recognized as preferred uses because they advance the public interest in a general sense.[1] The preferred use doctrine, which is unique to Michigan, has subsequently been developed by the court in several decisions.[2] In a recent application of the doctrine, *Smookler v. Wheatfield Township*,[3] the court held that defendant Township's economic justifications for exclusion of mobile home parks were invalid per se.[4] In *Smookler* defendant described a mobile home district in its zoning ordinance, but failed to designate land appropriate for this land use.[5] Plaintiff, owner of land zoned agricultural and residential, applied for a rezoning to permit use of his land for a mobile home park. Upon denial of this application, plaintiff brought suit, alleging that mobile home parks should be con-

1. Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971).

2. Wilkins v. Village of Birch Run, 48 Mich. App. 57, 209 N.W.2d 863 (1973); Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 243 (1973); Sabo v. Monroe Township, 46 Mich. App. 344, 208 N.W.2d 57 (1973); Smookler v. Wheatfield Township, 46 Mich. App. 162, 207 N.W.2d 464 (1973); Johnson v. Lyon Township, 45 Mich. App. 491, 206 N.W.2d 761 (1973); George v. Harrison Township, 44 Mich. App. 357, 205 N.W.2d 254 (1973); Rodd v. Palmyra Township, 42 Mich. App. 434, 439, 202 N.W.2d 446, 448 (1972) (O'Hara, J., dissenting); Jamens v. Shelby Township, 41 Mich. App. 461, 474, 200 N.W.2d 479, 486 (1972) (Bronson, J., concurring); Midland Township v. Rapanos, 41 Mich. App. 75, 199 N.W.2d 548 (1972); Kropf v. City of Sterling Heights, 41 Mich. App. 21, 199 N.W.2d 567 (1972); Congregation Dovid Ben Nuchim v. City of Oak Park, 40 Mich. App. 698, 199 N.W.2d 557 (1972); Green v. Lima Township, 40 Mich. App. 655, 199 N.W.2d 243 (1972); Baker v. City of Algonac, 39 Mich. App. 526, 198 N.W.2d 13 (1972); Cohen v. Canton Township, 38 Mich. App. 680, 197 N.W.2d 101 (1972); Simmons v. City of Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972).

3. 46 Mich. App. 162, 207 N.W.2d 464 (1973).

4. *Id.* at 164, 207 N.W.2d at 465.

5. All three previous requests for rezoning to permit mobile home parks had been denied. On the problem of the "floating zone" see 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.16 (1968) [hereinafter cited as ANDERSON]; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 62 (1971).

sidered preferred uses. The circuit court denied relief, holding that defendant Township had met its burden of showing that community needs of health, safety and welfare far outweighed those of the regional public interest in providing living space for low-income families.[6] Applying the preferred use doctrine, the court of appeals of Michigan reversed, holding that the Township had failed to justify total exclusion of mobile home parks from the municipality.[7]

Since the preferred use doctrine modifies the traditional presumption of validity of zoning ordinances, analysis of the doctrine must begin with an examination of traditional zoning law. In 1926, in *Village of Euclid v. Ambler Realty Co.*,[8] the United States Supreme Court held that municipalities could regulate land uses through zoning ordinances. These ordinances, provided they bear a substantial relation to a proper purpose of the police power, were given a presumption of validity.[9] The application of this presumption was limited by the following caveat: "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[10] In its decision, however, the Court applied the presumption of validity test without balancing regional housing needs of the metropolitan area with local land use policy.[11]

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6. As evidence for this determination, the trial court found: (1) the proposed mobile home park when completed would double the population of Wheatfield and more than double the number of housing units; (2) Wheatfield had no fire protection and depended on the City of Williamston and other townships for such protection; and (3) Wheatfield had no police protection and depended on the county sheriff and the state police. 46 Mich. App. at 163-64, 207 N.W.2d at 465.

7. This holding is directly based upon the interpretation of the preferred use doctrine in Green v. Lima Township, 40 Mich. App. 655, 199 N.W.2d 243 (1972).

8. 272 U.S. 365 (1926).

9. *See* ANDERSON § 7.03; D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 645 (2d ed. 1971). Professor Mandelker finds that the *Euclid* Court failed in its land use planning strategy by: (1) not reviewing the economic class bias inherent in the community's zoning ordinance, (2) creating the myth that the Village of Euclid was a homogeneous, densely populated community, (3) maintaining a misguided support for the separation of incompatible uses, and (4) defending the single-family residential zone as the optimal land use category.

10. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926).

11. *See* Bronstein & Erickson, *Zoning Amendments in Michigan—Two Recent Developments,* 50 J. URBAN L. 729 (1973); Fisher, *The General Public Interest v. The Presumption of Zoning Ordinance Validity: A Debatable Question,* 50 J. URBAN L. 129 (1972).

In Michigan, courts have traditionally held that the *Euclid* presumption of validity test applies to local regulation of all land uses.[12] In contesting a zoning ordinance, a property owner has had the burden of proving that the reasonableness of the ordinance was beyond a "debatable question":

> This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. . . . It must appear that the clause attacked is an arbitrary fiat . . . and that there is no room for a legitimate difference of opinion concerning its reasonableness.[13]

The "debatable question" test has failed to provide a sufficient guideline for the Michigan judiciary to determine the reasonableness of a municipal zoning ordinance.[14] This failure has resulted from (1) inherent conflict between community-serving exclusionary zoning and regional planning needs,[15] and (2) lack of a standard that could be employed to protect land uses crucial to regional public needs.[16]

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12. *See* Biske v. City of Troy, 381 Mich. 611, 166 N.W.2d 453 (1969); June v. City of Lincoln Park, 361 Mich. 95, 104 N.W.2d 792 (1960); Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955); Anderson v. Township of Highland, 21 Mich. App. 64, 174 N.W.2d 909 (1969). *See also* R. HEGEL, MOBILE HOME ZONING, BUILDING AND SITE REGULATIONS, AND TAXATION—IMPLICATIONS FOR MICHIGAN MUNICIPALITIES 32 (1970). According to Anderson: "[In *Gust*] [t]he court's emphasis was upon the denial of an immediate, income-producing use of land rather than upon the failure to provide space for multiple homes. Later Michigan decisions reached the same result, placing somewhat more emphasis on the exclusion or the practical exclusion of the use." 2 ANDERSON § 11.51.

13. Brae Burn, Inc. v. City of Bloomfield Hills, 350 Mich. 425, 432, 86 N.W.2d 166, 170 (1957). On the problem of the "fairly debatable issue" test see ANDERSON § 2.16; 7 URBAN L. ANN. 267 (1974).

14. C. CRAWFORD, MICHIGAN ZONING AND PLANNING § 7.01 (1965).

15. *See* note 11 *supra*. *See also* Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971); 7 URBAN L. ANN. 296 (1974).

16. *See* REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 211-17 (1968). Concerning fiscal zoning, the Commission reported:

> In many areas mobile homes are not taxable as real property. And in some States they are not subject to local personal property taxes because of special State levies, the imposition of which may exempt them from local taxes. In New York State, mobile homes are taxable as real property. . . . The high exclusion rate in New York may thus indicate an even greater amount of exclusion in other States.

Id. at 216.

See also Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). In the Williams

The inadequacy of the "debatable question" test for deciding the reasonableness of a zoning ordinance has led the Michigan judiciary to question the traditional *Euclid* test for determining the validity of zoning ordinances. Applying the *Euclid* test, the courts have held that the exclusion of churches,[17] hospitals[18] and natural resources[19] from a community is unreasonable. Prior to 1971, however, a "preferred use doctrine" had not been articulated by the Michigan judiciary as a modification of the traditional presumption of validity doctrine.

With its decision in *Bristow v. City of Woodhaven*,[20] the Michigan Court of Appeals first announced the preferred use doctrine. In *Bristow* the trial court struck down a zoning ordinance because the ordinance constructively excluded trailer parks from the municipality. Given the factual context of the case and the then existing judicial precedent in Michigan,[21] the appellate court could have affirmed, reasoning that the ordinance unreasonably excluded mobile homes. Instead, the court developed concepts of the "general public interest" and "preferred land uses" in reaching its holding.[22] Applying the preferred use doctrine, the court reversed, holding that, because the municipality failed to carry its burden of justifying the prohibition of "favored" usage (*i.e.*, mobile home parks), its zoning ordinance was invalid. In seeking to invoke the preferred use doctrine, plaintiff must establish that a particular land use substantially advances

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and Norman study, mobile homes in the four New Jersey counties surveyed were generally excluded, both as of right and as conditional uses, from every municipality.

17. Archbishop of Detroit v. Village of Orchard Lake, 333 Mich. 389, 53 N.W.2d 308 (1952).

18. Sisters of Bon Secours Hosp. v. City of Grosse Pointe, 8 Mich. App. 342, 154 N.W.2d 644 (1967).

19. Certain-Teed Prods. Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958); City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929).

20. 35 Mich. App. 205, 192 N.W.2d 322 (1971).

21. *See* Anderson v. Township of Highland, 21 Mich. App. 64, 174 N.W.2d 909 (1969).

22. For a discussion of these concepts and their development see articles cited in notes 11 & 15 *supra*.

the regional public interest[23] and is appropriate for a given site.[24] Usually, both statutory enactments and judicial precedent must be offered into evidence as recognizing the preferred status of the usage to the region.[25] Once a preferred use is confirmed, the municipality bears the burden of going forward to justify its prohibition of the use.[26]

To carry the burden, the municipality can rely on the following justifications for restricting or prohibiting a preferred use: (1) lack of need for the proposed usage, (2) overabundance of similar existing uses, (3) presentation of predesigned and available sites better suited for the usage, (4) existence of a rational, flexible master plan that would carry weight only when noticeably implemented, or (5) affirmative proof that an unwanted and yet necessary use is not being "pushed off" onto neighboring communities where it may be equally unwanted.[27] The preferred use doctrine and test for zoning justification provide a workable standard through which the "general public interest" can be advanced.[28] This standard has been altered in sub-

23. In its determination that mobile home parks substantially advance the general public interest of the region, the Michigan Court of Appeals stated that a "massive nation-wide housing shortage" existed. Bristow v. City of Woodhaven, 35 Mich. App. 205, 217, 192 N.W.2d 322, 327 (1971). No empirical data was introduced for this conclusion. Also, no regional economic analysis was provided to substantiate the validity of the conclusion that mobile home parks would significantly advance the general public interest of the region.

24. *See* Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 243 (1973). Note that under the minority interpretation of *Bristow,* the court of appeals of Michigan does not consider the appropriateness of the preferred use for a given site. *See* Green v. Lima Township, 40 Mich. App. 655, 199 N.W.2d 243 (1972).

25. The statutory standard for the presentation of mobile home parks as substantially advancing the "general public interest" is in MICH. STAT. ANN. §§ 5.278(21)-(126) (1973).

26. *See* Johnson v. Lyon Township, 45 Mich. App. 491, 206 N.W.2d 761 (1973). Under the minority interpretation of *Bristow,* the court of appeals of Michigan shifted the burden of proof to the municipality. *See* Green v. Lima Township, 40 Mich. App. 655, 199 N.W.2d 243 (1972).

27. Bristow v. City of Woodhaven, 35 Mich. App. 205, 219-20, 192 N.W.2d 322, 329 (1971). For a review of the traditional criteria used to test the validity of zoning ordinances see ANDERSON §§ 2.19-.30.

28. Three other state courts have attempted to protect certain land uses, but without formulating a preferred use doctrine. In Illinois, mobile home parks have been protected under a reasonableness test, upon evidence of a regional shortage of low- and middle-income housing. The burden of proof, however, remains with plaintiff. *See* Glassey v. County of Tazewell, 11 Ill. App. 3d 1087, 297 N.E.2d 235 (1973); Schmitt v. Village of Skokie, 6 Ill. App. 3d 177, 285 N.E.2d 202 (1972); Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 252

sequent decisions of the Michigan Court of Appeals.

In the post-*Bristow* era, the preferred use doctrine has not ended application of the traditional presumption of validity test in Michigan. Through selective readings of various sections of the *Bristow* opinion, the court of appeals of Michigan has applied the preferred use doctrine without consistent implementation of the *Bristow* test of zoning validity.[29] The development of the preferred use doctrine has produced two schools of interpretation—one applying the *Bristow* test as a modification of the traditional presumption of validity test, and the other emphasizing the doctrine as a strategy for regional low-income housing development.

In the majority of decisions interpreting *Bristow,* however, the Michigan Court of Appeals has applied the preferred use doctrine as a modification of the traditional presumption of validity test.[30] Under this interpretation, three elements must be established. First, there must be a determination that the land use has a substantial

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N.E.2d 765 (1969).

In Pennsylvania, the commonwealth court and supreme court have altered the traditional presumption of validity for zoning ordinances. First, the supreme court has held that zoning ordinances adopted for exclusionary purposes are invalid per se. The court struck down ordinances that established minimum-size building lots and prohibited multi-unit dwellings. In these cases, the burden of persuasion shifted to the municipality. *See* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); *In re* Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). Secondly, the commonwealth court has held that the burden of producing evidence shifts to the municipality upon proof that a municipal zoning ordinance totally prohibits a legitimate land use. *See* Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Commw. 458, 275 A.2d 702 (1971).

In New Jersey the superior court has applied the federal equal protection clause to protect lower-income households, as a class, from being excluded from municipalities. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971). For an analysis of these cases see Williams, 23 ZONING DIGEST 423 (1971).

29. Of the 15 decisions of the Michigan Court of Appeals in the post-*Bristow* period, only three have explicitly acknowledged the full set of criteria in the *Bristow* test for zoning validity: Wilkins v. Village of Birch Run, 48 Mich. App. 57, 209 N.W.2d 863 (1973); Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 243 (1973); Johnson v. Lyon Township, 45 Mich. App. 491, 206 N.W.2d 761 (1973).

30. The leading theoretical decisions for the majority interpretation of *Bristow* are Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 243 (1973); Johnson v. Lyon Township, 45 Mich. App. 491, 206 N.W.2d 761 (1973); Cohen v. Canton Township, 38 Mich. App. 680, 197 N.W.2d 101 (1972).

relationship to the regional public interest[31] and, but for restrictive zoning, is appropriate for a given site.[32] Secondly, it must be shown that the local zoning excludes the preferred use.[33] Upon proof of the first two elements, the burden of going forward is shifted to the municipality.[34] The burden of persuasion, however, remains with the party seeking a rezoning. Finally, the unreasonableness of the zoning ordinance must be established.[35] Plaintiff must prove that the *regional* public interest outweighs the "general welfare" of the *local* community. The governmental unit must rebut a prima facie case of unreasonableness by "clear, positive, and credible . . . evidence . . . that would challenge either the existence of a 'favored' status of the proposed use, the suitability of the site for such a use, the degree of exclusion, or the legal conclusion of invalidity."[36]

Under the majority interpretation, the court has not uniformly applied the preferred use doctrine to encourage regional low-income housing development.[37] Only two of the five criteria in the *Bristow*

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31. Note that under the majority interpretation only two cases, Johnson v. Lyon Township, 45 Mich. App. 491, 206 N.W.2d 761 (1973), and Sabo v. Monroe Township, 46 Mich. App. 344, 208 N.W.2d 57 (1973), upheld a rezoning of land under the pretense of furthering the "general public interest" in preferred uses (*i.e.*, mobile home parks). In *Johnson* the Michigan Court of Appeals supported the trial court, finding that no area demand existed for agricultural land use but that an area demand did exist for low-cost residential space.

32. *See* note 24 *supra.*

33. Of this school of interpretation only one case, Cohen v. Canton Township, 38 Mich. App. 680, 197 N.W.2d 101 (1972), would limit the preferred use doctrine solely to zoning ordinances that completely exclude mobile home parks from the community.

34. Only three cases explicitly recognize the preferred use doctrine as shifting the burden of going forward with the evidence to the municipality, as opposed to shifting the burden of proof. *See* cases cited note 29 *supra.* For other state cases distinguishing between the burden of persuasion and the burden of production of evidence see Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558, 468 P.2d 290 (1970); Junar Constr. Co. v. Town Bd., 57 Misc. 2d 727, 293 N.Y.S.2d 358 (Sup. Ct. 1968).

35. If the evidence submitted by plaintiff "conclusively establishes the unreasonableness of defendant's zoning ordinance as applied to plaintiffs' property, it is unnecessary for this Court to resort to the 'preferred' use doctrine . . . ." Sabo v. Monroe Township, 46 Mich. App. 344, 350 n.2, 208 N.W.2d 57, 59 n.2 (1973).

36. Johnson v. Lyon Township, 45 Mich. App. 491, 494, 206 N.W.2d 761, 763 (1973). This standard of proof for the municipal burden of rebuttal is unfortunately vague.

37. *See, e.g.*, Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 863 (1973).

test for municipal zoning justification[38] have been uniformly applied: the presentation of predesignated and available sites better suited for the usage, and the existence of a rational, flexible master plan that would carry weight only when noticeably implemented.[39] Focusing upon the former criterion, a showing that the zoning is invalid as a whole because of its exclusionary purpose does not compel a conclusion that the plaintiff's parcel must necessarily be rezoned to permit the excluded use.[40] Focusing upon the latter criterion, regional land use needs may be disregarded by a timed schedule of local development.[41]

In a minority of cases, the Michigan Court of Appeals has applied the preferred use doctrine to promote development of moderate- and low-income housing. The minority view of the doctrine was first expressed in *Green v. Lima Township*.[42] There the court held that defendant township had failed to prove that exclusion of a proposed mobile home park was in furtherance of the "general welfare" of the community.[43] In reaching its decision, the court found defendant's justifications inadequate. It rejected defendant's contention that the proposed mobile home park would increase the burdens, economic and otherwise, for future services.[44]

Essential to the *Green* interpretation of *Bristow* is the use of the concept of "general welfare:"

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38. *See* text at note 27 *supra.*

39. For a discussion of the requirement that zoning be in accordance with a comprehensive plan see ANDERSON §§ 5.02-.03. Under the interpretation in Binkowski v. Shelby Township, 46 Mich. App. 451, 208 N.W.2d 243 (1973), the court of appeals of Michigan would set a lower standard for the master plan as a criterion for zoning validity, *i.e.*, that master plans "are developed in good faith and are reasonable as a whole with regard to the needs of the local and the general community." *Id.* at 463, 208 N.W.2d at 249.

40. Binkowski v. Shelby Township, 46 Mich. App. 451, 468, 208 N.W.2d 243, 252 (1973).

41. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972). In *Golden* the Court of Appeals of New York upheld an amendment to a zoning ordinance through which subdivision development would be directed by the scheduled completion dates in an 18-year capital plan. For an analysis of *Golden* see Franklin, *Controlling Urban Growth—But for Whom?*, 24 ZONING DIGEST 307 (1972).

42. 40 Mich. App. 655, 199 N.W.2d 243 (1972).

43. *Id.* at 663, 199 N.W.2d at 248.

44. *Id.* at 659-60, 199 N.W.2d at 246.

> Townships such as Lima are heterogeneous governmental units whose political boundaries are largely artificial. To allow the first 600 people in an area to use these artificial boundaries to exclude all but certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners, subverts the idea of zoning promoting the general welfare.[45]

Under the *Green* rationale, zoning will be declared invalid if its primary purpose is to interfere with the right to housing that potential entrants can afford.[46] Under this view, the court of appeals of Michigan has ruled that local governments must carry the burden of proof when they seek to exclude preferred uses (*i.e.*, mobile home parks and multiple-dwelling units).[47] Only when the exclusion of low- or middle-income housing is a side effect of "legitimate community policy" (*e.g.*, state health standards) will the municipality prevail.[48]

The significance of the *Smookler* decision as an application of the preferred use doctrine lies in its extension of the *Green* test. In *Smookler* the court interpreted *Green* to hold that defendant Township's economic justifications for the exclusion of mobile home parks

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45. *Id.* at 663, 199 N.W.2d at 248.

46. In reaching this test the court relied on principles established by two decisions of the Pennsylvania supreme court: *In re* Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). *See* note 28 *supra*. For an analysis of these cases see Strong, 22 ZONING DIGEST 100a (1970); Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634 (1969). In her article Strong notes that the Pennsylvania cases fail in their strategy to provide for low-income housing development in regional areas:

> What is the likely effect of these decisions on increasing housing opportunities for people of all incomes? Minimal . . . . The effect of the opinions will be on municipal density, not income distribution. For the total income spectrum, what significance is there in the difference in cost between a house on one acre and a house on two or three acres? . . . Will the various code requirements for apartment construction be so demanding that all but the well-off will be priced out of that market?

Strong, 22 ZONING DIGEST 100a (1970).

47. In addition to encouraging mobile home park development, the Michigan Court of Appeals has ruled that multiple-dwelling units are preferred uses. *See* George v. Harrison Township, 44 Mich. App. 357, 205 N.W.2d 254 (1973); Kropf v. City of Sterling Heights, 41 Mich. App. 21, 199 N.W.2d 567 (1972). The favored status of these units has likewise led the court to place the burden of proof on the zoning authority to justify a total exclusion of this use.

48. Green v. Lima Township, 40 Mich. App. 655, 661, 199 N.W.2d 243, 247 (1972).

are invalid per se.[49] Contrary to *Green, Smookler* establishes that proof of municipal intent to exclude a particular class of entrants is unnecessary.[50]

Like *Green,* however, *Smookler* fails to incorporate the *Bristow* test for municipal zoning justification in interpreting the preferred use doctrine. According to the *Smookler-Green* rationale, any economic justification for exclusionary zoning is insufficient to meet the Township's burden of proof because it represents only one of the five criteria listed in the *Bristow* test. For this reason *Smookler* is a minority view. The *Smookler-Green* rationale disregards the theory that zoning ordinances reinforce the sum of the individual choices of a community.[51] In addition, the rationale fails to perceive the preferred use doctrine as a dialectical interplay between the regional public interest in certain land uses and municipal concerns for fiscal stability and class bias.[52] No regional economic analysis has substantiated the conclusion that mobile home parks substantially advance the general public interest of the region.[53] Without this empirical determination,

49. Contrast the *Smookler* zoning validity test with the equal protection standard developed in the New Jersey cases cited in note 28 *supra.*

50. For a review of the income status of average mobile home households see M. DRURY, MOBILE HOMES: THE UNRECOGNIZED REVOLUTION IN AMERICAN HOUSING (1972). According to Drury's data (taken from a survey for the United States Department of Housing and Urban Development) the median mobile home household is composed of a husband, wife, and usually one child. About three-fourths of such households had children under six years of age. The typical husband was under thirty-five, had completed three years of high school, and had a total income of about $6,700 per annum. In view of this survey Wheatfield Township's worries about juvenile delinquency or density problems in mobile home parks appear misguided. *Id.* at 28-29.

51. For a presentation of this theory of zoning as a community decision-making process see Mandelker, *The Role of Law in the Planning Process,* 30 LAW & CONTEMP. PROB. 26 (1965).

52. *See* Feiler, 24 ZONING DIGEST 193 (1972). The author states:

> [T]he *Bristow* cases evidence a failure of present zoning techniques to deal with urban growth and metropolitan development. If the Michigan court means what it says, it may herald an end to the validity of a community's attempt to distinguish between types of dwelling units . . . . All that may be left to the community is the right to designate an area for residential use and to specify height, density, and minimum living area limitations.

Id. at 194.

53. R. NEWCOMB, MOBILE HOME PARKS 31 (1970) (percentage of mobile home households with incomes under $5,000 is expected to decline by nearly 10% between 1967 and 1980); REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 108 (1968). In a recent report a sociologist has commented:

the concepts of the "general public interest" and "general welfare," so important to *Bristow,* are ambiguous.[54]

In the post-*Bristow* era the Michigan judiciary is left with the dilemma of reconciling municipal concerns for fiscal stability and community homogeneity with regional needs for low- and middle-income housing. The preferred use doctrine and the *Bristow* test for municipal zoning justification have not provided authoritative standards for determining when the "general public interest" outweighs a conflicting municipal interest.*

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[A]s of 1966, less than 2 per cent of the mobile home population was Negro. In part this low percentage can be explained by the variety of means by which Negroes have been deliberately excluded from mobile-home parks. . . . [T]he current financing of mobile homes places them beyond the means of most ghetto families. Most banks require 20 to 25 per cent of the purchase price as a down payment, and add-on interest charges plus a relatively short loan period . . . [mean] high monthly payments in addition to the cost of renting a space in a park.

S. JOHNSON, IDLE HAVEN: COMMUNITY BUILDING AMONG THE WORKING-CLASS RETIRED 164 (1971).

54. *See* note 11 *supra.*

**EPILOGUE*

Following years of deference to the Michigan Court of Appeals, the Michigan Supreme Court has recently altered the scope of the preferred use doctrine. In Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974), the court held that the exclusion of apartment development from a particular parcel zoned for single-family residential use was valid. The court explicitly overruled the minority interpretation of the preferred use doctrine, *i.e.,* that upon finding a land use is preferred, the burden of proof is shifted to the municipality to justify the reasonableness of its zoning ordinance. *See* text at notes 42-48 *supra.* The majority interpretation of the doctrine, however, was not overruled. The court failed to recognize the theoretical bifurcation in post-*Bristow* developments. *See* text following note 29 *supra.* Rather, it proceeded to formulate its own "legitimate use" doctrine.

Under the *Kropf* "legitimate use" doctrine, upon a finding that a land use is legitimate, a zoning ordinance that *totally* excludes the use from the municipality is labeled with a "strong taint of unlawful discrimination and denial of equal protection of law to the excluded use." 391 Mich. at ....., 215 N.W.2d at 185. This "strong taint," however, is only relevant in answering the ultimate question of whether the zoning ordinance is valid. Essential to the *Kropf* test of zoning validity is proving the unreasonableness of the ordinance. Two alternative grounds will be recognized as establishing the unreasonableness of the ordinance: that there exists no reasonable governmental interest advanced by the zoning classification, or that there exists an arbitrary, capricious and unfounded exclusion of *other* types of legitimate uses from the area in dispute. *Id.* at ....., 215 N.W.2d at 186. Under the first test, the court dismissed the issue by demonstrating

the supposed inadequacy of plaintiff's pleading, *i.e.*, that no proof was provided as to the unreasonableness of developing the parcel for single-family residences, as opposed to the unreasonableness of excluding multi-unit development from the parcel by municipal authority. *Id.* at ....., 215 N.W.2d at 187. Under the second test, the court invoked the presumption of zoning validity and held that plaintiff failed to meet his burden of proof. *Id.* at ....., 215 N.W.2d at 187-89. Several reasons were given by the court for excluding other legitimate land uses from the parcel: inadequate street facilities for the potential increased traffic resulting from multi-unit development, the floodgate problem of other apartment developers using a rezoning as a precedent for the development of other parcels in the area, and the negative externalities of multi-unit development on the environment of residential neighborhoods. *Id.*

In the post-*Kropf* era real estate developers will be faced with the inequitable burden of proving either that there exists no reasonable governmental interest that is advanced by the zoning classification or that the zoning classification has no rational purpose in excluding *other* types of legitimate uses from the area in dispute. Under either test, the following problems arise: (1) the developer is faced with the burden of proving a "negative," which is an unreasonable task; (2) the consideration of the regional public interest in certain land uses is abandoned; and (3) the Euclidean myth of the incompatibility of apartment development with single-family residences is presented as an empirical fact. For a critique of the Euclidean myth see note 9 *supra*. Under the *Kropf* legitimate use doctrine, it is the totality of the exclusion that is emphasized, not the regional need for the particular land use in question. 291 Mich. at ....., 215 N.W.2d at 185. From an urban planning perspective, the principal difficulty with the doctrine arises from its failure to allow for a consideration of the trade-offs between regional housing policy and local fiscal and cultural interests. The only consolation that can be derived from the *Kropf* decision is that it failed to overrule the majority interpretation of the *Bristow* preferred use doctrine and test for zoning validity. For an analysis of this majority interpretation see text at notes 30-36 *supra*.