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## State Flood-Plain Zoning

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# COMMENTS

## STATE FLOOD-PLAIN ZONING

### INTRODUCTION

Despite extensive expenditures for flood control, there have been continued catastrophic flood losses in recent years. These losses accentuate the need for land-use regulation in flood plains.<sup>1</sup> Flood-plain zoning is one method that has been accepted on the municipal and county levels as a valid tool for the reduction of such damage. However, for flood-plain zoning to be most effective, it should be administered and enforced on the state level. In several states, including Illinois, the power to adopt flood-plain zoning has been delegated to lower governmental bodies. The state, however, still retains the option of withdrawing such power and exercising it directly. This should be done if flood-plain zoning is to be an effective preventive remedy.

In spite of the vast expenditures that have been made for flood control purposes, losses from floods total millions of dollars annually and are increasing every year.<sup>2</sup> This increase in flood damage has been attributed in part to an actual increase in the number of floods,<sup>3</sup> but the larger part of the increase has been caused by the "continuing human encroachment upon flood plains."<sup>4</sup>

After a careful analysis of the increased costs of flood damage between 1903 and 1951, Hoyt and Langbein reported that:

Of the increase in reported property damage by flood, we may ascribe about 45 per cent to the increase in property values, 25 per cent to an increase in the amount of flooding, and 30 per cent to an increase in building and other uses on flood-hazard lands.<sup>5</sup>

<sup>1</sup> The term "flood plain" is used here to mean "any area of bottom land subject to flooding by stream overflow." White, *The Control and Development of Flood Plain Areas* 95, SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE ON PLANNING AND ZONING (1961).

<sup>2</sup> LEOPOLD & MADDOCK, *THE FLOOD CONTROL CONTROVERSY—BIG DAMS, LITTLE DAMS, AND LAND MANAGEMENT* 83 (1954). See also Interstate Conference on Water Problems, Water Policy Committee, Subcommittee Reports, p. 4 (December 5-6, 1960). Flood losses may be defined as "the destruction or impairment, partial or complete, of the value of goods or services, or of health, resulting from the action of flood waters and the silt and debris they carry." HOYT & LANGBEIN, *FLOODS* 77 (1954).

<sup>3</sup> HOYT & LANGBEIN, *op. cit. supra* note 2, at 88.

<sup>4</sup> White, *Strategic Aspects of Urban Flood Plain Occupance* 86, Journal of the Hydraulics Division, Proceedings of the American Society of Civil Engineers (February, 1960).

<sup>5</sup> HOYT & LANGBEIN, *op. cit. supra* note 2, at 90.

At the present time, "about 10,000,000 people in the United States prefer to reside and/or work on some 50,000,000 acres of land subject to occasional inundation."<sup>6</sup> Thus, the magnitude of the flood problem is primarily the result of unimpeded encroachments by man upon flood plains.<sup>7</sup> Several ways of arresting this rising trend of flood losses have been suggested: broadening the range of choice in making adjustments to flood hazards;<sup>8</sup> more modern engineering works; land elevation; flood proofing;<sup>9</sup> various emergency measures; public relief and flood insurance. Of major importance is the growing acceptance of using flood-plain land-use regulation to control further encroachment.<sup>10</sup>

Discussion of land-use regulation of flood plains may be said to have begun with a deceptively simple and appealing question in the *Engineering News Record* of March 1937:

Is it sound economics to let such property be damaged year after year, to rescue and take care of the occupants, to spend millions for their local 'protection,' when a slight shift in location would assure safety?<sup>11</sup>

Now it is generally accepted that "net flood losses cannot be reduced by engineering works alone but that land-use planning and regulation is an essential part of an effective national program for loss reduction. . . ."<sup>12</sup> Methods of regulating land use in flood plains presently include: encroachment or floodway statutes, zoning ordinances, subdivision regulations, building codes, urban renewal, and warning signs.<sup>13</sup> The method with which we are here primarily concerned is *zoning*.

<sup>6</sup> *Id.* at 187.

<sup>7</sup> WHITE, CHANGES IN URBAN OCCUPANCE OF FLOOD PLAINS IN THE UNITED STATES, University of Chicago, Department of Geography Research Paper No. 57 (1958).

<sup>8</sup> *Id.* at 232. The full range of possible adjustments is examined in WHITE, HUMAN ADJUSTMENT TO FLOODS, University of Chicago, Department of Geography Research Paper No. 29 (1942).

<sup>9</sup> See SHEAFFER, FLOOD PROOFING—AN ELEMENT IN A FLOOD DAMAGE REDUCTION PROGRAM, University of Chicago, Department of Geography Research Paper No. 65 (1960).

<sup>10</sup> See, e.g., MURPHY, REGULATING FLOOD-PLAIN DEVELOPMENT, University of Chicago, Department of Geography Research Paper No. 56 (1958).

<sup>11</sup> *Engineering News-Record* 385 (March 11, 1937).

<sup>12</sup> WHITE, *op. cit. supra* note 1, at 94. See generally MILLER, FLOOD DAMAGE PREVENTION FOR TENNESSEE, Tennessee State Planning Commission (November, 1960); MOORE, PLANNING FOR FLOOD DAMAGE PREVENTION, Georgia Institute of Technology, Engineering Experiment Station, Special Report No. 35 (1958).

<sup>13</sup> For a good discussion of the probable constitutionality of regulations effecting sound land use in floodable areas where the rational relationship between such regulations and the public benefit is demonstrable, see Cooter, *To Stay Out of Floods*, NATIONAL CIVIC REVIEW, Vol. L, No. 10, pp. 534-39 (November, 1961).

## FLOOD-PLAIN ZONING

The constitutionality of zoning as a proper exercise of the police power has been established for some time.<sup>14</sup> The general principle of zoning ordinances was first held constitutional and not violative of the due process clause in *Village of Euclid v. Ambler Realty Company*.<sup>15</sup> While their application to particular situations is sometimes held so arbitrary as to violate the due process clause,<sup>16</sup> zoning ordinances have been held valid in virtually every case in which the zoning was reasonably related to the public health, safety, or general welfare.<sup>17</sup>

Since a zoning ordinance imposes a restriction on the use of private property, to be valid it must be a proper exercise of the police power. It was decided in the landmark Illinois case of *City of Aurora v. Burns*,<sup>18</sup> that zoning was such a proper exercise of the police power if the zoning ordinance was *reasonable*. Thus, the test of whether a zoning ordinance is valid or not, is whether it is reasonable in relation to the general public welfare.

A zoning ordinance that may be valid in and of itself may be invalid as applied to a particular piece of property. For example, a dispute may arise as to whether a particular piece of property has been properly placed in a particular zone rather than whether the use classification of the zoning ordinance is itself valid.<sup>19</sup> Similarly, a zoning ordinance may not restrict a piece of property to a use for which it is totally unsuited because this would amount to confiscation and would therefore be unconstitutional.<sup>20</sup>

Flood-plain zoning is much the same as other city or county zoning,

<sup>14</sup> See McQuillin, *Constitutional Validity of Zoning Under the Police Power*, 11 ST. LOUIS L. REV. 76 (1926). See also Byrne, *Constitutionality of a General Zoning Ordinance*, 11 MARQ. L. REV. 189 (1927); Baker, *Constitutionality of Zoning Laws*, 20 ILL. L. REV. 213 (1925); and Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834 (1924).

<sup>15</sup> 272 U.S. 365 (1926).

<sup>16</sup> See, e.g., *Nectow v. Cambridge*, 277 U.S. 183 (1928). See also Ribble, *Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689 (1930).

<sup>17</sup> For example, it has been pointed out that during the period from January, 1954 to May, 1957, the Illinois Supreme Court upheld the validity of the ordinance in 23 of 30 cases. Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U. L. REV. 174, 175-6 (1957).

<sup>18</sup> 319 Ill. 84, 149 N.E. 784 (1925).

<sup>19</sup> See 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 69 N.E. 2d 827 (1946), and cases cited therein.

<sup>20</sup> See, e.g., *County of Du Page v. Halkier*, 1 Ill. 2d 491, 115 N.E. 2d 635 (1953); *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N.E. 2d 315 (1953).

except that it has a somewhat different objective or purpose, that is, the zoning of the flood-threatened areas along the stream. It is a means of regulating the use of land and the type of structures which may be erected thereon by placing land subject to flood in a separate district with certain restrictive use provisions aimed at minimizing flood damage. Those areas closest to the stream subject to flooding which would be hazardous to human life are placed in one district. Areas farther from the stream and with less hazard are zoned accordingly, in much the same manner as city or county zoning.<sup>21</sup>

As a legal concept, flood-plain zoning is, in most of its aspects, not revolutionary. However, due to the fact that almost all of the ordinances have been enacted since 1949,<sup>22</sup> judicial construction of them is extremely sparse.

The leading case is *American Land Company v. City of Keene*.<sup>23</sup> In 1925 the city of Keene, New Hampshire, sold 32 acres of land to the plaintiff, who proposed to develop and subdivide it for residences. The mayor had indicated that it was suitable for residential sites and could be sewerred, despite the fact that about 28 acres of it was lowland near the Ashualot River. A branch of the river ran through a corner of the land and nearly every spring the ice in this branch broke up earlier than in the sluggish river into which the branch emptied. This resulted in the annual or periodic flooding of much of the real estate in question, making it entirely unfit for residential purposes. After the plaintiff had subdivided the land and sold several of the lots, the city amended its zoning ordinance (1927), classifying this land in an "Unrestricted District" category in which no dwelling house could be erected without the consent of an adjustment board. As criteria, the board was to use the health and safety of the occupants and the health, safety, and general welfare of the public. At the trial in the federal district court the principal issue was whether the land was fit for residential purposes. After the city showed that the land was subject to flooding at certain periods of the year and was not susceptible of good drainage, the court held the ordinance constitutional and a valid exercise of the police power. The trial court then denied a post-trial amendment to the complaint seeking relief on the ground of fraud. On appeal both majority and dissenting opinions agreed there had been a valid exercise of the police power. As the dissent put it, this was

<sup>21</sup> For a Model Flood Plain Zoning Ordinance Amendment and analysis thereof, see BEUCHERT, A LEGAL VIEW OF THE FLOOD PLAIN 57-77 (1961). See also MURPHY, *op. cit. supra* note 10, at 175-89 for a comprehensive collection of flood-plain provisions in zoning ordinances.

<sup>22</sup> See MURPHY, *op. cit. supra* note 10, at 56-70. Of the 49 flood-plain zoning ordinances listed in the tables, only four were enacted prior to 1949.

<sup>23</sup> 41 F. 2d 484 (1st Cir. 1930).

"an eminently proper exercise of the city's police powers in order to protect possible purchasers from being victimized—as the plaintiff was victimized by the city itself."<sup>24</sup>

It is seen, therefore, that the ordinance itself was not one of flood-plain zoning; such was just the particular application of it in the *Keene* case. This, however, does not substantially lessen its value as legal precedent, despite the element of fraud. The denial of the permit was based on flood-plain zoning, and this was upheld under the police power in spite of the general criteria specified for the granting of the permit.

Beuchert discusses what appears to be the only other case dealing with flood-plain zoning, *Sevier Terrace Realty Co. v. City of Kingsport*.<sup>25</sup> In 1957 the Tennessee legislature added to the general grant of zoning power<sup>26</sup> the following amendment:

Special districts or zones may be established in those areas deemed subject to seasonal or periodic flooding, and such regulations may be applied therein as will minimize danger to life and property, and as will secure to the citizens of Tennessee the eligibility for flood insurance under Public Law 1016, 84th Congress or subsequent related laws or regulations promulgated thereunder.<sup>27</sup>

Later the same year the defendant adopted an ordinance which set up floodway channel districts, varying from 40 to 65 feet on each side of the centerline of Reedy Creek and prohibited the construction, alteration or extension of any building or structure, as well as dumping and the permanent storage of materials within the said districts.<sup>28</sup> The plaintiff, who owned unimproved real estate within such a district and so was restricted in the use of his land according to the terms of the ordinance, brought suit for declaratory judgment. Since the plaintiff asserted that Chapter 306 resulted in an unconstitutional taking of private property without just compensation or due process of law, the Attorney General became a party. This aspect of the case was heard separately. The Attorney General, besides relying on the *Keene* case and that the prevention of fraud and deceit is part of the police power, argued that the same reasons which permit zoning to be used to protect persons and property from the dangers of fire apply also to floods. The Chancellor held that the state law was a reasonable exercise of the police power and stated that he could see little difference between flood zoning and the usual type of zoning law.

<sup>24</sup> *American Land Co. v. Keene*, 41 F. 2d 484, 490 (1st Cir. 1930).

<sup>25</sup> No. 7172, Ch. Sullivan County, Tennessee, October 29, 1959, an unreported case discussed in BEUCHERT, *op. cit. supra* note 21, at 51-53.

<sup>26</sup> As contained in TENN. CODE ANN. § 13-401 (referring to quarterly courts) and § 13-701 (referring to municipalities) (Supp. 1960).

<sup>27</sup> TENN. ACTS 1957, ch. 306.

<sup>28</sup> Kingsport, Tenn., Zoning Ordinance, §§ V-VI (1957); MURPHY, *op. cit. supra* note 10, at 185.

The validity of the city ordinance has not yet been passed upon, but since in its nature it seems to be more of an encroachment-type law rather than zoning in the sense here used,<sup>29</sup> a decision on it may not have special legal significance. These two instances are the extent of case law dealing directly with flood-plain zoning.<sup>30</sup> As was mentioned above, this is attributable mainly to the fact that flood-plain zoning is of such recent development.

A very thorough analysis of the constitutionality of flood-plain zoning was made by Allison Dunham in 1959 in his article *Flood Control Via the Police Power*.<sup>31</sup> Dunham specifically rejected basing validity on the phrase "to promote health, safety, protect property and promote the general welfare" or some other comprehensive phrase. Rather he discussed the four reasons commonly given for flood-plain regulation: 1) Individual choices result in unwise land use patterns in a flood plain; 2) Individual choices result in land uses which obstruct a flood flow so as to damage other land users in the use of their own land; 3) There is not really a rational choice, and therefore the individual land user must be protected against being "victimized" to the damage of his health, safety or property; 4) Individual choices result in land uses which require expensive public works such as reservoirs and levees or require costly disaster relief when the floods come, so that restriction on choice will promote welfare by reducing public expenditures. He concluded that the first reason by itself lacks legal basis, but that the other three reasons are supportable.<sup>32</sup>

Dunham dismissed the first reason on the basis that the police power has traditionally been used to prevent one from using his property in a manner that would injure another or be damaging to the community as a whole; whereas, it may be suggested that the exclusion or restriction of uses in areas subject to flooding is a device protecting a person from his own acts, and as such lies outside the scope of the police power.<sup>33</sup> It is not felt, however, that the regulation of flood plain uses within the frame-

<sup>29</sup> The basic intent of encroachment and flooding statutes is to prevent encroachment upon or obstruction in the stream channels themselves that would restrict their width or otherwise increase flood heights and velocities. See MURPHY, *op. cit. supra* note 10, at 19-34, 165-74.

<sup>30</sup> Beuchert mentions two other cases which touch upon the area indirectly but which as he points out are clearly distinguishable from flood-plain zoning in its normal sense: *Hager v. Louisville & Jefferson County Planning & Zoning Comm'n*, 261 S.W. 2d 619 (Ky. 1953); and *Konitz v. Bd. of County Comm'rs of Johnson County*, 180 Kan. 230, 303 P. 2d 180 (1956). BEUCHERT, *op. cit. supra* note 21, at 53.

<sup>31</sup> 107 U. PA. L. REV. 1098 (1959).

<sup>32</sup> Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098, 1110-17 (1959).

<sup>33</sup> See WERTHEIMER, FLOOD-PLAIN ZONING—POSSIBILITIES AND LEGALITY WITH SPECIAL REFERENCE TO LOS ANGELES COUNTY, CALIFORNIA 30, California State Planning Board (June, 1942).

work of a comprehensive zoning plan is solely, or chiefly, an action protecting one from the consequences of his own acts, but almost necessarily involves the protection of other land users and the public as well.<sup>34</sup>

As to the third reason, it is very possible that those who wish to build in the flood plain may not have knowledge of the flood risk involved. The fact that such a possibility exists makes the regulation of flood plain uses in the interest of both the individual and the public. In cases where the builder is not to be the ultimate owner, it is certainly a proper exercise of the police power to protect possible purchasers from being victimized.<sup>35</sup>

Dunham also examined the last three reasons for the validity of flood-plain zoning from a due process viewpoint and found little difficulty with them as long as the legislation in question indicates that these were the true reasons for passage.<sup>36</sup>

The construction of protective devices such as dams and levees as a method of reducing flood damage will, in many cases, enhance the market value of the property protected. On the other hand, the placing of use restrictions on areas subject to flood will, in many instances, reduce opportunities for land speculation and may bring out the real value of the land affected. This fact alone causes many objections to the use of the police power to prevent or reduce flood damage in lieu of protective works. The lowering of market value, however, has been held not to be a valid argument against the proper use of the police power.<sup>37</sup> As to the extent of diminution of market value that will be permitted, the courts generally hold that to sustain an attack upon the validity of a zoning ordinance, the aggrieved property owner must show that if the ordinance is enforced the consequent restriction precludes its use for any purpose to which it is reasonably adapted.<sup>38</sup> Provision must be made for existing uses, however, since zoning must not be retroactive.<sup>39</sup>

In the final analysis each ordinance setting up a land-use regulation must, in the words of the courts, "be reasonable and not arbitrary." The principal criterion as to the reasonableness of flood-plain zoning ordinances involves a determination of the extent of the flood hazard. In other words, the regulations must bear a reasonable relation to the engi-

<sup>34</sup> See SILER, *FLOOD PROBLEMS AND THEIR SOLUTION THROUGH URBAN PLANNING PROGRAMS* 14, Tennessee State Planning Commission (1955).

<sup>35</sup> See *American Land Co. v. Keene*, 41 F. 2d 484 (1930).

<sup>36</sup> DUNHAM, *supra* note 32, at 1123-28.

<sup>37</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), property worth \$800,000 as a brickyard, \$60,000 for residential purposes; *Geneva Investment Co. v. City of St. Louis*, 87 F. 2d 83 (8th Cir. 1937); *Marblehead Land Co. v. City of Los Angeles*, 47 F. 2d 528 (9th Cir. 1931).

<sup>38</sup> See the cases collected in *Annots.*, 117 A.L.R. 1129 (1938); 86 A.L.R. 671 (1933).

<sup>39</sup> ILL. REV. STAT. ch. 34, § 3151 (1961).



neering data. In order to be reasonable the area, extent and elevation determinations of the land placed in the flood plain zone should be based upon: historical evidence of flooding; a computed frequency of floods; an engineering study of flood potential; an analysis of the degree of flood protection afforded by other methods of regulation; the degree of flood protection offered by engineering structures and whether or not development in the immediate future will increase or lessen the runoff.<sup>40</sup> The uses to be permitted on the land subject to flooding should also take into consideration the anticipated growth of the area and the availability of non-flood land sufficient for the needs of the community.<sup>41</sup>

Once a legislative finding of fact as to flood hazard has been made, although not conclusive upon the courts, it will be accorded judicial consideration and deference.<sup>42</sup> Therefore, there appears to be no legal reason why flood-plain zoning is any different from any other type of zoning except for the rather extensive amount of engineering research which must be conducted in order to determine the area and elevation of the land to be included in any such district.

#### STATE FLOOD-PLAIN ZONING

At the present time the primary responsibility for the preparation and enforcement of flood-plain zoning regulations rests upon local governments. Of the communities that have authority to plan and zone, however, not all are taking advantage of the powers available to them,<sup>43</sup> and some are even hostile to their use. Such hostility is usually justified on the theory that community planning, zoning and other regulations infringe on the right of the individual to exercise free choice in the use of his property and therefore should be opposed for the preservation of individual liberty.

Many local governments do not have and cannot afford to employ competent professional and technical personnel to enable them to relate the flood situation to development problems and to prepare suitable zoning

<sup>40</sup> See Barrows, "Legal Aspects of Flood Plain Zoning," Paper presented at the thirty-third meeting of the Northeastern Resources Committee, September 13, 1960. For a good analysis of the methods available for the identification and evaluation of flood and land-use factors which should be considered in planning for flood damage prevention so that the most *reasonable* type of flood-plain regulation will be determined, see MOORE, *op. cit. supra* note 12, at 10-28.

<sup>41</sup> See White, *op. cit. supra* note 1. See also WHITE, HUMAN ADJUSTMENTS TO FLOODS, University of Chicago, Department of Geography Research Paper No. 29 (1942).

<sup>42</sup> Block v. Hirsh, 256 U.S. 135 (1921); People v. Nebbia, 262 N.Y. 259, 186 N.E. 694 (1933).

<sup>43</sup> Murphy noted that as of July, 1958, only 49 cities and counties in 15 states had adopted flood-plain zoning ordinances. MURPHY, *op. cit. supra* note 10, at 55-59.

provisions to guide and control land use in flood plains. Likewise, many cities do not have sufficient trained personnel to administer and enforce such regulations. Although responsibility for enforcement is local, the impact of poor enforcement is often regional and sometimes even state-wide. Awareness of this extra-territorial effect of flood-plain zoning administration caused Klar in 1960 to comment:

[E]ven with the very best of flood plain zoning, inevitably the streams which may give rise to such flooding in one community pass through other communities first. If suitable measures are not taken upstream, the community which is conscientiously trying to do the best for its citizens may find itself thwarted in its program. This obviously speaks for regional planning—if not regional zoning.<sup>44</sup>

On the county level there is the so-called problem of "leakage." County zoning ordinances restrict land uses only in the unincorporated areas of the county. Many landowners in unincorporated areas, upon finding themselves restricted in the use of their property by county zoning ordinances, have had little trouble in having their land reclassified to some less restrictive use upon its annexation to an adjoining city or village. Needless to say, this practice, if widely adopted, would vitiate the effectiveness of any conscientious program of county zoning for the reduction of flood damage.

Many of the difficulties encountered by the local administration of flood-plain zoning could be substantially alleviated and the objective of flood-plain land-use regulation more effectively achieved by the wider adoption of the concept of regional or state flood-plain zoning.

A recent and extensive study, conducted by Morse to determine the role of the states in guiding land use in flood plains, concluded that the states have a major responsibility for regulating land use in flood hazard areas.<sup>45</sup> This conclusion was based upon the fact that federal agencies do not have the requisite authority and that local governments cannot control land use in those portions of the flood plains which extend beyond their local government jurisdiction. Authority to regulate land use, including the flood plains, resides in the states. The federal government does not have this authority except on federally-owned land. Cities and counties do not have such authority except as it is granted to them by the state. The states, therefore, hold the key to responsible action for regulating flood-plain development. The study strongly recommends that the state's

<sup>44</sup> Klar, "Flood Plain Zoning in Urban Renewal and Regional Planning Program," p. c 12. Paper presented at the thirty-third Meeting, Northeastern Resources Committee, Berlin, Connecticut, September 13, 1960.

<sup>45</sup> MORSE, ROLE OF THE STATES IN GUIDING LAND USE IN FLOOD PLAINS, Tennessee Valley Authority and the Graduate Program in City Planning, Georgia Institute of Technology, Special Report No. 38 (June, 1962).

role in a comprehensive state flood damage prevention program include state regulation of land in flood plains.<sup>46</sup>

With the exception of encroachment and floodway statutes<sup>47</sup> none of the states, except Hawaii, has directly exercised their authority to regulate land use in flood plains. Instead, they have authorized cities and counties to adopt and enforce such regulations. The State of Hawaii has adopted in principle the concept of state zoning. One of its objectives is to establish conservation districts for the prevention of floods and soil erosion.

The Hawaii State Legislature passed Act No. 187, in June, 1961, authorizing the state to establish land-use zones within the state for those uses to which they are best suited for the public welfare and to create a complementary tax assessment program that would encourage rather than penalize persons who would develop uses that are best suited for the public welfare. The act created a State Land Use Commission consisting of seven members. One member is appointed from each senatorial district and one member is appointed at large. The Director of the Department which is responsible for administering the act and the Director of the Department of Planning and Research serve as ex-officio voting members.

The State Land Use Commission is directed by the act to establish three major classes of use to which all lands in the state shall be put: urban, agriculture and conservation. The Commission is empowered to group contiguous land areas suitable for one of these three major uses into a district and designate it as an urban district, agricultural district or conservation district.

The act further provides that zoning powers are granted to counties and that the counties shall govern the specific zoning within the three types of districts, except that areas may not be zoned for urban uses except in those districts that are designated as urban districts by the State Land Use Commission. The act also provides that the Commission shall prepare and furnish each county with copies of classification maps for that county showing the district boundaries adopted in final form by the state.

The Commission is required to adopt in final form not later than twenty-four months from the effective date of the act, regulations prescribing the permitted uses in the various classes of districts. The counties are responsible for determining the specific location of permitted uses within the districts.

As opposed to the act passed by the Hawaii State Legislature, the Tennessee State Planning Commission has proposed enactment of a state flood-plain zoning statute that would provide a temporary interim solution to

<sup>46</sup> *Ibid.* at X.

<sup>47</sup> See note 29 *supra*.

regional or "extra-territorial" flood-plain zoning problem.<sup>48</sup> To permit zoning of flood hazard areas currently unserved by local planning agencies, this act would permit the state, through the State Planning Commission, to use its police power to promulgate zoning on flood-plain areas. The proposed statute provides procedures for the certification of a zoning plan of a flood district by the State Planning Commission to the Secretary of State's office. A public hearing would be required in the county where the district is to be established. The act provides for a board of appeals to be appointed by the governor. Administration and enforcement of the zoning would be the responsibility of the office of a State Building Inspector within the State Planning Commission. This office would administer such zoning districts, issue necessary building permits, provide required inspections and enforce compliance with the zoning ordinance as passed.

The general concept outlined in this proposal merits consideration and study because it would seem to provide a reasonable basis for protecting areas not served by a local planning commission, or for encouraging local action.

State zoning regulations for areas not served by a planning commission would cease after a local planning commission has been established, local zoning regulations adopted and provisions made for a building inspector and an appeals board to administer and enforce such local zoning regulations. Therefore the provisions of this act do not apply where flood district zoning is already in effect or where a county court or chief legislative body of the municipality has already adopted a zoning resolution or ordinance with flood-plain provisions.

Since the proposed legislation does not establish any minimum zoning standards that the localities must meet before the state zoning regulations are terminated, a local government could apparently adopt a zoning ordinance for the express purpose of avoiding state controls.<sup>49</sup>

#### WITHDRAWAL OF PREVIOUSLY DELEGATED POLICE POWER

The power to zone, which carries with it police powers for the enforcement of zoning provisions, rests initially with the state. This police power

<sup>48</sup> MILLER, FLOOD DAMAGE PREVENTION FOR TENNESSEE 68, 71-78, Tennessee State Planning Commission (November, 1960).

<sup>49</sup> As another example of state regulation, the Alabama State Health Department recently adopted policies for approval of subdivisions in flood plains. These regulations provide that "Approval cannot be given to any subdivision which lies wholly below the fifty-year flood stage. Where a subdivision is located partly above and partly below the fifty-year flood stage, the portion of the area above the flood stage may be approved, provided it satisfies all the requirements of the sanitation regulations and subdivision criteria." Alabama State Health Department, "Policies on Approval of Subdivisions in Flood Plains," p. 1 (July, 1961).

was assigned to the states in the federal constitution<sup>50</sup> and has never been delegated to the federal government; it may be, and is, delegated by the states to its various political subdivisions.

Municipalities and counties, being local governments, have only such powers as are granted to them by the legislature. Their corporate authorities have no power as to zoning or other matters except as such power is given to them by statute.<sup>51</sup> In Illinois the General Assembly is the governing body of the state and is the sole constitutional repository of legislative power.<sup>52</sup> The only legislative powers municipalities have are those delegated to them by the General Assembly.

In 1959 the Illinois General Assembly amended its municipal zoning enabling act<sup>53</sup> so as to expressly empower municipalities to enact flood plain regulations. The act now reads in part:

To the end that . . . the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided . . . the corporate authorities in each municipality have the following powers, within the corporate limits or in contiguous territory not more than one and one-half miles beyond the corporate limits and not included in any municipality . . . to establish, regulate and limit . . . the building or set-back lines on or along any . . . storm or floodwater runoff channel or basin. . . .<sup>54</sup>

A substantially similar amendment to the county zoning enabling act<sup>55</sup> authorized counties to enact zoning regulations for this same purpose.<sup>56</sup>

The above amendments represent a delegation of police power to Illinois municipalities and counties to effect the desired regulation. Such a delegation of authority has not proved particularly motivating to the municipalities and counties of the several other states which have similarly empowered their lower governmental bodies to enact flood-plain regulations.<sup>57</sup> An alternative to such regulation on a municipal and county level would be to have flood-plain zoning effected and enforced either by the state itself or by a special state commission. By using such an alternative many of the difficulties encountered on a local level, such as the shortage of competent professional and technical personnel, local hostility and recalcitrance and the problem of leakage, could be substantially overcome.

Having once delegated an attribute of its police power to municipalities

<sup>50</sup> U.S. CONST. amend. X.

<sup>51</sup> See Matthews, *The Power to Zone in Illinois*, 1954 U. ILL. L. F. 167.

<sup>52</sup> ILL. CONST. art. iv, § 1.

<sup>53</sup> ILL. REV. STAT. ch. 24, § 11-13-1 (1961).

<sup>54</sup> *Ibid.*

<sup>55</sup> ILL. REV. STAT. ch. 34, § 3151 (1961).

<sup>56</sup> II LAWS OF ILLINOIS 1959, p. 1653, § 1 (municipalities); II LAWS OF ILLINOIS 1959, p. 1676, § 1 (counties).

<sup>57</sup> See note 43 *supra*.

and counties, the issue which presents itself is whether the Illinois Legislature has the power to withdraw such delegated power and, upon resuming it, either exercise it directly or confer it upon an administrative body.

The general legal doctrine, supported by an unbroken line of authorities, is held to be that the delegation of powers of local self-government is wholly within the discretion of the legislature and may be abridged or abrogated at its pleasure.<sup>58</sup> The legislature may withdraw such powers conferred on municipal corporations in whole or in part and resume them in whole or in part, and may either return such powers to itself or vest them in other agencies, such as special commissions.<sup>59</sup> It follows as a general rule that the state legislature, unless restricted by the constitution, may withdraw previously delegated police power and exercise it directly or provide for its exercise by some other duly constituted agency.<sup>60</sup> In this connection, the inalienable character of the police power of the state prevents the legislature from irrevocably parting with it in whole or in part in favor of any municipal corporation.<sup>61</sup> Such rule has been often recognized by the Illinois courts.

In a *quo warranto* proceeding to determine the constitutionality of the 1949 Hospital District Act,<sup>62</sup> *People ex rel. Royal v. Cain*,<sup>63</sup> the Illinois Supreme Court rejected the argument that the act attempted to vest in the newly created hospital districts power and jurisdiction coextensive with that of counties. Had this argument been accepted, both political entities would have purportedly had the power to levy taxes against identical property for identical purposes, in violation of the due process clause of the Illinois Constitution.<sup>64</sup> The court, however, took notice of the fact that the act specifically provided for the cessation of operation of any pre-existing public agencies authorized to own and maintain public hospitals and to levy taxes therefor. In its opinion the court quoted *People ex rel. Greening v. Bartholf*<sup>65</sup> where the Illinois Supreme Court had said:

<sup>58</sup> For authorities and for the constitutional development of municipal home rule, see MCBAIN, *LAW AND PRACTICE OF MUNICIPAL HOME RULE* (1916); and McBain, *Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916). (This doctrine is utterly refuted in the United States.) See also MCGOLDRICK, *LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930* (1933).

<sup>59</sup> See generally 2 McQUILLIN, *MUNICIPAL CORPORATIONS* ch. 4, § 4.05 (3rd ed. 1949).

<sup>60</sup> *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919).

<sup>61</sup> *Milwaukee Elec. Ry. v. Wisconsin R.R. Comm'n*, 238 U.S. 174 (1915). See generally 6 McQUILLIN, *MUNICIPAL CORPORATIONS* ch. 24, § 24.42 (3rd ed. 1949).

<sup>62</sup> ILL. REV. STAT. ch. 23, paras. 163.30-50 (1949).

<sup>63</sup> 410 Ill. 39, 101 N.E. 2d 74 (1951).

<sup>64</sup> ILL. CONST. art. II, § 2.

<sup>65</sup> 388 Ill. 445, 463, 58 N.E. 2d 172, 180-81 (1944). Quoted in *People ex rel. Royal v. Cain*, 410 Ill. 39, 51, 101 N.E. 2d 74, 80 (1951).

The Constitution contains no prohibition against the creation by the legislature of every conceivable description of corporate facilities, and the endowment of them, when created, with all the faculties and attributes of other pre-existing corporate authorities. . . . In the organization of park districts located within the jurisdiction of an existing municipal corporation which had the power to create and maintain parks, this court has adhered strictly to the principle that the General Assembly has the power to withdraw from a municipal corporation a power previously given, and confer it upon another municipality.<sup>66</sup>

It also pointed out that this same principle was reiterated in *People ex rel. Curren v. Wood*,<sup>67</sup> where the court sustained the validity of a provision of the Airport Authority Act of 1945 specifying that a newly created airport authority shall succeed to the interest of any pre-existing public airport, located within the corporate limits of the authority.

The case of *Anderson v. Nick*<sup>68</sup> concerned the continued validity of an 1889 prohibition ordinance of the town of Lake which had been granted certain protection by the Illinois Annexation Act.<sup>69</sup> In holding that the rights of cities and villages with respect to the prohibition and regulation of the sale of alcoholic beverages were now subject to the Illinois Liquor Control Act,<sup>70</sup> the court stated:

A municipal corporation created by a State which has been delegated the exercise of a police power has no privilege to continue exercising the police power after the legislature has manifested a different intention with reference to the exercise thereof.<sup>71</sup>

With respect to a private corporation the court held that where the legislature had given the University of Chicago the power to prohibit the sale of liquor within a prescribed area, such power could be revoked at the pleasure of the legislature because the police power of the state could not be subject to an irrevocable grant.<sup>72</sup>

In *Kizer v. City of Mattoon*,<sup>73</sup> the exclusive power of regulation as to the storage, keeping and sale of gasoline and volatile oils, previously lodged in cities and villages,<sup>74</sup> was held to have been withdrawn by superceding state laws<sup>75</sup> and vested in the department of trade and commerce.

<sup>66</sup> *People ex rel. Royal v. Cain*, 410 Ill. 39, 51, 101 N.E. 2d 74, 80 (1951).

<sup>67</sup> 391 Ill. 237, 62 N.E. 2d 809 (1945).      <sup>69</sup> Laws of Illinois 1889, pp. 66, 75.

<sup>68</sup> 402 Ill. 508, 84 N.E. 2d 394 (1949).      <sup>70</sup> ILL. REV. STAT. ch. 43, § 194 (1961).

<sup>71</sup> *Anderson v. Nick*, 402 Ill. 508, 514, 84 N.E. 2d 394, 398 (1949).

<sup>72</sup> *Dingman v. People*, 51 Ill. 277 (1869).

<sup>73</sup> 332 Ill. 545, 164 N.E. 20 (1928).

<sup>74</sup> Illinois Cities and Villages Act, art. 5 § 1, clause 65 (Smith's Stat. 1927, p. 340).

<sup>75</sup> Laws 1919, p. 692 "AN ACT to regulate the storage, transportation, sale and use of gasoline and volatile oils," and Civil Administrative Code, § 56 (SMITH-HURD REV. STAT. ch. 127, 1927).

The court pointed out that where the state delegates to a municipality the power to pass ordinances, the state may resume such power through legislative action and thus deprive the municipality of the right to exercise it. Other powers similarly held to have been *expressly* withdrawn from municipalities possessing them under the Illinois Cities and Villages Act include the power to exact a license fee from master plumbers,<sup>76</sup> and the power to license and tax foreign insurance companies.<sup>77</sup>

The Illinois Public Utilities Act,<sup>78</sup> which created the Illinois Commerce Commission, and vested in it exclusive power over the regulation of public utilities, has been interpreted as having *impliedly* withdrawn from cities and villages certain powers previously delegated under the Cities and Villages Act. Powers held to have been so withdrawn include the powers to pass regulations concerning: the speed of trains within corporate limits;<sup>79</sup> the separation of grades by railroads at highway crossings;<sup>80</sup> the scales and weights of freight shipments;<sup>81</sup> the use of streets, alleys and public places by public utilities;<sup>82</sup> the maintenance of flagmen at railroad crossings;<sup>83</sup> the equipping of street railroads with brightly lighted headlights;<sup>84</sup> and the equipment and operation of street cars in the city of Chicago.<sup>85</sup>

Thus, aside from situations where police powers previously being exercised by, or merely residing in, counties and municipalities have been held to have expressly withdrawn by superceding state statutes,<sup>86</sup> the Illinois courts have frequently recognized that such police powers may also be withdrawn by implication.<sup>87</sup> Withdrawals of police power and repeals of statutes and ordinances by implication, however, are not favored. It is

<sup>76</sup> *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N.E. 1004 (1900).

<sup>77</sup> *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276, 18 N.E. 668 (1888).

<sup>78</sup> ILL. REV. STAT. ch. 111½ (1961).

<sup>79</sup> *Hemphill v. Wabash R. R.*, 209 F. 2d 768 (1954), *cert. denied* 347 U.S. 954 (1954); *City of Witt v. Cleveland, C., C. & St. L. Ry.*, 324 Ill. 494, 155 N.E. 325 (1927).

<sup>80</sup> *City of Chicago v. Illinois Commerce Comm'n*, 356 Ill. 501, 190 N.E. 896 (1934).

<sup>81</sup> *City of Chicago v. Chicago Great Western R. R.*, 348 Ill. 193, 180 N.E. 835 (1932).

<sup>82</sup> *Chicago N. S. & M. R. R. v. City of Chicago*, 331 Ill. 360, 163 N.E. 141 (1928).

<sup>83</sup> *Village of Atwood v. Cincinnati, I. & W. R. R.*, 316 Ill. 425, 147 N.E. 449 (1925).

<sup>84</sup> *Northern Trust Co. v. Chicago Ry.*, 318 Ill. 402, 149 N.E. 422 (1925).

<sup>85</sup> *City of Chicago v. O'Connell*, 278 Ill. 591, 116 N.E. 210 (1917).

<sup>86</sup> *E.g.*, *Anderson v. Nick*, 402 Ill. 508, 84 N.E. 2d 394 (1949); *Kizer v. City of Mattoon*, 332 Ill. 545, 164 N.E. 20 (1928); *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276, 18 N.E. 668 (1888).

<sup>87</sup> *E.g.*, *City of Chicago v. Illinois Commerce Commission*, 356 Ill. 501, 190 N.E. 896 (1934); *City of Witt v. Cleveland, C., C. & St. L. Ry.*, 324 Ill. 494, 155 N.E. 325 (1927); *Village of Atwood v. Cincinnati, I. & W. R. R.*, 316 Ill. 425, 147 N.E. 449 (1925).



only where there is a clear repugnance between two laws and the provisions of both cannot be carried into effect that the later law must prevail and the former be considered repealed by implication.<sup>88</sup> Even where two statutes are enacted which have relation to the same subject, the earlier continues in force unless the two acts are clearly inconsistent with or repugnant to each other, or unless in the later statute some express notice is taken of the former plainly indicating an intention to repeal it.<sup>89</sup>

As a rule of construction, two statutes which are seemingly repugnant to each other should, if possible, be so construed that the subsequent act may not operate to repeal by implication the earlier act.<sup>90</sup> In all such cases it is the intention of the legislature to impliedly withdraw the previously delegated power that is the controlling factor.<sup>91</sup> The repeal by implication of one act by a later act is not effected by mere conflicts or inconsistencies between them, but occurs only where the carrying out of the later act prevents the enforcement of the former. To the extent they are in conflict the first act is repealed, but the parts of the first act not affected remain in full force and effect.<sup>92</sup>

Similarly, while municipal ordinances must be in harmony with the general laws of the state, and in the case of conflict the ordinance must give way, the mere fact that the state has legislated upon a subject does not necessarily deprive a lower governmental body power to deal with the subject by ordinance.<sup>93</sup> This is particularly true where the statute itself provides that the ordinance may prevail within the municipality<sup>94</sup> and

<sup>88</sup> *People v. Burke*, 313 Ill. 576, 145 N.E. 164 (1924).

<sup>89</sup> *Village of Glencoe v. Hurford*, 317 Ill. 203, 148 N.E. 69 (1925); *Town of Ottawa v. County of La Salle*, 12 Ill. 339 (1851).

<sup>90</sup> *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N.E. 2d 26 (1941), *cert. denied* 316 U.S. 670 (1942); *Dugan v. Berning*, 11 Ill. 2d 353, 143 N.E. 2d 547 (1957).

<sup>91</sup> *City of Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N.E. 588 (1913). Compare *Ayres v. City of Chicago*, 239 Ill. 237, 87 N.E. 1073 (1909) and *People v. Sargent*, 254 Ill. 514, 98 N.E. 959 (1912) with *City of Chicago v. Walden W. Shaw Livery Co. supra*.

<sup>92</sup> *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N.E. 2d 26 (1941), *cert. denied*, 316 U.S. 670 (1942), the power vested in cities to permit or refuse a license or franchise to a public utility, held not to have been withdrawn by the provisions of the Public Utilities Act; *Great Atlantic and Pacific Tea Co. v. Mayor & Com'rs of City of Danville*, 367 Ill. 310, 11 N.E. 2d 388 (1937), the power vested in cities to permit or refuse a license for the sale of intoxicating liquors to groceries or meat stores, held not to be repugnant to nor withdrawn by the Liquor Control Act; *City of Geneseo v. Shearer*, 326 Ill. 82, 157 N.E. 28 (1927), the power vested in cities to pave, by special assessment, streets over which state bond issue road passes, held not to have been withdrawn by the Hard-Surfaced Road Act.

<sup>93</sup> *Concrete Contractors' Ass'n of Greater Chicago v. Village of La Grange Park*, 14 Ill. 2d 65, 150 N.E. 2d 783 (1958).

<sup>94</sup> *City of Chicago v. Michalowski*, 318 Ill. App. 533, 48 N.E. 2d 541 (1943).

the statute not be operative therein.<sup>95</sup> This principle was applied in two very recent Illinois cases with respect to a general zoning ordinance of the City of Rockford which included certain procedural requirements for its amendment, in addition to, but not inconsistent with, those of the statute,<sup>96</sup> and a Cicero ordinance regulating trailer camps.<sup>97</sup>

Several of these principles have already been applied in cases concerning the validity of zoning ordinances. For example, a federal court in Florida held that a Florida statute which prohibited the erection, maintenance or operation of any filling station, public garage or mercantile establishment on Bayshore Boulevard, and within an area contiguous thereto in the city of Tampa, superceded two ordinances of the city of Tampa forbidding such building in the area, and stood above them as paramount and controlling.<sup>98</sup> It has likewise been accepted that the power of the state over the subject of zoning being supreme, local zoning regulations, ordinances or by-laws may not contravene the statutes or general law of the state,<sup>99</sup> and, in the event of conflict between the two, the local zoning regulations, to the extent of such conflict, must yield.<sup>100</sup>

#### CONCLUSION

Flood-plain zoning is valid as a proper exercise of the police power. This power to regulate land uses in flood plains rests initially with the state. The states may delegate this power to lower governmental bodies, as in fact they have in several instances. The administration of flood-plain zoning on a local level has encountered the difficulties of insufficient professional and technical personnel, local recalcitrance and the problem of leakage. To overcome these difficulties and to give recognition to the extra-jurisdictional aspect of flood-plain zoning, it is recommended that flood-plain zoning be effectuated on the state level. Illinois has already delegated the power to effect such regulation to Illinois municipalities and counties. The Illinois General Assembly, however, has the option of withdrawing this power and exercising it either directly or through a special administrative body. For the more effective administration of flood-plain zoning it is suggested that this option be exercised.

<sup>95</sup> See *Kizer v. City of Mattoon*, 332 Ill. 545, 164 N.E. 20 (1928).

<sup>96</sup> *Treadway v. City of Rockford*, 24 Ill. 2d 488, 182 N.E. 2d 219 (1962).

<sup>97</sup> *Town of Cicero v. Weiland*, 35 Ill. App. 2d 456, 183 N.E. 2d 40 (1962).

<sup>98</sup> *Texas Co. v. City of Tampa, Florida*, 100 F. 2d 347 (5th Cir. 1938).

<sup>99</sup> *David v. Board of Appeals of Reading*, 333 Mass. 657, 132 N.E. 2d 386 (1956); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A. 2d 362 (1952); *State v. Accera*, 36 N.J. Super. 420, 116 A. 2d 203 (1955).

<sup>100</sup> *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A. 2d 362 (1952); *Attorney General v. Inhabitants of Town of Dover*, 327 Mass. 601, 100 N.E. 2d 1 (1951); *Bennett v. Board of Appeal of City of Cambridge*, 268 Mass. 419, 167 N.E. 659 (1929).