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CITY PLANNING AND RESTRICTIONS ON THE USE OF PROPERTY†

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IN a previous section of this article the writer dealt with the development of a comprehensive city plan emphasizing the acquisition, control and protection of public property, paying only incidental attention to private property.[63] The present discussion will treat the subject of city planning from the viewpoint of government restrictions on the use of private property.

5. BAD RESULTS FROM LACK OF REGULATING THE USE OF PRIVATE PROPERTY

A leading question arises at the outset—why should the use of private property be restricted? The answer is that our laissez faire or individualistic philosphy of city-making as in most of our business undertakings, until recently, has produced some very bad results. Some of these may now be mentioned. Until very recent times, in every city a land owner could erect a building to any height, of any size and use it for almost any purpose regardless of the injury he might do his neighbors. It frequently happened that a person bought some land in a neighborhood of homes and built a house with a vacant lot on either side only to have someone erect an apartment house on one side overshadowing his home, stealing his sunshine and fresh air. Another selfish individualist would construct a noisy, malodorous public garage which kept him awake nights and finally drove him to sell at a great loss. A residential district has sometimes been invaded by huge apartment houses that are a little less than giant, airless hives housing human

†Continued from 9 MINNESOTA LAW REVIEW 541.
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[63]9 MINNESOTA LAW REVIEW 518.

beings like crowded bees, or has been blighted by sporadic stores, factories, junk-yards, livery stables and brick-yards. These unwelcome intrusions usually have started a panic like a "run on a bank," each person trying to save himself by "unloading" his property for any kind of objectionable use.

Not only have residence districts been ruined but business districts, also, by factories and public garages which have come elbowing in among neat retail stores and well-kept apartment houses, oftentimes practically destroying the earnings of a lifetime. Industrial districts have been invaded by residences until their efficiency has been greatly impaired because they could not secure adequate public improvements such as terminals, sidings, wide, well constructed streets and large sewers adequate for carrying industrial wastes. Thus industrial efficiency has been reduced to a "residence" basis by unfriendly local residents who opposed the expenditure of necessary public funds for providing adequate industrial facilities. Furthermore, the skyscraper, called the "step-brother of the vacant lot," has reared its tall and bulky form with the result that its lower floors are too dark and unsatisfactory for human use while the upper floors depreciated the value of neighboring property. In addition, it housed such armies of occupants that streets became congested and transportation facilities choked. Finally, the frontages of houses in a block that had been built with a uniform setback have been "pocketed" by a few stores trying to short-circuit trade by leaving the regular business streets and projecting themselves with their plate-glass fronts out flush with the street line.

These obstacles to good health, stability of property values as well as comfort and convenience, have been characterized as "keeping the gas range in the parlor and the piano in the kitchen." Remedies for these untoward conditions have been earnestly sought. Prior to comprehensive city planning, a few partially successful expedients have been tried, namely, private restrictions in deeds, uncorrelated official activity, and the use of eminent domain.

6. EXPEDIENTS TRIED BEFORE THE USE OF POLICE POWER

Some may say that all these injurious effects might have been prevented by the use of private restrictions in deeds[64]. Some benefits have been secured in this way but the results have been far from satisfactory. The best results by means of restrictions in deeds

[64] 9 MINNESOTA LAW REVIEW 522, 528.

have been secured in connection with residential developments but very meager results have been secured by this method in residential districts after they have been built up. The reason for this is that private owners, as a rule, cannot agree on the restrictions after buildings are once erected. Even in residential districts the benefits by agreement usually run for a limited term, say fifteen to twenty-five years. During this time the major portion of the lots may be built upon according to agreement. But some lots remain vacant, especially corner lots, so that with the lapse of restrictions apartment houses may be placed upon them, thus exploiting the private homes district. Again, sometimes properties are allowed to deteriorate and become valueless as the restrictions expire, so that the land may be used without great loss for apartment and business houses. Another difficulty is that neighbors become jealous and alert to prevent the violation of the restrictive agreements and the result is altercations and frequent litigations. Even if the restrictions are perpetual they have proved troublesome. Some claim they are more unmanageable than restrictions for a fixed term because the courts may hold that they have lapsed on account of a change in the neighborhood. Restrictions in deeds have never been attempted for the regulation of skyscrapers, the invasion of industry in the business section, or the stabilization of large land areas well adapted to different uses. In spite of these defects, contract restrictions have been a great service to cities to supplement other forms of control and are still useful, but they are ineffective for long-time protection to carry out a comprehensive plan. They are not capable of meeting the changing needs of a city[65].

Sometimes large powers have been given officers, boards, or departments to fix fire limits and prevent offensive uses of buildings or to segregate those of the nuisance or near nuisance type to certain localities. If these officers are not guided and regulated by law their acts may result in favoritism, gross discrimination and lack of good judgment. This method has not accomplished any thorough-going results.

A theoretical case could be made out for the use of eminent domain, and in given cases, it has been successful, but in the long run it has been a failure unless used when the police power is inadequate or would work great individual hardship. The large ex-

[65]See E. M. Bassett's pamphlet on zoning, published by the National Municipal League.

pense involved in both time and labor for assessing benefits and damages of every lot in the community condemns eminent domain as unworkable when used alone. It has led to obstructive methods, specious claims and endless litigation. Every city is either growing or changing and if zoned by eminent domain would be fixed in a rigid mould; that is, eminent domain would tend to ossify the city. It is not capable of flexibility and change and has not met the requirements of a city's development along correct lines[66]. Oftentimes the individuals who most need the protection of government restrictions have been reluctant to demand the use of eminent domain.

7. Community or Police Power

City planning with reference to restrictions on the use of private property must depend upon the use of the police power.

(1) *Nature and Scope of the Police Power.*—What is this community or police power? The courts and writers on the subject freely acknowledge that the police power has never been more than partially defined. Its nature prevents a concise definition. The supreme court of Iowa has said that this power cannot be embalmed in any fixed or rigid formula and the Supreme Court of the United States in the *Slaughter House Cases*[67] said: "The police power is, and must be from its very nature, incapable of very exact definition and limitation." Justice Shaw in *Commonwealth v. Alger*[68] pointed out that it is much easier to prescribe and realize the existence and source of the police power than to mark its boundaries and prescribe the limitations of its existence." Various

[66]For approval of the use of eminent domain in zoning see R. S. Wiggin in 1 Minnesota Law Review 135 and C. J. Rockwood, 1 Minnesota Law Review 487. For cases dealing with eminent domain for zoning purposes, see Kansas City v. Liebi. (Mo. 1923) 252 S. W. 404; Atty. Gen'l v. Williams, (1899) 124 Mass. 476, 55 N. E. 77; State ex rel Twin City Bldg. & Invst. Co. v. Houghton, (1919) 144 Minn. 1, 174 N. W. 885; Pera v. Village of Shorewood, (1922) 176 Wis. 261, 186 N. W. 623; Pontiac Improvement Co. v. Board of Commissioners, (1922) 104 Ohio St. 447, 135 N. E. 635; State ex rel. Roerig v. City of Minneapolis, (1917) 136 Minn. 479, 162 N. W. 477; Sanitary District of Chicago v. Chicago and Alton R. Co. (1915) 267 Ill. 252, 108 N. E. 312; Forster v. Scott, (1893) 136 N. Y. 577, 32 N. E. 976; Matter of opening Furman Street, (1836) 17 Wend. (N. Y.) 649; Edwards v. Bruorton, (1904) 184 Mass. 529, 69 N. E. 328; Curran v. Guilfoyle, (1899) 38 App. Div. 82, 55 N. Y. S. 1018; People ex rel. Dilzer v. Calder, (1903) 89 App. Div. 503, 85 N. Y. S. 1015; St. Louis v. Hill, (1893) 116 Mo. 527. 22 S. W. 861; Fruth et al. v. Board of Affairs of City of Charleston, (1915) 84 S. E. 105, 75 W. Va. 456.

[67](1872) 16 Wall. (U. S.) 36, 21 L. Ed. 394.

[68](1851) 7 Cush. (Mass.) 53.

writers have made general statements touching the nature of the police power. John Stuart Mill, touching the powers of the government[69] said: "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Professor Ernst Freund[70], the most recent, and undoubtedly the ablest writer on the police power, after stating that the object of the police power is the general welfare, says:

"It [the state] exercises its compulsory power for the prevention and anticipation of wrong by narrowing common rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous."

The doctrine of the police power originated with, and has been developed by, the courts until this power has come to have a recognized place along with such powers of the state as the constituent, the administrative, the proprietary, the taxing and eminent domain. But the courts do not attempt formal definitions. Each case is allowed to rest upon its own individual merits. In *Gibbons v. Ogden*[71], Chief Justice Marshall referred to the state police power without using the term as "the state's power to regulate its internal affairs" whether of "trading or police," and in *Brown v. Maryland*[72] he used the term "police power" for the first time in any adjudicated case. In *Lakeview v. Rosehill Cemetery Company*[73] the supreme court of Illinois, by Justice Scott, said:

"It [the police power] is a power co-extensive with self preservation and is not inaptly termed the law of over-ruling necessity. It may be said to be that inherent or plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

While the supreme court of Vermont in the case of *Thorpe v. Rutland Railroad Company*[74] described the police power as follows:

"It extends to the protection of the lives, limbs, health, com-

[69]Essay on Liberty, Ch. 4, p. 283, Harvard Classics.
[70]Freund, Police Power, sec. 8.
[71](1824) 9 Wheat. (U. S.) 1, 6 L. Ed. 23.
[72](1827) 12 Wheat. (U. S.) 419, 6 L. Ed. 678.
[73](1873) 70 Ill. 191, 22 Am. Rep. 71.
[74](1854) 27 Vt. 140, 62 Am. Dec. 625.

fort and quiet of all property within the state . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state."

The Supreme Court of the United States has held that the state may use the police power for public convenience[75], general prosperity[76] and the greatest welfare[77]. The fourteenth amendment does not curtail the police power of the states when properly exercised. The supreme court in *Barbier v. Connolly*[78] said:

"It is not designed to interfere with the police power of the state, to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

A still wider meaning was given to the police power in the case of *Noble State Bank v. Haskell,*[79] when the court by Holmes, J. said:

"It may be said in a general way that the police power extends to all the great public needs. 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."

Summarizing these statements, it is clear that the police power has been developed by the legislatures and approved by the courts until it now extends to the protection of public health, safety, order, morals, conservation and development of natural resources, increasing industries, wealth, prosperity, and the promotion of public convenience. In short, it may now be used for all public needs and the greatest welfare.

The writer, discussing the police power in another article[80], used the following words:

"The state may exercise the police power when there is an emergency, danger or need of such magnitude as amounts to public rather than merely private welfare and the emergency danger or need cannot be met more effectively by the exercise of some other power. The police power legislation should be in some proportion to the danger or need, should tend to remove the danger or meet the need, and at the same time not seriously impair essential rights.

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[75]Lake Shore and Michigan Southern R. Co. v. Ohio, (1899) 173 U. S. 285, 19 S. C. R. 465, 43 L. Ed. 702.

[76]Bacon v. Walker, (1907) 204 U. S. 311, 27 S. C. R. 289, 51 L. Ed. 499.

[77]Chicago, Burlington and Quincy R. Co. v. Drainage Commission, (1906) 200 U. S. 561, 26 S. C. R. 341, 50 L. Ed. 596; Eubank v. Richmond, (1911) 226 U. S. 137, 33 S. C. R. 76, 57 L. Ed. 156.

[78](1885) 113 U S. 27, 5 S. C. R. 357, 28 L. Ed. 923.

[79](1911) 219 U. S. 104, 31 S. C. R. 186, 55 L. Ed. 112.

[80]5 MINNESOTA LAW REVIEW 183

"The police power is anticipatory and deals with incipient tendencies and conditions that unchecked may lead to the violation of rights and the commission of crime. The exercise of this salutary legislative power is closing the garage before the auto is stolen. If used wisely it may promote the general welfare better than a resort to other coercive measures such as taxing, eminent domain and the criminal power. The general spirit of the times favors prevention rather than allowing matters to drift until crime is committed and punishment must be inflicted; the prevention of typhoid, smallpox, diphtheria and numerous other contagious and infectious diseases by abolition of the slums and the substitution of sanitary hygiene, drainage and sewage; the prevention of vice by wholesome amusements, settlement houses and proper home conditions; the prevention of food adulteration instead of curing nationwide poisoning and disease; the prevention of fraud by proper licensing, inspection and publicity; the prevention of social and economic injustice by wholesome legislation. In short, the idea back of police power legislation is that an ounce of prevention is worth a pound of cure; restraint and regulation of persons in the use of their liberty and property are better than reformation and punishment."

(2) *Government Restrictions on the Use of Private Property.*—The reader may well raise the question whether city planning can be promoted by invoking the police power for the purpose of placing salutary restrictions on the use of private property. An examination of a few cases will show how far the courts have sanctioned such restrictions.

In the case of *Commonwealth v. Alger,*[81] the supreme court of Massachusetts approved the principle that people hold their property subject to such restraints and regulations as the legislature sees fit to impose. In the course of the opinion the court said: "We think it is a settled principle growing out of the nature of a well-ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is . . . derived directly or indirectly from the government and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested

[81] (1862) 7 Cush. (Mass.) 53.

in them by the constitution, may think necessary and expedient." This is one of the early and emphatic judicial declarations on the power of the legislature to restrict the use of property. Private owners of property are always aroused when the legislature passes acts that in any way impose restrictions on individual use, and in passing, it may be said that property only becomes significant through its use. The exercise of the police power in regulating and prohibiting the sale of intoxicating liquor has been opposed by those who have property invested in the business on the ground that it is not a regulation of property but a taking of property without due process of law. Two early important decisions were rendered by the Supreme Court of the United States on government interference with the liquor traffic. In the first case, *Beer Company v. Massachusetts*,[82] the Supreme Court of the United States used the following language:

"All rights are held subject to the police power of a state and if the public safety and the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience."

In the case of *Mugler v. Kansas*,[83] the Supreme Court of the United States said:

"Lawful state legislation in the exercise of the police power of the state to prohibit the manufacture and sale, within the state, of spirituous, malt, vinous, fermented or intoxicating liquors to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

The same court in the *Slaughter House Cases*[84] said:

"Every person ought so to use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community."

Continuing, the court said:

"Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law in the midst of dense masses of population on the general and rational principle that every person ought so to use his property as not to injure his

[82](1877) 97 U. S. 25, 24 L. Ed. 989.
[83](1887) 123 U. S. 623, 8 S. C. R. 273, 31 L. Ed. 205.
[84](1872) 16 Wall. (U. S.) 36, 21 L. Ed. 394.

neighbors, and that private interest must be made subservient to the general interests of the community."

Also, in the case of *L'Hote v. New Orleans*,[85] the Supreme Court reiterated its approval of the principle that damage to property in the exercise of the police power was not such damage as required compensation, and said:

"The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of the pecuniary injury does not warrant the overthrow of legislation of a police power character."

The underlying principle in these cases is that private property is not taken as by eminent domain, with compensation, but is regulated under the police power by not allowing a use that is detrimental to the public.

Can the principle approved in these cases be used in city planning to restrict the use of private property in such a way as to provide for replotting of whole sections in a city, the regulation of the height and bulk of buildings, the fixing of a building line, the regulation of the use of buildings and structures for various purposes, such as residence, business and industrial, the exclusion of laundries, tanneries, soap factories, brick kilns, public garages, lumber yards, etc., from residence and general business districts? The answer to this question will determine how far city planning can invoke the police power to serve its purposes.

8. City Planning Under the Police Power

The widespread interest in city planning has called for the use of the police power for replotting and zoning.

(1) *Replotting.*

Replotting is the obliteration of one set of divisions and the substitution of a new sub-division of building land in a city. The size and shape of lots and their relation to streets and other public improvements have a public interest. Many cities in the United States are surrounded by a fringe or ring of suburban additions poorly planned and oftentimes not articulating properly with the older and better-planned parts of the city. Other parts already planned have sometimes been devastated by fire, flood or earthquake and can be carefully replotted at small expense. Still other parts are badly planned but highly improved, in which case replotting would be costly. In any case of replotting, there is such a

[85](1900) 177 U. S. 587, 20 S. C. R. 788, 44 L. Ed. 899.

public interest involved as to demand healthful dwellings convenient stores and factories and economical, stabilized real estate development. It is essential that re-plotting should be publicly supervised. Sometimes private parties, realizing the advantages of expert re-plotting, voluntarily submit to having their land thrown into a common mass and re-plotted and their share returned to them. Usually owners do not see the advantages of public supervision but do find an opportunity for unfair personal advantage, frequently detrimental to the public interest. Therefore resort must be had to compulsion. This compulsion may take the form of eminent domain if expensive improvements are to be destroyed and large expenses are necessary, or it may be done under the police power, sometimes supplemented by local assessments, if the expenses are low and can be pretty equally distributed. Touching the question of which methods should have been undertaken in the Back Bay Improvement in Boston, the Supreme Court of the United States said:[86]

"It is not alleged in the pleadings, nor was there any evidence tending to show that the cost of raising the grade would have been so slight, compared with the real value of the property, that a due regard to the constitution demanded that the owner should have been given opportunity to raise the grade at his own expense, and retain the property in its improved condition."

The use of the police power in re-plotting receives strong support from its use for such analogous purposes as drainage, irrigation and compulsory joint improvements. Freund, in his book on police power[87] states the case for employment of the police power for a private interest, that because of location or situation, is also a public interest, in the following words:

"While in general, a person will not be compelled to improve his land in a particular manner, the principle suffers some modification where the improvement (without being strictly or directly public, though perhaps remotely or indirectly so) is common to several adjoining estates. In one aspect the compulsion is exercised in favor of other persons, and thus resembles the legislation allowing the construction of private ways, drains and ditches across the land of others. . . . . But in the cases to be now considered, the owner whose land is affected by the exercise of the power shares in the benefit of the improvement to which he is made to contribute, and because he does so share he may be compelled to bear a part of the cost of the joint enterprise.

"Where a number of pieces of land are so situated that either

[86]Sweet v. Rechel, (1895) 159 U. S. 380, 16 S. C. R. 43, 40 L. Ed. 188.
[87]Freund, Police Power, secs. 440-44.

the improvement can be undertaken only jointly, or that the joint improvement would be more effective or more economical than individual results a stated number or proportion, usually a majority in interest or area, of owners may petition the proper authorities for the creation of a drainage or irrigation district which may include the lands of non-consenting owners. . . . It is true that ordinarily an owner will not be forced to improve his land merely to increase the general prosperity of the country; nor will one party be forced into a partnership with another because the interests of both can be better served by joint than by individual action. But lands may be so situated towards each other as to create a mutual dependence and a natural community. The exercise of the police power then consists, in applying to the community, the same principle of majority rule which is recognized as a matter of course, for local purposes in a larger neighborhood constituting a political sub-division."

In regard to drainage and irrigation of private land in California the Supreme Court of the United States in *Fallbrook Irrigation District v. Bradley*[88] said:

"The case does not essentially differ from that of *Hagar v. Reclamation District,* 111 U. S. 701, where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provisions of the federal constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head v. Amoskeag Manufacturing Company,* 113 U. S. 9, 22; *Wurtz v. Hoaglund,* 114 U. S. 606, 611; Cooley on Taxation, 617 (2d ed.). If it be essential or material for the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all, or nearly all, of such owners by reason of the peculiar natural conditions of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such cases the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit. Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case."

On compulsory joint improvement Nichols says:[89]

[88](1896) 164 U. S. 112, 17 S. C. R. 56, 41 L. Ed. 369.

[89]Nichols, Eminent Domain, 3rd ed. 283.

"When a tract of such land is divided into several parcels held by different owners and a general improvement of the whole cannot be effected without the harmonious co-operation of all the owners, the common necessity is met and the common interest secured by the intervention of the state, and the individual rights of each owner are subjected to such modifications as seem most adapted to secure the best advantage of all. Those who are damaged are compensated by those who are benefited. Land is actually taken and pecuniary impositions are levied, although the use is not public, but neither the power of eminent domain nor the power of taxation is exercised. No land outside the tract affected by the common interest is taken or assessed, and it is settled that the compulsory improvement of the tract in the manner described is a valid exercise of the police power."

Replotting some parts of a city where the property of individuals is so situated that no general improvement can be made without the co-operation of all, may justify the intervention of the state by invoking the police power.

The discussion thus far has led up to the center of general public interest in city planning, namely, zoning under the police power.

(2) ZONING.

A. *Building Lines.* As a prelude to zoning proper, a brief consideration may be given to building line restrictions under the police power. The building line or set-back as a protection to public property has been treated from the standpoint of eminent domain.[90] The building line may be so used as to injure private property as much or more than public property. When private property is properly restricted a correct building line has distinct advantages, among which may be mentioned reducing collisions in crowded sections; allowing space for lawns in front of buildings; increasing light and air for the community as a whole; raising and stabilizing land values; making district more quiet, pleasant and healthful for residence purposes.

The most frequently quoted case against the use of the police power for restricting building lines is: *St. Louis v. Hill.*[91] In the course of the opinion the court said:

"The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot; the day afterwards he was as effectively prevented from building on the forty-foot strip subject to peril or punishment as if the

[90] 9 MINNESOTA LAW REVIEW 528.

[91] (1893) 116 Mo. 527, 22 S. W. 861. See 9 MINNESOTA LAW REVIEW 528, footnote 33.

city had built a wall around it, and this too without any form of notice, any species of judicial inquiry or any tender of compensation. If this is not a taking by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

The early decisions against the constitutionality of the building line by the police power without compensation was prior to the advent of zoning as a part of a comprehensive plan. Under these early restrictions, the owner was required to leave a given part of his land open irrespective of size and shape of the lot which frequently worked great hardship. The restriction sometimes placed unequal burdens upon the owners of lots of different sizes and shapes, but the new zoning building line, as a part of a comprehensive plan, attempts to equalize the burdens in such a way that there will be a minimum of inequality, sometimes providing a board of appeals to equalize its terms.

There are two decisions that support the view that the police power may be used for establishing a building line. In the case of *Eubank v. Richmond,*[92] the supreme court of Virginia said:

"An act of the assembly authorizing the councils of cities and towns to establish building lines on streets to which all property owners must conform, is within the police power of the legislature and is constitutional if not unreasonable. Such legislation is in the interests of the health, safety, comfort and convenience of the public. The supreme court of Connecticut in the case of the *Town of Windsor v. Whitney*[93] said:

"Eminent domain takes property because it is useful to the public; the police power regulates the use of property or impairs rights therein because the free exercise of these is detrimental to the public interest. The general assembly in the exercise of the police power can establish building lines without making compensation where the regulations are reasonable and tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood."

If the building line does not impose excessive difficulties and is a part of a general comprehensive zoning plan, there is a possibility, even a probability, that it will be held a constitutional exercise of the police power.

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[92](1916) 110 Va. 749, 63 S. E. 376. See 9 MINNESOTA LAW REVIEW 529.

[93](1920) 95 Conn. 357, 111 Atl. 354. For other cases on building lines see Philadelphia v. Linnard, (1881) 97 Pa. St. 242; In re Chestnut St., (1888) 118 Pa. St. 593, 12 Atl. 585; State ex rel. Berger v. Hurley, (1901) 73 Conn. 536, 48 Atl. 215.

The building line restriction whether considered from the standpoint of protecting public or private property and irrespective of the use of eminent domain or the police power furnishes a good transition to zoning. The meaning of zoning has now been crystallized until it includes restrictions on the height, area, and uses of different kinds of structures.

Zoning originated in France and was developed in Germany beginning about 1894 and was restricted mostly to use and area or bulk zoning.[94] In the United States the State of New York as early as 1885 made a beginning of zoning; Massachusetts followed in 1898; Congress did likewise for Washington, D. C., the same year; Baltimore in 1904; Indiana in 1905; Los Angeles in 1909 extended the zoning practice; finally, New York City adopted a comprehensive zoning ordinance in 1916. Before the example of New York's comprehensive zoning ordinance which spread rapidly throughout the United States, there were numerous sporadic attempts at block or small residential district zoning. These acts were promptly contested before the courts. There has been a wide diversity of opinion among the courts as to the constitutionality of these initial attempts at zoning. Some ordinances have been held constitutional[95] while others have been declared void.[96]. These irregular piecemeal attempts emphasize the necessity of a comprehensive system of zoning, the classification to include height, area or bulk, and use districts, the classification being based on a map. At the present time zoning ordinances usually cover the entire territory of a municipality, dividing it into districts in each of which uniform regulations are provided for height, area or bulk, and uses of buildings. In some ordinances these three district classifications overlap; in others they are coterminous.

B. *Height Districts.* In 1885 the state of New York passed an act limiting the height of houses used as dwellings. In decid-

[94]See Williams, op. cit. chap. II.

[95]See Des Moines v. Manhattan Oil Co., (1924) 193 Ia. 1096, 184 N. W. 823; Salt Lake City v. Western Foundry & Stove Repair Works, (1920) 5 Utah 447, 187 Pac. 829; Knock v. Velick Scrap Iron and Machinery Co., (1922) 219 Mich. 573, 189 N. W. 54; State ex rel. Banner Grain Co. v. Houghton, (1919) 142 Minn. 28, 170 N. W. 853.

[96]Spann v. City of Dallas, (1921) 111 Tex. 350, 235 S. W. 513; Willison v. Cooke, (1913) 54 Colo. 320, 130 Pac. 828; Levy v. Mravlag, (1921) 96 N. J. L. 367, 115 Atl. 350; People ex rel. Friend v. City of Chicago, (1913) 261 Ill. 16, 103 N. E. 609; State ex rel. Lachtman v. Houghton, (1916) 134 Minn. 226, 158 N. W. 1017; State ex rel. Roerig v. Minneapolis, (1917) 136 Minn. 479, 162 N. W. 477; Romar Realty Co. v. Bd. of Commrs. of Haddonfield, (1921) 96 N. J. L. 117, 114 Atl. 248; Clements v. McCabe, (1920) 210 Mich. 207, 177 N. W. 722.

ing the constitutionality of this act the New York Supreme Court in the case of *People ex rel. Kemp v. D'Oench*[97] said there was "no doubt of the competency of the legislature in the exercise of the police power under the constitution to pass such an act." In 1889 a federal statute was enacted limiting the height of buildings, by zoning, in Washington, D. C. In 1899 the Supreme Court of Massachusetts upheld the statute of 1898 limiting to ninety feet the height of buildings bordering on Copley Square. This act was passed primarily for the protection of public property and utilized eminent domain.[98] However, the court intimated that the police power might have been used as the following words indicate: "In view of the kind of buildings erected on the streets about Copley Square and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power as other statutes regulating the erection of buildings are commonly passed." An auspicious beginning having been made, the Massachusetts legislature in 1904 made provision for two different height districts for the city of Boston. This act was contested in the case of *Welch v. Swasey*.[99] The issues were (1) may the city limit building heights under the police power; and (2) if so, may it prescribe different heights for different districts? Both questions were answered in the affirmative. In the course of the opinion the court said:

"The erection of very high buildings in cities especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air and thus weaken the public health; it may also increase the danger to persons and property from fire and be a subject for legislation on this ground. . . The value of land and the demand for space in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residence purposes. It was therefore reasonable to provide in the statute, that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter. . . Such restrictions in this country are of very recent origin and they are still uncommon. Unless they place the limited height at an extreme point beyond which hardly anyone

[97](1888) 111 N. Y. 359, 18 N. E. 862; see People ex rel. Brown v. Brady, (1889) 26 N. Y. Misc. 82, 56 N. Y. S. 567.

[98]Attorney General v. Williams, (1899) 174 Mass. 476, 55 N. E. 77. See also 9 MINNESOTA LAW REVIEW 526.

[99](1907) 193 Mass. 364, 79 N. E. 745.

would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed and the manner in which the land is laid out and the nature of the approaches to it."

On appeal the Supreme Court of the United States affirmed the decision of the Massachusetts court and in doing so said:[100]

"It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. The Court is not familiar with the actual facts, but it may be that in this limited commercial area the height of the buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime and very few people sleep there at night. And there may, in the residential part be more wooden buildings, the fire apparatus may be more widely scattered and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the waterfront, that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which it must be presumed were known to the legislature and whether or not such were the facts was a question among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the City of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff-in-error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That in addition to these sufficient facts, consideration of an aesthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff-in-error, nor do the statutes deprive him of the equal protection of the laws. The reasons contained in the opinion of the State Court are in our view sufficient to justify their enactment."

The supreme court of Maryland upheld the constitutionality of an act prohibiting the erection of any building, except churches, to a height of more than seventy feet above the surface of the street at the base of Washington Monument in the city of Baltimore. The reasons assigned were partly to preserve the architectural beauty of the locality but mainly as a fire prevention.[101]

[100]Welch v. Swasey, (1918) 214 U. S. 91, 29 S. C. R. 567, 53 L. Ed. 923.

[101]Cochran v. Preston, (1908) 108 Md. 220, 70 Atl. 113. For decisions holding that the police power can not be used to compel the erection of buildings up to a certain height, see Romar Realty Co. v. Bd. of Commrs. Haddonfield, (1921) 96 N. J. L. 117, 114 Atl. 248; Dorison v. Saul, (N. J. 1922) 118 Atl. 691.

These leading decisions clearly indicate the constitutionality of height restrictions under the police power. The main reasons are safety and health.

The need for restricting the height of buildings is well illustrated by citing one example: The Equitable Building in New York casts a shadow of one fifth of a mile at noon on December twenty-first and that shadow covers an area of seven and a half acres. The skyscraper has been made possible since the invention of steel construction. In constructing a tall building it was thought a more intensive use could be made of land in the central part of a large city and that large profits would result, but experience has shown that the law of diminishing returns operates. In normal times the skyscraper does not pay. Proportionately the construction is heavier than a lower building. The space for elevators, fire-proofing and special fire-fighting apparatus, the lower rents and high percentage of vacancies caused by neighboring tall buildings, reduce profits to the vanishing point when the original skyscraper is hemmed in by others and cannot appropriate light and air from neighboring land owners. Until the economic motive as a result of diminishing profits puts a stop to the building of tall structures, zoning restrictions under the police power should be used.

C. *Area or Bulk Districts.* Building line and height restrictions on the use of private property promote the general welfare, but they are not enough and are supplemented by the area or bulk restrictions. These three forms of restrictions bear an intimate relation to each other. Neither can be used successfully alone.

The chief object of area restrictions is to prevent undue concentration, which has a tendency to increase in a city, due to intensive use of land and the augmentation of returns from the use of the land. This increased concentration becomes congestion which injures business, industrial and living conditions. Congestion may throw an undue burden upon public improvements. A certain intensity of use determines the planning and construction of streets, transit facilities, sewers, parks, etc. There should be a fine balance between the public improvements and the bulk of structures of the city that are privately owned. Undue concentration resulting in congestion increases the burden on public improvements, until conditions sometimes become almost unbearable. As examples of dislocation, confusion and heavy losses, the hope-

less congestion of people and traffic in lower New York City and the Loop District in Chicago may be cited.

The regulation of intensity of building development to prevent congestion is now well recognized. Every building of whatever kind in which human beings live or work, requires a certain amount of open space appurtenant to it to admit sunshine and fresh air as a public street cannot furnish an adequate supply. There must be a provision for a division of light and air between lot owners. This is accomplished by area regulations which limit the maximum bulk of structures either by requiring minimum courts and yards and perhaps front, side or rear setbacks irrespective of the size of the building or lot, or by fixing the maximum area of the structure at a percentage of the lot. Sometimes the area requirements are made to vary with the height of the building. The government passes laws specifying standard minima of space per capita for occupants of tenements and operatives in factories; building codes set up standards of sunlight within workshops, stores and apartments. Analogously, the bulk restrictions measure the territory of a city, estimate the number of people who will live and work within the territory and on the basis of expert investigation of topographical, economic, and social facts determine the future residential, business and industrial structures to the end that fire hazards, disease, accidents and juvenile delinquency may be reduced to the minimum. These restrictions fall well within the police power and can be justified by the principles approved by the courts in the cases examined in the two preceding topics.

D. *Use Districts.* The restriction on the use to which a building may be put furnishes the very storm center of debate in zoning at present. There is general agreement on the height and area restrictions but the widest variation of opinion exists as to regulating the uses of structures under the police power. The reason for this is that property gets its value from use. There are such a multitude of uses in our complex social, business and industrial life that zoning restrictions on the use of private property must necessarily arouse opposition from owners who think their constitutional protections are being disregarded.

No zoning can be complete without restrictions on the use of private property. Zoning a city for uses of buildings, attempts to locate different uses in the best places, prevent intrusion of uses not in harmony with or suitable to the district and prevent pre-

mature changes in the district. Use restriction means the permitting or prohibiting utilization of a structure for different purposes such as residence, business and industrial. These three are sometimes further subdivided as for instance: residence districts are divided into single-family, multi-family or apartment houses; business districts into central and local; industrial districts into light manufacturing, heavy but non-nuisance types of industry and nuisance types for unrestricted districts.

Heavy industrial districts are intended for industries of the nuisance character such as require large blocks, wide streets and an extensive spread of buildings and yards. They are usually found near transportation lines. Some zoning experts do not favor allowing residences in heavy industrial districts because it will produce friction and neglected and unsanitary residences. They think in the long run the highest use of the land will be conserved by localizing the heavy industries and leaving them undisturbed. They argue that this will serve the highest purposes of zoning, especially if the residence district for the employees in the different industries is located near. Other zoning experts think that if the land is sufficiently high for drainage, residences should be permitted in the heavy industrial districts in order to make the most general use of land. If this is not done the owner may have a long wait and heavy carrying charges on the idle land in parts of the heavy industrial district. It is contended that the owner should not be prevented from making the highest possible use of his land. In the light industrial districts some business should be allowed. Light industries and business of certain kinds must necessarily be neighbors in the same district. Light manufacturing is a necessity in department stores, millinery shops and jewelry stores. Residence districts may include dwellings, clubs, churches, schools, libraries, hospitals and private garages.

The use of restrictions usually takes the form of prevention in new parts of a city and suppression or strict regulation in the older parts. The method of accomplishing these results employs various forms of exclusions which include various types of buildings, as for example (1) exclusion of certain trades and industries from business districts; (2) exclusion of factories and heavy trades from residence districts; (3) exclusion of business from residence districts; (4) exclusion of apartments from private house districts; (5) exclusion of particular classes of buildings from close proximity to special buildings or areas.

The constitutionality of these exclusions will now be considered. Courts do not look with favor on property restrictions that cannot be justified on the basis of well-established or standardized forms. The exclusions usually begin with the abatement of nuisances or near nuisances over which municipalities have an extensive control. Nuisances are usually divided into two classes—private and public. "A private nuisance is one which affects a private right not common to the public or which causes special injury to the person or property of a single person or a definite number of persons."[102] The private nuisances are abated only on proof of definite injury. Sometimes offensive industries have been abated by giving them a location where they are not private nuisances. Sometimes objectionable industries have also been excluded from certain districts because they are public nuisances. "A public nuisance is one which affects at the same time an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[103] A public nuisance may be abated by law and no proof of specific injury is necessary but only proof of violation of the law.

Things that may call for abatement as nuisances are usually divided into three classes:

"First: those which in their nature are nuisances per se and are so denounced by the common law or by statute. Second: those acts and things, including certain trades and occupations, . . . which in their nature may fairly be regarded as tending to prejudice the public health and comfort when carried on in populous centers and about which, while impartial minds may differ yet they may honestly be regarded as noxious and hurtful to the public interests, and as nuisances in fact; Third: those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be maintained, managed, conducted, etc."[104]

Cities have the right to abate anything falling within these classes but it is for the courts to say whether a thing is a nuisance in fact, especially in the third class, which is the class that causes most of the controversies in zoning.

1. EXCLUSIONS

1. *Exclusion of Certain Trades and Industries from the Business District.* For convenience, efficiency and comfort, cer-

[102]Joyce, Nuisances, sec. 8.
[103]Ibid.
[104]Dillon, op. cit. sec. 690; for nuisance analogies see Alfred Bettman, 37 Harv. L. Rev. 834.

tain trades and industries have been excluded from the central business districts of cities. In 1918 Massachusetts amended its constitution empowering the general court to restrict buildings according to their use or construction to specific districts in cities and towns. The general court passed a law to carry out its provisions and the supreme court in giving its opinion touching the validity of the act said:[105]

"The segregation of manufacturing, commerce and mercantile business of various kinds to particular locations, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community."

The court said the act was not unconstitutional because it had an aesthetic phase, provided it was not the sole object. The court of appeals in New York in the case of *Lincoln Trust Company v. Williams Building Corporation*[106] said:

"A resolution regulating and restricting the location of trades and industries and the location of buildings designed for special uses and establishing the boundaries of districts for said purposes . . . is a proper exercise of the police power and does not constitute an encumbrance upon real property."

The city of Little Rock, Arkansas, passed an ordinance prohibiting livery stables in the business section of the city. In upholding the constitutionality of this act the Supreme Court of the United States said:[107]

"It is clearly within the police power of the state to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not asserted arbitrarily or with unjust discrimination so as to infringe upon rights guaranteed by the fourteenth amendment. So long as the regulation in question is not shown to be clearly unreasonable and arbitrary and operates uniformly upon all persons similarly situated in a particular district, the district itself not appearing to have been arbitrarily selected, it is constitutional."

2. *Exclusions from Residence Districts*

(1) *Factories, Heavy Trades and Business.* Non-residential structures tend to obtrude themselves in a scattered and spotty manner into residential neighborhoods thus harming a large territory without becoming a business or industrial district. A little observation will show that unregulated city growth tends to sub-

[105]Opinion of the Justices, (1920) 234 Mass. 597, 127 N. E. 525.
[106](1920) 229 N. Y. 313, 128 N. E. 209.
[107]Reinman v. Little Rock, (1915) 237 U. S. 171, 35 S. C. R. 511, 59 L. Ed. 900.

ject residence districts to offensive environment and that modern comprehensive zoning tends to counteract this tendency.

In 1911 the city of Los Angeles by ordinance established a number of industrial zones or districts and the rest of the city was designated as a residence district and from this residence district there was excluded "any stone crusher, rolling mill, carpet beating establishment, fire-work factory, soap factory or any other works or factory whose power other than animal power is used to operate or, in the operation of the same or any haybarn, woodyard, lumber yard, public laundry or wash house." This ordinance was contested before the supreme court in *Ex parte Quong Wo*.[108] In the course of the opinion the court said:

"There can be no question that the power to regulate the carrying on of certain lawful occupations includes the power to confine the same to certain limits. The design of the ordinance here involved was to protect such portions of the city of Los Angeles as are devoted properly to residence purposes from the dangers and discomforts attendant upon the operation of certain kinds of business which, while not necessarily nuisances per se, have always been recognized as proper subjects of police regulation."

The ordinance was upheld as a health measure. The constitutionality of this ordinance was again contested in *Ex parte Montgomery*.[109] Here the excluded business was a lumber yard. In the course of the opinion the court said:

"While a lumber yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there."

For a third time the ordinance was contested in *Ex parte Hadacheck*.[110] The business excluded was a brick kiln. In this case the court said:

"The burning of brick is a trade which may, when conducted in close proximity to dwelling houses, be so offensive to those residing in the vicinity as to constitute a nuisance. This is true of all trades which in their operation involve the discharge of smoke or offensive odors in the surrounding atmosphere."

In upholding an ordinance prohibiting brick kilns within the limits of Omaha the supreme court of Nebraska[111] argued that it

[108](1911) 161 Cal. 220, 118 Pac. 714.
[109](1912) 163 Cal. 457, 125 Pac. 1070.
[110](1913) 165 Cal. 416, 132 Pac. 589; affirmed by the Supreme Court of United States in Hadacheck v. Sebastian, (1915) 239 U. S. 394, 36 S. C. R. 143, 60 L. Ed. 348.
[111]Krittenbrink v. Withnell, (1912) 91 Neb. 101, 135 N. W. 376.

was offensive because of the production of smoke and dust; also because it was an inviting place for tramps in cold weather who might be turned loose on the residents in the neighborhood where police protection is frequently inadequate, and finally, because the value of residence property in the neighborhood might be damaged. The city of Niagara Falls passed an ordinance prohibiting any factory within a prescribed residence area without the consent of adjacent property owners. This ordinance was upheld on the ground that it would greatly impair the value of property in this section and seriously interfere with the proper enjoyment in the purposes to which it had been heretofore devoted.[112] In Illinois a public garage in a residence block or in places in which two-thirds of the buildings within a radius of five hundred feet were residences, was prohibited.[113]

The city of Spokane, Washington, ousted livery stables from a residence district where two-thirds of the buildings in a block were residences unless a majority of the lot owners should consent. This was upheld by the supreme court of the state of Washington.[114] A store building was prohibited in the city of Dallas in the residence district except with the consent of three-fourths of the property owners.[115] The city of Chicago prohibited a livery stable in any block where two-thirds of the buildings were residences unless the owners of the majority of the lots consented. This was upheld as constitutional by the supreme court of Illinois.[116]

The decisions of some supreme courts show an interesting change of base. This is well illustrated in the case of Minnesota. The supreme court had declined to sanction the exclusion of stores and apartment houses from residence districts in Minneapolis. This same ordinance came before the court in 1919. It involved the exclusion of an industrial use in a residential district.[117] Although the district was well adapted to the erection of the flour mill, the court in the case of *State ex rel. Banner Grain Company v. Houghton*[118] held that harmless uses cannot be prohibited and then treated the matter of the proposed use as one of fact and

[112]In re Russell, (1916) 158 N. Y. S. 162.
[113]People ex rel. Busching v. Ericson, (1914) 263 Ill. 368, 105 N. E. 315.
[114]City of Spokane v. Camp, (1908) 50 Wash. 554, 97 Pac. 770.
[115]Spann v. City of Dallas, (1915) 189 S. W. 999.
[116]City of Chicago v. Stratton, (1916) 162 Ill. 494, 44 N. E. 853.
[117]State ex rel. Roerig v. Minneapolis, (1917) 136 Minn. 479, 162 N. W. 477; State ex rel. Lachtman v. Houghton, (1916) 134 Minn. 158 N. W. 1017.
[118](1919) 142 Minn. 28, 170 N. W. 853.

refused to set aside the lower court's findings on this fact issue and added:

"The area having been legally established as a residential district and the relator thereafter claiming the right to erect and operate a factory thereon, the burden of proof is upon him to show that the proposed industry would not impair the value of the property within the district or seriously interfere with its proper enjoyment as residential property."

This is a recognition of the principle that preservation of the property value of a residential district is sufficient to justify the invocation of the police power.

The city of St. Paul passed an ordinance excluding undertaking establishments or funeral homes from residence districts. It was contended that a funeral home should be upon the same basis as a church. The supreme court of Minnesota, upholding the constitutionality of the act in the case of the city of *St. Paul v. Kessler*,[118] said:

"The funeral home. . . does not fill the same function as a church. The funeral services in the latter are, as a rule, confined to those who in life are members and hence are necessarily infrequent. The dead body is in the church only for a brief period of the service. The funeral home, on the other hand, is open to anyone who will pay the price. It is a business proposition. To make it successful the endeavor will be to have as many bodies brought there as possible, and to accommodate the business, dead bodies may be kept there for hours or even days. We conclude that the stipulated facts are such that an ordinance which prohibits them in residence districts . . . cannot be held unreasonable or void."

The courts do not always insist that the excluded use fall within one of the traditional types of offensive nuisances. A small city in California passed an ordinance which excluded from a residence district a corral for the keeping of horses, mules, jenneys, jacks or burros for hire. This ordinance was contested before the California courts. The lower court found that the corrals were productive of dust, dirt and loud noises, but the appellate court held that the city's police power was not restricted to recognized traditional types of nuisances and used the following vigorous words concerning a noise producer:[120]

"We know of no heaven-sent Maxim to invent a silencer for this brute, that one beholding him, neck outstretched and jaws distended wide, could persuade himself that he but heard from the

[118](1920) 146 Minn. 124, 178 N. W. 171.

[120]Boyd v. City of Sierra Madre, (1919) 41 Cal. App. 520, 183 Pac. 230.

depths of the beast's crimson coated cavern 'a sound so fine there's nothing lives twixt it and silence.'

"We fear that until nature evolves the whispering burro or man invents some harmless but effective mule muffler, we shall oft, 'in the dead vast and middle of the night,' even in such corrals as appellant's kept in a 'cleanly, wholesome and sanitary manner,' hear the loud, discordant bray of this sociable, but shrill-toned friend of man, filling the air with barbarous dissonance, and drowning even that shout that

" 'Tore Hell's concave and beyond
Frighted the reign of Chaos and old Night.' "

If the relatively soothing braying of a mule can move the judicial feelings to such vigorous expression, certainly the nerve-racking and sleep destroying noises of auto trucks or garages and machine shops would move the court almost to the point of exhausting the possibilities of the English language.

Restrictions on the use of billboards have caused city councils and courts considerable trouble in discovering the proper basis for regulation. The restrictions have had a double purpose, namely, protection of public property and also private, and especially residential property, as the billboards are usually on vacant lots and make the streets less agreeable for residences. The early decisions were unfriendly to billboard regulation on the ground that the regulations were unreasonable or for aesthetic purposes only.[121]

A decision of the supreme court of Missouri in 1911 marked a turning point in billboard regulation.[122] The court held that the billboards are dangerous to public safety due to unstable construction, the increase of fire hazards and the shielding of immoral practices. The supreme court of Illinois in 1905 suggested a billboard zoning system for different districts. In the case of the *City of Chicago et al. v. Gunning System*,[123] the court said:

"It must be apparent to all reasonable minds that . . . a provision might be a reasonable police regulation in the one case and in one locality which would be wholly unreasonable under other circumstances in another locality. This ordinance is, however, without qualification or limitation, applicable to signs and bill-

[121]See People v. Green, (1903) 85 App. Div. 400, 83 N. Y. S. 460; Commonwealth v. Boston Advertising Co., (1905) 188 Mass. 348, 74 N. E. 601; Varney v. Williams, (1909) 155 Cal. 318, 100 Pac. 867; Crawford v. City of Topeka, (1893) 51 Kans. 761, 33 Pac. 476; City of Passaic v. Patterson Bill Posting, Advertising and Sign Painting Co., (1905) 72 N. J. L. 285, 62 Atl. 267; State v. Whitlock, (1908) 149 N. C. 542, 63 S. E. 123.

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

[123](1914) 214 Ill. 628, 73 N. E. 1035.

boards alike in all portions of the great city of Chicago; applicable alike to every portion of its extended territory. We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city."

Shortly after this decision the city of Chicago passed an ordinance in compliance with the hint given in the above case which made it unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without obtaining the consent in writing of a majority of the frontal owners on both sides of the street. The supreme court of Illinois upheld[124] this ordinance as constitutional on the ground first, that billboards created a fire hazard because of the accumulation of combustible material; second, they are a protection for disorderly and immoral practices; thirdly, the ordinance is not an unconstitutional delegation of legislative power. In affirming this decision, the Supreme Court of the United States in the case of *Cusack Company v. City of Chicago*[125] said:

"Neglecting the testimony which was excluded by the trial courts there remained sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a special class by themselves and to justify the prohibition against their erection in residential districts in a city in the interests of safety, morality, health and decency of the community."

Under comprehensive zoning billboards may be entirely excluded from residence districts by passing a special ordinance zoning the city as to advertising, which Los Angeles and San Francisco have done. Or it may also be accomplished under a general zoning ordinance regulating the construction and use of all kinds of structures because billboards are business structures.

Attempts have been made to exclude retail stores from residence districts. In 1898 the supreme court of Missouri declared unconstitutional an ordinance of St. Louis which prohibited all business on Washington Boulevard.[126] In 1913 the supreme court of Illinois held void an ordinance of Chicago requiring the consent of a majority of property owners on both sides of the street for the erection of a store "in any block in which all of the residences

[124]Cusack Co. v. City of Chicago, (1914) 267 Ill. 344, 108 N. E. 340.
[125]242 U. S. 526, 37 S. C. R. 190, 61 L. Ed. 472.
[126]St. Louis v. Dorr, (1898) 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.

are used exclusively for residence purposes. The court said:[127]

"There is nothing inherently dangerous to the health, and safety of the public in conducting a retail store . . . Legislation, either by the state or by a municipal corporation cannot be sustained for purely aesthetic reasons."

The supreme court of Massachusetts upheld the exclusion of all business from a residence district in these words:[128]

"The suppression and prevention of disorder, the extinguishment of fire and the enforcement and regulation for street traffic, and other ordinances designed primarily to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residences."

The supreme courts of Minnesota[129] and New Jersey[130] have refused to uphold the exclusion of retail stores from residence districts. From the foregoing review it is reasonable to conclude that the adjudications thus far have not fixed the place of the retail store in zoning but in view of the trend of the decisions, it is reasonable to expect that its exclusion from residence districts will be upheld by the courts in the not distant future. It is not difficult to make out a case for the exclusion of stores from residential districts. A store may appear harmless, but business exists by attracting customers and any successful business attracts many more persons to a given locality in a day than would come there if the structure is used for residential purposes only. An increased number of vehicles would also come and this adds to the noise. There is much loading and unloading of vehicles. There is sawing and hammering incident to the opening and closing of boxes and crates. All this causes interference with the sleep and rest of the inhabitants of the district. It has been estimated that one-fifth of the population of a large city are children under five years of age. No argument is needed to establish the necessity of quiet, so that children may obtain a reasonable amount of sleep in the daytime. Again, in a large city not only small children need sleep but also a large number of night workers such as newspaper men, telephone operators, motor men, policemen, firemen, janitors, bakers, etc. These need a quiet residential district so they will be able to sleep in the daytime. While the day sleep of night workers is important the night sleep of day workers is equally impor-

[127]People ex rel. Friend v. City of Chicago, (1913) 261 Ill. 16, 103 N. E. 609.

[128]Opinion of the Justices, (1920) 234 Mass. 597, 127 N. E. 525.

[129]State ex rel. Lachtman v. Houghton, (1916) 134 Minn. 226, 158 N. W. 1017.

[130]Ignaciunas v. Nutley, (N. J. 1924) 125 Atl. 121.

tant if not more so because many stores are open late at night, especially Saturday night. Not only does noise need to be reduced in residential districts or segregated entirely but also offensive dust, dirt and odors that accompany stores should be excluded.

(2) *Exclusion of Apartments and Tenements from One-Family House Districts.* The adjudications have left the exclusion of apartments and tenements from one-family residence districts another open question. The supreme court of Minnesota in *State ex rel. Twin City Building Company v. Houghton*[131] held a statute under which Minneapolis attempted to exclude an apartment house from a residence district under eminent domain, void, but on rehearing upheld the statute and in doing so said:[132]

"People are . . . calling for city planning in which the individual homes may be segregated from not only industrial and mercantile districts but also from districts devoted to hotels and apartments."

The supreme court of New Jersey in 1922 held void an ordinance creating a residential district of one-family houses.[133] In 1920 a lower court of Ohio approved the East Cleveland zoning ordinance which provided for four districts including a one-family residence district. In the course of the opinion the court said:[134]

"As a matter of common knowledge, of which the court may take judicial notice, it [the apartment house] shuts off the light and air from its neighbors, it invades their privacy, it spreads smoke and soot throughout the neighborhood. The noise of constant deliveries is almost continuous. The fire hazard is recognized to be increased. The number of people passing in and out, render immoral practices therein more difficult of detection and suppression. The light, air and ventilation are necessarily limited, from the nature of its construction. The danger of the spread of infectious disease is undoubtedly increased, however little, where a number of families use a common hallway, and common and rear stairways.

"With the growth of its population, it appears to be practically certain that unless restricted, the greater part of East Cleveland will be built up with apartments, and the home owners must choose whether to adopt apartment life or abandon their depreciated property, and move out of the city or into its more remote parts.

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[131](1919) 144 Minn. 1, 174 N. W. 885.

[132]State ex rel. Twin City Building Co. v. Houghton, (1919) 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

[133]Handy v. City of South Orange, (N. J. 1922) 118 Atl. 838.

[134]State ex rel. Morris v. Osborn, (1920) 22 Ohio N. P. (N. S.) 549.

"If the claim of the relator here is sound, a city of private homes, grass plots, trees and open spaces, with the civic pride and quality of citizenship which is usually found in such circumstances, is powerless to protect itself against the obliteration of its private residence districts, by apartments, which shut out the sun and sky from its streets, and one another, and are generally owned by those whose greatest interest is in the revenue that the building will produce. If such is the law, it must be conceded that it is unfortunate.

"It seems eminently fair to restrict the apartment builder to a limited area, where use of his property will do the least damage to others and to the community. The necessities or convenience of those who live in them will be served thus with the least sacrifice of the necessities and convenience of others. Whatever of the burden arising from apartments there are, will be borne by those whose purposes they serve, and not shifted to the other property owners of the town, to make their property unfit for use as a home."

The supreme court of Massachusetts in *Brett v. Building Commissioner of Brookline* used the following words:[135]

"Restrictions of the use of land to buildings, if to be occupied as a residence for a single family may be viewed at least in two aspects. It may be regarded as preventive of fire. It seems to us manifest, that, other circumstances being the same, there is less danger of a building becoming ignited if occupied by one family than if occupied by two or more families. Any increase in the number of persons or of stoves or lights under a single roof increases the risk of fire. A regulation designed to decrease the number of families in one house may reasonably be thought to diminish that risk. . ."

"It may be a reasonable view that the health and general physical and mental welfare of society would be promoted by each family dwelling in a house by itself. Increase of fresh air, freedom for the play of children and movement for adults, the opportunity to cultivate a bit of land, and the reduction in the spread of contagious diseases may be thought to be advanced by a general custom that every family live in a house by itself. . . These features of family life are equally essential or equally advantageous for all inhabitants whatever may be their social standing or material prosperity. There is nothing on the face of this by-law to indicate that it will not operate indifferently for the general benefit."

A very recent case was decided by the supreme court of California upholding the exclusion of a four-flat building from a residence district. In the course of the opinion the court said:[136]

[135] (Mass. 1924) 145 N. E. 269.

[136] Miller v. Board of Pub. Works of City of Los Angeles. (Cal. 1925) 234 Pac. 381.

"In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole.

"The establishment of single family residence districts offers inducement not only to the wealthy but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safe-guarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment."

3. *Exclusion of Particular Classes of Buildings from Proximity to Special Buildings or Areas*

Special buildings need protection regardless of the zone in which they are located. The city of Norman, Oklahoma, prohibited certain industries, including laundries, within one hundred fifty feet of a church, school, or hospital. This ordinance was upheld by the supreme court of the state.[137] Public garages have been prohibited within fifty feet of a school.[138] A Chicago ordinance was held valid which required that a junk shop should not be allowed in a block where two-thirds of the buildings were used as residences, for wholesale or retail purposes or within one hundred feet of such a block, without the consent of the property owners.[139] A Chicago ordinance prohibiting a moving picture theatre within two hundred feet of a school was upheld by the

[137]Walcher v. First Presbyterian Church, (1919) 76 Okla. 9, 184 Pac. 106.

[138]Matter of McIntosh v. Johnson, (1919) 211 N. Y. 265, 105 N. E. 414.

[139]Smolensky v. City of Chicago, (1917) 282 Ill. 131, 118 N. E. 410.

supreme court of Illinois.[140] The city of Spokane prohibited a livery stable within two hundred feet of any residence.[141]

These decisions use some general expressions such as "comfort," "convenience." "welfare," and "prosperity." They seem to be grounded upon the theory that property development trends and other factors have established the best use of a structure or a district, thereby building up what business men call a good-will or neighborhood amenity that should not be ruthlessly disturbed by an interloping garage, moving picture theater, junk shop or livery stable. In short, that property and human values should be protected against speculative real estate manipulators who propose to exploit both the property and comfort of others for their own selfish purposes.

2. AESTHETICS. What is the relation of aesthetics to zoning? Is it or should it be a recognized form of use under police power restrictions? Many zoning experts make a strong plea for a recognition of civic beauty in city planning.[142] Beauty gives pleasure and pleasure is a fundamental in human life. Ruskin says the object of all vital art is "either to state a true thing or to adorn a serviceable one."[143] Taxation and eminent domain have been used for the promotion of aesthetic purposes.[144] In discussing this point Nichols says:[145]

"Questions differing but slightly from those already discussed arise in deciding whether a use is public which satisfies no material needs but gratifies the artistic sense of the public or supplies means for public pleasure and recreation. It was felt in former times that land could be taken only to be used by the public for necessary and useful purposes and not for public pleasure and aesthetic gratification. Inroads on this doctrine have been made on all sides, partly by general acquiescence and partly by judicial decisions, until all that is left of it is the possibility that in a close case lack of material advantages to the public may be held to be decisive against the public nature of a taking.

"From the earliest recorded times public money has been spent to make public buildings attractive, and under American constitutions it has long been considered proper for the nation, state or city to erect memorial halls, monuments, and statues and to plan public buildings upon a more expensive scale than if designed for utility alone. The public mind has thus been educated to feel that

[140]Nahser v. City of Chicago, (1916) 271 Ill. 288, 111 N. E. 119.
[141]City of Spokane v. Camp, (1908) 50 Wash. 554, 97 Pac. 770.
[142]See Williams, op. cit. Part VI.
[143]Lectures on Art No. 4, The Relation of Art to Use.
[144]9 Minnesota Law Review 526, footnote 26.
[145]Nichols on Eminent Domain, 2nd ed., sec. 55.

aesthetic and artistic gratification are purposes public enough to justify the expenditure of public money, and to authorize the exercise of eminent domain in behalf of similar purposes was but a short step beyond."

Aesthetics alone is not regarded by the courts as a proper basis for the employment of the police power.[146] However, some decisions hint at upholding the use of police power for aesthetic purposes. Justice Holt in *State ex rel. Twin City Building Company v. Houghton*[147] said:

"It is time that courts recognized the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures. But it is not sufficient that the building is fitting and proper standing alone; it should also fit in with surrounding structures to some degree."

The supreme court of Massachusetts in the case of *Attorney-General v. Williams*[148] also declared that the power of eminent domain as well as the police power, could be utilized for municipal aesthetics and the same court in *Welch v. Swasey*,[149] denying that the police power could be used "for purely aesthetic objects" nevertheless said that if "the primary and substantial purpose of the legislation is in the interests of such a matter as the public health or safety, considerations of taste and beauty may enter in as an auxiliary." The supreme court of Maryland in *Cochrane v. Preston*[150] said that a statute limiting the height of buildings fronting on a public square in Baltimore might be sustained on aesthetic grounds and used the following words:

"It may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this [police] power even for such purposes. . . ."

Freund, in discussing aesthetics in connection with unsightly billboards, says:[151]

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[146]People v. Wineburgh Adv. Co., (1909) 195 N. Y. 126, 88 N. E. 17; People ex rel. Publicity Leasing Co. v. Ludwig, (1916) 218 N. Y. 540, 113 N. E. 532; People v. Green, (1903) 85 App. Div. 400, 83 N. Y. S. 460; Haller Sign Works v. Physical Culture Training School, (1911) 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (N.S.) 998; Passaic v. Paterson Bill Posting, Advertising & Sign Painting Company, (1905) 72 N. J. L. 285, 62 Atl. 267; Varney v. Williams, (1909) 155 Cal. 318, 100 Pac. 867.

[147]Supra.

[148]Supra.

[149]Supra.

[150]Supra.

[151]Police Power, sec. 182, p. 166. See 20 Harv. L. R. 35; St. Louis Poster Adv. Co. v. St. Louis, (1919) 249 U. S. 269, 63 L. Ed. 599, 39 S. C. R. 274.

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent) is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further application. It is true that ugliness is not as offensive as noise or stench. But on the other hand, offensive manufactures are useful and the offense unintentional and inevitable, whereas in the case of an advertisement the owner claims the right to obtrude upon the public an offensive sight which they do not want, and which but for this undesired obtrusion, would not be of the slightest value to him."

Justice Owen of the supreme court of Wisconsin in the case of *State ex rel. Carter v. Harper*[152] said, touching the question of aesthetics:

"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 beginning of zoning in this country undoubtedly originated in the utilitarian desire of New York City to protect Fifth Avenue property values from the intrusion of manufacturing, and the bearing of attractiveness on pecuniary values must have influenced the City Council in making the restriction. Every person wants an attractive well-arranged home in which to live but most persons work outside of the home a considerable part of the day. Why should not stores, office buildings, factories, streets and parks be physically attractive as well as the home? It is difficult to exclude an aesthetic consideration from the exercise of the police power for it can be traced into the general welfare. Anything

[152](Wis. 1923) 196 N. W. 451.

that spoils the beauty of a district, depreciates and destroys property values and anything that beautifies it increases the value of property; therefore what has been called by the courts aesthetic is in reality economic. If this be true, it follows that the economic promotes the general welfare and the general welfare is the leading object for the use of the police power.

E. RETROACTION AND VESTED INTERESTS. Property has a strong constitutional protection in the United States. Usually the sanctity of vested interests is observed. In zoning a new city or new sections of any city, the question of impairment of vested interests does not arise, but in zoning the older parts of a well-settled city it arises in connection with non-conforming bulk or uses of structures. The zoning regulations are either retroactive or in many cases the zoning attempts by strict requirements to restrict the non-conforming bulk or use and as rapidly as possible eliminate it entirely. If an ordinance is not retroactive, the charge of discrimination or a lack of equal protection of the law may arise between non-conforming uses and owners who propose to devote their property to a non-conforming use in the future. This question has arisen in Aurora, Illinois, and has been before the supreme court of the state. In the case of *City of Aurora v. Burns*[153] the court held an ordinance void as contravening section 22 of article 4 of the constitution of 1870, which provides that the general assembly shall not pass local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever; and that what the general assembly is forbidden to do directly it cannot do indirectly by authorizing its creatures, cities and villages to do. The court is further reported to have held that an act which arbitrarily discriminates against one class of persons in the transaction of business and leaves unaffected other persons or classes engaged in a business not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranty; and that since the city council would not have adopted the ordinance in question without the provision that it should not apply to existing business, the entire ordinance is void. A rehearing having been granted, the foregoing may prove not to be the opinion of the court; but if correctly reported, and if the court adheres to this position, and retroactive measures are not

[153]As reported in the Chicago papers.

adopted, the result will be that only new sections of a city can be effectually zoned.

The writer suggests that a different holding might be justified using the analogy of the fire district which was the beginning of zoning.[154] In the fire district the construction of wooden buildings in the future is prohibited. Present wooden buildings may be allowed to remain or be demolished. No one raises the question of discrimination or lack of equal protection of the law as between the owner of a wooden building which is allowed to remain within the district and the owner of another building within the district who may propose to change it to a wooden building, or still another owner who proposes to erect a new wooden building within the fire district. Legislation, unless expressly stated otherwise, is prospective. It operates always in the present and looks toward the future. If a city allows a non-conforming building to continue in order to prevent investment loss this does not justify the charge of discrimination if a second party insists that he has a right to inflict additional injury on the public and is prevented from doing so.

Some cities have made their ordinances retroactive for industries more or less offensive. The industries have been given the option of moving or ceasing operations. This retroaction has been held constitutional in some leading cases. Touching the subject of retroaction and vested interests, the Supreme Court of the United States in the case of *Chicago and Alton R. Co. v. Tranbarger* said:[155]

"No person has a vested right in any general rule of law or policy of legislation entitling him to insist upon its being unchanged for his benefit, nor is immunity from change of general rules of law to be implied as an unexpressed term of an express contract."

By a decision of the supreme court of California, *Ex parte Quong Wo*,[156] 110 Chinese laundries were legislated out of business; in *Ex parte Hadacheck*[157] a brick kiln of long standing was forced to move at a great loss, and in *Reiman v. Little Rock*,[158] a livery stable was compelled to do the same. In affirming the deci-

[154]See Republica v. Duquet, (1799) 2 Yeates (Pa.) 493; City of Crawfordsville v. Braden, (1891) 130 Ind. 149, 28 N. E. 849; Alexander v. Town of Greenville, (1877) 54 Miss. 659; McKibbin v. Ft. Smith, (1880) 35 Ark. 352; Hine v. New Haven, (1873) 40 Conn. 478; Houlton v. Titcomb, (1906) 102 Me. 272, 66 Atl. 733.

[155](1914) 238 U. S. 67, 59 L. Ed. 1204, 35 S. C. R. 678.

[156](1911) 161 Cal. 220, 118 Pac. 714.

[157](1913) 165 Cal. 416, 132 Pac. 58.

[158](1915) 237 U. S. 171, 35 S. C. R. 511, 59 L. Ed. 900.

sion of the supreme court of California, in *Ex parte Hadacheck*, the Supreme Court of the United States in the case of *Hadacheck v. Sebastian*[159] said:

"It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . To so hold would preclude development and fix a city forever in its primitive conditions. 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 logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus."

Retroactive zoning is not to be recommended except in very unusual cases and public protection imperatively demands it. Nonconforming bulks and uses should be gradually eliminated so that the owner's investment will not be rendered worthless but be preserved.

F. Zoning Procedure and Judicial Interpretation. The city has no inherent police power. If it secures this power it must come as a delegation from the state which is the source of the police power. A constitutional amendment is not necessary although Massachusetts has adopted one. All that is needed is for the state to pass an enabling act authorizing the city to exercise the police power for zoning purposes. In 1924 the United States Department of Commerce prepared a standard enabling act which has been adopted by about twenty states. This model act contains five essential features: (1) a grant of zoning power to regulate height, bulk, use, yards, courts and density of population; (2) safe-guards in the preparation and adoption of a zoning plan such as preliminary consideration of the needs of each district; arrangement for public hearings and the comprehensive and impartial application of the regulations; (3) requirement of more than an absolute majority of the council to make changes after written protest of property owners; (4) provisions for a board of appeals with power to vary the strict letter of the ordinance and maps in cases of practical difficulty and unnecessary hardship on property owners; (5) enforcement and penalties.

[159](1915) 239 U. S. 394, 60 L. Ed. 348, 36 S. C. R. 143.

In states that have home rule cities an enabling act is not necessary as the police power has been granted in the state constitution. A grant of police power either by the constitution or by statute, is absolutely necessary if adverse court decisions are to be avoided.[160] The constitutionality of zoning if an enabling act has been passed, has been upheld in most states except New Jersey and even there it has narrowed down to exclusion of a retail store from a residence district.[161] In Missouri[162] and Texas[163] the unfriendly decisions were called forth by ordinances passed when the police power had not been specifically granted. The Nebraska[164] and California[165] acts contained no board of appeals; the Baltimore zoning act[166] did not clearly define the powers of the board of appeals but the spirit of the decisions is unfriendly to the general principles of zoning.

The zoning plan should be prepared by a zoning commission under the guidance of a zoning expert and the coöperation of property owners of all sorts and conditions; there should be numerous public hearings, discussion and publicity; accurate maps and charts should be made—one for heights, another for use, and still another for density of population. These maps should show growths, trends and prospective needs. The city council must take full responsibility for adoption of the maps and the enactment of the zoning ordinance.

Stability should be aimed at in all this work but there must be future change and amendment from time to time as necessity arises and circumstances change. One council can change what

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[160]City of Olympia v. Mann, (1890) 1 Wash. 389, 25 Pac. 330, 337; First National Bank of Mt. Vernon v. Sarlls, (1891) 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481; Commonwealth v. Roberts, (1892) 155 Mass. 281, 29 N. E. 522; Health Department v. Rector, etc., (1895) 145 N. Y. 32, 39 N. E. 833; Attorney-General v. Williams, (1899) 174 Mass. 476, 55 N. E. 77, (Copley Square, Boston); People ex rel. Friend v. Chicago, (1913) 261 Ill. 16, 103 N. E. 609; Eubank v. City of Richmond, (1912) 226 U. S. 137, 57 L. Ed. 156, 33 S. C. R. 76; State v. Johnson, (1894) 114 N. C. 846, 19 S. E. 599.

[161]See Bassett in 13 National Municipal Review 492.

[162]State ex rel. Penrose Inv. Co. v. McKelvey, (Mo. 1923) 256 S. W. 474; State ex rel. Better Built Home and Mortgage Co. v. McKelvey, (Mo. 1923) 256 S. W. 495; City of St. Louis v. Evraiff, (Mo. 1923) 256 S. W. 489.

[163]Spann v. City of Dallas, (1921) 111 Tex. 350, 235 S. W. 513.

[164]State ex rel. Westminster Presbyterian Church v. Edgecomb, (1922) 108 Neb. 859, 189 N. W. 617.

[165]Miller v. Bd. of Public Works of Los Angeles, 234 Pac. 381. Cf. People ex rel. Friend v. City of Chicago, (1913) 261 Ill. 16, 103 N. E. 609; Barker v. Switzer, (1924) 209 App. Div. 151, 205 N. Y. S. 108.

[166]Goldman v. Crowther, (Md. 1925) 128 Atl. 50.

another has passed. In order to prevent a mercurial council from making hasty changes in the maps and ordinance the state legislature should require an extraordinary majority of the council to make the changes. This check should be extended to home rule cities.

A safety valve device is the requirement of a board of appeals to decide border-line cases varying the letter but not the spirit of the ordinance in order to prevent unnecessary individual hardships. This board of appeals, if it functions properly, can furnish necessary elasticity, minimize lawsuits and oftentimes forestall court cases that might endanger the constitutionality of the ordinance. Mr. E. M. Bassett argues for every decision of the board of appeals to be reviewable by the courts on a writ of certiorari.[167] The city of New York has had great success with its board of appeals. It is claimed that the work of this board has prevented about four hundred adverse court decisions in the course of eight years.[168] There should be a sharp line of demarkation between the powers of the council and the board of appeals. The fundamental matter of adopting the maps and ordinance is a council power, but applying the maps and ordinance to specific buildings should be committed to the board of appeals.

The local authorities should be given power to use any or all of the following methods to bring about a compliance with the zoning ordinance:[169]

"They may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may stop the work in the case of a new building, and prevent its going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law, and prevent its reoccupancy until the conditions have been cured."

The courts insist upon a few essential points in a zoning ordinance in addition to the grant of police power from a state. The regulation and administration of the ordinance must stand the test of reasonableness. Much municipal sinning has been done in the name of zoning, some city councils act as if they thought zoning was a panacea for all municipal ills. Piecemeal zoning has sometimes been very unreasonable in its emphasis upon protect-

[167]See Zoning, a pamphlet issued by National Municipal League, New York City, 1922 p.
[168]See Bassett in 13 National Municipal Review 476 and cases cited.
[169]See A Standard State Zoning Enabling Act p. 12, note 46.

ing a small block, area or exclusive residence section; sometimes the real, if not the ostensible object of an ordinance is to beautify some particular preferential locality;[170] sometimes it is an attempt to protect an obsolete one-family house district and stop the development of multi-family house or business districts;[171] sometimes the ordinance has no relation to the police power, as when one-story stores are prohibited in favor of two stories or more;[172] sometimes an attempt is made to zone a suburban village into one exclusive residential district excluding all multi-family houses, churches, hospitals, stores, public garages, laundries and factories;[173] sometimes property restrictions are imposed upon one land owner when the relation of the ordinance to the police power is very remote and the incidence bids fair to result in confiscation of property, a term erroneously taken over into zoning nomenclature from public utility cases.[174]

Although piece-meal zoning has often met with judicial condemnation, still in some cases it has been upheld. For example, height[175] and use[176] zoning, alone, have been upheld. But area restrictions are also important. Therefore, comprehensive zoning that includes all three is more reasonable than zoning for only one purpose. Furthermore, comprehensiveness has a geographical as well as a content extent and is more reasonable when the entire territory of the city is included. Classification into different districts may be made and have been upheld but properties similarly situated should be treated alike.[177] Reasonableness then, extends to regulations, classifications and administration.

The courts carefully scrutinize any seeming attempt at an unconstitutional delegation of legislative power. In zoning this

[170]Piper v. Ekern, (Wis. 1923) 194 N. W. 159.

[171]Matter of Isenbarth v. Bartnett, (1923) 206 App. Div. 546, 201 N. Y. S. 383.

[172]Romar Realty Co. v. Board of Commissioners of Haddonfield, (1921) 96 N. J. L. 117, 114 Atl. 248; Dorison v. Saul, (1922) 98 N. J. L. 112, 118 Atl. 691.

[173]Bassett, op. cit., p. 497.

[174]Ambler Realty Co. v. Euclid Village, (U.S.D.C. 1924) 297 Fed. 307, 21 Ohio L. B. 607. On confiscation see Bettman, op. cit., p. 848.

[175]See Welch v. Swasey, (1918) 214 U. S. 91, 53 L. Ed. 923, 29 S. C. R. 567; Cochran v. Preston, (1908) 108 Md. 220, 70 Atl. 113; Atkinson v. Piper, (Wis. 1923) 195 N. W. 544.

[176]See ex parte Hadacheck, (1913) 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B 1248, Ann. Cas. 1917B 927; affirmed by U. S. Supreme Court under name of Hadacheck v. Sebastian, (1915) 239 U. S. 394, 60 L. Ed. 348, 36 S. C. R. 143.

[177]For the power to make reasonable classification, see Freund, op. cit., sec. 611; Barbier v. Connolly, (1884) 113 U. S. 27, 28 L. Ed. 923, 5 S. C. R. 357; State ex rel. Morris v. Osborn, (1920) 18 Ohio L. Rep. 22.

has arisen in two ways,—first the part that property owners play and second, the functioning of the board of appeals. The city of Richmond, Virginia, enacted an ordinance providing that "whenever the owner of two-thirds of the property abutting on any street shall in writing request the commissioner on streets to establish a building line on the side of the square on which the property fronts, the said commissioner shall establish such line. . ." The Supreme Court of the United States held this ordinance void as an unconstitutional delegation of legislative power and said:[178] "It [the ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners." Following this case, ordinances admitting into, or excluding from a locality a given use upon the consent of a percentage, less than all, of the property owners of the locality have been held an unconstitutional delegation of legislative power;[179] but as a prerequisite to action by public authorities, or as a waiving of a prohibition, a provision for consent of property holders has been held valid.[180]

Touching the proper use of property owner's consent, the Supreme Court of the United States in *Cusack v. the City of Chicago*[181] distinguished the case at bar from the Eubank Case and said:

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[178]Eubank v. Richmond, (1912) 226 U. S. 137, 57 L. Ed. 156, 33 S. C. R. 76.

[179]In re Quong Woo, (1882) 13 Fed. 229; Ex parte Sing Lee, (1892) 96 Cal. 354, 31 Pac. 245; Coon v. Bd. of Public Works, (1908) 7 Cal. App. 760, 95 Pac. 913; see Sam Kee v. Wilde, (1919) 41 Cal. App. 528, 183 Pac. 164; Denver v. Rogers, (1909) 46 Col. 479, 104 Pac. 1042; Curran Co. v. Denver, (1910) 47 Col. 221, 107 Pac. 261; Williston v. Cooke, (1913) 54 Col. 320, 130 Pac. 828; Dangel v. Williams, (1916) 11 Del. Ch. 213, 99 Atl. 84; Chicago v. Gunning System, (1905) 214 Ill. 628, 73 N. E. 1035; People ex rel. Friend v. Chicago, (1913) 261 Ill. 16, 103 N. E. 609; Tilford v. Belknap, (1907) 126 Ky. 244, 103 S. W. 289; St. Louis v. Russell, (1893) 116 Mo. 248, 22 S. W. 470; Hays v. Bluff, (1914) 263 Mo. 516, 173 S. W. 676; State ex rel. v. Withnell, (1907) 78 Neb. 33, 110 N. W. 680; Eubank v. Richmond, (1910) 110 Va. 749, 67 S. E. 376, (1912) 226 U. S 137, 57 L. Ed. 156, 33 S. C. R. 76; State ex rel. Nehrbass v. Harper, (1916) 162 Wis. 589, 156 N. W. 941.

[180]As a prerequisite to action by the public authorities or as a waiver of a prohibition, a provision for consent is valid. Myers v. Fortunato, (Del. 1920) 110 Atl. 847; Weeks v. Heurich, (1913) 40 App. D. C. 46. City of Chicago v. Stratton, (1896) 162 Ill. 494, 44 N. E. 853; People ex rel. Busching v. Ericsson, (1914) 263 Ill. 368, 105 N. E. 315; People ex rel. Keller v. Village of Oak Park, (1914) 266 Ill. 365, 107 N. E. 636; Cusack Co. v. City of Chicago, (1915) 267 Ill. 344, 108 N. E. 340, (1917) 242 U. S. 526, 61 L. Ed. 472, 37 S. C. R. 190.

[181](1917) 142 U. S. 526, 61 L. Ed. 472, 37 S. C. R. 190. For discussion, of consent of property owners, see McBain, Law Making by Property Owners, 36 Pol. Sc. Q. 617.

"The former left the establishment of the building line untouched until the lot owners should act, and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

The policy that sanctions allowing a certain percentage of property owners in a small section such as a block, to waive restrictions that have been made by the ordinance-making power, for example the erection of a garage, a retail store or apartment house, does not comport with the ideals of comprehensive zoning. It is a substitution of a block plan for a community plan; the tastes, judgments and even the caprices and whims of the owners may vary from block to block and the result may be diversity and confusion rather than unity and completeness. A comprehensive zoning plan is motivated by a desire for the promotion of the welfare of the whole territory for the general benefit of the entire city.

In a recent case decided by the supreme court of Maryland,[182] the board of appeals provided for in the Baltimore zoning ordinance is criticized for the exercise of an unconstitutionally delegated legislative power. The dissenting opinion of Bond, C. J., ably answers the majority.[183] In addition to the cases cited a few other cases may be brought forward to establish the constitutionality of the legislative creation of various kinds of boards such as the board of appeals. The supreme court of Oregon having under consideration the constitutionality of an act creating a railroad commission in the case of *State v. Corvalis*,[184] by Justice Moore said:

"The rule is universal that a legislative assembly exercising the authority conferred by the constitution cannot delegate the

[182]Goldman v. Crowther, (Md. 1925) 128 Atl. 50.

[183]Ibid. Citing Field v. Clark, (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. C. R. 495; Buttfield v. Stranahan, (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. C. R. 349; Union Bridge Co. v. United States, (1907) 204 U. S. 364, 57 L. Ed. 523, 27 S. C. R. 367; Philadelphia Co. v. Stimson, (1912) 223 U. S. 605, 56 L. Ed. 570, 32 S. C. R. 340; United States v. Grimaud, (1911) 220 U S. 506, 55 L. Ed. 563, 31 S. C. R. 480.

[184](1911) 59 Ore. 450, 117 Pac. 980.

power to enact laws. It can, however, direct that the application of a statute to a designated district or to a specific state of facts, shall depend upon the existence of certain conditions, to be ascertained and determined in a particular manner. The supreme court of Minnesota in *State v. Chicago, Milwaukee and St. Paul R. R. Co.*[185] has said:

"The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly . . . do itself."

The statute books are full of legislation granting to officers large discretionary powers in the execution of laws, the validity of which has never been successfully assailed. The supreme court of Pennsylvania in the case of *Moers v. Reading* has said:[186]

"Half the statutes on our books are in the alternative form depending upon the discretion of some person or persons to whom is confided the duty of determining whether the occasion exists for executing them, but it cannot be said that the exercise of such discrimination is the making of law."

The principle established by these decisions is that in city zoning the council cannot delegate the power to make laws but it can create an agency called the board of appeals, to carry out the legislative will as expressed in the zoning ordinance. The social and economic conditions are so vast and complex that a zoning ordinance is passed in general terms and its full operation is made to depend upon future contingencies and the determination of certain sets of facts. The determination of facts is placed in the hands of the board of appeals. The council sets the standard in an ordinance and all that the board does is to apply the standard to certain determined facts. It can vary the letter but not the standard or spirit of the ordinance. It is therefore entirely constitutional. The interstate commerce commission, the federal trade commission, the federal reserve board, state public service commissions, state labor boards, state boards for the administration of minimum wage and the sale of securities are good examples of boards exercising constitutional powers similar to those exercised by a board of appeals provided for in zoning ordinances.

Many of the decisions cited or analyzed and used in this discussion do not deal directly with the constitutionality of zoning, or if they deal with it some isolated individual property right is involved under piecemeal and not comprehensive zoning. In some cases no state enabling act granting the city the police power had

[185](1888) 38 Minn. 281, 295, 37 N. W. 782.
[186](1853) 21 Pa. St. 188.

been passed; in others the decision went off on a question of statutory or charter construction. The leading decisions both friendly[187] and unfriendly[188] toward the constitutionality of zoning under the police power are cited in the footnotes. The balance is well on the side of upholding the constitutionality of zoning under the police power. The highest courts both state and federal have upheld the constitutionality of zoning and will undoubtedly continue to do so if the zoning work is properly done.

9. Summary and Conclusions

In the first part of this article the writer called attention to the importance of the urban problem and the development of city planning, which is a new profession that is making rapid progress; outlined the leading subjects of a comprehensive plan for public property; sketched the methods of securing public property which include dedication, prescription, agreement or purchase and eminent domain; outlined the methods of controlling and protecting public property which include private restrictions in deeds of trans-

[187]Welch v. Swasey, (1918) 214 U. S. 91, 53 L. Ed. 923, 29 S. C. R. 567; Hadacheck v. Sebastian, (1915) 239 U. S. 394, 60 L. Ed. 348, 36 S. C. R. 143; Miller et al v. Board of Public Works of the City of Los Angeles, (Cal. 1923) 234 Pac. 381; Lincoln Trust Co. v. Williams Building Corporation, (1920) 229 N. Y. 313, 128 N. E. 209; Palmer v. Mann, (1923) 120 Misc. 396, 198 N. Y. S. 548; (1923) 206 App. Div. 480, 201 N. Y. S. 525; Ware v. City of Wichita, (1923) 113 Kan. 153, 214 Pac. 99; State ex rel. Civello v. New Orleans, (1923) 154 La. 271, 97 So. 440; Boland v. Compagno, (1923) 154 La. 469, 97 So. 661; Ex parte Quong Wo, (1911) 161 Cal. 220, 118 Pac. 714; Brown v. City of Los Angeles, (1920) 183 Cal. 783, 192 Pac. 716; State ex rel. Carter v. Harper, (Wis. 1923) 196 N. W. 451; State ex rel. Morris v. Osborn, (1920) 22 Ohio N. P. (N.S.) 549, 31 Ohio Dec. 98, 197; Opinion of the Justices, (1920) 234 Mass. 597, 127 N. E. 525; Schait v. Senior, (1922) 97 N. J. L. 390, 117 Atl. 517; Cliffside Park Realty Co. v. Borough of Cliffside, (1921) 96 N. J. L. 278, 114 Atl. 797; Cohen v. Rosedale Realty Co., (1923) 120 Misc. 416, 199 N. Y. S. 4; In re Cherry, (1922) 201 App. Div. 856, 193 N. Y. S. 57, (1922) 196 N. Y. S. 920; Cherry v. Isbister, (1922) 234 N. Y. 607, 138 N. E. 465; State ex rel. Dancig v. Durant, (C.A. Ohio, 1923) 21 Ohio L. B. 395; see dissenting opinions of Judge White in State ex rel. Penrose Investment Co. v. McKelvey, (Mo. 1923) 256 S. W. 474 and also opinion of Holt, J., in State ex rel. Twin City Bldg. & Invst. Co. v. Houghton, (1919) 144 Minn. 1, 174 N. W. 885; Cusack v. City of Chicago, (1917) 142 U. S. 526, 61 L. Ed. 473, 37 S. C. R. 190.

[188]Goldman v. Crowther, (Md. 1925) 128 Atl. 50; City of Aurora, Appellee v. Burns and De Latour, Appellants, (Ill. 1924) Docket No. 16137, Agenda 22; State ex rel. Westminster Presbyterian Church v. Edgecomb, (1922) 108 Neb. 859, 189 N. W. 617; State ex rel. Penrose Invst. Co. v. McKelvey, (Mo. 1923) 256 S. W. 474; City of St. Louis v. Evraiff, (Mo. 1923) 256 S. W. 489; and State ex rel. Better Built Home and Mortgage Co. v. McKelvey, (Mo. 1923) 245 S. W. 495; Ignaciunas v. Risley, (1923) 98 N. J. L. 712, 121 Atl. 783; Ambler Realty Co. v. Euclid Village, (U.S.D.C., 1924) 297 Fed. 307, 21 Ohio L. B. 607.

fer, advertising, regulating parks and street uses, granting of franchises to public utility corporations, use of eminent domain touching height, building lines, zoning and excess condemnation and their constitutionality in the light of recent court decisions. The entire first part was devoted to a discussion of city planning and restrictions on property in its public aspects.

In the present discussion the center of interest has been city planning and restrictions on the use of private property. The writer pointed out the bad result from lack of regulating the use of private property and described some of the partially successful expedients, such as restrictions in deeds, unregulated official action and eminent domain that were tried to solve the difficulties; explained the nature of the police power; traced the beginning of government restrictions on the use of private property and raised the question whether city planning can make use of the police power to serve its purpose; applied police power principles to city planning on such subjects as replotting and zoning to include building lines, height area, or bulk and use districts; and under the latter called attention to the various uses of houses for residence, business and industry pointing out how various exclusions are used for the protection of these different uses; took a cursory glance at aesthetics as a subject for treatment under the police power; and finally treated the subject of zoning procedure and judicial interpretation.

It must be evident to the reader who has followed patiently to this point that the writer believes the destiny of urban dwellers is to a large extent bound up with wise city planning which includes zoning under the police power as the wisest solution of the largest number of city problems.

The expected results of wise zoning should include some or all of the following: (1) The assiduous cultivation of the police power maxim, "so use your own as not to injure others," until urban dwellers consent to and coöperate with a policy of orderly growth for the city by segregating residential, business and industrial uses to convenient and mutually advantageous locations and then protecting them from non-conforming uses, that are insisted upon by those who wish to exploit the values that others have created. If a person has a lot in the midst of a district of homes and insists that he has a vested right to erect a machine shop on it and damage his neighbors, he should be taught that the enjoyment of property does not give him a vested right to destroy and the

community remain unprotected. The person whose property right is restricted, should not be the only one to claim and secure protection; the majority, also, has rights that should be protected. The property rights of one individual should not be placed above the property rights of the many because the latter have a statutory police power basis and the former a worn-out or obsolete dead hand constitutional basis. (2) The encouragement of new buildings according to zoning and housing requirements, thus stabilizing residential, business and industrial development and increasing and preserving the sources of municipal revenue, and decreasing unequal tax burdens. (3) Superseding inefficient protective methods such as restrictions in deeds and eminent domain except in some instances, by substituting police power restrictions. (4) Prevention of street and transit congestion by fair limitations of the building lines, height of buildings and the intensity of the use of land. (5) Promotion of the health, morals, and safety of the people by safeguarding against congestion of population which can be done by fixing the maximum density. (6) Finally, the stabilization of property values, of course, but above all the stabilization and improvement of the living and working environment of the people.