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Legal Aspects of Local Planning and Zoning in Louisiana

JEFFERSON B. FORDHAM*

This is a crucial period in the life of city planning and zoning in America. Despite the critical need for new homes and the construction requirements of the industrial and commercial community, it is of the highest importance that there be no breakdown in our planning and zoning standards. The situation actually demands the strengthening and more effective use of such controls. A tremendous amount of building will be in progress for a period of years. If it turns into a haphazard, mushrooming process the objectives of health, beauty, convenience and stable economic values will suffer immeasurably. What is involved, then, is much more than meeting the pressing current need of housing. At stake are the very shape and character of our cities, towns and villages for the indefinite future.

The physical focus of the problem is the suburban area. There is nothing more artificial than municipal corporate limits. It is a commonplace that urban population trends are strongly outward from the heart of a given community toward the suburban periphery. This means that effective planning and zoning must comprehend the suburbs. The capital city, Baton Rouge, epitomizes the matter. The Baton Rouge metropolitan district embraces a total area and an aggregate population far more than double those of the city proper. The city, however, may zone only its own territory.¹ The parish is not endowed with zoning authority and the only available parish legal controls are the powers of the police jury to govern the location and construction of public improvements and to regulate the laying out of subdivisions.²

It is quite in order, then, to re-examine the legal basis for community planning and zoning in Louisiana. An adequate inquiry into the subject would deal as well with the administrative materials. It is proposed to pursue that branch of the study more

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1. La. Act 240 of 1926, § 2 [Dart's Stats. (1939) § 5789].

2. La. Rev. Stats. of 1870, § 2743, as amended by La. Act 234 of 1928 [Dart's Stats. (1939) § 6405].

at leisure and to treat of it in a subsequent issue of this REVIEW. At the moment, I have an eye to the fact that the legislature is due to meet in May. What statutory changes are needed to place the local units of government in a position to do a good planning and zoning job? Let us take an inventory.

PLANNING

The position of primacy in the legal control of community development is occupied by planning. Careful planning is a *sine qua non* of intelligent zoning. Louisiana's planning legislation is spotty and does not give full recognition to this fundamental. At the state level there is effective provision for planning as a function of the Department of Public Works.³ The enabling statute contemplates assistance to and cooperation with local planning agencies. This includes investigation of particular local planning problems. In addition to existing federal aids to local planners, the pending Wagner-Ellender Housing Bill authorizes an appropriation of \$12,500,000 for studies and reports on various factors affecting housing, including zoning regulations, and a further appropriation of \$25,000,000 for grants to local public bodies on a fifty-fifty basis to aid in financing local studies, plans and surveys relating to housing and other community development.⁴ But, quite apart from these external aids, the legal position of local planning agencies should be bolstered.

The general city planning enabling act applies only to "cities," whereas zoning power has been granted to all municipalities.⁵ The act does not define "cities." They are defined in the general municipal charter law, the so-called Lawrason Act, as municipalities with five thousand or more inhabitants.⁶ The statute refers to the "commission council" as the city governing body, whereas cities operating under the Lawrason Act have the mayor and board of aldermen form of government. Provision is made for an unwieldy planning commission of fifteen members, who

3. A state planning commission was created by La. Act 38 of 1936 [Dart's Stats. (1939) § 9664.1 et seq.]. By La. Act 2 of 1942, § 3 [Dart's Stats. (Supp. 1944) § 6753.3] the commission was "merged and consolidated" into the newly created department of public works.

4. S. 1592, 79th Cong., 2nd sess. (1946) Title II.

5. La. Act 305 of 1926, § 1 [Dart's Stats. (1939) § 5768]. While the title of the act refers to "municipalities," the purview applies only to "cities." The commission-manager form of government law authorizes the creation of a "city plan board" with such duties and powers as shall be prescribed by ordinance. La. Act 160 of 1918, § 54 [Dart's Stats. (1939) § 5559]. It is no credit to Louisiana that of the more than 600 city manager cities in the United States not one is a Louisiana municipality.

6. La. Act 136 of 1898, § 1, as amended [Dart's Stats. (1939) § 5408].

must be "freeholders." A much smaller body would doubtless be better mobilized and more effective. The common law term "freeholder" was an obvious inadvertence; it was clearly intended to refer to a property owner. Why, however, have a property qualification? This is not 1832 or before. The ablest, sanest and most interested student of community development may very well not be a landowner.⁸

The act is silent as to the organization and procedure of the commission. Nothing is said about a chairman, vice-chairman, secretary or other officers and employees. The methods of conducting business and making and preserving records are likewise left to conjecture or improvisation.

The statute is entirely inadequate in its treatment of the powers and duties of a planning commission. It does not require the preparation of a master plan. Community planning which is not projected on a scale which embraces an over-all pattern is almost as objectionable as piecemeal zoning.⁹ The task must be seen in the large if intelligent integration is to be achieved. Nor is provision made for the adoption of an official map showing the layout of streets, parks and other public ways or places.¹⁰ No mention is made of such important ancillary powers as the authority to enter upon private property for the purpose of making examinations and surveys.¹¹

The act requires submission of plats, plans and allotments or subdivisions, laid out into lots or plats with streets or other ways intended to be dedicated to public use, to the city planning commission prior to being received for record "unless accepted by the legislative body of the municipality." This is little more than an empty gesture. Commission approval has no vitality because the governing body may ignore it. Even where the latter exercised restraint the commission would be in a weak position since

7. *Supra* note 5. Members of such a board are appointed for ten year terms on a staggered basis. This is a very extended period. A compact body of five members with terms so staggered that there would be one new member each year is suggested as a desirable pattern.

8. Even if proprietorship of land were once a valid qualification for public office, it would be sadly antiquated in this day of landholding and development through the corporate device. See Berle and Means, *The Modern Corporation and Private Property* (1933) c. I.

9. See text above note 46 *infra*.

10. It seems desirable, moreover, to regulate expressly the subject of building in mapped streets. It may be done by appropriate provision in a planning enabling act or by separate enactment. See Bassett, Williams, Bettman and Whitten, *Model Laws for Planning Cities, Counties and States* (Harvard City Planning Studies VII—1935) 43, 89.

11. The state planning act, on the other hand, confers this authority upon the state planning agency. La. Act 38 of 1938, § 6 [Dart's Stats. (1939) § 9664.6].

the law does not articulate guiding standards nor authorize the commission to adopt regulations or impose conditions. Procedure is ignored; there is no provision for public hearings or judicial review.

Perhaps enough has been said to suggest the desirability of a new and adequate municipal planning enabling act. Ample comparative materials are available to the draftsman.¹²

What is the situation at the parish level? The problem of the suburb presses for attention; it bespeaks an approach geared to the factual unity of intra-municipal and suburban areas. The police juries were granted a measure of planning authority in 1928.¹³ The statute does not provide for any separate planning agency or other administrative machinery but it does empower a police jury to legislate broadly with respect both to the laying out and modification of streets, parks and other public improvements and to the private platting and subdividing of land. It is to be observed that the city planning law authorizes a planning commission to prepare maps and plans as to land outside the municipality and to make recommendations concerning the development of such land. The 1928 law relating to parishes expressly saves, unaffected by the act, any power or authority then vested by law in a municipal governing authority. The difficulty is that a planning commission is not a governing authority, nor does it derive its authority from such a body. This reasoning is academic at best, however, since a city planning commission's work has no binding legal effect, in any event.

The Local Services Act of 1942 empowers any one or more parishes and any one or more municipalities to engage jointly in the "exercise of any power, the making of any improvement, or the promotion and maintenance of any undertaking" which each is empowered by law to exercise or undertake separately.¹⁴ That act contemplates that joint action be undertaken by written agreement and authorizes the creation of a joint agency

12. The draftsman has but to resort to the ample comparative statutory materials to find no end of suggestive provisions. For model statutes see Model City Charter (National Municipal League, 5 ed. 1941) § 125 et seq.; Bassett, Williams, Bettman and Whitten, *op. cit. supra* note 10, at 39, 76.

13. La. Rev. Stats. of 1870, § 2743, as amended by La. Act 234 of 1928, § 1 [Dart's Stats. (1939) § 6405]. In *American Ice Company v. Police Jury, Parish of Jefferson*, 162 La. 614, 617, 110 So. 878, 879 (1926), the supreme court declared invalid, as *ultra vires*, a parish ordinance, which prohibited the erection and maintenance of establishments using coal, oil, electricity or any other motor power for the operation of a business, without first securing a permit from the police jury. The court remarked: "So far as we know, the only laws applicable to zoning apply to municipalities, and not to police juries."

14. La. Act 246 of 1942, § 4 [Dart's Stats. (Supp. 1944) § 6283.4].

to administer the terms of the agreement. The statute is literally broad enough to embrace joint parish-municipal action with respect to control of private platting and subdividing in suburban areas. Something more is needed. As will already have appeared, such action, unassociated with a comprehensive, unified plan, would be little more than uncorrelated patchwork.

It is my conclusion that the legislature should enact broad parish planning enabling legislation, designed to encourage cooperation between parish and city planning agencies.¹⁵

Slum Clearance

The worst blighted areas in southern cities are, of course, the negro residence districts. The problems they generate are more acute than those of the suburban areas but are not so pressing on the conventional city planning and zoning level. The objective, in dealing with such areas, is not private development of private property, implemented by effective legal controls and well-integrated public improvements. Rather, it is slum clearance and rehabilitation based on a frank recognition of the fact that the citizens and residents concerned are, in economic fact, unable to correct the situation without positive governmental assistance.

Thus far we have barely scratched the surface in this most difficult area of community development. In 1924 the legislature enacted a race segregation measure, which was intended to get around the constitutional barrier to segregation legislation raised by the United States Supreme Court in *Buchanan v. Warley*¹⁶ The act forbade any white person to establish his residence in a negro community and any negro to establish his residence in a white community except with the written consent of a majority of the persons of the other race residing in the community.¹⁷ A New Orleans ordinance, adopted pursuant to this and an earlier statute,¹⁸ was upheld by the Louisiana Supreme Court, as applied to the proposed use of a house in a white community to quarter negro tenants.¹⁹ That court proceeded upon the theory that the

15. Distinctly rural planning is a separate problem. See, for example, Wis. Stats. (1943) 27.015 and Wertheimer, *Constitutionality of Rural Zoning* (1938) 28 Calif. L. Rev. 175.

16. 245 U.S. 60, 38 S.Ct. 16, 62 L. Ed. 149 (1917).

17. La. Act 118 of 1924, § 1 [Dart's Stats. (1939) § 5814]. The act was applicable only to municipalities with populations exceeding 25,000 persons. It defined "community" to include every residence fronting on either side of any street within 300 feet from the location of the property involved.

18. La. Act 117 of 1912, § 1 [Dart's Stats. (1939) § 5811].

19. *Tyler v. Harmon*, 158 La. 439, 104 So. 200 (1925); 160 La. 943, 107 So. 704 (1926).

ordinance was, in substance, a non-discriminatory zoning measure within the legitimate sweep of the police power. The transparent consent mechanism was deemed enough to negative discrimination and distinguish the case from *Buchanan v. Warley*. The Supreme Court of the United States, on writ of error, considered the judgment below so patently wrong that it, by a per curiam decision, without opinion, reversed the judgment and contented itself with merely citing *Buchanan v. Warley*.²⁰

Race segregation measures, even if constitutional, would have no constructive value in meeting the real problem. Instead, they would impede the economically capable negro in doing something for himself.

Some progress has been made in New Orleans and Shreveport through the construction of low cost public housing projects with Federal Public Housing Authority assistance. By the express terms of the Housing Authorities Law, all housing projects of an authority are subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality.²¹ In aid of housing projects, however, municipalities and parishes are authorized by the Housing Cooperation Law to plan or replan, zone or rezone any parts of their territories and municipalities to change their maps.²² Thus, there is a sufficient grant of statutory authority to fit FPHA housing into the conventional planning and zoning pattern.

The next step is to include slum clearance and blighted area rehabilitation in the grant of planning authority and to empower municipalities to execute the pertinent plans which are developed.²³ This is, admittedly, a big step for Louisiana but the need is great and the time most opportune. Certainly, American in-

20. *Harmon v. Tyler*, 273 U.S. 668, 47 S.Ct. 471, 71 L. Ed. 831 (1927). See also *Land Development Co. of Louisiana, Limited v. City of New Orleans*, 164 La. 72, 113 So. 768 (1927).

Private exclusion of negroes can legally be effected by restriction in acts of sale. *Queensboro Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1914).

21. La. Act 275 of 1936, § 12 [Dart's Stats. (1939) § 6280.12].

22. La. Act 277 of 1938, § 4 [Dart's Stats. (1939) § 6280.32 (d)].

23. Section 143 of the Model City Charter (National Municipal League, 5 ed. 1941) grants the power in broad terms as follows:

"The council may adopt, modify and carry out plans proposed by the planning commission for clearance of slum districts and rehabilitation of blighted areas within the city and, for the accomplishment of this purpose, may acquire by purchase or condemnation all privately owned land, buildings, and other real property interests within the district; may establish, locate, relocate, build and improve the streets and other public open spaces provided for in the plan; may maintain, operate, lease, or sell said buildings or any of them; may sell the land, or any part thereof, designated for buildings and private open spaces upon such terms and conditions and subject to such restrictions as to building uses and open spaces as will substantially carry out and effect the plan."

industry is capable of producing cheap, mass-production, prefabricated housing, multiple and single. Such structures may prove to be the key to rehabilitation in sub-marginal residential areas inhabited by people in the lowest income groups.

Slum clearance has been recognized as a public purpose in the housing cases.²⁴ There can be no serious doubt that a broad grant of authority to municipalities to prosecute slum clearance and blighted area rehabilitation would stand up as a constitutional matter.²⁵

ZONING

Background

Prior to the enactment of any zoning enabling legislation in the state, the City of New Orleans experimented with piecemeal zoning grounded upon the broad charter powers of the city.²⁶ The commission council enacted ordinances designed to set apart certain streets as exclusively residential zones. A tenant, who was operating a grocery in the affected zone, successfully challenged one ordinance.²⁷ A second ordinance succumbed to the attack of a property owner who desired a permit to construct a building to house a private market.²⁸ The court proceeded on the theory that the purpose was strictly esthetic, which overreached the police power and, thus, merited the stigma "*ultra vires, unreasonable, and invalid.*" The second case was decided in 1917. The following year the general assembly enacted a brief measure, which authorized cities having populations in excess of fifty thousand, "to define and regulate the kind, style and manner of construction of buildings and other edifices which may be erected on certain designated streets and thoroughfares and to permit or prohibit the establishment and operation of businesses and trades within designated limits."²⁹

24. The test case in Louisiana was *State ex rel. Porterie v. Housing Authority of New Orleans*, 190 La. 710, 182 So. 725 (1938). A very recent case of accord is *Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E. (2d) 18 (1945).

25. The United States Supreme Court, in a cryptic opinion, recently upheld the exertion by the federal government, through the Federal Public Housing Authority, of power to acquire property for and to establish low-cost housing projects. *City of Cleveland v. United States*, 323 U.S. 329, 65 S.Ct. 280 (1945). See generally Ebenstein, *The Law of Public Housing* (1940) *passim*.

26. The city charter conferred upon the city all powers which by or pursuant to the constitution could be granted to or exercised by any city. La. Act 159 of 1912, § 1(e) [Dart's Stats. (1939) § 6175 (d)].

27. *Calvo v. City of New Orleans*, 136 La. 480, 67 So. 338 (1915).

28. *State ex rel. Blaise v. City of New Orleans*, 142 La. 73, 76 So. 244 (1917).

29. La. Act 27 of 1918, § 1 [Dart's Stats. (1939) § 5766].

It was not until 1923 that the constitutionality of the 1918 act was presented for judicial determination. In the meantime the state had adopted a new constitution, which contained the following zoning enabling provision:

"All municipalities are authorized to zone their territory; to create residential, commercial and industrial districts, and to prohibit the establishment of places of business in residential districts."³⁰

Doubtless, as Chief Justice O'Niell early pointed out, the provision was intended to put at rest any question about municipal authority to zone.³¹ The chief justice added, however, the sententious observation that the section was unnecessary. State governments are governments of residual, plenary authority. Thus, a state legislature possesses all legislative power not denied to it by the federal or state constitution or by limitations implicit in our federal system.³² Fortunately, the court embraced the view that the express grant in the constitution was mere supererogation.³³ Nevertheless, it is worth pointing out that such constitutional drafting is fraught with hazards. On its face, the instant section is self-executing; it grants authority directly to all municipalities. It is not surprising that the general zoning enabling act of 1926 was attacked on the ground that the legislature may not place limitations on the exertion of zoning authority or regulate the manner of its exercise.³⁴ The constitutional grant, moreover, refers simply to intra-municipal territory. Is the rule of exclusion to be invoked to make of the provision a denial of authority to zone extracorporate areas?³⁵

In 1944 the same conception of constitutional theory was employed to add an express authorization for parish and municipal airport zoning.³⁶

30. La. Const. of 1921, Art. XIV, § 29.

31. State ex rel. Civello v. City of New Orleans, 154 La. 271, 277, 97 So. 440, 442 (1923).

32. The court recently had occasion to reaffirm this elementary principle of American constitutional law. Perot v. Police Jury of Natchitoches Parish, 208 La. 1, 22 So. (2d) 666, 668 (1945).

33. State ex rel. Civello v. City of New Orleans, 154 La. 271, 277, 97 So. 440, 442 (1923).

34. State ex rel. Holcombe v. City of Lake Charles, 175 La. 803, 144 So. 502 (1932).

35. It is to be hoped that such would not be the case. The question is a rational one. A famous application of the rule is to be found in *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803). There it was applied to the clause in the Federal Constitution (Art. III, § 2) pertaining to the original jurisdiction of the supreme court.

36. This was done by an amendment to La. Const. of 1921, Art. XIV, § 29, which was initiated by La. Act 321 of 1944 and adopted by the electorate on

The constitutionality of the 1918 enabling law came up for determination in 1923. The supreme court upheld certain piecemeal zoning ordinances of New Orleans, which had been adopted pursuant to that act and which were attacked in six separate suits by persons who desired to conduct retail or manufacturing businesses in the residence zones.³⁷ The adverse decisions, which had been rendered prior to 1918, were expressly overruled to the extent that they involved holdings that municipal ordinances proscribing business establishments in residence districts were essentially esthetic measures not sustainable upon ordinary police power considerations. By 1923 the courts of quite a number of states had upheld zoning and the Louisiana court duly noted the trend. In support of its favorable decision the court marshalled the customary arguments about the advantages of exclusive residence zones from the standpoint of police and fire protection and general health and wellbeing. Objections rested upon the due process and equal protection of the laws clauses of the Fourteenth Amendment were rejected; the ordinances affected alike all persons similarly situated.

In 1928 the court upheld a setback ordinance as a valid exercise of the police power.³⁸ The United States Supreme Court affirmed, in a per curiam opinion,³⁹ on the authority of such then recent cases as the *Village of Euclid v. Ambler Realty Company*⁴⁰ and *Gorieb v. Fox*.⁴¹

General Enabling Legislation

In 1926 the legislature enacted a comprehensive municipal zoning enabling law.⁴² The act took effect only a few months

November 7, 1944. The enabling statute, La. Act 118 of 1944, was confirmed by this amendment.

37. State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923); State ex rel. Dubos v. City of New Orleans, 154 La. 287, 97 So. 445 (1923); State ex rel. Liberty Oil Co., Limited v. City of New Orleans, 154 La. 288, 97 So. 446 (1923); State ex rel. Traverse v. City of New Orleans, 154 La. 289, 97 So. 446 (1923); State ex rel. Hayes v. City of New Orleans, 154 La. 289, 97 So. 446 (1923); Boland v. Compagno, 154 La. 469, 97 So. 661 (1923).

Zoning ordinances were upheld in State ex rel. Roberts v. City of New Orleans, 162 La. 202, 110 So. 201 (1926); State ex rel. Palma v. City of New Orleans, 161 La. 1103, 109 So. 916 (1926); and State ex rel. Giangrosso v. City of New Orleans, 159 La. 1016, 106 So. 549 (1925).

38. Sampere v. City of New Orleans, 166 La. 776, 117 So. 827 (1928).

39. Sampere v. New Orleans, 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971 (1929).

40. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

41. 274 U.S. 603, 47 S.Ct. 675, 71 L. Ed. 1228 (1927).

42. La. Act 240 of 1926 [Dart's Stats. (1939) § 5788 et seq.]. At the same session the legislature enacted a building line enabling measure. La. Act 339 of 1926 [Dart's Stats. (1939) § 5772 et seq.]. The title and first section of this act are referable solely to municipalities having populations in excess of 50,000 persons as of the last preceding federal census. The enabling pro-

before the Supreme Court of the United States, in *Village of Euclid v. Ambler Realty Company*,⁴³ upheld comprehensive zoning against attacks under the due process and equal protection clauses of the Fourteenth Amendment. The model after which the Louisiana act was patterned was the Standard Zoning Act, sponsored by the Department of Commerce under the aegis of Secretary Hoover. Except for airport zoning, the parishes have not been granted zoning authority.⁴⁴

While the 1926 enabling act is confined to comprehensive zoning, it expressly saves the 1918 piecemeal zoning law and assumes the label "supplementary" legislation.⁴⁵ Only two cities, New Orleans and Shreveport, are affected by the earlier law and both have comprehensive zoning ordinances; but it is not amiss to observe, in passing, that piecemeal zoning is ill-conceived. The occasion derives substance from the fact that Baton Rouge's existing zoning is nothing more than the setting apart of scattered residential zones.⁴⁶ Piecemeal zoning is superficial. It has little perspective and scant relation to community planning since it is but a random singling out of areas unassociated with any studied and coherent over-all plan covering both private property and integrated public improvements. The 1918 law should, therefore, be repealed.

A comprehensive zoning ordinance has the effect of abrogating all prior piecemeal zoning regulations even though it does not purport, in terms, to repeal them. On June 1, 1929, the governing body of the City of New Orleans adopted what was termed and intended as a comprehensive zoning ordinance. That ordinance prohibited mortuary establishments in certain districts except upon the express permission of the governing body. This provision was held unconstitutional in *Bultman Mortuary Serv-*

visions of Section 2, however, apply to municipalities of over 5,000 inhabitants.

43. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

44. See note 13, *supra*. Airport zoning by parishes is authorized by La. Const. of 1921, Art. XIV, § 29, as amended in 1944, and by La. Act 118 of 1944 [Dart's Stats. (Supp. 1944) § 27.40 et seq.]. See note 36, *supra*.

45. La. Act 240 of 1926, § 12 [Dart's Stats. (1939) § 5799]. The pertinent compiler's notes in Dart's Statutes are a bit contradictory. Under Section 5766, which is Section 1 of Act 27 of 1918, it is stated that the act was probably partially, if not entirely, superseded by Act 240 of 1926. But under Section 5799, which is Section 12 of Act 240 of 1926, it is said that the act by express provision does not limit or repeal the powers granted by the 1918 act. The latter statement is, of course, the correct one. *Collett v. City of Shreveport*, 168 So. 346 (La. App. 1936). And see *State ex rel. Chachere v. Booth*, 196 La. 598, 603, 199 So. 654, 656 (1941).

46. The Commission Council, on March 11, 1941, adopted a series of brief zoning ordinances creating certain "strictly residential" districts.

ice, Incorporated v. City of New Orleans,⁴⁷ for reasons hereinafter stated. With that unconstitutional provision out of the way, the supreme court found that the ordinance, in effect, permitted a mortuary establishment in a certain district. The court proceeded to hold that a prior prohibitive ordinance was repealed by implication, both because of conflict with the comprehensive zoning ordinance *sans* the offending provision and because the comprehensive zoning ordinance covered the whole subject matter of zoning and thus left no room for the operation of any earlier ordinance on the subject.

The 1926 law is a broad, general measure, designed to occupy the field exclusively, save for the 1918 act. Thus, it repeals by implication pre-existing inconsistent provisions of special charters.⁴⁸

It should be observed at once that the zoning authority granted by the act is power to adopt zoning regulations "in accordance with a comprehensive plan." There is no authority for piecemeal or "shotgun" zoning, not predicated upon a comprehensive plan. It is believed that some of our municipalities are not clear on this point.

With respect to territorial scope comprehensive zoning stops at the corporate limits.⁴⁹ The rapidly developing suburbs are untouched. There are several legal ways of bridging the gap. (1) The legislature might, by a special law, grant a municipality of 2500 inhabitants or over a new charter or enact an amendment to the old, which would so redefine municipal boundaries as to include suburban areas.⁵⁰ (2) Such areas might be annexed under authority of the general annexation law.⁵¹ Annexation is effected by ordinance but, as a prerequisite, the governing body must have received the written assent of the owners of twenty-five per centum in assessed value of the property in an area to be annexed as determined by the assessment for the previous calendar year as well as twenty-five per centum in number of the property taxpayers in that area. (3) Zoning authority might

47. 174 La. 360, 140 So. 503 (1932).

48. State ex rel. Chachere v. Booth, 196 La. 598, 199 So. 654 (1941).

49. Airport zoning is an exception. See La. Act 118 of 1944, § 5 (3) [Dart's Stats. (Supp. 1944) § 27.44 (3)].

50. La. Const. of 1921, Art. IV, § 3, proscribes local and special legislation as to municipal corporations of less than 2500 inhabitants, but not as to those whose populations are 2500 or more.

51. La. Act 35 of 1924 as amended by Act 149 of 1928 [Dart's Stats. (1939) § 5370]. La. Act 154 of 1944 [Dart's Stats. (Supp. 1944) § 5370] was designed as a revision of this law. It was garbled in the legislature, however, and is probably completely abortive.

be conferred upon the parishes by general enabling legislation.⁵² While legislative tinkering with municipal government by special legislation is not commended as good policy, it might be warranted in special instances where metropolitan problems, such as those of Baton Rouge, exist. Annexation is feasible; a city can "sell itself" to the suburbs. Parish zoning should be authorized in any event. By correlating their planning and zoning parish and municipality could cover the ground effectively.

The general enabling act does not provide for slum clearance. The subject could be dealt with by separate enactment but it is intimately related to planning and zoning and, thus, it would not be desirable to hedge the grant of power about with limitations out of harmony with planning and zoning powers and procedures.⁵³

Continuance of Nonconforming Uses; Retroactive Zoning

Since zoning ordinances are drawn after vagaries in land uses have already developed it is but just and proper that continuance of existing nonconforming uses in restricted districts be permitted. The pattern, of course, is to prevent extension or renewal of those uses so that ultimately they will leave the scene. The immediate effect is to permit *A* to continue his existing use but deny to *B* permission to begin a like use of his land in the same district. That difference of treatment is not unconstitutional discrimination.⁵⁴ The Louisiana court has ruled that the basis for such treatment, prevention of excessive hardship, is broad enough to support the extension of a nonconforming use as well as its bare continuance.⁵⁵

The grant of zoning power is extensive enough to permit retroactive zoning. Such drastic regulation has been upheld in Louisiana. The City of New Orleans adopted a piecemeal zoning ordinance in 1927, which created an exclusive residence zone and allowed one year in which to liquidate business establishments already in the zone. A real estate corporation, which owned residential property in the district, sought and obtained, after the year had elapsed, injunctions against the continuance

52. The police jury of Calcasieu Parish has tried its hand at airport zoning without, so far as I am aware, benefit of enabling legislation. See *United States v. 357.25 Acres of Land in Calcasieu Parish, La.*, 55 F. Supp. 461 (W.D. La. 1944).

53. See the pertinent provisions of the Model City Charter (National Municipal League, 1941) § 143 et seq.

54. *Sampere v. City of New Orleans*, 166 La. 776, 117 So. 827 (1928); aff'd 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971 (1929).

55. *State ex rel. Manhein v. Harrison*, 164 La. 564, 114 So. 159 (1927).

of a grocery business⁵⁶ and a drug store⁵⁷ on premises in the district, which were near its properties. The Supreme Court relied upon *Village of Euclid v. Ambler Realty Company*⁵⁸ in upholding the measure. The burden of its reasoning was that if a municipality has authority to create an exclusive residential district it followed necessarily that authority would exist to remove any business or trade from the district and to fix the limit of time for removal. In the first of these cases a petition to the United States Supreme Court for review by certiorari was denied.⁵⁹ These were hard cases. There was no comprehensive zoning ordinance to guide the defendants to other locations safe from further piecemeal measures. Even in comprehensive zoning sparing resort to such drastic action as retroactive exclusion from a zone is indicated.

In *State ex rel. National Oil Works of Louisiana v. McShane*,⁶⁰ the ordinance in question required that garages and filling stations within the zone be removed within a period of roughly twelve months. The suit was one by a company, which had long operated a filling station within the zone, to obtain a mandamus requiring the issuance of a permit to remodel its building so as to allow the construction of a drive-in filling station. Certain property owners residing in the area intervened and prayed for a permanent injunction against the operation of the business on the ground that it was a nuisance in fact. The court concluded that, on the evidence as to the continuous noise made at the plaintiff's establishment, it was a nuisance in fact. The court held that the intervenors were entitled to a perpetual injunction against the operation of the business. It did not discuss the retroactive feature of the ordinance, but did declare that the measure was not discriminatory and was a valid exercise of the police power. It is significant, however, that the nuisance element was enough to explain the result.

It appeared, in *City of Shreveport v. Dickason*,⁶¹ that Dickason had in an earlier suit sought mandamus to compel the issuance of a permit to build a filling station on her lot in a residence zone. While that suit was pending, the city passed a zoning ordinance which provided that nothing therein should be construed

56. *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929).

57. *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929).
58. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

59. *McDonald v. Louisiana ex rel. Dema Realty Co.*, 280 U.S. 556, 50 S.Ct. 16, 74 L.Ed. 612 (1929).

60. 159 La. 723, 106 So. 252 (1925).

61. 160 La. 563, 107 So. 427 (1926).

as cancelling any permit theretofore granted or impairing the rights of occupants and owners of existing business houses in zoned areas. In that earlier case the ordinance zoning the area in which Dickason's property was located was held invalid because of uncertainty in the description of the zoned area, and the supreme court held that the property owner was entitled to a building permit. Shortly after that decision the council passed an ordinance forbidding the building inspector to issue permits for the erection of any business building in a defined residence zone which included the property in question. In this case the city sought to have the construction of the building enjoined, but the court held that since at the time the ordinance preserving any outstanding permit was passed the property owner was entitled to such a permit and was in the process of having her right to the permit adjudicated, she was rightfully in the same class as persons who actually had outstanding permits, and that it would be a denial of equal protection of the laws to treat her now as in a different class. Acting on this conclusion, the court granted judgment for Dickason, as plaintiff in reconvention, extending and continuing in force for a period of six months from the date the judgment should become final, the permit issued to Dickason, (apparently pursuant to the judgment in the earlier case; such permit is not referred to elsewhere in this opinion), and enjoining the city and its officers for such period from interfering with the enjoyment of the permit. The six months provision in this bit of "judicial legislation" was based upon the fact that under the ordinances and building code of the city, building permits were not revocable except for cause if construction was begun within six months from the date of a permit.

In *State ex rel. Manhein v. Harrison*,⁶² application had been made for a building permit for a filling station prior to the adoption of a zoning ordinance which placed the property in question in a residence zone. The ordinance was given effect as to the property in question despite the existence of the application for a permit, and the *Dickason* case was distinguished by reference to the judgment in the earlier case between the same parties, upholding the right of the property owner to a permit, and to the ordinance involved in that case which preserved permits which had already been issued. Neither of those elements existed in the *Manhein* case.⁶³

62. 164 La. 564, 114 So. 159 (1927).

63. See also *State ex rel. Sansone v. City of New Orleans*, 163 La. 860, 113 So. 126 (1927); *St. Bernard Oil Co. v. City of New Orleans*, 165 La. 665, 115

The *Manhein* decision was distinguished in the very recent case of *State ex rel. Fitzmaurice v. Clay*.⁶⁴ There the City of Opelousas had, by resolution, held up action on applications for building permits for construction of commercial buildings in an area, proposed to be zoned for residence purposes, pending consideration of and action on the proposal. This included an application by X for a permit to build a gasoline filling station in the area. He sought mandamus to compel its issuance. The zoning proposal was referred to the zoning commission, which reported on October 7, 1941. The next day X had judgment in the district court for a peremptory writ of mandamus. The position of the city was that action on X's application had merely been deferred pending a final report of the zoning commission. But no zoning ordinance had been adopted, nor, as a matter of fact, was one ever enacted down to the time that the case was argued in the supreme court in 1945. Thus, there was no police power regulation to ground a denial of a permit. The supreme court affirmed.

Necessity for Conformity with State Law

A zoning ordinance would necessarily give way in a case of conflict with state law unless the enabling statute specially provided that the zoning ordinance should prevail. In the case of *Federal Land Bank v. John D. Nix, Enterpriser*,⁶⁵ the court recognized that a building regulation ordinance would govern despite an inconsistent statute where the enabling statute specifically so provided. This decision was misconceived, however, in the court of appeal case of *Zeller v. La Nasa Bakery*,⁶⁶ in which the court assumed that a zoning ordinance adopted under the 1926 act might override a statute to the extent recognized in the *Nix* case. The objection to this is that the matter can be determined only by reference to the provisions of the enabling statute and to those of the other statute if it be a later enactment; a zoning ordinance would not override an existing statute unless it was so provided in the enabling act. The 1926 act provides, in Section 9, that wherever the regulations made under the authority of the act require a greater width or size of side yards or other open spaces, or require a lower height of buildings, and so on, or im-

So. 817 (1928); and *State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta*, 196 So. 338 (La. App. 1940).

64. 208 La. 443, 23 So. (2d) 177 (1945).

65. 166 La. 566, 117 So. 720 (1928).

66. 172 So. 33 (La. App. 1937).

pose other "higher standards" than are required in any other statute or local ordinance or regulation, the provision of the regulations made pursuant to that act shall govern. Where the regulations prescribe a lower standard it is provided that the provisions of such other statute or local ordinance or regulation shall govern. It must be remembered, of course, that so far as the municipality is concerned the legislature may by subsequent enactment take away what it has given.

Certainty

Just like any other exertion of legislative power, a zoning ordinance, to be effective, must be sufficiently certain to be reasonably susceptible of application. Thus, in *State ex rel. Dickason v. Harris*,⁶⁷ a zoning ordinance, which prohibited business buildings in "any recognized residential district" and contained no description by streets or metes or bounds, was held invalid because of the uncertainty as to the bounds of the districts.

Legislative Procedure

The Standard Zoning Act requires, as a condition precedent to exercising the powers conferred by the act, that a municipal governing body appoint a zoning commission "to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein." The commission must file a preliminary report and hold public hearings on it before submitting a final report to the governing body. Where a city planning commission exists it may be constituted the zoning commission. The Louisiana law tracks the Standard Act to this point, except that it leaves no discretion about appointing an existing planning commission to serve as the zoning commission. It significantly fails, however, to complete the pattern by providing, as does the Standard Act, that the governing body shall not hold its public hearings or take action until it has received the final report of the commission.⁶⁸ This represents a serious breakdown in comprehensive planning-zoning principles. It means that a city council may ignore the zoning commission and proceed to zone, however ill-prepared it may be for the task. This should be corrected by amendment. The omission, however, does not warrant the conclusion that the publication of notice requirement applicable to a governing body hearing on a proposed zoning meas-

67. 158 La. 974, 105 So. 33 (1925).

68. Bassett, Williams, Bettman and Whitten, *op. cit. supra* note 10, at 33.

ure applies as well to a zoning commission hearing on its preliminary report. The hearing requirements are separate and the publication provision relates, it seems clear, only to governing body action. In a late case, however, the publication requirement was deemed applicable to a zoning commission hearing.⁶⁹

The statutory requirements with respect to the adoption and publication of zoning ordinances must, of course, be strictly complied with. In *State ex rel. Holcombe v. City of Lake Charles*⁷⁰ there was a serious want of compliance. There was no publication of notice of a hearing on the proposed ordinance and no hearing was held. The ordinance was declared invalid.

The requirement that at least thirty days notice of the time and place of public hearing be given by newspaper publication is inadequate. In the case of original adoption of a comprehensive zoning ordinance it doubtless should suffice to put the public on notice merely to set out that purpose in the notice and to state that access may be had to a copy of the proposed ordinance at a designated place, such as the city clerk's office. But where the proposed action is an amendment to a zoning ordinance people living or owning property in the affected area are the ones primarily concerned and the notice should be specific about the area or areas affected. Moreover, more than one publication should be made.⁷¹ The statute might, for example, be amended to require publication once in each of two consecutive weeks, first publication to be made at least fifteen days before the date set for the hearing. It would be a simple matter to draft an amendment to the statute to cover both these points.

In case of a sufficient protest against a proposed change in zoning regulations a favorable vote of three-fifths of all the members of the governing body is required for enactment.⁷² It is enough if the protest is signed by the owners of twenty per centum or more in area of (a) the land included in the proposed change or (b) the "area determined by lines drawn parallel to and two hundred (200) feet distant from the boundaries of the district proposed to be changed, . . ." Alternative "(b)" is ill-conceived because it refers to a two-hundred foot strip entirely around a district and applies even where only a slight change on one side was contemplated. While the provision is but a mild brake on municipal action, at best, the protest mechanism, if to

69. *State ex rel. Fitzmaurice v. Clay*, 208 La. 443, 23 So. (2d) 177 (1945).

70. 175 La. 803, 144 So. 502 (1932).

71. The likelihood that interested persons would see the notice would, of course, be greatly enhanced.

72. La. Act 240 of 1926, § 5 [Dart's Stats. (1939) § 5792].

be continued, should be made available only to owners of property immediately affected.

Apart from the requirement of notice and a public hearing, the statute leaves to the governing body of a municipality the task of providing for the manner in which zoning regulations shall be adopted and modified.⁷³ Since an ordinance regulating procedure would be of no greater dignity than a zoning ordinance the failure of the governing body itself to follow the prescribed procedure is not likely to be considered an invalidating circumstance. Thus, in *State ex rel. Pleasant v. Hardy*,⁷⁴ it appeared that Shreveport had first adopted a resolution and later an ordinance fixing the procedure for applications to the governing body for amendments to the city's general zoning ordinance. The fact that such procedure had not been followed was not considered significant because it was a creature of the governing body and not a limitation upon the power of that body to amend the ordinance.

The explanation of the *Hardy* decision is a bit too plausible. Even though procedure for enactment has been determined by the local governing body there is an important interest in conformity. Persons affected look to the established procedure. It can be urged, moreover, that when the legislature expressly left the subject in local hands the design was to achieve both local discretion in the determination of procedure and the formulation of rules which could be relied upon.

As a general proposition the courts will not enjoin legislative action even on the local level. One who may be specially affected can have his day in court after legislative discretion has been exercised and policy articulated in a definite measure. This principle has been applied by the Court of Appeal of Louisiana for the Second Circuit in denying injunctive relief with respect to a proposed amendment to a zoning ordinance.⁷⁵ More recently, the supreme court has laid it down plainly that an injunction may be obtained against the adoption of a municipal ordinance only where the ordinance would be in direct violation of a prohibitory law.⁷⁶

Administrative Procedure; Review

The zoning enabling act authorizes a municipality to establish a board of adjustment to perform the functions of a typical

73. La. Act 240 of 1926, § 4 [Dart's Stats. (1939) § 5791].

74. 157 So. 130 (La. App. 1934).

75. *State ex rel. Pleasant v. Hardy*, 157 So. 130 (La. App. 1934).

76. *Durrett Hardware & Furniture Co., Inc. v. City of Monroe*, 199 La.

zoning board of appeals.⁷⁷ The exercise of this authority is optional. Instead of exercising it a municipal governing body may undertake to perform zoning administrative functions directly. In the larger communities, at least, there is likely to be a considerable volume of work of this character, which strongly bespeaks the need of an independent board to perform it.

In at least two instances the Louisiana Supreme Court has been confronted with zoning ordinances which provided for the allowing of nonconforming uses in restricted zones by special permission of the governing bodies but did not articulate any standard to govern the exercise of their discretion. In each case the ordinance was declared unconstitutional on the ground that it vested an arbitrary administrative discretion in the governing body the adverse exercise of which amounted to denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.⁷⁸

Such difficulties could readily be obviated. The court is not very exacting in its application of the requirement that there be a governing standard. A zoning ordinance which empowered the governing body to authorize a temporary building for commerce or industry incidental to the residential development in a residence zone has been upheld.⁷⁹

A board of adjustment is a five-man body organized along judicial lines. It is granted ancillary powers appropriate to the conduct of its business. An appeal may be taken to the board from a decision of an administrative officer by any person aggrieved or by any officer, department, board or bureau of the municipality. An appeal stays all proceedings in furtherance of the action appealed from, except that if the administrative officer certifies that, in his opinion, a stay would cause imminent peril of life or property, proceedings may be stayed only by restraining order of the board or a court of record on due cause shown.

The powers of such a board are:

"1. To hear and decide appeals where it is alleged there is error in any order, requirement, decisions, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

329, 5 So. (2d) 911, 140 A.L.R. 433 (1942), noted in (1942) 16 Tulane L. Rev. 632.

77. La. Act 240 of 1926, § 7 [Dart's Stats. (1939) § 5794].

78. *Bultman Mortuary Service, Inc. v. City of New Orleans*, 174 La. 360, 140 So. 503 (1932); *State ex rel. Dickson v. Harrison*, 161 La. 218, 108 So. 421 (1926).

79. *State ex rel. Manhein v. Harrison*, 164 La. 564, 114 So. 159 (1927).

"2. To hear and decide all matters referred to it or upon which it is required to pass under such ordinance.

"3. In passing upon appeals, where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."⁸⁰

The second item, unlike the corresponding item of the Standard Act, is not limited to action on special exceptions to a zoning ordinance. Its content is left to the discretion of the municipal governing body.

In acting on an appeal a board may reverse or modify the action appealed from and may take such action as ought to be taken. For that purpose it is endowed with all the powers of the officer whose action is under review. A four-fifths vote is required to reverse the action of an administrative officer, to rule for the applicant on any matter upon which it is required to pass under a zoning ordinance, or to effect any variation in the ordinance.

A board decision is subject to district court review by certiorari with respect to its "legality." If, upon the hearing, the court considers testimony necessary it may take it or appoint a referee to take testimony and report his findings of fact and conclusions of law for consideration by the court as a part of the record. The court may reverse, affirm or modify the decision below.

Once a governing body has put the board of adjustment machinery in operation parties affected should be deemed bound to employ it in all matters within its field of operation. An aggrieved property owner would, thus, have to exhaust his right of recourse to the board before he could seek judicial relief.⁸¹ Even more, he should be held to the method of judicial review provided unless it were shown to be clearly inadequate. In the case of *State ex rel. Kreher v. Quinlan*,⁸² it appeared that X and Y owned properties across from each other on a street in a class B residence zone in which the erection of a storage garage was for-

80. La. Act 240 of 1926, § 7 [Dart's Stats. (1939) § 5794].

81. This is in keeping with the well-established principle that one must first exhaust administrative remedies. See Berger, *Exhaustion of Administrative Remedies* (1939) 48 Yale L. J. 981.

82. 182 La. 721, 162 So. 577 (1935).

bidden. X already had a garage on his property and the city engineer refused a permit to Y to build one on his; but the board of adjustment, on appeal, reversed the engineer's ruling and directed the issuance of the permit. X applied for a rehearing before the board in opposition to the issuance of the permit but his application was denied. X then brought this suit for mandamus to compel the board and the city engineer to revoke and set aside the permit granted to Y. A judgment denying the writ was affirmed on two grounds: (1) the discretion of the board of adjustment with respect to the granting of the permit cannot be controlled by mandamus, and (2) the remedy of certiorari provided by the statute was appropriate and adequate.

There has been no adjudication of the validity of that provision of the 1926 act empowering a zoning board of adjustment to vary or modify the application of a zoning ordinance in cases of practical difficulties or unnecessary hardships "so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." The question is whether the delegation of power is sufficiently narrowed by a governing standard. While it is considered that the Standard Act is more effectively worded to this end, I have little doubt but that the provision would withstand attack in the courts. The situation is not unlike that of numerous federal administrative bodies which employ judicial methods in applying very broad legislative standards.⁸³

A zoning board of adjustment is so thoroughly judicial in character that it has been deemed to have no standing to appeal from a decision of a district court in a case in which that court was reviewing board action.⁸⁴ The thought, in brief, is that a judge is not a party to a case he is hearing. The statute provides that costs, in the district court, shall not be allowed against a board unless it shall appear to the court that the board had acted with malice, gross negligence or bad faith. Were costs assessed to a board, that would create a pecuniary interest in the matter and give rise to the question whether there might be an appeal as to costs alone, apart from the merits of the case.

83. The Federal Communication Commission is a fair example. *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166 (1933).

84. *State ex rel. Bringham v. Zoning Board of Appeal and Adjustment*, 198 La. 758, 4 So. (2d) 820 (1941); *State ex rel. Hurley v. Zoning Board of Appeal and Adjustment*, 198 La. 766, 4 So. (2d) 822 (1941).

Contra: *Rommell v. Walsh*, 127 Conn. 16, 15 A. (2d) 6 (1940). The Connecticut court forcefully developed the point that the board represents the public interest.

Sanctions

(1) *Punitive.* The zoning enabling act makes violation of a municipal zoning regulation a misdemeanor, punishable by a fine of from ten to twenty-five dollars "nor more than thirty days' jail sentence" for each day the violation continues. This provision is ambiguous as to whether there may be sentence of either fine or imprisonment or both.⁸⁵ It should be clarified by amendment.

(2) *Civil.* Even before the zoning enabling law was enacted the supreme court recognized the standing of a municipality to obtain an injunction to restrain the continuance of a prohibited nonconforming use. New Orleans had the operation of a retail ladies wearing apparel store in a residence area enjoined.⁸⁶ The suit was deemed in effect one to abate a nuisance since, in the view of the court, the outlawing of the nonconforming use made it a nuisance—if for no other reason because it was in defiance of the municipal government.

Under Section 8 of the zoning enabling act a municipality is authorized to institute any appropriate action to prevent an unlawful erection or use in violation of a zoning ordinance. This would include resort to injunctive relief.

A nice question arises as to the standing to sue of another property owner, whose property is devoted to a conforming use. If the continuance of a prohibited nonconforming use constitutes a public nuisance, it would seem to follow that it would be a private nuisance as to any property owner specially damaged. The decisions bear out this reasoning.⁸⁷

In a recent case arising in New Orleans commerce won a resounding victory over the fireside. The comprehensive zoning ordinance so divided a certain block that a nice corner residence property and the vacant lot adjoining were in an apartment district, from which business establishments such as restaurants were excluded, and the restaurant just beyond the lot was in a

85. The defendant in *City of New Orleans v. Estrade*, 200 La. 552, 8 So. (2d) 536 (1942), was sentenced to pay a fine of \$10, or in default thereof, to serve thirty days in the parish prison. The conviction was annulled on the merits by the supreme court. Defendant had two illuminated horseshoe pitching courts in his side yard, which were used nearly every evening. His home was in a residential district. The court would not accept the contention that the use was non-residential and thus violative of the provisions of the city's zoning ordinance.

86. *City of New Orleans v. Liberty Shop, Limited*, 157 La. 26, 101 So. 798, 40 A.L.R. 1136 (1924).

87. *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 614 (1929); *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929).

commercial district. X owned both the lot and the restaurant building. The lot was used as a parking area for patrons of the restaurant, which, incidentally, was open all night. The zoning ordinance defined "garage" to mean a building or any lot used for, among other things, parking self-propelled vehicles. The owner and occupant of the residence obtained a sweeping preliminary injunction against the use of the lot for parking purposes. The supreme court dissolved the injunction.⁸⁸ The court rejected both the contention that the use of the lot was an extension of the restaurant business to it and the argument that the use for parking was within the definition of "garage." Great stress was laid upon the refusal of the municipal authorities to prosecute and their apparent interpretation of the ordinance favorably to the use complained of. I do not find this reasoning very compelling. I would be more interested in a studied opinion of the city attorney than in mere failure to prosecute. The actual use of the lot was patently commercial. That use, moreover, was incident to the restaurant business. Again, the lot was being used for parking as a profit venture; that no separate charge was made does not obscure the profit nature of the use.

Airport Zoning

It is necessary to control, in some wise, the heights of structures and trees in the area surrounding an airport if conditions requisite to safe flying operations are to be assured. Of various possible methods of control,⁸⁹ airport zoning has grown rapidly in popularity.⁹⁰ This is a particularly attractive method to the air lines for the practical reason that it is not costly to them. Over thirty states, including Louisiana, have adopted airport zoning legislation in one form or another.⁹¹

The Louisiana enabling law is Act 118 of 1944.⁹² It is based

88. State ex rel. Szodomka v. Gruber, 201 La. 1068, 10 So. (2d) 899 (1942).

89. "Ten possible ways of controlling the height of structures or trees which interfere with the use of airports have been suggested. These are: (1) Voluntary action by owners of property adjoining or near the airport, (2) Purchase of all land near the airport, (3) Purchase of air space rights over the land near the airport, (4) Acquisition of the land near the airport by use of the power of eminent domain, (5) Acquisition of air space rights over the land near the airport by use of the power of eminent domain, (6) Police power condemnation of hazards dangerous to those using the airport, (7) Zoning regulations, (8) Use of Commerce power by the Federal Government, (9) Use of War power by the Federal Government, and (10) Use of the postal by the Federal Government." Rhyne, *Airports and the Courts* (1944) 165.

90. Concerning federal airport zoning see Smylie, *Constitutionality of Federal Airport Zoning* (1943) 12 Geo. Wash. L. Rev. 1.

91. Rhyne, *op. cit. supra* note 89, at 171.

92. Dart's Stats. (Supp. 1944) § 27.40 et seq.

upon the model act sponsored by the Civil Aeronautics Administration and the National Institute of Municipal Law Officers.⁹³ The model act was but imperfectly adapted to conform to Louisiana's situation. One finds, for example, that counties and boroughs, in addition to parishes, cities, towns and villages, are granted airport zoning authority!

Zoning authority under the act comprehends regulation of (a) land uses and (b) height of structures and trees. Such regulation may be fitted into a general pattern of comprehensive zoning. Retroactive airport zoning is expressly forbidden,⁹⁴ but a system of permit-issuance is authorized under which conformity may be exacted with respect to nonconforming structures which have been abandoned or more than eighty per centum torn down, destroyed or deteriorated and to trees which have been "abandoned" or are over eighty per centum decayed.⁹⁵

Any parish or municipality may adopt airport zoning regulations for "any airport within its jurisdiction." Likewise, the parish or municipality which owns an airport may zone to protect its approaches, whether located within or wholly or partly outside its limits. In case of conflict the regulations of the proprietor unit govern.⁹⁶ Beyond the general concept of "approach-protection" the act affords little guidance as to the physical scope of airport zoning. A definite geographical pattern could not effectively be made by statute. The act provides for administrative review by a board of appeals,⁹⁷ along the same lines as that set out in the Standard Zoning Enabling Act. The jurisdiction of such a board, however, would not extend to the case of a landowner who contended that his property was not properly included in the area zoned. He would have standing to attack the ordinance immediately by any judicial proceeding appropriate to his situation, such as mandamus to compel issuance of a building permit, without first running the administrative gamut.⁹⁸

93. The model act stems from a draft published in 1939. See Rhyne, *loc. cit. supra* note 91. Since then it has undergone several revisions. See *Municipalities and the Law in Action* (National Institute of Municipal Law Officers—1945 ed.) 259.

94. La. Act 118 of 1944, § 5(4) [Dart's Stats. (Supp. 1944) § 2744(4)]. Louisiana left out the provision of the model act which precludes application of the zoning restrictions to existing trees.

95. La. Act 118 of 1944, § 6 [Dart's Stats. (Supp. 1944) § 27.45].

96. La. Act 118 of 1944, § 5(3) [Dart's Stats. (Supp. 1944) § 27.44(3)].

97. La. Act 118 of 1944, § 7(3) [Dart's Stats. (Supp. 1944) § 27.46(3)].

If the local unit already has a zoning board of adjustment or appeals it may be appointed as the board of appeals under this act.

98. The situation is comparable to that where the inclusion of particular land in a restricted zone is open to attack as arbitrary and not conducive to police power objectives. See *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

A significant feature is the grant of authority for joint zoning.⁹⁹ The parish in which a municipal airport is situated and the proprietor municipality may jointly zone to protect the aerial approaches to the airport. The actual zoning is done by a joint board, composed of two members from each participating unit, appointed by its chief executive officer.

The constitutionality of airport zoning, under the Fourteenth Amendment, has not been established. With respect to land situated quite close to an airport proper and in an approach lane, height regulation will, of course, be most drastic and constitutionality most in doubt. The problem thins out as to property in the more distant reaches of the zoned area. Airport zoning does not fit neatly into the conception of comprehensive zoning as an arrangement interacting to the advantage of owners in the various zones by fostering appropriate development in accordance with a coherent general plan. It simply restricts development in the zoned area for the benefit of air navigation and commerce. The reciprocal advantage is the general benefit to the community of the facility and such favorable economic effect upon property uses and values as propinquity to an airport may involve.¹⁰⁰

An inferior court in New Jersey has declared a Newark airport zoning ordinance unconstitutional as a taking of private property without due process of law.¹⁰¹ The court rested one foot on lack of statutory authority for such zoning. That would have been enough as an independent ground of decision. The other foot, however, was planted firmly on the constitutional objection.

An overzealous advocate of airport zoning has found in a federal district court case, which arose in Louisiana, support for the validity of airport zoning.¹⁰² The United States was condemning aviation rights with respect to the airspace over land of certain owners, situated near the Lake Charles Army Air Field.¹⁰³ The police jury of the parish had previously adopted an ordinance fixing a building height limit of twenty-five feet in an area including the property in suit. There is no indication that any question was raised as to the validity of the ordinance. A verdict of "no dollars" as to the value of the rights was sustained

99. La. Act 118 of 1944, § 5(2) [Dart's Stats. (1939) § 27.44(2)].

100. The subject is discussed in Comment (1944) 23 Tex. L. Rev. 56.

101. *Yara Engineering Corporation v. City of Newark*, 132 N.J.L. 370, 40 A. (2d) 559 (1945); *Rice v. City of Newark*, 132 N.J.L. 387, 40 A. (2d) 561 (1945).

102. *Rhyne*, op. cit. supra note 89, at 187.

103. *United States v. 357.25 Acres of Land in Calcasieu Parish, La.*, 55 F. Supp. 461 (W.D. La. 1944).

by denial of a motion for a new trial. Judge Dawkins expressed the view that, in view of the ordinance, and the location and probable use of the land, no appreciable diminution in value was effected by the taking. Thus, while the judgment might be *res adjudicata*, as between the parties, with respect to questions of validity, on the theory that they could have been raised,¹⁰⁴ the case is obviously of no significance as a precedent.

The statute is fortified, however, by a provision authorizing expropriation where the "necessary approach protection cannot, because of constitutional limitations, be provided by airport zoning regulations under this act."¹⁰⁵ Such frank recognition of the problem is commendable. It provides, moreover, an effective alternative method of proceeding.

CONCLUSION

It has been my purpose, in this paper, to present an appraisal of the legal materials of planning and zoning in Louisiana. A number of critical observations have been made. If any one or more of them have merit, there is yet time to give them legislative formulation with a view to consideration by the legislature at the coming regular session.

104. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).

105. La. Act 118 of 1944, § 10 [Dart's Stats. (Supp. 1944) § 27.49].