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Law of Zoning in Missouri, The

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The Law of Zoning in Missouri

by

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I

THE DEVELOPMENT OF ZONING

A. Introduction

The term "Zoning" is used in this article only in its broad sense to mean a comprehensive scheme for the districting of a city by law to accomplish certain ends. Zoning for cities has been defined as: "The creation by law of districts, in which regulations, differing in different districts, prohibit injurious and unsuitable structures and uses of structures and land."[2] The zone plan helps to coordinate the various parts of the city plan in accordance with a predetermined city-wide scheme for development.[3] It is in the essence the exercise of the community right to regulate to a limited degree the private uses of buildings and land in the interests of the public health, safety and general welfare.

This article will include a brief resumé of the nature and history of zoning and an analysis of its legal basis with special reference to Missouri.

B. General Nature of Zoning

Zoning laws have become necessary in this country to help cure the evils and to correct the tendencies that the unregulated and unrestricted phenomenal growth of our cities has produced.[4] We have attained little or no degree of control over the haphazard growth of our American city and we are reaping the inevitable reward—chaotic conditions in many of our larger cities. Over-crowding of the land with its consequent increase in immorality, crime and disease is one of the direct results[5] of the unregulated growth of our cities. The noise, smoke, confusion, din, and dirt to which parts of the residential areas of our cities are subjected are hardly conducive to congenial environment and good citizenship. The so-called right of intrusion has worked to make

1. LL.B. University of Missouri, 1924. This article is the thesis written by Mr. Wells in partial fulfillment for the degree of A.M. in the Graduate School of the University of Missouri, 1925.
2. Bassett, Nat. Mun. Rev., Suppl., IX, p. 315.
3. Adams, Am. City, XXV, p. 213.
4. For further information see, Swan, Am. City, XXII, p. 339-344.
5. Discussed in *The Zone Plan*, by *City Plan Commission of St. Louis*, pp. 58-68.

land values unstable.[6] Cities have been confronted with shifting neighborhoods with the attendant economic loss. The city's administrative problem concerning street construction, lighting, and traffic,[7] proper water supply, sanitation, fire and police protection, and housing[8] becomes more complex when the city is providing for districts that are both residential and industrial.

It is evident that zoning by helping to solve these problems has not only a great economic value but is of great social and political significance as well. The American public is awakening to that fact and city planning and zoning are making rapid strides in this country.[9]

Zoning power rests with the state.[10] It must either be justified under the police power or under the power of eminent domain. It is usually exercised under a city ordinance after the state legislature has given the power under an enabling act which may be general, or special, if the state constitution does not prohibit special legislation. It is becoming more and more the practice to pass zoning-enabling acts and this fact is raising a strong presumption in law that local communities do not have power to zone without express authorization.[11] Power to zone may be given to the municipalities in any way that the state, acting within its constitutional scope, may see fit to give it. Massachusetts[12] and Louisiana have by constitutional amendments authorized their legislatures to pass zoning legislation. It is well settled that states have the power to enact zoning laws if there is no constitutional prohibition.

The purpose of zoning is to divide the city into various districts for the uses for which they are best suited and to protect and accentuate the individuality of the districts thus created. Generally, zoning laws do not apply retroactively. They only conserve the future by controlling the city's growth in accordance with a predetermined city-wide scheme for development.

Zoning deals with fundamentals. In connection with proper city planning it provides the city dweller with better physical, social, and moral environment and the results are healthy, contented people and better citizenship.[13] From the economic point of view, it pays by giving stability to land values, and by preventing much unnecessary expense through simplification of the city's administration problems. Conven-

6. See Swan, Am. City, XIX, p. 7-10.
7. Fisher, Am. City, XXX, p. 144.
8. Adams, Am. City, XXIV, p. 287.
9. See *infra.*
10. Chamberlain and Pierson, Am. Bar Ass'n Jour., X, pp. 185-187.
11. *People ex rel. Friend v. City of Chicago,* (1913) 261 Ill. 16, 103 N. E. 609; *Matter of Backer v. Switzer,* (1924) 209 App. Div. (N. Y.) 151, 205 N. Y. S. 108.
12. Constitution, Amendments, Art. 71 (1919).
13. Veiller, Am. City, X, pp. 525-529.

ience to the city dweller and a more beautiful city are only incidents and by-products.

A comprehensive zoning law divides the city into three kinds of districts—for use, for height, and for area or size of building. The districts need not be coterminous but it is evident that the use would have a pronounced effect on the needs as to height and area. Higher buildings would be more necessary in a commercial district than in a residential district. A larger per cent of the area of the lot should be available for buildings in an industrial district than in a residential district.

The "use" districts may be designated as follows: (1) First Residential (restricted to one-family homes); (2) Residential (all sorts of resident dwellings); (3) Commercial; (4) Light Industrial; (5) Heavy Industrial; (6) Unrestricted; (7) Undetermined. The names of the districts are for the greater part self-explanatory but a zoning law would of necessity be very detailed regarding each district. Height districts may be classified as follows: (1) 50 foot height district; (2) 75 foot height district; (3) 130 foot height district; (4) 160 foot height district; (5) 200 foot height district. Height restrictions are imposed primarily to insure adequate light and air, and to prevent congestion, and are of importance as protective measures against fire.

Area districts may be described as follows: (1) 30 per cent area district; (2) 40 per cent area district; (3) 60 per cent area district; (4) 80 per cent area district.

Many zoning laws provide a procedure for relief against the strict enforcement of the height, area, and use restrictions in particular cases if strict enforcement would be unduly arbitrary and if giving the relief would not infringe on the purposes of the zoning law.[14]

C. Origin of Zoning in Europe

The zoning idea originated in Europe where city planning movements and methods are far in advance of similar progress in the United States. Baumeister, a noted German city planner, put forth the zoning idea and it was first applied in Frankfort in 1884.[15] The plan was greatly extended in Germany by the Lex Adickes adopted in 1891.[15] Zoning was soon adopted by most of the continental countries and England incorporated the principle of zoning in her Town Planning Act of 1909. Zoning in European countries has not been restricted by written constitutions as in the United States. It has now been widely adopted in Germany, England, Italy, and many of the other European countries.

14. Bassett, Am. City, XXV. p. 50.
15. Munro, Mun. Govt. and Admin., II, p. 93.

D. Introduction and Development in the United States

The first zoning in the United States was in Boston in 1904.[16] Boston was divided into two districts known as *A* District and *B* District. The limitations were only as to the height of buildings above the street level. The validity of this act as a proper exercise of police power was sustained by the Massachusetts Supreme Court in 1907,[17] and confirmed by the United States Supreme Court in 1908.[18] In 1909 Los Angeles adopted a zoning ordinance on the basis of "use". It virtually divided the city into two districts—residential and non-residential districts. The ordinance has been upheld by the California Supreme Court and the Supreme Court of the United States.[19] New York City in 1916 adopted the most comprehensive zoning scheme to be found in this country or abroad. Thus far it has worked well.[20]

That the zoning idea has made a strong appeal to the American public is shown by its rapid spread in this country. On Jan. 1, 1923 there were 129 zoned cities in the United States.[21] On Jan. 1, 1925 there were approximately 24,000,000 people living in 320 municipalities enjoying the benefits of zoning.

In 1923 the advisory committee on zoning of the Department of Commerce, Washington, D. C., prepared a standard state zoning-enabling act as a model for those desiring to introduce zoning laws in their states. Great care was used in the preparation of this draft act and since Jan. 1, 1923 the twenty-two states that have enacted zoning legislation have used all or a major portion of it. Thirty-nine states and the District of Columbia now have zoning laws in some form.

The spread of zoning in the United States is best shown by the following table.[22]

Name of State	No. of cities that have adopted zoning	Adopted over period of years
Alabama	1	1924
Arkansas	1	1924
California	38	1920-1924[23]
Colorado	1	1923
Connecticut	1	1924
Delaware	1	1924

16. See Bassett, Nat. Mun. Rev., Suppl., IX, p. 321.
17. *Welch v. Swasey*, (1907) 193 Mass. 364, 79 N. E. 745.
18. *Welch v. Swasey*, (1908) 214 U. S. 91.
19. *Hadacheck v. Sebastian*, (1913) 165 Cal. 416; (1915) 239 U. S. 394.
20. Bassett, Am. City, XXV, p. 625.
21. Dept. of Commerce, Washington, D. C., Zoning Progress in the U. S. (1925).
22. Compiled from data in Dept. of Commerce, Washington, D. C., Zoning Progress in the U. S. (1925).
23. Except Los Angeles, zoned in 1909.

Name of State	No. of states that have adopted zoning	Adopted over period of years
Florida	2	1923-1924
Georgia	1	1922
Illinois	36	1921-1924
Indiana	5	1922-1923
Iowa	1	1924
Kansas	4	1921-1924
Maryland	1	1923
Massachusetts	24	1920-1924[24]
Michigan	9	1922-1924
Minnesota	2	1922-1924
Missouri	4	1922-1923
Nebraska	1	1923
Nevada	1	1924
New Jersey	72	1919-1924
New York[25]	56	1916-1924
North Carolina	1	1923
North Dakota	1	1924
Ohio	21	1920-1924
Oklahoma	2	1923
Oregon	1	1924
Pennsylvania	4	1923-1924
Rhode Island	4	1922-1923
South Carolina	1	1924
Tennessee	1	1922
Utah	1	1920
Virginia	4	1922-1924
Washington	2	1919-1923
Wisconsin	14	1915-1924
District of Columbia	1	1920

E. Zoning Progress in Missouri

There have not been many attempts at zoning in Missouri. The Missouri Supreme Court in 1893 in the case of St. Louis v. Hill [26] held unconstitutional a law that provided that houses on Forest Park Boulevard should conform to certain building lines—that there should be a 40 foot distance from the building line to the street. The same court in 1898[27] held a St. Louis ordinance unconstitutional that provided that property on a certain street should be used for residential purposes only. The theory of these two cases seems to have been that the restrictions

24. Boston adopted a comprehensive zoning ordinance in 1924 to replace one of 1904.
25. Only New York City was zoned 1916-1919.
26. 116 Mo. 527, 22 S. W. 861.
27. *City of St. Louis v. Dorr*, (1898) 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.

would have been sustained if adequate compensation had been made to the injured parties.

In 1911 the State Supreme Court[28] held a St. Louis ordinance that purported to regulate the size, height, and position of billboards along the street to be a proper exercise of the police power. The case was taken to the United States Supreme Court[29] and was there dismissed by agreement. The Missouri Supreme Court upheld the billboard ordinance again in *St. Louis Poster Adv. Co. v. St. Louis*.[30] The decision in that case was affirmed by the Federal Supreme Court.[31]

The Kansas City ordinance number 39946 that restricted the use of property on a certain street to residential purposes was held to be a proper exercise of the power of eminent domain and not a violation of due process as guaranteed by the state and federal constitutions.[32] These cases are of importance because they show the attitude of the Missouri courts on the matter of public restriction on the use of private real property in the city.

St. Louis was the first Missouri city to adopt real zoning and in 1918 passed a comprehensive zoning ordinance. The city was divided into five "use" districts, four height districts, and four area districts. The ordinance was declared unconstitutional by the Missouri Supreme Court in 1923.[33] The Missouri Legislature in 1921 passed two zoning-enabling acts.[34] University City and Richmond Heights passed zoning ordinances in 1922 under the law of 1921. Webster Groves passed a zoning ordinance in 1923. Kansas City acting under the authority conferred by the above-mentioned statutes adopted a comprehensive zoning ordinance June 4, 1923. The question of the legality of this ordinance has never been before the State Supreme Court. The new Kansas City charter adopted February 24, 1925, provided,[35] that the city should be zoned, with restrictions on height, use, and building "to promote the public health, safety, convenience, comfort, morals, prosperity, or general welfare."

28. *St. Louis Gunning Advertising Co. v. City of St. Louis* (1911) 235 Mo. 99, 137 S. W. 929.

29. (1913) 231 U. S. 761.

30. (1917) 195 S. W. 717.

31. (1919) 249 U. S. 269.

32. *Kansas City v. Liebi et al.*, (1923) 298 Mo. 569, 252 S. W. 404.

33. *State ex rel. Penrose Inv. Co. v. Mc Kelvey*, (1923) 301 Mo. 1, 256 S. W. 474; *City of St. Louis v. Evraiff*, (1923) 301 Mo. 231, 256 S. W. 489.

34. Laws of 1921, S. B. 61, Secs. 1-8. Applies to "Cities or towns having a population of 50,000 or less." Laws of 1921 S. B. 332, Secs. 1-9. Applies to "Cities having a population of not less than 200,000 nor more than 600,000."

35. Kansas City Charter of 1925. See Art. 1, Sec. 1, Par. 55. Read, in connection with this, secs. 400, 401, 402 and 403 of Art. XIII. Also Sec. 128, Art. VI.

It seems evident from reading the various provisions of the charter that Kansas City considers zoning as a proper exercise of the police power and will not attempt zoning under eminent domain.

The future success of zoning in Missouri can be predicted only after a careful study of the opinions of the State Supreme Court in the above and other cases.

II

CONSTITUTIONAL RESTRICTIONS ON ZONING

A. In General

Although the idea of zoning originated in Europe, zoning, as exemplified in the United States, is "distinctively an American movement." This is so because there are certain federal and state constitutional provisions, peculiar to our American political machinery, that have had a profound influence on the methods and principles employed in zoning. Zoning in the United States, outside the District of Columbia, is not a matter that falls within the enumerated powers delegated to our Federal Government. The power to enact zoning laws then rests wholly with each state.

Most of the states that have authorized zoning justify it under the state's police power. A few instances in which zoning has been carried out under the power of eminent domain constitute the exception. But the state while exercising these two so-called inherent powers to further the practice of zoning must keep within certain constitutional bounds. These powers are limited by state and federal constitutional provisions. An outstanding feature of zoning is the regulation and restriction put upon the use of private property in a zoned area. As we conceive of property as being not only a tangible thing, but intangible in its nature, not merely the thing itself but the relation to the thing, the rights in relation to it, it is clear that any restriction upon that relation as imposed by a zoning ordinance impairs a property right.

The fifth amendment to the federal constitution provides that "no person shall . . . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." This is a restriction on the power of the United States and does not apply to state action. But by the fourteenth amendment[36] of the United States Constitution, state action is limited by these words: "nor shall any State deprive any person of life, liberty, or property without due process of law;[37] nor deny to any person within its

36. Amendment 14, Par. 1.

37. This provision will be referred to throughout this chapter as the "Due Process" clause.

jurisdiction the equal protection of the laws."[38] Similar provisions in many state constitutions offer additional guarantees of protection against state action. It is these constitutional provisions that protect property rights from the improper use of either the police power or the power of eminent domain.

The decisions in the various state courts in which the constitutionality of zoning has been questioned indicate that the states have very much the same constitutional restrictions on the general exercise of the police power and the power of eminent domain. In practically every case the provisions contain no further restrictions than are found in the federal constitution. The eminent domain provision in some state constitutions contains a damage clause but this does not operate as a restriction on the police power as interpreted by most courts.[39] Massachusetts and Louisiana have authorized the passage of zoning laws by constitutional provision.

B. Zoning Under the Police Power

The police power is often referred to as the inherent power in the state government to make regulations to protect or promote health, safety, education, morals, order, and the general welfare. Justice Holmes of the United States Supreme Court in *Noble State Bank v. Haskell*[40] said: "It may be said in a general way that the police power extends to all the great public needs."

State regulations under the police power are not necessarily negative in character in that they prohibit action. On the contrary, police regulations often have a positive affirmative aspect. Especially is this true when a state authorizes zoning ordinances to promote health, safety, morals, order and general welfare. Since as a rule no compensation is allowed for loss or injury resulting from police regulations, the courts have refused to sustain a measure purporting to be an exercise of the police power, unless the measure tends in a sufficient degree to accomplish a purpose justifiable under the police power and also is free from unreasonableness.[41] Reasonable classification for the application of a

38. This provision will be referred to throughout this chapter as the "Equality Clause."

39. This matter will be discussed in a subsequent chapter.

40. (1911) 219 U. S. 104.

41. *City of Passiac v. Patterson Bill Posting, Advertising, and Sign Painting Co.* (1905) 72 N. J. L. 285, 67 Atl. 267; *Dobbins v. Los Angeles* (1904) 195 U. S. 223. The point is also discussed in: *Ex parte Quong Wo*, (1911) 161 Cal. 220, 118 Pac. 714; *Mugler v. Kansas* (1887) 123 U. S. 623; *Muller v. Oregon* (1908) 208 U. S. 412.

police regulation does not violate the equality provision in the federal constitution.[42]

Changes in the social, economic, and political conditions within the state make further extension of the police power reasonable and constitutional. It has been well said that "Law is a progressive science." What is reasonable under one set of conditions and needs may be wholly unreasonable under different conditions. In *Block v. Hirsh*[43] Justice Holmes said: "Plainly circumstances may so change in time or so differ in space ..... as to clothe with a public interest what at other times or in other places would be a matter of purely private concern." It is because of the meaning of the word "reasonable" that the courts have been able to uphold as constitutional the further application of the police power to the new situations that arise in a changing society. Courts have repeatedly held that the police power exists to protect or further the public welfare or the public good. The terms "public welfare" and "public good" are general in meaning and as is true of the word "reasonable," offer considerable latitude for the expression of the attitude, or viewpoint of the court deciding a particular case. A conservative court would have a much narrower view of what is reasonable and for the public good than a court that is progressive, open minded and aware of the advancing needs of society. So it is the attitude of the courts in a particular jurisdiction that has had much to do with the fate of zoning regulations.

Zoning represents a further extension of some of the old principles of regulation of property for public purposes.[44] It is a further encroachment upon the fundamental concept regarding individual freedom in respect to property. It is evident in the light of modern knowledge that our police regulations regarding public safety, public health, and nuisances, and the private restrictions in deeds are inadequate to insure in the greatest measure the public health, safety, and general welfare in modern cities. The necessity for zoning regulation in behalf of the public welfare is evident but some courts are inclined to disregard this fact. Zoning meets the exigencies of the situation because of its comprehensiveness. All property is regulated in the interest of all the people. We still have our nuisance laws and our restrictions in deeds for additional protection.

The weight of authority favors the constitutionality of zoning as a proper exercise of the police power.[45] In the cases favoring constitutional-

42. *Missouri v. Lewis* (1879) 101 U. S. 22; *Muller v. Oregon* (1908) 208 U. S. 412; *People v. Gallagher* (1883) 93 New York 438; *Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540.

43. (1921) 256 U. S. 135, p. 155.

44. See, *Harvard Law Review*, XXXVII, pp. 836-838.

45. Cases favoring constitutionality: *Opinion of the Justices*, (1920) 234 Mass. 597, 127 N. E. 525; *Welch v. Swasey*, (1907) 193 Mass. 364, 79 N. E. 745; (1908) 214 U.

ity the courts have decided that zoning does not violate the due process and equality provision in either the state or federal constitutions. They have viewed each particular restriction or classification in the light of the end sought to be attained by the whole ordinance. It is only when particular restrictions are thus considered that they appear as having a reasonable connection with the accomplishment of a purpose justifiable under the police power.

The courts upholding zoning ordinances have concluded that the general benefits and protection to all property, resulting from regulation add substantially to the public welfare and that these public benefits justify a measure of arbitrariness in a few cases. It is evident that any scheme as general as a zoning ordinance must be sufficiently detailed in order for it to accomplish its purpose. It is these detailed provisions that appear harsh in many cases but it is well settled that "mathematical nicety" is not practical or necessary under the police power and the courts do not require it.

A well-reasoned opinion of the relation of zoning regulations to health, safety, and public welfare is to be found in *State ex rel. Civello v. New Orleans*.[46] Justice O'Niell said:

"It is sufficient that the Municipal Council could reasonably have had such considerations in mind (considerations of public health, safety, comfort, and general welfare). If such condition could have justified the ordinances, we must assume that they did justify them.

"The attorneys for the appellant have suggested several considerations that might well have prompted the enactment of the ordinances in question. In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protec-

S. 91 (Height restriction only); *Lincoln Trust Co. v. Williams Building Corporation*, (1920) 229 N. Y. 313, 128 N. E. 209; *Ware v. City of Wichita* (1923) 113 Kans. 153, 214 Pac. 99; *State ex rel. Civello v. New Orleans* (and cases following) (1923) 154 La. 271 287, 290, 97 So. 440; *Boland v. Compagne* (1923) 154 La. 470, 97 So. 661; *State ex rel. Carter v. Harper*, (1923) 182 Wis. 148, 196 N. W. 451; *Palmer v. Mann*, (1923) 198 N. Y. S. 548, 201 N. Y. S. 525; *Cliffside Park Realty Co. v. Borough of Cliffside* (1921) 96 N. J. L. 278, 114 Atl. 797; *Schait v. Senior*, (1922) 97 N. J. L. 390, 117 Atl. 517; *Cohen v. Rosedale Realty Co.* (1923) 199 N. Y. S. 4. See also dissenting opinion of Judge White in *State ex rel. Penrose Investment Co. v. Mc Kelvey*, (1923) 301 Mo. 1, 256 S. W. 474.

46. (1923) 154 La. 271, p. 282, 97 So. 440.

tion. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded a cheaper pavement serves the purpose. It is pointed out, too, that the fire hazard is greater in the neighborhood of business establishments than it is in residence districts. A better and more expensive fire department—better equipment and younger and stronger men—are needed in the business centers where the building are taller, than in the residence districts. . . . ."

"Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc."

The case involved one of several block ordinances that restricted certain districts to residential use only, and was not a case arising under a comprehensive zoning ordinance; but somewhat the same principles are involved.

A few cases hold that zoning is not within the constitutional scope of the police power.[47] With the exception of the Missouri decision which will be discussed later, the cases holding zoning unconstitutional are limited to those in which a specific piece of property or a single provision of a zoning ordinance was involved. Clearly, these courts have taken an illogical attitude when they disregard the practical necessity and the expediency of zoning in general and declare an entire ordinance void because a single provision when considered alone seems arbitrary and unreasonable.

The authorities are divided as to the constitutionality of ordinances placing restrictions on specific blocks or districts when there is no comprehensive zoning ordinance.[48] The "equal protection" and "due process"

47. These cases are: *State ex rel. Penrose Inv. Co. v. Mc Kelvey, supra*; *City of St. Louis v. Evraiff*, (1923) 301 Mo. 231, 256 S. W. 489; *State ex rel. Better Building Home and Mortgage Co. v. Mc Kelvey*, (1923) 301 Mo. 130, 256 S. W. 495; *Ambler Realty Co. v. Euclid Village*, (1924) 21 Ohio Law B. and Rep. 607; *Ignaciunas v. Risley*, (1923) 121 Atl. 783, affirmed May, 1924, by N. J. Ct. of Errors and Appeals; *State ex rel. Westminster Presbyterian Church v. Edgecomb*, (1922) 108 Neb. 859, 189 N. W. 617.

48. A few cases hold it proper under the police power: *Ex parte Quong Wo.* (1911) 161 Cal. 220, 118 Pac. 714; *Brown v. City of Los Angeles* (1920) 183 Cal. 783, 192 Pac. 716; *Ex parte Hadacheck* (1913) 165 Cal. 416, 132 Pac. 584; *Manhattan Oil Co. v. City of Des Moines* (1922), 193 Ia. 1096, 188 N. W. 921; *Salt Lake City v. Western Foundry and Stove Repair Wks.*, (1920) 55 Utah 447, 187 Pac. 829. See also La. case cited, *supra* note 46.

Contra:

Levy v. Mravlag, (1911) 96 N. J. L. 367, 115 Atl. 350; *People ex rel. Friend v. Chicago*

clauses of the state and federal constitutions are often successfully invoked to attack these ordinances. It is clear that block ordinances standing alone appear much more arbitrary and discriminatory than when they are a part of a general scheme. Questions concerning statutory and charter powers often play an important role in this class of cases. Where an ordinance provides that a certain per cent of the property owners in a block may authorize a change in the uses of property in that block the question of unconstitutional delegation of legislative authority arises.

Certain provisions of zoning ordinances give rise to constitutional questions. It is well settled that a party injured by a police regulation is not entitled to compensation. Constitutional difficulties are avoided by having the ordinance take effect in the future, thus avoiding a retroactive effect. A striking exception is presented in the case of *Hadacheck v. Sebastian.*[49] Here Hadacheck had erected his brick yard and kiln in an uninhabited region several miles outside the city of Los Angeles. Later the city's boundaries took in this territory and Hadacheck was forced to move his yards at a great loss because a city ordinance restricted the use of that territory to residential use only. The courts upheld the ordinance as proper under the police power and Hadacheck was not allowed compensation. Set-back provisions or building line provisions present an interesting constitutional question regarding equality and due process. There is authority that they are unconstitutional when they are not a part of a comprehensive zone plan.[50] No case involving this point seems to have arisen under a comprehensive zoning ordinance.

In some of the cases the argument is advanced that zoning is provided under the guise of the police power for purely aesthetic purposes. There is authority to the effect that the police power cannot be exercised for such purpose.[51] But where the motive of beautification is only inciden-

(1913) 261 Ill. 16, 103 N. E. 609; *Romar Realty Co. v. Heddonfield,* (1921) 96 N. J. L. 117, 114 Atl. 248; *Clements v. McCabe* (1920) 210 Mich. 207, 177 N. W. 722; *Spann v. City of Dallas,* (1921) 111 Tex. 350, 235 S. W. 513; *Calvo v. New Orleans,* (1915) 136 La. 480, 67 So. 338. This case was overruled in *State ex rel. Civello v. City of New Orleans* (1923) 154 La. 271, 97 So. 440.

49. (1915) 165 Cal. 416; 239 U. S. 394.

50. See *St. Louis v. Hill,* (1893) 116 Mo. 527, 22 S. W. 861; *People ex rel. Dilzer v. Calder,* (1903) 89 App. Div. 503, 85 N. Y. Supp. 1015; *Eubank v. City of Richmond* (1910) 110 Va. 749, 67 S. E. 376; (1912) 226 U. S. 137.

51. See *City of Passiac v. Patterson Bill Posting and Sign Painting Co.* (1905) 72 N. J. L. 285, 62 Atl. 267; *Crawford v. Topeka* (1893) 51 Kans. 756, 33 Pac. 476; *Commonwealth v. Boston Advertising Co.* (1905) 188 Mass. 348, 74 N. E. 601; *People v. Green* (1903) 85 App. Div. 400, 83 N. Y. Supp. 460. As to the relation of beauty to public purpose see: *Shoemaker v. U. S.* (1892) 147 U. S. 282; *U. S. v. Gettysburg Elec. Ry. Co.* (1896) 160 U. S. 668; *Att'y General v. Williams,* (1889) 174 Mass. 476, 55 N. E. 77.

tally present as is the case with most zoning ordinances, the ordinance is not invalid because the additional "aesthetic ingredient" is present.[52]

There is a marked tendency on the part of the Federal Supreme Court to sustain state court decisions upholding police regulations where a legislative discretion has been reasonably exercised. We have no decision from the highest court of the land on the constitutionality of a comprehensive zoning scheme, but the United States Supreme Court has sustained a general height regulation in *Welch v. Swasey*[53] and has upheld use regulations in *Hadacheck v. Sebastian*[54] and *Rienman v. Little Rock*,[55] cases involving strictly zoning principles. Hence, we may hazard a prediction that it will consider the matter favorably when it is properly presented.

C. Zoning Under Eminent Domain

Eminent domain is the power of the state to take private property for a public purpose upon making just compensation. It is an inherent sovereign power qualified by the provisions of the constitution. States may further restrict it by their own constitutions.[56]

It is desirable that zoning be secured under the police power rather than by eminent domain because of the inherent difficulties that would be encountered if only the latter power could be used in zoning. Eminent domain would require that proper notice be given in due form to each interested party, and that each party be given a hearing so that he could present his claim for damages. Whether these claims resulted in the awarding of damages or not, great loss in both time and money would result. Every substantial change in the zoning regulations would necessitate a repetition of the legal processes. Modifications to meet changed conditions would be discouraged and stereotyped zoning would be the result. The good features of zoning could not be realized under such difficulties.

Two states, Nebraska and Wisconsin, passed statutes authorizing zoning under eminent domain, with the provision that damages that

52. *St. Louis Poster Adv. Co. v. St. Louis* (1919) 249 U. S. 269; *Opinion of the Justices*, (1920) 234 Mass. 597, 127 N. E. 525; *Welch v. Swasey*, (1909) 214 U. S. 91; *Cochran v. Preston* (1908) 108 Md. 220, 70 Atl. 113; *Ayer v. Com'r on Hgts. of Bldgs. in Boston* (1922) 242 Mass. 30, 136 N. E. 338.

53. (1909) 214 U. S. 91.

54. (1915) 239 U. S. 394.

55. (1913) 107 Ark. 174, 155 S. W. 105; (1915) 237 U. S. 171.

56. As to the nature of the power, see the following: *Chicago, B. & Q. R. R. Co. v. Chicago*, (1896) 166 U. S. 226; *People v. Adirondack Ry. Co.* (1899) 160 N. Y. 225, 54 N. E. 689; *Opinion of the Justices* (1910) 204 Mass. 607, 91 N. E. 405; *Long Island Water Supply Co. v. Brooklyn.* (1897) 166 U. S. 685; *Clark v. Nash* (1905) 198 U. S. 361.

resulted should be assessed against those benefitted.[57] But these have been replaced and zoning is now provided under the police power in each of these states.[58] There are cases holding that restrictions as to use or height in the nature of zoning restrictions are proper under the eminent domain power.[59]

There is a nice question presented as to whether such regulatory restrictions amount to a taking. The Ohio Supreme Court in *Pontiac Improvement Co. v. Board of Commonwealth* held that these restrictions did not constitute a taking for public use.[60] The question as to what constitutes a taking is a matter that each state may deal with differently by statutes or by constitutional provisions interpreted by its courts. We would expect to find conflicts in the decisions on this point. But if we hold that zoning regulations can be justified under eminent domain, the regulations must be imposed for a public purpose. If a public purpose is sufficiently present to justify eminent domain, no peculiar state constitutional limitations or extensions of the power of eminent domain or the state police power being present, it is because the zoning regulations tend to accomplish a purpose for which the police power exists—to promote health, safety, morals, order, or the general welfare. This matter is of especial importance to the advocates of zoning in Missouri, since the Missouri Supreme Court has held[61] in a case involving the constitutionality of the St. Louis zoning ordinance, that the regulations and restrictions sought to be imposed were not constitutionally justifiable under the police power, but the majority of the court strongly intimates that they would have been proper under eminent domain.[62] So far, no large American city has attempted a zoning plan under eminent domain. It is true that certain necessary undertakings such as street widening and excess condemnation, the establishment of municipal parks, playgrounds, etc., and general city improvements, to insure the full accomplishment of zoning purposes, may necessitate the exercise of the power of eminent domain, but there seems to be no just reason for the apparent failure of some courts to properly distinguish between the scope and inherent nature of this power and the police power.

57. Laws of Nebraska (1915) Ch. 213, secs. 4-9; Nebraska Metropolitan Cities (1919) Ch. 185; Wisconsin Laws (1913) Ch. 456, 457; Wisconsin Cities (1917) Ch. 404, stat. (1921) secs. 62, 23, subd. 5, 6.

58. *State ex rel. Carter v. Harper* (1923) 182 Wis. 148, 196 N. W. 451.

59. *Kansas City v. Liebi*, (1923) 298 Mo. 569, 252 S. W. 404; *Att'y General v. Williams* (1899) 174 Mass. 476, 55 N. E. 77; *State ex rel. Twin City Bldg. and Investment Co. v. Houghton* (1919) 144 Minn. 1, 174 N. W. 885.

60. (1922) 104 Ohio 447, 135 N. E. 635.

61. *State ex rel. Penrose Investment Co. v. Mc Kelvey* (1923) 301 Mo. 1, 256 S. W. 474.

62. Discussion of case is reserved for a later chapter.

III

THE PRESENT CONSTITUTIONAL STATUS OF THE LAW OF ZONING IN MISSOURI

A. In General

It was pointed out in the preceding chapter that the great weight of authority upholds the constitutionality of zoning as a proper exercise of the police power and that the principles of zoning are becoming well established in the American system of jurisprudence. In Missouri, however, the Supreme Court has materially restricted zoning as an exercise of the police power.[63] The legal status of zoning in Missouri can best be understood after a careful study of the decisions on zoning and other cases in which questions relative to the constitutionality of zoning have arisen. These decisions were influenced largely by the interpretations the courts placed upon certain constitutional and statutory provisions.

B. Constitutional and Statutory Provisions Affecting Zoning in Missouri

The Fourteenth Amendment to the Federal Constitution provides:[64] "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The constitution and laws of Missouri are subject to this provision. It is a decided check on the arbitrary taking or the unreasonable regulation of property. Zoning laws that violate this provision are void.

The Missouri Constitution provides: "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined without regard to any legislative assertion that the use is public."[65] It further provides "That private property shall not be taken or damaged for public use without just compensation,"[66] and, "That no person shall be deprived of life, liberty, or property without due process of

63. *State ex rel. Penrose Inv. Co. et al. v. Mc Kelvey* (1923) 301 Mo. 1, 256 S. W. 474; *St. Louis v. Evraiff*, (1923) 301 Mo. 231, 256 S. W. 489; *State ex rel. Better Built Home and Mortgage Co. v. Mc Kelvey*, (1923) 301 Mo. 130, 256 S. W. 495.

64. 14th Amendment, Par. 1.

65. Mo. Const. Art. II, Sec. 20.

66. Mo. Const. Art. II, Sec. 21.

law."[67] These provisions will be discussed later in connection with the cases. It suffices to state here that they offer additional protection to private property from governmental interference. The interpretation that certain earlier cases placed upon the damage clause in the eminent domain provision quoted above seems to have been largely responsible for the attitude the Missouri Supreme Court has taken toward zoning as an exercise of the police power.

Zoning in Missouri has been undertaken either under special grants of power, as in the case of St. Louis,[68] or under the two laws passed in 1921.[69] These laws provided in substance that cities within the classes designated should thereafter have power to adopt zoning regulations restricting the height, area, and use of buildings in the interest "of the public health, safety, convenience, comfort, prosperity, or general welfare." These acts contained no provision for compensation. Thus far these statutes of 1921 have not been interpreted by the State Supreme Court although Judge Graves in his opinion in *State ex rel. Better Built Home and Mortgage Co. v. Davis et al.* said that zoning under the act approved April 1, 1921, Laws 1921, p. 481, would be void for the reasons given in the zoning cases.[71] Zoning under the special act for St. Louis was declared unconstitutional in 1923.[71] The State Supreme Court's rulings against the validity of the St. Louis zoning ordinance were a great blow to zoning in Missouri. Advocates of zoning hoped that the constitutional convention of 1922-23, would include a provision to offset the effect of those rulings. "At the special election on February 26, 1924, the voters of Missouri ratified six and rejected fifteen of the twenty-one constitutional amendments submitted by the constitutional con-

67. Mo. Const. Art. II, Sec. 30.

68. St. Louis City charter 1914, Art. I, delegating the state's police power to the city, provides that the city shall have power:

"Section 25. To define and prohibit, abate, suppress, and prevent or license and regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience, or welfare of the inhabitants of the city and all nuisances and causes thereof.

"Section 26. To prescribe limits within which business, occupations and practices liable to be nuisances or detrimental to the health, morals, security, or general welfare of the people may lawfully be established, conducted, or maintained.

"Section 35. To exercise all powers granted or not prohibited to it by law which it would be competent for this charter to enumerate."

69. Laws, 1921, pp. 177-180, secs. 1-9, applies to cities with population of not less than 200,000 and not more than 600,000. Laws of Missouri, 1921, pp. 481-484, secs. 1-8, applies to cities with a population of 50,000 or less.

70. (1924) 259 S. W. 80. This was an original proceeding in prohibition and Judge Graves' statement was dictum.

71. *State ex rel. Penrose Inv. Co. v. Mc Kelvey* (1923) 301 Mo. 1, 256 S. W. 474; *St. Louis v. Evraiff* (1923) 301 Mo. 231, 256 S. W. 489; *State ex rel. Better Built Home and Mortgage Co. v. Mc Kelvey* (1923) 301 Mo. 130, 256 S. W. 495.

vention."[72] Of the fifteen amendments rejected, one contained a section providing that every city should have the power to adopt zoning regulations as should be provided by general law.[73] Since the section relating to zoning comprised only a small part of one amendment, zoning did not become a distinct issue and the amendment was rejected for other reasons.

The Missouri legislature during its 1925 session passed a zoning-enabling act,[74] patterned after the model drawn up by the Federal Department of Commerce at Washington. The bill as originally drawn applied to "all incorporated cities, towns, and villages" but the Senate amended it so as to apply only in counties having a population of fifty thousand inhabitants or more.

The bill authorizes zoning under the police power. Great care was used in drawing the bill to avoid all constitutional inhibitions upon its enforcement. The provisions of the act were summarized in its title as follows: "An act authorizing the legislative body of all incorporated cities, towns and villages, for the purpose of promoting health, safety, morals or the general welfare of the community, to regulate and restrict by ordinance the height, number of stories and size of all buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; to divide such municipalities into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; to regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land therein; to provide for the appointment of a zoning commission; to provide for the adoption of comprehensive zoning plans; to provide for the change of such regulations, restrictions, and boundaries of zones; to provide for a board of adjustment; the taking of testimony and objections and rulings thereon; to provide for the taking of appeals to circuit courts from the rulings or decisions of the board of adjustment; to provide the method of procedure and for other purposes, and repealing all acts and parts of acts inconsistent with the provisions of this act." As indicated above, an amendment provided that the act should not apply "to counties having a population of less than fifty thousand in-

72. Loeb, Am. Political Science Rev., XVIII, p. 329.

73. Sec. 27, of proposed Amendment XI, dealing with counties, towns, and villages, provided: "Every city shall have the power to provide for the division of the territory within its boundaries into zones or districts and for the regulation and restrictions in the use of the land and structures within such zones or districts to the extent and in the manner provided by general law."

74. Laws, 1925, p. 307.

habitants." The bill was approved by the Governor and went into effect on July 9, 1925.

C. Judicial Decisions Affecting the Law of Zoning in Missouri.

Before discussing the zoning cases it is desirable to review the decisions in certain earlier Missouri cases that apparently have become landmarks in the development of the public law of Missouri relative to the imposition of legal restrictions on the use of private property. These cases establish in the main the precedents that influenced the Supreme Court in its decisions on zoning. The case of *City of St. Louis v. Hill*[75] was the first of these cases. In 1891 the Missouri Legislature passed what is known as the Boulevard Law.[76] The law authorized all cities in Missouri having a population of three hundred thousand inhabitants or more, or which should thereafter reach said population, to establish by ordinance boulevards and provide for maintaining the same and to establish building lines along said boulevards to which all buildings and structures thereon should conform. By virtue of the power acquired under the Boulevard Law St. Louis passed an ordinance[77] designating a certain public highway as Forest Park Boulevard. The ordinance established building lines of forty feet along the boulevard. Neither the Boulevard Law nor the ordinance contained any provision for compensating those whose property would be damaged by the enforcement of the building line restrictions. Hill was found guilty and fined in a lower court for violating this ordinance by building on his lot within the forty-foot line. He appealed his case to the Missouri Supreme Court. There he contended that both the state law and the ordinance were unconstitutional and void. He said that the establishment by law of a building line of forty feet amounted to a damaging and taking of private property within the meaning of sections 21 and 30,[78] of Article II, of the Missouri Constitution and that by said sections private property could be taken or damaged only for a public purpose upon just compensation being made. The city answered that there was no taking of property but merely a

75. (1893) 116 Mo. 527, 22 S. W. 861.

76. Laws, 1891, p. 47, provided: "Section 1. All cities in Missouri having a population of three hundred thousand inhabitants or more, or which shall hereafter reach said population, are hereby authorized and empowered to establish by ordinance boulevards and provide for maintaining the same; and may regulate traffic thereon . . . . . and may establish building lines to which all buildings and structures thereon shall conform . . . . . ."

77. St. Louis Ordinance No. 16450, sec. 1, described and named a certain public highway as "Forest Park Boulevard." Sec. 4 provided: "All houses or buildings hereafter to be erected on said Forest Park Boulevard shall conform to uniform building lines, which building lines shall be forty feet distant from a parallel with the north and south lines of said Forest Park Boulevard, respectively." Sec. 4a provided a penalty for the violation of this ordinance.

78. These sections are quoted, *supra*.

beneficial regulation of the property. The court held that since the use is one of the most essential and important attributes of property, a restriction on the lawful use amounts to a taking and damaging within the meaning of sections 21 and 30, of Article II, of the Missouri Constitution, for which compensation is due, and that since both the law and the ordinance failed to provide for compensation they violated said sections of the Missouri Constitution and were void. The court did not consider the ordinance as a police regulation. They based their decision on general principles regarding eminent domain, established in earlier Missouri cases.[79] Again in *St. Louis v. Dorr et al.*[80] the court was called upon to consider the constitutionality of a St. Louis ordinance[81] which purported to restrict a portion of Washington Boulevard to residential use only, without making compensation for damages resulting from this restriction. The court held in the opinion handed down by Judge Barclay that the ordinance was invalid because the act[82] of the state legislature which alone gave the city the power to provide that certain areas should be used exclusively for residential purposes was a special act passed in violation of section 53 of Article IV[83] of the Missouri Constitution, hence, was unconstitutional and void and the city was devoid of power to make and enforce the ordinance. The question as to whether or not the ordinance could be sustained as a police regulation (had there been a sufficient delegation of the state's police power) was not passed upon by the court. Judges Gantt, Robinson, and Brace, while concurring in the majority opinion that the act of the legislature was unconstitutional because it was a special act, gave as an additional reason for affirmance that the ordinance was unconstitutional because it deprived the defendants of property rights by restricting the uses to which they could put their property without making just compensation. They relied on the *City of St. Louis v. Hill*[84] as authority for that conslusion. Judges Sherwood and Burgess dissented from the majority view that the law was a special act and unconstitutional on that ground. They concurred

79. These cases were: *Newby v. Platte County* (1857) 25 Mo. 258; *Walther v. Warner* (1857) 25 Mo. 277 (these two cases arose under the constitution of 1820); *Provolt v. Chicago, Rock Island and Pac. R. R. Co.* (1874) 57 Mo. 256 (case arose under constitution of 1865); *Evans v. The Missouri, Iowa and Nebraska Ry. Co.* (1877) 64 Mo. 453; *Lowery v. Rainwater* (1879) 70 Mo. 152; *River Rendering Co. v. Behr* (1882) 77 Mo. 91.

80. (1898) 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.

81. St. Louis Ordinance No. 16669 (1892).

82. Mo. Boulevard Law, (Laws, 1891, p. 47).

83. Missouri Constitution, Art. IV. Sec. 53, prohibits the passing of any local or special law "authorizing the laying or opening, altering or maintaining roads, highways, streets, or alleys" or "incorporating cities, towns or villages, or changing their charters."

84. (1893) 116 Mo. 527, 22 S. W. 861.

in the result that the law was unconstitutional on the ground that it authorized the city to restrict the lawful use of private property without providing compensation for damages in violation of sections 21 and 30 of Article II of the Missouri Constitution. They relied on the case of *St. Louis v. Hill*[85] to sustain that view. Judge Macfarlane concurred in the opinion as written by Judge Barclay. The case, however, is not authority for the proposition that the police power cannot be exercised to regulate and restrict lawful, non-nuisance uses of property, though five of the seven judges appear to take this position.

The Missouri Supreme Court in *St. Louis Gunning Advertising Co. v. City of St. Louis et al.*[86] held in a rather lengthy opinion that a St. Louis ordinance[87] which regulated the height, size and position of billboards on vacant lots within the city of St. Louis was a proper exercise of the city's police power.[88] The court held that the ordinance did not violate the due process provisions of either our State or Federal Constitutions, that it did not violate equal protection as provided for in the Fourteenth Amendment to the Federal Constitution, nor was it a taking or damaging of private property for a public use for which compensation must be made under sections 21 and 30 of Article II of the Missouri Constitution. The Court pointed out that the structure and use of billboards are such that without regulation they might afford hiding and lurking places for criminals and thus become a menace to public safety; they might afford cover for immoral practices to the detriment of public morals; trash and rubbish have a tendency to accumulate behind them which would endanger public health; billboards may be so constructed as to add to the fire hazard and that with these considerations in mind the regulations imposed by the ordinance were reasonable and necessary to promote and protect the public health, morals, and safety. Judge Graves dissented on the ground that the

85. (1893) 116 Mo. 527, 22 S. W. 861.

86. (1911) 235 Mo. 99, 137 S. W. 929.

87. St. Louis Ordinance No. 22022 passed Apr. 7, 1905. The ordinance provides that no billboard of twenty-five square feet or more shall be erected without a permit and none to extend more than fourteen feet high above the ground. It requires an open space of four feet to be left between the lower edge and the ground, forbids an approach of nearer than six feet to any building or to the side of the lot, or nearer than two feet to any other billboard. With qualifications there must be certain conformity to the building line. No billboard is to exceed five hundred square feet in area. The fee for a permit is one dollar for every five lineal feet. The ordinance also regulated the manner in which signs and fences should be erected.

88. The St. Louis charter (1914) Art. III, sec. 26, par. 5, in substance gave the city the power to "license, tax, and regulate" all business, and vocations within city. Par. 14, known as the general welfare clause, further provided that the city could pass "all ordinances not inconsistent with the provisions of this charter in maintaining the peace, good government, health," etc.

ordinance restricted the use of private property for purely aesthetic purposes. The case was appealed to the United States Supreme Court and was there dismissed by agreement,[89] without an opinion being handed down.

The constitutionality of the St. Louis billboard ordinance was raised again in the case of *St. Louis Poster Advertising Co. v. St. Louis.*[90] The plaintiffs exerted great effort to prove that their billboards were not so constructed as to endanger health, morals or the public safety. The company contended that the ordinance regulating billboards could not be sustained as a proper exercise of the police power because in the particular case the regulations had no reasonable relation to the protection of public health, morals, and safety. It was argued further that since the ordinance could not be sustained as a police power measure its enforcement would amount to a taking of private property in violation of Sections 21 and 30 of Article II of the Missouri Constitution and of section 1 of the Fourteenth Amendment to our Federal Constitution.

The court in accord with the decision handed down in the *St. Louis Gunning Advertising Company* case upheld the ordinance. Judge Graves dissented for the reasons given in *St. Louis Gunning Advertising Co. v. St. Louis.*[91] The case was appealed to the United States Supreme Court where the decision of the Missouri Supreme Court was affirmed.[92] The cases of *St. Louis Gunning Advertising Company v. St. Louis*[93] and *St. Louis Poster Advertising Company v. St. Louis*[94] firmly establish the law in Missouri that billboards may be regulated under the state's police power. The attitude taken in these cases is hardly in accord with the decision in *State ex rel. Penrose Investment Company v. Mc Kelvey*[95] which will be discussed later.

In the case of *St. Louis v. Dreisoerner*,[96] the defendant had been found guilty and fined in a lower court for operating a manufacturing plant within 600 feet of Tower Grove Park in violation of a St. Louis ordinance. The Supreme Court held that the ordinance forbidding the maintenance of a manufacturing plant of any size within 600 feet of the park was an unwarranted exercise of the police power, unreasonable on its face, and if applied to the defendant's business—that of making wooden articles—it would deprive him of the full use of his property

89. (1913) 231 U. S. 761.
90. (1917) 195 S. W. 717.
91. (1911) 235 Mo. 99, 137 S. W. 929.
92. (1919) 249 U. S. 269. Accord: *Cusack Co. v. Chicago* (1917) 242 U. S. 526; *Kansas City Gunning Adv. Co. v. Kansas City* (1912) 240 Mo. 659, 144 S. W. 1099.
93. (1911) 235 Mo. 99, 137 S. W. 929.
94. (1917) 195 S. W. 717; affirmed (1919) 249 U. S. 269.
95. (1923) 301 Mo. 1, 256 S. W. 474.
96. (1912) 243 Mo. 217, 147 S. W. 998.

without compensation and without due process. The decision is in accord with *St. Louis v. Packing Co.*,[97] holding that St. Louis had no power to declare by ordinance anything to be a nuisance which is not a nuisance at common law. The ordinance was very arbitrary and unreasonable and the decision is sound.

In *Kansas City v. Liebi et al.*,[98] the court held that a Kansas City ordinance,[99] restricting a portion of Gladstone Boulevard to residential use and also establishing a thirty-five foot building line along the sides of the street (compensation for all damages being given and said compensation to be raised by special assessment against the benefitted area) was constitutional. The court pointed out that the regulations imposed restricted the lawful use of property which amounted to a taking and damaging within the meaning of section 21[100] of Article II of the Missouri Constitution but the court overruled the contention of the defendants that it was a taking for a private purpose in violation of section 20[101] of Article II of that instrument and in violation of the due process clause in the Fourteenth Amendment to our Federal Constitution. The court said that the city by statute had been given the power to exercise the power of eminent domain and that since the ordinance under review was passed in the interest of health, safety, morality, general enjoyment, and education it was a taking for a public purpose. The court took the view that the term "public use", or "public purpose" is of a flexible nature capable of being adapted to the needs as they arise in a changing social and economic order. Reference was made to the exercise of the power of eminent domain for public parks, play grounds, libraries, museums and many other undertakings, indicating the historical expansion of the term "public use." The court agreed further that the mere fact that the immediate advantage of an undertaking inures to the benefit of a small group does not deprive the undertaking of its public character when the public is the recipient of many indirect benefits.[102] The court cited the case of *Welch v. Swasey*,[103] holding constitutional a Massachusetts statute limiting the height of buildings in a certain part of Boston to one height

97. (1897) 141 Mo. 375, 42 S. W. 954.

98. (1923) 298 Mo. 569, 252 S. W. 404.

99. Kansas City Ordinance No. 39946. The ordinance provided that it should not be repealed within 20 years except upon petition of a majority of the owners of private property upon the boulevard and within the benefit district.

100. This section provides: "That private property shall not be taken or damaged for public use without just compensation."

101. This section provides: "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except . . . . ."

102. The court referred to language used in the cases of *St. Louis v. Hill* (1893) 116 Mo. 527, 22 S. W. 861, and *St. Louis v. Dorr* (1898) 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, as authority for this proposition.

103. (1907) 193 Mass. 364, 79 N. E. 745; (1909) 214 U. S. 91.

and to another height in another part of the city. The court in that case overruled the contention that the police power was being exercised for purely private aesthetic purposes. The majority in *Kansas City v. Liebi* also relied on the cases of *Attorney-General v. Williams*[104] and *State v. Houghton*[105] the former upholding a Massachusetts statute limiting the height of buildings around Copley Square in Boston, compensation for damages being given, and the latter holding a Minnesota statute constitutional which provided that in cities of the first class certain areas should be used exclusively for residential purposes. The courts in each of the cases ruled that the public interest justified the exercise of the power of eminent domain. Holt, J., in *State v. Houghton* rendered an eminently sound opinion.

Judge Walker dissented in *Kansas City v. Liebi* on the ground that the city ordinance authorized private property to be condemned and taxed for purely private and aesthetic purposes in violation of sections 20 and 30 of Article II of the Missouri Constitution and of the Fourteenth Amendment to the Federal Constitution. It appears that Judge Walker conceives "public use" to imply "possession, occupation, and enjoyment of the land by the public at large or by public agencies," and he would not extend it to quasi-public control in the form of regulation. Judge David Blair concurred in Judge Walker's opinion. The case of *Kansas City v. Liebi* did not involve a comprehensive zoning ordinance but the rulings in that case seem to form the basis for the majority opinion in the later zoning cases.

State ex rel. Penrose Investment Company et al. v. McKelvey[106] was the first comprehensive zoning case decided by the Missouri Supreme Court. An original proceeding in mandamus was brought by the state on behalf of the relators against McKelvey, building commissioner of the City of St. Louis, to require him to issue a building permit. The relators owned the lot upon which they desired to erect a building in which an electrically driven ice manufacturing plant was to be installed and conducted. Compliance with all ordinances, except the zoning ordinance number 30199, approved July 15, 1918, and the observance of all formal requirements prerequisite to the issuance of a building permit were alleged. The respondent defended on the ground that the relators had failed to comply with the requirements of the zoning ordinance, particularly sections 2, 3, 6, 7, and 29.[107] It was pointed out that the zoning

104. (1899) 174 Mass. 476, 55 N. E. 77.
105. (1920) 144 Minn. 1, 174 N. W. 885.
106. (1923) 301 Mo. 1, 256 S. W. 474.
107. The following sections of the St. Louis zoning ordinance were involved in the zoning cases.

"*Section Two.*—In order to designate, regulate and restrict the location of

ordinance classified the district in which the relators sought to install their plant as a "second residence district", and that the proposed use was prohibited by said ordinance.

The relators answered that the zoning ordinance was unconstitutional and void for several reasons. First, they said that the ordinance authorized the taking of private property for a proposed public use without making just compensation in violation of the Fifth Amend-

commerce, business, trades and industries and the location of all buildings designed or occupied for specified uses, the city of St. Louis is hereby divided into five districts which shall be known as: (a) first residence district; (b) second residence district; (c) commercial district; (d) industrial district; and (e) unrestricted district. The City of St. Louis is hereby divided into the five classes of districts aforesaid, and the boundaries of the districts are shown upon the map attached hereto and made a part of this ordinance, being designated as 'Use Zone Map', and said map and all the notations, references and other things shown thereon shall be as much a part of this ordinance as if the matters and things set forth by said map were all fully described herein.

"*Section Three*—Except as hereinafter provided, the use or uses of all buildings and premises existing at the time of the adoption of this ordinance may be continued. Except as hereinafter provided, no building now existing and no building hereafter erected shall be occupied, or altered for occupancy, for a specified use in a district restricted against such use, as shown on the map hereinabove mentioned.

"*Section Six*—All land and buildings in the second residence district except as hereinafter provided shall be erected for and used exclusively as dwellings, tenements, hotels, lodging and boarding houses, churches, private clubs, hospitals or sanitariums, public or semi-public institutions of an educational, philanthropic elecmosynary nature, railroad passenger station and the usual accessories located in the same lot or plot with these various buildings, including the office of a physician, dentist or other persons authorized by law to practice medicine and including private garage containing space for not more than four automobiles; provided, however, that no tenement, hotel, lodging or boarding house shall hereafter be erected, maintained or conducted except as provided in Section Three in this ordinance in any second residence district occupied exclusively by one and two family residences, without the unanimous consent of the Board of Public Service after public hearing, duly advertised, has been held thereon. Farming, truck gardening, nurseries or greenhouses may be erected and maintained in second residence districts.

"*Section Seven*—All land and buildings in commercial districts as shown upon the map hereinabove mentioned shall be erected for and used as a store or shop for the conduct of a wholesale or retail business, a place of amusement, an office or offices, police or fire department station house, post office, studios, conservatories, dancing academies, carpenter shop, cleaning and dyeing works, painting, paper hanging and decorating stores, dressmaker, laundry, millinery store, photograph gallery, plumbing shop, roofing or plastering establishment, tailor, tin-smith, undertaker, upholsterer and other similar enterprises or institutions, and also any use permitted in the first and second residence districts; provided, however, that no building shall have more than fifty per cent of the floor area devoted to industry or storage purposes incidental to its primary use, and provided that not more than five employes shall be engaged in any trade or industry which shall be incidental or essential to the primary use. A telephone exchange, electric sub-station, or car barn may be established in the commercial district upon permit being issued therefor by the Board of Public Service where such a structure will not be detrimental to or tend to change the character of the neighborhood. The Board of Public Service may issue a permit for the establishing of a public garage in a residential or commercial district

ment to the Federal Constitution. Second, they contended that the ordinance was not a proper exercise of the police power because it was arbitrary, unreasonable and not of uniform application throughout St. Louis; that it was not a constitutional exercise of the power of eminent domain as it was without provision for just compensation; hence, it violated the due process clause and the uniformity clause of section 1 of the Fourteenth Amendment to the Federal Constitution. Third, they argued that the ordinance violated sections 21 and 30 of Article II of the Missouri Constitution by permitting private property to be "taken" and "damaged for public use without just compensation," and that it authorized the taking of private property without due process of law. Considerable stress was laid on the proposition that the contemplated use was not a nuisance *per se* or potential and since the proposed use was lawful the constitutional provisions referred to above prohibit its restriction in the manner set out by the zoning ordinance.

It was contended on behalf of the City that the ordinance was reasonable and necessary in the light of existing economic and social conditions in St. Louis to protect and to promote public health, safety, morals, and general good; that it was a proper exercise of the City's police power and not a violation of the provisions of the Missouri and Federal Constitutions set out by the relators. Issue was joined on the constitutional points mentioned.

A careful reading of the majority opinion written by Judge Walker fails to make clear just what was the basis of the decision. Much space is used to show that the City of St. Louis was acting in excess of the police power granted in the charter of 1914,[108] and this appears to be the real ground for holding the ordinance invalid. Subsequently in the same opinion he intimates that the ordinance is unconstitutional because it imposes restrictions on the lawful use of property having no relation to public health, morals, safety, and general welfare, hence, a private use, and an improper exercise of either the police power or the power of eminent domain. In support of this latter view he cites his dissenting

upon presentation of a petition duly signed where such structure will not be detrimental or tend to change the character of the neighborhood. Such permits shall specify the maximum size or capacity of the garage and shall impose appropriate safeguards upon the construction and use thereof.

"*Section Twenty-nine*—The City Plan Commission may of its own initiative or upon petition duly signed and acknowledged by the owners of fifty per cent of the property in any given district or part thereof, cause to be prepared and introduced an ordinance altering the height, area or use restrictions herewith or subsequently established for such district or part thereof as may be deemed affected by such change. Appeal from the decision of the City Plan Commission on all petitions may be taken to the Board of Public Service."

108. Quoted, *supra*, note 88.

opinion in *Kansas City v. Liebi* and the opinion of Commissioner Higbee in *City of St. Louis v. Evraiff*,[109] an opinion involving the constitutionality of the same ordinance under review in the Penrose case but which had not yet been handed down. Chief Justice Woodson and Judge David E. Blair concurred in Judge Walker's opinion.

Judge Graves in a separate opinion concurred only in the result. In substance he said that the use for which St. Louis sought to take some interest or right in private property by regulation was a public use, but that such rights could not be taken for public use without just compensation. He said that eminent domain is but the limited exercise of the police power; and that the police power could only be used to abate, suppress or regulate uses of property which, if not regulated, would rise to the "plane of nuisances" while restrictions on the lawful uses of property could only be imposed under eminent domain with just compensation. He seems to have a very conservative view as to the scope of the police power. Judge Graves intimates that he would have sustained the ordinance had adequate compensation been given.

Judge White wrote a strong dissenting opinion which might well be sustained upon both reason and authority. He showed conclusively that St. Louis had been given the power to adopt zoning in the charter of 1914.[110] He said that the state's police power is of necessity being expanded to meet the increased social and economic needs, and he cites much authority both State and Federal to show zoning to be proper under that power.[111] He points out how in the light of modern knowledge zoning is a necessary means of insuring public health, safety, enjoyment, public economy, and the general good. The following quotation from his opinion dealing with health, is indicative of the progressive attitude of his reasoning:

"There is the matter of health. The state's interference in an individual's liberty is not limited, as formerly, to vaccination and quarantine against contagion. The recent discoveries of medical science show that a

109. (1923) 301 Mo. 231, 256 S. W. 489. This case had been decided but the opinion had not yet been handed down.

110. Provisions of the charter are quoted *supra*, note 88.

111. The following cases formed the basis of Justice White's dissent: *Welch v. Swasey* (1909) 214 U. S. 91; *St. Louis Poster Adv. Co. v. St. Louis* (1919) 249 U. S. 269; *St. Louis Gunning Adv. Co. v. St. Louis* (1911) 235 Mo. 99, 137 S. W. 929; *Ware v. Wichita* (1923) 113 Kans. 153, 214 Pac. 99; *Palmer v. Mann* (1923) 198 N. Y. S.548; *City of Utica v. Hanna* (1922) 202 App. Div. 610, 195 N. Y. S. 225; *City of Des Moines v. Manhattan Oil Co.* (1922) 193 Ia. 1096, 188 N. W. 921; *Opinion of the Justices* (1920) 234 Mass. 597, 127 N. E. 525; *Atty.-Gen. v. Williams et al.* (1899) 174 Mass. 476, 55 N. E. 77; *Cliffside Park Realty Co. v. Borough* (1921) 96 N. J. L. 278, 114 Atl. 797; *Schait v. Senior* (1922) 97 N. J. L. 390, 117 Atl. 517; *Knack v. Scrap Iron Co.* (1922) 219 Mich. 573, 189 N. W. 54; *State ex rel. v. Houghton* (1919) 144 Minn. 1, 174 N. W. 885.

thousand perils, unsuspected a generation ago, swarm in the atmosphere of a busy street. For instance, the poisonous gas from the exhaust of a gasoline engine is dangerous to health even in the open spaces of city thoroughfares. Healthful surroundings mean not only freedom from contagion and poisonous gases, but freedom from disturbing noises and confusion of traffic and other incidents which disturb the quiet and peace of one's home. The city planners are better judges of those matters than the courts."

He shows that the effect of the majority view "instead of protecting the citizens of St. Louis in the enjoyment of their property rights is to render the city powerless to protect them;" that the person, the use of whose property alone is restricted, is considered while the great majority the enjoyment of whose property required such restriction, are ignored; that more consideration is given to an alleged private right than to the public good. Justice White is of the opinion that it is the comprehensiveness of the zoning scheme that makes it reasonable. All the property is regulated in the interest of all the people. According to Judge White the St. Louis zoning ordinance was reasonable and necessary to the future development and expansion of that city and St. Louis has the power to segregate its factories and protect the residence district against the intrusion of manufacturing establishments. Judges James T. Blair and Ragland, concurred in the dissent.

The City of St. Louis was not satisfied with the four to three decision. Three of the judges, Walker, Woodson, and David Blair, held that the St. Louis charter had given no power to zone and that the use was private. Judge Graves seemed to favor zoning if carried out under eminent domain, while Judges White, James T. Blair, and Ragland had held the St. Louis ordinance to be proper under the police power. A motion for a rehearing was heard November 20, 1923.

Judge Graves wrote the majority opinion on the motion for rehearing. In brief, this opinion recites that the City of St. Louis had been given by its charter the power to adopt zoning but it holds the particular ordinance invalid because it restricts the use of private property for a public purpose—the benefits of zoning in violation of the Fifth Amendment to the Federal Constitution and of sections 20[112] and 21[112] of Article II of the Missouri Constitution. The public purpose is conceded, and, to sustain the proposition that these purposes could not be accomplished without compensation being given, the majority rely on the cases of *St. Louis v. Hill*,[113] *St. Louis v. Dorr*,[114] *St. Louis v. Dreisoerner*,[115] and

112. Quoted *supra*.
113. (1893) 116 Mo. 527, 22 S. W. 861.
114. (1898) 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.
115. (1912) 243 Mo. 217, 147 S. W. 998.

Kansas City v. Liebi.[116] As was true of the majority opinion written by Judge Walker on the original hearing, not a single case involving a comprehensive zoning ordinance was reviewed or discussed. Judges Woodson, Walker and David E. Blair appear to have receded somewhat from the position they took in the opinion on the original hearing and now concur in the view expressed by Judge Graves. Judge White wrote a dissenting opinion on the motion for rehearing which emphasizes the illogical position taken by the majority.

The case of *City of St. Louis v. Evraiff et al.*[117] was decided along with the original decision in the Penrose case. Since that case involved practically the same questions relative to the constitutionality of the St. Louis zoning ordinance as did the Penrose case, it is desirable to note the rulings in the Evraiff case in order that both cases may be discussed together. Evraiff and others had established and conducted a rag and junk yard within a section of St. Louis designated as an industrial district by the St. Louis zoning ordinance. The ordinance prohibited the use of property for the storage of rags, junk, etc., in the industrial districts as named and described by the ordinance. It was to recover the penalty for violating this provision of the zoning ordinance that this action was instituted against Evraiff *et al.* A demurrer to the action having been sustained, the city appealed to the Supreme Court.

It was urged on behalf of St. Louis that the provisions of the ordinance were necessary and reasonable to protect and promote the public health, morals, safety, and general good and that the zoning ordinance was a proper exercise of authorized police power. The court in an opinion written by Commissioner Higbee sustained the views of the defense and ruled that the zoning ordinance placed arbitrary and unreasonable restrictions on the use of private property having no relation to health, safety, and welfare of the inhabitants[118] of the city, hence, the ordinance was not a proper exercise of the city's police power and constituted a violation of due process as provided for in section 30 of Article II of the Missouri Constitution and the Fourteenth Amendment to the Federal Constitution. The opinion also states that the ordinance was not within the powers delegated to the city. The greater portion of the authority relied on in the opinion, strange as it may seem, points to a conclusion directly opposite to the one reached. Judges Woodson, David

116. (1923) 298 Mo. 569, 252 S. W. 404.

117. (1923) 301 Mo. 231, 256 S. W. 489.

118. The Missouri Supreme Court previously held that the city of St. Louis had power to license and regulate junk dealers under its police power because, besides being favorable to the disposition of stolen goods, the rags and junk might contain germs and thus cause a spread of disease. *City of St. Louis v. Sam Baskowiz,* (1918) 273 Mo. 543, 201 S. W. 870.

E. Blair and Walker concurred in this opinion. Judge Graves concurred in the result for the reasons stated in his separate concurring opinion in the Penrose case. Judges White, James T. Blair, and Ragland dissented.

The Missouri Supreme Court in *Better Built Home and Mortgage Co. v. Mc Kelvey* cited the Penrose and Evraiff cases and again declared the St. Louis zoning ordinance void for the reasons given in those cases.[119] The case of *State ex rel. Better Built Home and Mortgage Co. v. Davis*[120] involved the question as to whether a writ of prohibition would issue against the zoning commission of the City of Clayton, Missouri. The Missouri Supreme Court ruled that the commission was not exercising judicial functions in holding public hearings on the proposed zoning ordinance and that the writ would not issue. The case is of interest because zoning was being attempted under the enabling act approved April 1, 1921, Laws 1921, p. 481, and the dicta in the case by Judges Graves state that both the law and the ordinance would be invalid unless the law and the ordinance provided just compensation to those the use of whose property would be restricted by the zoning ordinance.

A narrow view as to the scope of the police power underlies the majority ruling in the Penrose and Evraiff cases. There is some dicta concurred in by Judges Walker, David Blair and Woodson, to the effect that St. Louis had not been granted the power sought to be exercised; but these judges later (on the motion for the rehearing of the Penrose case) acceded to the views of Judge Graves that the power had been granted but that its exercise not being within the police power would amount to a taking or damaging of private property for a public use and would violate the Fifth and Fourteenth Amendments to the Federal Constitution and sections 21 and 30 of Article II of the Missouri Constitution. That conclusion, it seems, can hardly be sustained either by reason or authority.

It is a well-settled rule of constitutional law that the provision, "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation," in the Fifth Amendment to the Federal Constitution constitutes a limitation upon the Federal Government and in no way restricts state action.[121] The weight of authority also sustains the proposition that the

119. (1923) 301 Mo. 130, 256 S. W. 495.

120. (1924) 302 Mo. 307, 259 S. W. 80.

121. *Hunter v. Pittsburg* (1907) 207 U. S. 161; *Holden v. Hardy* (1898) 169 U. S. 366; *Munn v. Ill.* (1876) 94 U. S. 113; *Davis v. Texas* (1891) 139 U. S. 651; *State v. Gordon* (1916) 268 Mo. 713, 188 S. W. 160; *State v. Parker Distilling Co.* (1911) 237 Mo. 103, 139 S. W. 453; *McGrew v. Mo. Pac. Ry. Co.* (1910) 230 Mo. 496, 132 S. W. 1076; also see cases collected 12 C. J. page 1194, note 80.

destruction of property or the limitation of the use of it under the police power does not violate "due process" as employed in state constitutions and in the fourteenth Amendment to the Federal Constitution. Nor is it a taking within the meaning of the eminent domain provision of the Missouri Constitution for which compensation must be made.[122]

Mr. Justice Brown of the Federal Supreme Court in *Holden v. Hardy*,[123] p. 391, speaking of the police power said:

"While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the last century."

It is well settled that a state government may under its police power impose restrictions on the use of property in the interest of public health, morals, and safety and it is also well established that the same restrictions may be imposed upon the use of property in promotion of the public welfare, convenience, and general prosperity.

The Federal Supreme Court in *C. B. and Q. Ry. Co. v. Drainage Commissioners*, [124] p. 592, said: "We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. . . . . ."

This principle was quoted with approval in *Bacon v. Walker*,[125] where it was said: "It (the police power) extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people."

In *Noble State Bank v. Haskell*,[126] the court said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. U. S.*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In *Munn v. Illinois*[127] at page 124, Chief Justice White said:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact

122. *Mugler v. Kansas* (1887) 123 U. S. 623; *Chicago etc. R. R. Co. v. Illinois* (1906) 200 U. S. 561; *St. Louis Poster Adv. Co. v. St. Louis* (1919) 249 U. S. 269; *St. Louis Gunning Adv. Co. v. St. Louis* (1911) 235 Mo. 99; 137 S. W. 929; *Carson v. Missouri Ry. Co.* (1916) 184 S. W. 1039; *Morrison v. Morey* (1898) 146 Mo. 543, 48 S. W. 629; *Chicago, etc. Ry Co. v. Milwaukee* (1897) 97 Wis. 418, 72 N. W. 1118.

123. (1898) 169 U. S. 366.

124. (1906) 200 U. S. 561.

125. (1906) 204 U. S. 311.

126. (1911) 219 U. S. 104 at p. 111.

127. (1876) 94 U. S. 113.

by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 'are nothing more than the powers of government inherent in every sovereignty, ... that is to say . . . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

In a well reasoned case, *State ex rel. Adams v. Burdge*,[128] at p. 398, the Wisconsin Supreme Court said: "It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." The same court in the trading stamp cases[129] at p. 625 also said:

"The law on the subject as embodied in the decided cases shows that the police power is held to include all those regulations which promote the general interest and prosperity of the public generally."

In *Haller Sign Works v. Physical Culture School*,[130] the Illinois Supreme Court p. 439 said:

"The natural right every citizen has to use his property according to his own will is necessarily subject to the limitation that in such use others shall not be injured.

"All uses of property or courses of conduct which are injurious to the health, comfort, safety, and welfare of society may be prohibited under the sovereign power of the State, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the State may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, *salus populi est suprema lex*. The existence and exercise of this power are an essential attribute of sovereignty and the establishment of government presupposes that the individual citizen surrenders all private rights the

128. (1897) 95 Wis. 390, 70 N. W. 347.
129. (1917) 166 Wis. 613, 166 N. W. 64.
130. (1911) 249 Ill. 436, 94 N. E. 920.

exercise of which would prove hurtful to the citizens generally, *City of Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 375; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

"While the general principle above announced is uniformly recognized, it is equally true that the owner of property has the right to make any use of it he desires that does not endanger or threaten the safety, health, comfort or general welfare of the public."

The above quotations indicate the line of reasoning that has led the courts to permit the newer and multiple lines of human endeavor to be regulated under the police power. This does not signify that our constitutions have been changed or violated. It means that our constitutional provisions are being interpreted in the light of modern needs and conditions. Law is by necessity in a degree a "progressive science." That the better reason and weight of authority greatly increases the scope of the police power is a matter of common knowledge with most courts, State and Federal.[131]

It has been repeatedly held that reasonable municipal zoning with regulations based on health, morals, safety and the general welfare of the community falls within the widened scope of the police power. The law is clear that zoning regulations restricting the height, area and bulk of buildings may be imposed as a public measure, where the provisions of the ordinance are framed so as to have some relation to access of light and air, fire protection, or facility for fighting fire.[132]

The subject of use regulation in zoning presents the most difficult question for the courts but the weight of authority also sustains this phase of zoning as was brought out in Chapter II of this article.

The majority in the Penrose Case took the position that section 21 of Article II of the Missouri Constitution which provides, "That private property shall not be taken or damaged for public use without just compensation" expressly limits the State's police power. Special emphasis is placed on the effect of the damage clause. That construction appears to be erroneous. The Missouri Constitution of 1865 did not contain the words "or damaged." The Constitution of 1865, Article I, section 16 provided: "That no private property ought to be taken or applied to public use, without just compensation." The damage clause was inserted in the Constitution of 1875 for remedial purposes to correct the narrow interpretation the courts had placed upon the words "taken

131. For a fuller exposition on the nature and scope of the police power see Hall, Cases on Constitutional Law, ch. X, pp. 318-531. Also see 12 C. J. pp. 904-932 and the cases there cited.

132. *Welch v. Swasey* (1909) 214 U. S. 91; *Cliffside Park Realty Co. v. Borough of Cliffside Park* (1921) 96 N. J. L. 278, 114 Atl. 797; *State ex rel. Klefisch v. Wisconsin Telephone Co.* (1923) 181 Wis. 519, 195 N. W. 544.

for public use." We should construe the newer wording with reference to the old provision, the evil to be corrected and the remedy.[133] Clearly, the damage clause was intended to apply to a taking under eminent domain for public use and was not intended to cut down or limit the state's police power. Justice White pointed out in his dissenting opinion, on the motion for rehearing, that the weight of the later Missouri decisions confirms that view. Justice White quoted from the ruling in *Van De Vere v. Kansas City*[134] to prove that the court had construed the damage clause to refer to special damages, and not to damages general to a class. The quotation follows: "The plaintiff, if suing for consequential damages, must show that he suffered an injury special and peculiar to his property and that it was not enough to show a damage the same in kind as that suffered by other persons, though different in degree." As was stated by Justice White, that ruling has been expressly approved in *Gorman v. Railroad*,[135] and *Peters v. Buckner*.[136]

The rulings in *St. Louis Gunning Adv. Co. v. St. Louis*[137] and in *St. Louis Poster Adv. Co. v. St. Louis*[138] (both discussed supra,) and *Kansas City Gunning Adv. Co. v. Kansas City*[139] indicate a greatly expanded police power rather than a limited one.

A quotation from *St. Louis Gunning Adv. Co. v. St. Louis*[137] is in point. Judge Woodson said:

"The Constitution of this State in the Bill of Rights provides that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry ..... This, of course, does not confer upon anyone the absolute right to use his property as he pleases. No such right exists in a state of civil society; but on the contrary, the right of one to use his own must always be exercised in subordination to the right of others ..... The same instrument provides that 'no person shall be deprived of life, liberty, or property, without due process of law.' Clearly this provision was not intended to withdraw the rights of private property from the reasonable exercise of the police power by the legislative branch of the Government. 'All rights are held subject to the police power of the state.' "

133. That a constitutional provision should be examined in the light of prior and contemporaneous history, and of the condition and circumstances under which the constitutional provision was adopted, see: *Maxwell v. Dow* (1900) 176 U. S. 581; *Fargo v. Powers* (1914) 220 Fed. 697; *Ferrill v. Keel* (1912) 105 Ark. 380, 151 S. W. 269; *Gardner v. Ray* (1913) 154 Ky 509, 157 S. E. 1147.

134. (1891) 107 Mo. 83, p. 89, 17 S. W. 695.

135. (1913) 255 Mo. 483, 164 S. W. 509.

136. (1921) 288 Mo. 618, 232 S. W. 1024.

137. (1911) 235 Mo. 99, 137 S. W. 929.

138. (1917) 195 S. W. 717.

139. (1912) 240 Mo. 659, 144 S. W. 1099.

Judge Graves' opinion for the Missouri Supreme Court in the case of *State ex rel. v. Public Service Commission*[140] p. 210, quoted with approval the Federal Supreme Court ruling in *Chicago and Alton R. Co. v. Tranbarger*,[141] as follows:

" 'It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. (Atlantic Coast Line v. Galdboro, 232 U. S. 548, 558, and cases cited.) And it is also settled that the police power embraces regulations designed to promote the *public convenience or the general welfare and prosperity* as well as those in the interest of the public health, morals, or safety. (*Lake Shore and Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 292; *C. B. & Q. Ry. v. Drainage Commissioners*, 200 U. S. 561, 592; *Bacon v. Walker*, 204 U. S. 311, 317).' "

The Missouri cases relied on by the majority in the zoning cases, as authority to prove a limited scope of the police power, can be clearly distinguished. *St. Louis v. Hill*, *St. Louis v. Dorr*, and *St. Louis v. Dreisoerner* (cases discussed supra in this chapter) are not authority for a limited police power. As was brought out, those cases did not involve comprehensive zoning ordinances but dealt with special cases. These ordinances were unreasonable because the restrictions imposed had no relation to public health, morals, or safety and were in a measure discriminatory since they applied to only a part of the city with no constitutional basis for the classification. Those rulings would stand even under the more liberal view as to the scope of the police power. The case of *Kansas City v. Liebi* (discussed supra) involved an exercise of the power of eminent domain. The question of police power was not involved but the rulings in that case indicate a liberal view as to the nature of a public use.

As I have attempted to bring out, the later Missouri decisions (excepting the zoning cases) indicate that Missouri's police power has an average scope if not an expanded one, and that section 21 of Article II of the Missouri Constitution does not limit the scope of this power.

The narrow view taken by the majority as to the scope of the police power apparently precluded a consideration of the reasonableness of the particular zoning ordinance and of zoning in general. This attitude is hardly in accord with an earlier statement in *St. Louis v. Theatre*

140. (1918) 275 Mo. 201, 204 S. W. 497.
141. (1915) 238 U. S. 67, 76. (The italics are Judge Graves'.)

Co.,[142] quoted by the dissenting opinion in the Penrose Case. Judge White said:

"What the urgent necessities of the public are in a crowded city, we are unable to judge without more than the legislative act in the shape of an ordinance. 'Municipal corporations are *prima facie* the sole judges of the necessity of their ordinances and courts will not, ordinarily, review their reasonableness, when passed in strict pursuance of an express grant.'"

The Missouri Supreme Court has repeatedly ruled in accord with the weight of authority that there is a presumption in favor of constitutionality of all legislative acts and that all doubts are resolved in favor of the constitutionality.[143]

The court in its zeal to protect the individual lost sight of the public welfare. Zoning is a new type of property regulation. It has been evolved to secure public benefits which the law of nuisances and a less comprehensive application of the police power have been inadequate to secure. Alfred Bretman[144] has ably stated this view as follows:

"The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections in which the homes of the people are or may appropriately be located. The mode of regulation may be new; but the purpose and the fundamental philosophy are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise. True, the noiseless or odorless plant is excluded along with the nuisance type. Experience demonstrates, however, that the advent of the first non-residential structure in a residential neighborhood makes it more unfair and therefore more difficult to prevent the arrival of the second, even though the second be more nearly a nuisance type than the first; that these non-residential structures tend to locate themselves in a scattered and spotty manner, thus harming a larger territory than would be

142. (1907) 202 Mo. 690, 100 S. W. 627.

143. *State v. Cantwell* (1904) 179 Mo. 245, 78 S. W. 569; *Ex Parte Loring* (1903) 178 Mo. 194, 77 S. W. 508; *State v. Thompson* (1898) 144 Mo. 314, 46 S. W. 191; *State ex inf. v. Merchants Exchange* (1916) 269 Mo. 346, 190 S. W. 903. Accord: *Atkins v. Kans.* (1903) 191 U S. 207; *Munn v. Ill.* (1876) 94 U. S. 131.

144. Bretman, *Harvard Law Review*, XXXVII, p. 837.

affected if they were more compactly situated; that often the neighborhood becomes blighted as a place of habitation, without substantially developing as a business or industrial district; that, consequently, the single new plant, however non-nuisance in itself, may not be inoffensive, or, at least falls well within the settled principle of constitutional law which permits the innocuous to be included within the prohibition or regulation when such inclusion is reasonably necessary in order that the harmful may be successfully combatted."

Many courts sustain reasonable zoning as a proper exercise of the police power.[145] Unreasonable and arbitrary zoning laws can no more be sustained under the police power than can any other unreasonable police regulation violative of due process.

The Federal Supreme Court in *Hadacheck v. Sabastian*, (sustaining the California Supreme Court in holding an ordinance valid under the police power that restricted a certain area to residential use) in speaking of the case of *Reinman v. Little Rock*, where a livery stable was excluded from a certain district, said: "granting that the business was not a nuisance *per se*, it was clearly within the police power of the state to regulate it." The court also said: "There must be progress, and if in its march private interests are in the way they must yield to the good of the community." The Federal Supreme Court has held three times that a municipal government under its police power (when the latter has been properly delegated to it) may prohibit the owners of property from using their property for business purposes in residence districts.[146]

The Utah Supreme Court[147] upholding an ordinance of Salt Lake City designating certain areas as residence districts and prohibiting certain businesses (among which was the foundry business) from said areas ruled, that where the creation of a residence district would extend to the needs of the general public, the power to regulate or prohibit by ordinance the invasion of such a district by industrial plants ought not to be questioned on the ground that the exclusion of the industrial plant would be the taking of private property without just compensation.

In the case of *Lincoln Trust Co. v. Williams Building Corporation*[148] an action was brought to compel specific performance of a contract to purchase land free from encumbrance. The court held that the New York Zoning ordinance dividing New York City into districts and regulating the height, area, and uses of buildings and land was a proper

145. See cases *supra*.

146. *Hadacheck v. Sebastian*, (1912) 229 U. S. 394; *Cusack v. Chicago* (1916) 242 U. S. 529; *St. Louis Poster Adv. Co. v. St. Louis* (1918) 249 U. S. 269.

147. *Salt Lake City v. Western Foundry and Stove Rep. Wks.* (1920) 55 Utah 447, 187 Pac. 829.

148. (1920) 229 N. Y. 313, 128 N. E. 209.

exercise of the police power and did not constitute an encumbrance since the contract to purchase the land was entered into subject to the same. The court said: "In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an encumbrance, since it was a proper exercise of the police power."

The reasonableness of zoning was well brought out by the Massachusetts Supreme Court in the *Opinion of the Justices.*[149] In deciding that the state zoning-enabling act would not violate any part of the Federal Constitution the Court said: "The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire, and which render life less secure to those living in homes in close proximity. Health and security from injury of children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by requiring that dwelling houses be separated from the territory devoted to trade and industry. The suppression and prevention of disorder, the extinguishment of fires, the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residence."

The New York Court in *Cohen v. Rosendale Realty Co.*[150] upheld the zoning resolution for Brooklyn and prohibited the erection of a building unlawfully commenced before its passage.

The Court of Errors and Appeals of New Jersey in *Cliffside Park Realty Co. v. Borough of Cliffside*[151] refused to declare the elaborate zoning ordinance of Cliffside Park unconstitutional *in toto* because it unduly restricted the use of property and because parts of it were invalid.

The Louisiana Supreme Court has upheld zoning restrictions in the form of block district ordinances.[152] Although the Louisiana Constitution of 1921, Article 14, section 29, authorized zoning, the reasoning employed would probably have sustained it as a police power measure without the constitutional provision. The reasoning is much like that

149. (1920) 234 Mass. 597, 611, 127 N. E. 525.
150. (1923) 199 N. Y. Supp. 4.
151. (1921) 96 N. J. L. 278, 114 Atl. 797.
152. See *Civello v. New Orleans* (and cases following) (1923) 154 La. 271, 287, 290, 97 So. 440; *Boland v. Compagno* (1923) 154 La. 470, 97 So. 661. The case of *Calva v. New Orleans* (1915) 136 La. 480, 67 So. 338, is overruled.

used by the courts of other states to sustain more comprehensive zoning ordinances.

The Wisconsin Supreme Court in the well-reasoned case of *State ex rel Carter v. Harper*[153] sustained the comprehensive zoning law for Milwaukee in holding that the realtor was not entitled to a building permit to enlarge his dairy business in violation of said ordinance, even though he was engaged in said business before the zoning law was passed. The court, in holding that zoning was proper under the police power and not a violation of either the State or Federal Constitutions, summarized the benefits to cities adopting zoning as follows:

"They attract a desirable and assure a permanent citizenship; they foster pride in and an attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such a district is not deprived of its use by such regulations. He may use it for the purposes to which the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden."

In speaking of the question of aesthetics in that case, Justice Owens said on p. 455:

"It is sometimes said that these regulations rest solely upon aesthetic considerations . . . . . It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities, well may be pondered."

The New York Supreme Court in *Palmer v. Mann*[154] upheld the

153. (1923) 182 Wis. 148, 196 N. W. 451.

154. (1923) 198 N. Y. Supp. 548. The decision was reversed in *Palmer v. Mann* (201 N. Y. Supp. 525) because of a different interpretation of some of the detailed provisions of the ordinance that affected this particular case. The ruling as to the constitutionality was not involved in the rehearing.

elaborate zoning plan for New York City and ruled that the petitioner must comply with the height restrictions before she could demand a building permit.

In *Schait v. Senior*,[155] the New Jersey Supreme Court ruled that the New Jersey Home Rule Act authorizing a city under its police power to enact zoning ordinances to promote the public health, safety, and general welfare was valid, and that the ordinance of Newark prohibiting the erection of garages within a 200 foot radius of certain public buildings was constitutional.

Many other cases have sustained zoning as a proper exercise of the police power where the restrictions contained in the zoning ordinances have had any reasonable connection with the accomplishment of a public need relative to the public health, morals, safety, and general welfare.[156] There are cases that are often cited as authority to prove that zoning is unconstitutional, but all of these cases, except the Missouri cases involving the St. Louis zoning ordinance, can be distinguished. Some writers seem to have failed to understand the real basis of the Missouri Supreme Court's decisions in the zoning cases.[157]

155. (1922) 97 N. J. L. 390, 117 Atl. 517.

156. See *Ware v. Wichita* (1923) 113 Kans. 153, 214 Pac. 99; *Manhattan Oil Co. v. Des Moines* (1922) 193 Iowa 1096, 188 N. W. 921; *Salt Lake City v. Western Foundry Wks.* (1920) 55 Utah 447, 187 Pac. 829. Also see *People v. Village of Oak Park*, (1914) 266 Ill. 365, 107 N. E. 636, holding valid an ordinance prohibiting the erection of automobile garages within certain districts. The court said that garages would become nuisances in some localities.

Brown v. City of Los Angeles (1920) 183 Calif. 783, 192 Pac. 716, holds that Los Angeles under the police power can confine the undertaking business to certain areas. The court pointed out that Cal. had regulated livery stables, laundries, soap and glue factories, carpet beating establishments, lumber yards, brick yards, billboards, cemeteries, private hospitals for inebriates, insane and tubercular patients under the police power and that their maintenance may be prohibited under that power.

State ex rel. Twin City Building and Investment Co. v. Houghton (1920) 144 Minn. 1, 174 N. W. 885, holds that there is a sufficient public purpose involved in prohibiting an apartment building in a residence district, to justify the exercise of the power of eminent domain. A general zoning scheme was not involved but the reasoning as to the public purpose is very favorable for zoning under the police power.

Sheldon v. Board of Appeals of New York (1921) 189 N. Y. S. 772, and *Standard Oil Co. v. City of Montgomery* (Ala. 1924 or 1925, unreported) uphold zoning under the police power. Also *Walcher v. First Presbyterian Church* (1919) 76 Okla. 9,184 Pac. 106, upheld an ordinance prohibiting certain industries within 150 ft. of a church, school or hospital. *Matter of McIntosh v. Johnson* (1919) 211 N. Y. 265, 105 N. E. 414, prohibited public garages within fifty feet of a school.

Other cases upholding zoning principles are *Smolensky v. City of Chicago* (1917) 282 Ill. 131, 118 N. E. 410; *Hench v. East Orange* (1924) N. J. Adv. R. vol. II, No. 26; *State ex rel. Danzig v. Durant* (Ohio Appeals, 1923) 21 Ohio L. Bulletin and Rep. 395.

157. Young, City Planning and Restrictions on the use of Property, p. 629, reprinted from 9 Minnesota Law Review, 518-541, 593-637. Bassett, National Municipal Review, XIII, Sept. 1924.

The Michigan Supreme Court in *Clements v. McCabe*[158] held the Detroit zoning ordinance void because the state had not delegated sufficient police power to that city. It merely holds that the city has no inherent power to zone its territory. Power to zone must come from the state.

In the case of *Spann v. Dallas*[159] the Texas Supreme Court ruled that the City of Dallas could not impose restrictive conditions upon the construction of a building for the ordinary retail store business in a residential district. Here the city was attempting to apply zoning principles in a spotty, piecemeal fashion. The decision turned on the point that the city had never been authorized by the state to adopt zoning, and is not an authority against zoning.

The Illinois Supreme Court in *Friend v. Chicago*[160] ruled that Chicago had exceeded her delegated power in adopting zoning. Here again the lack of delegated power is the basis of the decision although the court in arriving at that conclusion uses language that would seem to be against zoning. Relatively, this is not a late case.

The cases of *Romar Reality Co. v. Board of Com'rs. of Haddenfield*[161] and *Levy et al. v. Mrovlag*[162] are often cited as authority for the unconstitutionality of zoning. The New Jersey court held the ordinances void in both cases as an improper use of the police power. In the Romar case the ordinance attacked purported to unreasonably restrict the construction of buildings and to limit the kinds of buildings on a certain highway without making compensation. In the Levy case, the ordinance prohibited the erection of a building for retail purposes in a certain residential area unless three-fourths of the property owners assented to the erection of the building. Neither case involved comprehensive zoning and can be easily distinguished from the zoning cases since in both the ordinances were clearly unreasonable.

The New Jersey Court in a later case, *Ignaciunas v. Risley et al.*[163] held a provision of the comprehensive zoning ordinance of Nultey invalid but refused to declare the whole ordinance void. The court made it clear that the prohibition of the erection of a store building in the designated area was unreasonable because it had no bearing on health, morals, or safety. The case resolves itself into the proposition that zoning as an exercise of the police power must be reasonable.

158. (1920) 210 Mich. 207, 177 N. W. 722.
159. (1921) 111 Texas 350, 235 S. W. 513.
160. (1913) 261 Ill. 16, 103 N. E. 609.
161. (1921) 96 N. J. L. 117, 114 Atl. 248.
162. (1921) 96 N. J. L. 367, 115 Atl. 350. Accord: *Dorison v. Saul* (1922) (N. J.) 118 Atl. 691.
163. (1923) 98 N. J. L. 712, 121 Atl. 782.

The Nebraska Supreme Court in *State ex rel. Westminster Presbyterian Church v. Edgecomb*[164] ruled that that part of the Omaha zoning ordinance which restricted lot occupancy in certain parts of the city to 25% was unreasonable and that the relators were entitled to a building permit for a building to cover 37½% of their lot. Here only a provision of the ordinance was declared void, but that ruling is contra to the better principles as well as the weight of authority. The better view is expressed in Judge Rose's dissent in that case.

Aside from the recent Missouri decisions, the cases that seem to hold against zoning may be classed under three heads, namely those where the city attempted zoning without an enabling act, those where zoning was void because it was piecemeal and clearly unreasonable,[165] and those where some provisions of the zone scheme were arbitrary and unreasonable, in their application—a matter that might well have been avoided by the proper functioning of a zoning board of appeals.[166]

An exhaustive study of the cases shows conclusively that zoning is proper under the police power, and Judge Woodson's assertion in the Evraiff case that the weight of authority condemns zoning as an exercise of the police power is not sustained by the facts.

IV

Conclusion

We are living in a highly organized society where regulation is necessary to protect freedom. Personal liberties and property rights are valuable because of such regulations. As the public needs change, our laws governing human beings and regulating property must change. What is a public need is largely a matter of public opinion and is then in the ultimate psychological. Our constitutions do not change with every popular clamor but they can be interpreted in the light of modern knowledge and present-day needs. Our Federal Constitution owes its existence today to such interpretations.

164. (1922) 108 Nebr. 859, 189 N. W. 617.

165. See *Willison, Bldg. Inspector of Denver v. Cooke* (1913) 54 Colo. 320, 130 Pac. 828; *Roerig v. Minneapolis* (1917) 136 Minn. 479, 162 N. W. 477; *Lachtman v. Houghton* (1916) 134 Minn. 226, 158 N. W. 1017. None of these cases involve a general zoning scheme and strictly speaking are not zoning cases. They should not be cited as authority against zoning. Also see *Goldman v. Crowther* (1925) 147 Md. 282, 128 Atl. 50; *Ambler Realty Co. v. Euclid Village* (1924) 21 Ohio L. B. 607. See cases collected by Bassett, *National Municipal Review* XIII, Sept. 1924, foot-note 18, p. 496, on the successful functioning of the New York Board of Zoning Appeals. It is true that a board of appeals operates as a sort of safety valve to relieve the unreasonableness of a zoning ordinance.

166. Bassett, Am. City, XXVI, p. 50.

Zoning is a new social instrument. It is a means to an end and not an end in itself. By causing the city to develop along planned and orderly lines and thus promoting the public health, happiness, safety, morals and general welfare, it helps to insure a more wholesome and prosperous life and better citizens in the future. The weight of authority sustains it as an exercise of the police power, conferred by constitutional amendment or by statute. There must be an express grant of the police power to the municipality.

The Missouri Court with a four-to-three decision has taken the position that zoning regulations can only be imposed under eminent domain, with just compensation being given. It is axiomatic in our constitutional law, State and Federal, that under the police power harmful uses of property may be and are prevented. The Missouri Court seems to limit the use of the police power for this purpose and to require the exercise of the power of eminent domain in zoning cases. The court exaggerates the old idea that every person can use his property as he pleases. The majority of the court supported their position with their interpretation of Article II, section 21, of the Missouri Constitution which provides: "That private property shall not be taken or damaged for public use without just compensation." They seem to hold that this constitutional provision limits the exercise of the State's police power.

The issues of police power and public use in the Missouri zoning cases were more or less confused by questions concerning the grant of power. Perhaps, when a zoning case arising under the enabling act passed at the 1925 session of the Missouri Legislature is properly presented to the court, it will, after a better review of the decisions, sustain zoning under the police power. However, a strict adherence to the doctrine and rulings laid down in the Penrose and other zoning cases and the dicta of Judge Graves in *Better Built Home and Mortgage Co. v. Davis*[167] would preclude zoning under the police power and make zoning possible only under eminent domain—a result that could be prevented only by an amendment to the Missouri Constitution.

167. (1924) 302 Mo. 307, 259 S. W. 80.