Litigating the Zoning Case in Ohio: Suggestions to Fill the Textbook Void

Edward Kancler

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Land Use Law Commons, and the Litigation Commons

How does access to this work benefit you? Let us know!

Recommended Citation
Edward Kancler, Litigating the Zoning Case in Ohio: Suggestions to Fill the Textbook Void, 24 Clev. St. L. Rev. 33 (1975)
available at https://engagedscholarship.csuohio.edu/clevstlrev/vol24/iss1/6

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
Litigating The Zoning Case in Ohio: Suggestions To Fill The Textbook Void
Edward Kancler*

Public resistance to rezoning has often opened a path to the courtroom. The fact is that the amount of zoning litigation is increasing as the amount of land available for sensible development is decreasing.¹ Yet there is a lack of practical knowledge regarding the litigation of a zoning case. While much textual material is available citing case law and discussing legal theories of zoning law,² there is very little material explaining the proper tactics and presentation to be used in a successful rezoning case. This lack of practice material, lack of attorney involvement at the earliest stages of the zoning process, and the failure to properly interpret and effectively present evidence in court all contribute to ill-conceived and disorganized trials of zoning cases.

The purpose of this article is to fill this textbook void by presenting a practical overview of the total rezoning procedure, from the application for rezoning through the actual trial, and the tactics and methods to be used in the proper presentation of the zoning case.³ This will include a discussion of courtroom procedure, presentation of evidence, rules of civil procedure and pretrial discovery and their particular application in zoning litigation.

How the Zoning Issue Reaches the Courtroom

The right of a city or village to zone, i.e., to divide areas into use classifications pursuant to a comprehensive plan and to amend the zoning ordinance, is a grant of local home rule provided by Article 18, Section 3, of the Ohio Constitution.⁴ The municipality may choose

* A.B., 1961 Ohio University; J.D., 1964, Western Reserve University, is a practicing attorney in Cleveland, Ohio, and a member of the firm of Strotter, Familio, Cavitch, Elden & Durkin Co., L.P.A. The author wishes to acknowledge the assistance of Robert M. Nelson in the preparation of this article.


³ This article will not discuss the use of the various federal civil rights acts to attack zoning. The reader is referred to the excellent survey of such litigation set forth at Rubinowitz, Exclusionary Zoning: A Wrong in Search of a Remedy, 6 U. Mich. J. L. Reform 625 (1973). There the author details the courtroom success in attacking zoning regulations which require large-sized sublots (e.g., one-half acre or more) as being contrary to the civil rights of low income or minority groups. See also 23 Cleve. St. L. Rev. 354 (1974).

⁴ Article 18, Section 3 of the Ohio Constitution is commonly referred to as the "Home Rule" section. In the past, it has been a constant source of litigation, analysis and text review. At present, over 300 reported cases have dealt with the interpretation of the application of the so-called "non-conflict" clause. See, e.g., City of Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939); Kaufmann v. Paulding, 92 Ohio App. 169, 109 N.E.2d 531 (1951).
to adopt a charter and enact a zoning ordinance pursuant to that charter. Without a charter, the municipalities must enact zoning legislation pursuant to the statutory pattern set forth at Chapter 713.12 of the Ohio Revised Code. The powers of a township to zone are set forth in Chapter 519 of the Ohio Revised Code, but are not derived from the “Home Rule” provision of the Ohio Constitution.

At the present time, it may be said that the zoning issue may reach the courtroom by any one of six proceedings: (1) federal civil rights action; (2) declaratory judgment; (3) injunction action brought by the property owner or adjoining owner; (4) Chapter 2506 appeal; (5) mandamus, or other extraordinary writ; and

5 Adoption of a charter by a municipality (city or village) pursuant to Article XVIII of the Ohio Constitution is set forth at Ohio Revised Code Sections 705.01-06. In essence, the charter becomes the constitution of the municipality empowering it to exercise all powers of local self-government subject to the limitations imposed by the Ohio and Federal Constitutions, in addition to “police, sanitary or other measures” promulgated by the state legislature.

Since zoning ordinances are in the nature of “police measures,” even chartered municipalities may not enact zoning ordinances in conflict with those promulgated by the state legislature. However, the Ohio General Assembly has not yet entered the zoning field by enacting zoning regulations. 3 FARRELL-ELLIS, OHIO MUNICIPAL CODE §§10.3, at 307 (11th ed. 1962). While no zoning legislation prescribing the use of land has been enacted, there is nevertheless substantial legislation prescribing procedure to be followed by municipalities in enacting zoning ordinances. It is clear that a non-chartered municipality must follow the statutory procedure. Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954). However, the question of whether or not a chartered municipality is similarly restricted in the absence of charter provisions has not yet been clearly resolved. Compare State ex rel. Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941), with State ex rel. Gulf Ref. Co. v. DeFrance, 89 Ohio App. 1, 100 N.E.2d 689 (1950).

4 Chapter 519 of the Ohio Revised Code governing township zoning, although dealing with political bodies which are different in name than cities and villages (township zoning commission vs. planning commission, and township trustees vs. city or village council), follows the same general pattern for adopting a zoning ordinance, or amendments thereto, as is provided at Chapter 713 of the Ohio Revised Code. Of greater importance is the fact that the courts have consistently applied the same principles of law and have considered the same factors in determining the validity or invalidity of zoning, whether township, village or city zoning is involved.

7 The federal civil rights case usually involves attacks upon zoning codes which require substantial sublot size requirements (1/2 acre, 1 acre or more) wherein it is alleged that such a size requirement for single-family dwellings is discriminatory. Such cases have met with mixed success in the courtroom. See Rubinowitz, Exclusionary Zoning: A Wrong in Search of a Remedy, 6 U. MICH. J. L. REFORM 625 (1973).


11 The writ of mandamus is classified as an “extraordinary legal remedy.” The entire purpose of the remedy is to afford rapid relief when there is no other adequate remedy available in the ordinary course of law. To entitle a party to a writ of mandamus, there must be a clear legal right to the relief requested, such as the issuance of a building permit. In addition to the common pleas court under Section 2731.02 of the Ohio Revised Code, the court of appeals and Ohio Supreme Court are also vested with original jurisdiction to hear mandamus cases. But, the Ohio Supreme Court usually declines to hear cases in mandamus involving private matters. The procedure is relatively simple. A petition for a writ of mandamus is filed with the court; the court then issues what is called an “Alternative Writ of Mandamus,” which is served on the respondent. The alternative

(Continued on next page)
(6) quasi-criminal proceedings alleging a violation of existing zoning laws.12

The declaratory judgment action is the traditional method by which the zoning issue is raised because it can result not only in voiding the existing zoning scheme, but in obtaining rezoning by court order.13 With increasing regularity, however, the zoning issue has been determined by the courts in appeals brought under Chapter 2506 of the Ohio Revised Code.14 Such cases may begin as an appeal from the refusal of a local zoning board to issue a conditional use permit, or a variance, but by the time the case reaches the courtroom, the zoning itself comes under attack.

Irrespective of the remedy or forum, certain factors are considered by the court in reaching a decision when confronted with the contention that the present zoning is invalid. These factors include: (1) the pattern of past and present development of adjoining or nearby land; (2) the effect of that pattern on land in question; (3) the severe reduction in value of land by reason of existing zoning, either amounting to a confiscation or its practical equivalent; (4) the suitability of land for existing use, and related economic questions; (5) the suitability of the land for the proposed use; (6) the existing uses of adjacent land; (7) whether the existing zoning is part of a comprehensive plan; and (8) the treatment of land similarly situated.15

(Continued from preceding page)

writ is merely an order to show cause as to why the writ should not be granted. The respondent may then demur or appear at the hearing, at which point, the matter is heard as if it were a trial. The problem with seeking a writ of mandamus in respect to a permit under an allegedly invalid zoning ordinance is that the court may well determine that the sole seeking relief has another remedy available in the ordinary course of law, such as the Chapter 2506 appeal. See, e.g., State ex rel. Sibarco Corp. v. Berea, 7 Ohio St. 2d 85, 218 N.E.2d 428 (1966), cert. denied, 386 U.S. 957 (1967); State ex rel. Gund Co. v. Solon, 171 Ohio St. 318, 170 N.E.2d 487 (1960); State ex rel. Fredrix v. Beachwood, 171 Ohio St. 343, 170 N.E.2d 847 (1960); State ex rel. Trusz v. Middleburg Heights, 112 Ohio App. 87, 163 N.E.2d 778 (1960). In all events, mandamus should only be utilized when (1) there is almost no question at all that the relief requested is correct, (2) that the realtor has complied with all legal requirements and (3) no other remedy will adequately afford the relief necessary.


13Chapter 2721 of the Ohio Revised Code governs declaratory judgments. The declaratory judgment action is essentially one in which plaintiff seeks a declaration of the rights and duties of the parties under the fact pattern involved. No claim for damages is usually presented. Section 2721.03 of the Ohio Revised Code expressly vests jurisdiction in all courts of record to determine the validity of a municipal ordinance.

14Chapter 2506 of the Ohio Revised Code consists of four sections: 2506.01-04. The purpose of this chapter is to provide an appellate remedy to the common pleas court, for administrative decisions of a municipality. Thus, when a Board of Zoning Appeals refuses to grant a variance from the literal words of the zoning ordinance, the aggrieved party may file a notice of appeal to the common pleas court. Obviously, if the underlying zoning ordinance is invalid, its constitutionality may come under direct attack in the Chapter 2506 proceeding.

Pitted against these factors is one of the strongest presumptions of civil law: the existing zoning is presumed valid unless the complaining party proves it is clearly invalid and that the issue is "beyond debate." Through the use of this presumption, the court may exercise its discretion to protect the rights of adjoining property owners if the rezoning sought would have a radical effect on their property.

On the other hand, there are certain factors which the courts have stated are not proper considerations for zoning laws. These include aesthetics and traffic regulation. In other words, zoning may proscribe the kind of land use within a zone, but not the style of the building so long as it conforms to the existing use permitted.

A court will rarely declare existing zoning unconstitutional if only one of the above factors exists strongly in favor of the plaintiff. For example, the traditional rule has been to refuse relief if the landowner's argument against the existing zoning is limited to the fact that the land is worth less money and that a more profitable use of the land could be made if it were zoned differently. But in unusual circumstances the court may decide that the "loss of value" or "economic hardship" is so great as to virtually result in a confiscation. Obviously, perceiving where the line is to be drawn between confiscation and regulation is difficult.

Attorney Involvement

If the client is in the land development business, attorney involvement may very well be minimal, such as advice as to the law or a request of the attorney's presence at public meetings or hearings. Usually, the sophisticated client is fully capable of handling the matter up to this point. But the unsophisticated client is not, and attorney involvement is, from this writer's point of view, absolutely essential.

Obviously, facts and law must be analyzed far in advance of making the application for rezoning. A copy of the local zoning ordinance usually can be purchased for as little as ten dollars. A view of the property is essential, including observation of adjoining land and

---


17 The rule is stated that aesthetics "standing alone" is not a proper purpose of zoning. Pritz v. Messer, 112 Ohio St. 628, 638, 149 N.E. 30, 33 (1925). But, it has also been held that if aesthetic conditions are merely part of other purposes of the zoning ordinance, then such an ordinance will be upheld. Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963). A zoning ordinance cannot have as its primary purpose the regulation of traffic. State ex rel. Killeen Realty Co. v. East Cleveland, 108 Ohio App. 99, 153 N.E.2d 177 (1959), aff'd 169 Ohio St. 375, 160 N.E.2d 1 (1959).


the immediate vicinity. Where is the vacant land located in relationship to adjoining uses? What, if any, pattern exists in the city's zoning? To what, if any, economic use can the land be put under the existing zoning plan? Confer with an engineer in regard to what problems may or may not exist on the land itself in light of the proposed development. In short, treat the matter at this point for what it is: a case that may become a lawsuit.

It would also be beneficial at this stage for the attorney to determine how much court involvement the municipality has had in the past. By discerning what, if any, pattern of such involvement exists, the attorney can possibly foresee the development of the city's defense posture. Thus with minimum effort, substantial time and money in terms of litigation expense will be saved.\textsuperscript{20}

The Application for Rezoning

The application for rezoning is technically a request to amend the city's zoning ordinance and is usually presented to the city council by a letter addressed to the clerk of council.\textsuperscript{21} Few, if any, municipalities have regular forms which are required for seeking the rezoning of land. Accordingly, the application for rezoning is a creation of the landowner and his representative.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{20} It also might be said that lawyer involvement at such an early stage will reveal whether the municipality involved will resist the rezoning attempt "all the way," meaning through the court of appeals and supreme court. Such resistance will mean several years in court, and must be considered in terms of the issue involved.
\item \textsuperscript{21} The pattern of most municipalities in the adoption of zoning ordinances does not differ substantially from the requirements set forth at Section 713.12 of the Ohio Revised Code, where the municipality is a charter city that has adopted its own procedures. Basic to the adoption of a zoning ordinance are the following steps: (1) Application; (2) Public hearing, with 30 days published notice; (3) Planning Commission Action; (4) Approval by a majority of city council, or if the planning commission rejects the rezoning, then by a ¾ vote of city council. Township zoning procedures are slightly different, and are set forth at Chapter 519 of the Ohio Revised Code. The essential requirement is a public hearing prior to the adoption of the zoning, OHIO REV. CODE ANN. § 519.08 (Page 1954). This occurs after the matter is referred to the Township Zoning Commission. If the Township Trustees adopt the ordinance a referendum provision is set forth at Section 519.11 of the Code.
\item \textsuperscript{22} Unless expressly provided in the zoning code in question, the application need not be filed by the landowner. Most codes permit a purchaser or optionholder to prosecute the application with the written consent of the owner. Despite the lack of formal requirements at the application stage, the application should contain the following information:
\begin{enumerate}
\item name of owner (and purchaser or optionholder, if applicable);
\item legal description of the property involved (usually enclosed with the request as an exhibit);
\item present zoning of the property involved; and
\item the zoning change requested.
\end{enumerate}
It is usually neither necessary nor desirable, from a legal point of view, to state why the rezoning is being requested. However, it is often desirable to include in the application a general description of what will be developed on the land if the rezoning is granted by the city council. The reasons, legal or otherwise, why the rezoning is being sought can be presented at public hearings and meetings.
\end{itemize}
Public Hearings and Meetings

After the application for rezoning is delivered to the clerk of council, it is placed on the agenda at the next city council meeting. It is from this point on that municipalities vary in their "in house" procedure, and it is also at any point thereafter that the issue may become a courtroom matter. Usually, the council initially will refer the request for rezoning to its building and zoning committee and to the city planning commission for review.\(^2\) The building and zoning committee then holds a meeting open to the public and makes its recommendations to the city council after such meeting, as does the city planning commission.\(^3\) Both of these meetings are extremely important for two reasons: first, the attitudes of the city toward the request will be ascertained; and second, the opportunity is presented to explain the facts, the goals, and the client's intentions as to the development of the property.

The planning for these meetings, therefore, is critical, especially if it is apparent that the rezoning will be resisted. The amount of time and money to be spent at this stage is a matter of sound business judgment. At least the following materials should be used at the public meetings: (1) a map of the property involved and surrounding properties, with the area in question clearly identified by coloring or boundary delineation, large enough to become a focus point of attention at the meeting; and (2) a plot plan, i.e., a map which portrays the location and general size of the buildings to be constructed. The attorney should not confuse a plot plan with an architect's rendering, which is an extremely expensive proposition.

At this stage, the parties involved in the presentations at the meetings should be prepared to answer questions regarding why the present zoning is not proper; what effect the development of the land will have on existing drainage, sewers, water, and other utilities; what costs to the city will be involved; and what benefits will be derived. The best way to do this is to treat the presentation at each meeting as if it were an opening statement in the courtroom. This approach, together with the visual aids on hand, usually will answer all the relevant questions concerning the property. The only questions left to be answered do not truly relate to the central issue, such as the financial motivation of the owner. The presentation should emphasize that the rezoning proposal would not only result in increased land values, but also in benefits to the community at large, such as

\(^2\) Under the Ohio Revised Code any city may establish a planning commission, the function of which includes zoning. OHIO REV. CODE ANN. § § 713.01-10 (Page 1954).

\(^3\) The Ohio Revised Code contains one unique feature. If the city planning commission recommends against the rezoning, then the rezoning cannot be enacted by city council unless passed or approved by not less than \(\frac{3}{4}\) of the membership of the municipal legislative authority. OHIO REV. CODE ANN. § 713.12 (Page Supp. 1973).
increased tax revenue, new sewers and water lines. Likewise, the community should be advised of the financial commitment which the property owner is willing to undertake if the rezoning is granted since many people do not realize that a sizeable investment is often involved in multi-family development.

How comprehensive should the presentation be at this point? The size of the proposed development and the complexities involved dictate the answer. If it can be assumed that serious drainage, water, or sewer problems may exist, or that serious questions will be presented in that regard, then it may be necessary to have an engineer available to give his analysis. If questions of aesthetics and building considerations are involved, even though not proper criteria for zoning laws, it may also be necessary to have the contractor or architect available. Likewise, it may be advisable to have a real estate broker testify as to the effect of the proposed project on the value of adjoining properties. The problem at this point is to avoid dramatic overkill, and it can only be resolved by exercising the best judgment possible under the circumstances.

If you have been successful at this stage and the building and zoning committee and city planning commission recommend the rezoning, the municipal law director or solicitor will prepare a proposed amendment to the zoning ordinance.

This proposed ordinance will be placed on the agenda and a public hearing before the council will be scheduled. Due to the public resistance to rezoning, public hearings can often lead to questions having no legal relevance. Regardless of this resistance, the attorney and client should be prepared to make and support the presentation. By the time of the public hearing, and with the experience of the prior meetings, the presentation should be well-developed and honed. Additional tools, however, are useful at the public hearing; one of the best is to pass out a “fact sheet” or “white paper” to the audience and the members of the council before commencing the presentation.²⁵

A proper presentation will limit the scope of inquiry of the public hearing to the relevant questions. The position to maintain is one of open and frank business dealings. Any impression engendered to the contrary can only be the fault of the method in which the presentation is made. Most people, whether angered by a rezoning application or not, are as good as any jury, and are interested in the facts and the advantages and disadvantages involved.

²⁵If done properly, the presentation will proceed rapidly, while everyone in the room is reading the paper. The fact sheet should be on one page, in all capital letters, and enumerate each positive benefit to the community that will result from the rezoning,
The Referendum and the Zoning Case

Even if the council has acted favorably on the application for rezoning, problems leading to litigation may still occur if the citizenry circulates and files a petition for referendum on the rezoning ordinance adopted by city council. Recently, the referendum has become a tool of great importance. Cases involving the referendum, in this writer's experience over the past two years, have included rezoning, annexation, emergency clauses in ordinances, and even plat approval. Disenchantment with government in general, and a stereotyped dislike for lawyers and land developers, together with all the other factors previously discussed concerning public resistance to rezoning, have contributed to a recent increase in referendum activity. In some cities, through charter amendment, no rezoning of land can be effective without the approval of the electorate by means of a "built-in" or "automatic" referendum. The constitutionality of this recent device is unclear, although it seems obviously inconsistent with the concept of representative government. Nevertheless, the right to referendum under the Ohio Constitution, Revised Code or under the provisions of a charter in a chartered municipality is absolutely clear. The right exists and must be dealt with since a negative referendum vote can destroy the months of time, money, and effort expended in obtaining the rezoning.

Although the referendum petition may not be questioned in court until it has been filed, it is at that time subject to attack if not procedurally correct. Under Ohio law, a petition for referendum must be filed within 30 days after the ordinance is submitted to the mayor, or in case of mayoral veto, within 30 days after city council overrides the veto. Extensions of time cannot be granted by anyone, and a delay

---

26 There are three basic referendum provisions. Township referendum procedures are set forth at Sections 519.11 and 519.12 of the Ohio Revised Code, and apply to both the enactment and amendment of a zoning ordinance respectively. Second, and more recently, a number of municipalities have adopted "built-in" referendum provisions, which require an automatic referendum when any zoning ordinance is adopted by city council. The built-in referendum is already the subject of litigation, and will be so, for a number of years. Finally, municipal referendum procedure is set forth at Section 731.29 of the Ohio Revised Code. That section applies to all ordinances including zoning ordinances, except ordinances for appropriation of funds for current expenses, street improvements petitioned for by residents and emergency ordinances. Ohio Rev. Code Ann. § 731.30 (Page 1954). A zoning ordinance may be adopted as an emergency measure by a chartered municipality thereby precluding a referendum election thereon. Partain v. Brooklyn, 101 Ohio App. 279, 133 N.E.2d 616 (1956). However, it has been held that a non-charter municipality cannot enact an emergency zoning ordinance, because of a conflict with article 18, section 3, of the Ohio Constitution. Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954). The reason for this distinction is that a non-charter city must adopt zoning ordinances pursuant to Section 713.12 of the Ohio Revised Code, which requires a public hearing. Charter cities can presumably avoid this problem. As a practical matter, however, most cities today do not adopt zoning ordinances as emergency measures, mainly due to the public resistance to rezoning.

of one day is fatal to the petition. In addition, the petition for referendum must also contain the required number of signatures. Finally, the petition for referendum must conform to the technical legal requirements of form, notarization, and affidavits of circulators.

Any defects in the referendum petition can be raised by the landowner through the device of a complaint for declaratory judgment. Rapid relief, however, must be sought when the timing of the matter involves a forthcoming general or special election. Without appropriate preliminary judicial relief, by way of a preliminary injunction or an *ex parte* restraining order, neither the city nor the board of elections may withhold placing the issue on the ballot. Indeed, without such preliminary relief, the city and the board of elections are obligated to continue the referendum process. Accordingly, it is necessary to name as parties defendant the city, the board of elections, and the city officer (clerk or auditor), who is by law required to certify the petition for referendum to the board of elections. Additionally, it is often necessary to file a motion to advance the case in order to obtain an early determination.

It should be pointed out that in many cases involving referendum issues, most, if not all, of the cases can be entered on stipulated facts because, in essence, the referendum process involves a question of law, *i.e.*, whether the petition for referendum is technically correct. A victory in such a case, even though based on technicalities, is no different from a victory against a technically imperfect mechanic's

---

29 *Cf.* Hamilton v. Greevy, 9 Ohio App. 221 (1917). A city with a charter may adopt its own referendum provisions. However, if the charter is silent as to referendum, then the provisions of Section 731.29 of the Ohio Revised Code apply. State *ex rel.* Mika v. Lemon, 170 Ohio St. 1, 161 N.E.2d 488 (1959). Interestingly, most charters, with the exception of the recent incidence of built-in referendum merely reenact Section 731.29 of the Ohio Revised Code as part of the charter. Query: does a proper interpretation of the law mean that a built-in referendum if placed in a charter is valid, but if a non-charter city is involved, that the only method available for referendum is that which is provided at Section 731.29 of the Ohio Revised Code?

30 Section 731.29 of the Ohio Revised Code provides that there must be signatures of ten percent of the electors of the city who cast votes at the preceding gubernatorial election.

31 Section 731.35 of the Ohio Revised Code, provides that the committee of circulators of the referendum petition must file an expense statement. Failure to do so, however, does not invalidate the petition for referendum. Violation of this section does not impose any penalty of none, other than a monetary fine. Candidates for public office in Ohio may be prohibited from running for office for a period of five years, if the expense statement is neither timely filed nor filed at all. Section 731.35 does not so penalize the circulators of the referendum petition. See Gem Development Co. v. Clymer 120 Ohio App. 189, 201 N.E.2d 721 (1963).

32 Section 731.29 of the Ohio Revised Code is specific, and states in pertinent part:

[S]uch auditor or clerk shall ... certify the text of the ordinance or measure to the board of elections. The auditor or clerk shall retain the petition. The board shall submit the ordinance or measure to such electors. . . . (Emphasis added).

33 *See* OHIO R. CIV. P. 19, which states (A) "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be *
lien. On the other hand, if the lawsuit is lost, the advisability of appeal is not to be taken lightly. The passage of time during the appellate process may well have a favorable result insofar as a lessening of public outrage may occur.

If city council votes against the rezoning petition, or if it is unable to override a mayoral veto, or overcome a negative planning commission recommendation, or if at any stage after the application for rezoning, the city fails to act, the next decision to make is whether or not to go to court. Many sophisticated land developers will often decide not to litigate, but instead table the matter, go on to other things, and re-present the application for rezoning at a later time. The sound business judgment of the client in this regard is usually not open to question since his familiarity with the community is often far better than the attorney's. Likewise, the passage of time may ultimately resolve the problem by reason of changes of uses of land in the vicinity. Finally, the client may be involved in the development of land elsewhere in the same community, and his judgment as to the effect of a lawsuit on other pending land developments must be respected.

If the decision is to litigate, then the case becomes a true zoning lawsuit. The attorney who has followed the procedure delineated so far will have gained a valuable overview of the case and find that much of his courtroom preparation has already been completed. The balance of this article will deal with preparation for trial and the handling of the trial itself. For purposes of discussion and illustration, it will be assumed that the client's application for rezoning of land from single family use to multi-family use has been denied by the failure of the council to enact the rezoning ordinance, and that the landowner is now bringing action for declaratory judgment. Though the discussion will relate to this particular fact pattern, the suggested procedure may be validly applied to other rezoning matters.

---

34 It should be noted that this article does not deal with the subject of county rural zoning, as set forth at Chapter 305 of the Ohio Revised Code. As a consequence, the referendum provisions set forth at Section 303.11 of the Ohio Revised Code are not discussed.

35 Some decisions indicate that Chapter 2506 should be the proper forum to contest city council disapproval of a rezoning request. In those cases, it is said that the applicant who has been refused rezoning, should then apply for a building permit, have it denied, appeal the denial to the board of zoning appeals, have it deny the appeal, and then appeal to common pleas court under Chapter 2506. The entire procedure is senseless, because if the rezoning has not been granted, to apply for a building permit which in no event can be issued would be an exercise in futility. The cases which have required this cumbersome procedure are: Espy v. Montgomery, 30 Ohio App. 2d 65, 283 N.E.2d 177 (1971); Shaker Coventry Corp. v. Shaker Hts., Bd. of Zoning Apps., 115 Ohio App. 472, 180 N.E.2d 27 (1962). Inasmuch as a Board of Zoning Appeals has no jurisdiction to amend or rezone land, the procedure appears even more senseless. See Garber v. Joseph Skilken & Co., 53 Ohio Misc. 178, 293 N.E.2d 335 (C.P. 1972). The Ohio Supreme Court has recognized this problem, although obliquely, in Mobile Oil Corp. v. Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974), in the concurring opinions of Judge Corrigan and Judge Brown. See also Van Curen v. Village of Mayfield, 100 Ohio App. 2d 166, 448 N.E.2d 4 (1984).
Following the Case to the Courtroom

The Complaint

While the validity of zoning ordinances has been tested and resolved by various means, the traditional method by which existing zoning and the requested change sought is brought before the court is by an action for declaratory judgment,36 governed by Chapter 2721 of the Ohio Revised Code,37 and Rule 57 of the Ohio Rules of Civil Procedure.38

The allegations of the complaint are relatively simple. The parties and the property involved must be identified with particularity. A legal description of the property should be set forth, either incorporated into the body of the complaint or attached to it as an exhibit.39 The complaint should also set forth the present zoning of the property, and the requested rezoning. To establish that an actual case or controversy exists and to avoid any question as to whether the plaintiff has exhausted all administrative remedies available,40 the complaint should allege that the city refused the request for rezoning. If favorable recommendations had been obtained, such as

36 The text material dealing with the development, history, nature, and recent case law in regard to the action for declaratory judgment is voluminous. See, e.g., 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 24.01-10; Glosser, The Declaratory Judgment as an Alternative in Ohio, 4 OHIO ST. L. J. 1 (1938), Harper, Declaratory Judgments in Ohio: A Case Study, 28 U. CIN. L. REV. 33 (1959).

37 Section 2721.03 of the Ohio Revised Code states in appropriate part:

Any person interested . . . or whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction validity arising under such . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

Direct reference is also made to necessary parties at Section 2721.12 of the Ohio Revised Code:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and shall be heard.

Moreover, the statute expressly states the scope of relief which may be granted by the court at Section 2721.13 of the Ohio Revised Code:

Sections 2721.01 to 2721.15, inclusive, of the Revised Code are remedial, and shall be liberally construed and administered.

38 Rule 57 of the Ohio Rules of Civil Procedure simply incorporates by reference the provisions of Chapter 2721 of the Ohio Revised Code, with a further provision stating that the court may advance the hearing of an action for declaratory judgment. Since a court can always advance any case for early hearing, the addition of such language is not particularly clear or meaningful.

39 The latter is a better practice because most undeveloped land is described by metes and bounds. The resultant legal description is therefore usually of great length. Rather than waste time in excessive typing, a photocopy exhibit of the deed, for example, which contains the legal description of the property, may be attached to the complaint and is wholly adequate.

40 See note 35, supra.
planning commission approval, building and zoning committee approval, or that the rezoning request was passed by vote of city council on the first or second reading of the proposed ordinance, these items should also be alleged. While there is no binding legal effect of such actions, the court by the pleadings will be advised of the background at the earliest possible time.

Most actions for a declaratory judgment in zoning cases name only the city as a party defendant in the complaint despite the seemingly clear language of Section 2712.12 of the Ohio Revised Code which requires that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." Notwithstanding this language, it would appear in a zoning case that the only parties who have or claim any interest are the adjoining or contiguous property owners. 41 Excessive time should not be expended on determining whether such property owners should be made parties defendant by the plaintiff. As a practical matter, the city's interest is usually no different from that of the adjoining owner, and if the adjoining owner desires to be made a party to the case, that may be accomplished under a motion for intervention under Rule 24 of Ohio Rules of Civil Procedure. 42 The obvious principle involved is to avoid, if possible, a multi-party lawsuit which would result in delay, to the prejudice of the plaintiff.

Finally, the complaint should clearly state the relief sought, which is twofold. First, the complaint should seek a declaration by the court that the existing zoning of the land owned by the plaintiff is invalid; and second, the complaint should seek specific relief so that the court will grant the rezoning requested by the plaintiff.

Though the city is usually the only party defendant named, a copy of the complaint must be served upon the Attorney General of Ohio. 43


42 Rule 24 of the Ohio Rules of Civil Procedure involves two distinct types of intervention: mandatory and permissive. Mandatory intervention occurs when:

[A] statute . . . confers an unconditional right to intervene; or . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action . . . unless the applicant’s interest is adequately represented by existing parties.

Permissive intervention is within the discretion of the court, and occurs when a state statute confers a conditional right to intervene, or where a common question of law or fact exists. An example of a conditional statute may be found at Section 733.581 of the Ohio Revised Code which states that a taxpayer may be named a party in an action brought by a city, or any person may intervene if the court determines that the public interest will be better protected or justice furthered.

43 Section 2721.12 of the Ohio Revised Code is a legislative curiosity. Prior to 1970, the usual procedure was to name the State Attorney General as a party and to make certain that he would be served with a copy of the complaint. The invariable response of
Preliminary Relief

Usually, preliminary relief is not necessary in a case when plaintiff is seeking a litigated rezoning of his property. Some municipalities, however, will not only deny the requested rezoning, but also will attempt to zone the land involved to an even more restricted use than that which exists. In such a situation, a preliminary injunction not only is available, but is absolutely essential. Otherwise, the city may very well zone the client right out of the courtroom. Courts will and should restrain or enjoin the city from enacting such legislation. Outside of such a situation, which may arise at any time, it is seldom that preliminary relief is required in the rezoning case.

Lining Up the Plaintiff’s Evidence

Preparation for the trial of the zoning case in many ways is more important than in other areas of civil litigation. This is because of the burden of proof imposed upon a plaintiff: The city is protected by an extremely strong presumption of law that the existing zoning is valid. As noted earlier, this presumption is not overcome unless plaintiff’s evidence is “beyond debate” or “clearly establishes to the contrary.” Fortunately, the prior administrative steps provide the attorney with substantial insight into the problem and aid him in marshalling his evidence with two goals in mind: establishing that the existing zoning is invalid and the plaintiff’s proposed rezoning is valid.

Expert Testimony

The testimony of the client, without supporting evidence, is usually not sufficient to accomplish these two goals. Thus, it is necessary to support the claims of the plaintiff with expert testimony. A

(Continued from preceding page)

the Attorney General was a letter directed to the clerk of court, stating that the Attorney General would not participate in the case. Since 1970, the incumbent Attorney General claims that he should not be a party since the statute merely says he is to be served with a copy of the proceeding. Thus, today, most attorneys either mail a copy of the complaint to the attorney general or request that the court perform the function, without naming the attorney general a party.

44 See OHIO R. Civ. P. 65.

45 Thus by way of example, plaintiff may own land zoned for light or heavy industrial use which abuts a single family residential zone. Though the landowner, in good faith, may have requested zoning to multi-family use, the city may decide, after the complaint is filed, to rezone the land to single family use.

46 A word of caution is in order because it very well may be that the court is not disposed to the granting of ex parte restraining orders or preliminary relief. However, such an application is worth the effort if the result can be to rapidly advance the case for trial. In other words, irrespective of pending rezoning, plaintiff’s motion for preliminary injunction can be converted to a motion to advance the case for early hearing.

qualified real estate broker, familiar with the area, is usually the most desirable expert.48

The qualifications of the expert real estate broker must be of such degree that they can be portrayed with particularity and to the advantage of the plaintiff. Parenthetically, it should be observed that a stipulation of the broker’s qualifications is not ordinarily desirable from the property owner’s point of view. The court should be apprised of the fact that the expert testifying is of the highest caliber available. To stipulate such qualifications tends to diminish the effectiveness of the expert. The expert’s qualifications should include a broker’s license, as distinguished from a salesman’s license; membership in various professional societies, including appraisal societies; considerable experience; familiarity with the land in question; knowledge of and actual handling of both single family and multi-family land transactions, in addition to familiarity and experience in real estate transactions in the community involved.

Usually, the validity of the existing zoning is well covered by the testimony of the sophisticated client and the real estate broker. However, in some cases, such testimony is not sufficient. There may be unique factors involved in the land about which only an engineer can testify. The quality of the land itself usually dictates whether an engineer’s testimony is necessary, and of equal importance, what kind of engineer should be utilized. Testimony of either a sanitary engineer, a surveyor, or a registered professional engineer, may reveal problems with the land which might not be apparent by an observation of maps, but will tend to establish that the existing zoning is unreasonable.49

In addition to having excellent qualifications, the engineer, as in the case of the real estate broker, must be familiar with the zoning code of the city. Furthermore, the engineer must be entirely familiar with the provisions of the city’s building code, so that the scientific analysis of the land is fully applicable to the facts. It should be remembered, however, that the engineer is not in a position to testify

48 The reason for this statement is that the broker can present a better overall picture of the problem than any other witness, save the client. While the engineer or architect is more technically and scientifically trained, their particular testimony is limited to one facet of the problem, whereas the broker deals with the land as an entirety and compares it with other land in the vicinity.

49 For example, if the present zoning is for single family use, the physical topography of the land may make such use impractical and not economically feasible. The location of hilly terrain may well obviate any reasonable use of the land for its full development for single family use, while multi-family dwellings could be placed on a portion of the land with ease. The existing storm and sanitary sewers may not be capable of accepting a fully-developed subdivision of single family residences, whereas the multi-family development will with its own sewage disposal system. There may be areas of land on the parcel which cannot be used at all. Moreover, the physical boundaries of the land may in effect prohibit its maximum development under the existing zoning. Additionally, underground conditions, not apparent to the real estate broker, may establish that general
in regard to the best use of the land, or what the use of the land should be. Instead, his testimony is directed to engineering problems incident to the use of the land under the existing zoning plan and the absence of such problems under the proposed rezoning.

An architect is not often utilized as an expert witness in the zoning case, partially because an effective presentation by an architect is relatively expensive. Architectural renderings, on a total basis of sight plans and contractor specifications can cost as much as $3,000.00. Also, the architect’s testimony is usually limited to the nature of the proposed development if the rezoning is granted. While such testimony is not inadmissible in the zoning case, it can result in the court granting the relief requested but limiting the use specifically to the plans of the architect involved. This is not desirable because the result does not provide for flexible planning by the landowner, which can be disastrous in view of increasing costs.

The architect, however, may become a necessary witness. This situation will arise if it has become apparent during early administrative steps that one of the city’s defenses relates to the proposed plans for development of the property if the rezoning is granted. Then, it is necessary to have the architect testify in defense of the proposed plans. Obviously, the architect must be knowledgable about the city’s building code, which can be presumed to a certain extent if the plans include contractor specifications. However, a word of caution is in order because many architects use boiler-plate specifications which may not necessarily conform to the particular building code of the city involved. Therefore, if the architect must testify, it must be clearly understood at the earliest possible time that the specifications will be questioned and that they must conform with the city building code.

Demonstrative Evidence

Demonstrative evidence in the zoning case does not involve exotic models, but does start with the use of maps. Two basic maps are necessary in the courtroom: the zoning map of the municipality, and a “close-up” map of the land involved. The zoning map is essential so that the court may become familiar with the location of the land, the

---

50 Under Section 2721.12 of the Ohio Revised Code, it would appear that the court has the power and capacity to make such a ruling.

51 As always, the lawyer’s judgment in avoiding excessive testimony must be observed. In regard to expert testimony, one good real estate broker should be sufficient. If more than one is used, the danger of conflicting opinions is presented, and to any degree that such might exist, the value of plaintiff’s case will diminish. Moreover, witness contact at the earliest stage is necessary. Insofar as the use of demonstrative evidence is concerned, the judgment exercised in this regard is obvious. The desire is not to fill up the courtroom with numerous maps and photographs to portray plaintiff’s problem. It is better to locate the maps and photographs on one board in the courtroom so that when attention is directed to them it will always be directed to the same location in the courtroom irrespective of whether that attention is drawn by a witness testifying, by counsel, or by the continuing inquiry of the court.
municipality's zoning pattern (if any), recent changes which may have been entered on the zoning map, and the relationship of plaintiff's land to the zoning pattern. The "close-up" map is essential (as at the public hearing) to portray the location of the land and adjoining property.  

Photographs of the land involved and adjoining land usually are not necessary unless the land in question is vacant and undeveloped, in which case a photograph can be extremely beneficial to portray the present status of the land. For example, if the property is zoned single family residential, and it abuts a railroad track, a photograph is a direct and convincing portrayal of the invalidity of the existing zoning.

At this point, consideration should also be given to whether or not a judicial inspection of the premises is desirable at the time of trial. In smaller communities, the judge may be more familiar with the location of the land and its history than the counsel involved. However, in larger communities, the judiciary may not be particularly aware of the parcel of land involved and how it is situated in relationship to other land. While the visual aids prepared for trial may be sufficient to portray the size, location, and relationship of the land in question to other land in the vicinity, a view of the premises may be far more appropriate to impress upon the court the lack of any evident zoning plan of the city, or inconsistent uses adjacent to, adjoining, or in the vicinity of the land in question. Accordingly, a judicial view of the premises is entirely proper and can be ultimately beneficial to the plaintiff.

**Stipulated Evidence**

Early consideration should be given to the potential use of stipulated evidence in the courtroom. Too often, the possibilities of stipulating facts and documentary evidence is not considered until shortly before or during the trial. If such a situation arises, and careful thought has not been given to the form and use of stipulated evidence.

---

52 A close-up map can usually be prepared by simply obtaining a copy of the map from county records. A draftsman can be engaged to do this properly, and the map can be stipulated into evidence.

53 Naturally, if photographs are to be admitted into evidence, the normal rules of evidence apply. Thus, the photographer must identify the photograph, the photograph must be dated, and it must be an accurate portrayal of the property. As a practical matter, in most cases, photographs can be stipulated into evidence.

54 Section 2315.02 of the Ohio Revised Code was not repealed by the adoption of the Ohio Rules of Civil Procedure. That section, in appropriate cases, permits a jury to view the premises.

55 A view of the premises is usually accomplished by stipulation because there is no specific provision in the Rules to cover the situation. As a practical matter, however, no attorney refuses a court's reasonable desire to view the property. If one attorney proposes a view of the premises, the other attorney is not likely to refuse, for to refuse would give the appearance of having something to hide.
evidence, an undesirable result may be achieved by the stipulations. As previously indicated, the qualifications of plaintiff's experts should not be stipulated, assuming that they have good qualifications. Thus, although it would seem more efficient for the parties to stipulate the qualifications of all expert witnesses, the important right to cross-examine the opponent's expert's qualifications would be lost, and with it the opportunity to either destroy or at least diminish the effect of such testimony.

Certain evidence, however, should be stipulated, simply in the interest of saving time and also of presenting a coordinated case. For example, even though the court may take judicial notice of municipal ordinances, it is good practice to stipulate the zoning code of the city. In this way, the code is always before the court, and no one can or will be in a position to question this evidence. Likewise, a copy of the zoning map of the city should be stipulated as a joint exhibit. Furthermore, the minutes of city council, the city planning commission, and the building and zoning committee of council should also be stipulated. By agreeing to all of the foregoing, the issuance of subpoenas and presentation of such evidence through the record-keepers of the municipality is avoided, eliminating the waste of valuable courtroom time and making the presentation of plaintiff's case more orderly.

The municipality may request a stipulation of its building code. Such a stipulation should be avoided for numerous reasons, the most important of which is the fact that the building code requirements of the municipality are not really an issue in the zoning case. By stipulating the building code, the danger exists that the court may confuse building code requirements with the real issues before it, namely, the zoning questions. Should the court grant the relief requested subject to the stipulated building code requirements in evidence, it is apparent that rights to attack provisions of the building code may be lost, or subsequent changes in the building code not in existence at the time of the court order may well result in an invitation to further litigation.

If the pleadings have not admitted plaintiff's status as owner of the land involved, these facts should be stipulated to avoid the necessity of introducting certified deeds to prove ownership of the property.

Finally, it may be desirable to stipulate evidence which plaintiff would present in any event, such as maps presented at public hearings in order to impress upon the court the fact that at all steps along the way plaintiff was fairly and consistently presenting his arguments in favor of the rezoning.
Municipal Records

A wealth of evidence, which can be devastating to any municipal defense, can often be obtained from the municipal records. For example, some municipalities refer a rezoning request to its engineer for evaluation. The engineer’s report usually is available, but only fleeting reference may have been made to it in the various minutes of the building and zoning committee, planning commission, or council. Such reports, however, if in writing, may reveal that the proposed rezoning is feasible from an engineering standpoint.

Likewise, most planning commissions refer the request for rezoning to the regional planning commission. Again, even though the minutes of the planning commission may make a sketchy reference to the report, the full written report itself may reveal that the regional planning commission not only approved of the request for rezoning, but also recommended it. Such reports are golden opportunities on behalf of the plaintiff, and if produced pursuant to discovery provisions of the Ohio Rules of Civil Procedure, may be admitted into evidence as part of the municipality’s records. Thus, time is saved in trial presentation, and, of equal importance, the municipality is in the position of not being able to cross-examine its own records. Thus, a favorable recommendation by the regional planning commission may stand in court unanswered by the defense.

Moreover, a careful review of past minutes of the council and planning commission may reveal the existence of prior land use studies which also may have recommended rezoning of plaintiff’s land. On the other hand, if such reports and records are not favorable, this also must be known because in all likelihood the municipality will present such reports as evidence against the rezoning. If such an approach will be raised as part of the defense, it is well to be aware of it and, at least, to have conferred with plaintiff’s experts in order to counter such evidence. In most situations, if the reports contain problem areas, anticipatory tactics should be considered, even to the extent of presenting the evidence as part of plaintiff’s case, if plaintiff’s expert can effectively counter the statements and conclusions made in such reports.54

There are other areas of investigation which are more in the nature of quasi-municipal records, rather than actual city records. For example, it is not unusual for the municipality to request local chambers of commerce or growth associations to attempt to attract industry by public relations contact and other media publicity. As

54 For example, the reports may be several years old, based on facts that no longer exist. The reports, by the simple passage of time may have become stale in that the plans for the city’s future development at the time of the report may well have been proved incorrect, thus under-scoring the unreasonableness of the existing zoning.
opposed to the usual single family to multi-family rezoning request, the plaintiff's land may be located in a commercial or industrial zone and the request may be from that zone to multi-family use. The failure of the campaign to attract industry or commerce can be important evidence of the invalidity of the existing zoning on plaintiff's land. If such reports are part of the municipal records, introduction of such records in evidence should be considered. Of equal importance, however, is the fact that such records may lead to conferences with members of the chamber of commerce or growth association, thereby producing even more evidence tending to favor plaintiff's case.

State and County Records

With two possible exceptions, state and county records are usually of very little substantive value in the zoning case. One exception involves the possible appropriation of the land by the state highway department. Since the rezoning of land to a more valuable use increases the value of the land, the potential appropriation of the land by the state will raise a question as to plaintiff's true motivation. If such facts exist, and the court admits testimony thereto, it is likely that plaintiff will not recover. Therefore, this possibility should be investigated.

Of more value, however, is the Environmental Protection Agency. Its records and reports, for example, may often reveal serious water, sewer, and drainage problems, which in effect would prohibit development of the land involved for single family use unless and until the city conforms to the Environmental Protection Agency regulations. This often means that no single family residences can be constructed without serious and substantial alteration of the entire sewer and water system of the city. Such information is of great use to plaintiff as evidence of the unsuitability of existing zoning, especially when construction of multi-family units, with their own sewer filtration and disposal system, would conform to the environmental protection agency standards. Such information may be presented properly into evidence as official documentation under the provisions of Rule 44 of the Ohio Rules of Civil Procedure.

57 The Ohio Environmental Protection Agency (Water Pollution Control Board) is a creature of statute, set forth at Chapter 6111 of the Ohio Revised Code. Its powers encompass sewers, industrial waste, sewerage systems and pollution.
58 Rule 44 of the Ohio Rules of Civil Procedure establishes a simple method by which official documents (such as certified copies of state department records) may be admitted into evidence. One merely needs to obtain a copy of the document desired, with an attestation by the public official that such document is an exact copy of the original in his department. Thus, if one of the issues involved is whether the sewer system in the municipality can be used for single-family residences, and the Water Pollution Control Board has issued an order that they cannot, this will be of great use to the party seeking rezoning to multi-family use, since apartments can be constructed with a self-contained sewer disposal system that does not connect with that of the municipality.
Regional Planning Commission Records

Most of the citizenry, including attorneys, have only a vague idea of the existence, purpose, and operation of regional planning commissions. Many attorneys are surprised to learn that such commissions are created by statute and, in effect, are actually a governmental unit. However, with the possible exception of township zoning and planning and the little-known provisions of Section 713.23(C) of the Ohio Revised Code, the regional planning commission is without authority to enforce its recommendations for further land use planning. In some ways, this is regrettable because most of the regional planning commissions in Ohio have greater knowledge, expertise, and insight into land use problems than the average municipal government.

Thus, if the municipality involved in the zoning case belongs to or in any way has participated in regional planning commission programs, a wealth of records, documents, information, and expert insight will be available, often involving the very property in dispute. The information, although sometimes disappointing, may well reveal that the regional planning commission recommended rezoning of the land. Furthermore, that recommendation will be a result of a far greater depth of analysis than made by either the city council or the city planning commission, especially in view of the pressures which may have been expressed by the public against the rezoning at various public hearings.

Discovery Techniques

The use and advisability of pretrial discovery in the zoning case is different, to a certain extent, from that utilized in other civil actions. There are a number of reasons for this. First, plaintiff's major line of preparation for trial in a zoning case is to obtain evidence to overcome an extremely strong presumption of law. With rare exception, the proper planning and preparation for such an approach is indeed time consuming. Second, it is difficult to "depose" a presumption of law. Thus, although in the personal jury action, by way of example,
plaintiff and defendant want to know what each party will say at the earliest possible time in order to limit such testimony, the same situation is not true in the zoning case. Thus, the deposition, per se, is not usually the starting point for discovery in the zoning case.\textsuperscript{42}

Other tools of discovery available under Rules 26 through 37, inclusive, of the Ohio Rules of Civil Procedure, however, can be of substantial use. Rule 34 of the Ohio Rules of Civil Procedure provides for the production and inspection of documents and obtaining copies thereof.\textsuperscript{43} Such a motion should be filed at the earliest possible time, so that plaintiff possesses an adequate file of the documents to be used at trial. As a consequence of the production of documents by the city, county or state, the attorney will be in a better position to determine what documents should be subpoenaed for trial. Also, plaintiff's attorney will be aware at the earliest possible time of what problems may be contained in the municipality's defense.

The use of interrogatories under Rule 33 of the Ohio Rules of Civil Procedure is not, in itself, of much benefit in the zoning case. This writer is of the opinion that a good deposition will usually be of far more benefit to counsel than the time-consuming preparation of interrogatories and the "tricky" answers that often are given in response thereto.\textsuperscript{44}

Some use can also be made of Rule 36 which authorizes requests for admission.\textsuperscript{45} In the scheme of discovery, it is unlikely that matters will be presented immediately upon filing of the complaint which would result in a request for admission. However, the request for admissions may become of substantial value after other discovery measures have been complied with, such as production and inspection of documents or conferences with the regional planning commission. For example, if the records of the municipality include an engineer-

\textsuperscript{42} In some situations the deposition may be of beneficial use. For example, the deposition of the council clerk may crystallize for the record each step of the proceedings in which plaintiff was involved. If every step in the history of the rezoning application has been favorable to plaintiff, then the final act of city council refusal will appear arbitrary. As a practical matter, such evidence will be presented in due course during the trial and pretrial.

Other areas for deposition may be of use, especially when reference is made to reports of the municipal engineer, for example, and it is discovered that such reports were not written, but rather verbal. The verbal engineer's report often is an after-the-fact process, which is reflected in the minutes of the city council or the planning commission and does not have much substance to it. In any event, a deposition of the engineer under such circumstances will be as beneficial as such a deposition would be in a personal injury case. The reason is obvious: the engineer's testimony and position, in addition to his analysis, will be limited by a skillful deposition.

\textsuperscript{43} \textbf{OHIO R. CIV. P. 34.}

\textsuperscript{44} Interrogatories can be meaningful, but it has been this writer's experience that in zoning cases they are cumbersome and expensive.

\textsuperscript{45} The request for admissions binds the opposing party to the admission sought. \textbf{OHIO R. CIV. P. 36(B).}
ing report which is favorable, a planning commission recommendation for rezoning, or regional planning commission written reports which are favorable to rezoning, significant time can be saved by simply preparing the request for admissions which, if answered affirmatively, become evidence under Rule 36.

Anticipating Defense Tactics

Very often the most common defense tactic of a municipality in opposing the action for rezoning is simply one of delay. This procedure is so common as to have become a truism. However, counsel for municipalities will often engage in discovery, and the plaintiff’s attorney should be aware of what to anticipate. For example, in many zoning cases, the municipality will propound interrogatories to the plaintiff in an effort to establish evidentiary points which, standing alone, are not relevant, but for some unknown reasons always sway a court in its opinion. Often, admissions will be sought, either by way of interrogatories or deposition, as to the fact that when plaintiff purchased the land involved, it was zoned under the existing zoning being contested. Likewise, defendant will seek admissions in regard to the fact that plaintiff may not be a local resident, is strictly in the business for profit, or is limited to the business of development of land for its most profitable use. Conversely, the municipality may also seek admission that the plaintiff is not an experienced developer, thus raising either by implication or directly the fact that plaintiff is only seeking the rezoning for profit, or that plaintiff’s proposed development is questionable because of his lack of experience in the building industry.

The municipality may also request the names and addresses of both expert and lay witnesses which plaintiff intends to have testify at the trial of the case. Rule 26(B) (1) of the Ohio Rules of Civil Procedure clearly provides for such an exchange of information. It is questionable whether the defendant is entitled to reports of experts who may be called to testify on behalf of plaintiff. The reader is directed to the provisions of Rule 26(B) (4) (b) in particular, and the potential use of interrogatories by the defense in order to discover the subject matter and names of experts.

The Pretrial and Possible Settlement

Most courts, despite the provisions of Rule 16 of the Ohio Rules of Civil Procedure which permit a written pretrial order, do not follow

---

66 Rule 26(B) (1) of the Ohio Rules of Civil Procedure, states in part:
   Parties may obtain discovery regarding any matter, not privileged . . . [including] the identity and location of persons having knowledge of any discoverable matter.

67 Rule 26(B) (4) (b) of the Ohio Rules of Civil Procedure states in part:
   [A] party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify.
such procedure. In fact, most pretrials in the zoning case are little more than agreements reached between the court and counsel as to the trial date, and an estimate as to the length of time the trial will take. However, there are always exceptions to the general practice and therefore, plaintiff's counsel would be well advised to be adequately prepared for the pretrial of the zoning case. The attorney should be prepared to argue or present concisely to the court the plaintiff's position with supportive case authority. A plan of settlement should also be made in readiness for the defense's consideration.

A properly developed settlement package which may be attractive to the municipality should employ two concepts: first, a "buffer zone;" and second, a density requirement. Through the use of a buffer zone, the plaintiff offers to buffer such area of land which he owns that adjoin single family residential use areas so that the impact of the multi-family zoning is lessened. The number of feet involved in the buffer zone, the manner and method of landscaping, if any, should be clearly analyzed in terms of the remaining use availability of the land, and the degree such a buffer zone will interfere with the original plans of the plaintiff. Second, most cities, in discussing settlement, are interested in a density requirement which in effect would require fewer residential units per acre than that which would be permitted under the city's zoning code for multi-family use. Again, the judgment of the client and the attorney as to whether fewer units on a settlement basis would be preferable to a long, drawn-out court battle are primary considerations. Finally, in some situations, it may be advisable to offer in settlement a restriction on the architectural style of the proposed development, even though in theory at least the law does not consider aesthetics standing alone as a basis for zoning.

Such settlement proposals are not only beneficial to the plaintiff, but also enable the municipality to obtain open space and more land between the multi-family and single family districts. The settlement in its entirety will avoid, in some cases, years of litigation, and also resolve a community problem. Finally, the municipality will be obtaining benefits for adjoining land-owners, and also control the terms of the proposed development in such a manner so as to fit it into the scheme of the municipality's comprehensive plan, presuming there is one. Thus, both parties will benefit from a settlement, rather than leaving the decision to the dictates of a court which may not be interested in the desires of the parties.

In practice, settlement takes different forms. In some cases, as a consequence of the agreement, the declaratory judgment action is dismissed, and the municipal council enacts appropriate legislation setting forth the terms of the settlement and adopting the rezoning requested. This procedure is highly undesirable from the plaintiff's point of view due to the risk of changes in administration or of public
pressure. Accordingly, it is better not to dismiss the action until the rezoning is actually effected. In other cases, it is common to enter into an agreement by judgment order to be signed by the court in order to record the fact that a settlement has been agreed to, that is approved by the court and that all parties have been fully advised of its consequences.

The problems of the built-in referendum, alluded to earlier in this article, become significant when a zoning case is settled. In the municipalities which have adopted such built-in referendum provisions it is questionable whether any settlement can be entered into without a referendum thereon by the vote of the electorate.\(68\) Thus, the practice of settling the zoning case at pretrial by agreed judgment order, although valid with council approval in municipalities where there is no built-in referendum, may be open to a referendum vote in municipalities with such devices. It is also readily apparent that settling the zoning case in the city with a built-in referendum may only be opening the door to further and more expensive litigation which would relate only to a referendum question, and not to the issue involved in the declaratory judgment action.

The Trial

Preliminary Steps

As in any important civil litigation, final preparation for trial of the zoning case should include a trial outline, trial briefs, witness preparation, and preparation of opening statement and closing argument. As there is a wealth of text material dealing with the proper presentation of the foregoing materials,\(69\) this subject will not be treated in depth here. Most texts refer to the trial of the zoning case as proceeding as in the trials of other civil cases.\(70\) However, anticipating the defense by the city in a zoning case is perhaps somewhat easier than in other civil cases. First, under Rule 26 of the Ohio Rules of Civil Procedure, the names and identities of defense witnesses may be discovered.\(71\) Moreover, the names of the municipality's experts are discoverable and the subject matter of their testimony must be

\(68\) Query: If the city involved is a built-in referendum city, and city council approves a court settlement which is thereafter approved by the court, can the electorate demand a referendum? If so, on what? Would not this create a conflict between branches of government because in effect, it would give the electorate the right to vote on a judgment order of the court? On the other hand, what if it is argued that the built-in referendum means the electorate and not city council has the sole right to effect a rezoning? The problem is obviously substantial and awaits, indeed invites, litigation.

\(69\) See, e.g., M. BELL, MODERN TRIALS (1954); S. GAZAN, ENCYCLOPEDIA OF TRIAL STRATEGY AND TACTICS (1962); I. GOLDSTEIN & F. LANE, GOLDSTEIN TRIAL TECHNIQUES (2d ed. 1969); S. SCHWEITZER, CYCLOPEDIA OF TRIAL PRACTICE (2d ed. 1970).

\(70\) Id.

\(71\) Id.
disclosed. At some point, it may even be determined that the city will present no defense, and that it will simply rest on the presumption of law favoring the validity of the existing zoning. Further, a decision should have been made as to whether or not a view of the premises by the trial court is advisable. Finally, it is probably better practice to request a separation of witnesses, especially if the city intends to present its own expert testimony.

Plaintiff's Case

Obviously, the ideal first witness is the property owner himself. The court then has the earliest opportunity not only to hear the facts, but also to observe the demeanor and credibility of the plaintiff. Since it is difficult to conceive of dramatic moments in the zoning case, questions should be tailored to have what can be characterized as a business rather than glamour impact.

Thus, the client should be able to describe the land involved, its history, the uses of other land in the vicinity, whether or not a demand exists for the land use as presently zoned, and the procedural steps involved in the zoning process which resulted in the particular case having come to court. This sets the stage for a discussion of the specific plans of the plaintiff, and what the rezoning, if granted, will accomplish, as well as what will happen to the land if the rezoning is not granted. Also, the testimony should relate the attempts which have been made to use the land under its existing zone, and what economic factors and possibilities are involved.

The expert or experts should then present an analysis of the area and the best use which could be made of the client's land. At this point, plaintiff's case should be completed. The question then is whether the defense will go forward. Thus, a word of caution is in order: plaintiff should save nothing for rebuttal in the zoning case because once the city rests, no other evidence is admissible.

---

72 See notes 66 and 67 supra.
73 See notes 54 and 55 supra.
74 After the essential background is covered, the testimony could cover what the property will look like if the rezoning is granted by the court. For example, if multi-family rezoning is sought, the witness should be familiar with the city zoning and building code so that the court will understand that that code might pose different requirements than the zoning code.
76 By way of example, in an ordinary civil case, the plaintiff's attorney may not desire to utilize a witness unless the defense raises a question as part of its case; then the rebuttal witness may successfully curtail or even destroy the defense raised. However, in the zoning case, the major thrust of the plaintiff's case is to overcome the presumption in favor of the existing zoning, and not necessarily to plan a rejoinder to the city's evidence. Thus, all the evidence should be presented as part of the plaintiff's case in chief because should the city rest at the close of the plaintiff's case, the rebuttal witness cannot be
Defendant's Case

Because of the immediate courtroom impact of testimony, many attorneys often lose sight of the fact that in the zoning case the plaintiff's primary obstacle is a presumption of law, and not necessarily the city's witnesses. Thus, it must be remembered that regardless of how unconvincing such witnesses may appear, the burden is still on the plaintiff to overcome the presumption of law in favor of the present zoning. The attorney for plaintiff should not let the client forget this fact either. Therefore, if the city does present testimony, the goal on cross-examination should be to rebut the city's defense in support of the presumption of existing zoning. This approach is suggested because an attack on the credibility of the engineer's scientific conclusions may be construed as an acknowledgment by plaintiff that a "fairly debatable" point exists which would tend to favor the municipality's decision not to rezone. Therefore, cross-examination of the engineer, for example, should be directed to obtaining admissions that soil and drainage problems may exist irrespective of how the land is zoned, and that these problems must be corrected pursuant to a drainage plan regardless of how the city really is zoned. Also, the engineer will be compelled to admit that, irrespective of how the land is zoned, the municipality must approve building, drainage, and sewer plans. The high point of the cross-examination is to establish that such problems are not zoning problems, but instead are building code problems not truly in issue in the zoning case. In this manner, the testimony is properly focused on the real issue before the court, i.e., the validity of the existing zoning rather than the problems inherent in the land itself. Such problems exist regardless of how the land is zoned. It should be borne in mind that this approach presumes that plaintiff's expert also will have covered the subject on direct examination.

It is also a good idea, if possible, to infer that what the city really wants is to force the land to remain vacant. Obviously, this inference cannot be raised by direct questioning, but a conclusion can be reached by the circumstances involved, such as public opposition expressed at public hearings and noted in the minutes of city council. The minutes of city council may also show such opposition by both residents and council to any development of the land. While no plaintiff has ever won a zoning case simply because of such public opposition, this kind of evidence does detract from the city's defense. It is one thing to be opposed to multi-family zoning, for example, but it is quite another thing to be

---

77 For example, the defense may be directed to evidence of drainage and soil condition problems through the testimony of the city or village engineer. Rather than attacking the credibility of these facts as analyzed by the engineer, the attack on cross-examination should be directed against mother nature. In other words, the goal is to show that the soil and drainage problems exist nor because of the plaintiff's proposed zoning, but because of the imperfections inherent in mother nature and not the existing zoning.
opposed to any development of land because the latter can lead to an argument that the existing zoning is in effect a confiscation of plaintiff’s land.

At the close of the trial, most courts are not in position to rule immediately. Furthermore, because the zoning case is a non-jury case, closing arguments, if any, are generally short and of little value. However, many points may have been raised which require further legal analysis. Accordingly, it is good practice under such circumstances to file briefs in lieu of closing arguments.

The Victory or Defeat

Victory

The case may be completely won by plaintiff, or only partially won, in that the court may decide that only a portion of the land should be rezoned to plaintiff’s proposed use. Although the court’s decision may be a technical victory for the plaintiff, certain items included therein may necessitate an appeal. However, for purposes of this section, it is presumed that plaintiff has prevailed completely and that the court has determined that the existing zoning is invalid and that plaintiff’s proposed use is proper. At this point the client may face an appeal by the municipality. The appeal process is favorable to the city for a number of reasons. First, the delay involved can result in a complete change of the plaintiff’s plans due to the uncertainty of financing, changing interest rates, expiration of loan commitments, and the need for plaintiff to remain in business in other projects. Second, despite the fact that valuable land is in question, the city need not file an appeal bond in order to stay proceedings against development of the land. Third, it would appear that appellate courts do not approach the zoning case with the same insight as trial courts. Thus, while the general rule is that most cases are upheld on appeal, the same cannot necessarily be said in regard to the zoning case. Finally, the city may rezone the land involved to an entirely different use, in an effort to zone the litigation into mootness. The general rule seems to be that amendment of the zoning ordinance during appeal renders the issue moot or, at the least, requires consideration of the issue of the amended zoning ordinance on appeal. However, other jurisdictions have ruled to the contrary. It is submitted that such action by the city does not represent good faith conduct. Accordingly,

78 Rule 62 (C) of the Ohio Rules of Civil Procedure provides:

When an appeal is taken by this state or political subdivision, or administrative agency of either, or by any officer, thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

the better practice would be to permit the granting of a motion to stay proceedings against a city that is attempting to rezone land which is in litigation. No Ohio case, however, seems to be on point.

Defeat

If the zoning case is lost at trial, there are several alternatives open to the client. One is a motion for new trial under Rule 59 of the Ohio Rules of Civil Procedure.\(^2\) Obviously, a motion for new trial is rarely granted, and the use of Rule 59 must be analyzed in light of the opinion of the court in the particular zoning case involved. For example, did the court treat the evidence as of the time of trial or as of the time the complaint was filed? Did the decision contain any intimation that plaintiff's position was justified in any respect? Did the court agree that changing conditions, for example, or continuing and future change may invalidate the existing zoning? Did the court find as a matter of fact as well as law that the land in question is zoned pursuant to a comprehensive plan? Favorable answers to any of the foregoing questions may invite the filing of a motion for new trial, with some hope of success. Additionally, the expense involved is far less than that of appeal.

Appellate procedure is discussed in full in many other sources, and will therefore not be reviewed in detail in this article. It is important to note, however, that certain procedural steps in the appellate process in Ohio are mandatory, for example, the transcript of testimony must be prepared and timely filed.\(^3\) It does no good to present a zoning case on appeal without the transcript of testimony, for without such a transcript the court is almost powerless to analyze the impact of the existing zoning upon the evidence. Only if the error of the court is manifest on the docket, in the pleadings, or in its opinion could such an appeal have any success without the transcript of testimony. Even so, unless the error of law complained of is gross, it is better practice to file a transcript of testimony to complete the record on appeal.

It should also be pointed out to the client that the appellate process is not only expensive, but also time consuming. The timing set up by

---

\(^2\) In pertinent part, Rule 59 provides as follows:
On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

\(^3\) See Ohio R. App. P. 9, 10.
the Ohio Rules of Appellate Procedure guarantees that at least three months will expire before the matter is ready for argument.\textsuperscript{64} Only thereafter will the case be assigned for hearing.

Conclusion

The conflict between a municipality and the landowner is partially due to a misconception of their respective legal rights and duties. The municipality has a right to regulate the use of land, but it cannot ignore the fact that the landowner's rights exist, nor can it ignore the necessity to plan well for the future of the community. The landowner, on the other hand, cannot assume that a municipality is without the right to regulate the use of his land, but must instead ascertain whether the use imposed is consistent with the present and future needs of the land itself, the vicinity, and the community as a whole. Thus, if zoning is to survive as a meaningful tool to plan a community, there must be a better understanding between municipal government and the landowner. Better presentation of rezoning plans by the landowner and a willingness of the municipality to thoroughly assess such plans is the key to successful land use. Otherwise, effective community planning is impossible.

There have been encouraging signs in recent years, to the credit of the municipalities as well as the landowner-developer. For example, the willingness of developers to spend millions of dollars in developing streets and sewer systems dedicated to public use is a positive trend as is the recognition by developers of the importance of open areas and the conservation of existing landscape and recreational areas.\textsuperscript{65}

However, even with the most optimistic view of the future of zoning as a useful tool for planning a community, there will always be some conflict to be resolved by the courts. The attorney handling such a case must combine an in-depth understanding of the zoning process with the application of traditional trial techniques in order to properly represent his client, whether that client be the landowner, the nearby residents, or the city itself.

\textsuperscript{64} Rule 9 of the Ohio Rules of Appellate Procedure provide that the appellant must order a transcript within ten days after filing the notice of appeal, while Rule 10 states that the record must be transmitted to the court of appeals within 40 days after the filing of notice of appeal. Finally Rule 18 sets forth the time limits for the filing of briefs: appellant’s brief must be filed within 20 days after the record is filed; the appellee has 20 days after the service of the appellant’s brief to file his brief; and the appellant may file a reply brief within 10 days after service of the appellee’s brief. The sum total of these time limitations approximates three months.

\textsuperscript{65} Of recent significance is the concept of “impact zoning” where the municipality appoints a blue ribbon planning commission, which in turn develops the master plan for the community. There are no rigid zoning requirements, such as units per acre; instead the developer and commission reach an agreement, which is then approved by the municipality. See The Town That Said “No” to No Growth, HOUSE AND HOME, Dec., 1973,