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INTRODUCTION

The law of zoning, in a relatively short period of time, has achieved a prominent position. The process by which this facet of land use control originated, expanded and is maturing, can be traced, to a large extent, by an examination of its relationship with the much older common law concept of nuisance. Though the influence of nuisance law on zoning today is limited, zoning has had a continuing effect on the application of the former. This comment will explore the various interrelationships of both concepts.

COMPARISON OF NUISANCE AND ZONING

Nuisance Defined

Nuisance is of common-law origin[1] and is grounded in the maxim that "a man shall not use his property so as to harm another."[2] The concept of nuisance is a broad one, difficult to define precisely.[3] Its meaning has been the subject of numerous and varied definitions,[4] some of which extend its scope beyond the invasion of property interests. In its narrower, more accurate sense, nuisance denotes a condition, which because of some noxious or harmful characteristic, causes an unwarranted interference with the ownership and enjoyment of another's property.

Nuisances have been classified according to the scope of their effects as public or common, private, and mixed or united. A public nuisance is one which infringes upon those rights shared as a whole by the citizens of the community, regardless of the number directly injured.[5] Private nuisances, on the other hand, affect one or more persons in the enjoyment of an individual right not similarly shared by the general public.[6] Those which are mixed or united constitute both a public and a private nuisance.[7] A facility, for example, polluting the atmosphere with smoke or dust may constitute both a public nuisance, enjoinable at the behest of the municipality, and a private nuisance, actionable

1. See Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (1610).

2. "Sic utere tuo ut alienum non laedas." Joyce, The Law of Nuisances 45 (1906).

3. It has been said that "the only approximately accurate method of determining the meaning of the term nuisance is to examine the cases adjudicating what are and what are not nuisances." Id. at 1. For a discussion of the relationship between nuisance and negligence, see Comment, 24 Ind. L.J. 402 (1949).

4. See, e.g., Hart v. Wagner, 184 Md. 40, 43, 40 A.2d 47, 50 (1944); Randall v. Village of Excelsior, — Minn. —, —, 103 N.W.2d 131, 134 (1960); Lore v. Town of Douglas, — Wyo. —, —, 355 P.2d 367, 370 (1960). See also the definitions listed in Joyce, The Law of Nuisances 2-5 n.6 (1906). Blackstone gives a broad definition, describing it as "[A]nything that worketh hurt, inconvenience or damage." 3 Blackstone, Commentaries *216.

5. See, e.g., Echave v. City of Grand Junction, 118 Colo. 165, 168, 193 P.2d 277, 280 (1948); Mandell v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct. 1956).

6. E.g., W. G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953); Adams v. Commissioners, 204 Md. 165, 102 A.2d 830 (1954).

7. Garfield Box Co. v. Clifton Paper Bd. Co., 125 N.J.L. 603, 17 A.2d 588 (Sup. Ct. 1941).

by an individual property owner injured thereby.[8] Generally, a public nuisance cannot be the subject of an action by an individual citizen unless he can show special injury apart from that suffered by the public.[9]

Nuisances have been further categorized according to type. A nuisance per se or at law is an act, occupation, or structure which is a nuisance regardless of location or surroundings.[10] Examples fitting within this definition are necessarily limited, gambling establishments[11] and disorderly houses[12] being the two most often cited. Much more common are nuisances *per accidens,* or in fact, those which become such by reason of circumstances or location.[13] A gasoline station[14] or funeral parlor[15] may in one location be an authorized activity, and in another may constitute a nuisance in fact. It has also been held, inaccurately, that these may be nuisances per se.[16] In addition, those activities which have been declared nuisances by the legislature, or are carried on in violation of an ordinance, are said to be statutory nuisances.[17]

Zoning Distinguished

In its accurate sense, common-law nuisance applies only to what is in some way actually or at least potentially noxious or harmful. Zoning is concerned with the regulation of uses whether or not they fall within this category. The basic philosophy behind both nuisance and zoning is the same, *i.e.,* the proper regulation and use of property. But zoning is more comprehensive because it proceeds on the basis of benefitting the entire community through a more or less extensive planned scheme of restrictions. Various factors are taken into consideration such as the character of the district and its suitability for par-

8. See McGee v. Yazoo & M.V.R.R., 206 La. 121, 122, 19 So. 2d 21, 22 (1944). See also City of Phoenix v. Johnson, 51 Ariz. 115, 119, 75 P.2d 30, 34 (1938).

9. Schroder v. City of Lincoln, 155 Neb. 599, 52 N.W.2d 808 (1952); Morris v. Borough of Haledon, 24 N.J. Super. 171, 174, 93 A.2d 781, 784 (Super. Ct. 1952). See Note, 23 Albany L. Rev. 447 (1959).

10. See Dill v. Exel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958); Bluemer v. Saginaw Cent. Oil & Gas Serv., 356 Mich. 399, 97 N.W.2d 90, (1959).

11. Heyne v. Loges, 68 Ariz. 310, 312, 205 P.2d 586, 588 (1949).

12. Kelley v. Clark County, 61 Nev. 293, 296, 127 P.2d 221, 224 (1942); Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 416, 47 N.E. 2, 4 (1897).

13. E.g., Lauderdale County Bd. of Educ. v. Alexander, 269 Ala. 79, 83, 110 So. 2d 911, 915-16 (1959).

A nuisance per se is sometimes referred to as an absolute nuisance, and a nuisance in fact as a qualified nuisance. Interstate Sash & Door Co. v. City of Cleveland, 148 Ohio St. 325, 326, 74 N.E.2d 239, 240-41 (1947). "[T]he former . . . is established by proof of the mere act . . . the latter by proof of the act and its consequences." State v. WOR-TV Tower, 39 N.J. Super. 583, 587, 121 A.2d 764, 768 (Super. Ct. 1956).

14. Bell v. Brockman, 190 Okla. 583, 584, 126 P.2d 78, 79 (1942); Thomas v. Dougherty, 325 Pa. 525, 526, 190 Atl. 886, 887 (1937).

15. City of St. Paul v. Kessler, 146 Minn. 124, 125, 178 N.W. 171, 172 (1920).

16. Pennell v. Kennedy, 338 Pa. 285, 12 A.2d 54 (1940); Appeal of Perrin, 305 Pa. 42, 156 Atl. 305 (1931). See Note, 24 Mo. L. Rev. 269 (1959).

17. O'Keefe v. Sheehan, 235 Mass. 390, 126 N.E. 822 (1920).

ticular uses,[18] the conservation of property values,[19] the lessening of traffic congestion,[20] public safety,[21] and aesthetic considerations.[22] These and similar factors may also be given weight in nuisance actions.[23] In the latter case, they are not prior, planned considerations, as they are in zoning, but rather constitute evidentiary aids in determining the character of the use in question.

Influence of Nuisance on the Development of Zoning

Nuisance law exerted a greater influence on zoning when it was in its formative stages than it does today. It was early recognized that the validity of zoning laws was based not upon their relation to the law of nuisance, but upon the police power of the state.[24] Yet courts relied on the concept of nuisance in passing upon the new zoning ordinances.[25] Since the first zoning enactments were little more than nuisance regulations,[26] it was natural for courts to tend to relate them by analogy. Particularly before the decision in *Village of Euclid v. Ambler Realty Co.*,[27] which upheld zoning regulations as a proper exercise of the police power, restrictions of uses which were also common-law nuisances, or which at least contained elements of the same, were more likely to be upheld.[28] Failure to give compensation for the restriction of uses which were not nuisances was considered to border on deprivation of property without due process of law.

As zoning ordinances expanded to include the regulation of nonoffensive sub-

18. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); City of Keene v. Blood, 101 N.H. 466, 146 A.2d 262 (1958); Eves v. Zoning Bd., 401 Pa. 211, 164 A.2d 7 (1960). Additional zoning purpose are listed in State v. Hillman, 110 Conn. 92, 94-97 n.1, 147 Atl. 294, 295-96 n.1 (1929). See also Pa. Stat. Ann. tit. 16, § 5226 (1953).

19. Strain v. Mims, 123 Conn. 275, 193 Atl. 754 (1937); Cobble Close Farm v. Board of Adjustment, 10 N.J. 442, 452-53, 92 A.2d 4, 9 (1952).

20. Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743, 753 (1948).

21. State v. Iten, — Minn. —, —, 106 N.W.2d 366, 368-69 (1960).

22. See Comment, 29 Fordham L. Rev. 729 (1961).

23. Obrecht v. National Gypsum Co., 361 Mich. 399, 105 N.W.2d 143 (1960); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960); Pennoyer v. Allen, 56 Wis. 502, 14 N.W. 609 (1883). See also Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440, 443.

24. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926); Miller v. Board of Pub. Works, 195 Cal. 584, 234 Pac. 381, 384 (1925); Boyd v. City of Sierra Madre, 41 Cal. App. 520, 183 Pac. 230 (Dist. Ct. App. 1919); Comment, 32 Yale L.J. 833, 834 (1923); Comment, 29 Yale L.J. 109 (1919).

25. See Noel, Unaesthetic Sights As Nuisances, 25 Cornell L.Q. 1, 14 (1939).

26. See Bettman, The Constitutionality of Zoning, 37 Harv. L. Rev. 834, 839 (1924): "[Z]oning represents no radically new type of property regulation, but merely an extension or new application of sanctioned traditional methods for sanctioned traditional purposes." See also Comment, 39 Yale L.J. 735, 737-38 (1930).

27. 272 U.S. 365 (1926).

28. "When zoning was new and had to win its way through legislatures and the courts, theories not linking up with familiar categories of power and policy would have been no help to the cause, the legal pioneers in the movement were wise to proceed as they did." Freund, Some Problems in the Law of Zoning, 24 Ill. L. Rev. 135, 149 (1929).

jects, it became clear that the police power of the state was the sole basis for their constitutionality. This was conclusively determined by the *Euclid* decision, although it was noted by Mr. Justice Sutherland that the analogies of nuisance law, where applicable, could serve as useful guides.[29] It could no longer be doubted that zoning was not limited to or coextensive with nuisance. However, because of the early reliance on nuisance, and because of the analogy between nuisances and restricted uses, courts remained prone to regard all restricted uses as nuisances, if not in theory, at least in terminology. Use of nuisance terms in zoning cases has persisted long after the cleavage between them should have become complete.[30] This has helped to sustain the notion, less and less prevalent, that somehow nuisance and zoning are dependent upon each other.

Nuisance influence has remained strongest in the field of retroactive zoning.[31] Logically, it was felt that a more persuasive reason was necessary to justify the removal without compensation of already existing uses than the prohibition of future ones. The abatement power over nuisance could be borrowed if there were in fact an element of common-law nuisance present in the subject sought to be removed.[32] Reliance upon the latter was felt to be necessary because of the difference in the application of the respective powers of zoning and nuisance. This was explained by the court in *Jones v. City of Los Angeles:*[33]

> And here the distinction between the power to prohibit nuisances and the power to zone is exceedingly important. The power over nuisances is more circumscribed in its objects; but once an undoubted menace to public health, safety, or morals is shown, the method of protection may be drastic. . . . Zoning is not so limited in its purposes. . . . It deals with many uses of property which are in no way harmful. If its objects are so much broader than those of nuisance regulation, if its invasion of private property interests is more extensive, and if the public necessity to justify its exercise need not be so pressing, then does it not follow that its means of regulation must be more reasonable and less destructive of established interests?[34]

Generally, nonconforming uses which were not actual nuisances would be protected even today from removal without compensation.[35] Yet if they become

29. 272 U.S. at 387-88.

30. See Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940); King v. Blue Mountain Forest Ass'n, 100 N.H. 212, 123 A.2d 151 (1956); Mayor of Alpine v. Brewster, 7 N.J. 42, 80 A.2d 297 (1951); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182, 189 (Super. Ct.), aff'd, 15 N.J. 238, 104 A.2d 441 (1954).

31. See Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14, 22 (1930); Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457, 473 (1941); O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Geo. L.J. 218, 225 (1934).

32. Jones v. City of Los Angeles, supra note 31; Noel, supra note 31, at 473: "Although according to the better view it is not essential that a particular enterprise actually constitute a common-law nuisance to be subject to legislative removal, the matter of whether injunctions have been frequent or rare will influence strongly the decision as to whether the use is sufficiently detrimental to the public welfare to be subject to removal without compensation."

33. 211 Cal. 304, 295 Pac. 14 (1930).

34. Id. at 310, 295 Pac. at 20. See also Comment, 1951 Wis. L. Rev. 685, 692.

35. Kryscnski v. Shenkin, 53 N.J. Super. 590, 148 A.2d 58 (Super. Ct. 1959); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); Incorporated Village of Brookville v. Paulgene

inimical to the public health or safety, they may be removed under the police power.[36] Even though such uses are usually found to be nuisances, this finding is unnecessary. Zoning has thus achieved an independent, self-sufficient status. This contrasts sharply with the earlier consideration of zoning as a mere extension of nuisance law.

Influence of Zoning on the Law of Nuisance

The growth of zoning may be tending to liberalize nuisance law. This is indicated by an analysis of court decisions in nuisance cases outside of zoned areas.[37] Since the trend today is toward a liberal application of zoning laws, the effect upon nuisance law in zoned areas has been similar. In the latter instance, however, the influence has been more direct, leading some courts to hold that where they coincide with common-law nuisance, zoning regulations have pre-empted the field.[38] At the least, while the law of nuisance remains essentially distinct, zoning statutes have to varying degrees circumscribed the extent of nuisance actions. There are dual aspects of this effect—the authorization of common-law nuisances and the restriction of uses which are not such.

Effect of Authorizing Ordinances

A use which is being properly operated in an authorized zone cannot be a nuisance per se. Generally it cannot be a public nuisance either.[39] In reaching this conclusion, the court, in *Robinson Brick Co. v. Luthi*,[40] stated:

> Where the legislative arm of the government has declared by statute and zoning resolution what activities may or may not be conducted in a prescribed zone, it has in effect declared what is or is not a public nuisance.[41]

An authorized use, however, may constitute what is in fact a public nuisance.[42]

Realty Corp., 24 Misc. 2d 790, 200 N.Y.S.2d 126 (Sup. Ct. 1960); Incorporated Village of No. Hornell v. Rauber, 181 Misc. 546, 40 N.Y.S.2d 938 (Sup. Ct. 1943). See generally Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457 (1941); O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Geo. L.J. 218 (1934).

36. Incorporated Village of Brookville v. Paulgene Realty Corp., supra note 35. "How far the police power will go in sustaining a governmental agency in interfering with established property rights without paying compensation therefore is not capable of exact statement. Apparently it is a matter of weighing the urgency of the evil to be corrected against the cost to the property owner of complying with the new law, or the dimunition in value which results from it. . . ." Id. at 798, 200 N.Y.S.2d at 137.

37. Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440.

38. Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946); Godard v. Babcon-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943). See generally Kurtz, The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas, 36 Dicta 414 (1959); Comment, 54 Mich. L. Rev. 266 (1955).

39. E.g., Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 269, 288 P.2d 507, 511 (1955); Nugent v. Vallone, — R.I. —, 161 A.2d 802 (1960); Lindermeyer v. City of Milwaukee, 241 Wis. 637, 639, 6 N.W.2d 653, 655 (1942).

40. 115 Colo. 106, 169 P.2d 171 (1946).

41. Id. at 108, 169 P.2d at 173.

42. See the definition of public nuisance at text accompanying note 5 supra.

But since the governing authority which has authorized the use is also the only proper party to bring an action for abatement of a public nuisance,[43] the remedy has, in effect, been suspended.

The court, in *Robinson*, went further, and held that even if the mining operations in question were a private nuisance, the lower court had no jurisdiction to enjoin the operation, because of the authorizing statute.[44] A majority of courts, however, have held that a use, which, though authorized by statute, becomes a nuisance in fact, may be the basis of an action to enjoin a private nuisance on the part of the one injured.[45] This view recognizes that what constitutes a nuisance should not be conclusively determined by zoning ordinances. The minority cases hold that the zoning ordinance, since it decides which uses are permitted in various zones, is decisive as to whether nuisance remedies should be granted. The implication, therefore, is that a remedy for a private nuisance will not be permitted against an authorized use, not because it is not in fact a common-law nuisance, but because it is located in an authorized zone.[46] At least one state has expressly so provided by statute.[47]

The theory behind this enactment and decisions of similar effect is that persons living in developed areas must to a certain degree submit to the unavoidable annoyances and discomfort attendant upon the operation of necessary industries or facilities. It is the purpose of zoning to attempt to strike a balance between these conflicting interests as painlessly as possible. Necessarily the line must be drawn somewhere, resulting in different classifications of zones. For this reason, "what would be an unreasonable interference with the comfortable enjoyment of one's home in a residential area might be regarded as the normal, expected and inescapable concomitant of modern social conditions in an industrial section."[48]

Thus the conflict in this line of cases is not whether a nuisance is in fact present, but over the policy question of whether authorized operations will be actionable despite their careful conduct. To say that an authorized use is not or cannot be a nuisance really means that the complainant is without a remedy.

43. See Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 Atl. 379 (1917); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (Super. Ct. 1952).

44. 115 Colo. at 108, 169 P.2d at 173.

45. E.g., Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396 (D.R.I. 1959); Vulcan Materials Co. v. Griffith, 215 Ga. 811, 815, 114 S.E.2d 29, 33-34 (1960); Rockenbach v. Apostle, 330 Mich. 338, 341, 47 N.W.2d 636, 639 (1951); Sweet v. Campbell, 282 N.Y. 146, 25 N.E.2d 963 (1940) (four-to-three decision); Reid v. Brodsky, 397 Pa. 463, 465 n.1, 156 A.2d 334, 336 n.1 (1959). See 9 Fordham L. Rev. 437 (1940); 11 Syracuse L. Rev. 323 (1960).

46. See Bove v. Donner-Hanna Coke Corp., 142 Misc. 329, 254 N.Y. Supp. 403 (Sup. Ct. 1931). See also Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440, 443-44; Comment, 54 Mich. L. Rev. 266, 267 (1955).

47. Cal. Code Civ. Proc. § 731a. Compare Fendley v. City of Anaheim, 110 Cal. 731, 294 Pac. 769 (1930), with Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955).

48. Fuchs v. Curran Carbonizing & Eng'r Co., 279 S.W.2d 211, 218 (Mo. Ct. App. 1955). See also Kankakee v. New York C.R.R., 387 Ill. 109, 55 N.E.2d 87, 90 (1944).

The expression that the legislature may legalize that which otherwise would be a public or private nuisance[49] leads to the same result. Conversely, the legislature has the power to prescribe, under reasonable limitations, that certain operations constitute nuisances, thereby changing the common-law classifications.[50]

The Effect of Zoning Ordinances Upon Unauthorized Uses

The authority of the legislature to modify the extent of nuisance law has been carried to an extreme by several cases[51] which have declared that any operation carried out in violation of a zoning ordinance is a nuisance, even, in some instances, a nuisance per se. Thus a retail store in a residential area has been expressly declared a nuisance because it violated a zoning ordinance,[52] although the restriction has no real relation to the common-law concept of nuisance.[53] The effect of these decisions is to extend the definition of nuisance beyond its traditional meaning, thereby introducing another element of uncertainty into this already ill-defined and confused area.

The majority of courts recognize that the legislature does not have the power to declare that a violation of a zoning ordinance will itself constitute a nuisance.[54] Structures erected subsequent to and in violation of a zoning ordinance may of course be enjoined,[55] whether they are or are not common-law nuisances. On the other hand, prior nonconforming uses which cannot be reasonably included either under the police power, or under nuisance law, should not be subject to removal without compensation.[56]

Ultimately, the test, in the case of either future or existing nonconforming uses, reduces itself basically to the question of whether the restrictive ordinance, considering all the circumstances, is or is not arbitrary in its application.[57] The fact that a restricted operation is denominated a nuisance, a statutory nuisance, or is excludable under the police power is not determinative. This goes back to

49. Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943); Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940).

50. Mayor of Alpine v. Brewster, 7 N.J. 42, 80 A.2d 297 (1951); Borough of Creskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (Super. Ct. 1953), aff'd, 15 N.J. 238, 104 A.2d 441 (1954). See also Pa. Stat. Ann. tit. 16, § 5190 (1953).

51. See McIvor v. Mercer-Fraser Co., 76 Cal. App. 2d 247, 172 P.2d 758 (Dist. Ct. App. 1946); City of New Orleans v. Lafon, 61 So. 2d 270, 273 (La. Ct. App. 1952); Heinl v. Pecher, 330 Pa. 232, 234, 198 Atl. 797, 799 (1938). See also People v. Kelly, 295 Mich. 632, 634, 295 N.W. 341, 343 (1940).

52. City of New Orleans v. Liberty Shop, Ltd., 157 La. 26, 101 So. 798 (1924).

53. Ibid.

54. Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Monzolino v. Grossman, 11 N.J.L. 325, 168 Atl. 673 (1933); Parker v. Zoning Bd., — R.I. —, —, 156 A.2d 210, 213 (1959); Greenwood v. The Olympic, Inc., 51 Wash. 2d 18, 315 P.2d 295 (1957).

55. See Pa. Stat. Ann. tit. 16, § 5232 (1953).

56. See note 35 supra and accompanying text.

57. Reese v. Mandel, 224 Md. 121, 125, 167 A.2d 111, 115-16 (1961); Kozesnick v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); Delawanna Iron & Metal Co. v. Albrecht, 9 N.J. 424, 426, 88 A.2d 616, 618 (1952); Walker v. Town of Elkin, 254 N.C. 85, 88, 118 S.E.2d 1, 4 (1961); Gayland v. Salt Lake County, — Utah —, —, 358 P.2d 633, 636 (1961).

the distinction between nuisance and zoning noted in the early case of *City of Aurora v. Burns*,[58] a view subsequently adopted by the *Euclid* decision:

> The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.[59]

If the operation in question is not offensive or dangerous, it should not properly be the subject of a nuisance action. If it is a proposed use, it may be restricted by a zoning ordinance. But if it preceded the zoning regulation it will generally be protected as a nonconforming use.[60] The courts, in applying a rule of reason, to both zoning and nuisance restrictions, will determine whether they are so confiscatory as to come within the purview of the just compensation clause of the fifth amendment or the due process clause of the fourteenth amendment. This is actually the underlying basis for the validity of all regulatory enactments dealing with property.

Zoning Laws as Evidence of Nuisance

In nuisance actions, courts may take into consideration zoning regulations proscribing or authorizing similar uses. While the presence or absence of such statutes may be persuasive evidence, it is not determinative of the question in the particular case.[61] The majority of courts do not feel conclusively bound in nuisance cases by zoning ordinances either authorizing or prohibiting the type of operation in question.[62]

Conclusion

Both nuisance and zoning derive from the same basis—the police power; and both have the same ultimate purpose—land use regulation. Both are ultimately governed in their application by the appropriate clauses of the fifth and fourteenth amendments. Within these bounds, the unmistakable tendency has been to allow a widening of the scope of zoning and an extension of its powers to the outside limits of what is a reasonable and non arbitrary plan for a better community. Similarly, except where the policy of protection of industrial uses has intervened, there has been a liberalization of the application of nuisance law. It can be expected that in the future there will be a decrease in the uncertainty caused by relating zoning with the confusing concept of nuisance, proportionate to the increase in the scope and self-sufficiency of zoning.

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58. 319 Ill. 93, 149 N.E. 784 (1925).

59. 272 U.S. at 392-93 (1926), citing City of Aurora v. Burns, 319 Ill. 93, 94-95, 149 N.E. 784, 788 (1925).

60. See note 35 supra and accompanying text. See also Pa. Stat. Ann. tit. 16, § 5233 (1953).

61. See Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396, 409 (D.R.I. 1959); Lauderdale County Bd. of Educ. v. Alexander, 269 Ala. 79, 110 So. 2d 911 (1959); Rockenbach v. Apostle, 330 Mich. 338, 341, 47 N.W.2d 636, 639 (1951); White v. Old York Rd. Country Club, 222 Pa. 147, 185 Atl. 316 (1936); Appeal of Perin, 305 Pa. 42, 156 Atl. 305 (1931). See also Kellerhals v. Kallenberger, — Iowa —, 103 N.W.2d 691 (1960); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960).

62. See notes 45 and 54 supra and accompanying text.