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Municipal Land Use Regulation: Challenging Historic Notions of the Public's Best Interests and Zoning Changes

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Today's faculty features:

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"Municipal Land Use Regulation: Challenging Historic Notions of the Public's Best Interests and Zoning Changes" Outline

In many parts of America, the only word people hate more than zoning, is taxes!

I. The Genesis of Comprehensive Zoning
   A. Local Governmental Power to Abate and Prevent Nuisances
      1. Inability to regulate/prohibit the use of property in non-nuisance situations
      2. *Mugler v. Kansas*, 123 U.S. 623 (1887)
      3. *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915)
   B. Pre-Zoning Municipal Land Use Powers are Inadequate to Address Complex Problems of Rapid Urban Growth
      1. Effects on cities of immigration
      2. Effects of industrial revolution
      3. Effects of modern construction – high rise buildings
      4. Effects of mass transit
   C. NYC – The First Comprehensive Zoning Law (1916)
      1. Theory of Comprehensive Zoning
         a. Reciprocal benefits and burdens
         b. Zoning in accordance with a comprehensive plan
         c. Combination of the two, justifying regulation/prohibition of uses of property that would not be nuisances
   D. "The Standard Acts": Standard Zoning Enabling Act (SZEA) (1924) and Standard City Planning Enabling Act (SCPEA) (1928)
      1. Promulgated by the U.S. Department of Commerce
      2. Became the basis for most state enabling zoning laws
      3. Delegated land use regulatory powers to units of local government
         a. Pre-Home rule
         b. Under "Dillon's Rule" delegation necessary because municipalities (prior to Home rule) had no inherent powers, but only those powers delegated by the state legislature and those necessarily implied therefrom
      4. *City of Euclid v. Amber Realty Co*., 272 U.S. 365 (1926)
         a. Against a due process challenge, the U.S. Supreme Court upheld the constitutionality of comprehensive zoning
         b. Amicus brief filed by Alfred Bettman (one of the first municipal lawyers to craft the theory of zoning) is what carried the day
            a. Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L.REV. 834 (1924)
         c. U.S. Supreme Court did not take a major zoning case for the next half century and the law of zoning developed principally in state courts

II. Traditional or "Euclidean" Zoning

A. Separation of incompatible land uses into different zones
   1. Basic zoning system was
      a. R – Residential
      b. C – Commercial
      c. I – Industrial
   2. Enumerate uses allowed "as of right" – meaning with no required discretionary approvals; only a building permit needed to commence use

B. Specially Permitted Uses and Site Plan Approval
   1. Uses enumerated on a district-by-district basis that require special permit and/or site plan approval
   2. Such uses are deemed "generally" compatible with as of right uses, but specially permitted uses require a discretionary approval to be undertaken on a particular parcel
   3. Site plan review confined to physical configuration of the development, including ingress/egress, parking, lighting, landscaping, etc.

C. Accessory Uses
   1. Customarily incidental to the principal use
   2. Subordinate to the principal use

D. Bulk Standards
   1. Regulations per district, often by using governing physical configuration and size of development, including:
      a. Minimum lot size
      b. Height limits
      c. Minimum street frontage
      d. Maximum lot coverage
      e. Setbacks from property lines (a/k/a yard requirements)
      f. Sky exposure planes and tower regulations (high rise development)

E. Subdivision of Land
   1. Predates zoning
   2. Originally a mapping law in which lot numbers displaced use of legal descriptions in conveyances of property
   3. Post-Euclid, typical zoning law includes standards and requirements for subdivision of land
   4. Subdivisions must be in accordance with zoning requirements (both use and bulk), including minimum lot size

F. Variances
   1. Constitutional "safety valve" for zoning – permission to violate the zoning use and/or bulk regulations
   2. Use variance
      a. Unnecessary hardship
      b. Requires hard "dollars and cents" proof

c. Essentially must prove that without the use variance no economically productive use of the property is possible

3. Area variance
    a. Practical difficulties
    b. Non-self created hardship
    c. Minimum variance necessary
    d. Effect on surrounding community character

G. Nonconformities
1. Nonconforming uses
2. Noncomplying buildings/structures/lots
3. Must be lawful when commenced
4. Abandonment (requires intent) vs. termination (no intent required)
5. Interconnection with use variances

H. Local Boards
1. Governing Body (City Council, Town Board, Village Board, etc.)
    a. Adopts zoning law
    b. Adopts comprehensive plan
    c. Can reserve to itself the power to grant special use permits
2. Planning Board
    a. Special permit approvals
    b. Site plan approval
    c. Subdivision approval
    d. Development of draft comprehensive plans
3. Zoning Board of Appeals
    a. Variances
    b. Appeals from decisions of building inspectors/code officers
4. Authority to attach conditions on administrative approvals
    a. Reasonableness
    b. Not to regulate details of conduct of business – must be land use related

I. Comprehensive Plan
1. "[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use." *Udell v. Haas*, 21 N.Y.2d 463, 469 (1968)
2. Document articulating the municipality's land use goals, objectives and means for implementation, the logic for the zoning

J. Post-Euclidean Zoning
1. Floating zones
2. Planned Unit Developments (PUDs)
3. Incentive Zoning
4. Transit Orientated Development
5. Affordable Housing Requirements

III. Hot Topics in Zoning Law Today

A. Zoning as a tool to promote equity

1. Affordable Housing
    a. Rent and housing prices are steadily increasing throughout the country, with 1 in 7 Americans spending half or more of their income on housing
    b. Zoning atlas – nationwide visual representation being developed to illustrate how local zoning codes impact the housing market
    c. "Incentive zoning" – developers provide specific amenities in exchange for additional floor area beyond what is permitted under Land Use code
    d. Incentives for developing affordable housing include expedited permitting, fee waivers or reductions, density bonuses, tax abatements, etc.
    e. Arlington, Virginia is struggling to reach its affordable housing goals because low- and middle-income workers are being forced to move to the outskirts due to costs
        a. City is conducting a study to assess the benefits of legalizing "missing middle housing" through zoning reform
        b. Middle housing - housing types that fit between single-family detached homes and mid-to-high rise apartment buildings (duplexes, triplexes, townhomes, etc.)
        c. Further Reading: missingmiddlehousing.com
2. Accessory Dwelling Units (ADUs) and Residential Zoning
    a. Smaller, independent dwelling units such as basements, carriage houses, and attics rented out by homeowners in areas zoned for single-unit dwellings (prohibited by exclusionary zoning rules)
    b. Legalizing ADUs expands housing supply but does not change the current landscape and improves safety and access
        a. Illegal ADUs can be dangerous (11 people drowned in illegal basement apartment in NYC during Hurricane Ida)
        b. Has the potential to increase housing affordability for homeowners and tenants
    c. New York State Senate Bill S4547A proposes ADU legalization
    d. California's SB9 – permits an additional residential unit to be constructed on a lot zoned for single-unit dwellings, excluding ADUs

B. Environmental Sustainability and Climate Change

1. "Restrictive zoning" such as that limiting construction to single-family dwellings reinforces patterns of inequality and increases communities' vulnerability to climate related risks

a. State laws preempting local zoning regulations to promote development of denser housing; reducing urban sprawl decreases transportation emissions
b. Oregon, California, Virginia, and Washington have passed variations of laws that preempt municipalities from prohibiting multifamily dwellings in single-family dwelling zones
c. *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, 135 HARV. L. REV. 1592 (2022)

2. Zoning and Mining Operations
    a. Salt Lake County Utah, zoning ordinance was adopted to prohibit further development of mining operations
    b. Nonconforming use doctrine: Case involving a sand and gravel mine received a permit to expand its mining operations from Department of Environmental Conservation contrary to language of zoning law which states permits cannot be reviewed if local zoning laws prohibit mining in a specified area; issuance of permit was found to be arbitrary and capricious
        a. Dissent argues this threatens the future of the industry because "a municipality within the statutorily protected areas could effectively zone out the active and permitted mines throughout covered areas by simply legislating that no mining is permitted."
    c. *Matter of Town of Southampton v. N.Y. State Dept. of Envtl. Conservation*, 194 A.D.3d 1310 (3d Dept. 2021), *appeal granted*, 2022 N.Y. Slip Op. 61775 (Feb. 15)

C. Business Development
1. Cannabis
    a. Marihuana Regulation and Taxation Act (MRTA) (N.Y. March 2021)
        a. Delegates opt out provision – local governments could enact a local law to prohibit adult-use cannabis retail dispensaries or on site-consumption businesses if decisions were made by December 31, 2021
        b. 769 out of 1520 municipalities opted out of retail dispensaries and onsite consumption facilities
        c. 884 opted out of only on-site consumption businesses
        d. What preemption issues are raised if a municipality opts out, but the state law permits a licensed operation? Cannabis Control Board's proposed regulations do not speak to this issue directly
2. Breweries
    a. Breweries are often relegated to the outskirts of industrial parts of neighborhoods which can stifle growth for small, local businesses

b. Further Reading: Alexandra G. DeSimone, *Brewing Flexibility in Municipal Zoning Laws, One Pint at a Time,* 70 Syracuse L. Rev. 943 (2020)

D. Data facilities and cryptocurrency mining
   1. Demand for data center construction is continuing to increase and the cryptocurrency sector is steadily growing
   2. These facilities have higher energy and water demands than traditional industrial and commercial facilities, thus inspiring some localities to regulate them as distinct uses in their zoning codes
      a. Loudon County, Virginia – distinct use-specific standards apply to new data centers
      b. Washington County, Tennessee – Recent settlement reached in lawsuit regarding whether a bitcoin operation conforms to the proper use allowed under the county's zoning regulations
   3. Further Reading: David Morley, *Zoning for Data Centers and Cryptocurrency Mining*, American Planning Association (2022)

E. Religious Uses
   1. Religious Land Use and Institutionalized Persons Act (RLUIPA) - Prohibits the implementation of land use regulations that treat religious institutions less than equal to non-religious institutions
   2. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022)
      a. California church purchased two-story property and wanted to hold services on the first floor
      b. Court held equal terms provision of RLUIPA was violated by a zoning restriction that prohibited "clubs, lodges, places of religious assembly and similar assembly uses" from operating on the "ground floor of buildings…"; City did not treat the church the same as non-religious assemblies which could operate on the ground floor
   3. *Canaan Christian Church v. Montgomery County, Maryland*, 29 F.4th 182 (4th Cir. 2022)
      a. Maryland church purchased parcels of land contingent on being able to extend the public sewer system, however a conservation provision prohibited such expansion
      b. Court held that the impediment on the religious practice was not substantial enough to amount to a RLUIPA violation
   4. *Matter of Yeshiva Talmud Torah Ohr Moshe v. Zoning Bd. of Appeals of the Town of Wawarsing*, 170 A.D.3d 1488 (2019)
      a. Article 78 proceeding where court held that on-site overnight camp was in fact a "religious use" in an area where town's zoning code prohibited camps

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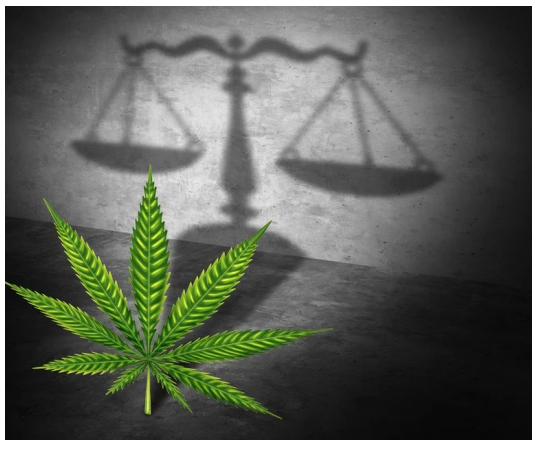

ANALYSIS

Adult-Use Cannabis in New York: Hashing Out the Potential for State Preemption of Local Zoning Laws and its Impact

There are burning questions involving the interplay between state and local law and such implications could very well negatively affect the groups that the legislation sets out to empower.

February 03, 2022 at 10:45 AM

7 minute read

By Elizabeth Kase and Alexandra Piscitello

On March 31, 2021, then Governor Andrew Cuomo signed the Marihuana Regulation and Taxation Act (MRTA), legalizing adult-use cannabis in New York state. S.B. 854-A (N.Y. 2021). MRTA was passed in an attempt to right past wrongs by the government, specifically involving minority groups and those members of minority communities negatively and disproportionately affected by prior cannabis prohibition.

MRTA directs the Cannabis Control Board (CCB) to prioritize social and economic equity applicants (Equity Applicants) with the goal of awarding fifty percent of adult-use cannabis licenses to Equity Applicants. MRTA §10(2). In New York, a social equity applicant is a person who is: (1) from a minority group, (2) a woman, (3) a disable veteran, (4) a farmer in financial distress and (5) those persons from communities disproportionately impacted by the war on drug. §87. The legislation aims to award licenses in a manner that considers small business opportunities, avoids market dominance, and "reflects the demographics of the state." §10(2). The state has also set forth a desire to assist Equity Applicants succeed by way of "low-and-zero interest loans, reduced or waived fees and assistance in preparing applications." Id.

This fall, the five-member board of New York's CCB was appointed. However, little else is known about the state's plans and potential license applicants are anxiously awaiting details of the regulatory framework.

Since MRTA was passed, there has been significant buzz about preemption between federal and state law given cannabis' status as a Schedule I drug, which makes it federally illegal for use, possession and sale. Controlled Substances Act, 21 U.S.C. §812. At the same time, there are arguably even more burning questions involving the interplay between state and local law and such implications could very well negatively affect the groups that the legislation sets out to empower.

Registered Organizations

The sale and use of medical marijuana in New York state was legalized by the July 2014 Compassionate Care Act and in 2015, New York state began issuing licenses for medical marijuana entities, which are referred to as Registered Organizations (RO). N.Y. Pub. Health Law §§3360-3369. What was anticipated to be a booming industry, was actually a bit of a bust. Doctors, fearful of federal repercussions, shied award from recommending cannabis to patients and a limited number of licenses and shops meant that pricing, now also inclusive of tax, did not make sense outside of the illicit market. Now just 37 shops in New York are run by 10 companies, many owned by multi-state operators (MSO) or multinational corporations. Notably, this leaves very little room in the current landscape for mom and pop shops.

ROs, under MRTA, are eligible to apply for Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary licenses, which give ROs the ability to distribute their own products for adult-use purposes in "three of the organization's medical dispensaries' premises." MRTA §68-A.

Zoning, Opt-Out and Taxes

In accordance with MRTA, municipalities are preempted from regulating the operation or licensure of ROs for medical marijuana purposes. However, towns, villages, and cities may opt-out of allowing adult-use retail dispensaries and on-site consumption licenses within their respective boundaries. Towns, villages and cities may not opt out of allowing licensed delivery, nursery, cultivation or microbusiness licensees from operating within their jurisdiction. §131(2).

Each municipality had until Dec. 31, 2021 to opt-out by adopting a local law subject to a permissive referendum. According to the Rockefeller Institute of Government, as of Dec. 3, 2022, of the 1,518 municipalities in New York state, 655 opted out of retail establishments and 751 opted out of on-site consumption. Each municipality may also adopt laws, rules, ordinances, or regulations governing the time, place, and manner of the operation of the licensed retail dispensaries and on-site consumption sites. Id.

MRTA establishes a 13% tax on adult-use cannabis sales, 4% of which is split between the county (25%) and municipalities (75%). §493. Where a municipality opts out, they forgo the tax revenue. Id.

Potential Preemption

The question begs: For ROs that apply for a Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary license, will New York state law preempt local ordinances? More specifically, if a municipality opts out of adult use under state law by adopting a local law, will an RO, equipped with a Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary license, still be able to operate within their municipality given the state law? If so, is the municipality then entitled to the tax revenue—even though they technically opted out?

The answer is hazy at best and we will have to wait until the CCB's rules and regulations are published to clear up any ambiguities.

However, if ROs are permitted to operate as adult-use retailers or on-site consumption facilities in jurisdictions that opted out of those very uses under MRTA, it may defeat the entire purpose of New York's legislation. Not only would it "reward" the big players, including the MSOs that dominate the medical marijuana field, but it could also create a retail monopoly in certain municipalities of which Equity Applicants are now forbidden—ironically, because of the opt-out provision. Resultantly, it would further bolster MSOs market share and profit potential, in what analysts' suggest could become a five billion dollar industry by 2026.

New York law supports state preemption where a conflict exists involving any "conduct, safety, health and well-being of persons or property therein." N.Y. Const. art. IX, §2(c)(10). In *People v. Amerada Hess*, 765 N.Y.S.2d 202, 207 (N.Y. Dist. Ct. 2003), a New York court held that a municipality's restrictive covenant, which ran with the land and barred the sale of alcoholic beverages, could not prevent sales, as such sales were legal under state law. Hence, state law preempted the law at the local level.

Additionally, because New York is late to the recreational cannabis game, legislators have set forth ambitious goals in getting legal cannabis into the hands of New Yorkers. However, the state has been slow in its execution. New York, knowing that the ROs are already set up to do business, could give ROs the green light to operate months ahead of new applicants, including Equity Applicants, of whom likely will not know of their license status—nonetheless have operations up and running—until at least early 2023. Such a move would again disregard small business interests and drive market dominance into the hands of a few larger and better financially positioned players; the diametrical opposite of New York's legislative intent.

In what can be viewed as an ominous foretoken to New York, despite being a $2 billion industry and the first state in the country to introduce a social equity and economic empowerment component in their 2016 legislation, Massachusetts has fallen short in what it envisioned would be a diverse sector reflective of its communities, and one to serve as a model of restorative justice. As Hadley Barndollar of the Herald News deduced, Massachusetts' cannabis industry is "shaping up to be disproportionately white and male-owned."

Conclusion

However, all hope is not lost for adult-use license applicants in New York. The newly formed CCB is vested with thoughtful veterans of the cannabis industry, and they have the time, resources, and opportunity to reflect on what went wrong in other states, including Massachusetts, and ensure that new applicants, especially Equity Applicants, are not paid only in lip service.

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June 10, 2022

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9 minute read

LAW FIRMS MENTIONED

Ruskin Moscou Faltischek

CONSTITUTIONALITY OF ZONING

ZONING is the regulation by districts of building development and uses of property. A typical zoning ordinance divides the territory covered by the ordinance, usually the whole territory of a single municipality, into districts, in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. In some ordinances the boundaries of the use, height, and area districts overlap; in others these boundaries are coterminous, that is, any district has, within and throughout its territory, uniform use, height, and bulk regulations. By use regulation is meant a statement of the permitted or prohibited uses of property and buildings, as, for instance, residential, business, and industrial. Use districts are often further subclassified, as, for instance, residential districts into those restricted to single-family houses and those in which multiple-family or apartment structures are permitted; business districts into central and local, or those in which light manufacturing is permitted or excluded; industrial districts for light manufacturing, for heavy but non-nuisance types of industry, and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Bulk regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts, and the extent and location of open spaces, such as building set-backs, side yards, and rear yards.

"Zoning" may, perhaps, be an unfortunate designation, in that it may produce an impression of large, more or less concentric areas, as in the zone system of street-railroad fares. As a matter of practice, the "zones" or districts are usually of all sorts of irregular shapes, and of sizes varying from one side of a city block or the four lots of a single street intersection to great areas of many square miles.

Zoning has had a remarkable spread in the United States. The first comprehensive zone ordinance may be said to be that of New York City, enacted in 1916. According to the latest bulletin of the United States Department of Commerce, two

hundred and eight municipalities have been zoned, and over twenty-two million inhabitants (or forty per cent of the urban population) are living in zoned territory. While some evidence has been discovered pointing to the practice of zoning in ancient times, and modern European countries have zoned their cities to some extent, still, both by virtue of the principles and methods in vogue in the United States and the extent to which they have been applied, zoning, as exemplified in this country, is distinctively an American movement.

With one or two exceptions, zone ordinances have been passed in exercise of the police power and not of eminent domain. A few cases have expressly held that restrictions upon the use of property or height of buildings may be imposed by means of eminent domain.[1] There are, however, decisions indicating that such regulation is not a taking of property for public use and, therefore, not within the scope of eminent domain.[2] Even if this constitutional difficulty were overcome, the practical difficulties of acquiring by appropriation the right to impose the varied and complicated regulations of a comprehensive zone plan would be insuperable. The benefits of zoning are obtainable only by means of the police power. The constitutional limitations upon eminent domain, such as the requirement that compensation be paid, have no relevance where an ordinance is an exercise of the police power. There are constitutional limitations upon the exercise of this power; but where the issue concerns the validity of a measure enacted under the police power, the citation of constitutional provisions relating to eminent domain is a confusion of different powers and principles. Some of the opinions in zoning cases contain examples of this confusion.

It is not necessary to burden this article with the conventional definitions of the police power, or with judicial expressions of the truisms that it extends to all the public needs, that it grows with the needs, that it has constitutional limits, that it is

[1] Kansas City *v.* Liebi, 252 S. W. 404 (Mo., 1923); Att'y Gen'l *v.* Williams, 174 Mass. 476, 55 N. E. 77 (1899); State *ex rel.* Twin City Bldg. & Investment Co. *v.* Houghton, 144 Minn. 1, 174 N. W. 885 (1919). See also Pera *v.* Village of Shorewood, 176 Wis. 261, 186 N. W. 623 (1922).

[2] See Pontiac Improvement Co. *v.* Board of Commissioners, 104 Ohio St. 447, 135 N. E. 635 (1922).

for the promotion of the public health, public order, public convenience, public morals, public prosperity, and the general welfare, that the law or ordinance in question must bear some reasonable relationship to those purposes. The Constitution may not change, but the conditions and therefore the needs do change. The rapidly growing industrial city of today presents problems for legislative solution by methods which would have been inappropriate to more rural and pioneer conditions. What is the meaning of " reasonable," when we speak of reasonable relationship to public health? A strict, anxious adherence to the principle of separation of legislative and judicial power would result in defining reasonable to mean that the reasoning faculties of an intelligent legislator, exercised with some degree of care and honesty, could discover and credit a tangible, palpable relationship between the measure under consideration and the promotion of health. In many police power cases the courts have adhered to this super-scrupulous limitation of their function. As we all know, however, in actual practice in constitutional cases, " reasonable " often signifies little more than that the court does not feel that the measure under discussion is going too far, or, in other words, that, to the mind of the court, the balance of considerations of private and public interests has been fairly maintained. A new type or mode of property regulation is not likely to sustain itself in the courts, unless it can be shown to bear some analogy to recognized and sanctioned traditional methods of regulation. Consequently, as a practical if not a strictly logical matter, some brief reference to the analogies is appropriate.

What, for example, is the relationship of zoning to the law of nuisances? The term " nuisance " is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughter-house or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so

use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substance or vibration into or onto his neighbor's property. The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections in which the homes of the people are or may appropriately be located. The mode of regulation may be new; but the purpose and the fundamental philosophy are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise. True, the noiseless or odorless plant is excluded along with the nuisance type. Experience demonstrates, however, that the advent of the first non-residential structure in a residential neighborhood makes it more unfair and therefore more difficult to prevent the arrival of the second, even though the second be more nearly a nuisance type than was the first; that these non-residential structures tend to locate themselves in a scattered and spotty manner, thus harming a larger territory than would be affected if they were more compactly situated; that often the neighborhood becomes blighted as a place of habitation, without substantially developing as a business or industrial district; that, consequently, the single new plant, however non-nuisance in itself, may not be inoffensive, or, at least, falls well within the settled principle of constitutional law which permits the innocuous to be included within the prohibition or regulation when such inclusion is reasonably necessary in order that the harmful may be successfully combatted. The Constitution may not recognize any modern right to more highly sensitized nerves or ears or noses than those of our forefathers; but it surely permits us to learn by experience and to have some degree of imagination. Experience demonstrates that unregulated city growth tends to subject the home districts to offensive enviroment; and

not much imagination is needed to realize that zoning can counteract this tendency.

The law concerning highway obstruction furnishes another analogy. The owner of property abutting on a street may be forbidden to place a permanent or temporary obstruction across the sidewalk. The owner of a sky-scraper might, within the bounds of reason, be held to contribute more than his fair share of street obstruction, in the stream of pedestrians and vehicles which he draws to or pours out from his property. The law may constitutionally prohibit the abutting property owner from staging in his show window an entertainment that would tend to attract a crowd to that part of the street. The very number of persons or vehicles drawn to a section of the street by the high buildings located along it may be equally obstructive. Limitations of height or of other forms of buildings intensity have an obvious relationship to freedom of movement on the highway and to traffic control.

The regulation of intensity of building development, as a means of preventing excessive gathering of human beings within a designated space, is a recognized mode of constitutional exercise of the police power. Tenement-house and factory regulations specify standard minima of space *per capita* of occupants or operatives. Analogously, the zone plan measures the territory of the city available for development, estimates the number of human beings who will live and work within the territory during the period of the life of the ordinance, gathers the topographic, economic, and social facts of the territory, and, applying recognized principles of health, safety, economic prosperity, convenience, and so forth, to these measurements, estimates, and facts, determines such distribution of future residential, business, industrial, and public structures, and such standards of bulk and height of buildings, as will moderate unwholesome and inconvenient congestion during the process of the growth of the city's population, business, and industry. Zoning is an application to the whole territory of the community of the same basic motives and principles as justify, in the constitutional sense, the right to regulate congestion within the space of an individual piece of property or plant. Building laws specify standards of sunlight within the workshop or apartment. Building-height

limitation is designed, among other results, to regulate the amount of darkness which one building may throw into adjacent buildings or into those across the street.

The limits of this article do not permit an exhaustive indication of all the analogies of zoning ordinances to sanctioned modes of property regulation. The above will serve as sufficient illustrations. Perhaps another analogy might be referred to in passing, and that is the recognized power to enforce coöperation upon members of a group similarly situated, for the direct benefit of all of the group, with indirect benefit to the general public. The classic case is that of the enforced joint guarantee of bank deposits, where the principle is expressed:

> " It would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." [3]

In the case of a zone plan, each piece of property pays, in the form of reasonable regulation of its use, for the protection which the plan gives to all property lying within the boundaries of the plan.[4]

These analogies have been sufficiently discussed to show that zoning represents no radically new type of property regulation, but merely an extension or new application of sanctioned traditional methods for sanctioned traditional purposes. That intelligent and honest men do believe that zoning promotes the public health, safety, order, convenience, prosperity, and welfare, is attested by quantities of testimony of lawyers, real-estate operators, physicians, public-health and housing experts, persons experienced in financing building construction, accident insurance actuaries, police and fire chiefs, and others, not to speak of the city-planning and zoning experts themselves. The evils that need to be conquered or reduced are obvious. The blighted districts in every municipality furnish depressing evidence of the harmful effect upon both standards of living and housing development of premature invasion of residential districts by non-residential uses. Promotion of the single-family home, for in-

[3] Noble State Bank *v.* Haskell, 219 U. S. 104, 111 (1911).

[4] This aspect is mentioned in State *ex rel.* Carter *v.* Harper, 196 N. W. 451 (Wis., 1923).

stance, is deemed good public policy in America. It requires little reasoning to show that this promotion will be aided by regulations which protect and stabilize the single-family-home districts. The Housing Bureau of the federal Department of Commerce devotes itself extensively to the encouragement of zoning as a means of solving the housing problem. Some of the wastes of the excessive congestion of today are due to a hodge-podge development, producing spots of uncontrollable traffic congestion, often with plenty of available unused street area a few yards away, or throwing together into an indiscriminate mass types of traffic which would automatically separate themselves were there some degree of segregation in the developments along the highways. The resources of the growing city, human or financial, can obviously furnish a greater degree of police protection, fire protection, health protection, transportation convenience, and so forth, if the city be developed along the lines of an ordered plan. Some of the conditions which are breaking the financial backs of our cities and reducing their adequacy or effectiveness in guarding the welfare of their inhabitants, are due to the confused, indiscriminate manner in which the cities have been built up. Stabilization of property values has been frequently mentioned as one of the purposes of zoning which form its constitutional basis; and undoubtedly there is a prosperity motive in stabilizing property values. More accurately speaking, however, stabilization of values is the means or by-product, not the end. Stabilization of the living and working environment is the object sought.

This is not the place in which to attempt an exhaustive discussion of the relationship of zoning to the promotion of the public health and other benefits which fall within the scope of the police power. The above is sufficient to indicate this relationship. Judged by the standard of real, substantial relationship to the promotion of those public benefits, or by the standard of appropriateness as a means, or by the standard of honest, careful and intelligent legislators' belief in this relationship or appropriateness, or by any other recognized standard of reasonableness in the constitutional sense of the word, zoning plainly measures up to the standard. Few indeed are the legislative measures, state or municipal, which are preceded by so careful and thorough a study of the facts, or which receive such anxious

application of the reasoning faculties to the facts, as are given to the carefully-wrought zone plan.

Though, as we have seen, zoning and, in truth, all property regulation has the same fundamental basis as the law against nuisances, no greater fallacy could exist than that zoning is restricted to or is identical with nuisance regulation. On the contrary, the need for zoning arises from the utter inadequacy of the law of nuisances to cope with the problems of municipal growth. In fact, the exigencies of the situation have driven courts to such an elasticity of definition of what is or may be declared a nuisance, that the term has no definite meaning as a measure of legislative power. In *Ex parte Quong Wo*,[5] an early case arising out of the Los Angeles, California, districting regulations and dealing with the exclusion of a laundry from a residential area, the Supreme Court of California justified the exclusion upon the principle that a laundry is "of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city," which is tantamount to saying that a use may be excluded if it be of a kind which may be excluded. The irreconcilable conflicts of decisions upon public and private garages illustrate the situation. A conscientious lawyer would hardly hazard a guess as to whether his client's proposed industry will or will not be called a nuisance. There is something manifestly unfair in requiring the owner of an industry to select and pay for his site, design his plant, and even build, before he can obtain any degree of assurance that he will be permitted to operate. Compared with this system, if system it can be called, a zone plan is decidedly more just; for the zone plan specifies the sections of the city in which the various types of industry may locate.

The confusing of zoning-law questions with nuisance questions, or the reducing of the constitutional law of property regulation to the law of nuisances, fails to regard the principle so well expressed in *Bacon* v. *Walker*, where the Supreme Court of the United States said:

"That power [police power] is not confined to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing

[5] 161 Cal. 220, 118 Pac. 714 (1911).

with the conditions which exist in the State as to bring out of them the greatest welfare of its people." [6]

In other words, the police power acts not only negatively, but also constructively and affirmatively for the promotion of the public welfare. The zone-plan's restriction of nuisance industries to designated districts is not a suppression of nuisances, but is part of a general constructive plan whereby the territory of the city is allotted to different uses, in such a way as to prevent or reduce the various types of wastes and disorders of unplanned development, and to promote the conveniences, economies, efficiencies, and amenities of the community which develops according to a design. In fact, the zoning ordinance gives a protection to investments in nuisance industries by supplying a sort of legal sanction to locate in the designated districts.[7] The distinctions as to validity which some decisions make or imply between zone regulations of nuisance or near-nuisance and non-nuisance uses, as, for instance, upholding exclusion of factories from residential districts while invalidating the exclusion of stores from the same districts, or upholding exclusively residential districts while invalidating the division of the latter into single and multiple-family-home districts, are based upon a fallacious reduction of the scope of the police power to the limits of that branch or subdivision of this power which has to do with the suppression of offensive uses of property.

This reference to the methods and purposes of the zone plan brings to the fore the importance of the comprehensiveness of the plan, and this subject is sufficiently important to justify our dwelling upon it at some length. Comprehensiveness may be of two kinds. First, an ordinance may include all three of the types of regulation, height, use, and bulk, or it may be limited to one or two of these. Districting by height alone has been sustained in the few cases which have reached the courts, including a decision of the United States Supreme Court.[8] There are

[6] 204 U. S. 311, 318 (1907).

[7] See the recent case of *In re* Permit to American Reduction Company, Pittsburg Leg. J. of April 5 (C. P. Ct., Allegheny Co., Pa., 1924), in which neighbors unsuccessfully objected to location of a reduction plant as allowed by the ordinance.

[8] Welch *v.* Swasey, 214 U. S. 91 (1909), affirming 193 Mass. 364, 79 N. E. 745

cases upholding use regulations exclusively.[9] As the zoning problem is largely one of distribution of population and traffic, and as, obviously, the number of people living, working, or moving in any particular portion of the city, or the traffic therein, is dependent not only on the uses of property but also on the intensity of building development, in both height and bulk, the combination of all three types of regulation is more thorough, more scientific and, therefore, more reasonable than any one of these types of regulation applied alone. The comprehensive ordinance, consequently, has an obviously greater reasonableness than mere height or use districting.

The comprehensiveness of the ordinance relates also to its geographical extent, that is, the extent to which it covers the territory of the municipality. In failing to realize the significance of this aspect, a few courts and many who have written about zoning have fallen into some confusion of terminology. A city might decide to zone a large portion of its territory less than the whole, that is, to divide this large portion into the various types of height, use, and bulk districts, and such a plan might, without great inaccuracy, be called a comprehensive zone plan. But many ordinances, falsely called zoning, simply select a small district or special districts for protection, without any provision for the remainder of the territory. A customary type of such ordinance, much in vogue previous to the contemporary zoning movement and still used, is the block or residential-district ordinance, specifying particular residential districts or giving a definition of a residential block or district, and excluding therefrom certain non-residential uses of property. Such a measure requires and contains no map. It protects only selected sections, which have developed predominantly with residential uses. The true zoning ordinance necessarily includes a map which districts the whole territory covered by the map.

(1907); Ayer *v.* Commrs. on Height of Buildings in Boston, 242 Mass. 30, 136 N. E. 338 (1922); Cochran *v.* Preston, 108 Md. 220, 70 Atl. 113 (1908). See also Atkinson *v.* Piper, 195 N. W. 544 (Wis., 1923) (upholding statute fixing maximum heights).

[9] *Ex parte* Hadacheck, 165 Cal. 416, 132 Pac. 584 (1913), aff'd under name of Hadacheck *v.* Sebastian, 239 U. S. 394 (1915); *In re* Montgomery, 163 Cal. 457, 125 Pac. 1070 (1912).

Many of these block or residential-district ordinances have been held to be constitutional [10] while others have been held unconstitutional.[11] Quite obviously, however, the block ordinance has traits of arbitrariness or discrimination which are absent from the true comprehensive zone plan. The block ordinance selects portions of the city for protection without any regard for the remaining portions, or without any attempt to allot each type of development to its appropriate and adequate territory. In effect, the block ordinance permits those who have built within the protected block or district to determine the uses to which the property of their neighbors may be put. While this has not been envisaged as a delegation of legislative power, it is in essence as fully a grant of law-making power to the designated percentage of owners who have built houses in the block or district, as would be an express provision that this same percentage of owners shall decide upon the admission or exclusion of a non-residential use into or from the block or district. In the process of making a comprehensive plan, of course the actual development, residential, business, and industrial, is taken into account as an important, often a decisive, factor, both for the reason that such development is good evidence of its appropriateness to the district in which it has taken place, and because an ignoring of the actual uses might result in grave injustices and discriminations. The comprehensive plan, however, is not a mere arbitrary selection of districts, or a regulation limited by things as they are, but is the whole community's plan, motivated by the desire for the promotion of the best practicable districting

[10] Des Moines *v.* Manhattan Oil Co., 193 Ia. 1096, 184 N. W. 823 (1922); Salt Lake City *v.* Western Foundry & Stove Repair Works, 55 Ut. 447, 187 Pac. 829 (1920); Knack *v.* Velick Scrap Iron & Machinery Co., 219 Mich. 573, 189 N. W. 54 (1922); State *ex rel.* Banner Grain Co. *v.* Houghton, 142 Minn. 28, 170 N. W. 853 (1919). These are simply a few illustrative cases.

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

of the whole territory for the benefit of all. In short, to adopt a colloquialism of the day, it is the comprehensiveness which puts the "reason" into "reasonableness." A few courts have failed to realize this distinction.[12] Some courts have understood it, and have ruled against particular ordinances expressly because they were not of the comprehensive type.[13]

The failure to realize the significance of the comprehensive aspects of the ordinance in some cases has led and, until it is corrected, will continue to lead courts into the illogical attitude of keeping their eyes solely on the particular piece of property of the plaintiff and the immediately adjacent or neighboring lots, thus permitting the constitutionality of the plan of a city to turn exclusively upon evidence concerning a very small fraction of its territory. To illustrate: a plaintiff attacks the exclusion of business structures from the residential district in which his property is located in a plan which allots ample and convenient territory for business uses, present and future, local and central. If the validity of the exclusion be determined on the issue whether a store on the plaintiff's property would or would not impair the health of the people living next door, such method of determination involves either a complete denial of the validity of any zoning, or the absurdity of deciding the reasonableness of one item of a zone plan by excluding from consideration the plan which is itself the reason for the item. The plaintiff's property was placed in a residential district not because of the harm a store there might do to the owners or occupants of neighboring lots, but because the plan which allotted that district to homes aimed to present a reasonable districting of the whole territory of the city; and the logically correct issue is whether that plan is or is not reasonably sustainable by the facts about the whole territory of the city, in the light of those pur-

[12] State *ex rel.* Penrose Inv. Co. *v.* McKelvey, 256 S. W. 474 (Mo., 1923); City of St. Louis *v.* Evraiff, 256 S. W. 489 (Mo., 1923).

[13] City of Utica *v.* Hanna, 202 App. Div. 610, 195 N. Y. Supp. 225 (1922); Hayden *v.* Clary (Sup. Ct., N. Y., Jan. 6, 1922), unreported. See also Clements *v.* McCabe, 210 Mich. 207, 177 N. W. 722 (1920). In Atkinson *v.* Piper, 195 N. W. 545, 547 (Wis., 1923), the court, upholding a statute which fixed maximum building heights, stated incidentally that a zone plan would be "a more scientific and satisfactory way of limiting the height and character of buildings."

poses which are recognized as falling within the constitutional scope of the police power.

The number of decisions upon the constitutionality of zoning ordinances is not large, all of them, favorable[14] and adverse,[15] being cited below. As will be seen from these citations, there is a strong balance of authority in favor of constitutionality. Most of the favorable opinions uphold zoning in general; others are expressly limited to the particular regulation in issue in the case, though the logic of the reasoning would support zoning. With the exception of the Missouri cases, every adverse decision is expressly limited to a single piece of property or single provision

[14] Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920); Palmer *v.* Mann, 120 Misc. 396, 198 N. Y. Supp. 548 (1923), 206 App. Div. 480, 201 N. Y. Supp. 525 (1923); Ware *v.* City of Wichita, 113 Kan. 153, 214 Pac. 99 (1923); State *ex rel.* Civello *v.* New Orleans (and other cases of the same group), 97 So. 440, 445, 446 (La., 1923) — not a single comprehensive zoning ordinance, but dealing with several of a group of use district ordinances which together cover a substantial portion of the city; Boland *v.* Compagno, 97 So. 661 (La., 1923); *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911) (an early type of use-zoning case, treated by a rather strained process as a nuisance case); Brown *v.* City of Los Angeles, 183 Cal. 783, 192 Pac. 716 (1920) (similar); *Ex parte* Hadacheck, *supra,* note 9 (similar); State *ex rel.* Carter *v.* Harper, 196 N. W. 451 (Wis., 1923); State *ex rel.* Morris *v.* Osborn, 22 Ohio N. P. (N. S.) 549, 31 Ohio Dec. 98, 197 (1920); Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920); Schait *v.* Senior, 117 Atl. 517 (N. J., 1922); Cliffside Park Realty Co. *v.* Borough of Cliffside, 96 N. J. L. 278, 114 Atl. 797 (1921); Cohen *v.* Rosedale Realty Co., 120 Misc. 416, 199 N. Y. Supp. 4 (1923); *In re* Cherry, 193 N. Y. Supp. 57 (App. Div., 1922), 196 N. Y. Supp. 920 (App. Div., 1922); Cherry *v.* Isbister, 234 N. Y. 607, 138 N. E. 465 (1922); State *ex rel.* Dantzig *v.* Durant, 21 Ohio Law Bull. and Rep. 395 (C. A., Ohio, 1923); Motor Home Inc. *v.* Hedden (Super. Ct., Los Angeles Co., Cal., Nov. 14, 1923), unreported; Kahn Bros. *v.* City of Youngstown (C. P. Ct., Mahoning Co., Ohio, 1923), unreported. See dissenting opinions of Judge White in State *ex rel.* Penrose Inv. Co. *v.* McKelvey, 256 S. W. 474, 479, 485 (Mo., 1923). See also opinion of Holt, J., in State *ex rel.* Twin City Bldg. & Investment Co. *v.* Houghton, 144 Minn. 1, 12, 174 N. W. 885, 888 (1919).

[15] State *ex rel.* Westminster Presbyterian Church *v.* Edgecomb, 108 Neb. 859, 189 N. W. 617 (1922) (involving one of the area restrictions only); State *ex rel.* Penrose Inv. Co. *v.* McKelvey, City of St. Louis *v.* Evraiff, and State *ex rel.* Better Built Home & Mortgage Co. *v.* McKelvey, 256 S. W. 474, 489, 495 (Mo., 1923) (three cases arising from the St. Louis ordinance); Ignaciunas *v.* Risley, 121 Atl. 783 (N. J., 1923); Kosloy *v.* Quigley (Sup. Ct., N. J., Nov. 8, 1922), unreported; Miller *v.* Board of Public Works of Los Angeles (Dist. C. A., Cal., Dec. 21, 1923), unreported, — not a single comprehensive ordinance, but one of a group of block ordinances which together covered the city; Ambler Realty Co. *v.* Euclid Village, 21 Ohio Law Bull. and Rep. 607 (U. S. Dist. Ct., N. D. Ohio., 1924).

of the ordinance, though the process of reasoning is logically inconsistent with the basic theory of zoning. The Missouri court alone has expressly decided against the constitutionality of zoning; but even here questions of statutory or charter powers, as distinguished from constitutional issues, were involved, and exerted a marked influence upon some of the judges of the court.

If the true issue be the reasonableness of the plan, the question then arises whether the effect of the plan on the value of an individual piece of property has any relevant bearing on the issue of constitutionality, when the plan is attacked by the owner of the property. The attack will generally include the accusation that the ordinance is " confiscatory," that its effect is a " confiscation " of the property. These words " confiscatory " and " confiscation " came into constant use in public utility rate cases. Both courts and lawyers are developing a tendency to carry their use over into the field of private-property regulation. They have appeared with some frequency in zoning discussion. It becomes of importance, therefore, to ascertain just what these words mean in relation to the constitutional limits of the power to regulate private property.

That pecuniary injury from an exercise of the police power does not demonstrate or indicate violation of constitutional limitations, is too well settled to require argument or citations. A sufficiently striking case is *Hadacheck* v. *Sebastian,*[16] upholding an ordinance of the city of Los Angeles, which was not a single comprehensive zoning ordinance in the contemporary sense, but which, together with other ordinances, constituted a division of the whole territory of the city into industrial and residential districts. Hadacheck had erected his brickyard and kiln in an uninhabited region several miles outside the city limits upon an eight-acre tract of land with soil peculiarly valuable for brick-making. The city boundaries later were extended so that they took in this region. In the meantime some residential development had taken place. The ordinance zoned the region as residential, and operated retroactively so as to require the removal of the industry. The testimony tended to show that for brick-making purposes the tract had a value of

[16] *Supra,* note 9.

$800,000, whereas for residential uses its value would be reduced to $60,000; and unquestionably the ordinance caused an enormous money loss to the owner of the property. Despite this retroactive operation and great impairment of value, the Supreme Courts of both California and the United States declared the ordinance valid. Neither court squarely called the brickyard a nuisance. Even if it could fairly have been called a nuisance industry, that surely would not have deprived it of constitutional protection. If the Constitution forbids "confiscation," one would seek in vain for any logical ground for placing the nuisance industry beyond the pale of this prohibition; especially if the industry had not been a nuisance when established, but became one solely through the action of others than its owner or operator.

The argument often made that when property is held by its owner for a particular use, as, for instance, an industrial use, the prohibition of such use is "confiscatory" because destructive of that use or of the property's value derived from the possibilities of that use, is obviously the same sort of begging of the question and vicious circle as the proposition formerly advanced but now discredited, that the capitalization of the earning capacity of a utility may be applied as the valuation basis in testing the validity of a rate regulation. Surely the individual cannot be permitted to speculate upon the community's not exercising its constitutional powers, and then claim that the community is barred from interfering with the speculation.

In public-utility rate cases, the courts evolved the formula of the deprivation of a fair return upon a fair value as the measure of confiscation. In its application even this test has proved to be full of uncertainties and inconsistencies. It is not appropriate to purely private property, nor can a value test of any degree of certainty be devised for defining the limitations of the power to regulate private property. In public-utility cases, the courts felt compelled to permit themselves to become administrative tribunals, passing upon many details of rate schedules or utility valuations, instead of remaining within the judicial province of adjudicating the validity of general principles of valuation as applied by utility commissions, city councils, or other regulative bodies. Were the courts to permit themselves to determine the

validity of zoning or other private-property regulation by some mathematical test of its effect upon the value of each individual piece of property, we should arrive outside the domain of law altogether. In short, this test of " confiscation " is incapable of sufficient definiteness to be a principle of the constitutional law of private-property regulation. In that field the words " confiscation " and " confiscatory " are terms of abuse and not of law. An examination of the cases will disclose the fact that these words have been employed with surprising and gratifying rareness.

This does not necessarily signify, however, that evidence of the effect of the zone plan on the value of the property involved in the case has no relevance whatever to the constitutional issue. As property derives its value, to a degree, from the factor of its capacity for some appropriate use, a substantial impairment of actual market value may, though not necessarily, indicate poor zoning. The reasonableness of the plan results from the fact that it represents a careful attempt to apply sound zoning principles and standards, including a reasonable degree of recognition of the appropriateness of the various regulations to the different sections of the city, by reason of location, topography, past development, trends, and other factors. The survey preceding the plan usually does and always should include a study of land values, since these constitute an important factor of the planning problem, especially in their bearing upon the avoidance of regulations which would unnecessarily impair the earning capacity or the appropriate economic exploitation of property in the different sections of the city. A substantial impairment of the actual present market value of a particular piece of property does not itself demonstrate or even indicate unconstitutionality, but it may be considered as an item of evidence, not in itself conclusive or decisive or even presumptive, but probative, of some failure to apply tenable zoning principles.[17] Such evidence

[17] Isenbarth *v.* Bartnett, 206 App. Div. 546, 201 N. Y. Supp. 383 (1923), is an example of the proper treatment of the problem. Here property which logically belonged in a business district was placed in a residential district solely to preserve a vista for a private residential park, with the result that the market value of the property was reduced from $55,000 to $17,000. This was rightly held to be unreasonable. See also Willerup *v.* Village of Hempstead, 120 Misc. 485, 199 N. Y. Supp. 56 (1923).

may be counteracted, of course, by proof of the general reasonableness of the plan, its methods, and standards. Care needs to be taken to restrict such evidence to actual market values and to exclude merely speculative or future values, for the admission of the latter would involve the question-begging to which reference has been made. Speculative values are, to some extent, the accompaniment of the very evils against which zoning is directed.

As for the equality clause of the Fourteenth Amendment, though it is discussed in some cases, no ordinance seems to have been invalidated for discriminatory treatment of different sections of the city or of different lots within a district. The principle, that a measure does not violate the equality clause simply because the legislation does not cover the whole possible field of the subject, has been applied to zoning ordinances, as, for instance, the holding that an ordinance is not unconstitutional for excluding laundries from one district while not excluding them from other districts similarly situated.[18] The zones necessarily have boundary lines, which may be the center of a street or street intersection, so that properties on one side of the street will fall into a residential and on the other side into a business or industrial district. A certain degree of arbitrariness is inherent in all law-made boundaries. The zone boundaries generally will be found less, rather than more arbitrary than those of taxing districts, street railroad or telephone rate zones, freight classification districts, or other types of man-made boundary lines within which we live, move, and pay our taxes.[19] As the zone plan is applied to a territory which has developed in an unzoned, spotty fashion, there will generally be existing non-conforming uses in each district, as, for instance, a few business or factory structures in the residential districts. These are permitted to remain so that the ordinance shall not have a retroactive effect, and are departures from the ideal plan in the interest of fairness to existing structures. A lightening of

[18] *Ex parte* Quong Wo, *supra,* note 14; Boland *v.* Compagno, 97 So. 661 (La., 1923) (upholding the exclusion of all business except drug store, ' otel, and bank, from residence district). See also *Ex parte* Hadacheck, *supra,* note 9.

[19] Brown *v.* City of Los Angeles, 183 Cal. 783, 192 Pac. 716 (1920), holding that the failure to subject similar territory to same regulations is not discriminatory, since a certain degree of arbitrariness in location of boundaries is inevitable.

restrictions on some property, as compared with other property similarly situated, is not unconstitutional discrimination.[20] As zoning is regulation by districts and not by individual pieces of property, the proper test of equality is the general intelligence and fairness of the classification as a whole, not an impossible and prohibitive identity of treatment of individual lots of land. The zoning power is itself entitled to equality of scope and privilege with other legislative powers, and therefore is entitled to the application of the general principle that the Constitution requires only such equality as is reasonably appropriate to the nature of the power exercised — absence of arbitrary classification. Rare indeed will be the case of two lots subjected in the ordinance to different regulation, which are so similarly located in every respect that complete identity of regulation is the only possible equality of treatment; and where such a case arises, the discrimination can generally be removed by the administrative action of the board of adjustment referred to later in this article. If courts be drawn into such detailed equalization problems, they run the danger of permitting themselves to become administrative rather than judicial tribunals, or of dislocating the plan by modifying it at particular spots, without organic adjustments. The true principle would seem to be that, if the districting in general cannot be shown to have disregarded the reasonable dictates of equality, it should be upheld. Here as elsewhere in the realm of the due-process and equality clauses, general considerations and not particular instances should govern, and here, as elsewhere, there is no escape from questions of degree.

In addition to these general issues of due process and equality, a typical zoning ordinance contains provisions raising special constitutional problems, to which brief mention should be given. The area or bulk regulations often include provisions for set-back or building lines. That a set-back ordinance, *per se*, is of doubtful validity, may be considered fairly well settled.[21] Cer-

[20] Ayer *v.* Commrs. on Height of Buildings in Boston, 242 Mass. 30, 136 N. E. 338 (1922).

[21] St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861 (1893); Fruth *v.* Board of Affairs, 75 W. Va. 456, 84 S. E. 105 (1915); People *ex rel.* Dilzer *v.* Calder, 89 App. Div. 503, 85 N. Y. Supp. 1015 (1903). *Contra,* Eubank *v.* City of Rich-

tainly where the set-back requirement is actually and deliberately a preliminary step in a program of street widening, it constitutes the taking of property for public use, and compensation must be paid. So far as appears from reported cases, no court has as yet been called upon to determine the validity of the set-back provisions of a zoning ordinance, where these provisions were items of a whole plan of regulation of the development of the territory of the city and, consequently, as in the case of other items of the plan, derived a reasonableness and a meaning from their place in the plan. Moderate set-back requirements, which do not impose excessive difficulties upon building development and which are a part of a zone plan, would seem to fall within the constitutional scope of police power. Such holding is indicated by a recent Connecticut decision,[22] upholding a statute which prohibited the building lines of a private subdivision to be nearer the street than building lines as laid out on the town plan, and in which the court enjoined a subdivision of land with non-conforming building lines or any construction in violation of the building lines as mapped on the town plan.

A special equality problem is raised when a set-back requirement is governed by the actual building lines of existing buildings, as, for instance, a provision to the effect that the set-back line on any particular block shall not be required to be at greater distance from the street than the average actual set-backs of existing buildings on that block, the line thus fixed being nearer to the street than the general set-back standard of the ordinance. Is such a provision unconstitutional, in that it requires new buildings to be placed at a greater distance from the street than at least some of the existing buildings, or permits new buildings on a partly-developed block to be nearer the street line than similar buildings on an undeveloped but otherwise similar block? Probably this averaging of the line may be held valid as a rather fair, rough-and-ready equalization or adjustment between the requirements of the set-back standards of the

mond, 110 Va. 749, 67 S. E. 376 (1910), which upheld set-back regulation; reversed in 226 U. S. 137 (1912), but only upon point that the building line was to be fixed by a percentage of property owners, and the Court said (at p. 144): "We need not consider the power of a city to establish a building line."

22 Town of Windsor *v.* Whitney, 95 Conn. 357, 111 Atl. 354 (1920).

ordinance and the actual situation of developed property. In view of the fact that in all except brand-new towns, the zoning ordinance necessarily deals with both developed and undeveloped property, with existing buildings and new buildings, the dictates of equality should not be held to require more than a reasonably fair, rough-and-ready equalization.

Zoning ordinances often contain provisions whereby an otherwise prohibited use may be permitted by consent of a designated percentage of owners of property in a designated territory, as, for example, permission to locate a public garage in a block by consent of a percentage of owners in the block or along both sides of the same street. Such provisions raise a question of delegation of legislative power. Courts have frequently made a distinction, somewhat elusive, between a rule whose taking effect is dependent upon the vote of the neighborhood and a rule whose suspension may be brought about by the vote of the neighborhood. The constitutionality of such provisions of a zone ordinance would probably be determined by the attitude of the court upon similar delegation of legislative power in other types of measures; with this difference, that the plan gives a reasonableness to this, as to other details, which similar provisions of a block or other type of ordinance might not have.

Retroactive operation of the provisions of the ordinance is generally avoided; that is, there is customarily no requirement of change in an existing structure or in the use made of property at the time of the passage of the legislation. As the zone plan is fundamentally a design for the constructive control of future development, rather than a mere program of suppression of offensive uses, a retroactive provision of a zoning ordinance does not present any constitutional question different from that of the same or similar provision in any other type of measure.

These ordinances usually contain the creation and designation of the powers of a board of zoning appeals or adjustment. This board is given power to hear and decide appeals from the rulings of the building commissioner. Its functions are mainly interpretative and administrative, though upon a very strict definition of administrative, some of the powers of the board might be considered as shading off into the legislative field. The territory of a city, particularly a large city, contains such localized topo-

graphical and developmental variations, that the map and regulations, if literally applied everywhere, would inevitably produce here and there excessive, even prohibitive, burdens. For instance, the topography of an individual lot may be such that a strict application of the bulk regulations would make it impossible to build at all. Border-line cases may need adjustment in the interest of avoidance of exceptional and excessive hardships, as in the case of an industrial plant on the border-line of a residential district, where an extension of the plant would be impossible unless some variation from the strict application of the regulations at that single point were to be permitted. The board is generally given the power to treat these exceptional situations, and is an ingenious device whereby these situations can receive fair and adequate treatment without breaking down the whole plan. The defining of the board's powers generally raises issues of statutory and charter interpretation, rather than constitutional questions. All of the reported cases have occurred in the state of New York,[23] and an examination of them will disclose that no constitutional issue of delegation of legislative power was raised, though the New York boards are granted a power to vary the regulations (but not the map) which may properly be called legislative in its nature. If and when this constitutional issue is raised, then, as in so many other fields of legislation and administration, the courts should and no doubt will allow generous scope to the discretion of these administrative bodies, and thus avoid requiring a prohibitive amount of detail in the ordinance itself or unduly drawing themselves into administrative problems.

[23] Matter of Palmer *v.* Mann, 120 Misc. 396, 198 N. Y. Supp. 548 (1923), 206 App. Div. 484, 201 N. Y. Supp. 525 (1923); People *ex rel.* Cotton *v.* Leo, 110 Misc. 519, 180 N. Y. Supp. 554 (1920); People *ex rel.* Parry *v.* Walsh, 121 Misc. 637, 202 N. Y. Supp. 48 (1923); People *ex rel.* Healy *v.* Leo, 185 N. Y. Supp. 948 (App. Div., 1920); People *ex rel.* Ventres *v.* Walsh, 121 Misc. 494, 201 N. Y. Supp. 226 (1923); People *ex rel.* McAvoy *v.* Leo, 109 Misc. 225, 178 N. Y. Supp. 513 (1919); People *ex rel.* Wohl *v.* Leo, 109 Misc. 448, 178 N. Y. Supp. 851 (1919); People *ex rel.* Helvetia Realty Co. *v.* Leo, 183 N. Y. Supp. 37 (Sup. Ct., 1920), 231 N. Y. 619, 132 N. E. 912 (1921); People *ex rel.* Facey *v.* Leo, 230 N. Y. 602, 130 N. E. 910 (1921); People *ex rel.* Kannensohn Holding Corp. *v.* Walsh, 120 Misc. 467, 199 N. Y. Supp. 534 (1923); People *ex rel.* Sheldon *v.* Board of Appeals, 234 N. Y. 484, 138 N. E. 416 (1923), reversing 115 Misc. 449, 189 N. Y. Supp. 772 (1921).

Zoning ordinances generally contain a blanket savings clause to the effect that the invalidity of any section or provision shall not invalidate any other section or provision. Excepting only the Missouri decisions on the St. Louis ordinance, in every case in which the attack on the ordinance was successful the court expressly limited the decision's effect to the particular regulation under attack as applied to the plaintiff's individual piece of property. There has been no case in which any party contended or court decided that, despite the savings clause, the invalidity of the particular provision under attack would result in such dislocation of the plan as necessarily to carry down the rest of the ordinance. One can conceive of cases in which the organic and adjusted nature of the plan might be destroyed by the invalidity of a particular provision. Such a case seems not to have arisen, and the almost universal practice is to treat all provisions of the ordinance as intact except the one which has been expressly invalidated, and to limit that invalidation to the particular property involved in the case. Certainly a decision should not be given effect beyond the logic of its grounds; and when those grounds include the special facts concerning an individual piece of property, the effect of the decision should be limited to that property.

This suggests the question whether the ordinance is subject to attack in court previous to its actual or threatened enforcement against the property or property owner. The usual method of enforcement is the withholding of a building permit. There may also be a penal clause providing for the punishment of a violation of the ordinance. Obviously, neither method of enforcement can or will be applied against an owner of property until he plans to build or does build. If, however, he holds the property for sale in undeveloped state or without any building plan or intention, will the court entertain his action for an injunction? The few decisions are in conflict.[24] One finds difficulty in discovering

[24] Cases refusing to enjoin ordinance at suit of a plaintiff who had not applied for a building permit: Cliffside Park Realty Co. *v.* Borough of Cliffside, 96 N. J. L. 278, 114 Atl. 797 (1921) (holding action for injunction before refusal of building permit to be premature, since ordinance not void as a whole); Whitridge *v.* Calestock, 100 Misc. 367, 165 N. Y. Supp. 640 (1917). *Contra,* Ambler Realty Co. *v.* Euclid Village, *supra,* note 15.

just what there is to enjoin or decree against? The provisions of the ordinance do not constitute a cloud upon the title to the property or an encumbrance.[25] The ordinance is a law, not different in kind from any other statute or ordinance regulating the use of property. The grant of an injunction or other decree under such circumstances would be a departure from the basic principle of the administration of constitutional law, that a court will not entertain suits directed against a statute or ordinance itself, but only against its enforcement, and will determine a constitutional issue only when it arises in the course of a litigation brought for a relief other than the bare determination of such issue. Nevertheless, as the mere promulgation of a zone plan may have a harmful effect on the marketability or the market value of the undeveloped property, there is, it must be admitted, an injustice if the property owner has no means of relief from this injury when the ordinance is unconstitutional. Relief against an ordinance prior to its enforcement is of so extraordinary a nature, however, that it should certainly not be granted except in the clearest case and when there is no other possible remedy, that is, only when the plaintiff can demonstrate beyond doubt the unconstitutionality of the regulation and shall have exhausted all other remedy, including application to council or other legislative body for amendment of the ordinance, the latter especially if the ordinance itself provides a procedure for amendment upon application of property owners.[26]

Zoning cases raise in peculiarly urgent shape the problem of the extent to which the question of constitutionality is decided from the four corners of the measure or is one upon which evidence may be received and considered. These cases make it clear, if such demonstration be necessary at this late date, that fact issues are necessarily involved in the issue of reasonableness. Our state and national constitutions would be strange instruments indeed if they required the courts to close their ears to all testimony, sworn or printed, on the relationship of zoning to the public health, safety, convenience, order, prosperity, and welfare, and still permitted them to declare that no such

[25] Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920); Moss *v.* Rubenstein, 117 Misc. 385, 191 N. Y. Supp. 496 (1921).

[26] See Sam Kee *v.* Wilde, 41 Cal. App. 528, 183 Pac. 164 (1919).

relationship exists. Our constitutional procedure would itself be unreasonable and arbitrary, if it were to permit a court to declare a zone plan unreasonable and arbitrary without hearing the facts upon which the plan was based and the principles which went into its making. This the courts have realized, and they have, in zoning cases, received evidence of the survey preceding the plan, the thoroughness of the preparatory steps, the data upon which the plan was based, evidence of the relationship of the zone plan to the city's development and the public health and welfare, as well as evidence bearing upon the particular piece of property and district involved in the suit.[27]

There remains, for brief discussion, the accusation that zoning is designed to promote aesthetic values, and the contention that promotion of aesthetic values is beyond the constitutional scope of the police power. Aesthetic is a word which needs more clear-cut, precise definition, if it is to be used as a term of constitutional law. If physical attractiveness be meant, then certainly aesthetic considerations are not entirely absent from zoning. The same is true, however, of street cleaning, or smoke abatement, or most other public or private activities. Indeed there is probably an aesthetic ingredient in almost every human action. When the lawyer clears his disordered desk, while efficiency may be his main motive, he is probably not without some regard for the " looks of things." [28] The principle recognized by the courts is to the effect that promotion of beauty is not alone sufficient to justify property regulation, but the presence of this motive of beautification will not invalidate the regulation if health or other customary police-power motives be present.[29] This principle may or may not have arisen from consciousness of the universality of an aesthetic ingredient in all human action; but, at any rate, it corresponds to the realities. The aesthetic and the utilitarian are not sharply-defined, separate, differentiated, or con-

[27] State *ex rel.* Morris *v.* Osborn, *supra,* note 14; Willerup *v.* Village of Hempstead, 120 Misc. 485, 199 N. Y. Supp. 56 (1923).

[28] State *ex rel.* Carter *v.* Harper, 196 N. W. 451 (Wis., 1923) (a zoning case, showing the changing and relative nature of aesthetic considerations).

[29] Thomas Cusack Co. *v.* City of Chicago, 267 Ill. 344, 108 N. E. 340 (1915) aff'd in 242 U. S. 526 (1917); St. Louis Poster Advertising Co. *v.* St. Louis, 249 U. S. 269 (1919); Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920).

trasted compartments of human motive or activity. American zoning received its first great impulse from the utilitarian desire to protect Fifth Avenue, New York City, property values from the demoralization which was being caused by the inroads of manufacturing structures. Undoubtedly, the physical attractiveness of the street was not absent from the minds of those who urged protective legislation. At the very least, they were not unmindful of the effect of that attractiveness upon the pecuniary values of their properties. In the course of this movement, there came to those who were studying the problem an increasing realization of the possibilities of a zone plan for the health, good housing, congestion control, and other general living conditions of the whole city. And as zoning has progressed throughout the country, and those engaged in this work have sought the advice of lawyers and have been made increasingly conscious of the limitations of the police power, these public-welfare motives have become increasingly influential and predominant in the actual process of preparing zone plans.

The home-builder or home-maker, if worthy of his position, segregates the different portions of the home according to function — sleeping quarters separated from the kitchen or shop, living-room from the bath-room. This "zoning" of the home not only increases the efficiency of each part for the performance of its function, but also makes possible a general orderliness and neatness in the domestic environment. The parent who prefers to rear his children in an environment of order, quiet, and neatness, may or may not be actuated by matters of taste; but he cannot be considered as unreasonable or arbitrary in believing that his children will be the better, physically, mentally, and morally, for such environment.[30] These children and their parents live and work outside of as well as within the home — in the stores and office buildings and factories and on the streets of the city. In the modern, growing city, the power over what are called nuisances is hopelessly inadequate to suppress or prevent harmful conditions. The individual's control of the environment in which he and his family live and

[30] On the intimate relationship of attractiveness to health, etc., see opinion of Holt, J., on the rehearing in State *ex rel.* Twin City Co. *v.* Houghton, 144 Minn. 1, 12, 174 N. W. 885, 888 (1919).

work is limited to the area of the land which he owns or over which he exercises dominion — certainly a very inadequate control for all except an insignificant percentage of the community. Unless urban communities exercise, by means of planning and zoning, some control over the distribution of their population and traffic and the environment in which their inhabitants live, work, and rear children, sooner or later these communities will have to choose between accepting a deterioration in the physical and moral caliber of their citizens or deliberately limiting the growth of their population.

Alfred Bettman.

CINCINNATI, OHIO.

EXHIBIT B

No. [redacted] 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

THE VILLAGE OF EUCLID and HARRY W. STEIN, Inspector of Buildings,

Appellants,

v.

THE AMBLER REALTY COMPANY,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE AND BRIEF ON BEHALF OF THE NATIONAL CONFERENCE ON CITY PLANNING, THE NATIONAL HOUSING ASSOCIATION AND THE MASSACHUSETTS FEDERATION OF TOWN PLANNING BOARDS, AMICI CURIAE.

ALFRED BETTMAN,

Counsel for The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association and The Massachusetts Federation of Town Planning Boards, Amici Curiae.

No. 665

IN THE

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OCTOBER TERM, 1925

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Appellants,

v.

THE AMBLER REALTY COMPANY,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

MOTION FOR LEAVE TO FILE ATTACHED BRIEF, AMICI CURIAE.

Now come The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association and The Massachusetts Federation of Town Planning Boards by Alfred Bettman, their counsel, and move the Court for leave to file as *amici curiae* a brief herewith exhibited in the above entitled cause arising under the constitution and laws of the United States, and,

TABLE OF CONTENTS.

APPENDIX.

TABLE OF CASES.

(NOTE—A full list of decisions involving the issue of the constitutionality of zoning will be found on pages 15 to 22. The following citations are limited to those otherwise cited or quoted from in the text of the brief.)

TEXTS CITED.

No. 665

IN THE

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(The opinion of the District Court in this case is reported in *Ambler Realty Company* v. *Village of Euclid*, 297 Fed. R. 197.)

PURPOSE AND SCOPE OF THIS BRIEF.

This brief is designed to discuss solely the question of the constitutionality of comprehensive zoning. We do not intend to argue any issues of either fact or law which may have been raised by the parties to the case, except as they

relate themselves to this matter of the constitutionality of zoning. The attorneys for appellee suggest that this case may turn upon the reasonableness or arbitrariness of that detail of the ordinance which has placed appellee's land in a residential rather than an industrial zone. We would agree that the decision in this or any other case may turn upon the reasonableness, that is, the general appropriateness of the specific districting involved in the case. In so far as the contentions of the parties relate to the reasonableness or arbitrariness of the Euclid Village ordinance itself in its districting of the particular property of the appellee, that is, in so far as the issues of this case relate themselves specially to this ordinance and its provisions for this piece of property, we do not feel it within our province to present any statement whatever. The attorneys of the appellee, however, have not chosen to restrict themselves to an attack upon a particular provision of this particular ordinance or the special nature of its effect upon the particular piece of property of the appellee, but have attacked the constitutionality of zoning of the general type of the ordinance in this case. As they have sought to support that attack by what we deem to be fallacious arguments on constitutional law, as well as entirely mistaken citation of authorities, and as many general expressions in the opinion of the District Judge may be and are being interpreted as adverse to the validity of zoning, and as we deem zoning to be a vital necessity to the welfare of that increasing majority of the inhabitants of the United States who live in urban communities, we have availed ourselves of the leave granted by the Court to file this brief.

WHAT IS ZONING?

Zoning is the regulation by districts of building development and uses of property. A typical zoning ordinance divides the territory covered by the ordinance, usually the whole territory of a single municipality, into districts, in each of which uniform regulations are provided for the

uses of buildings and land, the height of buildings and the area or bulk of buildings and open spaces. By use regulation is meant a statement of the permitted or prohibited uses of property and buildings, as, for instance, residential, business and industrial. Use districts are often further sub-classified, as, for instance, residential districts into those restricted to single-family houses and those in which multiple-family or apartment structures are permitted; business districts into central and local and those in which light manufacturing is permitted or excluded; industrial districts for light manufacturing, for heavy but non-nuisance types of industry, and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Area regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts and the extent and location of open spaces, such as building set-backs, side yards, rear yards. The typical comprehensive ordinance includes all these types of regulations.

A confusion in terminology, and, therefore, some confusion in the statements of the law has taken place by reason of an inaccurate use of the word "zoning" and by designating as "zoning ordinances" measures which are not entitled to the name. A zoning ordinance necessarily consists of a map of the zoned territory showing the boundaries of the districts, and of a text which applies the various regulations to the various districts as shown on the map. There are other types of ordinances often erroneously referred to as zoning ordinances. For instance, a customary type is one that sets forth a definition of a residential area according to the extent of actual residential development therein, and prohibits nonresidential developments in any area which may fulfill the definition. This sort of ordinance is more properly termed a "block" or "residential district" ordinance; but it is not zoning. It does not district the whole or a substantial portion of the city by means of a map, allotting each type of regulation to its most appropriate territory.

On the contrary, it selects certain portions of the city which have developed predominantly as residential, and protects these selected portions, without making any provision for the remainder of the territory of the city; and thus, in effect, it permits the existing users of property in the protected areas to determine the standards of use by other property owners. Many of these block ordinances have been upheld by the courts. Obviously, however, the true zoning ordinance, which is a comprehensive distribution of the whole or a major portion of the territory of the community among all the necessary uses of every kind, each with appropriate standards of height and occupancy, all worked out as a community plan for the promotion of the common health, safety and welfare, has elements of reasonableness which the block ordinance does not possess. Consequently the validity of a block type of ordinance shows, a fortiori, the validity of the comprehensive true zoning ordinance; but the invalidity of the block type does not indicate the invalidity of the true zoning ordinance. Several courts have recognized the basic difference, from a constitutional standpoint, between these types of measures. The courts of New York, Ohio and Louisiana, for instance, uphold zoning, including the creation of exclusively residential districts, but have invalidated certain block or residential district ordinances upon the express ground that these ordinances arbitrarily selected certain districts for protection and did not represent a careful, comprehensive plan for the zoning of the city. See *Wertheimer* v. *Schwab,* 210 N. Y. Supp. 312; *City of Youngstown* v. *Kahn Bros. Co.,* 112 O. S. 654, and *State, ex rel.,* v. *Harris,* 105 So. R. 33, 158 La. ———.

This brief is concerned with the constitutionality of the true zoning ordinance and not with the block or residential district type.

THE REMARKABLE SPREAD OF ZONING IN THE UNITED STATES.

That zoning represents a pressing need in growing American cities and urban regions is evidenced by the fact of the remarkable growth of the zoning movement. The first comprehensive zoning ordinance was that of New York City, adopted in 1916, though there were tentative types of such ordinances previous to that date, such as the Los Angeles use ordinances in 1909 and the Boston height zoning in 1904. The latest bulletin issued by the Housing and Zoning Bureau of the U. S. Department of Commerce states that on the first of January, 1926, 420 American municipalities had enacted zoning ordinances and more than 27,000,000 of our inhabitants were living under the protection of such measures. Hundreds of other municipalities are engaged in the preparation of zone plans. All but five states, as well as Congress on behalf of the District of Columbia, have passed zoning statutes. This alone demonstrates the conviction, on the part of those who deal with the problems of urban living in the United States, that zoning is absolutely essential if conditions of living are to remain tolerable and healthful. These facts indicate the existence of the need, and that zoning represents the "prevailing morality or strong or preponderant opinion" of the people of this country as to the best and most just method of controlling the development of growing urban communities in the interest of the health, convenience and welfare of their inhabitants.

VALIDITY OF ZONING HAS BEEN UPHELD BY SUPREME COURT OF OHIO AND CONSEQUENTLY THE ISSUE BEFORE THIS COURT IS RESTRICTED TO THE FEDERAL CONSTITUTIONAL QUESTION.

Since the instant case was decided by the District Court, the Supreme Court of Ohio has upheld the constitutionality of zoning in the case of *Pritz* v. *Messer,* 112 Ohio State

628, 149 N. E. R. 30. The situation with which the court was dealing in that case was concerned with area and height rather than with use regulations; but, being the first zoning case to reach it, the Ohio Supreme Court treated the validity of comprehensive zoning as involved, and both in the opinion and in the official syllabus, which, under the practice in Ohio, has the status of the authoritative statement of the law, the court passed upon the larger question, including use regulation. The official syllabus, adopting the title of the Ohio zoning statute, reads:

> "An ordinance enacted by a municipality under Article XVIII, Section 3 of the Ohio Constitution and under Sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence or other specific uses, the height, bulk, or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, set back building lines, and the area of yards, courts and other spaces, and for such purposes divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment."

Consequently, the conformance of zoning ordinances, of the type of the Euclid Village ordinance, with the constitution of Ohio must be treated as settled and determined, and the constitutional issue before this Court is restricted to the federal constitutional question.

THIS COURT HAS SUSTAINED THE VALIDITY OF ZONING REGULATIONS.

Zoning questions are not an entire novelty in this Court. On the contrary this Court, in two leading cases, has had

occasion to pass upon the validity of ordinances of a zoning nature and in each case upheld the ordinance.

Welch v. *Swasey*, 214 U. S. 91 (1909), upheld an ordinance of Boston, which divided the territory of that city into height zones or districts and prescribed the maximum height of buildings in each of the zones. The attack on the ordinance was based on the usual claims in this type of case—that the real purpose of the ordinance was aesthetic, that there was no substantial relation to health and safety, that the zone classification was arbitrary, that no compensation to property owners was provided. This Court overruled all these claims, and held that the relation of the measure to health and safety was easily observable, and that no compensation need be provided in cases of the reasonable exercise of the police power; and affirmed the judgment of the Supreme Judicial Court of Massachusetts upholding the ordinance.

Hadacheck v. *Sebastian*, 239 U. S. 394 (1915), is analogous to the case at bar, for in that case use regulation was involved. It was concerned with an ordinance of Los Angeles, which excluded brickyards and certain other industrial uses from a residential zone. The brick plant had been located before the district became designated as residential. The ordinance was therefore retroactive in its effect (which the Euclid Village ordinance is not) and the evidence tended to prove that the owner of the property would suffer heavy financial loss in the reduction in value of his property, if the ordinance were enforced against him. The ordinance had characteristics of both the block and zoning types and might be considered a partial zoning ordinance in that it was one of a group of measures which divided the city into residential and non-residential zones. This Court affirmed the judgment of the Supreme Court of California enforcing the ordinance. This decision, as well many state decisions which might be cited, effectively disposes of the contention of appellee that use regulation is unconstitutional though height and area regulation may not

be. Obviously the constitution makes no such distinction. Regulation of the use of property, when it bears a substantial relation to public health, welfare, etc., has exactly the same constitutional basis and justification as regulation of height and area or any other exercise of the police power over persons or property.

Since these two decisions, the technique of zoning has advanced to the comprehensive type, which includes height, use and area regulation as parts of a single plan, based on careful surveys, made more reasonable by careful adjustment to the economic, as well as social, factors involved. In the comprehensive ordinance, the locating of the districts and the height, use and area standards are adjusted to a carefully wrought plan for the promotion of the health, safety, convenience and welfare of the whole community. Such an ordinance is emphatically more reasonable in the constitutional sense than the separate height or use regulations embodied in the Boston and Los Angeles measures upheld by this Court.

The extent of the zoning movement, its importance to American urban communities and some adverse expressions in the opinion of the District Judge in this instant case warrant an extended discussion of the subject of the constitutional bases of zoning ordinances and their relation to public health, safety, convenience, morals, prosperity and welfare, even though these two prior decisions of this Court might logically be cited as conclusive.

Before entering into this discussion, we desire to refer to and dispose of two lines of attack and denunciation which are usually invoked in police power cases, namely, the charge that the measure under attack has an effect on the value of the complainant's property which in and of itself makes the measure unconstitutional (this effect being sometimes called "confiscatory"), and, secondly, the charge that the measure constitutes a taking of property without compensation.

EFFECT OF POLICE POWER REGULATION ON VALUE OF PURELY PRIVATE PROPERTY CAN NEVER BE THE TEST OF CONSTITUTIONALITY; FOR SUCH TEST BEGS THE CONSTITUTIONAL QUESTION.

The briefs of the attorneys of record contain frequent references to the effect of the ordinance upon the value of appellee's land. There is danger of confusion of thought as to the relevance and constitutional effect of evidence of this nature. The principle that pecuniary injury resulting from an exercise of the police power does not demonstrate or indicate the violation of constitutional limitations, is too well settled to require further argument or citations. To ascertain the value of the property previous to the enactment of a regulation and then to estimate the value with the regulation in effect and, if the latter figure be less than the former, to then conclude that the regulation must be invalid, is, obviously, a begging of the constitutional question. Such a contention seeks to disprove the existence of a legislative power by assuming a right to be free from such legislative power. The question before us, for instance, is whether the community has the power, as part of a comprehensive zone plan, to restrict property in certain districts to residential uses. To contend that, if the property was acquired for a non-residential use, the purpose of the acquisition would be impaired and the legislation thereby rendered unconstitutional, is a pure begging of the question. One may not speculate upon a community's not exercising its constitutional police power and then claim a vested property right in the community's non-action. In truth, the old value for which protection is claimed may have been produced, in whole or part, by the very evils against which the legislation is directed. The right to make a noise or congest the streets or impair the living conditions of a residential neighborhood may give a specific piece of land more value than it would have for residential

use; but surely there can be no such vested interest in any such right as would preclude the legislature from exercising its regulatory powers. In *Hadacheck* v. *Los Angeles*, *supra*, Mr. Justice McKenna, speaking for this Court, said:

> "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precluded any limitation upon it when not exerted arbitrarily. A vested interest can not be asserted against it because of conditions once obtaining."

Consequently, whatever confiscation may mean in the constitutional sense, it can not refer to that effect on future speculative values which is a necessary incident of the very existence of the police power.

This does not necessarily signify, however, that evidence of the effect of a particular zone plan on the value of a specific piece of property has no relevance whatever to the constitutional issue. Property derives its value from its appropriateness, by reason of location, for certain uses, and the fact that a zoning ordinance causes a substantial impairment of value may be evidence, not conclusive or presumptive, but an item of evidence of arbitrary, unreasonable zoning; that is of zoning which, in fixing the boundaries between the various zones, has been careless of or has ignored this factor of appropriateness of location. The reasonableness of the plan, in the constitutional sense of reasonableness, is, of course, in issue in any case in which the validity of the plan is attacked, and this brings into issue the question whether the plan represents a genuine attempt to apply sound zoning standards, including a reasonable degree of consideration of the appropriateness of the various regulations to the different sections of the city by reason of location, topography, access to utilities, population trends and other factors. But to contend that a

showing of so and so much reduction in the value of a particular piece of land proves the invalidity of the ordinance, would plainly represent a confusion of thought and a begging of the constitutional question.

ZONING NOT A TAKING OF PROPERTY—QUESTION OF COMPENSATION NOT INVOLVED.

The attorneys of appellee dwell considerably on the absence of provision for direct money compensation to be paid to the property owners. This is wholly beside the point. The ordinance is frankly and expressly an exercise of the police power and not of the power of eminent domain. The community is not taking or destroying any property or property rights for public use. The ordinance is exclusively regulative. As stated in *Chicago, ex rel. R. R. Co.*, v. *People*, 200 U. S. 561:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which can not, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434."

In the case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413, this Court said:

> "Government hardly could go on if to some extent values incident to property could not be diminished

without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power."

Appellee's attorneys seem to rely greatly on this Pennsylvania Coal Company case. But the statute involved in that case is utterly different from and remote in kind, character and degree from a zoning law or ordinance. In that case the statute destroyed, not regulated, but destroyed a property title or interest expressly created by and reserved in a deed. The right of the mining company to mine coal was created by specific and express deeds and the statute expressly abolished that right. In stating the facts of the case, Mr. Justice Holmes, who delivered the opinion, said, p. 413:

> "As applied to this case the statute is admitted to destroy previously existing rights of property and contract." * * * "It (the statute) purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs."

The case at bar is in no way analogous to that case nor remotely similar. No property or contract right created by deed or other instrument is here in any respect abolished, suppressed, destroyed or even regulated. The property rights asserted are simply those which inhere generally in all owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Zoning regulations are quite free from and outside of the scope of the Pennsylvania Coal Company case, in which specified property interests created by contract were destroyed by the statute. It is quite evident that this Court did not consider that case as having

any relevancy to regulations of the nature of zoning regulations; for not only did it not overrule, it did not even mention the cases in which it had sustained regulations similar to zoning regulations, namely, *Welsh* v. *Swasey, supra,* and *Hadacheck* v. *Sebastian, supra.* Surely if the Pennsylvania Coal Company decision had been conceived as in any respect modifying or overruling or affecting these cases, they would have been mentioned by this Court.

As stated by Judge Peckham in *Health Department* v. *Rector,* 145 N. Y. 32, 43:

> "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer, injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

Eliminating from further consideration, therefore, these confusing contentions about compensation or confiscation, we address ourselves to the relevant issues involved in the question whether comprehensive zoning is within the constitutional scope of the police power.

THE STATE OF THE AUTHORITIES.

While there have been a few decisions adverse to the constitutionality of zoning, the favorable decisions greatly outnumber them; and the overwhelming weight of authority, as expressed in judicial decisions, is in favor of the constitutionality of zoning. Former assertions to the contrary were due to the fallacy of including, as citations, cases which do not involve true zoning ordinances but which are upon block or residential district or other types of ordinances, or cases dealing with questions of

statutory power or statutory interpretation and not with constitutionality. In his opinion in this instant case in the court below, Judge Westenhaver cited numerous cases but only two which involved true zoning ordinances, one of them from Missouri and the other a California case which has been since reversed by the Supreme Court of that state.

We desire to call to the Court's attention that since the decision of the District Court in the case at bar, the highest courts of Massachusetts, California, Minnesota, Ohio, Illinois, Oregon and Rhode Island, have each and all of them upheld zoning in clear-cut cases and with decisive opinions, and the highest courts of New York, Wisconsin, Louisiana and Kansas have reaffirmed their previous holdings to this same effect. Any contentions in the arguments before the District Court that the constitutional issue was in an uncertain, conflicting or indecisive stage has ceased to have any basis. Every one of these decisions upheld the creation of exclusively residential districts and the exclusion of nonnuisance industries and business therefrom, and many of them upheld the creation of exclusively single-family home districts from which apartment houses were excluded.

The following, so far as can be learned from available sources of which we know, constitute all the decisions, at the date of writing this brief (July 14, 1926), upon the constitutionality of zoning, both favorable and adverse. No case has been included in the list of favorable decisions unless it could be properly treated as a zoning case or unless decided wholly or in part upon or necessarily involving the constitutional question. Many cases on block ordinances or other types of property regulation lead logically to the upholding of zoning, but such cases have not been included. Many cases have arisen in the course of the administration of zoning ordinances, particularly in the state of New York, which necessarily assume the validity of the ordinance, but in which that issue was not raised or decided, and such cases have not been included in the list.

On the other hand, in the list of adverse cases have been included all those in which any provision of a zoning ordinance has been declared invalid or whose logic would invalidate zoning in general, even though the court expressly stated that it was not determining the validity of zoning in general or even though the court expressly upheld the validity of zoning.

In order that the list may be complete, we have included decisions of nisi prius courts and unreported cases.

Favorable Decisions of Highest and Appellate State Courts.

CALIFORNIA.

Blumenthal & Co. v. *Cryer*, 236 Pac. 216 (Cal. App. 1925). (Apartment in single-family district.)

Ex parte Quong Wo, 161 Cal. 220 (an early type of use zoning case treated by a rather strained process as a nuisance case); *Brown* v. *City of Los Angeles*, 183 Cal. 783, is similar; also *Ex parte Hadacheck*, 165 Cal. 416, affirmed under name *Hadacheck* v. *Sebastian*, 239 U. S. 394. (Laundry and brickyard in residential district.)

Fourcade v. *City and County of San Francisco*, 238 Pac. R. 934. (Supreme Court of California, 1925.) (Milk pasteurizing, bottling and distributing plant in residential district.)

Miller v. *Board of Public Works of Los Angeles* (Supreme Court of California, 1925), 234 Pac. R. 381. (Four-family apartment building in single and double-family district.)

Zahn v. *Board of Public Works of Los Angeles*, 234 Pac. R. 388 (Supreme Court of California, 1925), reversing 43 Cal. App. 663. (Store in residential district.)

ILLINOIS.

Deynzer v. *City of Evanston*, 149 N. E. R. 784, and *City of Aurora* v. *Burns*, 149 N. E. R. 790. (Supreme Court of Illinois, December, 1925.) (Apart-

ment house in single-family district and stores in residential district.)

KANSAS.

Ware v. *City of Wichita,* 113 Kan. 153, 214 Pac. R. 99. (Store in residential district.)

West v. *City of Wichita,* 118 Kan. 265, 234 Pac. 978 (1925). (Apartments in single-family districts.)

LOUISIANA.

City of New Orleans v. *Liberty Shop,* 157 La. 26, 101 So. R. 798 (1924). (Retail store in residential district.)

State, ex rel. Civello, v. *New Orleans, La.* (and other cases of the same group), 154 La. 271-295, 97 So. R. 440, 445, 446 (1923). (Stores and manufacturing plant in residential district.)

State, ex rel. Gianygrosso, v. *New Orleans,* 159 La. —, 106 So. R. 549. (Supreme Court of Louisiana, 1925.) (Filling station and soft-drink stand in residential district.)

MAINE.

Opinion of Justices, 124 Me. 502, 129 Atl. Rep. 181 (1925).

MASSACHUSETTS.

Welch v. *Swasey,* 193 Mass. 364, 214 U. S. 91. (Height regulation.)

Opinion of Justices, 234 Mass. 597.

Building Inspector of Lowell v. *Stoklosa,* 250 Mass. 52, 145 N. E. R. 262 (1924). (Store in industrial district.)

Brett v. *Building Inspr. of Brookline,* 250 Mass. 73, 145 N. E. R. 269 (1924). (Apartment house in single-family district.)

Bradley v. *Board of Zoning Adjustment of Boston* (S. C. Mass. 1926), 150 N. E. R. 892.

Spector v. *Building Inspr. of Milton* (1924), 250 Mass. 63, 145 N. E. R. 265. (Stores in residential district.)

MINNESOTA.

State, ex rel. Beery, v. *Houghton, Inspector* (Supreme Court of Minnesota, July, 1925), 204 N. W. R. 569. (Apartment in single-family district.)

NEW YORK.

Lincoln Trust Co. v. *Williams Bldg. Corp.,* 229 N. Y. 313. (Store in residential district.)

Matter of Wulfsohn v. *Burden,* 241 N. Y. 288, 150 N. E. R. 120. (November 24, 1925, affirming Supreme Court, App. Div., 1925.) (Apartment house in single-family district and set-backs.)

Cohen v. *Rosedale Realty Co.,* 199 N. Y. Supp. 4; and *People, ex rel. Rosedale Realty Co.,* v. *Kleinert,* 237 N. Y. 580, an affirmance without report of decisions of the Supreme Court and Supreme Court, Appellate Division. (Apartment house in single-family district.)

Headley v. *Fennell,* Supreme Ct. of N. Y., App. Div., 124 Misc. 886, 210 N. Y. Supp. 102. (Apartment house in single-family district.)

In re Cherry, 193 N. Y. Supp. 57, 196 N. Y. Supp. 920, 234 N. Y. 607.

Matter of McGarry v. *Walsh* (Supreme Court, Appellate Division), 210 N. Y. Supp. 286.

Palmer v. *Mann,* 198 N. Y. Supp. 548, 201 N. Y. Supp. 525. (Height regulation.)

People, ex rel. Werner, v. *Walsh,* 209 N. Y. Supp. 454, 212 App. Div. 635. (Garages in business district.)

OHIO.

Pritz v. *Messer* (Supreme Court of Ohio, May 19, 1925), 112 O. S. 628, 149 N. E. 30. (Area regulations of apartment house.)

State, ex rel. Dantzig, v. *Durant* (Ohio Court of Appeals, Vol. XXI Ohio Law Bulletin and Reporter

395, Jan. 14, 1924 number.) (Apartment in single-family district.)

OREGON.

Kroner v. *City of Portland,* 240 Pac. R. 536. (Supreme Court of Oregon, December, 1925.) (Creamery in residential district.)

RHODE ISLAND

City of Providence v. *Stephens* (Supreme Court of Rhode Island, June 11, 1926) 133 Atl. Rep. 614. (Apartment house in more restricted residential district.)

WISCONSIN.

Holzbauer v. *Ritter,* 184 Wis. 35, 198 N. W. R. 852 (1924). (Stores in residential district.)

State, ex rel. Carter, v. *Harper, Bldg. Inspector of Milwaukee* (1923), 182 Wis. 148, 196 N. W. 451. (Wholesale and retail business in residential district.)

Favorable Decisions of Inferior Courts.

ALABAMA.

Standard Oil Co. v. *Commissioners of Montgomery* (Circuit Court, Alabama, 1925). (Filling station in residential district.)

COLORADO.

Milton v. *Azpell* (District Court, Colorado, August, 1925). (Store in residential district), and *Willis* v. *Board of Adjustment of Denver* (District Court, Colorado, October, 1925). (Brickyard adjoining an existing brickyard in a residential district.)

CONNECTICUT.

City of Hartford v. *Katz* (Superior Court, Connecticut, 1925). (Filling station in residential district.)

DISTRICT OF COLUMBIA.

U. S., ex rel. Stearman, v. *Oehmann,* Supreme Court, District of Columbia, July 6, 1925. (Exclusion of stores from residential district. Zoning ordinance of Washington.)

NEW JERSEY.

Hench v. *City of East Orange,* 130 Atl. R. 363.

Schait v. *Senior,* 97 N. J. L. 390, 117 Atl. R. 517.

NEW YORK.

In re Collins (N. Y. Supreme Court, May, 1925), 211 N. Y. Supp. 437. (Laundry in residential district.)

People, ex rel. Stevens, v. *Clark,* 213 N. Y. Supp. 350. (Supreme Court, 1925.) (Apartment house area and bulk regulations.)

NORTH DAKOTA.

City of Bismarck v. *Hughes* (District Court, North Dakota, 1925). (Apartment house in single-family district.)

OHIO.

People, ex rel. Morris, v. *Osborn,* 22 Ohio N. P. (N.S.) 549, 51 Ohio Decisions 98, 197. (Apartment in single-family district.)

Santangelo v. *Cincinnati,* 25 Ohio N. P. (N.S.) 49 Ohio Law Bulletin and Reporter, Aug. 11, 1924. (Stores in residential district.)

PENNSYLVANIA.

Appeal of Armstrong. (Common Pleas Court of Allegheny County, Pa.) (Semi-nuisance industry.)

In re American Reduction Co., 72 Pittsburgh Legal Journal 321, 326. (Nuisance industry.)

TENNESSEE.

City of Memphis v. *Spencer-Sturla Co.* (Circuit Court of Shelby County, Tennessee.) (Funeral home in residential district.)

Adverse Decisions in Highest and Appellate State Courts.

CALIFORNIA.

Ex parte White (Cal. App.), 234 Pac. R. 396. (Court upheld validity of zoning, but declared particular ordinance invalid because of unreasonably restricted size of business district.)

DELAWARE.

City of Wilmington v. *Turk*, Del. Ch., 1925, 129 Atl. 512. (Exclusion of nurses' private hospital in a residence zone.)

GEORGIA.

Smith v. *City of Atlanta.* (Supreme Court of Georgia, 1926) 161 Ga. —, 132 S. E. Rep. 66. (Stores in residential district.)

Morrow v. *City of Atlanta* (Supreme Court of Georgia, May 13, 1926) 133 S. E. Rep. 345. (Tire repair shop in residential district.)

MARYLAND.

Goldman v. *Crowther*, Court of Appeals of Maryland (1925), 147 Md. 282, 128 Atl. R. 50. (Store in residential district.) (See able dissenting opinion.)

MISSOURI.

State, ex rel. Penrose Inv. Co., v. *McKelvey; City of St. Louis* v. *Evraiff*, and *State, ex rel. Better home Co.*, v. *McKelvey* (1923), 301 Mo. 1, 231, 130; 256 S. W. R. 474, 489, 495 (three cases arising from the St. Louis ordinance. Junk yard and industries in business district. Able dissenting opinion. Missouri had no zoning enabling statute and in the opinions questions of statutory power were mixed with constitutional questions.)

NEBRASKA.

State, ex rel. Westminster Church, v. *Edgecomb*, 108 Nebr. 859. (Involved one of the area restrictions only, without passing upon validity of zoning and case has not been interpreted in Nebraska as invalidating zoning.)

NEW JERSEY.

State, ex rel. Ignacunias, v. *Risley* (1923), 98 N. J. L. 712, 121 Atl. R. 783, affirmed in 125 Atl. R. 121. (Stores and apartment houses in double-family residential district.) (This is known as *Nutley* case and is the leading New Jersey case. New Jersey municipalities seem to have kept on enforcing zoning ordinances, with the result that on the authority of the *Nutley* decision a large number of adverse decisions, cited below, have been rendered by inferior New Jersey courts.)

The Court of Error and Appeals affirmed its position in

Krumgold v. *Mayor* (1925), 130 Atl. R. 635. (Stores in residential district), and

Ingersoll v. *South Orange* (1925), 130 Atl. R. 721, affirming 126 Atl. R. 213, 128 Atl. R. 393. (Apartment house in single-family district.)

Adverse Decisions in Inferior Courts.

NEW JERSEY.

Numerous decisions of Supreme Court of New Jersey in 1924 and 1925 based on above cited *Nutley* case: *Huppert* v. *Jersey City; King* v. *Bldg. Insp. of Lydnhurst; Plymouth Co.* v. *Newark; R. & B. Realty Co.* v. *Passaic; White* v. *Ridgefield; Eaton* v. *Village of South Orange; Heller* v. *Village of South Orange; Kantorowitz* v. *Bigelow; Williams* v. *Gage*, 130 Atl. R. 362, 364, 365, 366, 534, 721, 811; *Becker* v. *Dowling, Falco* v. *Kalterbach, Inspr. of Bldgs. of City of Elizabeth; Sarg* v. *Hooper; State, ex rel. Losick*, v. *Binda, Bldg. Inspr. of Township of Weehawken; State, ex rel.*

Nelson Bldg. Co., v. *Binda, Inspr. of Bldgs. of Township of Weehawken; Union County Development Co.* v. *Kaltenbach, Bldg. Inspr. of Elizabeth*, 128 Atl. Rep. 376, 394, 395, 396, 618, 619; *State, ex rel. Jersey Land Co.*, v. *Scott*, 126 Atl. R. 173; *Prince* v. *Board of Montclair*, 129 Atl. R. 123. (These decisions are concerned with exclusions respectfully of stores, filling stations, stables from residential districts and apartment houses from single-family districts.)

OHIO.

State, ex rel. Ball, v. *Harris*, Common Pleas Court of Trumbull County, 1926. (Set-back provisions in residential district.)

PENNSYLVANIA.

Appeal of White from Board of Appeals of Pittsburgh, Superior Court, Western Dist., Pennsylvania, July 9, 1925. (Invalidated set-back provisions based on set-backs of existing buildings.)

It will be noted from the above citations that the strong weight of authority, both in the highest and appellate courts and in courts of first instance, is in favor of the constitutionality of zoning; favorable decisions having been rendered by the highest courts of New York, Louisiana, California, Wisconsin, Massachusetts, Kansas, Ohio, Minnesota, Illinois, and Oregon, as against adverse decisions in Missouri, New Jersey, Maryland, Georgia and perhaps Delaware.

General discussions of the subject and citations will be found in the following articles: Constitutionality of Zoning, by Alfred Bettman, 37 Harvard Law Review 834; Constitutionality of Zoning Laws, by Newman F. Baker, 20 Illinois Law Review 213 (November, 1925); City Planning and Restrictions on Property, by J. S. Young, 9 Minnesota Law Review 593 (June, 1925).

ANALOGIES WITH OTHER TYPES OF REGULATION OF PROPERTY.

Zoning has Same Fundamental Purposes and Justification as All Other Property Regulation, Including Law of Nuisances; but Zoning is not Mere Suppression of Nuisance; it is Constructive Planning for Prevention of Developments Detrimental to Public Health, Convenience, Safety, Morals and Welfare.

Zoning is simply a modern mode or application to modern urban conditions of recognized and sanctioned methods of regulating property in the interest of the public health, convenience, safety, morals and welfare. Zoning bears distinct analogies to the recognized and sanctioned modes of such regulation. The fallacy underlying much of the argument against zoning consists in treating the methods of the exercise of legislative power as fixed once and forever, and in declaring that whatever new evils may grow up in the community, the community is impotent if it can not deal with the evil with exactly the same devices as those with which it dealt with other evils fifty or a hundred years ago. The analogous modes of regulation point the way, but can never fix the constitutional limitations; otherwise law would remain unchangeable and impotent.

What, for example, is the relationship of zoning to the law of nuisances? The term "nuisance" is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughter house or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other dis-

turbing substances or vibration into or onto his neighbor's property. The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections of the city in which the homes of the people are or may be appropriately located. The mode of regulation may be new; but the purpose and the fundamental justification are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of street traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise and dangers. Experience demonstrates that unregulated city growth tends to subject the home districts to offensive environment; and not much imagination is needed to realize that zoning can counteract this tendency.

The law concerning highway obstruction furnishes another analogy. The owner of property abutting on a street may be forbidden to place a permanent or temporary obstruction across the sidewalk. The owner of a skyscraper might be held, without going beyond the bounds of reason, to contribute more than his fair share of street obstruction, by the stream of pedestrians and vehicles which he draws to or pours out from his property. The law may and does prohibit the abutting property owner from staging an attractive entertainment in his show window, such as would tend to draw a crowd to that part of the street. The very number of persons or vehicles drawn to a section of the street by the high buildings located along it may be equally obstructive. Limitations of height or of other forms of building intensity have an obvious relationship to freedom of movement on the highway and to traffic control.

The regulation of intensity of building development, as a means of preventing excessive gathering of human beings within a designated space, is a recognized mode of constitutional exercise of the police power. Tenement house and factory regulations specify standard minima of space per capita of occupant or operative. Analogously, the zone plan measures the territory of the city available for development, estimates the number of human beings who will live and work within the territory during the period of the life of the ordinance, gathers the topographic, economic and social facts of the territory, and, applying recognized principles of health, safety, economic prosperity and convenience to these data, determines such distribution of future residential, business, industrial and public structures and such standards of bulk and height of buildings as will moderate unwholesome and inconvenient congestion during the process of the growth of the city's population, business and industry. Zoning is an application to the whole territory of the community of the same basic motives and principles as justify, in the constitutional sense, the right to regulate congestion within the space of an individual piece of property or plant. Building laws specify standards of sunlight within the workshop or apartment. Building height limitation is designed, among other results, to regulate the amount of darkness which one building may throw into adjacent buildings or those across the street.

The limits of this brief do not permit an exhaustive indication of all the analogies of zoning ordinances to sanctioned modes of property regulation. The above will serve as sufficient illustrations. Perhaps another analogy might be referred to in passing, and that is the recognized power to enforce co-operation upon members of a group similarly situated, for the direct benefit of all of the group, with indirect benefit to the general public. The classic case is that of the enforced joint guarantee of bank deposits, *Noble State Bank* v. *Haskell*, 219 U. S. 104, where the principle is expressed:

> "It would seem that there may be other cases beside the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

In the case of a zone plan, each piece of property pays, in the shape of reasonable regulation of its use, for the protection which the plan gives to all property lying within its boundaries. As stated in *State, ex rel. Carter*, v. *Harper*, 182 Wis. 148, a zoning case:

> "Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor."

These analogies have been sufficiently discussed to show that zoning represents no radically new type of property regulation, but merely a new application of sanctioned traditional methods for sanctioned traditional purposes.

Though zoning and, in truth, all property regulation has the same fundamental basis as the law against nuisances, neither zoning nor property regulation in general is restricted to or identical with nuisance regulation. Any attempt to reduce the constitutional law of property regulation down to the law of nuisances, fails to regard the principle so well expressed in *Bacon* v. *Walker*, 204 U. S. 311, where this Court said:

> "It (the police power) is not confined to the suppression of what is offensive, disorderly or unsanitary. * * * It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people."

In other words, the police power acts not only suppressively, but also constructively for the promotion of the

public welfare.[1] As stated in Freund on Police Power, Section 29:

> "The common law of nuisance deals with nearly all the more serious and flagrant violations of the interests which the police power protects, but it deals with evils only after they have come into existence, and it leaves the determination of what is evil very largely to the particular circumstance of each case. The police power endeavors to prevent evil by checking the tendency toward it and it seeks to place a margin of safety between that which is permitted and that which is sure to lead to injury or loss. This can be accomplished to some extent by establishing positive standards and limitations which must be observed, although to step beyond them would not necessarily create a nuisance at common law."

That is just what a zoning ordinance does, namely, establishes standards and limitations of building use, height, and lot occupancy for the prevention of tendencies which, if permitted to develop, will have a detrimental effect upon the public health, safety, convenience, morals and welfare. In fact, the need of zoning has arisen to a considerable degree from the inadequacy of the technical law of nuisance to cope with the problems of contemporary municipal growth. Municipal councils are bombarded daily with pressure to prevent this or that proposed development, such as a public garage or filling station or industrial plant, which the neighbors dislike, and in the past attempted to meet such situations by block ordinances which, by reason of their attempt to protect selected neighborhoods or keep out selected types of proposed uses, may contain an element of arbitrariness and injustice. Such cases and enactments, coming before the courts from time to time, have produced such an elasticity of definition as to what is or may be declared a nuisance, that the term has ceased to have any definite meaning as a measure of legislative

[1] The above passages of this brief pp. 23 to 27 have been taken almost verbatim from the article "Constitutionality of Zoning" by the author of this brief in Harvard Law Review, May, 1924.

power. The decisions upon the definition of nuisance have become utterly irreconcilable. In *Ex Parte Quong Wo*, 161 Cal. 220, dealing with the exclusion of a laundry from a residential area, the Supreme Court of California justified the exclusion upon the principle that a laundry is "of such a nature that it may be confined in the lawful exercise of the police power within definite limits of a city," which is equal to saying that a use may be excluded if it be of a kind which may be excluded. A lawyer would often hardly hazard a guess as to whether his client's proposed industry will or will not be declared a nuisance. There is something manifestly unfair in requiring the owner of an industry to select and pay for his site, design his plant and even build before he can obtain any degree of assurance that he will be permitted to operate. The zone plan, by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use, is decidedly more just, intelligent and reasonable than the system, if system it can be called, of spotty ordinances and uncertain litigations about the definition of a nuisance. Certainly the constitutional scope of the police power is not limited to the common-law of nuisances.

ZONING IS NOT FOR AESTHETIC PURPOSES.

The Charge of Aesthetic Motives Represents a Confusion Between Considerations of Taste and Beauty and Considerations of Orderliness, Cleanliness, Quiet and Healthfulness of Environment.

Appellee's attorneys constantly refer to aesthetic considerations and the promotion of beauty; seeking, apparently, to give the impression that the promotion of aesthetic values is the chief purpose of the creation of residential districts, and that this is something to be condemned or at least something which transcends constitutional powers. This Court has held, that if a measure finds its justification in considerations of health, convenience, safety, morals or

welfare, the presence of an aesthetic ingredient in the legislative purpose would not destroy the validity of the measure. See *Welch* v. *Swasey, supra; St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U. S. 269. On this phase of the issues, we might rest our argument on this principle and admit that zoning ordinances, in addition to health, safety, convenience, morals and welfare, aim to improve the appearance of cities. Any such admission, however, would, in our opinion, contain a fallacious interpretation of the meaning of "aesthetic" in constitutional law, a term which has not as yet received any definite or authoritative interpretation. Zoning does aim to improve the good order of the cities, that is the general orderliness, which is perhaps, what appellee's attorneys have in mind. That is, however, something quite different from the artistic or the beautiful. An artist might prefer the slovenly streets of Naples to the neat American suburb. The essential object of promoting what might be called orderliness in the lay-out of cities is not the satisfaction of taste or aesthetic desires, but rather the promotion of those beneficial effects upon health and morals which come from living in orderly and decent surroundings. When we put the furnace in the cellar rather than in the living room, we are not actuated so much by dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live and the house a more generally healthful place if the furnace and the gas range and the shop, if there be one, and the other industrial, so to speak, features of the house are kept out of the living room and the sleeping rooms and the dining room. Similarly, the man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct. The researches of physicians and public

health students have demonstrated the importance of our physical environment as a factor in our physical health, mental sanity and moral strength; and the records of hospitals and criminal courts amply support these conclusions. The comparative health statistics of the planned and unplanned communities, so far as same have been gathered, tend to show more favorable results in the former than in the latter. Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself. The individual can control the conditions inside of his house; but except in the case of the rarely wealthy individual who can afford to buy large open spaces owned and controlled by himself, it is the community and the community alone which can furnish the necessary environmental protection. Besides, the conditions outside the house affect the conditions within the house, as for instance the noise of industrial traffic affects the living conditions within the house, and the light and air conditions outside largely govern the light and air conditions inside. Zoning has, amongst others, this purpose of promoting public health, order, safety, convenience and morals by the promotion of favorable environmental conditions in which people live and work; which is something very different from aesthetic in the sense of pleasing to the eye or satisfying to artistic cravings.

GENERAL PRINCIPLES OF CONSTITUTIONAL LAW AND POLICE POWER.

It is hardly necessary to enter into extensive definitions of the police power or to repeat the standard quotations concerning its scope. As is well known, the police power is the whole reserve power of the community to legislate concerning persons and things in the interest of the promotion of the public health, the public morals, the public safety, the public convenience, the public order, the public prosperity and the general welfare. Police power is in truth little else than the whole legislative power except

those specific types of power which have names and definitions of their own, such as taxing power and eminent domain. Necessarily the police power is coextensive with the public needs. Like every other legislative power, it is subject to constitutional limitations. Accurately speaking, the power does not grow; for it is always complete. New public needs, new situations necessitate new methods, new legislative devices; as, for instance, American urban conditions present problems so different from the problems of early pioneer rural life, that new types of measures become necessary to solve them.

There are certain well-known fundamental principles of the application and procedure of constitutional law which need be stated in only the most general way and for which no citation of authorities is required. The acts of a legislative body are presumed to be constitutional, and he who attacks the validity has the burden of establishing his case. All doubts are resolved in favor of constitutionality, for courts do not declare laws unconstitutional unless convinced beyond all reasonable doubts. The Home Rule clause of the Ohio Constitution grants police powers to cities, so that a municipal ordinance of a charter city, limited to the territory of that city, has all the constitutional standing of a state statute and the tests of constitutionality are the same as those of a state statute. Reasonableness means the absence of arbitrariness, that is, the honest exercise of intelligence, that is, that the measure can represent the decision of an intelligent legislator, honestly aiming to promote the public health, etc. If reasonableness depends on circumstances, such circumstances are presumed to exist, and he who attacks an ordinance as unreasonable has the burden of demonstrating that the circumstances do not exist.

RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY, CONVENIENCE, MORALS AND GENERAL WELFARE DEMONSTRATED BY THE EXPERIENCE OF AMERICAN CITIES AND CONCLUSIONS OF PERSONS QUALIFIED UPON THESE SUBJECTS.

We come then to the application of these general principles of police power and constitutional law. What are the needs which zoning is designed to meet and its appropriateness or reasonableness as a means of meeting these needs? Zoning is based upon a thorough and comprehensive study of the developments of modern American cities, with full consideration of economic factors of municipal growth, as well as the social factors. Volumes have been written on the needs, the technique and methods with which these needs are met and the factors of the problem. We have space here for only a short outline, with reference to a few points as illustrations; and we respectfully ask the Court to consider them simply as a few illustrations. A full discussion or a reading of the literature on the subject would demonstrate that zoning takes into account both economic and social factors of modern urban conditions and is most intimately and substantially related to and promotive of every phase of public health, public safety, public convenience, public order, public prosperity, public morals and general welfare.

Every one admits that the home and housing conditions bear an intimate relationship to health. "Own your own home" is a slogan based on this realization of the advantages, in the way of health, which come from the home which has a surrounding or environment of sunlight, air, quiet, and cleanliness. Parents prefer to bring up children in such environment, not for any snobbish or aesthetic reasons, but because it promotes the health, mental, moral and physical, of the children.

What happens in American cities is this: American urban communities grow quickly. New business and industrial plants are established and located with great frequency. Stores or industrial plants are, with considerable frequency, placed in residential neighborhoods, not always because of any imperative economic necessity for such location, but often by reason of all sorts of whims, accidents, mistaken judgments. The neighborhood immediately declines as a residential district. Those financially able to do so move further out, thus extending the residential territory which has to be served by water, gas and other public utilities, placing an added drain upon and increasing the cost of the community's transportation, street, light and other utility service. The store or factory bring business and industrial traffic, which is larger, noisier and more dangerous than the purely residential traffic. If the store or factory be simply the vanguard of a logically located business or factory district, then the district may develop promptly as a business or industrial district. But more often the locating of the store or factory in this district was a mistake or very premature or there are conditions not conducive to its upbuilding as a business or industrial area. So it declines as a residential area and does not upbuild as a business or industrial area. Land values become demoralized; the standard of living goes down. The district becomes a blighted district representing an economic loss to the community, the premature and unnecessary destruction of a healthful home district, the beginnings of a slum or mixed slum and industrial territory; in fact, all of the less healthful instead of more healthful urban conditions are speedily produced in that area. Every growing American city has these doleful and sordid and unhealthful evidences of this unnecessary and wasteful destruction of home districts by non-residential invasions.

As recently stated by Secretary Hoover in a letter to the President of the National Conference on City Planning:

> "The fact is constantly brought before me as Secretary of Commerce that lack of city planning and zoning constantly hampers commerce and industry in their basic function of serving mankind. This is particularly true in connection with housing and general living conditions, while the waste and inefficiency in transportation, and losses through bad location of structures are a constant drag on our resources, and tend to retard increases in living standards."

Gradually all areas except those protected by private restrictions (these being generally limited to newer and high-priced subdivisions) become a heterogeneous mixture of business, industrial and residential developments. This mixture places an added drain upon the police and fire departments of the community, since it takes more resources in the way of policing and fire prevention where uses of property are mixed than where they are segregated to some degree. Crime and vice increase in the blighted districts whose general conditions are more promotive of sickness and delinquency. Fewer and fewer streets are immune from the noises and dangers of business and industrial traffic. The unhygenic, unsafe, wasteful, costly and inconvenient conditions due to slums, blighted districts, congestion, spotty development of the growing but unplanned city grow constantly more and more beyond the community's capacity to cope with them.

What is an appropriate and reasonable means for preventing the growth of these evils? Obviously it is to preserve for residential purposes territory which, by reason of land values and topographic conditions and residential utilties, is appropriate for home uses, until the time arises when, by virtue of changes in land values or modes of transportation or the pressure of business and industry, the time shall have arrived when appropriately the residential areas should be moved elsewhere. By this means

the healthful environment of the city's homes is protected, By this means, also, the building of homes is promoted; for residential land values are stabilized and those who finance residential construction have a security for their investment which causes them to be willing to finance more home construction. The working man, with his savings, and others, with their capital available for homes, are encouraged to build homes, because the healthful home environment receives the protection of the law. No person who believes in homes and healthful home surroundings can fail to believe in the stabilized residential environment.

Municipalities, however, do not exist or thrive solely for or by homes. Places of work, as well as of habitation, are necessary; also places of recreation and civic activities, and of educational and religious activities, all located so as to furnish convenient access to and from the residential areas and to and from each other. Each residential district, for instance, requires its neighborhood business center with its grocery store, drug store, branch bank, churches, schools. Therefore, in planning the districting, these local business and civic centers require to be allotted their appropriate territory, sufficiently close to the residential district to furnish convenience of access, sufficiently large to care for all the local civic and business needs of the estimated population of the neighborhood to which they are tributary, and with transportation and other utility conveniences taken into account and with economic factor of the land value given its proper force. Consequently these local business and civic areas, though segregated somewhat from the residential areas, are placed immediately adjoining to or in the center of the residential areas.

The city needs, also, its central business, civic, recreational, educational, institutions, its banks, department stores, theatres, large hotels, office buildings, central libraries, central schools and so on. In locating these districts convenience of access to residential areas and to the manu-

facturing districts, the economic factor of the land value appropriate to these central business and civic uses and numerous other factors are taken into account. The area devoted to these central business and civic purposes must be of sufficient extent to be adequate for the whole estimated population of the city in accordance with the development of the city's entire territory in accordance with the plan.

In the case of those communities which have or need industrial areas, that is, in which industry forms an appropriate part of the uses of property within the community, adequate space will be provided in the zone plan for the industrial developments. These areas need be so located as to give the necessary industrial facilities, railroads, traffic highways and others. The economic factor of the land values appropriate to industrial development is taken into account. The area devoted to industrial use is determined so as to give ample space for full industrial development of the growing community. In the industrial district industry is legalized, thus freeing it from the injunctions and other complaints of neighboring properties and stabilizing the investments in the industrial plants; all of which is promotive of prosperity. The street system can be adjusted to the districting, reducing the evils of mixed industrial and non-industrial traffic, thus promoting public convenience.

Similar considerations and factors and adjustments govern the location of railroad terminals and other utilities, parks and other recreational spaces and the other manifold activities of urban life.

Perhaps the above is sufficient to illustrate how the zone plan is one consistent whole, with parts adjusted to each other, carefully worked out on the basis of actual facts and tendencies, including actual economic factors, so as to secure development of all the territory within the city in such a way as to promote the public health, safety, convenience, order and general welfare. Zoning reaches real public needs, the needs of the modern growing American

urban community. It seeks to meet those needs by an appropriate and reasonable method. It represents the application of foresight and intelligence to the development of the community. If the plan be well made as a result of a careful survey, it is fair and just, for in exchange of the restrictions which it places on each piece of property, it places restrictions for each piece of property, that is for the benefit of each piece of property, and protects each piece of property, as well as gives to each piece of property its share of the general health, order, convenience, and security which the whole plan brings to the community. The area of the property which the individual himself owns represents the limit of protection which the individual can provide for himself, his property or his family or his business. The community alone, by means of a zone plan, can protect him and his family and his property and his business against the unwholesome, demoralizing and depreciating effects which his neighbors or other property owners may bring upon him, his property, his family or his business by the unregulated uses to which they put their properties.

In answer to the line of attack which seeks to deride the capacity of municipal councils to legislate wisely, it is sufficient to say that our constitutional system is not and can not be based upon the assumption of the stupidity or mediocrity of our legislative assemblies. On the contrary, the principle of the separation of powers requires the assumption that the legislature has sufficient intelligence to deal wisely with public needs, leaving to the courts the function of guarding against arbitrariness, insincerity, carelessness, capriciousness and discrimination. As stated by James Bradley Thayer, an outstandingly able lawyer, in his essay entitled, "The Origin and Scope of The American Doctrine of Constitutional Law," p. 23:

> "It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense and competent

knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. 'It is a postulate,' said Mr. Justice Gibson 'in the theory of our government * * * that the people are wise, virtuous and competent to manage their own affairs.' *Eakin* v. *Raub*, 12 S. & R. 355. 'It would be indecent in the extreme,' said Marshall, C. J., in *Fletcher* v. *Peck*, 6 Cr. 131, 'upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of the state.' And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may naturally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs—what such persons may reasonably think or do, what is the permissible view of them."

Zoning requires no greater foresight or skill than many other tasks with which the legislative bodies are called upon to deal in the ordinary run of their work, such as health codes, building codes, food and drug acts, utility regulation, taxation. The necessary professional, technical and expert talent and experience are available to assist. A zoning ordinance, like any other measure, is subject to amendment to meet changing situations and developments. Compared to the folly which the experience of American cities has shown to be inherent in unregulated urban development, any conscientiously made zone plan is wisdom itself.

Nor does zoning interfere with private initiative, (except, of course, in the sense that all law, including the law against homicide, affects the field of individual choice). Quite

the contrary. While full statistics have not been collected, there has been sufficient observation of the quantities of building erected in various American cities to demonstrate beyond doubt, that the zoned cities compare most favorably with unzoned cities in the quantity of building construction for homes, stores and industries. The most elementary process of a priori reasoning will disclose that the protection and stability which zoning gives to investment in buildings will increase and promote the construction of homes and stores and industrial plants. That is one of its purposes and a purpose which it is certain to accomplish. In a book published in 1923 in Cleveland entitled, "City Growth and Values," with the express endorsement of The National Association of Real Estate Boards and written by Stanley L. McMichael, formerly secretary of the Cleveland Real Estate Board and active in the real estate business, and Robert F. Bingham, contains a chapter on zoning, which contains the following passages:

> "In principle the advisability of zoning of cities can scarcely be questioned. Different classes of business and industries are segregated to districts adapted to their needs. Apartments and double houses are alloted to other territories while areas for single houses are always provided. The desirability of zoning laws in suburbs of large cities seems to be proven by the experience of many home communities where it has been tried. Retail business, manufacturing and nuisances are not allowed to creep into residential districts, destroying home values and undermining the elements of permanency and exclusiveness, which make residential districts desirable. * * * Insofar as this discussion is concerned the two questions of interest are:
>
> Does zoning help or hinder a city's growth?
>
> Does zoning increase or lower real estate values?
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> The first question may be answered by the statement that the growth of those cities in which zoning has been

effective has not been, apparently, checked in any degree. The right of a city to place certain restrictive measures upon the privileges of owners to use their property is one which public policy should, to a great extent, control. If promiscuous growth is detrimental and orderly growth desirable, and a zoning law accomplishes the latter object, then it seems that zoning, properly applied, would be beneficial rather than detrimental to any growing community. Selfishness on the part of a property owner who is determined to use his land for whatever purpose he chooses, should not prevent the accomplishment of a zoning plan, if the general interest of the community is thereby advanced. In the long run he is likely to fare quite as well under a zoning law and realize just as much from his property. * * *

With reference to the problem as to whether zoning raises or lowers real estate values, it is difficult to believe that such a law, in its general application, can do other than raise values throughout an entire community, although in specific instances it may curtail the ambitions of property owners who hold lots near or in restricted sections who wish to use their land for a widely different purpose from that of the general neighborhood. Public welfare is paramount and the wishes of a few individuals to realize more from the sale or use of their properties for uses foreign to the character of the neighborhood should not interfere with the general application of that principle.

It is significant that in cities where zoning laws have been made effective there has been great real estate activity in certain sections. Home neighborhoods which had no protection from business encroachment have taken a sudden spurt and have built up rapidly as soon as it was apparent that only residences were to be allowed therein. Likewise, as soon as certain streets were designated as business thoroughfares thus creating a limited amount of business property to be allotted to each section of the city such streets were bound to become, sooner or later, important retail arteries, restricted permanently for that use."

There is no tenable political philosophy, however much it may stress the virtues of private and warn against public action, but admits the need of public action when the nature of the problem is such that private action can not cope with it; and as we have seen, the protections which zoning afford in the modern urban community are not within the power of the individual (with few exceptions) to obtain for himself, his family, his business, his industry. Consequently, the protection afforded by the community frees his individual initiative to undertake the things that do lie within his power. The private land and building development of cities would be self-destructive, if the community did not furnish health, safety, convenience and moral facilities and regulation. The Constitution of the United States, certainly, has not incorporated into itself any such political philosophy as deprives us of the community's help in warding off or reducing those great impairments of health, convenience, safety, morals, and prosperity which both experience and the social sciences show to result inevitably from unregulated urban development.

Enough has been stated to indicate that zoning meets actual public needs growing out of modern American urban conditions, that its purpose is to promote the health, safety, convenience, order, prosperity and welfare of urban communities, that it is an intelligent, reasonable means of promoting these goods. In the course of the zoning movement, there has been gathered a large mass of testimony of qualified persons upon the relationship of zoning to the advancement of the public health, convenience, safety, morals, prosperity and welfare. Public health experts, such as health officers of various cities, academies of medicine, practicing physicians, sanitary engineers, have testified that by means of districting, conditions can be produced in both residential and non-residential districts which will promote the public health and reduce the evils of unregulated urban growth. Experts on convenience, such as heads

of traffic police departments and street traffic experts, have testified to the reduction or avoidance of congestion which will be produced by zoning. Safety experts, such as chiefs of fire and police departments, accident insurance actuaries, experts of fire prevention bureaus, have testified to the increase of public safety which will be brought about by means of traffic segregation and reduction of congestion resulting from zoning. Building association authorities, heads of mortgage companies, life insurance companies and other financial institutions, have testified to the promotion of home building that will be effected by zoning. Judges of juvenile courts and probation officers have testified to the reduction of crime and juvenile delinquency which will be afforded by the protection of residential areas and the prevention of the blighted districts. Bankers have testified to the promotion of public prosperity by the protection afforded to investments in building developments. City engineers have testified to the beneficial effects of zoning on public convenience by means of the better street and transportation systems which can be afforded in the zoned community. For years the National Housing Association has devoted a considerable percentage of its programs and energies to promoting zoning as an essential factor in the solution of the housing problem. The United States Department of Commerce, as a part of its program for improving housing conditions in this country, has created a zoning bureau, which has distributed model zoning enabling statutes similar to the Ohio law and literature promotive of zoning. Engineering colleges have established courses to train up the necessary technical and professional talent.

In addition to the numerous books by students or practitioners of city planning, many references to periodicals, city plan reports and legislative hearings could be supplied. As an appendix to this brief, we have selected a few illustrative documents, namely: Paper on "Zoning and Health," by George C. Whipple, Professor of Sanitary

Engineering of Harvard University, read at the meeting of the City Planning Division of the American Society of Civil Engineers at Detroit, Michigan, in 1924. (Appendix, page 63.) Professor Whipple was probably the leading sanitary engineer in the United States and one of our leading authorities on public health. His essay will be found interesting and convincing. It demonstrates beyond any question that zoning has a very substantial relation to the promotion of public health in urban communities. Also:

On relation of zoning to public health:

Statement of Dr. William H. Peters, Health Commissioner of Cincinnati, to City Council of Cincinnati. (Appendix, page 77.)

Statement of David I. Wolfstein, a leading neurologist of Cincinnati, to City Council of Cincinnati. (Appendix, page 79.)

Report to City Council of Cincinnati of Committee on Public Health and Social Service of the Cincinnati Academy of Medicine. (Appendix, page 82.)

Report to City Council of Cincinnati of the Public Health Federation of Cincinnati. (Appendix, page 86.)

Extracts from Statement of Dr. John Dill Robertson, Commissioner of Health of the City of Chicago. (Appendix, page 91.)

Extracts from Report of New York City Commission on Building Districts and Restrictions on Effects of Congestion. (Appendix, page 92.)

Extracts from Statements of Dr. William A. Evans, Health Commissioner of Chicago, published in "Studies on Building Height Limitations," by Chicago Real Estate Board. (Appendix, page 94.)

Extracts from Statement of Dr. M. A. Bliss, a leading neurologist of St. Louis, published in " Zone Plan," by City Planning Commission (p. 62), 1919. (Appendix, page 95.)

On relation to public morals:

Statement of Hon. C. W. Hoffman, Judge of Juvenile Court. (Appendix, page 96.)

On relation to public convenience and safety:

Extracts from Report of Committee on City Planning and Zoning of National Street and Highway Safety Conference, 1924, called by Secretary Hoover. (Appendix, page 97.)

Extracts from the Conclusions adopted by said Conference. (Appendix, page 98.)

Extracts from "Influences of Zoning on the Design of Transportation Services," by J. Rowland Bibbins, a leading engineer of Washington, D. C., before American Society of Civil Engineers. (Appendix, page 100.)

Extracts from "Some Aspects of the Automobile Industry," by Alvan Macauley, President of Packard Motor Company. (Appendix, page 101.)

Extracts from "City Planning as a Permanent Solution of the Traffic Problem," by Morris Knowles, a leading engineer of Pittsburgh. (Appendix, page 102.)

Extracts from "The City, Its Past and Its Future," by Raymond Unwin of the British Ministry of Health." (Appendix, page 104.)

Extracts from Memorandum on "Zoning in Built-Up Areas," prepared for London County Council by British Town Planning Institute. (Appendix, page 105.)

On relation to public safety:

Statement of Edmund Dwight, from New York, Manager of The Employers' Liability Insurance Corporation, on relation of zoning to safety on streets. (Appendix, page 106.)

Statement of John Kenlon, Chief of Fire Department of New York, on effects of height and bulk of buildings on fire hazards. (Appendix, page 107.)

From 1925 Fire Prevention Year Book, issued by Baltimore Underwriters and National Agent. (Appendix, page 108.)

On relation to housing, living conditions, recreation, general welfare and prosperity:

Extracts from "How Zoning Prevents Blighted Districts," by Edward M. Bassett, member of Department of Commerce Advisory Committee. (Appendix, page 112.)

Leaflet on "City Zoning is Sound Business," by John Ihlder, Civic Department, Department of U. S. Chamber of Commerce. (Appendix, page 113.)

Statement by Bleecker Marquette, Executive Secretary of Better Housing League of Cincinnati. (Appendix, page 118.)

Extract from Statement of Raymond V. Ingersoll, Park Commissioner of New York. (Appendix, page 125.)

Extract from Statement of Clarence H. Kelsey, President of The Title Guarantee and Trust Company of New York. (Appendix, page 126.)

Extracts from article of George S. Edie, Vice-President of Westchester Trust Company of Yonkers, N. Y., entitled, "What the Banker Thinks of Zoning." (Appendix, page 127.)

Leaflet entitled, "Why Zone Our Town?" by John Ihlder, Manager of the Civic Development Department of the Chamber of Commerce of the United States. (Appendix, page 130.)

Extracts from "A Zoning Primer," issued by The Advisory Committee on Zoning of the United States Department of Commerce. (Appendix, page 133.)

Passages from "Elements of Land Economics," by Richard T. Ely and Edward W. Morehouse, Director of and Instructor in The Institute for Research in Land Economics and Public Utilities in the University of Wisconsin. (Appendix, page 135.)

These documents show convincingly that the nature of modern city life is such that with zoning general health is bound to be promoted; that without zoning the traffic problem becomes incurable, and with zoning it becomes, at least, subject to some effective control; that without zoning the safety of residential districts is lessened, with zoning that safety is promoted; that without zoning the risks of the depreciation of living conditions in residential neighborhoods are such that development of healthful housing conditions is retarded, whereas with zoning that development is promoted; that zoning stabilizes

land values and protects land in all portions of the community for the best uses of the land and that it protects and increases the aggregate prosperity represented by land values. Without zoning the growth of blighted districts and slum districts is unavoidable, and these in turn bring juvenile delinquency and vice due to deteriorated environment. With zoning, residential districts are protected against deterioration until appropriately needed for the progress of business and industrial growth.

In the light of even a slight or casual analysis of modern conditions of urban development, and in the light of the expressions of opinions by qualified students of the problems of public health, convenience, safety, morals and welfare, it is utterly impossible to find any tenable ground for any claim that, in the opinion of careful, honest, reasonable and intelligent legislators, zoning has not a substantial relation to or does not promote the public health, the public safety, public convenience and welfare and morals.

EXPRESSIONS OF COURTS UPON THE RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY AND OTHER PUBLIC BENEFITS WITHIN THE SCOPE OF THE POLICE POWER

The courts which have passed upon zoning cases have plainly seen some, at least, of these phases of the relationship of zoning to the promotion of public health, safety and other public benefits which fall within the general classifications of the scope of the police power, and by way of illustration we give some quotations from the opinions of the courts which illustrate the judicial recognition of these relationships.

State, ex rel. Civello and others, v. *New Orleans,* 154 La. 271, 282, was a group of six cases, all on the New Orleans zoning ordinance, all involving the residential district regulations and arising out of the exclusions, respectively, of a grocery store, a fruit stand, an oyster counter, a filling station and an ice factory. The group, therefore, involved every type of non-residential use, both business and industrial, with varying degrees of offensiveness or inoffensiveness. The state constitution expressly permitted zoning, so that the court's discussion was concerned with the federal constitution alone. The court upheld the ordinance in every one of the cases. In the course of its opinion the court said:

> "It is not necessary, for the validity of the ordinance in question, that we should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.
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> "The attorneys for appellant have suggested considerations that might well have prompted the enactment of the ordinances in question. In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a resident neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregation need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. It is pointed out, too, that the fire hazard is greater in the neighborhood of business establishments than it is in residence districts. A better and more expensive fire department—better equipment and younger and

stronger men—are needed in the business centers, where the buildings are taller, than in the residence districts.

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. Property brings a better price in a residence neighborhood where business establishments are excluded than in a residence neighborhood where an objectionable business is apt to be established at any time.

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

State, ex rel. Carter, v. *Harper, Building Inspector of Milwaukee,* 182 Wis. 148, in which the Supreme Court of Wisconsin sustained the Milwaukee zoning ordinance, was an action in mandamus. The relator had a dairy and milk pasteurizing plant and desired to enlarge same. The proposed addition would violate the zoning ordinance and a permit was refused. The court upheld the ordinance. In the course of its opinion, p. 153, the court said:

"It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which

property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considerad a taking of the property for which compensation must be made. * * *

"Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor. * * *

"The purpose of the law is to bring about an orderly development of our cities; to establish residence districts into which business, commercial and industrial establishments shall not intrude, and to fix business districts and light industrial districts upon which heavy industrial concerns may not encroach. This is no new idea, although it has but recently taken the form of legislation. Every one who has observed the haphazard development of cities, the deterioration in the desirability of certain residential sections by the encroachment of business and industrial establishments upon and into such sections, resulting in the consequent destruction of property values and in the ultimate abandonment of such sections for residential purposes, has appreciated the desirability of regulating the growth and development of our urban communities. The home seeker shuns a section of a city devoted to industrialism and seeks a home at some distance from the business center. A common and natural instinct directs him to a section far removed from the commerce, trade and industry of the com-

munity. He does this because the home instinct craves fresh air, sunshine and well-kept lawns—home association beyond the noise of commercial marts and the dirt and smoke of industrial plants. Fresh air and sunshine adds to the happiness of the home and has a direct effect upon the well-being of the occupants. It is not uncommon to witness efforts of promoters to preserve the residential character of their additions by placing covenants in their deeds restricting the use of the property to residential purposes, and, in some instances, requiring the erection of a home according to specified standards. It can not be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way. The one compares to the other about as a well ordered department store compares to a junk-shop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.

"When we reflect that one has always been required to so use his property as not to injure his neighbors, and that restrictions against the use of property in urban communities have increased with changing social standards, and that the luxuries of one decade become the necessities of another, can it be said that an offer to preserve various sections of a city from intrusion on the part of institutions that are offensive to and out of harmony with the use to which such sections are devoted, is unreasonable? The present standards of society prompt a revolt against such unbecoming intrusions, and they constitute such a recognized interference with the rights of the residents of such sections as to justify regulation.

"The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility and good order of the city. We do not hesitate to say that the attainment of these objects affords a

legitimate field for the exercise of the police power."

Opinion of the Justices of the Supreme Court of Massachusetts, 234 Mass. 597, was an advisory opinion upon a pending zoning enabling bill. The state constitution expressly authorized such legislation, so that the constitutional question was concerned solely with the federal constitution. The court in a most illuminating opinion pointed out the reasonableness and constitutionality of zoning as an exercise of police power, saying amongst other things:

"In the light of these principles declared by the Supreme Court of the United States, illumined by instances of their specific application, we are of opinion that the proposed statute can not be pronounced on its face contrary to any of the provisions of the federal constitution or its amendments. The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire and which renders life less secure to those living in homes in close proximity. Health and securing from injury of children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by requiring that dwelling houses be separated from the territory devoted to trade and industry. The suppression and prevention of disorder, the extinguishment of fires and the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residence.

"Conversely, the actual health and safety of the community may be aided by excluding from areas devoted to residence the confusion and danger of fire, contagion and disorder, which in greater or less degree attach to the location of stores, shops and factories.

> Regular and efficient transportation of the breadwinners to and from places of labor may be expedited. Construction and repair of streets may be rendered easier and less expensive if heavy traffic is confined to specified streets by the business there carried on."

As will be noted from the list of cases given earlier in this brief, the Supreme Court of Massachusetts has now had occasion to pass upon three zoning ordinances in three litigated and contested cases and has upheld the ordinance in every case. In the case of *Building Inspector of Lowell* v. *Stoklosa*, 250 Mass. 52, involving exclusion of stores from residential zones, the court referred to its aforesaid advisory opinion, stating:

> "The reasons which now seem decisive and the supporting authorities are stated at length in the advisory opinion. It is hardly worth while to extend the bulk of our reports covering the same ground again. Without further present discussion, summarization, and amplification regarding the statement herein paraphrased, that opinion is adopted as the judgment of the court in the case at bar. It covers every constitutional phase which has been argued or which has occurred to us."

Amongst the most recent decisions is one by the Supreme Court of California rendered February 27, 1925 in *Miller* v. *Board of Public Works of Los Angeles*, 234 Pac. 381, upholding a zoning ordinance which created single-family home districts and excluded therefrom a four-family apartment building. The case is particularly pertinent in Ohio, because the authority of the California cities to enact zoning ordinances was expressly derived from the home rule provisions of the constitution of California, identical in wording with the Ohio constitutional provision, namely:

> "Any city may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Every word of the opinion is pertinent here and informative and convincing, and we are tempted to copy the opinion in full, but for the sake of brevity, we are including only the following extracts, pp. 383ff:

> "• • • In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals or general welfare of the public. That is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.
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> "So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principles upon which that right is founded. In its original and primary sense zoning is simply the division of a city into districts and the prescription and application of different regulations in each district.
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> "It is conceded, as indeed it must be, by the opponents of the ordinance in controversy here that it is within the police power, by zoning, to banish nuisances and 'near-nuisances,' from certain districts. It is disputed, however, that the police power may be extended by any zoning ordinance, comprehensive or otherwise, to the regulation and isolation of vocations, business enterprises and residential uses which are not intrinsically obnoxious. A perusal of the decisions in California, which have upheld the prohibition and segregation of certain businesses by means of zoning, indicates that the court has not limited the power to zone to nuisances *per se* and has held that certain business establishments, harmless in themselves, may become 'near-nuisances' because of the character of the neigh-

borhood in which they are operating. In *Ex parte Quong Wo, supra,* the court justified the exclusion of a certain type of laundry from a residential district upon the theory that a laundry is 'of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city.' This is tantamount to saying that whenever the recognized purposes for which the police power may be called into play are subserved either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals and general welfare. It will thus be seen that the police power as evidenced in zoning ordinances has a much wider scope than the mere suppression of the offensive uses of property (*Des Moines* v. *Manhattan Oil Co.*, 184 N. W. 823), and that it acts not only negatively but constructively and affirmatively for the promotion of the public welfare. (*Bacon* v. *Walker*, 204 U. S. 311.)

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"* * * It may be safely said, we think, that it is the consensus of opinion that the regulation of the development of a city, under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community and there is no doubt it seems to us that the adoption and enforcement of such a plan, when fairly conceived, and equably applied, is well within the scope of the police power. The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire and health protection. Comprehensive and systematic zoning aids in the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare. Decisions upon the constitutionality of comprehensive zoning are not numerous but the weight of authority upon the subject is, however, strongly in favor of the constitutionality of comprehensive zoning. * * *

"That there are reasonable minds which are of the belief that a regulation creating and establishing strictly residential districts is necessary and proper is evidenced by the passage of such ordinances in such widely varying parts of the Union as Massachusetts, Louisiana, New York, Kansas, Iowa and Wisconsin. In each of these states the problem of the validity of the establishment of a strictly residential district was before the highest court of those respective jurisdictions and in each case such ordinance was held to be within the scope of the police power.

* * *

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

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

which must come from personal participation in projects looking toward community betterment."

In *Pritz* v. *Messer*, 112 O. S. 628, 149 N. E. R. 30, 35, the Supreme Court of Ohio, in the course of its discussion, said:

"Reverting to our original consideration, we have to remind ourselves that the question is not whether the slum will certainly be eliminated by such zoning, but whether such zoning reasonably tends toward the elimination of the slum; not whether congestion of traffic and enhanced public health and improved public morals will certainly result from the enactment of such measures, but whether there is a reasonable connection between such measures and the public health, morals, and safety.

"Upon mature consideration, after two exhaustive hearings given in this case, we can not say that there is no relation between the legislation enacted and the public health, safety, and morals. It is true that the slum roots in causes deeper than the mere kind of building found therein. It is true that non-nuisance businesses might better, so far as the health of their own inhabitants is concerned, be conducted in districts where there are no apartment houses and where there is no business life. It is also true, however, that family life is promoted by the separation of families, and by their residence in districts where the open spaces, the possibility of gardening, and the freedom from the society which presses around one in a partial business and tenement district, make for health through recreation and peace of mind.

"The entrance of business blocks into a residence district tends to 'blight' the district and gradually to invite therein the hazards, both physical and moral, which exist in the sections which combine business with home life.

"We cannot say that there is no reasonable relation between the public morals and an attempt to set off for the people of a great city ample parts of the town in which they can always maintain residence districts,

unblighted by industry and by the old style of tenement. In this particular instance such tracts of this kind have been reserved as will be available for the inhabitants of Cincinnati for a hundred years to come.

"If a law regulating the air space which must be allowed in a tenement house has a reasonable relation to health, we can not say that a measure which will save considerable districts for the city in which the air space is unblocked by massed building construction has no reasonable relation to health. The mere fact that the economic factor looms largest in determining the choice of a residence does not mean that restrictions which give space and air, light, and separation to houses will not eventually shape the kind of building which is done, and benefit the public health. The laws which compelled tenement houses to install plumbing and sanitary conveniences did not do away with poverty, but they did compel builders in future building to conform to certain health standards. We can not assume that similar results will not occur from regulations such as these embodied in this zoning ordinance.

"Furthermore, we can not say that the council did not look forward to a time when by the natural functioning of the law of supply and demand the tide of population would turn in the direction where light, air space, and health can be secured as normal living conditions, and where by these restrictions and by public demand the builders would be compelled to build homes which would make for the maintenance rather than for the deterioration of the American family.

"This problem must be viewed from the standpoint of coming generations. Regarded from the limited outlook of the immediate present, it is easy to claim with some degree of cogency that there is no relation between these measures and the public health, safety, or morals. Taking a long view into the future, however, and looking back into the past, to remind ourselves what detriment the unrestricted congestion in city life, both of traffic and housing, has already done the public welfare, we do see a real relation between the substantial material welfare of the community and this effort of the city to plan its physical life."

A still more recent decision is that rendered in November, 1925 by the Court of Appeals of New York in the case of *Matter of Wulfsohn* v. *Inspector of Buildings of the City of Mt. Vernon*, 241 N. Y. 288, 150 N. E. R. 120. It was concerned with the height, setback and rear yard regulations of an apartment building in a residence A district. The court discussed chiefly the right to exclude apartment houses altogether from single-family districts, deducing from the right of such exclusion the validity of the lesser actual restrictions of the Mt. Vernon ordinance. The opinion, written by Chief Judge Hiscock, and concurred in unanimously by all the members of the court, contains the following passages:

"In support of such a regulation we think the zoning authorities could assume and the courts below could have found that the orderly and advantageous development of the city of Mount Vernon and the welfare of its citizens would be promoted by fundamental division of the city into districts devoted respectively to business and residential purposes under which its dwellers might establish homes in the latter districts where they would be free from disturbing conditions and risks and deprivation of health conditions such as light and air ordinarily incident to congested business districts; that in the residential districts of Mount Vernon municipal facilities for sewage and water were liable to be overtaxed if the erection of large apartment houses was permitted; that through the construction of apartment houses whereby there would be gathered a large number of people in the space ordinarily occupied by a single family there would result a congestion of population increasing the dangers of traffic, especially to children, and multiplying the chances that through the carelessness of some individual fire and conflagration might be started or disease communicated and epidemics set on their way; that the advantages and value of property devoted to private residences would be impaired. If we are right that such facts could be found or assumed we do not think that a court could say as matter of law that a zoning regulation excluding large apartment houses could not be justified. There would be no object in creating a residential district unless there were to be secured to those dwelling therein the advantages and that immunity from risks and danger which would ordinarily be considered as the main benefits of such residences.

"Of course, zoning regulations are an exercise of the police power, and as we approach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. It is not limited to regulations designed to promote public health, public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. *Bacon* v. *Walker*, 204 U. S. 311, 17-18. Being designed to promote public convenience or general prosperity as well as public health, public morals or public safety the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation for the purpose of determining whether it is arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. *C. B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561. The field of regulation constantly widens into new regions. The question (of regulation) in a broad and definite sense is one of degree. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. *People, ex rel. Durham Realty Corp.*, v. *Fetra*, 230 N. Y. 429; aff'd in principle—257 U. S. 665. While the validity of police regulation certainly is not to be rested simply upon popular opinion it has been said that it has been 'put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant

opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank* v. *Haskell*, 219 U. S. 104.

"Acting in accordance with these general principles courts on the whole have been consistently and sensibly progressive in adjusting the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. What was once a matter of voluntary submissions to restrictive covenants in grants has become a matter of compulsory obedience to ordinances having the force of statutes. It has come about that 40 states have passed laws authorizing zoning ordinances which in one form and another had, in January, 1925, been adopted by 320 municipalities. Commencing, generally speaking, where restrictive covenants commonly stopped with the exclusion from residential districts of factories and business buildings, they have developed until as in the present case they create residential districts in a large sense limited to private dwellings as distinguished from hotels and apartment houses. Thus far these regulations have been sustained as being conducive to public health, safety and morals. With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented its appearance from being blotched by the erection of some incongruous structure whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to approve in substance the views of the Massachusetts Supreme Court that aesthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and sufficient reasons. *Welch* v. *Swasey*, 193 Mass. 364; *Welch* v. *Swasey*, 214 U. S. 91, 108.

"In attempting to apply all of these principles to the present case we deem it unnecessary to consider the proposition that zoning authorities may establish residential districts. This court has so definitely approved that proposition that we make take its decision as a starting point in the consideration of the further questions now before us. *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313.

"Having the power as we thus assume to establish residential districts it seems to us that the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health and safety of those desiring to live in such a district and enjoy the benefits thereof as we ordinarily conceive of them. Outside of large cities where more or less congestion is inevitable, we ordinarily think of a residential district as devoted to private homes rather than to commercial buildings. Such was apparently the character of the territory here involved before the zoning regulations were adopted. The primary purpose of such a district is safe, healthful and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits. Such life goes on by night as well as by day. It includes children as well as people of mature judgment and is housed in buildings which are not ordinarily of that character most designed to resist conflagrations and where fire protection is scantier and less effective than it would be elsewhere. *Welch* v. *Swasey*, 214 U. S. 91, 107.

"It seems to us quite in accordance with the decisions and principles to which we have referred that zoning authorities should have the right in a residential district to promote these purposes and to protect the people desiring to enjoy these conditions by excluding big apartment houses like the one proposed by appellant whereby the congestion and dangers of traffic on streets where children might be, and the dangers of disease and fires would be increased, to say nothing of other things such as the destruction of the character of the district as a residential one and the impairment in value of property already devoted to private residences.

* * * * * *

"It is not an effective argument against these ordinances, if otherwise valid, that they limit the use and may depreciate the value of appellant's premises.

That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual."

CONCLUSION

According to the principles of constitutional law practice, legislation is presumed to be valid, and he who attacks the validity has the burden of proof. This is also true of municipal legislation in Ohio. But waiving aside this question of who has the burden, we believe that we have demonstrated beyond question, that by virtue of the great weight of authority of judicial decisions in zoning cases, that by virtue of the analogies of other modes of regulating property in the interest of the public health, safety, morals, convenience, order, prosperity and welfare, by virtue of even a casual analysis of the problems which need to be dealt with by legislation to reduce the evil effects of unregulated building development in urban communities in America, by virtue of the opinions of those qualified on the health, safety, convenience and welfare problems of urban communities, by virtue of the recognition by the courts of the relationship of district or zone regulation to the promotion of public health and other benefits within the police power, zoning is constitutional and falls well within the constitutional scope of the powers of Ohio cities and villages.

Respectfully submitted,

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APPENDIX

Zoning and Health

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INTRODUCTION

The word "zoning" is now commonly used to designate the governmental process of dividing municipalities into districts and imposing on private property in such districts, uniform building restrictions relating to height, bulk, and use. The New York Committee which set the pace in this matter was called by the descriptive title, "Committee on Building Districts and Restrictions," but the shorter expression seems to be preferred by the American public, even if the districts established bear little resemblance to mathematical zones.

It was natural and fitting that zoning should begin in New York, N. Y., because this largest of cities was suffering most from congestion, indiscriminate building, and the encroachment of private on public interests. The conditions were prejudiciously affecting the welfare of the community as a whole, working damage to property investments and personal injury to individuals. Zoning came to New York as a necessary act of salvation; but it is a measure the need of which has since become recognized in scores of American cities, witnessed by the two hundred and more zoning ordinances which have been passed during the last ten years. So general has zoning become that one may wonder why it is necessary at this late date to consider the fundamental reasons for it or seek to justify its constitutionality. It is not realized, perhaps, that court decisions resulting from mandamus proceedings and involving the question of constitutionality are relatively few in number and not altogether in agreement. The legal status of zoning can not yet be regarded as fixed, although each year appears to strengthen its standing. It is worth while, therefore, to

consider some of the basic ideas which underlie the restriction of buildings by districts and without which zoning laws would be unsound.

In the typical zoning ordinance, provision is made for several height districts in each of which a limit is placed on the height to which buildings, or parts thereof, may be carried on established street lines, with provision for greater heights for parts of buildings back of certain established planes. From two to five or more height-districts are commonly provided, with uniform regulation for each district, the street width being often used as the basis of the mathematical statement of height permitted. Bulk or area districts are covered by regulations which fix the percentage of the lot which may be occupied and the location and extent of open spaces in front of and around the building. Use districts differ according to the permitted or prohibited use of buildings or land, and are described by the words, "residential," "business," or "industrial." The various districts vary greatly in size and shape, and the three kinds of districts are rarely co-extensive; hence, in any zoned city, there are many combinations. As the movement progresses, there seems to be a tendency to simplify the law by making residence, business, and industrial areas the primary basis of classification, and subdividing each of these on the basis of height and bulk.

It is important that there be uniformity of regulation for each district, for without this the principle of equality before the law would be violated. It is important, also, that the zoning plan be a comprehensive one for the entire city.

Zoning is an essential part of city planning. Generally speaking, about three-fourths of the land area of a city is privately owned and subdivided into blocks and lots; the other fourth, devoted to streets, parks, etc., is owned by the municipality or dedicated to public uses. Again, speaking in generalities, municipal control of the public land is obtained through the governmental power of eminent domain, while municipal control over the use of private property is dependent on the exercise of police power. With rare exceptions, eminent domain has nothing to do with zoning; there is no question of compensation to the owner; no question of the necessity of acquiring private property for public use. The constitutionality of zoning depends on whether the restrictions proposed are justifiable under a

reasonable use of the police power, a common-law principle which, although undefined and undefinable, finds its backing in certain well recognized needs of the community. Used conservatively, the police power has to do only with injury to health, safety, or morals; used more liberally, it covers, in addition, such matters as the public order and convenience and even extends to what are called the amenities of life. With the increasing concentration of people in cities, there is good reason for the widening scope of the police power which has been witnessed during recent years.

Zoning is advantageous to a city in many ways. It tends to stabilize real estate values, to promote orderly building, to enhance beauty, and to develop local self-consciousness and civic responbility on the part of the people. Yet, in the face of these benefits, zoning is likely to be declared by the highest courts to be unconstitutional if it can not be justified under the police power; and although instances may be cited where the police power has been exercised in a constructive manner to promote the general welfare of a community, its preponderant use has been to prevent injury to health, safety, morals, and—the lawyers like to add—"the like." The purpose of this paper is to outline the scientific evidence bearing on the relation of zoning to health.

Health.—At the outset, it is important to grasp the full meaning of the word "health," to realize that it is more than the absence of disease; that it has a positive quality; and that it has to do with the mind as well as the physical body. It is useful to keep in mind the derivation of the word from the Anglo-Saxon "haelth," which implied wholeness. If one were to venture a definition, it might be said that health is "that state or quality of life in which the body is sound, the various organs function naturally and the whole organism responds adequately to its environment."

In a popular sense, public health means the general or collective health of the community. In an administrative or legal sense, it means the health of the community as influenced by factors which affect a considerable number of people in some connected way. The police power is not limited to public health used in this restricted sense, but deals with health. Attention should be called to the fact that the adjective public restricts the word health instead of amplifying it.

Although it is difficult to define normal health, it is recognized that some factors tend to injure it, or lower its state, whereas other factors tend to promote it, or raise its state above the normal. Normal health presupposes a normal environment, the two ideas being complementary and inseparable. It is the purpose of zoning as it is that of sanitation, to secure and maintain an environment in which normal human beings can lead normally healthful lives.

In an address[1] on "Sanitation—Its Relation to Health and Life," before the Sanitary Engineering Division of the Society, the writer has already pointed out that the principal injurious factors to health are infections, poisons, and accidents. The physiological factors, air, food, water, light, temperature and humidity, sleep, exercise, clothing, and shelter, and the sensatory factors, smell, taste, sound, sight, and touch, are either health-promotive or health-injurious, according to their nature. This classification, indefinite though it is, serves to steady one's idea when considering the complicated relations between health and environment.

Quantitatively, health can be measured only imperfectly and in part. Individual health may be expressed in terms of growth, height, weight, and other biometrical units. Community health on its negative side may be measured in terms of death rates and sickness rates, general and specific, for different classes, age groups, and particular diseases. No adequate methods of measuring community health, on its positive side, have yet been developed; perhaps they will come in time.

To a large extent, therefore, the subject under discussion is beyond the range of statistics; and reliance must be placed on accumulated experience and the opinions of competent authorities, rather than on logical scientific demonstration, although, in certain parts of the problem, scientific proof is available.

Indoor and Outdoor Conditions.—The relation between health and indoor life has long been recognized. Laws and ordinances covering the size and ventilation of sleeping rooms, drainage, dark hallways, cellars, windows, refuse disposal, and many other items, are common. Detailed building and plumbing codes, housing laws, tenement house laws and the like are in force in most cities. It is well

[1] *Proceedings*, Am. Soc. C. E., April, 1924, Papers and Discussions, p. 498.

recognized by the courts that insanitary indoor conditions are prejudicial to the health of the people. It is coming to be recognized that, in important ways, indor conditions are dependent on and controlled by outdoor environment. The light that enters a room through a window depends on the light that falls on the outer wall of the building, and this is affected by the position, height, and bulk of neighboring buildings. The quantity of air that enters a building is influenced, sometimes very greatly, by neighboring buildings, and the quality of the air is affected by what is going on in the neighborhood. In fact, nearly all the physiological and sensatory factors related to health may be used to illustrate the close connection between indoors and outdoors.

Placing restrictions on the height and bulk of buildings is virtually public control of the space outside the buildings. It prevents private owners from monopolizing light and air to which all people should have a common right. In some respects, time-honored conceptions in regard to property rights are faulty. It is assumed that lots of land privately owned are bounded by vertical planes which extend upward and downward without limit, unmindful of the fact that, in this latitude at least, the sun's rays fall slantingly on the earth and the winds blow horizontally. Building without limit on one's land, therefore, may interfere with a neighbor's use of his land and the enjoyment of certain bounties of Nature, thereby doing injury to his health and comfort. From this point of view, restriction on height and bulk appears to be justifiable.

Conversely, the indoor use of property may affect outdoor conditions. Buildings of great height and bulk lead to such indoor massings of people that not only are the means of ingress and egress provided with difficulty, but means of conveyance and the streets themselves become so congested that safety, health, and morals are jeopardized. Congestion may extend even to the substructures of the streets—the water mains, sewers, gas pipes, and electric light and telephone wires. Municipal governments, responsible for the streets and their use, can not adequately perform their duties in the face of excessive developments of private property abutting on the streets. The indoor use of property, whether for residential, business, or industrail purposes, controls the character of the vehicular traffic and the character of the pavements required for it; it

affects the cleanliness of the streets, as well as dust, odors, sights, and noises. The abutters and the public have common interests in the streets and public lands, which can be protected only by placing restrictions on the use of private property.

Phases of Life.—One of the primary purposes of zoning is to safeguard the conditions which affect three primary phases of life, namely, work, recreation, and sleep, each of which occupy about one-third of the adult's normal day. Adequate provision for work, sleep, and recreation (using this word in a sense broad enough to include rest and nourishment and not merely as a synonym for pleasure), is essential to health. The necessary conditions are not the same for all three, although for sleep and recreation they are not dissimlar. The keynote of work is efficiency; of sleep, quiet; of recreation, cheerfulness.

In infancy and old age, and with the sick of all ages, the conditions which favor sleep are especially important. During childhood and youth, when bodies are growing and minds are developing, the recreation phase controls. In middle age, the work phase predominates. To a large extent, the three phases of life are controlled by the sun—the day is for work, the night for sleep, and the morning and evening for recreation; but to an increasing extent, life in cities ignores the clock. Factories run continuously, night work is required in many ways, transportation never ceases. Those who work at night must sleep by day. What was once a "time" separation is fast becoming a "place" separation. To obtain normal, healthful conditions in cities, home life must be separated in place from work life, and, in order that permanency be given to this separation, a certain amount of governmental control of private property is essential. This is the basic principle which underlies building restriction by districts.

In making this place separation, it is necessary to take into account various practical considerations. Many people like to live within walking distance of their work, and the daily walk, if not too long, is one of the positive factors of health. Home life requires that the grocer, the butcher, the baker, and other neighborhood conveniences be not too far away. Certain associated businesses gain in efficiency by segregation. Some kinds of manufacturing involve processes which are noisy or which give rise to odors, bearable during work, but offensive from the standpoint of home life. Cities which have been built under the doctrine of *laissez faire,* can not be rebuilt in a day. These and similar facts have led to the establishment of zones of the most irregular shape, size, and position, zones not always topographically logical, but the best that can be established under the circumstances. The need of zoning is the best argument in favor of city planning and regional planning.

The primary object of zoning, therefore, is (1) to protect the basic phases of life against injury by providing adequate place-separation of residence, business, and industry; and (2) to prevent the private monopoly of natural light and air, necessary to health, by restricting the height and bulk of buildings in ways appropriate to their neighborhood.

With these general principles in mind, various factors involved in the problem, namely, light, air, noise, odors, congestion, and the like, will now be discussed in some detail.

Light.—The rays of the sun bring light and heat to the earth and both are necessary to man's existence. Dr. Haven Emerson, paraphrasing Michelet, has tersely epitomized human experience by saying, "You can not raise babies any more without light and air than you can raise plants." Although admittedly mysterious in its action, sunlight is of positive biological benefit and this is true even of diffused sunlight, or daylight. Its action is both physiological and psychological. It is a natural stimulant to the skin and the nervous system. It aids naturally in providing resistance to the body against diseases like tuberculosis. It has recently been learned that it plays an important part in the cure and prevention of rickets in children. It helps to cure tuberculosis of the bones. It provides illumination, the absence of which hampers activities of mind and body and induces eye-strain with its attendant damages and discomforts. It provides warmth in winter. Although science has not yet fathomed the influence of the sun's rays (and this influence may perhaps include the rays beyond those of the spectrum of light), it is a matter of accumulated experience that sunlit rooms are not only cheerful, but healthful, and that dark rooms are gloomy and unhealthful.

There are likewise many indirect benefits. Sunlight is a powerful disinfectant, rapidly destroying bacteria ex-

posed to it, whether floating in the air or resting on pavements, floors, or walls. Unequal heating of the air induces convection currents and beneficial air movements. Places not exposed to sunlight are more likely than others to contain stagnant air. Air movements have an important influence in regulating the temperature of the body. Stagnant air around the body tends to increase in humidity, thereby making a person feel warmer in summer because of lessened evaporation and cooler in winter because of greater conduction of heat by the moist air.

Sunlight tends to reduce the relative humidity of the air by increasing its temperature and its ability to hold water vapor. By removing moisture from dust particles in the air, it tends to lessen fogs. It tends to dry pools of water which otherwise might become breeding spots for mosquitoes.

Sunlight markedly influences vegetation. Trees, shrubs, and grass are natural automatic regulators of heat conditions. During the summer, trees produce desirable shade, yet, in winter, they do not obstruct the sunlight. In this respect, the shade of trees differs from the shade of buildings. Vegetation also provides a natural chemical balance. Human beings, as well as all animals, inhale oxygen and exhale carbonic acid; whereas plants in sunlight take in carbonic acid and give out oxygen. Vegetation can not thrive without sunlight and water. It is a matter of history that the increasing height of buildings and the increasing extent of impermeable area, due to buildings and pavements, drives out trees, shrubs and grass. The effect of vegetation is local. Trees and grass concentrated in parks can not take the place of vegetation on streets and individual house lots.

Daylight, which means indirect lighting from the sun, by reflection from the sky, the clouds, and various surfaces, does all these things, but to a less degree than direct sunlight. Sunlight may even be too great, as every one knows, especially during the summer and in the tropics. Daylight has an important economic value. It is not only beneficial physiologically and psychologically, but increases the productiveness of labor and reduces the necessity of artificial illumination. Artificial illumination involves expense and must be arranged with great care in order to be effective and not cause injury to the eyesight. Lighting with oil or gas tends to vitiate the air by increasing the carbonic

acid and moisture, and even by increasing the poisonous carbonic oxide.

Artificial lighting also increases fire risks. Lack of proper exterior lighting increases the window space required and this, in turn, increases the heat loss in buildings in winter.

There are abundant reasons, therefore, for stating that adequate provision for allowing daylight to enter an inhabited building is essential to human growth, health, vitality, and comfort. Whoever, by building overmuch on his own land, prevents his neighbor from receiving a reasonable amount of light on his land is doing him an injury that properly comes within the scope of the police power.

Much can be done to make the best use of sunlight by the orientation of buildings and streets. Buildings facing the cardinal points are not as well lighted throughout the year as those facing the quarter-points. Our western townships with their north, south, east, and west boundaries have tended to grow up into cities having streets in these directions. Many trivial matters often control street orientation, whereas the element of sunlight receives scant attention. The matter does not become one of real importance until high buildings are constructed, and, by that time, street lines have become fixed. Contact with civil engineering students in recent years has convinced the writer that astronomy receives too little attention in the schools. Few students, on graduation, are able to trace the sun's path in the heavens at different seasons or to draw the shadow of an isolated house, not to mention the shadows of high buildings on each other, when located on a street of given latitude, width, and direction.

Air.—The necessity of pure air need not be argued. It is a fundamental principle registered by human experience. Modern studies of ventilation emphasize the physical properties of the air—temperature, humidity, and movement—and their physiological importance. These heat relations are closely linked with the problem of sunlight, already considered.

Nothing in recent experimentation, however, controverts the need of cleanliness of the air we breathe. Dust in the air tends to irritate and clog the breathing apparatus. If the dust particles are sharp, as in the case of silica, they wound the delicate membranes so that bacterial infection is likely to follow. Statistics of tuberculosis among stone-

cutters show that this disease is prevalent in direct proportion to the percentage of silica in the stone dust. Dust may injure the eyes and clog the pores of the skin. Its damage is economic as well as physiological. The extent to which disease germs are transmitted from person to person through the air is not well known. Ordinarily, spray from the mouth or nose does not carry more than a few feet, and accompanying bacteria capable of detection by present methods do not live long in the air because of the destructive effect of drying and sunlight. The behavior of the filterable viruses in air and the longevity of the spores of bacteria, moulds, and fungi, however, are only imperfectly understood. Irritating fumes from chemical processes may be not only offensive to the senses, but also cause physiological injury. Any air which by reason of dust or bacteria, irritating fumes, or offensive odors, tends instinctively to induce shallow breathing, must be regarded as injurious to health. Just as pure air tends to promote health by naturally inducing deep breathing and stimulating the bodily functions, so exposure to vitiated air tends to break down the individual's power to resist disease, especially respiratory affections, such as colds, pneumonia, and tuberculosis. Here, the element of time is important. A fleeting bad odor may be offensive, but do little or no injury, whereas some odors, long continued, may be injurious. On the other hand, there are odors to which people become accustomed and which do no damage. Individual susceptibility plays an important part in the phenomenon of odor. The extent to which foul air affects breathing during sleep appears to be not well known from experimental studies, but judging from experience, its influence is quite as important as during waking hours.

The air which enters a building, both in quality and quantity, is influenced by the neighboring buildings and by the streets. Intakes of ventilation systems are more often located with reference to indoor distribution than to exterior conditions which affect the quality of the entering air.

Many studies have been made of the number of dust particles and bacteria in city air, both in the United States and abroad. The absolute figures need not be considered, because their order of magnitude varies according to the methods used and the sizes of the dust particles included in the counts. Relatively, the tests agree in showing that

dust in the air is greatest near the street and decreases logarithmically upward; that macadamized streets and much traveled granite pavements produce more dust than streets sheet-paved; that dust is closely associated with the cleanliness of the streets and methods of cleaning; that automobile traffic produces less dust than horse traffic, but distributes it to a greater extent; that street cars raise dust one or more stories higher than horse traffic; that less dust is found over grass land than pavements; that less dust is found in residential districts than in business or industrial districts, etc.

Smoke is another important source of dust. The use of oil-burners in place of coal-burners is changing this problem. The Mexican oils are higher in sulphur than American oils, and their use increases the sulphurous fumes in the air to a measureable extent.

Where high buildings exist, the ventilation of streets is coming to be an important problem. If buildings are high relative to the street width, there is likely to be a stagnation of air over the pavement and a concentration of dust, bacteria, foul odors, and automobile smoke, injurious to the health of persons using the streets.

The density of automobile traffic in cities is already so great that traffic officers are sometimes overcome by the poisonous fumes of carbonic oxide, and pedestrians are greatly inconvenienced by the smoke. In business districts, where heavy trucks are used and traffic is heavy, these conditions are especially bad, and are at their worst when associated with high buildings with flat roofs and overhanging cornices. If the streets have a marked grade, there is a tendency for gravity currents to produce partial ventilation with dilution of the bad air; but when they are level, gentle winds do not suffice to effect the necessary ventilation of deep, cavernous streets. Strong winds, on the other hand, produce excessive currents through cavernous streets, that are very objectionable in winter.

In the interest of air purity, therefore, zoning is justified. Residential districts, where people sleep and recreate and where children grow up, need protection against the atmospheric dirt of the business and industrial districts.

Noise.—Susceptibility to noise in general and to particular noises varies greatly among individuals. It is a difficult question to discuss. It is well-known that noises hinder sleep. Physicians say that certain persons, especially those

suffering from nervous diseases, are seriously injured by noise and vibration. Every one knows that in many ways noises interfere with the comfort and tranquility of life. Quiet is especially important at night, in residential districts, and near hospitals and schools.

Noises are greatly increased by the reflection of sound waves from the hard surfaces of pavements and building walls. Limitation of the height of buildings is, therefore, a means of noise reduction. Vegetation, on the other hand, tends to dampen sound waves—another reason for providing conditions favorable for trees and grass in residential districts.

Many kinds of noises are preventable, but others appear to be inseparable from traffic, business, and manufacturing processes. In these cases, segregation appears to be the best solution.

Congestion.—Congestion, or crowding, needs to be viewed from at least three angles as far as health is concerned, that is, room crowding, land crowding, and personal contact.

Room crowding is commonly expressed as a ratio of the number of square feet of floor area, or number of cubic feet of room volume, per person. Minimum limits are sometimes placed on one or both of these ratios for sleeping rooms, barracks, schools, factories, etc., based on the hygienic need for light, air, and ventilation—matters which have already been considered.

Land crowding, expressed as so many persons per acre, introduces two aditional elements, the number of stories and the area of the building with reference to the size of the lot and the street width. One of the most important reasons for restricting the height and bulk of buildings by districts is to prevent overcrowding of corridors, elevators, streets, and sidewalks. These have to do more with questions of safety and accident than with normal health, questions not considered in this paper.

The third phase of congestion bears directly on the spread of disease. When people are brought into such close contact that opportunity exists for breaths to intermingle, as in crowded elevators and cars, or for the nasal spray of one person to pollute the air breathed by another, there is serious danger that disease germs may spread and that colds and respiratory diseases may become epidemic. It may be true, as medical bacteriologists claim, that crowd

exposure tends to build up an acquired immunity against certain diseases so that to some extent Nature protects itself, but the fact remains that, on the whole, crowding speeds up and increases the transmission of disease. It is a menace to health, morals, and safety.

No one has yet established a logical basis of street capacity, either for pedestrians or vehicular traffic, or the relation which an adequate street capacity should bear to the size of abutting buildings. Most streets in American cities were laid out to accommodate slow-moving traffic and buildings of two, four, or six stories, or thereabouts. Increase in building height has led to serious street congestion in many places. Fragmentary data exist as to the number of square feet per person in buildings used for different purposes, the permissible capacity of elevators, the space occupied by moving pedestrians under different conditions, and the street space monopolized by vehicles of different character moving at different speeds. These data should be assembled and studied with a view to establishing, if possible, some reasonable relation between building size and street area. The writer's unsatisfactory attempt to do this (too meager to warrant publication), has convinced him that the fundamental data need first consideration.

Psychological.—Health is mental as well as physical. Mental health is intangible, but none the less real. Sunlight is beneficial largely because it is cheerful. Trees and grass and flowers are healthful for the same reason. The beauty of form, color, light, and shade conduce to mental health. Eyes are rested by a change of focus and ears by a change of sound. Monotony causes mental fatigue, and carried to the yielding point, may cause insanity. Children, especially, need opportunities for proper development and adjustment of the senses, but all workers like to get away from their work at night. A most important benefit of zoning is to provide opportunities for the changes necessary to normal mental health.

Community Health.—It is easy to object to particular applications of the zoning principle. Building restrictions of necessity must be arbitrary. Boundaries of districts must be actual lines, and in establishing lines where conditions grade almost insensibly one into another, it is difficult to avoid individual injustices. It is ofen difficult to show that zoning prevents injury to the health of certain

particular individuals. There are various matters for adjustment and administration which should be provided for, as well as may be, in zoning laws. Although zoning as a principle has abundant justification under the police power, it must not be forgotten that since Magna Charta, the individual has had protection against undue restrictions of government in what is known as "due process of law."

The relation between zoning and health is a mass relation. It is the health of the community, the collective health of many people, that is at stake. Families rightly separate working quarters from sleeping quarters; cooking and eating and sleeping in the same room is regarded as insanitary. Tenement-house laws, factory regulations, building codes, and the like, safeguard the internal uses of the buildings. The zoning law does for a city what some of these laws do for the factories, schoolhouses, and dwellings.

When cities grow without plan, their constituent districts tend to change in character. Single houses give way to apartment houses; residential districts are insidiously invaded by business and manufacturing; and old buildings are converted to uses for which they were not intended and for which they are ill adapted. Converted houses are notoriously likely to be insanitary and unhealthful. In a growing city, there is a natural tendency toward concentration for economic reasons. A person who erects an apartment house in a region where only single dwellings exist, is capitalizing for his own pocketbook, light, air, and the other residential benefits at the expense of his neighbors. A single-house region once infected with an apartment house tends to accumulate other apartments, and the neighborhood tends to change from a stable, house-owning population to a shifting, renting class, a class lacking in neighborliness and civic pride and leading an impoverished family life. Thanks to sanitation and other modern improvements, apartment-house life has been made healthful for adult existence, but the compressed and repressed life of a modern city apartment is not conducive to growth or to a life that is full and rich. Segregation of apartment houses is justified as a measure for protecting community health.

Gradually it is dawning on men's minds that cities which grow to great size do so at the expense of the health and comfort of their own citizens; that rapid growth which outruns municipal ability to make or remake necessary thoroughfares and provide needed public utilities, leads to ugly confusion, whereas a slower, well-ordered growth is more likely to lead to civic beauty and a better civilization. The United States is entering on a period of lower population increase. As pride in growth and quantity production lessens, as it must, the elements of stability and self-control and beauty need to be strengthened.

Zoning should be regarded as a sort of collective self-control, a means by which a city controls its own life and growth for the best good of all its citizens. It is an act of police power fully justified in the interest of morals, safety, and health.

Statement by Dr. William H. Peters, Health Commissioner of Cincinnati, to City Council of Cincinnati.[1]

January 11, 1924.

The manifold advantages of a well zoned city from a health point of view are attracting the attention of sanitarians all over the country today.

Much of the zoning ordinance which we are considering in Cincinnati is based upon a desire to secure for the public conditions which make for better health, comfort and safety.

The zoning ordinance is not a cure for present ills, but it does safeguard the future against a repetition all over the city, of evils which now prevail in certain sections.

Bad housing in Cincinnati is one of the factors conspiring to keep up the army of susceptibles to tuberculosis at full strength. Our records show and it is generally accepted that overcrowding in dark, poorly ventilated rooms are predisposing causes of this disease. It is proved that sunlight in the living room materially aids in providing resistance against disease like tuberculosis. Nothing at the present time will prevent the development of new slums and tenements in areas not infected. With our high tuberculosis death rate we can not ignore the provisions of the zoning ordinance which will tend to minimize the prevalence of the "white plague" in Cincinnati. No sanitary problem is solved by caring for its victims. It is solved by eliminating the conditions creating the problem. We can labor from

[1] This and other statements contained in this Appendix as made to City Council of Cincinnati were filed with that body while the zoning ordinance of that city was pending.

now until the millennium comes to better housing conditions, but not until we have a zoning ordinance which will prevent the conditions which we are trying to overcome, can we look for any great improvement.

Fresh air and sunshine are admitted to be fundamental in health regulation. Sunlight destroys disease breeding bacteria; ordinary artificial light does not. Dark rooms and artificial light make for eye strain, and lower resistance. People who are able to live and work in well lighted apartments, workshops and offices have a physical resistance which is superior to that of people who live and work in dark rooms. Equally injurious is the lack of adequate ventilation. Were it not for the continual disinfection of the earth's surface by sunlight, the morbidity of infectious diseases would undoubtedly be greater. It is with these thoughts in mind that the zoning commission would limit the height of office buildings, factories, stores and dwellings, and likewise provide open spaces about new buildings.

While clearly essential, we can not get away from the fact that slaughter houses, fertilizer plants, and other odorous and noisome trades, do produce nuisances which lower resistance and undermine health. The complaints which filter through our office force the conclusion. The classification of industrial establishments in districts apart from residence sections gives us the relief desired.

Communicable diseases, particularly the upper respiratory diseases such as common colds, influenza and pneumonia, are acquired as the result of contact within the zone of droplet infection. The same applies to measles, scarlet fever and diphtheria. That congestion and overcrowding favor the transmission of these diseases is perfectly obvious. The restrictions of the zoning ordinance relieve congestion and crowding of public conveyances, and if the plans mature, we shall find many localities in such relation to residence neighborhoods that the employees may in many instances live within walking distance from their work. The zoning ordinance also lessens crowding by placing a limitation on the number of families per acre.

And finally zoning encourages home building by the man of average means in suitable locations where the owner and his family can enjoy the sun sweet air, a little bit of lawn and flowers without any fear of encroachments which may menace his health and comfort or interfere with

the peaceful enjoyment of his possessions. Children who are brought up in single or two-family houses where there is plenty of open space about are more likely to be healthy than those who are brought up in apartment or tenement houses. And in this respect we believe that the zoning ordinance enters the health quotient of Cincinnati.

Statement by Dr. David I. Wolfstein to City Council of Cincinnati

RELATION OF UNREGULATED CITY GROWTH TO NERVOUS DISORDERS

January 24, 1924.

It is an unquestioned fact that we find more "nervousness" in the cities than exists elsewhere.

It is also a fact that there are factors present in our modern cities which are conducive to this increase in nervousness.

These factors are *excessive noise*, continuous and uncontrolled; over-crowded and congested streets; an abnormal hustle and hurry; smoke-laden atmosphere; dust and dirt.

Except in the very largest cities of say, fifty years ago, the contrast between urban and country life was not extreme, but this contrast has today reached the point where city life has become not only very unpleasant, but has imposed a terrific strain upon the nervous system—a strain which the land-dweller escapes.

The advent of the skyscraper has deprived us of sunshine and made canyons of our main arteries of travel, and has tended to bring about a tremendous herding of people and traffic congestion. Elevators shoot us with incredible swiftness to dizzy heights above and drop us just as precipitously to the ground.

Another element has been added by the automobile. It is quite evident that this introduced new problems of complexity into our modern life which call for solution. I need not emphasize the attendant noises; they are too well known; nor do more than mention these two modern inventions; the skyscraper and the automobile, are fast making city life intolerable, dangerous and most unwholesome.

Another factor unknown to former periods is the large factory in close contiguity to residential or crowded business areas, to which must be added such new industries as

garages with their noises, bustle and fumes. Of economic disturbances and inequalities I am not speaking; it is only from the standpoint of health and particularly of "nervousness" that I desire to write these few remarks.

To return to the "simple life" of our fathers is, of course, neither possible nor desirable; we are deriving many advantages from our improvements; we must, however, recognize the attendant disadvantages and attempt to find remedy for them.

The main cause in the production of nervous disorders lies, I am sure, in what we may term an increased state of "tension" in the nervous system. It may well be said that the increase in the number and intensity of stimuli which the nervous apparatus of the modern city dweller must take in day and night has given rise to a state of immediate awareness and alertness; of super-active attention which can only act to constantly maintain and increase this "state of tension." All students of the subject agree that "nervousness" is on the increase and that this increase is only attributable to the "faster pace" and "over-stimulation" of our present-day life.

The city dweller has developed, under the stress of necessity, really a "sixth sense;" the sense of greater awareness; alertness. We can see this even in our children. Although we have provided playgrounds as safety zones, many must still use our streets for their play. Watch them at play; you will see this sixth sense constantly operating to insure freedom from peril. The adult as well, treading his path through crowded thoroughfares, dodging the unending stream of autos and other fast moving vehicles, keeping his "eyes peeled" acts more like a frightened animal than a calm and assured human being. His sense of "alertness" keeps him in a constant state of tension which is surely conducive to the production of nervous disorders.

It is a matter of daily experience that one is obliged to recommend, even to those who can not well afford it, "getting out into the suburbs," in the hope that here they may lead decent, quiet and wholesome lives; in other words, to imitate the procedure of the better situated who have long since resorted to this mode of escape from the terrors of the maelstrom of city life. Unfortunately, even there, there is no assured certainty, for the planlessness and recklessness of over-rapid, under-regulated development has not spared even the outlying districts. These suffer, though

in somewhat less degree, from the same ugly and distressing factors which has turned our modern communities into veritable breeding places for "nervousness," not to speak of many other debilitating conditions to which earlier generations were not subjected.

There is, therefore, before us a very pressing problem: How shall we hope to maintain our nervous system unimpaired despite the fact that we must continue to live the urban lives which we are practically forced to live? The answer is: to remedy, as far as possible, conditions which have resulted from the planless, unthinking, haphazard growth of our cities; to prevent further undemocratic infringement of the rights of others which grew out of the absence of lawful and scientific restraint; and to make studied provision for proper control of factors which modern invention is continually imposing as further burdens to city life.

Our representatives must study and face this problem; if not, living in any modern community will become not only intolerable, but will certainly accentuate the "nervous instability" which is fast putting the stamp of "unfitness" upon this age and generation.

Strength and stability are not the products of noise, hustle and bustle and filth. These qualities, which stand for the "strong mind in the strong body," develop best where there is quiet and sanity of life.

Speaking from the standpoint of a neurologist who so frequently sees the ill-effects to which allusion has been made, the Zoning and Districting Plan meets with my full approval. It will undo in part the evil already done and prevent a far greater degree of evil which adherence to our present foolish, selfish and unscientific system encourages and fosters. Only one word more: Why is it that the element of Beauty as an unquestioned factor of value for health and sanity has received such scant recognition in our American democracy? In the oldest democracies—Greece—this was almost the essential factor. It is fully recognized in a modern democracy—Switzerland; only here in America, there appears to have existed the idea that Beauty, Form, Design, and Aestheticism in general are luxuries; something for the rich; not for the poor. The reverse is true; a well-planned city which has due regard for property rights; for parks and breathing spaces; for art and architecture and music and play, affords to the so-called "common people" the surest safeguard against the incidence of ill health and discontent; conditions which the better situated have always recognized and endeavored to secure.

Report to City Council of Cincinnati of the Committee on Public Health and Social Service of the Cincinnati Academy of Medicine

This committee, in its consideration of the Zoning Ordinance, limits its opinion to the effects of zoning on the health of the people of this community.

This committee holds itself as incompetent to pass upon the merits of divers technical problems involved, such as heights of buildings in relation to thoroughfare width, exact boundaries of zones, etc.

The committee records its definite advocacy of a zoning system for Cincinnati, and subject to such modification as may appear practical and helpful after public hearings, urges early and favorable action on this proposed ordinance by Council.

To the minds of physicians and other persons engaged in health conservation, the conditions attending urban conduct of business, transportation, amusement, housing, etc, afford widespread health hazards that may be mitigated by a proper system of city zoning. In support of this contention, this committee submits certain data based, in part upon the experience and opinion of the committee's personnel, and in part drawn from published reports of other investigators in this field.

Congestion as a Factor in Community Health

This committee advocates the adoption of the zoning system for Cincinnati, because any proper zoning system will include provisions to avoid overcrowding of people. More and more medical experience is leading to the belief that human beings themselves are the chief sources and the disseminators of human diseases, particularly respiratory diseases, such as influenza, pneumonia, bronchitis, common colds, measles, scarlet fever, etc. Not only are the particular germs responsible for these diseases, so distributed, but physical conditions surrounding overcrowding become such as to favor widespread occurrence of these

diseases. From the hospital experience of physicians, it is accepted as a well established principle, that too few cubic feet of space per patient may lead to a variety of disease complications rarely encountered where the cubic foot allowance is adequate. In Cincinnati the congestion on street cars, in elevators, in certain types of stores, in certain types of restaurants, is to be regarded as a prime factor in disease dissemination.

These unfavorable effects of human congestion are not limited to business sections as contemplated above, but are encountered in the living quarters of unplanned cities. This committee accepts adequate housing as the very foundation of human progress. One of the ills of improper housing is the overcrowding always found. Sane, constructive plans, providing for the avoidance of congestion in our business districts and in living districts will go far in the betterment of Cincinnati's public health.

Sunlight and Health

Nature has provided effective means for the continual disinfection of the earth's surface. Sunlight has associated with it certain chemical rays capable of quick killing off those agents responsible for many diseases. Were it not for this continuous disinfecting action of the ultra violet rays, in the sunlight, we might expect an almost uncontrollable growth of bacteria molds, accompanied by unbearable stenches and other offensive results. This helpful action of sunlight is directly efficacious in ridding man of some of his diseases and in preventing the inception of an even larger number. Rickets, a disease common to children, is both prevented and cured by sunlight, providing feeding conditions are anywhere near adequate. Sunlight is probably the greatest single factor in the control of tuberculosis.

Modern urban life, particularly in the unplanned city, tends to the elimination of a proper supply of sunlight, so necessary in the conservation of the health of our people. Tall buildings, inadequate spacing, rooms without proper outside exposures, are all detrimental in this respect. This committee, strong in its advocacy of the beneficial effects of the sunlight, accepts zoning as calculated to protect the people against an unwarranted blocking off of sunlight.

Zoning and Tuberculosis

For many years Cincinnati was regarded as near the top on the list of tuberculosis occurrence and tuberculosis deaths. Only those cities, regarded as sanitaria cities for tuberculosis treatment or residents, had records worse than Cincinnati. At the present time, we are advised by the Health Commissioner, Cincinnati stands fifth, of the large American cities, in tuberculosis occurrence.

The very conditions responsible for a high tuberculosis rate are those conditions that would be prevented by zoning. Tuberculosis is a disease that may be expected to rise under conditions of poor housing, overcrowding, elimination of sunlight, and bad air conditions. The rate of tuberculosis occurrence may fairly well be predicted by examining, not the person, but the conditions under which they live and work. Among office workers, employed in tall or relatively tall buildings, disease rates are higher than obtain among the general population of corresponding ages.

Failure to control here in Cincinnati, during past years, tuberculosis producing conditions, has paved the way for economic losses to the entire city. It has become necessary to maintain expensive hospitals for the care of such efflicted individuals. Even though conditions are clearly ameliorated, tribute must be paid for at least the period of one additional generation for tuberculosis already in progress among our people.

Automobile Traffic and Zoning

Uncontrolled crowding of our business population into small areas of the city will inevitably lead to a near saturation of street space with motor vehicles. The exhausts from such engines, when moving at a fair rate of speed, contain approximately 6 per cent. of carbon monoxide gas. Such exhausts when engines are idling, under conditions of car stoppage, at street intersections, contain carbon monoxide gas in proportions as high as 15 per cent. Inasmuch as a large portion of the air of a tall building enters at low levels, there is every reason to believe that these gases may be distributed to a larger portion of persons in these buildings. This gas, even in low concentration, is definitely harmful, particularly if exposure continues over a considerable period of time. This is a new health hazard and is largely limited to a highly congested urban

life. It may readily be controlled by the avoidance of automobile congestion to that point that the carbon monoxide concentration is below harmful percentages. The same hazard obtains in less congested districts where gasoline motors are repaired and tested in large numbers, in garages and on streets. The residences above and adjacent to garages are probably frequently exposed to this hazard. It is the belief of this committee that proper zoning may obviate this hazard.

Noises, Vibration, Monotony—Common to Urban Life—in Relation to Health

The strain to which the human machine is daily subjected, under conditions of modern living and working, is said to be easily eight times as great as was true 30 or 40 years ago. While no such precise figure is accepted by this committee, it is a plausible belief that the wear and tear on the various systems of our bodies under conditions of modern urban life are conducive to the development of a great variety of neuroses, fatigue conditions, strains, particularly on eyes and ears, that in the aggregate can not fail to become liabilities in the health audit of our people. Noises lasting well into the night, intense lighting, odors from industrial processes, provide undue strain on human beings. Large numbers of persons are engaged in night occupations, necessitating daytime sleeping. It is highly desirable that certain portions of our cities be set apart wherein these strains of modern life may be relatively eliminated.

Air Conditioning and Public Health

From the fact that air is so abundant and obtained so freely it would appear that little opportunity exists for any argument for air conservation in community life. To the contrary, man-made conditions so affect the air we breathe, that it may become of tremendous importance in our lives. Although modern sanitation attaches no great significance to the percentage of carbon dioxide in the air as a health factor, and has proven that there are few grounds for a belief in specific poisons in exhaled air, such sanitary work has established more firmly than ever that frequent changes of air, proper air temperature, air motion, air free from harmful dusts are essential in the maintenance of health.

The relative humidity of air frequently encountered dur-

approaches the aridity of desert countries. Such air inevitably leads to the drying out of our mucous membranes and paves the way for divers infections.

Crowded places of amusement, street cars, elevators, school rooms, favor the vitiation of air. Heat strokes (not sun strokes) occur within buildings as a result of improper air conditions. Even in streets, particularly in neighborhoods of tall buildings, normal air currents are so affected as to bring about problems in health among exposed persons in these buildings. All such problems must be linked up with types of buildings, crowding together of buildings, heating methods necessary for certain types of buildings, congestion within buildings.

This committee maintains that these mentioned and other similar problems are amenable to practical solution and control and when controlled will yield results economically and humanely sound. In the belief that Cincinnati in future generations will be confronted with a much larger number of citizens, this commitee urges that at this time such city plans, including zoning, be instituted in order that, so far as possible, the health and other interests of these future citizens may be conserved.

Report to City Council of Cincinnati of the Public Health Federation of Cincinnati

One-third of Cincinnati's population lives in one-nineteenth of the city's area. Thirty thousand of our families live in 6,587 tenement houses— a greater percentage of tenement dwellers than in any other city of our size.

Many of our tenements have dark rooms, dark halls, inadequate open spaces, small yards, little play space for children. Practically none promote health, comfort and good standards of citizenship.

So far as existing tenement conditions are concerned, the situation is practically hopeless. Nothing that we can do will make them desirable homes. Our opportunity lies in the future.

The Public Health Federation strongly urges the enactment of a zoning ordinance for Cincinnati because it is the only method we know of that will absolutely prevent in the future the development of a slum congestion, and that will guarantee for all homes hereafter erected at least a minimum of light, ventilation and play space.

Cincinnati has an abnormally high death rate from tuberculosis. An exhaustive study of tuberculosis made here in 1916 by the U. S. Public Health Service showed that "the distribution of tuberculosis bears a direct relation to that of tenements, being twice as great among tenement dwellers as among these living in separate houses." (U. S. P. H. Bulletin No. 73.)

"Tuberculosis propagated by bad air, foul air and lack of sunlight, causes annually a loss of 200,000 citizens to the United States. This disease could be largely prevented if we lived and worked in pure air, in air relatively free from mineral and vegetable dust, and, last but not least, if we were to construct the buildings in which we live and labor to allow sunlight to enter more freely." (Statement made by Dr. S. Adolphus Knopf, Professor of Medicine, Post-Graduate Hospital, New York City. Report of New York Commission on Building Districts, 1916, page 142.)

"Sunlight in living and sleeping rooms materially aids in providing resistance against disease. The sun has a destructive effect upon disease breeding bacteria. Direct daylight has a powerful influence in destroying pathagenic bacteria. People living in well lighted apartments have a physical resistance superior to that of people who live in dark rooms. That has been proved under controlled experimental conditions in laboratory tests and is a matter of common observation among human beings."

"The portions of a city which have the small family house development show a lower death rate than prevails elsewhere in the city under equal economic conditions. Children brought up in single or two-family houses where there is plenty of land about, are more likely to be healthy than those brought up in an apartment or a tenement house."

(Statement by Dr. Haven Emerson, former Health Commissioner of New York City, one of the leading public health authorities in the United States—Reports of New York Commission on Building Districts and Restrictions, page 105-09.)

In the English garden villages where there is a limitation on the number of families to the acre and where all families live in single family homes with adequate open spaces, the death rate in 1912 varied from 4 to 6 per 1,000. In the cities of England the death rate ranged from 10 to 18 per 1,000.

Direct sunlight is now being used to cure one of the most difficult diseases that medicine has had to combat, namely, tuberculosis of the bone and the joints. Hospitals have been developed in Europe and in several places in the United States devoted entirely to heliotherapy, or sun treatment for these forms of tuberculosis. Authorities of our own Medical College are now working on plans for the more extensive use of sun treatment at the General Hospital.

Sunlight has a recognized place in the cure as well as in the prevention of rickets in children. If sunlight has such remarkable curative powers with serious diseases such as these, its vital importance in keeping people well requires no proof.

Greater congestion in the suburbs of Cincinnati is possible under our present laws than any that exists in our overcrowded basin districts. Any one may build here today the same type of tenement houses that have produced the abominable congestion that exists in New York City. There block after block is being built up with huge tenement barracks, housing as many as 1,600 people to the acre. Such congestion can be duplicated in any suburb in Cincinnati.

Sickness, delinquency, crime, dependency, bad citizenship are all fostered by crowding people together in unsanitary and unwholesome houses.

1. Zoning will do more to make the future Cincinnati a city of healthful homes than any other measure proposed for many years.
2. Zoning will prevent future congestion by limiting the number of families to the acre.
3. It will guarantee a minimum of sunlight and ventilation for all houses and places of work.
4. It will encourage the one and two-family home.
5. It will prevent the city from being over-developed with huge flat buildings such as are now blighting many of the large cities in this country.

Only second in importance to the effect of zoning on the homes in Cincinnati will be its effect on the places in which people work.

Zoning requires at least a minimum of light and ventilation for factories and for office buildings. Our working population should be protected from having to work in

dark, ill ventilated factories and offices. Statistics show that in New York the garment workers who work in congested buildings are afflicted more with tuberculosis than any other class of workers. Modern plants constructed by progressive manufacturers show that they recognize the direct relation of light and ventilation to the health and efficiency of employees.

The Zoning Ordinance proposes to limit the height of office buildings in the congested business district of Cincinnati.

Today, twenty-four American cities have limitations on the height of buildings, including practically all the larger cities: New York, Chicago, St. Louis, Boston, Baltimore, Cleveland, Buffalo, Indianapolis, Los Angeles, Milwaukee, New Orleans, Providence, Salt Lake City, Seattle, Minneapolis.

Two exhaustive studies as to the necessity for limiting the height of buildings have been published—one in New York City in 1913, and the other in Chicago in 1923. Both investigations resulted in recommendations that the height of buildings be limited in the interest of public health, public welfare and public safety.

The Chicago report made by the Real Estate Board recommends that the height of buildings should bear some relation to the width of the street. "If consideration of public welfare was the only thing to consider, it would demand the reduction in the height of buildings far below the recommended limitation." "No injustice is done to property owners from the economic point of view," says the Chicago report, because "the net revenue obtained from a building twenty stories high over a building fifteen stories high is less than one-fourth of 1 per cent. and above a twenty-story building there is a diminution on the return on the investment." In the entire business district of Chicago there are only forty buildings over seventeen stories in height.

Unreasonably high buildings cut off the light and ventilation from each other. The lower offices get practically no direct sunlight and a minimum of daylight, so that most of the office workers in the lower stories are compelled to work by artificial light. The higher the buildings are on a given street the less the sunlight received in the lower stories of these buildings. In a street built up uniformly with buildings two and one-half times the width of the

street a study made in Newark, New Jersey, showed that in mid-winter the ground floors receive absolutely no sunlight.

More than 85 per cent. of the office workers in the congested business district of New York have to work by artificial light. A study of the health of these workers made by the New York Health Department in 1916 showed more illness and a larger number of cases of tuberculosis than for the city as a whole.

What the height limitation on buildings in the downtown business district of Cincinnati should be is debatable. But that there should be some reasonable limitation in the interest of public health, public safety and public convenience is, we believe, beyond dispute.

To permit buildings of an unlimited height means constantly increasing street congestion, added difficulties in fire fighting, more baffling traffic problems, increase in street accidents, great danger to life in case of panic in high buildings. We believe that all these considerations indicate the lack of wisdom in waiting to act until the high building problem has become in Cincinnati the grave menace it is in many other large cities.

Protecting Residence Districts

Zoning further promotes the health and welfare of our citizens by protecting residence districts from being invaded and injured by objectionable businesses and industries.

Men and women are better able to withstand the strain of present-day life when they may enjoy rest and quiet in their home life. Anything that interferes with this is detrimental to health.

Business and industry inevitably disturb residence districts by producing noise, smoke, dust, odors, vibrations, increased traffic, incident to practically every business or industrial establishment.

Approximately one-fifth of the total population of a large city consists of children under five years of age. The necessity of preserving the quiet of residence districts so that these children can obtain a reasonable amount of sleep during the day time is of the greatest importance, as it is also to night workers.

Dust, smoke, noise, odors, do not directly cause disease, but they do have the effect of decreasing the vitality and breaking down physical resistance. Health is not merely the absence of disease. Health is something positive, it involves physical resistance and vitality, it is mental as well as physical.

From a Report on Zoning in the City of Chicago (Reprint Series No. 25, 1923), John Dill Robertson, M.D., Commissioner of Health (1919-1921), Charles B. Ball, C. E., Chief, Bureau of Sanitation

The Interest of Health Departments in Zoning

The methods of zoning, which have already been adopted in some American cities and are being formulated for numerous other cities, sustain such a vital relation to the health and social welfare of the people that no health administrator can afford to neglect any opportunity to observe the beneficient effects which such methods are producing or to refrain from exercising his influence to secure for his own community the speedy adoption of a complete and comprehensive districting plan.

The health advantages which result from zoning are:

"1. The gradual separation of districts in which the most notable industrial nuisances, such as smoke, odors, noise, dust, soot and vibration prevail, from the districts used for residential purposes.

2. The prevention of store intrusions which bring with them into residential districts nuisances similar to those named above, but less annoying in degree.

3. The arrangement of districts in which industries that do not produce nuisances may be located within walking distance of the homes of those employed in them, thus decreasing congestion of transportation facilities and the transmission of disease due to overcrowding in conveyances.

4. The increase of open spaces surrounding buildings, especially dwellings, so that a greater degree of sunlight and air circulations around and in buildings will be available, and the stimulating influence of green grass and trees may be afforded.

In arguing for the desirability of a zoning ordinance, Hon. G. A. Jordan, Assistant Health Commissioner, St. Louis, writes as follows:

"The observing person must be impressed, in contemplating the arrangement of the average city, with the very distinct advantage of some supervisory control which would prevent the haphazard go-as-you-please conditions that continually meet the eye. Canyons formed by skyscrapers on either side of whole city blocks, resulting in darkened streets, never, or for most brief periods, bathed by sunlight, the interior rooms of such buildings darkened and dependent upon artificial light and lacking proper ventilation; in other blocks one or two very tall buildings adjacent to buildings of two or three stories; boulevards whose beauty is destroyed by shops, factories and offensive industries; residential districts invaded by industries that impair property values; irregular arrangements of streets, congestion of living and transportation, all cry out for some supervising power that will prevent chaos and restore order, or at least prevent further chaos. Aside from the offense to the eye, which is the first impression, it is vital that regulations be established to conserve and protect community health, for no one thing is as valuable to a community as the health of those who compose it."

Extract from Report of Commission on Building Districts and Restrictions of New York City, 1916

From the point of view of public advantage the distribution of population is very important. Most of the evils of city life come from congestion of population. In precisely the measure that the city's population can be distributed will those evils be mitigated. As the number of families housed per 50 feet lot increases:

(1) The provision of light and air, so essential to health, vitality and comfort decreases.

(2) The opportunities for personal contact and thus for the spread of communicable disease increase.

(3) Noise and confusion incident to increased street traffic increases.

(4) Each family suffers more and more from the noises from neighboring families.

(5) Privacy is diminished.

(6) The children have less and less opportunity for outdoor play.

(7) The danger from fire, both to life and property, is increased.

(8) The transit lines become more and more congested during the rush hours.

It is therefore essential in the interest of the public health, safety, comfort, convenience and general welfare that a housing plan be adopted that will tend to distribute the population and secure to each section as much light, air and relief from congestion as is consistent with the housing of the entire population for a considerable period of years within the areas accessible and appropriate for housing purposes.

In order to provide the people of the city with the kinds of homes that they desire, are willing to pay for and that will bring the maximum advantage from the point of view of public health and safety, it is absolutely necessary to district the city in such a way as to encourage and conserve particular types of building in particular sections.

Many men and women would be unable to stand the strain of city life were it not possible for them to live in the more quiet, less densely populated sections. A detached house with yard and garden has kept some from breaking down under the nervous strain and has contributed to the efficiency and vitality of many others.

It is important from the standpoint of citizenship as well as from that of health, safety and comfort, that sections be set aside where a man can own his home and have a little open space about it. It makes a man take a keener interest in his neighborhood and city. It has undoubted advantage in the rearing of future citizens. The setting aside of sections for this detached dwelling type is necessary in order to retain within the city many citizens who would otherwise move to the suburbs. The retention of the citizenship of a greater proportion of this class of its business men is of great importance, not only as regards the city's taxable values, but also as regards civic interest and civic leadership.

Extracts from Statements of Dr. William A. Evans, Health Commissioner of Chicago, Published in "Studies on Building Height Limitations," by Chicago Real Estate Board

I will talk particularly to the subject of the need of sunlight in relation to colds, coughs, influenza, bronchitis and pneumonia.

First, I want to bring to your attention a series of charts showing the trend of health in Chicago during the last fifty years.

When we come to analyze this chart more closely we discover a remarkable fact:

First, that the improvement in health in the fifty years has been due to improvement in summer health; winter health is about as bad as it was fifty years ago.

Analyzing further, we find that there has been great improvement in the health as regards typhoid fever, diarrhea in children and death of babies under one year of age—types of causes largely responsible for the old time high summer mortality. On the other hand, a study of bronchitis, influenza and pneumonia shows that those diseases are far worse than they were in the 1870 decade.

This study proves two truths—First, we have controlled every disease against which we have seriously contended.

Second, in a half century in which we have almost wiped out typhoid, pneumonia and its closely related maladies have become materially worse.

In all the list of germ-caused diseases, the only group that is not coming under control—in fact, is not practically under control—is the pneumonia groups, the acute respiratory infections.

We know about what to do—in fact, we have more scientific information than we had as to typhoid fever when we decided to act in a large way against that disease.

Are we willing to approach the question of the height of buildings from that point of view?

There are several kinds of efforts that must be made to meet the problem of the acute respiratory diseases:

To enumerate:

"A—Effecorts against the disease directly—such as reporting, hospitalizing, intermediate and terminal disinfection, laboratory diagnosis, vaccines, curative sera, epidemicologic, procedures.

B—Efforts to improve vitally winter sports—vacations, better habits and customs.

C—Efforts to improve the environment—ventilation, smoke-prevention, street-cleaning, prevention of spitting, sunlight and air streets, zoning limitations of height of buildings.

The limitation of the height of buildings relates itself to problems of the acute respiratory diseases by reason of the decrease of sunlight, diffused light and air circulation on the pavements and the atmosphere between the buildings, and by reason of the interference with light and air inside them, and also by reason of the congestion on the street cars during the peak hours.

The surface of the pavement and the lower stretches of the atmosphere are being constantly polluted. Sunlight and drying are needed to sterilize it. If it is not so sterilized, we suffer infections, principally of the respiratory tract. The sun is less efficacious in the sterilizing process in the winter, because of the short effectve day (7 hours of effective disinfection as against 13 for summer) the more pollution of smoke, dust."

Extract from Statement of Dr. M. A. Bliss, of St. Louis, Published in "Zone Plan of St. Louis," by the Planning Commission

Districting or zoning presents to a specialist on nervous and mental disease many very attractive possibilities. Nervous disease is largely a product of cities; it does not flourish in the wide, sunlit, quiet country. As a matter of common observation, nervousness produced by conditions in large centers disappears if the sufferer is removed to the country. Why? Any one will reply: Fresh air, sunshine, quiet sleep, freedom from noise, dust and smoke.

By taking thought we now provide ourselves in cities with as good water and food as are to be had in the country. We attempt by ordinance to limit smoke and dust. Where we have failed to provide the condition necessary for sunshine, free air, quiet places to live and sleep are largely in the indiscriminate jumble of factory, store and residence and in attempting to crowd into a space adequate for ten people ten times as many.

If we make a clear separation of business and factory from the places where we live and where our children play; if we get away from twelve to sixteen hours from the rattle of machinery, the grinding of cars, the pounding of hoofs, the slamming of boxes on and off trucks, then nature has time and opportunity to restore the fatigued nerve cells and we issue from our homes in the morning fresh for another turn on the front line.

Within the recollection of the middle-aged the systems of rapid transportation have scattered the people of cities over large areas but no consistent plan has been adopted in our large cities to secure a separation of living from working areas. The man who establishes his home on a modest street, expecting to live in quiet and free from nuisances where his children may play in floods of sunshine and open air and in safety from the hurried traffic of business, is entitled to protection from the encroachment of livery stables, garages, factories and stores. The nervous stability of the worker and his family will certainly be enhanced by such protection. Work will be better done, and more of it. Children will grow up in better health and less inclined to nervous instability which so often finds its expression in the feverish pursuit of excitement."

PUBLIC MORALS AND GENERAL WELFARE

From Statement to City Council of Cincinnati of Hon. Charles W. Hoffman, Judge of Court of Domestic Relations, Hamilton County, Ohio

To no one institution is the proposed zoning ordinance more significant than that of the Juvenile Court, which deals almost exclusively with dependency and delinquency as manifested in children.

Comparatively recent research has disclosed that many of the causes of delinquency which we thought were congenital or hereditary are in fact the effect of unwholesome environmental conditions. The factors that distort a child's personality and finally lead him into a career of delinquency and crime may be found, it is true, in the homes of the well-to-do and in the wide open spaces, but the records of practically every court in this country dealing with childhood, reveal that the great majority of delinquent children come from the congested districts, where

families are crowded in houses with dull and forbidden exteriors, with no yards and little, if any, play spaces. Children invariably respond to the nature of their immediate physical environment. If conditions are repulsive and forbidden, the child's life will develop likewise. If conditions are wholesome, the child's chances for happiness and a useful career are tremendously increased.

We have prepared a chart indicating the wards of the city from which the delinquent children come into the Juvenile Court. It will be observed that delinquency prevails to a greater extent in those districts in which social and housing conditions are below the minimum requirements for normal child life.

PUBLIC CONVENIENCE AND SAFETY

From Report Made to the National Conference on Street and Highway Safety, Called by Secretary of Commerce, Herbert C. Hoover, and Held at Washington, D. C., December, 1924, by Committee on City Planning and Zoning Appointed for the Purpose by Secretary Hoover

Experience with the constantly growing volume of vehicular traffic makes clear that if we are to decrease the hazard to life and property or provide for the traffic needs of the future we must plan our street and highway systems and must design the individual thoroughfares with these ends in view.

The Committee therefore submits the following recommendations:

Summary of Recommendations

1. Street and highway hazards are due chiefly to vehicular traffic. These hazards can be greatly reduced by a *proper arrangement of streets and highways.* Consequently each community must necessarily study and carefully consider its own special problems with particular emphasis upon (the report enumerates the several causes of street congestion and danger, among which is):

5. *Relation Between Street Facilities and Development of Private Property—Zoning.*—Each community should, in determining the character, width and arrangement of its

streets, at the same time determine, through zoning, the character, use and bulk of abutting buildings.

Each community or group of communities in planning the main arterial highway system should take account of the effect of zoning regulations in regulating and stabilizing traffic flow.

(The report then proceeds to discuss each of the topics, the fifth being):

Relation Between Street Facilities and Development of Private Property—Zoning

It is obviously impossible to plan for adequate street facilities if there is no way of determining the demand which will be made upon those facilities. To widen streets in a congested area or even to increase the number of those streets is patently futile if the widening or increase is followed by an unforeseen increased intensive use of abutting property demanding still further increase of street facilities. It is equally impossible to plan for adequate outlets or arterial thoroughfares from a traffic-originating center if there is no way of estimating with a fair degree of accuracy the volume of traffic which may be expected to flow from and to this center.

As the volume of traffic upon a given street (excepting through or arterial highways) depends chiefly upon the use made of abutting property, there is an ascertainable relation between the character, use and bulk of abutting buildings and the needed traffic capacity of the street.

From the Report Adopted by the National Conference on Street and Highway Safety, 1924

The growing toll of street and highway accidents has become a great national problem, reaching in 1923 a total of 22,600 deaths, 678,000 serious personal injuries and $600,000,000 economic loss; an increase of 80 per cent. in the past seven years. About 85 per cent. of these accidents were incident to automobile traffic.

This is a national loss of so appalling a character as to warrant the most complete consideration and effort at drastic remedy. Such treatment is also essential in order that the full public benefit from this new system of transportation shall not be jeopardized because of accidents and congestion.

The Conference on Street and Highway Safety, including police officials, highway and motor vehicle commissioners, insurance companies, railroad and street railway companies, safety councils, chambers of commerce, labor unions, women's clubs, automobile associations, automobile manufacturers and various other national groups, was called by the Secretary of Commerce for the purpose of determining the essential facts and promoting better organization and co-ordination of activities in the reduction of accidents.

During the past six months eight representative committees have been engaged in the investigation of the facts of current practice and the most successful methods of reducing accidents. Their investigations cover (I) Statistics; (II) Traffic Control; (III) Construction and Engineering; (IV) City Planning and Zoning; (V) Insurance; (VI) Education; (VII) the Motor Vehicle; and (VIII) Public Relations. The reports of these committees, after widespread distribution and public comment, have been given detailed consideration by this Conference. They contain recommendations on which essential agreement has been reached and which, if carried out, even in part, will effect an immediate reduction in the accident toll.

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The Conference recognizes the need for fundamental preventive measures involved in comprehensive city planning and zoning. Unless there is proper control of the development of private property, it is rarely possible to provide street and highway facilities adequate for future needs.

City Planning and Zoning

Street and highway hazards are due chiefly to vehicular traffic. These hazards can be greatly reduced by a proper arrangement of streets and highways. Consequently each community must necessarily study and carefully consider its own special problems with particular emphasis upon:

(a) The problems presented by streets and highways crossing each other at grade or crossing railroad or rapid transit lines at grade, with the two purposes of reducing the number of crossings by a better arrangement of transit lines and thoroughfares and by separating grades so far as practicable where crossings remain necessary. Elimination of grade crossings is most needed along major traffic arteries or boulevards.

(b) The problem of classifying traffic and of providing suitable and adequate facilities for each class. This involves the proper location of the various kinds of development; industrial, commercial, resdiential, through a proper planning of traffic and other public facilities provided in the various areas, supplemented by zoning regulation of private property.

(c) The location of its traffic centers and the possible development of its outlying areas with the two purposes of straightening main traffic arteries and of so spacing them that there will lie between them areas sufficient in size to support neighborhood stores, schools and recreation facilities.

(d) The possibilities offered by its topography and its present development to create by-pass highways and belt highways which will permit through traffic, especially trucks, to avoid congested districts or even any built-up portions of the city or town.

(e) The control of subdivisions to avoid in the future the types of streets which tend to congest traffic and cause accidents.

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Relation Between Street Facilities and Development of Private Property—Zoning

Each community should, in determining the character, width and arrangement of its streets, at the same time determine, through zoning, the character, use and bulk of abutting buildings.

Each community or group of communities in planning the main arterial highway system should take account of the effect of zoning regulations in regulating and stabilizing traffic flow.

Extracts from Paper on "The Influence of Zoning on the Design of Transportation Services," Read by J. Rowland Bibbins, Engineer of Washington, D. C., to the October, 1924 Meeting at Detroit of the American Society of Civil Engineers

Meanwhile, cities are experimenting with block signals, one-way streets, etc., usually without adequate facts, surveys, or design, and in desperation, the police adopt no parking as the "last resource."

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This is not engineering; it is a stampede. Where are the sober facts, surveys, and carefully worked out plans of experienced authority that justify such drastic measures from a technical or economic viewpoint? The cost of planning would be microscopic, relative to the saving.

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Functional Purpose of Zoning in Transportation.—In order to distribute population rationally, reduce central congestion, relieve trunk thoroughfares of traffic "nodules" or bunched congestion, make possible adequate transportation, speed up that service, and reduce economic waste. What is the measuring stick of "density"? For on the density rests the transport capacity needed. If the limits are too easy, transport lines are overloaded, streets can not carry their burden, transit is stagnated. It is no solution to invade other streets of the city with many new lines of traffic of equal inefficiency, even if such new lines could be financed. Obviously, to obtain adequate street and transit capacity, higher and higher zoning limitations are required. The widening of a few streets or a few blocks in the central district will not suffice for, immediately, the building height limit shoots skyward several times faster. The outside zoning density standards in the end, form the major control.

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Conclusion.—Zoning is vastly beneficial to orderly development, checks glaring misuses, and, as now administered, will ultimately exercise a restraining influence on mass density, but unless standards are raised, it can not hope to turn the tide of growing congestion promptly enough to meet obvious traffic needs of the immediate future.

From "Some Aspects of the Automobile Industry," by Alvan Macauley, President of the Packard Motor Car Company, Detroit, Mich.

The New Saturation Problem

The fundamental traffic problem is the problem of the city plan. Traffic crowding, delays, accidents, high taxes for police purposes and relief streets, high costs of deliveries of food—all these problems and many others can be traced in large measure to the planlessness of our cities.

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Better City Planning—A Vital Need of the Automobile Industry

The possibility of a physical saturation point for automobiles in cities and the urgent need of measures to cope with traffic congestion have increased the interest of the automobile industry in city planning.

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It is the work of the city planner, therefore, to decide the nature and the extent of the traffic that is to move about the various parts of the city and to lay out the streets in relation to this movement; and to decide the nature and extent of the traffic which is to use each individual street and to base on these forecasts its width and other structural characteristics.

An increasing number of cities have found that it is not necessary merely to forecast their development, but also to control it. By means of "Zoning" plans and regulations a city can, with flexibility and yet with conscious determination, decide in what directions it had best grow and for what purposes each section had best be used. Cities are also exercising increasing control over the plotting of suburban areas—the suburb of today becomes "the city" of tomorrow.

From Paper of Morris Knowles, Consulting Engineer, Chairman, City Planning Commission, Pittsburgh, Pa., on "City Planning as a Permanent Solution of the Traffic Problem," read at the International Town and City Planning Conference, New York City, 1925

Remedies to be Applied.—The remedies to be applied are of two distinct classes: First, those which deal with the regulation and supervision of traffic, and second, those which deal with physical construction—and the planning of improvements. The former may be considered as fitting the traffic to the streets, and the second as fitting the streets for traffic. The first is merely a palliative, it is only using the tools which we have to the best advantage. To plan is to provide the tools.

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The permanent solution of the traffic problem involves three questions: First, the replanning of our cities to

solve the question of the congested and built-up district; second, the provision of sufficient facilities in the now undeveloped territory, so as to prevent congestion when these districts become more built up, and third, the planning and rearrangement of an entire region, so as to alleviate the conditions which now exist.

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Zoning.—One of the most important features of city planning in its relation to traffic—although perhaps not thoroughly realized—is that of zoning, or "the creation by law of districts in which regulations, differing in different districts, prohibit injurious or unsuitable uses of structures and land." Zoning attempts to give stability to the general plan. It sanctions where the residents should live and sets forth areas to be devoted to stores and industries.

The traffic needs of a community involve: First, the distribution of traffic within that community; second, the methods of getting traffic to and from the community; and third, the method of getting traffic around the center of the congested area without passing into it. Since zoning tends to give permanency to the city's development, it plays an important part in determining the street system. The character of a district determines, to a large extent, the type of streets required to meet the particular traffic need.

The factory districts, for example, will be interested in getting materials delivered to the factory and from the factory to shipping points and transportation centers. Their need is for wide heavy-hauling streets and generally the problem is that of caring for slow-moving traffic.

In the business districts, which are the principal objective points of all inter-city traffic, the question is largely one of arterial distribution within the district, with main exists and entrances. If the principal streets are stabilized as to use and thus as to value, it will more surely fix the improvements and provision for transportation requirements.

In short, to intelligently design a system of streets and to make them relatively permanent and, therefore, as nearly fixed as possible, requires zoning, so that the planner may be certain as to the kind and character of the traffic the streets must carry.

Thus zoning enables sensible planning of thoroughfares of sufficient width and of a type to meet the requirements of different kinds of development, so that it will not be necessary to first build, then tear down and rebuild.

From an Address on "The City, Its Past and Its Future," Delivered at Birmingham University, by Dr. Raymond Unwin, of the British Ministry of Health

The real advantages of community life can not be secured by adopting the methods of the thrusting crowd or the grasping scramble, and such methods should no longer be tolerated as the basis of civic life or town development.

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From the present method of haphazard growth, a disorderly muddle of industrial, commercial and residential areas or buildings inevitably results. As further accretions develop on the outside, many of the advantages which lead to the selection of particular sites are taken away. In the built-up area of each large town there ensues a continuous struggle of the different parts to re-sort themselves on some more rational basis; and every move is accompanied by the sacrifice of something which has gone before.

Overcrowding solves no problems; in whatever form adopted it creates new difficulties; that is our first lesson.

The second is that in essence the problem we have to handle is one of distribution and localization; the proper distribution of the parts of the town in relation to each other and to the site, and the localization as far as possible of the life of the people in each part.

In existing towns the disentanglement of the confusion of parts and buildings which has resulted from haphazard growth must take time; but this proper distribution of parts must underlie all our planning if it is to be on right lines. Better distribution and greater localization of life offer the only solution of the present traffic problems. It has become evident that there is no solution to be reached by merely multiplying facilities; each in turn is liable to increase the congestion by bringing people to the center, as much as it relieves it by taking them out, is liable, merely to increase the volume of movement. Bad distribution simply means that things are in wrong places. A large proportion of the different sections of the town, and many of the buildings which give rise to heavy transportation, being in the wrong places, much of the congestion of traffic is entirely due to the unnecessary moving to and from of goods and people which results.

The volume of traffic in large towns will be great in any case, but it can be reduced by good distribution, by decentraliziation and by localizing the life of the people in each decentralized unit. There will still be need to study carefully the many new methods of transportation now available, and using each for the kind of service for which it is best adapted, to frame the whole scheme to give adequate facilities for such movement of men and things as may prove to be necessary or desirable. So long, however, as our towns were permitted to spread out indefinitely over the surrounding territory in a dense mass of streets and buildings, industrial, commercial and residential parts indiscriminately mixed up and packed together, so long must the life in our towns be one vast disordered confusion of people rushing backwards and forwards over the whole area, impeded by the congestion which results from this cross transport of men and things.

From Memorandum on "Zoning in Built-Up Areas," by British Town Planning Institute to London County Council

1. The following memorandum has been prepared by the Council of the British Town Planning Institute in response to an invitation by the London County Council to place before it the views of the Institute upon the subject of zoning in built-up areas, with special reference to London.

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7. The great and increasing inconvenience of traffic congestion which is so evident in all our large cities, and particularly in London, is, perhaps, the most important instance of the result of attempting to deal with urban problems in watertight compartments. The present confusion and congestion in our streets appear to us to be largely due both to the amount of unnecessary traveling that now takes place owing to the disordered mingling of all kinds of buildings without regard to the relationship between their function and location, and to the fact that the uncontrolled change of character in buildings frequently renders streets, designed to serve the traffic arising out of the original user of the frontages, completely inadequate to deal with the traffic caused by a change of user. From the economic standpoint it is obvious that the width and construction

of streets should be determined in relation to the character of the buildings in the districts through which they pass, and in our view no satisfactory solution of the traffic problem can be arrived at until the improvement of the street system in a town is undertaken in conjunction with zoning as part of a general town plan.

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10. The effect of zoning upon land values is very largely a matter of surmise. The view that land values would suffer depreciation as a result of such restrictions being imposed is based upon the assumption that complete freedom in the matter of user is a considerable factor in the value of land. While this is no doubt true from the point of view of the land speculator operating in a town where conditions are undergoing rapid changes, it is probably not a factor of much consequence where changes in the character of property are gradual and where all the land is subject to zoning restrictions. In fact, under the latter conditions it appears to be much more probable that the added security afforded by zoning would have the effect of increasing land values. In residential areas considerable value is attached to the preservation of amenity, as every large landowner has recognized in his private restrictions. In the case of land used for commercial purposes, a certain degree of concentration and the existence of good traffic facilities are both elements of value which would be improved by zoning as part of a comprehensive planning scheme.

PUBLIC SAFETY

Statement by Edmund Dwight, Resident Manager, The Employers' Liability Assurance Corporation of London, May 18, 1916, to New York City Commission on Building Districts and Restrictions

As an owner of property in various parts of New York, I am satisfied that while in individual cases there might be some hardship, resulting from the proposed system, it should work as a whole to the enhancement and stability of real estate values, and to the great welfare of the community.

The plan of this commission provides for certain residential streets from which trade and industry will be excluded. This, in my judgment, will undoubtedly tend to reduce the

frequency of street accidents. Manufacturing operations carried on extensively in sections of the city which are also used for residential purposes and which involve an extensive use by truck, vans and express wagons, in residential streets, increases the number of accidents in the street. I believe that the same would be true if the mercantile use of the streets could be eliminated or reduced in residential sections.

From Statement of John Kenlon, Chief of Fire Department of New York City, to New York Commission on Building Districts and Restrictions, 1916, on Relation of Zoning to Fire-Fighting

Congestion of traffic and population and haphazard building make the city's fire fighting problem increasingly serious. It becomes increasingly difficult to move fire apparatus through the congested streets. Streets densely packed with crowds of people that quickly form wherever a fire occurs, interfere with prompt service after the scene of the fire is reached. If a serious fire should break out in lower Manhattan coincident with an explosion or earthquake shock that would cause a general panic and outpouring into the streets, it might be utterly impossible for the firemen to reach the fire and a terrible conflgration might result. This is the plain truth and it is fool-hardy to utterly ignore it and go on piling up buildings and further extending the danger zone. The districting plan will, as to future growth, tend to spread out business and industry, both by limiting the height of buildings and by encouraging the development of commercial and industrial areas in the other boroughs.

In the thirty years that I have been connected with the fire department, lower Manhattan has changed from a five story city to a twenty-five story city. There is great confusion there at the present time; during the daytime it is difficult to move apparatus in response to fire calls in the lower end of Manhattan Island. Increased congestion of people and traffic in this section will cause very serious delays in getting apparatus to work around the scene of fire. Any plan that will in a measure prevent the increase of congestion in the central portions of the city is a plan in the right direction.

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If you can confine stores to broad avenues and good substantial buildings and reserve side streets for residences, there would be a great deal less danger from fire. I think you are on the right line for the health and safety of the people in establishing residential and industrial districts.

Segregating buildings according to occupancy in different sections of the city will restrict the area in which a conflagration can occur. It will be a help to the Fire Department in laying out and equipping fire houses. I think it will greatly lessen the cost of fire protection.

If we can apply to the outlying sections provisions that will prevent so great a percentage of the lot being covered by buildings, by laying out wider yards and courts, the safety of the city will be promoted. Such a plan would tend to prevent the spread of fire. Where the area of the yard is increased on both sides and the courts are larger the danger of the spread of fire is considerably less.

Extract from 1925 Fire Prevention Year Book of Baltimore, Maryland, Underwriters and National Agent

Outside of individual cases let us consider the relationship of zoning to fire department work and fire prevention generally. In every city of any considerable size is a high hazard district, where spread fires are possible and probable. In these districts, in many cities, there is a provision in the building code or other law against the erection of any frame building. Many of these cities, even outside of this area, and where frame structures are allowed, require that any such frame structure must be built a certain distance from any other building, and which varies from ten to fifty feet. This frequently stands whether the original building is of frame or of fire proof construction. Good zoning might probably allow the introduction of a certain class of business, if the structure is built in conformity with the distances set down in other city regulations for safety, but may properly refuse the introduction into the community of a higher hazard business.

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It is probably entirely good zoning to require certain set-backs from building lines and certain side-yard spaces

in residential areas of the suburban type, not only for the usual reason of preservation of the character of a high-class zoned area, but for health and fire hazard reasons. Such areas are usually less protected by concentrations of fire apparatus than are the built-up sections of a city, fire alarm services are frequently carried overhead, instead of in conduits, and are thus subject to disturbance from the elements. Sweep fires in such areas are certainly less likely when each building is protected by free space. Especially when business houses are to be erected in an area district which requires one or two side yards and set-backs from the front building line the fire hazard is patently lessened. In high value business districts such protection would be possibly unreasonable, especially if in close contact with districts where the established procedure is to the contrary, but the requirements may not be unreasonable in newly-developed territory, especially where the commercial use is merely an adjunct to residential service, such as grocery, notion or drug stores.

Each experience teaches that the safest form of residence from a fire prevention viewpoint is the single-family house. There is usually less of trash accumulation and more care in handling inflammable material when the owner of the house and his immediate family only are concerned, than when there is a mixed occupancy.

The question of families per acre involves many considerations of hazards of life, or public safety. It is therefore entirely good zoning to prevent over-congestion, as far as possible, on a fire hazard basis and, in addition, to thoughts of health protection, etc.

Height restrictions can very well be considered vital zoning from a fire hazard viewpoint. It has been clearly demonstrated that a spread fire can involve so-called fireproof structures. * * *

* * * In sustaining a special act which limited construction to not more than 175 feet in Baltimore, Judge Worthington, in the Court of Appeals of Maryland, dwelt upon the ravages of the 1904 fire, and added: "Great impetus is given to such a fire by very tall buildings. They serve as so many large funnels, furnishing draft for the flame, thereby intensifying the heat, and outreaching the efforts of the fireman." Thus it would seem that height

restrictions are entirely good zoning within the police powers, as interpreted by this court.

The fire hazard must always be measured not only by the condition and amount of inflammable property, by the strength of fire-fighting forces of the particular community, and by the liability of the community to unusual wind and other elemental disturbances, but by the water supply of each particular area. It is a potent fact that the average main put in for a residential community may be entirely inadequate to take care of the fire department needs when a large industrial plant, or a series of such plants, which have invaded a strictly hitherto residential area, are food for flames. How many times does one read in the daily press about inadequacy of water supply after some large plant is destroyed in the outlying section of some large city. In many cases the water mains were originally laid for a scattered suburban supply, or a strictly residential drawoff, and the line is inadequate for fire service beyond a certain point. * * *

It can thus be seen that intelligent zoning is definitely tied up in relation to the fire hazard to the ability of the city to extend adequate water supply in particular areas. There is a very distinct fire hazard in the introduction of a business area, or an industrial area within a district zoned residential and provided with water supply for residential use.

Fire department statistics all over the country show that there is an increased hazard with the introduction of business. A building which is used for joint business and dwelling occupancy is more liable to fire than is one which is used for residence only. Again, a building used entirely for business purposes is a greater fire hazard than either the partial occupancy or the dwelling, in relation to the proportion of fires in regard to the number of occupancies in the entire community.

The fire department records of one large city were secured recently as an example of fire hazard and zoning needs, and some interesting deductions made. First, there was a study of fires in buildings having combined residence and business. It was found that there were 273 fires in a stated period in such occupancies. * * * During the same period there were only 1,182 fires in residences in the entire city, and the fires in combined residence and business uses were out of all proportion to those in residences only, when compared to the number of combined residences and stores, on the one hand, and the total number of residences, on the other, in the entire city.

About the same proportion of fires also existed for the period as between buildings used for apartments and stores jointly and those used for apartments only. * * *

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There can be no doubt that zoning has a distinct relation to fire prevention. The planning for work of fire departments and water departments is simplified where intelligent zoning maps out ahead its occupation of areas, and prevents haphazard invasion of areas restricted to residence or light commercial areas, as differentiated from industrial areas, and holds its restrictive area variations to the necessities of business and industrial growth and encroachments along common sense zoning lines so that no practical difficulty or unnecessary hardship is created merely for estheticism.

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"* * * Water engineers tell us that the distribution system, no matter how carefully designed, may in the course of time prove inadequate without some control over uses of property and an assurance that those uses will be stable. The distribution structure is almost unalterable to meet changing needs, and if inadequate must be replaced. The size of a water main necessary to supply a residential development is smaller than is required to supply a neighborhood which is interspersed with stores. As the number of business houses increases, the size of the water main must be increased, until the high value commercial district is reached, which is approximately the downtown business district, where the maximum supply must be provided. Mr. Siems says further: 'In order to design a water distribution system intelligently the character of the future development of the community and the location and widths of proposed traffic arteries must be known. Small mains have been laid into new territories on the theory that the demand will be slight, only to be replaced by larger mains when the territory became more closely built or its character changed. Where a system of city planning is followed the future consumption in a newly-developed territory may be anticipated. * * * A determination of the size of the feeder main extension to be economically installed may be made in advance.'

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"Summing up the opinion of the water engineer, his own words are as follows: 'A revised method of determining required fire flows has been developed which should be applicable to all conditions. From investigation it seems that the required fire flow is the criterion upon which the pipe capacity of any gridiron system should be based. To insure an economical and permanent design, anticipation of the development of the territory to be supplied should be made possible through the adoption of a definite scheme of zoning.'

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"Absolutely, the design of the water distribution system for fire protection and for domestic and manufacturing consumption is dependent on a definite plan for the use of property and on the height and bulk of buildings."

HOUSING, LIVING CONDITIONS, RECREATION, GENERAL WELFARE AND PROSPERITY.

"How Zoning Prevents Blighted Districts," by Edward M. Bassett, Member of Zoning Commission of New York City, and of Department of Commerce Advisory Committee on Zoning and City Planning

What starts blighted districts? Before the days of zoning they started almost over night. A residence block or a bright group of small stores would be invaded by a large stable or garage, or by a junk yard, milk bottling works or fume producing factory. The well-to-do owners would sell out and go elsewhere. The old houses and stores would be reoccupied by people who would let them run down. The stores would be taken for small industries and would go from bad to worse. It was almost impossible to stay the decline of a blighted district when it once got started. Some property owners lost a fortune trying to do it. The blighted district was usually started on its way by the invasion of one or more uses that were out of place in that particular locality.

Every part of the city was open to the exploiter. He could erect a building of any size, height or shape in any place and put it to any use however hurtful to the neighborhood. Sometimes it was storage of trucks in a good tenement district. Sometimes it was a six-story tenement in a locality of neat small cottages. Sometimes it was a

metal factory in a home district. Frequently a varnish or paint works or some other nuisance factory would buy an acre or two of land in the suburbs and establish itself in the heart of what ought to become an area of small homes. When the growth of the city forced home building in that direction the good homes would avoid the factory. The surrounding twenty or more acres would be left vacant for a time and then perhaps build up with cheap and squalid structures.

The zoning plan put a stop to this chaotic building. Invasions of harmful buildings and uses were prevented. Business districts are protected against industry, apartment house districts against business, and cottage districts against apartment houses.

Leaflet on "City Zoning is Sound Business," by John Ihlder, Manager, Civic Development Department, Chamber of Commerce of the United States

Advocacy of city zoning regulation has swept across the country during the past three years until today nearly one hundred cities and towns have adopted zoning ordinances or are at work upon proposed ordinances. Every week brings word of other communities which have become interested. Until the present year there was practically no opposition to zoning as zoning, but only to specific provisions in individual ordinances. This, of course, was a condition which could not continue. No proposal which undertakes to guide the action of others than its sponsors can go long unchallenged. So zoning is being challenged.

The fact that it is being challenged is cause for general congratulation in which its sincere advocates must join, for no proposition is so fool proof, so free from the possibility of error, that it can safely be left entirely in the hands of those thoroughly committed to it. For the past year and a half at least, some of these advocates have been watching with misgiving the speed and ease with which some communities have adopted ordinances, and they welcome the questioning which will bring to light defects in specific ordinances and so result in sound, constructive legislation.

Zoning has a sane, common-sense purpose—so to guide the development of a city's area that each part will be put to the most effective use and the whole community benefited by the substitution of system and order for chaos

and disorder. This it seeks to accomplish by dividing the city's area into three kinds of districts—use, height and area. Each of these kinds of districts is then classified; for example, use districts are classified as residential, commercial, industrial. There may be one or there may be many districts of each class, depending upon the city's size, topography and present development. Any one district may be as small as a single block or square—though, except in outlying residence districts where a four-corner is classified as commercial in order to provide for neighborhood stores, the smallest size is rare—or it may be quite large, though here again a limit is necessary in order that an industrial district, for instance, may be readily accessible from a workman's residential district.

The opposition to zoning so far seems to be due to two main causes: the natural opposition to any check on freedom of action, and the belief that zoning will prevent the greatest possible profit from an individual property in which the objector is interested. These are both legitimate causes for questioning a zoning ordinance, and the framers of the ordinance must take them into account. But the question whether to zone or not to zone can not be answered upon the basis of these two point only; it must be upon a wider basis.

The advocates of zoning put their case upon this wider basis. They assert that the unregulated development of our cities has resulted in a degree of confusion which causes constant loss of surprisingly large amounts both in operation and in capital account. This is, of course, most obvious in the largest cities. As one goes from them down to small cities and towns the loss becomes less apparent and to a considerable extent less real, until in villages it would be ludicrously pretentious to have an elaborate system of zoning. So, too, in private business, the careful thought which goes into distinctions between the departments of a great metropolitan department store would be ludicrous if applied to the general store of a village. Yet even the latter, small as it is, limited as are the varieties of goods in stock, simple as is its operation, benefits by a regime which values system and order. For the small town, zoning may be reduced to very simple terms. Yet, though the small town, like the mechanic who has only a dozen tools and so can remember where he left each one, may not find it very important to have a place for everything and to put every-

thing in its place, system becomes important if the town grows into a city or the mechanic becomes proprietor of a large shop. And early habits of carelessness are hard to change.

The losses in operation due to lack of zoning may be divided into two groups: Those caused by effort and time wasted in overcoming non-contributing distances and crowds, and those caused by inadequate facilities.

So great is the loss caused by non-contributing distances and crowds that throughout all city history different kinds of businesses have tended to segregate themselves. But such blind and groping efforts have been only in small degree successful. New York, for example, has long had its so-called financial district, various wholesale districts, its great retail districts. Yet New York was the first American city to adopt a thorough-going zoning code. For New York's subway riders, from bank president to office boy—so great is the crowding now that even high-salaried executives have to abandon their automobiles far up town if they expect to reach the office before closing hour—must journey past miles of business buildings which mean nothing in their business lives. And having reached their subway destination they must slowly push their way through crowds of people with whom they will never have any contact, except a too close physical contact. Zoning seeks to reduce this loss by supplementing the blind efforts of the past with a carefully worked-out system that will give the maximum of convenience and accessibility to business.

At the same time zoning provides the possibility of increased facilities. The needs of heavy manufacturing, light manufacturing, retail trade, and of residence are different. To mix all these in one district is obviously wasteful of opportunity and wasteful of resources. To put dwellings along the line of a railroad from which spur tracks may readily be run is a detriment to the occupants, who suffer from noise, smoke and cinders, and it is a handicap to a prospective industrial plant which must pay for the site not only the cost of land but also of the buildings cumbering it. To put a factory in a residence district not only is likely to entail needless trucking through streets unfitted for such use but diminishes property values on all sides.

To put a noisy or fume-producing industry or an automobile repair shop next to a department store will quickly reduce the latter's trade. Moreover, any such miscellany

of uses will make more difficult and expensive an adequate provision of public services; the best sizes and shapes of blocks or squares are not the same in an industrial district, a commercial district, a residential district. The kinds of street paving required for the three differ, and one kind is far more expensive than another. The sizes of water mains, sewers, lighting conduits differ. Police and fire protection is more difficult in a miscellaneous district. With proper classification the proper building of the city not only becomes much less expensive, but facilities for each kind of district, now impracticable because of conflicting interests, become easily practicable.

This, in brief, is the argument of advocates so far as operation is concerned. But more important is the argument based upon capital losses. There are opponents who contend that the character of a city district changes every ten years and reason from this that a zoning ordinance will be antiquated soon after it is enacted. The come-back of the zoners reminds one of the Scottsman's response to the famous Dr. Johnson's sneer that in Scotland men are fed on oats which in England are given only to horses: "Yes, but see what men we have in Scotland and what horses you have in England." The zoners, too, say: "Yes, but the rapid change in the character of city districts is one of the strongest reasons for zoning. Zoning will slow up this change and so prevent the waste of many millions of dollars worth of buildings that are still perfectly good for their original use but are unfitted for the new use forced by the changed character of the district."

Any man who has kept his eyes open has seen good buildings demolished, has seen old buildings converted to uses for which they are most inefficient, simply because the district has changed. Advocates of zoning claim that most of these changes are unnecessary.

It is to be noted that the advocates do not claim zoning will prevent changes but will simply slow them up. They recognize that a city is a growing body and that changes must take place. So zoning regulations provide that on the initiative of property owners or on that of the public authorities, the boundaries of a district may be changed or that it may be transferred from residential to commercial or industrial. What the regulations do is to prevent one owner from injuring his neighbor by erecting a store or a factory or a public garage in a residence district years

before there is any prospect that other stores or factories or garages would come into that neighborhood. In this way the probable life of any building erected today will be greatly lengthened, and the builder will be justified in investing a larger amount in constructing a finer building.

The argument for zoning, then, is the common sense one that it will prove of practical benefit to the whole community. Granted this, it is still a question whether the particular ordinance proposed for a city is an application of this common sense. Are the areas allotted to industry those best fitted for industry? Are they large enough in the aggregate to provide for future development? Are the areas allotted to commerce adequate in location and size for the city's commercial needs? These are first considerations, for the city was built by and for business. Its future depends upon business. At the same time it must be recognized that business is not an end in itself, but a means to an end.

Business must, therefore, set boundaries for itself in order that it may not spoil the things it buys. If business is to ruin residence districts where men have invested the savings of a lifetime, if it is to make our schools ineffective by erecting next to them noisy, smoky foundries and shops, it is in large measure defeating its own purpose. The zoning regulations, therefore, protect residence districts from such intrusion in order that men may feel greater assurance in invesitng their savings in things that build up family and social life.

Once this argument for zoning is accepted the first of the objections disappears. There is little resentment at the traffic policeman who halts us at a busy corner, for it is obvious that the regulation of traffic benefits us all. As for those who oppose zoning because it interferes with the greatest possible profit for a given piece of land, there are two questions for them to answer: First, will their proposed development be an asset or a liability to the city? Second, will their expected profit materialize if their neighbors follow their example? Usually the argument of this group is based upon plans to utilize a plot of land for a very high building covering a large proportion of the plot, and therefore dependent for light and air upon being surrounded by lower buildings.

In any given district all owners should be assured equal opportunities. The maximum permitted any owner, therefore, should be that which all owners may utilize without

mutual detriment. This, the advocates of zoning say, is not an unreasonable restriction upon private initiative, while it is at the same time a positive benefit to the community.

Statement to City Council of Cincinnati of Bleecker Marquette, Executive Secretary, Better Housing League of Cincinnati

Bad housing has been one of the most fruitful sources of social ills—poverty, disease, immorality, juvenile delinquency, crime, bad citizenship—in our city for the past forty or fifty years. How many millions of dollars it has cost us in maintaining hospitals, orphan asylums, reformatories, penal institutions, courts, jails, no one can estimate.

A study was made here in 1913 to find out where the majority of the inmates of such public institutions came from. A chart was prepared on which lines were drawn to show the place of residence of each inmate. It showed that *70 per cent. of them came from the congested section of the city where 120,000 people are crowded into 6,500 tenements* in 1/19 of the city's area—where the houses are built so close together that there is not enough space for light and ventilation; where halls and rooms are dark and ill-ventilated; where noise, smoke, odors are worst; where children have no place to play except in the streets, subject to constant dangers from passing autos and to the moral dangers of gang life.

Congestion Forces Children Into Streets

Scientific studies show that where the congestion reaches the point such as exists in our tenement districts where there are more than 37 families to the acre, 80 per cent. of the children have to play away from home because there is not yard space sufficient for them.

Every study that has been made in any large city in the country shows that the great source of cases in juvenile courts, in municipal courts, in dependency institutions, in social agencies, is the slums. The infant death rate is higher, the tuberculosis death rate is twice as great in the congested tenement sections of Cincinnati as in the city as a whole.

Mistakes of Past Can Not Be Remedied

No amount of effort will undo the mistakes of the past. Our only hope lies in preventing future slums. Here Cincinnati's outlook is more hopeful than that of most cities. During the past seven or eight years we have been building one and two-family homes in the suburbs, and the basin population had been moving out to the suburbs at the rate of one per cent. per year. Home ownership, although still low in comparison with other cities, is on the increase. We are slowly changing from a city of tenements to a city of homes. If we can continue this development, encourage the construction of small homes with ample space for light and ventilation and their own patches of green and places for children to play, and on the other hand prevent the too rapid growth of huge flat buildings, we can rest assured that the future of Cincinnati's housing is safe.

Nothing to Prevent the Creation of Future Slums

Today there is nothing to prevent the development of worse congestion in the suburbs than any we now have in the basin. Nothing in our present laws prevents the erection of tenements and apartments housing a thousand people to the acre. Nothing prevents the building of one and two-family houses with no space between them, no rear yards, no set-back from the street. We have no way of knowing that the housing of the future may not be as bad as that of the past. Experience shows that where there is no restriction on congestion there is almost no limit to the number of people who can be housed on an acre of land. In New York City, for example, the tenement houses being built today have more families to the acre than in the worst slums on the East Side. Tenements of this kind house as many as 1,000 and even 1,500 people to the acre—three or four thousand to the block. It is possible to have congestion equally great in Cincinnati unless through some medium like zoning we limit the number of families to the acre.

Zoning Will Guarantee Adequate Open Spaces

The proposed zoning ordinance will prevent congestion because it limits the size of apartments and tenement houses and limits the percentage of the lot they may occupy. It encourages the construction of one and two-family houses,

because it sets aside sections in which they are given preference and in which apartment houses are permitted only under safeguards that prevent them from stealing the light and air of smaller houses and from housing too many families. It means the elimination of the dark room because it requires that all windows in dwellings shall open to spaces large enough to guarantee a reasonable minimum of sunshine and ventilation, and because it requires that one and two-family houses shall have side yards, rear yards and a set-back from the street of reasonable dimensions, based for the most part upon the better practice that now prevails.

United States Department of Commerce Advocates Zoning

The testimony of physicians, sanitarians, social service experts and housing authorities to the evils of congestion and the advantages of sunlight, air, play space, small homes, is limitless. Former President Wilson and the late President Harding were staunch advocates of the vital importance of protecting our homes. Secretary of Commerce Herbert Hoover has established in his department a Bureau of Housing which is consistently urging zoning as one of the most important measures in the interest of better homes that could be enacted. Mr. Hoover himself is an earnest advocate of zoning.

Congestion and bad housing is a curse of modern civilization—the great menace against which every large city is fighting, and will fight in vain unless by means of zoning it makes impossible the creation of future slums. Congestion is not the only factor in disease, vice, crime, juvenile delinquency, bad citizenship. Yet so long as congested housing exists, our efforts to eliminate these social ills are doomed to failure.

Well-Lighted Homes Promote Health

"People who are able to live in well-lighted apartments have a physical resistance which is superior to that of people who live in dark rooms. That has been proved under exact experimental conditions in laboratory tests and is matter of common observation among human beings," says Dr. Haven Emerson, former Health Commissioner of New York City, and one of the country's leading health authorities. "The portions of the city which have the small

family house development show a lower death rate than prevails elsewhere in the city, under equal economic conditions. *Children brought up in one- or two-family houses, where there is plenty of land about, are more likely to be healthy* than those brought up in an apartment or a tenement house," says the same authority.

Exposure to a vitiated atmosphere, lack of sunlight, congested housing which brings people in close contact with each other, tend to break down the individual's resistance to disease. Such conditions tend to spread tuberculosis, pneumonia and colds. In the prevention and cure of disease pure air, and especially sunlight, are of the greatest value. More and more ills are shown by medical science to be improved by sunlight treatment, especially rickets and tuberculosis of the bones and joints. Sunlight is beneficial stimulant to the nervous system. It destroys harmful bacteria. Its action upon the air is prophylactic, rendering the air more healthy.

Evils of City Life Lessened by Preventing Congestion

In precisely the measure that the city's population is housed in small homes with adequate open spaces, the evils of city life will be lessened—as congestion increases, the evils of city life increase.

As the number of families housed, for example, on a typical lot 50x125 feet increases—

1. The provision of light and air, so essential to health, vitality and comfort, grows less.
2. The opportunities for personal contact and thus for the spread of communicable diseases become greater.
3. Noise and confusion incident to street traffic increases.
4. Each family suffers more and more from the noises of neighboring families.
5. Privacy is diminished.
6. The children have less and less opportunity for outdoor play.
7. The danger from fire, both to life and property, is increased.
8. The transit lines become more and more congested during the rush hours.

For these reasons the proposed zoning ordinance has made scientific provisions for distributing the population and for securing to each section of the city as much light, air and relief from contagion as is consistent with housing of four or five times the present population within the city's present areas.

The proposed zoning ordinance has properly provided for various types of homes in appropriate sections of the city. One-family home sections are protected to retain their amenities. Sections are set aside where apartment houses are specifically encouraged. The great bulk of the present residential areas is preserved for the types of residences that are characteristic of Cincinnati—one- and two-family houses and small apartments.

One- and Two-Family Homes Encouraged

The zoning ordinance encourages the detached one- and two-family houses, the types of residence that tend to conserve and promote family life. These detached homes with their yards and gardens promote health, safety and comfort. They foster a high type of citizenship by encouraging families to take a greater interest in their neighborhood and city. They have great advantages in the proper rearing of future citizens. They help to keep many persons from breaking down under the nervous strain of modern city life and contribute to the efficiency and vigor of others.

Protecting Residence Districts From Intrusion by Business and Industry

The proposed zoning ordinance sets aside districts for business and industry and excludes them from residence neighborhoods. The violent protests that have been made during the past few years by home owners against invading businesses, show how great is the injury done to a residence district by such objectionable uses. In numerous cases these controversies have led to legal action.

How important protection is to residence districts is shown also by the fact that practically every new residence subdivision is carefully restricted. Such restrictions protect the homes of the well-to-do, but they do not protect families in less fortunate circumstances.

Reasons for Excluding Business From Residence Districts

"An isolated neighborhood store may appear harmless, but is it? Increased noise is an incident of practically every business, even those businesses that are generally considered the least objectionable in this respect, such as the grocery store, the drug store, the millinery shop, etc. Business exists by attracting shoppers. The number of shoppers frequenting a business establishment, no matter what its character may be, as a rule, exceeds the number of persons who would in a day visit the same premises if used for residential purposes. Even a small shop will often serve several hundreds of customers in a day. This increased number of pedestrians diminishes the quiet of a street.

"In addition to the increased number of pedestrians there is also an increased number of vehicles on business streets, as compared with residential streets. This fact in itself, of course, adds to the noise on business streets, as all vehicular traffic is accompanied with a greater or less degree of noise.

"The loading and unloading of business vehicles always causes more or less disturbance to the peace of a residential neighborhood. Many stores have their goods consigned to them in crates, boxes, kegs or barrels which may be dumped from the delivery trucks onto the sidewalk without any fear of injuring the goods. Among the retail establishments especially offensive in this respect are the local hardware store and the dry goods store. The sawing of wood, the hammering, driving and removal of nails incident to the opening and closing of these boxes, causes, if anything, more noise than their loading and unloading.

"Noise injurious to home quiet also accompanies the conduct of certain businesses, as, for example, the rolling of balls in bowling alleys, the operation of motors and blowing of horns in garages, and the music and hilarity in theaters, ice cream parlors and dance halls. These establishments all keep open until late at night, and therefore very seriously interfere with the sleep and rest of the inhabitants in the district.

"Approximately one-fifth of the total population of a large city consists of children under five years of age. The necessity for quiet residence districts, so that the children can obtain a reasonable amount of sleep in the day time, is apparent. But in a large city it is not only young chil-

dren that need to sleep in the day time; there is also a huge army of night workers, newspapermen, telegraphers, telephone operators, motormen, policemen, firemen, janitors, bakers, etc. These, too, demand quiet residence districts so that they will be able to sleep during the day.

"The day sleep of the night worker is of vast importance, but the night sleep of the day worker is of far vaster importance. The same neighborhood businesses which disturb the rest of children and night workers during the day, also disturb the rest of the day worker at night. Local stores, it is true, generally close at six or seven o'clock in the evening, but on Saturday they usually remain open until ten or eleven o'clock. Then there are certain businesses which always close at a late hour. Drug stores, news stands, candy kitchens, cigar stores, delicatessen shops, etc., invariably remain open until at least ten o'clock; vaudeville, motion picture theaters and dance halls until eleven o'clock; billiard halls, pool rooms and bowling alleys until twelve or one o'clock.

"The intrusion of business is offensive to residential districts because it gives rise to increased dust. The more pedestrians and vehicular traffic a street has the more dust it will have and the more often will its dust be stirred up. In the first place, the wear of a sidewalk and pavement varies directly with the amount of traffic. That the flagging and pavement of a business street have to be renewed three or four times as often as that of a residential street proves this fact. In addition to pulverized asphalt and cement, there is, in the second place, also an increased amount of organic and metallic dust—manure from horses, grinding from steel and rubber tires, worn shoe leather and clothes. Certain businesses—carpet cleaning, shoddy mills, planing mills, etc.—are in their very nature dusty and should obviously be excluded from residence neighborhoods. But even though a business is in itself unaccompanied with trade dust its conduct in a residential district should be prohibited, as increased dust is an unavoidable incident to every business.

"The exclusion of business protects residence sections against offensive odors. Among the most notorious offenders against the amenities of residential districts, so far as a violation of the sense of smell is concerned, are the public garage, the stable, the fish market, the butcher shop, the poultry slaughter house. Today the smell of

gasoline escaping from misplaced garages permeates thousands of homes. The manure in stables, the decaying trade wastes in fish markets and butcher shops, and the wet feather in poultry slaughter houses, befouls the air in other thousands of homes. Odoriferous restaurants filled with fumes of frying fat and grease are hardly less annoying. The benzine emitted by dyeing and drying establishments and the turpentine by paint stores are not only offensive to the smell, but are actually so dangerous as to constitute a fire hazard. Objections like the above can be lodged against the presence of almost every business and industry situated in a residence district. That even a comparatively innocuous store exercises a potent influence over the character of a residential block is a matter of every-day experience. The adjoining residents move out, 'To let' signs go up and in short time the whole street finds itself in transition from one kind of occupancy to another."

The foregoing considerations are presented at length in the report—"Proposed Building Zones for Newark, N. J."

If it is important that we prevent in the future congested housing conditions like those in our existing tenements; if it is important to prevent diseases such as rickets and tuberculosis; if it is important that Cincinnati's future generations of children shall be protected from the physical and moral dangers of the city streets; if it is important to society that home ownership be encouraged, then the case for the enactment of a sound, practical, reasonable zoning ordinance is unimpeachable.

From Statement by Raymond V. Ingersoll, Commissioner, Department of Parks, Brooklyn, May 25, 1916, to New York City Commission on Building Districts and Restrictions

Effect of districting.—I believe that, without doing any violence to existing conditions, this plan, if it goes into effect, will check the unnecessary growth of congestion of population in certain sections, diminish the fire hazards, decrease unnecessary street congestion and the dangers from street congestion, particularly to children who have to play in the streets; that it will be a very great aid to the city in properly locating its schools and libraries and other public buildings by its tendency to make the growth

normal and to make it possible to anticipate it: in other words, a general substitution of harmony and plan for chaos and ugliness.

* * * * *

Stores on residential streets objectionable.—I think that a reasonable degree of separation of stores from residence districts is desirable. Take, for instance, the rattling through the streets of delivery wagons. Of course, there always must be delivery service from the stores to the residential districts, but if you have stores scattered indiscriminately through the residence sections there is just that much more noise and that much more danger of accident from the traffic that has to go through those streets, and it seems to me that your Commission has shown a very great deal of discretion in trying to separate the stores from the residence districts, and yet not to put them too far away, but always have them within reach, which, of course, is important.

Statement to New York City Zoning Commission, by Clarence H. Kelsey, President, Title Guarantee & Trust Company, March 30, 1916

Need for districting.—I have no doubt that the city has a right to direct future building development in accord with a well considered plan, and believe that it ought to exercise it immediately and firmly. If it does not do so, it is failing to protect itself and property values as well. Its present policy of allowing every owner of real estate to do as he pleases with his own, is a policy of self-destruction.

I do not wish to discuss the plan in detail, and I do not think the Commission should attempt to hear a vast number of property owners' individual views as influenced by the effect of the plan on their properties and attempt to reach a conclusion by reconciling these conflicting views, for the more property owners discuss the details, the more confused the situation will become. The Commission, if it is to succeed, will ultimately have to decide for itself, on broad general principles, what is best for the city's future development and adopt it without expecting to get the approval of a majority of the individual property owners. The conclusion should be based on the general good and

made effectual by right of the power of the city government to do what is best for the city at large.

I have no doubt that a great many property owners will see their particular properties limited in usefulness and somewhat depreciated in value, but if the plan is not adopted, I believe there will be a far greater depreciation affecting a far greater number of people.

On values as a whole, I have no doubt of the favorable effect of this proposed control of the improvement and use of real estate. There has been a great rescission in values during the last five years, and it has affected not only those who have gone counter to the new regulations sought to be established, but those who have not; and those who may complain of the effect of these regulations on their particular properties and who think that they should be left free to build as high as they please and use as they please, may, if nothing is done, and they do anticipate their neighbors and make a greedy improvement, find a much greater loss confronting them in the future depreciation of their new buildings. I believe such depreciation is sure to come from a continuance of the present policy, and such owners will lose less by the adoption of the restrictions now proposed. These restrictions will tend to steady values and enable all real estate owners to make reasonable use of their property. This is certainly better for the city as a whole than to continue to allow a few out of many to make unfair use of their property and depress still further the value of the remaining property and ultimately their own as well."

From "What the Banker Thinks of Zoning," an Article by George S. Edie, Vice-President, Westchester Trust Co., Yonkers, N. Y., in The National Municipal Review, May, 1924

The banker thinks no differently of zoning than does the ordinarily thoughtful citizen. He is, however, more interested in preserving values and preventing, as far as possible, unnecessary waste and unnecessary losses.

When one sees an apartment house erected in a district of private dwellings there comes to mind immediately the thought that someone is profiting at the expense of another. One knows that the apartment house is worth more because

of its location, and also that the owners of the houses in the immediate vicinity are losing values, because of the apartment house being located in that section.

* * * * *

Again, we have seen an instance in New York City where, in a business district occupied by stores, industry in the form of manufacturing plants came in, and immediately the value of that location as store property decreased, and many of the stores went out of business. The section of Sixth Avenue in the neighborhood of 23rd Street at one time was the bright and shining example of a very prosperous business section, but upon the arrival of industry, and manufacturing establishments, we saw that district wiped out.

This came to my attention as a banker, as our bank was trustee for an estate which held some property in that neighborhood. We found that the value of that property had shrunk considerably from the time we took the estate over.

* * * * *

Zoning, in my estimation, is just orderly house building —just the orderly development and arrangement of a city. The object of zoning is to achieve regularity and orderliness in a city's growth and development. Zoning lays out areas for buildings for the various purposes and needs of a city. It exercises a strong influence upon property development and subdivision of vacant land. Zoning protects property values from irresponsible and unscrupulous speculative interests. And, finally, zoning prepares for the future and preserves and safeguards the present from unnecessary depreciation and loss; and works in all ways for the welfare, prosperity and advancement of a city.

* * * * *

An interesting fact that our experience with our zoning ordinance has developed is that in sections of the town where before there was zoning there was no building, because of the uncertainty of its future development, we find that since our zoning ordinance went into effect, that these sections have come into their own. Houses similar to those built in years gone by have recently been built. Such a section is the Ludlow section in the south end of our town.

This has taken place because that section is now stable. People know that no one can go in there and kill their values by future development and future building.

Let me speak of zoning as an investment from a civic standpoint. When our sessions were on with relation to our zoning ordinance in Yonkers we found some people clamoring for us to permit higher buildings and more families per acre than we thought wise.

After careful study we found that if the number of families per acre and the height of buildings were increased, our public utilities could not stand the pressure. It would require new sewers, new water lines, and many other additional expenditures.

As a matter of fact, in one section of the town which was formerly a private house section, apartment houses sprang up so fast that we were forced to tear up the old sewer, which would have been adequate to supply the needs of the one-family houses, and put in a large new sewer at great expense.

That is what I call inexcusable waste. Zoning a city is of great value. It permits the engineer to lay out his public work, as the future will demand, and saves money for the city.

The conservative banker seeks to invest in securities of certain value, where there is little change or chance of fluctuation. He likes something that is stable, and looks for safety and security of investment.

From the point of view of real estate investments, the banker is deeply interested in zoning. Under the laws of New York, savings banks, trust companies and trustees are permitted to loan two-thirds of the appraised value of real estate. Prior to zoning we saw in Yonkers very violent changes in real estate.

* * * * *

The depositor in the bank often needs credit; and when his statement shows real estate investments, it is very important that the statement be scrutinized very cautionsly by the banker. In days prior to zoning, where the customer showed a property in a residential district it was very important to know whether or not this district was restricted for a long or short term of years, inasmuch as this would decide very materially its real value. So many violent changes had occurred in our town that many real

estate values had been destroyed by unwise building, and the banker, of necessity, had to be very cautions.

Today, with zoning, a residence has a real value and can be used by the customer as security at its real worth or cost. Consequently, the customer, if in need of capital for his business, can borrow large sums on first mortgage because of the stability of his property. If in need of credit, the real estate can be properly listed on a statement at its true value. This enables the customer to have less invested in real estate, and more money is made available for trade, manufacture and commerce.

Leaflet "Why Zone Our Town?" by John Ihlder, Manager Civic Development Department, Chamber of Commerce of the United States

There are people who still think that America has not changed since the days before the Civil War, or the Revolution. They believe—one can not say they think, because they have given the matter no real thought—they merely believe that because we had no zoning regulations in 1850 or 1774, therefore none are needed now. They don't connect the lack of modern factories, office buildings, railways, automobiles and a hundred other recent developments with the placid life of those times. Our towns in those days did not have speed limits or traffic cops either. They did not need them then, but they do now. So they have them now.

So it is with zoning. Modern facilities for carrying on the business of life have added greatly to our efficiency, but at the same time they have made life more complicated and crowded and so have produced the traffic cop, whose main purpose is not to arrest the few selfish individuals who wilfully make nuisances or menaces of themselves, but to help by giving directions to the well-meaning majority of us who want to be considerate of the other fellow and who have intelligence enough to know that in the long run all will fare better and arrive more quickly if there is order and decency instead of disorder and jostling, bad temper and occasional smash-ups.

Zoning regulation is analogous to the traffic cop who prevents disasters and gets us all to our destinations faster by keeping things moving smoothly instead of letting them get into a snarl. It establishes three kinds of districts:

use, height and area. These it then classifies. Use, for example, is classified under industrial or manufacturing, commercial and residential.

Our towns and cities are created primarily by and for business. Consequently in planning and zoning them business is given first consideration. Those districts best suited to manufacturing, whether because of natural location or because of some artificial advantage, as the proximity of a railway, are allotted to manufacturing. Those best suited to commercial enterprise, as the business center of the community or smaller centers in outlying areas, are allotted to commerce. This does not mean that all land along a railway should be zoned for manufacturing any more than that every street with a street car line should be zoned for commerce. Any such easy-going rule would often give us far more industrial and commercial acreage than the community could use and so nullify the benefits of zoning.

But while the town is created primarily by and for business, yet the purpose of business is to make life better worth living. It provides the wealth by which we purchase the things that add to the fullness and joy of life: pleasant homes, education, recreation. Business therefore can not afford to spoil the things which it buys. That would be defeating its own purpose.

Zoning recognizes this and so safeguards our home districts, our schools, from being spoiled by the intrusion of injurious occupations. It recognizes the social and the economic value of investment in homes and it stabilizes the financial value of residence districts. It makes them better long-time investments both for the workingman who buys a cottage and the wealthy man who buys a mansion by protecting them against the blight of a misplaced factory or store. For the location of a factory or store in a residence district has much the same effect upon those who have invested their money in homes that the selfish automobile speeder has upon other users of the highways, makes them panicky, prone to believe that they have ventured upon something uncertain and unsafe.

The same is true of the distinction zoning draws between commercial and industrial districts. Each has its particular needs and each may be injuriously affected by intrusion of the other. But commerce is more likely to be injured by manufacturing than is manufacturing by commerce. So zoning bars manufacturing from commercial districts. On

the other hand dwellings may prove a very real handicap to industries by interfering with their expansion, by raising questions of public health and welfare. So recent zoning codes are barring dwellings from industrial districts.

Zoning then tends to stabilize real property values, to make them better investments. Its good effect in this way is most marked in residential districts, but it is also notable in commercial and industrial districts.

In the commercial and industrial districts it also brings order out of confusion—in those fortunate towns which zone themselves early it prevents the development of confusion. It treats a town as a great manufacturing concern treats its plant, placing each unit where it will be most efficient. In a large modern manufacturing plant the greatest care is taken to place each shop or unit so that the product in process may go from one to the next over the shortest possible route and without crossing other lines of transportation. Care is taken also to locate different units so that one will not handicap the other. The office is not placed next to the foundry, the noise and dirt of which will drown conversation and smudge all the letters and literature the firm sends out. Zoning applies the same principles to the whole town.

As an instance of zoning preventing blighted districts, the north side of Washington Square and parts of Greenwich Village are sometimes referred to. Before the zoning came, small industries and repair shops had begun to creep into and among the well built private houses which had been deserted by their former tenants. Rents were low and everything appeared to be on the down grade. Then when zoning began in 1916 many of these streets were zoned as residential. There was an immediate brightening of the locality. The large homes were altered into studios and bachelor apartments. Now rents are good, the houses are well kept up and artists complain that they are being crowded out.

No blighted districts have begun in this city since the zoning was established, but on the contrary, some that had begun have been redeemed.

A ZONING PRIMER

By the Advisory Committee on Zoning of U. S. Department of Commerce, Appointed by Secretary Hoover

Why Do We Need Zoning?

Someone has asked, "Does your city keep its gas range in the parlor and its piano in the kitchen?" That is what many an American city permits its household to do for it.

We know what to think of a household in which an undisciplined daughter makes fudge in the parlor, in which her sister leaves soiled clothes soaking in the bathtub, while father throws his muddy shoes on the stairs, and little Johnny makes beautiful mud pies on the front steps.

Yet many American cities do the same sort of thing when they allow stores to crowd in at random among private dwellings, and factories and public garages to come elbowing in among neat retail stores or well-kept apartment houses. Cities do no better when they allow office buildings so tall and bulky and so closely crowded that the lower floors not only become too dark and unsatisfactory for human use but for that very reason fail to earn a fair cash return to the individual investors.

"Live and let live" is a better motto for the modern city than the savage one of "dog eat dog."

It is this stupid, wasteful jumble which zoning will prevent and gradually correct. We must remember, however, that while zoning is a very important part of city planning, it should go hand in hand with planning streets and providing for parks and playgrounds and other essential features of a well-equipped city. Alone it is no universal panacea for all municipal ills, but as part of a larger program it pays the city and the citizens a quicker return than any other form of civic improvement.

* * * * *

Zoning Protects Property and Health

Suppose you have just bought some land in a neighborhood of homes and built a cozy little house. There are two vacant lots south of you. If your town is zoned, no one can put up a large apartment house on those lots, overshadowing your home, stealing your sunshine and spoiling the

investment of twenty years' saving. Nor is anyone at liberty to erect a noisy, malodorous public garage to keep you awake nights or to drive you to sell out for half of what you put into your home.

If a town is zoned, property values become more stable, mortgage companies are more ready to lend money, and more houses can be built.

A zoning law, if enacted in time, prevents an apartment house from becoming a giant airless hive, housing human beings like crowded bees. It provides that buildings may not be so high and so close that men and women must work in rooms never freshened by sunshine or lighted from the open sky.

Zoning Reduces the Cost of Living

By zoning, millions of waste from the scrapping of buildings in "blighted districts" may be eliminated.

A "blighted district" is a district, originally developed for residence or industry, in the future of which people have lost confidence.

The causes of such "blight" are manifold. The most familiar case is that of a residential district into which there have begun to creep various uses threatening rapid destruction of its value for residences—such new uses as sporadic stores, or factories, or junk yards. It is not that a few such inappropriate uses really spoil the district, but that people having lost confidence, start a panic like a "run on the bank." Hundreds of them hurry up to "unload" their properties at a sacrifice for any kind of use, no matter how objectionable to their neighbors—and the "blight" is on! Dwellings worth in the aggregate millions of dollars for the purposes for which they were built, and physically fit to serve those purposes for many years to come, with a moderate investment in alterations and improvements, are thus annually abandoned to purposes for which they are not fit, or are left to stand practically idle. Expensive public services of water, gas, electricity, sewers, and transportation are maintained at great waste in order to get through the "blighted" district to the more distant and newly fashionable location.

The total economic loss is enormous, and this loss and the risk of it are paid by the people, in the price of house rents or otherwise, as inevitably as they pay the price of the enormous fire losses, either directly or through insurance.

Proper zoning cuts these losses at their source, just as proper building regulations and fire protection cut fire losses at their source.

Again, miles of streets and sewers and other utilities, such as are ordinarily built when land is newly subdivided for dwellings, need never be constructed if we know that these areas will be devoted mainly to large factories. Industry will be more efficient, as well as homes more wholesome, if kept generally separate. Separation need not mean great distances for workers to travel. Concentration of uses and a fair apportioning of districts should reduce the amount of all transportation and secure economies not only directly for the worker but indirectly in the costs of production and marketing of goods.

If zoning can reduce the cost of living, why not have it?

Passages from "Elements of Land Economics," by Richard T. Ely and Edward W. Morehouse, Director of and Instructor in The Institute for Research in Land Economics and Public Utilities in The University of Wisconsin

p. 23. In our great cities, where land has its most intensive use, social control through building codes, planning and zoning laws, sanitary regulations, is growing. This tendency finds expression in what may be called the principle of social control: The more intensive the use of land, the more highly developed must be the social control. In such a complex society as ours, social control of some forms of land utilization is necessary to achieve the social ends which are set before each individual.

pp. 86ff. *Social Control of Urban Land Utilization.* The evil results of allowing a city to develop "naturally" is the best evidence of the need of social control of urban land utilization. The unregulated desire for profits from ownership of private property often leads to a short-sighted view. Owners of city lots, for instance, may seek to use their space up to the limit prescribed in the building law, only to find 15 or 20 years later that they have not allowed enough space for light and air. In the long run it does not pay to crowd buildings onto a lot when your neighbor is doing the same thing. The result is crowded districts like

those of New York City. Small parks are now being introduced into these New York districts, but they are enormously expensive and the work proceeds slowly.

Another striking illustration of the results of natural development is afforded by the direction of the growth of factory production. How often do we see fine, old residences blackened by the smoke of encroaching factories! In many rapidly growing factory towns houses that used to be the aristocratic and high-priced residences of the founders of the town are now low-priced and are surrounded by cheap dwellings or factories. No one would reasonably wish that such development had been wholly eliminated, for the sacrifice of some districts was probably inevitable if the town was to progress at all; but some of these losses in value might have been avoided if the development of the city had been controlled. In the long run it does not pay to leave development unregulated in the hands of profit-seeking individuals, for the temptation is very great to plan for large profits in early years, which tends in later years to cause a more rapid decline in values than is necessary.

The remedy for these undesirable results of natural zoning is in some form of social control of land utilization. In some German cities this social control has taken the form of development of new city areas by the municipal government itself. In the United States, reliance is placed on private initiative regulated by a city planning law accompanied by a zoning ordinance. In other words, the American policy of social control is to place limits on private utilization according to a preconceived plan of developing the whole urban area.

The zoning of a city is accomplished by pressure of public opinion operating through private and legislative channels. It has been said that the "destiny and growth of your town is largely affected by the foresight of the man who subdivides the land." The real estate dealer who plans, builds, and operates a subdivision can increase the amenities of land and stabilize values through restrictions on property if in no other way. In fact, the members of the real estate profession are in a more advantageous position to accomplish zoning by private efforts. Notwithstanding this potential, and in some cases actual, influence of the real

estate men, private owners are not bound by the professional standards of dealers. For this reason, among others, the future development of the city should not be left entirely to private individuals, but should be entrusted to a commission of city planning experts, backed by zoning ordinances and by an active, supporting public opinion expressed through the real estate operators. More and more cities are coming to realize that such social control of urban land utilization is the wise policy.

Controlled Zoning. Controlled zoning is the restriction by public authority of the different uses of land to certain sections of a city following a preconceived city plan. When a city ordains that factories shall be built only in certain districts or that apartment houses may not be built in certain residence districts, we have what may be called controlled zoning. Such zoning requires in the first place a classification of the several uses to which urban land may be put and a grading of those uses so that non-harmonious uses will be prevented from conflicting. In the second place, zoning requires a comprehensive plan of the city, designed to secure the most economical use of the urban area and a rational development which will stabilize land values as much as possible.

One of the main factors in the stabilizing of land values is the protection of the amenities of land by proper zoning. By amenities are meant beautiful scenery, a pleasant neighborhood, congenial neighbors, and all other inducements which add to the pleasure and comforts of living. Home owners are willing to pay for these amenities. In the case of farm land, scenery is an item in the productive unit. But the economic significance of such amenities in agricultural land values is of small account in comparison with their significance in comparison with urban values. These amenities can be reduced to almost nothing by improper zoning of a city, which allows, for example, the nuisances of a factory district to be present in a residence district. The encroachment of smoke, noise, and dirt is a primary cause of the rapid decline of residential land values. It is, therefore, something to be guarded against in zoning, since the chief function of zoning is to stabilize values.

BREWING FLEXIBILITY IN MUNICIPAL ZONING LAWS, ONE PINT AT A TIME

Alexandra G. DeSimone†

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ABSTRACT

A fundamental incongruence exists between present-day zoning laws and the spectrum of small, independent brewers popping up in communities across the United States. Despite the overwhelming public support for these businesses and the economic benefits that they can provide their local economies, local zoning laws continue to challenge their

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growth by relegating these breweries to the industrial outskirts of town. As this Note will demonstrate, this disconnect stems from early twentieth-century regulatory schemes that no longer reflect the needs or conditions of the current market.

This Note argues for modernization and flexibility in local zoning laws that more accurately reflects the nature of small, independent brewers. This argument will highlight the importance of including small businesses in local planning efforts and recent attempts to do just that. Additionally, this Note will apply regulatory innovations at the federal and state level to a local context, providing a path forward for local zoning regulations in the era of the craft-beer revolution.

Ultimately, a modern, flexible approach to brewery zoning will foster more prosperous communities capable of attracting visitors, workers, and entrepreneurs. With this argument, this Note builds on previous literature advocating for craft brewery development by applying concepts to the local level. Furthermore, this argument lays the groundwork for an approach to zoning that fosters the establishment of new, innovative small businesses, beyond the brewing category, that break traditional molds.

INTRODUCTION

Siren Rock Brewing Company brings more to downtown Rockwall, Texas, than nearly two dozen handcrafted beers.[1] The brewery is "community driven," providing a place for the community to gather—kids, dogs, and all.[2] From its central location, Siren Rock customers can walk through downtown, challenge each other to outdoor games, or relax and enjoy the view of city hall.[3] To some, Siren Rock may seem like the latest in a long trend, but in important ways, Siren Rock is the first of its kind.[4]

Siren Rock is one of over 6,000 craft breweries in the United States, but in many municipalities, such a business would not exist—at least, not in its pedestrian-friendly, commercial location.[5] With its dog-friendly

1. *Brewery Tasting Room*, SIREN ROCK BREWING COMPANY, https://www.sirenrock.com/tasting-room.html (last visited Nov. 1, 2019) [hereinafter "*Brewery Tasting Room*"].

2. *Brewery Tasting Room*, *supra* note 1; *Our Craft Beer Story*, SIREN ROCK BREWING COMPANY, https://www.sirenrock.com/about.html (last visited Nov. 1, 2019).

3. *Brewery Tasting Room*, *supra* note 1.

4. *See Brewery Zoning and a Community Supported Brewery*, SIREN ROCK BREWING COMPANY (Aug. 7, 2018), https://blog.sirenrock.com/brewery-zoning-and-a-community-supported-brewery (describing efforts to become the first brewery in downtown Rockwall).

5. *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/number-of-breweries/ (last visited Jan. 10, 2019) [hereinafter "*National Beer Sales & Production Data*"].

taproom and backyard-esque picnic area, Siren Rock is a far cry from the large-scale, industrial operations behind Budweiser and MillerCoors. Yet, many municipal zoning codes would treat these businesses as one and the same, failing to distinguish between the different types of brewing operations that fill today's marketplace. For instance, New York City classifies breweries, regardless of size or distribution model, as "manufacturing establishments" and relegates them to industrial areas also suitable for slaughterhouses, garbage incinerators, and cement plants.[6] What flexibility does exist largely does not appear to work, according to industry professionals.[7]

The issue of outdated zoning codes is not new, and it certainly is not unique to the brewing industry. From their outset during the Industrial Revolution, zoning codes have sought to create distance between incompatible land uses within a community.[8] In doing so, their specific, narrow categories of acceptable land uses often create "well-intentioned roadblocks" for small businesses and entrepreneurial ventures.[9] In seeking to organize the community, municipal zoning codes can instead exclude innovative business practices that do not conform with the discrete list of land uses identified by local officials. In recent years, zoning codes have also clashed with the rise of Airbnb, food trucks, and tiny houses.[10]

Under rigid, dated zoning codes, communities can only grow in very specific ways. On the one hand, these laws may reflect the deliberate choices of local leaders to protect residents from nuisances or predatory business practices.[11] However, they can also threaten a community's

6. N.Y.C., N.Y., ZONING RESOLUTION ch. 2, art. IV, § 42-15 (2018).

7. Joe Anuta, *Changes Brewing for Beer-Makers*, CRAIN'S N.Y. BUS. (Mar. 26, 2018), https://www.crainsnewyork.com/article/20180326/SMALLBIZ/180329920/zoning-changes-brewing-for-beer-makers.

8. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002).

9. *Help Local Small Businesses by Revising Commercial Zoning Districts*, MCKENNA, https://www.mcka.com/bulletin/help-local-small-businesses-by-revising-commercial-zoning-districts/ (last visited Jan. 11, 2019).

10. Scott Zamost, Hannah Kliot, Morgan Brennan, Samantha Kummerer & Lora Kolodny, *Unwelcome Guests: Airbnb, Cities Battle Over Illegal Short-Term Rentals*, CNBC (May 24, 2018), https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html; Yantis Green, *San Angelo City Council Moves Forward on Food Truck Zoning*, SAN ANGELO LIVE! (Jan. 8, 2019), https://sanangelolive.com/news/business/2019-01-08/san-angelo-city-council-moves-forward-food-truck-zoning; Kerry Charles, *Atlanta Lawmakers Debate Tiny Houses Ordinances*, FOX 5 ATLANTA (Dec. 14, 2018), http://www.fox5atlanta.com/news/atlanta-lawmakers-debate-tiny-houses-ordinances.

11. *See* Zamost, Kliot, Brennan, Kummerer & Kolodny, *supra* note 10.

ability to embrace forward-thinking economic development, environmentalism, and inclusivity.[12]

Small businesses like Siren Rock Brewing Company enrich their communities by creating jobs, reinvesting in the local economy, and elevating local sustainability.[13] However, their impact is often stymied by outdated policies that do not leave room for modern innovations and customer preferences. This Note illustrates the need for flexibility and modernization in local zoning regulation with respect to one category of increasingly popular small businesses: independent breweries. Part I explains zoning more thoroughly, demonstrating the incongruence between historical zoning practices and modern small business development. Part II discusses today's brewing industry and the microbrewery movement. Part III describes the relationship between breweries and present-day zoning laws, including recent approaches to modernization and flexibility. Finally, Part IV offers a path forward, drawing on modernization in other areas of regulation to make recommendations for local zoning officials. Ultimately, these specific recommendations may not meet the needs or desires of every community across the country, but they nonetheless highlight the universal need for communities to appreciate and support the small businesses that sustain them.

I. THE HISTORY AND PURPOSES OF ZONING

At first glance, it may appear that zoning and entrepreneurship were destined for diametrical opposition. According to the late Justice Antonin Scalia, "[t]he very purpose of zoning regulation is to displace unfettered business freedom . . . ."[14] In restricting land use, zoning law inevitably limits the ability of business owners and entrepreneurs to carry out their enterprises. Even still, a historical analysis of the zoning practice reveals that land-use regulation, like entrepreneurship, represents an important form of innovation in American society. The following section traces this history and highlights the need for zoning to re-embrace its innovative spirit.

12. *See* Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1066–67 (2009); *see also* Salkin, s*upra* note 8, at 112.

13. Stacy Mitchell, *Top 10 Reasons to Support Locally Owned Businesses*, INST. FOR LOC. SELF-RELIANCE (Dec. 10, 2012), https://ilsr.org/why-support-locally-owned-businesses/.

14. City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 373 (1991).

A. From Twentieth-Century Solution to Twenty-First Century Roadblock

In the early twentieth century, zoning laws provided a modern solution to a new problem. As cities grew into complex and crowded urban jungles, local leaders saw the need to protect city dwellers from the harmful externalities of industrialization.[15] In New York City, the nation's earliest zoning code divided the city into several land-use districts, restricting property owners to certain types of development based on the location of their property.[16] Through these land-use districts, the zoning code separated residential areas from retail spaces and industrial development.[17]

Of course, the zoning innovation did not remain a strictly urban solution. It soon spread to suburbs, where it ultimately caught the Supreme Court's attention. In 1926, the Supreme Court declared zoning a valid exercise of the state's police power in *Euclid v. Ambler Realty Co*.[18] There, the Supreme Court upheld a zoning plan created by the village of Euclid, Ohio, a suburb of Cleveland, even though the division of land uses would reduce the value of Ambler's property, which was located partially in an industrial area.[19] Writing for the majority, Associate Justice George Sutherland asserted the power of municipalities to counteract through zoning "the evils of over-crowding," and to "exclud[e] from residential sections offensive trades, industries and structures likely to create nuisances."[20] At the same time, Justice Sutherland also recognized the power of zoning to guide local development in a very intentional way: "[The village's] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitively fixed lines."[21]

With its decision in *Euclid*, the Supreme Court ushered in an approach to local regulation that would become nearly universal, as so-called "Euclidean zoning" spread across the country.[22] Today, most

15. *See* John R. Nolon, Comment, *The Intersection of Environmental and Land Use Law: A Special Edition of the Pace Environmental Law Review, Including Commentaries and a Collection of Articles by Professor John R. Nolon: Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 829–30 (2006).

16. *Id.* at 830.

17. *Id.*

18. 272 U.S. 365, 389–90 (1926).

19. *Id.* at 379–84.

20. *Id.* at 388 (citing Welch v. Swasey, 214 U.S. 91, 106 (1909)).

21. *Id.* at 389.

22. Nolon, *supra* note 15, at 831.

American cities, villages, and towns follow some version of a zoning code, with the noteworthy exception of Houston, Texas, the only major U.S. city to forgo the zoning innovation.[23]

As zoning spread, it came under close scrutiny from courts and academics alike. Although the practice of segmenting a community into land-use districts remained—and, indeed, continues to remain—an effective mechanism for preventing nuisances and planning for development, zoning's critics and challengers raised important questions about equity, fairness, and sustainability. For instance, the Supreme Court of New Jersey in 1975 declared invalid a zoning ordinance in the township of Mount Laurel that prohibited all multi-family housing development from the community, thereby "mak[ing] it physically and economically impossible to provide low and moderate income housing in the municipality."[24] In striking the ordinance down, the court required municipalities to "make realistically possible an appropriate variety and choice of housing," including a "fair share" of housing opportunities for low- and moderate-income residents.[25] The so-called "Mount Laurel doctrine" has since received praise for addressing racial and economic inequities previously exacerbated by zoning.[26]

Still, concerns about inclusivity persisted into the twenty-first century, as land-use districts continued to separate work from home. As one scholar has pointed out as recently as 2009, an entrepreneur from a historic black neighborhood in Oklahoma City, Oklahoma, would have to travel some twenty blocks to open a business in the nearest commercial district.[27] Similarly, the twentieth-century practice of zoning work away from residential areas can exclude the work-from-home mother from the job market, by limiting opportunities for home-based businesses.[28] Today, zoning's widespread use has not foreclosed the many questions raised about its continued ability to represent a modern, innovative tool for communities.

23. Brady Getlan, Comment, *Houston Strong: A World Series Ring, But Is There a Problem with a Lack of Zoning Laws?,* 7 U. BALT. J. LAND & DEV. 63, 67 (2018).

24. S. Burlington Cty. NAACP v. Mount Laurel, 336 A.2d 713, 724 (N.J. 1975).

25. *Id.*

26. Daniel Meyler, Note, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 231–32 (2010).

27. Clowney, *supra* note 12, at 1084.

28. Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business*, 42 WM. & MARY L. REV. 1191, 1215–16 (2001).

B. The Twenty-First Century Solution: Modernization and Flexibility

Ultimately, this historical account of zoning raises two important points. First, zoning once originated as a modern, innovative solution to the twentieth-century problem of rapid industrialization.[29] The idea behind those early zoning codes was, at its most basic, to separate "incompatible" land uses within a community.[30] By segmenting a city into various land-use districts, zoning could avoid the "inherent conflict between uses that were not identical," such as single-family residential neighborhoods and large-scale industrial facilities, a conflict that did not exist before the Industrial Revolution.[31]

In this way, the history of zoning laws in the United States shows a need for modernization. The zoning codes that developed in the early to mid-twentieth century address the issues that were modern and relevant at that time, including over-crowding and unsanitary conditions arising from the manufacturing boom. By and large, they deem the commercial to be incompatible with the residential. While American urbanites scarcely may have enjoyed living near a post-Industrial Revolution business, such as a coal-powered brewery, city dwellers of today are more likely to crave the proximity to a diverse collection of businesses, including the dog-friendly neighborhood microbrewery.[32] In order to remain an innovative solution to the modern problems of urban development, zoning must adapt to twenty-first century conditions.

Second, the history behind modern zoning laws shows that local officials have broad authority, under the state's police power and the relevant enabling acts, to steer development within their borders in specific, intentional directions. With its decision in *Euclid v. Ambler Realty Co*., the Supreme Court directly asserted the power of Euclid's officials to guide industrial development "within definitively fixed lines."[33] This power comes, according to the Supreme Court, from the democratic duty of local officials to represent the will of their constituents.[34] Although this power has been qualified over the years, municipalities remain

29. *See* Salkin, *supra* note 8.

30. *Id.*

31. *Id.*

32. *See* Matthew Farina, *Millennials Stampede to Riverside, Five Points, Brooklyn*, FIRST COAST NEWS (Sept. 18, 2018), https://www.firstcoastnews.com/article/money/millennials-stampede-to-riverside-five-points-brooklyn/77-595773312 (arguing that "hip breweries" have made neighborhoods "havens" for millennials).

33. 272 U.S. 365, 389 (1926).

34. *See id.* (finding the ordinance is a "proper exercise of police power" by local officials, who are "presumably representing . . . and voicing" the will of their constituents).

empowered to place "well-intentioned roadblocks" in the way of small businesses and entrepreneurial innovations.[35]

This second point demonstrates a need for flexibility in modern zoning practices. The power to zone is inherently the power to restrict. In *Euclid*, local leaders sought to limit industrial development within its suburban environment.[36] In *Mount Laurel*, zoning ordinances served to prevent affordable housing development altogether.[37] In each of these cases, the zoning policy at issue represented a deliberate, intentional decision by the local government to pursue a desired goal that presumably reflected the ideals of the local population.[38] In order to reflect the ideals of a twenty-first century population, zoning codes will have to look beyond their twentieth-century roots. The concepts of "industrial," "commercial," and "residential" have grown increasingly more nuanced since the advent of Euclidean zoning, as advancements in social, economic, and technological forces merge these "spheres" together.[39] Americans today seek the flexibility to start a business in their home,[40] raise chickens in their backyard,[41] get married in refurbished, industrial warehouses,[42] and buy their food from a truck.[43] More than embracing millennial trends,

35. MCKENNA, *supra* note 9.

36. *See Euclid*, 272 U.S. at 388 ("Here . . . the exclusion is in general terms of all industrial establishments[.]").

37. *See* S. Burlington Cty. NAACP v. Mount Laurel, 336 A.2d 713, 724 (N.J. 1975) ("[B]y a system of land use regulation, [Mount Laurel made] it physically and economically impossible to provide low and moderate income housing in the municipality[.]").

38. *Euclid*, 272 U.S. at 389 (explaining that the village's leaders acted "presumably representing a majority of its inhabitants and voicing their will" to prevent development from "absorb[ing] the entire area for industrial enterprises"). In *Mount Laurel*, the policy to prohibit multi-family housing development served to protect the municipality's tax base. *See* Meyler, *supra* note 26, at 235. The New Jersey Supreme Court's decision to invalidate the ordinance has required local officials to look beyond economic factors and the will of the people in order to create a more equitable community. *See id.* at 225, 235 (quoting *Mount Laurel*, 336 A.2d at 726).

39. Garnett, *supra* note 28, at 1192, 1235–36.

40. Fiona Simpson, *Home Is Where the Work Is: The Rise of Home-Based Franchises*, FORBES (Nov. 26, 2018, 10:46 AM), https://www.forbes.com/sites/fionasimpson1/2018/11/26/home-is-where-the-work-is-the-rise-of-home-based-franchises/.

41. Susan Vela, *Boone County Teens Push for Belvidere Backyard Chicken Ordinance*, ROCKFORD REG. STAR (Nov. 1, 2018, 11:50 PM), https://www.rrstar.com/news/20181101/boone-county-teens-push-for-belvidere-backyard-chicken-ordinance.

42. Mary Hanbury, *Millennials' Preferences Are Leading to Major Changes in the Wedding Industry*, BUS. INSIDER (Aug. 15, 2018, 10:04 AM), https://www.businessinsider.com/millennials-ditch-traditional-weddings-2018-8.

43. Mitchell Northam, *City Council in N. Fulton Adjusts Zoning Laws to Allow Food Trucks*, ATLANTA J.-CONST. (Oct. 19, 2017), https://www.ajc.com/news/local/city-council-fulton-adjusts-zoning-laws-allow-food-trucks/SewTIKtyDPqRUBmrqlivCP/.

zoning codes that adopt a flexible approach to land-use definitions and districts can take an inclusive approach to planned development, welcoming the green thumb, the mom-preneur, and the modern-day small business owner.[44]

C. Moving Beyond the Euclidean Model

The preceding historical analysis does not suggest that zoning law has remained steadfastly tethered to its Euclidean roots. To be sure, zoning in many ways has evolved from its twentieth-century origins. Municipalities today often supplement or displace the strict Euclidean model with more modern approaches, such as performance zoning and mixed-use zoning.[45] These modern approaches allow for greater flexibility and attempt to address many of the concerns related to the obsolescence of Euclidean zoning laws.[46]

Nonetheless, there appear to remain two practical challenges for entrepreneurship. First, these alternatives to Euclidean zoning often supplant rigid land-use categories with subjective criteria, which can lead to a highly politicized process.[47] Such a process may adversely affect marginalized business owners or communities.[48] Second, and more relevant to the narrower focus of this Note, the categorical model of Euclidean zoning continues to guide communities in their approach to small business zoning.[49]

44. *See* Garnett, *supra* note 28; MCKENNA, *supra* note 9; Vela, *supra* note 41.

45. *See* Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 369 (1991); Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 ENVTL. L. REP. 11001, 11006 (2001).

46. *See id*. Performance zoning de-emphasizes the particular use of land in favor of criteria relating to traffic, emissions, and similar factors. Acker, *supra* note 45, at 364. In this way, performance zoning seeks to reform the rigid Euclidean system that deems land uses incompatible from one another. *See id.* at 370–71. Meanwhile, mixed-use zoning attempts to solve the same problem by combining land uses in limited areas. *See* Kublicki, *supra* note 45.

47. *See* Acker, *supra* note 45, at 388.

48. *See* Henry A. Span, Note, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8, 13, 15, 56, 59, 66 (2001) (discussing the uneven political playing field in zoning decisions, the disparate impact on those without political power who are excluded in exclusionary zoning decisions, and noting that public choice theory and recent history suggest "that municipalities and state legislatures cannot be trusted to address [exclusionary zoning] appropriately").

49. *See* Garnett, *supra* note 28, at 1205, 1208 (finding, as a general rule, zoning laws predetermine areas for different uses, with limited exceptions for professionals working from home, but not small businesses); Andrew J. Cates & Dwight H. Merriam*, Zoning for Home Occupations: "A Little Piece of Practical Poetry*," LAND USE INST.: PLAN., REG., LITIG., EMINENT DOMAIN & COMPENSATION, 1, 5, 7, 11 (2006) (ALI-ABA CLE materials discussing the Euclidean zoning model, and how most zoning ordinances today are close to it, in that they are concerned about protecting residential zones from home-based businesses).

By and large, local officials have created opportunities for small businesses like microbreweries by adopting narrow exceptions or amendments to categorical zoning laws. For instance, officials in York County, Virginia, which includes the historic communities of Williamsburg, Jamestown, and Yorktown, in 2014 approved a plan to allow small brewers to enter the county.[50] The policy amended the county's zoning code "by creating a specific category" for those businesses.[51] A similar approach, also common among municipalities considering the issue, involves moving microbreweries into a non-industrial category. An amendment adopted in Stafford, Virginia, between Washington, D.C., and Richmond, altered the categorical designation of microbreweries in this way.[52]

Thus, the current approach to zoning for entrepreneurship, particularly in the brewing industry, largely represents an attempt to fit new businesses into specific categories. Accordingly, there is precedent for creating new policies specific to small brewers and that such policies enhance the prosperity and vitality of local communities. Even more flexible solutions may exist—such as multi-use zoning or performance zoning—but as long as the concept of Euclidean categories underlies these flexible models, a community looking to foster innovative entrepreneurship must address the rigid, categorical system of its zoning code.

II. THE MODERN BREWING INDUSTRY

The following sections highlight one application of zoning laws that is particularly ripe for change, with the goal of inspiring a more flexible approach to small business development in general. The modern brewing industry has evolved like few other sectors in the United States' economy. At a time when big businesses—online, brick-and-mortar, or both—control much of the economy, growth in the brewing industry has come largely from small organizations.[53] While sales from major brewers fell by fourteen percent between 2007 and 2016, employment among the

50. Marie Albiges, *Interest in Microbreweries Prompts York County Officials to Discuss Zoning Change*, WILLIAMSBURG-YORKTOWN DAILY (Sept. 18, 2014), https://wydaily.com/local-news-old/2014/09/18/interest-in-microbreweries-prompts-york-county-officials-to-discuss-zoning-change/. *See Demographics*, YORK COUNTY, VA. (last visited Nov. 15, 2019), https://www.yorkcounty.gov/1389/Demographics.

51. Albiges, *supra* note 50.

52. Memorandum from the Bd. of Supervisors to the Stafford Cty. Planning Comm'n (June 12, 2013), http://plancomm.stafford.va.us/2013/06122013/Item9.pdf.

53. Derek Thompson, *Craft Beer Is the Strangest, Happiest Economic Story in America*, ATLANTIC (Jan. 19, 2018), https://www.theatlantic.com/business/archive/2018/01/craft-beer-industry/550850/.

brewing industry in general grew by 120 percent.[54] That growth came not from the big names like Anheuser-Busch, MillerCoors, and Heineken, but rather, from the smaller brewers behind the so-called "craft-beer revolution."[55] In taking the market by storm, these small brewers have fundamentally challenged the traditional definition of a brewery. Their small-batch brews and tourism-generating taprooms have broken the industrial mold, taking on more of a consumer-facing, retail form.[56] This section takes a closer look at the craft-beer revolution, beginning with a historical analysis of the United States brewing industry and then distinguishing today's small brewers from the large-scale, industrial operations that warranted relegation to the outskirts of communities.

A. The Prohibition Problem

The history of beer in the United States is even older than the country itself.[57] Bringing their taste buds with them, European settlers and immigrants introduced different styles of beer—first English ales, followed by lighter, German-style brews—to North America throughout early American history.[58] At its roots, the brewing industry in the United States closely resembled the brewing industry of today, as small, neighborhood breweries served local enthusiasts.[59] However, this model largely collapsed with the rise of Prohibition in the 1920s.[60] The nationwide ban on alcohol that lasted from 1920 until 1933, not surprisingly, sent the number of American breweries tumbling, from an estimated 1,300 breweries in 1916 to a mere "handful" after Prohibition ended.[61] Thus, the Eighteenth Amendment "crippled a thriving brewing industry" in the United States.[62]

54. *Id.*

55. *Id.*

56. Mary Ellen Shoup, *Beer Tourism Boom Brews Up Across the U.S., Showing No Signs of Slowing*, BEVERAGEDAILY (Jan. 24, 2017), https://www.beveragedaily.com/Article/2017/01/24/Beer-Tourism-boom-brews-up-across-the-US-showing-no-signs-of-slowing.

57. *Brewing History*, NAT'L MUSEUM OF AM. HIST., http://americanhistory.si.edu/topics/food-history/pages/brewing-history (last visited Jan. 25, 2019).

58. Ari Shapiro & Justine Kenin, *How the Story of Beer Is the Story of America*, NPR (July 3, 2017), https://www.npr.org/sections/thesalt/2017/07/03/532250762/how-the-story-of-beer-is-the-story-of-america.

59. *Id.*

60. *Id.*

61. Kate Vinton, *How Breweries like Coors, Yuengling and Anheuser-Busch Survived Prohibition*, FORBES (Nov. 4, 2015), https://www.forbes.com/sites/katevinton/2015/11/04/how-breweries-like-coors-yuengling-and-anheuser-busch-survived-prohibition/#642c96c0fabd.

62. *Id.*

What's more, the brewing industry that emerged after Prohibition looked "far different" from the neighborhood-based system that existed before it took effect.[63] The population of breweries that survived the debilitating era consisted primarily of large-scale, industrial operations.[64] In fact, many of the breweries that weathered the Prohibition storm will still sound familiar today. Anheuser-Busch, Coors, and Yuengling each survived, thanks to an ability to invest in other product lines.[65] Large brewers produced non-alcoholic products, such as sodas and ice cream, during Prohibition, then bought up smaller, struggling breweries to increase their market shares in the beer business.[66] Thus, while Prohibition stifled the American brewing industry as a whole, its impact particularly devastated the once-thriving small brewer.

This devastation ultimately helped to transform the brewing industry from local enterprise into big business. Following Prohibition, large-scale, industrial breweries remained dominant in the American market for generations. As recently as 2012, Anheuser-Busch and MillerCoors controlled a whopping ninety percent of beer production in the United States.[67] In fact, Anheuser-Busch alone accounted for more than fifty percent of the market.[68] Although still among the most recognizable names in the beer market, these brewing giants now represent just one side of the industry.

B. The Craft-Beer Revolution

A century after Prohibition, the small brewer is back. According to data from the Brewers Association, more than 6,000 breweries operated in the United States in 2017.[69] Of those, just seventy-one classified as "large non-craft" breweries.[70] The overwhelming majority of breweries in today's market fit into one of several categories of smaller brewers. The broadest of these categories is a craft brewer, which the Brewers

63. Adam Star, Note, *Getting a Handle on Growler Laws*, 39 SEATTLE U. L. REV. 1079, 1088 (2016).

64. Luke Basha, *It's Still 1970 Somewhere: How North Carolina's Small Craft Breweries Hope to "Craft Freedom" from Antiquated Statutes Friendly to Distributors and National Macrobreweries*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 340, 348 (2018) (noting that "[o]nly the largest brewers survived Prohibition").

65. Vinton, *supra* note 61.

66. Basha, *supra* note 64; *see also* Vinton, *supra* note 61.

67. Barry C. Lynn, *Big Beer, a Moral Market, and Innovation*, HARV. BUS. REV. (Dec. 26, 2012), https://hbr.org/2012/12/big-beer-a-moral-market-and-in.

68. *Id.*

69. *Number of Breweries*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/number-of-breweries/ (last visited Jan. 25, 2019).

70. *Id.*

Association defines as "a small and independent brewer."[71] More specifically, craft brewers produce no more than six million barrels of beer annually and maintain independent ownership.[72] Within the craft category, a "microbrewery" generally produces fewer than 15,000 barrels of beer per year.[73] Microbreweries often sell their products through distributors and on-site through a tap room.[74] Finally, a "brewpub" represents a hybrid "restaurant-brewery" that typically produces beer for sale in an on-site restaurant and bar.[75] In 2017, the United States had more than 3,800 microbreweries and more than 2,200 brewpubs.[76] In total, more than ninety-five percent of breweries in the United States operated as either a microbrewery or a brewpub during 2017.[77]

Despite their vast presence in the American marketplace, craft breweries have not displaced the large-scale, industrial breweries by any means. Even after years of growth, the craft beer segment represents less than thirteen percent of the overall beer market.[78] Nonetheless, the rise of the small-brewing community reveals a new dichotomy within the broader industry. Large brewers like Anheuser-Busch and MillerCoors thrive on volume, mass-producing their beer in industrial manufacturing facilities. Anheuser-Busch, for example, operates twenty-three breweries across the country,[79] including a 1.5-million-square-foot facility in Baldwinsville, New York;[80] a 1.6-million-square-foot facility in St. Louis, Missouri;[81] and a 1.2-million-square-foot facility in Williamsburg, Virginia.[82]

71. *Craft Brewer Definition*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/craft-brewer-defined/ (last visited Nov. 12, 2019).

72. *Id.*

73. *Craft Beer Industry Market Segments*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/market-segments/ (last visited Jan. 25, 2019).

74. *Id.*

75. *Id.*

76. *National Beer Sales & Production Data*, *supra* note 5.

77. *Id.*

78. *Id.*

79. *United States of Beer*, ANHEUSER-BUSCH, https://www.anheuser-busch.com/about/usa.html (last visited Jan. 25, 2019).

80. *Baldwinsville, N.Y.*, ANHEUSER-BUSCH, https://www.anheuser-busch.com/about/breweries-and-tours/baldwsinville-ny.html (last visited Jan. 25, 2019); *Anheuser Busch Baldwinsville NY*, NORTHEAST ENERGY EFFICIENCY PARTNERSHIP, https://neep.org/case-study/anheuser-busch-baldwinsville-ny (last visited Nov. 12, 2019).

81. *St. Louis, M.O.*, ANHEUSER-BUSCH, https://www.anheuser-busch.com/about/breweries-and-tours/st-louis-mo.html (last visited Jan. 25, 2019); *#14-17 Anheuser-Busch St. Louis Brewery*, FORBES, https://www.forbes.com/sites/davidewalt/2011/04/16/14-17-anheuser-busch-st-louis-brewery/#4f76aa5f2598 (last visited Nov. 12, 2019).

82. *Williamsburg, Va.*, ANHEUSER-BUSCH, https://www.anheuser-busch.com/about/breweries-and-tours/williamsburg-va.html (last visited Jan. 25, 2019); *Anheuser-Busch Invests $18*

Microbreweries and brewpubs lie at the other end of the brewing spectrum, substituting volume for quality by using non-traditional ingredients and innovative brewing techniques.[83] More than producers, these small brewers also serve their customers as retailers and destinations.[84] On-site sales account for approximately seven percent of total United States craft beer sales.[85] Microbreweries and brewpubs attract people to their locations with inviting tap rooms, unique restaurants, and in some cases, even boutique, overnight accommodations.[86] More than a "trendy hobby," beer tourism now draws ten million visitors to craft breweries each year.[87] In other words, the craft-beer revolution has taken small brewers so far beyond the manufacturing function that Americans actually want to travel to them, dine at them, and even stay overnight at their facilities. This evolution naturally begs the question whether craft brewers still belong in the industrial land-use category.

III. BREWERY ZONING: A SPECTRUM OF LAND USES IN AN INDUSTRIAL CATEGORY

With roots in the early twentieth century, many zoning codes in the United States arose at a time when the brewing industry looked fundamentally different than it does today. For instance, when the Supreme Court decided *Euclid v. Ambler Realty* in 1926, the number of American breweries had plummeted to an unprecedented low thanks to Prohibition.[88] Around the same time, the federal government promulgated the Standard Zoning Enabling Act (SZEA), which provided a model for states to use when delegating their zoning authority to municipalities.[89] Indeed, many states and municipalities subsequently followed the guidance from *Euclid* and the SZEA to implement their own zoning policies in the years that followed.[90] With Prohibition in full swing, local governments first codified protections that separated their residents from industrial facilities at the precise moment in American history when the brewing industry was at its most industrial. The loss of neighborhood

Million in Local Brewery, JAMES CITY COUNTY VA., https://jamescitycountyva.gov/CivicAlerts.aspx?AID=1321&ARC=2240 (last visited Nov. 12, 2019).

83. *Craft Brewer Definition*, *supra* note 71.

84. Shoup, *supra* note 56.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See National Beer Sales & Production Data*, *supra* note 5 (reporting zero breweries between 1920 and 1931).

89. Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U.L. REV. 383, 385 (2004).

90. *Id.*

breweries during Prohibition could not have come at a worse time for today's small brewers looking to return to their neighborhood roots.

As small brewers return, the incongruence between traditional zoning practices and the modern brewing industry has become painfully apparent to entrepreneurs across the country. This incongruence is perhaps best illustrated with a recent case study from Rockwall, Texas, where even present-day mechanisms for modernization and flexibility in the local zoning code struggled to overcome the rigid land-use definitions.

A. The Siren Rock Saga

In early 2018, a husband-and-wife team wanted to open the first brewery in downtown Rockwall, a growing city east of Dallas with a historic downtown district.[91] At the time, the city's two existing breweries had set up shop along an interstate highway corridor, an area zoned for "light industrial" land use.[92] Cory and Eva Cannon had a different vision for Siren Rock Brewing Company. Speaking to a local news team about the project, Cory Cannon said, "We really wanted to be downtown. We wanted to be part of the community, part of the downtown district, so that meant we had to go and have the [city's zoning ordinance] rewritten."[93] After the Cannons worked with the city for four months, local leaders passed an amendment to the zoning code that would allow breweries in the popular downtown district.[94]

Still, Siren Rock would need a specific-use permit to actually open in the downtown district.[95] For that, the Cannons applied to the planning and zoning commission and attended a public hearing.[96] Again, Cory Cannon described his vision for the business. Rather than an industrial plant, Siren Rock would serve as "a community hub," with an "open concept and family friendly" atmosphere that had the potential to "draw

91. Allie Spillyards, *Plans for Rockwall's First Downtown Brewery in Limbo*, NBC 5 DFW (July 18, 2018), https://www.nbcdfw.com/news/local/Plans-for-Rockwall-First-Brewery-Limbo-488569531.html?fbclid=IwAR2ox-GAfElDUucc9nqsbVs4Olt6yJLccQcWxakAs3X5Wfdhj_XypjquzM2I; CITY OF ROCKWALL, http://www.rockwall.com/about/index.asp (last visited Jan. 26, 2019).

92. Landon Fisher, *Siren Rock Brewery Hits Another Roadblock Despite Overwhelming Community Support*, ROCKWALL CTY. HERALD BANNER (July 18, 2018), https://www.rockwallheraldbanner.com/news/siren-rock-brewery-hits-another-roadblock-despite-overwhelming-community-support/article_be2a4500-8ad5-11e8-b90c-972d6e1c0865.html [hereinafter "*Siren Rock Roadblock*"].

93. Spillyards, *supra* note 91.

94. *Id.*

95. ROCKWALL, TEX., PLANNING AND ZONING COMM'N, MINUTES (June 26, 2018), http://www.rockwall.com/Meetings/PlanningMinutes/2018/06.26.2018_Signed.pdf.

96. *Id*.

tourism to the downtown area."[97] However, the commission denied Siren Rock's application.[98]

Following the denial, the Cannons continued to negotiate with the city.[99] In order to obtain the permit over a planning and zoning commission denial, Siren Rock needed the Rockwall City Council to vote by "super-majority" to override the commission's decision.[100] During the City Council's next meeting, local citizens spoke up in support of the craft brewery, and the Council ultimately voted by a six to one super-majority to approve the permit for Rockwall's first downtown microbrewery.[101]

The story of Siren Rock shows what many brewing entrepreneurs go up against in their local communities. Despite "overwhelming community support," the microbrewery project almost never came to fruition because of zoning laws that relegated breweries to industrial areas.[102] By restricting breweries to industrial zones, ordinances like the one in Rockwall adhere to an outdated, traditional definition of breweries, in which the facility is merely a means to an end. Siren Rock and its enthusiastic supporters, on the other hand, show that today's microbreweries and brewpubs create spaces that are themselves an end: They provide "community hubs" that welcome the public and add to downtown entertainment.[103] In this way, zoning codes that fail to distinguish between large-scale, industrial breweries and their innovative, independent counterparts not only challenge small brewers, but also limit opportunities for tourism, economic development, and revitalization in their downtown districts.[104]

B. Inconsistent Approaches to Modernization and Flexibility

In fairness, municipalities have not altogether ignored the craft-beer revolution. Many communities have grappled with—and continue to

97. *Id.*

98. *Siren Rock Roadblock*, *supra* note 92 (attributing the permit's failure to "unusual" opposition from the mayor).

99. Landon Fisher, *Siren Rock Brewing Co. gets 'OK' from city*, ROCKWALL CTY. HERALD BANNER (Aug. 8, 2018), https://www.rockwallheraldbanner.com/news/siren-rock-brewing-co-gets-ok-from-city/article_f8d35642-9b51-11e8-8dff-2fcfb39cb93d.html [hereinafter "*Siren Rock 'OK'*"].

100. ROCKWALL CITY COUNCIL, MINUTES FROM REGULAR CITY COUNCIL MEETING, 6 (Aug. 6, 2018), http://www.rockwall.com/meetings/CouncilMinutes/2018/08-06-18%20cc%20mtg%20mins.pdf.

101. *Id.* at 7, 9.

102. *Siren Rock Roadblock*, *supra* note 92.

103. *See* MINUTES, *supra* note 100.

104. *See* C.J. Hughes, *How Craft Breweries Are Helping to Revive Local Economies*, N.Y. TIMES (Feb. 27, 2018), https://www.nytimes.com/2018/02/27/business/craft-breweries-local-economy.html (asserting the ability of craft breweries to "giv[e] new fizz to sleepy commercial districts").

consider—the decision to permit small brewers beyond the industrial outskirts of town. In Charlotte, North Carolina, city councilors passed a text amendment to their zoning code to allow breweries beyond industrial areas in 2013.[105] Since the amendment took effect, the small-brewing scene "has exploded" in Charlotte, driving "ancillary development" in commercial areas along with the rise of microbreweries.[106] Similar amendments have earned approval in Enterprise, Alabama;[107] Smyrna, Georgia;[108] and Fairfax, Virginia;[109] to name a few. These amendments pave the way for exciting opportunities for business owners, residents, and visitors alike, but small brewers continue to face challenges in much of the United States, even where changes have taken effect.

These challenges stem largely from inconsistency in municipalities' approaches to modernization and flexibility. In Muncie, Indiana, microbrewers have campaigned for a change to the city's zoning code, which allows brewpubs to operate in commercial districts but restricts microbreweries to industrial areas, along with large-scale breweries.[110] The ordinance amended by Siren Rock's efforts in Rockwall, Texas, previously allowed wineries to operate downtown but refused to extend the same permission to small brewers.[111]

Ultimately, this survey of local approaches to brewer zoning reveals two primary opportunities for achieving modernization and flexibility for small brewers. First, municipalities can amend their zoning codes to distinguish between small-scale, commercial breweries and large-scale, industrial operations. Second, in amending their zoning codes, municipalities can account for the diverse forms that these innovative businesses take by broadening the definitions of permissible businesses in a given commercial district. Together, these changes will transform an archaic,

105. Ashley Fahey, *As Bold Rock Hard Cider Pushes for Zoning Change, City Council Has Questions*, CHARLOTTE BUS. J. (Jan. 17, 2018), https://www.bizjournals.com/charlotte/news/2018/01/17/as-bold-rock-hard-cider-pushes-for-zoning-change.html.

106. *Id.*

107. Leah Lancaster, *City Approves Micro-Breweries Ordinance*, ENTERPRISE LEDGER (Jan. 3, 2019), https://www.dothaneagle.com/enterprise_ledger/news/city-approves-micro-breweries-ordinance/article_dc2ee55c-0ecd-11e9-9827-0faa14f33863.html.

108. Haisten Willis, *Smyrna Breweries Might Be On The Way*, COBB CTY. COURIER (Dec. 19, 2018), https://cobbcountycourier.com/2018/12/smyrna-breweries/.

109. Brian Trompeter, *Fairfax Supervisors Open Door to More Craft-Brewing Operations*, INSIDE NOVA (Mar. 6, 2017), https://www.insidenova.com/news/business/fairfaxsupervisors-open-door-to-more-craft-brewing-operations/article_d1e6fd02-027a-11e7-9338-2b6d75d94c80.html.

110. Matthew Muncy, *New Resolution Could Open Commercial Zoning to Microbreweries in Downtown Muncie*, IND. ON TAP (Mar. 14, 2018), https://indianaontap.com/news/new-resolution-could-open-commercial-zoning-to-microbreweries-in-downtown-muncie/.

111. *Siren Rock Roadblock*, *supra* note 92.

one-size-fits-all approach into a modern, flexible policy that fosters entrepreneurship, innovation, and economic development within the community.

IV. INGREDIENTS OF CHANGE: A PRECEDENT FOR NEW APPROACHES TO BREWERY REGULATION

As craft beer has boomed, it has run up against stale regulations at all levels of government.[112] In fact, change has already brewed at the federal and state levels, offering a logical path forward for local zoning regulations. This section explores the modernization and flexibility that have occurred in other aspects of brewery regulation, which provide a precedent for distinguishing between small and large brewers at the local level.

In the last decade, numerous articles have analyzed the web of regulations surrounding breweries in an effort to encourage changes hospitable to the craft-beer revolution.[113] These articles focus predominantly on the so-called "three-tier system" for alcohol distribution, which arose after the repeal of Prohibition.[114] Like local zoning laws, the three-tier system has long challenged small brewers by preventing the vertical integration of beer—that is, consolidating the manufacture, distribution, and retail sale of beer into one business model.[115] Thus, the three-tier system and its reforms represent a logical starting point for the argument in favor of craft brewing. Reforms to the three-tier system, however, do not foreclose the need for change when regulatory challenges continue to exist at the local level. Rather, the three-tier system and its subsequent reforms provide a model for the changes that should occur locally. In calling for this type of local application, this Note takes a new step in the argument for small brewers.

A. The Three-Tier System

Briefly put, the three-tier system prohibits vertical integration of the alcohol-distribution process.[116] Instead, it separates this process into three distinct steps: manufacture, distribution, and retail.[117] Under this system, a manufacturer of beer must sell its product to a distributor, who must

112. *See* Thompson, *supra* note 53.

113. *See* Ryan R. Lee, *Prohibition's Hangover: How Antiquated Illinois Beer-Law is Abused by Big Beer to the Substantial Detriment of Craft Breweries*, 37 N. Ill. U. L. Rev. 144, 147 (2016); *see also* Star, *supra* note 63, at 1080.

114. Star, *supra* note 63, at 1083.

115. Lee, *supra* note 113, at 151 (calling for reform to the three-tier system to protect small brewers in Illinois).

116. Star, *supra* note 63, at 1083.

117. *Id.*

then pass it on to a retailer for sale to the consumer.[118] The manufacturer, the distributor, and the retailer must operate completely independent of one another.[119]

Under the three-tier system, brewers fall plainly into the manufacturing category.[120] As the makers of beer, brewers accordingly must constrain their activities to the first phase of the process, ceding to other businesses control over the distribution and sale of their product.[121] As a result, the three-tier system stands fundamentally incongruent to the craft-brewing business model, which often involves self-distribution and direct-to-consumer sale through an on-site tap room or restaurant.[122]

Like many local zoning codes, the three-tier system originated when the brewing industry was at its most industrial. Following the repeal of Prohibition, supporters of the temperance movement proposed the three-tier system as a way to prevent breweries from abusing their newly re-established position in the marketplace.[123] In particular, those opposed to vertical integration wanted to dismantle the "tied-house" model, in which a brewery exerted considerable influence over retailers, either by direct ownership or some other clout.[124] Early proponents of the three-tier system primarily sought to address "large brewery abuses," yet the system gave government significant power to regulate the entire beer market.[125]

Today, the three-tier system continues to regulate the beer market to some extent at both the federal and state levels. Following the end of Prohibition in 1933, the federal government adopted the Federal Alcohol Administration Act ("Act"), which explicitly prohibits tied houses.[126] Separating the industry into at least two tiers, the Act makes it unlawful for a brewer to hold an interest in or otherwise unfairly influence a retailer of alcoholic beverages.[127]

At the state level, the three-tier system goes much further.[128] Every state maintains some form of the three-tier system, licensing brewers,

118. *Id.*

119. *Id.*

120. Brian D. Anhalt, Comment, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 172 (2016).

121. *Id.*

122. *Id*. at 188.

123. *Id.* at 171.

124. *Id.* at 171–72.

125. Anhalt, *supra* note 120, at 173.

126. *See* 27 U.S.C. § 205(b) (2018).

127. *Id.*

128. Andrew Tamayo, Comment, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C.L. REV. 2198, 2206 (2010).

distributors, and retailers separately.[129] Under these regulatory schemes, beer-related businesses must apply for one of three permit types: a brewery permit, a wholesaler permit, or a retail permit.[130] The type of permit then determines the type of activities that those businesses can engage in.[131]

By identifying brewers as little more than manufacturers, the three-tier system's rigid delineation is akin to the widespread zoning of brewers as industrial or light industrial operations.[132] Both types of regulations box breweries into a traditional definition that reflects the post-Prohibition, twentieth-century mold.[133] Just as brewers have broken the industrial mold with new business models that welcome the public into a commercial or retail space, they have also grown beyond the manufacturing role.

B. Modernization and Flexibility: The Brewpub and Microbrewery Exceptions

As this transformation among brewers has occurred, change has begun to brew with respect to federal and state tied-house regulations. Federally, the Alcohol and Tobacco Tax and Trade Bureau (TTB)'s application for a federal brewery license now contains special provisions for applicants seeking to operate a brewpub.[134] These provisions were first added to the application in 2002.[135] Similarly, a majority of states now exempt small brewers from the three-tier system's rigid restrictions.[136] These exemptions generally take one of two basic forms: a brewpub license or a microbrewery license. A typical example of a brewpub exception comes from New Hampshire:

> I. A brew pub license shall authorize the licensee to manufacture beer or cider in quantities not to exceed 2,500 barrels annually primarily for consumption on the licensed premises.

129. Star, *supra* note 63, at 1084 (identifying Washington as the "only partial exception" to the three-tier system).

130. Tamayo, *supra* note 128, at 2204.

131. *Id.* ("Holders of brewery permits can only sell to holders of wholesaler permits (with some exceptions), and holders of wholesaler permits can only sell to other licensed wholesalers or retailers.").

132. Anhalt, *supra* note 120, at 166.

133. Tamayo, *supra* note 128, at 2224.

134. *See* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, BREWER'S NOTICE, OMB NO. 1513-0005, https://www.ttb.gov/forms/f513010.pdf.

135. U.S. DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, INDUSTRY CIRCULAR, NO. 2002-1 (2002), https://ttb.gov/industry_circulars/archives/2002/02-01.html.

136. Star, *supra* note 63, at 1086.

> II. A brew pub licensee may sell beer or cider manufactured on the premises . . . to individuals for on-premises and off-premises consumption and to New Hampshire licensed retailers and wholesalers. A brew pub shall maintain a full service (sic) restaurant. . . .[137]

Likewise, a typical example of a microbrewery exception comes from Michigan, which uses the following definition: "'Micro brewer' means a brewer that manufacturers in total less than 60,000 barrels of beer per year and that may sell the beer manufactured to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises and to retailers . . . ."[138]

In each case, the licensed brewer may sell its product direct-to-consumer, avoiding the three-tier system altogether.[139] As defined by Michigan, microbrewers also may self-distribute their product directly to retailers, avoiding the second tier of the traditional manufacturer-distributor-retailer system.[140] Finally, each statute recognizes the small-scale nature of brewpubs and microbreweries by limiting the self-distribution and direct-to-consumer privileges to those brewers that fall beneath a production cap.[141] Ultimately, these laws make it possible for small brewers to operate within the rigid landscape of the three-tier system.[142]

C. Application to Zoning

Although the brewpub and microbrewery laws now common at the state level inject modernity and flexibility into an outdated regulatory scheme, these legal innovations only represent half of the equation. They no doubt allow small brewers to obtain a business license hospitable to their innovative retail and distribution models, but they do not give those licensees a place to actually do business. For many small brewers looking to take advantage of the craft-beer revolution, zoning remains an "often overlooked" yet particularly challenging step in the start-up process.[143] As a result, an otherwise prepared and license-able brewer may struggle to find a "properly zoned, yet desirable, location" because of the outdated

137. N.H. REV. STAT. ANN. § 178:13 (2018).

138. MICH. COMP. LAWS § 439.1109(5) (2018).

139. Star, *supra* note 63, at 1086.

140. *Id*. at 1087.

141. *Id.*

142. Justin M. Welch, Note, *The Inevitability of the Brewpub: Legal Avenues for Expanding Distribution Capabilities*, 16 REV. LITIG. 173, 176 (1997) (describing brewpub licenses as a "narrow exception" to tied-house statutes).

143. Chip Grieco, *Location, Location, Location*, N.Y. STATE BREWERS ASS'N (July 6, 2015), https://newyorkcraftbeer.com/2015/07/location-location-location/.

land-use regulations that remain at the local level.[144] For this reason, the revisions made at the federal and state levels serve as a powerful guide for local leaders.

The exceptions to the three-tier system represent appropriate models for municipal officials for at least three reasons. First, the brewpub and microbrewery exceptions demonstrate that government can make room for these small businesses in their regulatory schemes without throwing out the entire system.[145] To achieve modernization and flexibility, municipalities need not reclassify brewers as a whole, thereby allowing a flood of industrial activity into their commercial districts. On the contrary, municipalities can achieve modernization and flexibility merely by acknowledging the existence of different forms of brewing operations—and regulating those forms accordingly. As at the federal and state levels, municipalities can transform a one-size-fits-all approach into an adaptive system that accounts for the different dynamics of small brewers.

Second, the brewpub and microbrewery exceptions assert that, through small brewers, brewing has evolved beyond its industrial, manufacturing roots.[146] By allowing brewpubs and microbrewers to take on the part of retailer and distributor, the exceptions to the three-tier system recognize that these small brewers do more than manufacture.[147] Thus, it makes little sense to confine these businesses to industrial zones traditionally reserved for manufacturing facilities. As manufacturers, distributors, and retailers, modern-day small brewers require locations that are conducive to their holistic business models.

Third, the motivations behind the brewpub and microbrewery exceptions mirror the motivations for change at the local level. The exceptions to the three-tier system came about as a response to the innovative entrepreneurship of small brewers and demand from the public.[148] These forces continue to drive the need for comparable modernization and flexibility in local zoning laws. In recent years, overall beer consumption in the United States has fallen.[149] According to the Brewers Association, overall sales of beer in the United States declined by 1.2 percent in 2017.[150] Meanwhile, sales of craft beer actually rose four percent during

144. *Id.*

145. *See* Welch, *supra* note 142 (describing brewpub licenses as a "narrow exception" to tied-house statutes).

146. *Id*.

147. *Id*.

148. *Id*. at 177.

149. Thompson, *supra* note 53.

150. *National Beer Sales & Production Data*, *supra* note 5.

that time.[151] Furthermore, the number of breweries reached an all-time-high in 2017, with over 6,300 breweries operating in the United States.[152] Of those, more than 6,200 were craft breweries.[153] With both sales of craft beer and the number of breweries up, the entrepreneurial spirt of small brewers and the demand for their product from the public appear alive and well.

Indeed, some communities have already begun to take the federal and state models to heart. In 2017, officials in New Rochelle, New York, passed an amendment to the city's zoning code to allow manufacture and retail on the same site in the downtown district.[154] Analogous to the state-level brewpub and microbrewery exceptions, this zoning amendment puts a stamp of approval on the small-brewing business model that combines the traditional phases of the brewing business. More recently, in 2018, municipal planners in Mathews County, Virginia, approved a proposal to allow small breweries in its own downtown districts.[155] Taking after the brewpub and microbrewery exceptions to the three-tier system, the Mathews County proposal allows both manufacture and retail to take place on the premises, provided that the brewery comply with maximum production caps.[156] There, the planning director pointed to the adequacy of federal and state regulations as a decisive factor in its consideration of the zoning amendment.[157] As these two local examples show, the federal and state approaches to small-brewer regulation translate aptly to the local level.

D. Brewing Change for Local Communities

By applying the concepts of these brewpub and microbrewery exceptions to local land-use control, municipalities can advance economic development, innovation, and diversity in their communities. Regardless of their industry, small businesses represent "the cornerstone or our local

151. *Id.*

152. *Id*.

153. *Id.*

154. Dan Reiner, *New Ro Brewery? City Zoning Welcomes Beer Makers*, LOHUD (July 22, 2017), https://www.lohud.com/story/news/local/westchester/new-rochelle/2017/07/22/new-rochelle-brewery-zoning/489986001/.

155. Sherry Hamilton, *Mathews Planners Endorse Microbrewery Zoning Change*, GLOUCESTER-MATHEWS GAZETTE-J. (Feb. 21, 2018), http://www.gazettejournal.net/index.php/news/news_article/mathews_planners_endorse_microbrewery_zoning_change.

156. *Id.*

157. *Id.*

and national economies."[158] They have the power to create jobs,[159] develop environmentally friendly business practices,[160] revitalize downtrodden neighborhoods,[161] and further economic justice.[162]

Small brewers, in particular, stand capable of energizing their local economies through tourism. In 2015, researchers at Grand Valley State University in Michigan found that craft-beer tourism generates $7.05 million in spending annually in Kent County, a western Michigan county that includes the city of Grand Rapids.[163] According to the study, this tourism further generates more than $5.1 million in indirect spending in the community.[164] This economic impact creates jobs and additional earnings for residents of the county, as craft-beer tourists spend money not just at small breweries, but also on lodging, food, transportation, retail, and entertainment.[165] For the nation as a whole, the Brewers Association estimates that the craft-brewing industry generated $79.1 billion for the United States economy in 2018, as well as 550,000 jobs.[166] As proven agents of revitalization, small brewers have the unique opportunity to further local economic development and bring prosperity to their communities.[167]

CONCLUSION

Beyond the economic benefits of fostering small business growth, supporting small brewers with modernity and flexibility in land-use regulation will correct a long-overlooked incongruence in zoning law. In continuing to restrict breweries of all sizes, shapes, and forms to industrial districts, many modern zoning codes perpetuate outdated

158. Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 250 (1997).

159. *See, e.g.*, Press Release, U.S. Small Bus. Admin., Small Businesses Drive Job Growth in the U.S. (Apr. 25, 2018), https://www.sba.gov/advocacy/small-businesses-drive-job-growth-us.

160. *See, e.g.*, Sushil Cheema, *Going Green Is Growing Important to Small Businesses*, ENTREPRENEUR (Apr. 18, 2012), https://www.entrepreneur.com/article/223377.

161. *See* Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 200–01 (1997).

162. *Id.* at 202.

163. DAN GIEDEMAN, PAUL ISELY & GERRY SIMONS, THE ECONOMIC IMPACT OF BEER TOURISM IN KENT COUNTY, MICHIGAN 1 (2015), https://www.gvsu.edu/cms4/asset/7A028470-B5EB-E9D6-C17010124D94A01E/beer_tourism_report_october_2015.pdf.

164. *Id*. at 8.

165. *Id.* at 7–8.

166. *Economic Impact*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/economic-impact-data/ (last visited Apr. 21, 2020).

167. *See* Hughes, *supra* note 104.

circumstances and concerns. These codes fail to distinguish between different types and sizes of breweries, largely to the detriment of innovative entrepreneurs seeking to reinvest in downtown.

More than ripe for change, these zoning laws also have a logical path forward to modernization and flexibility. Federal and state innovations, such as the brewpub and microbrewery exceptions to the rigid, Prohibition-era three-tier system, provide a useful model for adaptation at the local level. These regulations recognize the small-scale and non-industrial nature of craft breweries and create opportunities for those businesses to operate within a system that still protects against abuses by large-scale, industrial brewers.

Ultimately, these exceptions provide merely a starting point for change. Although largely beyond the scope of this Note, rethinking the categorical model altogether may allow communities to embrace a forward-thinking approach to zoning for entrepreneurship. As the inventory of new business models that run up against local zoning laws increases, the most efficient way forward may not be a categorical exception for each business. The time has come to embrace entrepreneurship and to plan ahead for small business growth.

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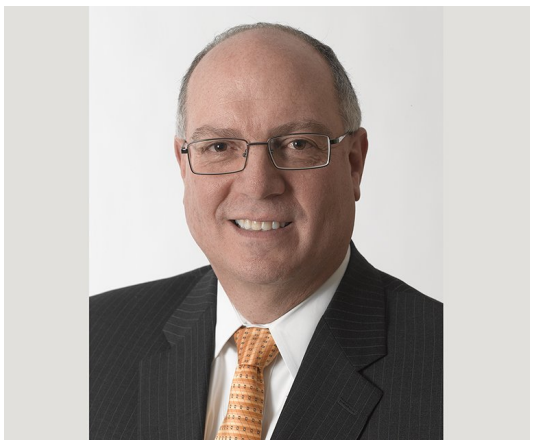

Anthony S. Guardino

EXPERT OPINION

Court of Appeals to Focus on 'Prior Nonconforming Uses'

The New York Court of Appeals has agreed to hear a case involving a decades-old sand mine on Long Island and a town's ability to block the mine's continuing operation.

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9 minute read

Expert Opinion

By Anthony S. Guardino

A "prior nonconforming use" is a use of property that existed before the enactment of a local zoning restriction that prohibits the use. New York law has long made it clear that a prior nonconforming use in existence when a zoning ordinance is adopted generally is constitutionally protected even though the ordinance may explicitly ban the activity that is the subject of the prior nonconforming use. *See, e.g., People v. Miller*, 304 N.Y. 105 (1952).

Courts and legislators disfavor the broad application of the prior nonconforming use doctrine, as the law generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York is aimed at their reasonable restriction and eventual elimination. *See, e.g., Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411 (1996). Nevertheless, property owners engaging in a particular activity may have a vested right to use their land for that activity, and prior nonconforming uses generally are permitted to continue. *See, e.g., Matter of Rudolf Steiner Fellowship Found. v. De Luccia*, 90 N.Y.2d 453 (1997).

A case now before the New York Court of Appeals may determine the scope of the protection afforded to property owners by the prior nonconforming use doctrine.

Should the court affirm the decision by the Appellate Division, Third Department, in *Matter of Town of Southampton v. N.Y. State Dept. of Envtl. Conservation*, 194 A.D.3d 1310 (3d Dept. 2021), *appeal granted*, 2022 N.Y. Slip Op. 61775 (Feb. 15), property owners operating their businesses under prior nonconforming uses may face an onslaught of municipal efforts to close them down.

If, however, the court rejects the Third Department's conclusion, then property owners will be able to continue to rely on the longstanding doctrine to protect their property, their investments and their businesses.

Background

The case involves Sand Land Corporation, the owner of a sand and gravel mine located on an approximately 50-acre parcel of property in a residential zoning district in the Town of Southampton on Long Island.

In 2014, Sand Land applied to the New York State Department of Environmental Conservation (DEC) for a modification permit seeking a vertical and horizontal expansion of its mining operations. The proposed horizontal expansion consisted of 4.9 acres—1.9 acres of previously unmined land and three acres known as the "stump dump" (i.e., a landfill site consisting of wood waste, such as tree stumps). The vertical expansion sought to mine 40 feet deeper to a level of 120 feet above mean sea level.

The DEC denied the permit and Sand Land requested a hearing. The DEC and Sand Land thereafter entered into a global settlement agreement under which the DEC, among other things, agreed to issue permits to Sand Land, including one authorizing it to deepen the mine by 40 feet.

In April 2019, the town, several civic organizations and three neighboring landowners filed suit seeking to annul the DEC-Sand Land settlement agreement and the permits issued by the DEC. Among other things, they relied on the mining prohibition contained in the town's zoning code.

The Supreme Court, Albany County, dismissed the petition in September 2020, and the dispute reached the Third Department. A divided appellate court reversed.

The Third Department's Decision

The Third Department began its discussion of the substantive issues by pointing to the New York State Mined Land Reclamation Law, ECL 23-2701 et seq., and explaining that it grants the DEC "broad authority" to regulate the mining industry in the state. The appellate court observed that the law seeks to encourage a sound mining industry, provide for the management of depletable resources and assure the reclamation of mined land. In order to assure this uniformity, the appellate court continued, the law contains an express supersession clause that provides that the Mined Land Reclamation Law shall supersede all "local laws relating to the extractive mining industry" (ECL 23-2703(2)).

The Third Department then emphasized that the Mined Land Reclamation Law does not supersede every single local law but only those relating to the industry. In particular, it noted that the Court of Appeals, in *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987), clarified the applicability of the supersession clause and differentiated between local laws pertaining to the actual operation and process of mining, which are subject to the clause, and other local laws that fall outside its preemptive orbit. The Third Department added that, in determining that zoning ordinances are not subject to the clause, the court in *Frew Run* stated that to do otherwise would drastically curtail a town's power to adopt zoning regulations.

The Third Department acknowledged that a mine such as Sand Land's generally is considered to be a legal prior nonconforming use and is "permitted to continue, notwithstanding the contrary provisions" of an ordinance. It then noted that "[c]rucially," ECL 23-2703(3) provides, "No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." This statute, the appellate court continued, is directed at a specific geographic area (e.g., Suffolk County, the location of the Sand Land mine, which is an area with a population of over one million that draws its primary drinking water from a sole source aquifer) and where the town's zoning laws prohibit mining (as is the situation in the Town of Southampton).

The Third Department rejected the contention that ECL 23-2703(3) applies only to new permits or permits seeking substantial modifications and ruled that it applies to all applications received from an area protected under ECL 23-2703(3). According to the Third Department, the statute "clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed." In this case, where the town's laws prohibit mining, the DEC "cannot process the application, let alone issue the permit," the appellate court ruled. Therefore, it concluded, the DEC's issuance of the permits to Sand Land contravened ECL 23-2703(3) and its actions in doing so were arbitrary and capricious.

The Dissent

Justice Stan L. Pritzker strongly disagreed with the majority's ruling on the validity of the DEC's permits.

Justice Pritzker noted that, with respect to ECL 23-2703(3), the Town of Southampton is within the protected area and the town's zoning laws generally prohibit mining within its borders. However, Pritzker declared, Sand Land has a "constitutionally protected prior nonconforming use"—which has been recognized both by the Appellate Division, Second Department, in *Matter of Sand Land Corp. v. Zoning Board of Appeals of Town of Southampton*, 137 A.D.3d 1289 (2d Dept. 2016), and by the town itself by virtue of its issuance of nonconforming use certificates of occupancy in 2011 and 2016.

Therefore, Pritzker said, although the town prohibits new mining operations within its borders, it has both recognized and permitted mining within "the area proposed to be mined," as provided by ECL 23-2703(3), as a legitimate prior nonconforming use.

Pritzker reasoned that the majority's interpretation of ECL 23-2703(3) as applying to all permits was "too broad" and could render the law unconstitutional. Specifically, according to Pritzker, "if this statute applies to all mining permits, including those based on prior nonconforming uses, then a municipality within the statutorily protected areas could effectively zone out the active and permitted mines throughout covered areas by simply legislating that no mining is permitted."

In Pritzker's view, although a municipality could do so for new mines (and could even reasonably curtail and amortize prior nonconforming uses), "it cannot terminate these uses in a wholesale fashion without running afoul of the Takings Clause."

Pritzker reasoned that his interpretation of the law allowed it to achieve its remedial environmental goal while still recognizing and protecting vested constitutional rights. For example, he said, although the DEC would not be prohibited from processing a modification permit relative to a mine operating as a prior nonconforming use, it would be prohibited from processing a permit for a new mine, or one seeking to expand outside of a prior nonconforming use, within a protected area.

Pritzker concluded that the DEC's interpretation as to the statute's applicability was correct and the lower court's judgment should be affirmed.

Conclusion

That the Court of Appeals will be considering the law of prior nonconforming uses in a case involving a sand mine may complicate how it ultimately resolves the scope of the doctrine. On the one hand, the court has recognized the "unique" character of quarry mining over the years and has admitted that it "colors our analysis of vested rights and nonconforming use." *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010); *see also Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88 (2009); *Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278 (1980).

On the other hand, some opponents of the Sand Land mine, seeking to base their objections on environmental concerns, argue that its continued operation threatens the groundwater by removing filtering layers of rock and soil—a complaint that many argue is without merit or that could be addressed without a complete prohibition of the mine's operation.

In any event, it would appear that the dispute over Sand Land's mine is a clear case for the court to reiterate the constitutional basis for the prior nonconforming use doctrine, as Justice Pritzker observed in his dissent. The state's multi-million dollar mining industry, and other businesses operating under the doctrine, deserve nothing less.

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PRACTICE DATA CENTERS

6

Zoning for Data Centers and Cryptocurrency Mining

By David Morley, AICP

Data centers are the physical facilities where the internet lives. Fundamentally, they consist of networked computer systems used for data storage and processing, along with supporting equipment, such as batteries, back-up power generators, and cooling devices. Modern data centers are the direct descendants of the, so-called, *telecom hotels* that began springing up in downtowns in the late 1990s to accommodate the rapid expansion of the commercial internet and, before that, of automated telephone exchange facilities that made it possible to place landline telephone calls across a city, the nation, or the world (Evans-Cowley 2002).

An emerging segment of the data center market consists of facilities dedicated in whole or part to "mining" cryptocurrency. A cryptocurrency is a decentralized digital currency that uses encrypted data strings to denote individual units, or coins, and a peer-to-peer database known as a blockchain to maintain a secure ledger of transactions. Several of the most popular cryptocurrencies, most notably Bitcoin, require extremely complex computations to verify each transaction and add a record, or block, for that transaction to the blockchain. Whoever verifies a transaction first receives a new cryptocurrency coin as a reward. While, theoretically, anyone with a computer server can "mine" new coins by helping to verify these transactions, large-scale cryptocurrency mining requires a massive amount of computing power.

This article explores the reasons why cities, towns, and counties may wish to define and regulate data centers and cryptocurrency mining as distinct uses in their zoning codes and provides a summary of contemporary approaches. It begins with a brief overview of the factors that drive demand for data centers or cryptocurrency mines in particular locations before examining the key planning issues that may merit special attention through zoning and posing a series of questions to guide code drafting.

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A hyperscale Google data center in Council Bluffs, Iowa.

The article concludes with short profiles of local zoning approaches that may serve as models for others.

DEMAND DRIVERS

Industry analysts predict sustained growth in data center construction in the coming years (Dunbar and Bonar 2021). This includes demand for larger and larger "hyperscale" data centers as well as more widely distributed "edge" data centers (Sowry et al. 2018). Data center developers (or operators) are attracted to sites with low latency to end users and dependable and affordable electricity.

While data centers have historically been clustered around major internet access points, information technology companies, and government employment centers, the proliferation of cloud computing and the internet of things is pushing demand out to network edges. This means more data centers in smaller metropolitan and nonmetropolitan areas.

Big technology companies are likely to continue looking for sites that can accommodate new, large single-story structures. But operators that specialize in leasing space in the same facility to multiple companies (i.e., collocated data centers) may be more open to infill sites and existing structures, especially if those sites have access to fiber optic infrastructure.

Data centers use a lot of electricity (see below) to power processing and storage hardware and to keep that hardware cool. The amount of electricity (and often water) needed for cooling is higher in warm, humid climates than in cool, dry areas. Consequently, holding other factors equal, developers favor locations with low electricity rates and cooler climates. Furthermore, because these facilities operate continuously, developers are also looking for sites that are less vulnerable to natural hazards.

Cryptocurrency miners are also looking for locations with cheap electricity and low hazard risk; however, dedicated mining facilities are not concerned about proximity to customers and are less likely to invest in backup power. While there seems to be a widespread consensus that data centers are essential to global communications and the global economy, cryptocurrency miners

have a more limited "social license" to operate. Widespread concerns about the energy use of mines and the limited utility of the coins they produce has led some countries, including China, to ban Bitcoin mining. Consequently, many cryptocurrency miners are relocating to the U.S. (Obando 2022).

PLANNING ISSUES

From the exterior, data centers and cryptocurrency mining facilities may be physically indistinguishable from many commercial or light industrial uses. However, the operational characteristics of these facilities are typically quite distinct from those of surrounding land uses. From a planning perspective, the most noteworthy characteristics relate to their electricity and water use, noise production, enhanced safety and security needs, and low employment densities.

They Use a Lot of Electricity (and Water)

In 2020, data centers used between 200 and 250 terawatt hours (TWh) of electricity, accounting for approximately one percent of global consumption (IEA 2021). While the total consumption has grown steadily along with global power demand, this ratio has held relatively constant over the past 20 years as efficiency improvements have proportionally offset increased demand from data centers. However, this pattern is unlikely to hold as growth in streaming video, online gaming, cloud computing, machine learning, virtual reality, and the internet of things begins to outstrip efficiency improvements.

The figures above exclude cryptocurrency mining. Bitcoin miners alone used an estimated additional 60 to 70 TWh in 2020. According to Cambridge University, if Bitcoin was country, it's annual electricity consumption would be slightly higher than that of Poland or Malaysia (2022).

Data center and cryptocurrency mining equipment also generates a tremendous amount of waste heat, which must be dissipated by fans or absorbed by a cooling medium to avoid hardware damage and ensure efficient operations. Many data centers and cryptocurrency mines use water as a cooling medium. Water is also necessary for most forms of electricity production. In aggregate, a medium-sized data center typically uses more water each year than two 18-hole golf courses (Mytton 2021).

They Can Be Noisy

Inside a data center or cryptocurrency mine server room, the noise can make it difficult to carry on a conversation at a normal volume. While most data centers and large cryptocurrency mines incorporate construction and soundproofing techniques that ensure this server noise isn't audible outside of the building, air conditioner compressors mounted on the roof or on ground near these facilities can generate noise that carries across property lines.

In some contexts, vegetation or other structures may rapidly attenuate this sound. In others, the sound may travel over long distances. Obviously, the degree to which these sounds constitute nuisance "noise" depends on surrounding land uses and ambient noise levels. The problem is typically most acute when data centers or mines are near residences.

They Have Enhanced Safety and Security Needs

Data centers typically aim to run continuously, and any outage or downtime can threaten business operations. Furthermore, data centers house expensive, highly specialized hardware, and many handle sensitive data. Consequently, most data centers incorporate enhanced safety and security features, such as gated access points, fencing, or bright lighting, to prevent unauthorized access and to minimize the likelihood of disruption.

Cryptocurrency mines have similar safety and security needs, with two key distinctions. First, miners want to maintain network access, but the stakes are lower than for data centers because an outage wouldn't negatively affect any other services or users. Second, cryptocurrency mines generally aren't receiving any clients and have little incentive to draw attention to themselves with fencing or lighting.

They Have a Low Employment Density

Data centers typically have far fewer workers per square foot than professional offices or light industrial facilities (Tarczynska 2016). And cryptocurrency mines generally have even lower employment densities than data centers. For some communities, data centers (and potentially cryptocurrency mines) are highly desirable from an economic development perspective because they often generate a large property tax surplus that can subsidize more service-intensive land uses, such as single-family homes. Others, however, are reluctant to devote too much commercial or light industrial space to uses that generate few jobs.

ZONING CONSIDERATIONS

Any community interested in regulating data centers and cryptocurrency mining through zoning should consider three key questions:

1. Do these uses need new use definitions?
2. Where should these uses be permitted?
3. Do these uses need special development or performance standards?

Do They Need New Use Definitions?

New land uses don't necessarily require new use definitions in the local zoning code. It depends, in part, on whether the use fits

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The roof of eBay's Topaz data center in South Jordan, Utah.

neatly under a broader use category or is substantially like another defined use. And it depends on whether treating the new use the same as this use category or other similar use would be likely to generate negative effects on nearby properties or the community as a whole.

Many communities have defined data centers (or some closely analogous term) as a distinct use in their zoning codes. These definitions typically reference the general function of the facility and the degree to which it is occupied by computer systems and related equipment. For example, Anne Arundel County, Maryland, defines *data storage center* as "a facility used primarily for the storage, management, processing, and transmission of digital data, which houses computer or network equipment, systems, servers, appliances, and other associated components related to digital data storage and operations" (§18-1-101.(44)).

Comparatively fewer communities have defined cryptocurrency mining as a distinct use. Many of these definitions focus on the specialized purpose of the facility, often with references to other newly defined terms, such as *high density load* or *server farm*, that clarify its distinct characteristics. For example, Moses Lake, Washington, specifies that *cryptocurrency mining* often uses more than 250 kilowatt-hours per square foot each year (§18.03.040).

Where Should They Be Permitted?

Communities that choose to regulate data centers or cryptocurrency mines as distinct uses may permit these uses either by right or with a discretionary use permit (i.e., conditional, special, or special exception use permits) in one or more existing base or overlay zoning districts. Alternatively, they may elect to establish a new special-purpose base or overlay zoning district for either use.

Many communities permit data centers and cryptocurrency mines either by right or with a discretionary use permit in commercial and industrial districts. While data centers and mines can fit in a wide range of existing commercial or industrial buildings, purpose-built facilities are often single-story structures with large floorplates.

Given that they generally have few employees and visitors, these uses may not be appropriate in ground-floor street-frontage spaces in pedestrian-oriented commercial areas. Wenatchee, Washington, addresses this issue by permitting data centers and cryptocurrency mines by right in multiple pedestrian-oriented commercial districts, with a simple stipulation that they cannot occupy "grade level commercial street frontage" (§10.10.020).

A new special-purpose zoning district can help steer data centers or cryptocurrency mines toward corridors or other subareas that have suitable utility infrastructure. When adopted as floating zones, special districts can also provide an extra layer of review for large projects that may cover dozens or hundreds of acres.

Prince William County, Virginia, added a Data Center Opportunity Zone Overlay District to its zoning code in 2016 (§32-509). The county has mapped this overlay to more than 70 percent of its industrially zoned land. The overlay permits data centers and includes design standards for these facilities; however, it does not otherwise modify the existing use permissions for underlying districts.

Do They Need Special Development or Performance Standards?

Communities that decide to regulate data centers or cryptocurrency mines as distinct uses may choose to adopt use-specific standards that modify or supplement other relevant universal or district-specific development or performance standards. This approach can help communities target standards to the distinct features of these uses to address specific community concerns.

Use-specific standards can help minimize reliance on discretionary approvals and improve the consistency of local decisions. Without these standards, local officials may be more likely to require all data centers and cryptocurrency mines to obtain a discretionary use permit, and they may be more likely to adopt wildly varying conditions of approval for substantially similar proposals.

Communities that have adopted use-specific standards for data centers and cryptocurrency mines often establish building design and buffering or screening requirements to minimize the visibility or improve the appearance of these facilities from public streets or nearby properties. Other common standards address environmental performance, including noise and light pollution, and evidence of electric utility approval.

EXAMPLES OF DEFINED USES

Jurisdiction	Defined Uses
Alpharetta, GA	Data center (§1.4.2)
Anne Arundel County, MD	Data storage center (§18-1-101.(44))
Fairfax County, VA	Data center (§9103)
Frederick County, MD	Critical digital infrastructure facility (§1-19-11.100)
Moses Lake, WA	Cryptocurrency mining; Data center/server farm/cluster (§18.03.040)
Pitt County, NC	Data processing facility (large scale) (§15)
Plattsburgh, NY	Commercial cryptocurrency mining; Server farm; High density load service (LL 6-2018)
Prince George's County, MD	Qualified data center (§27-2500)
Prince William County, VA	Data center (§32-100)
Somerville, MA	Data center (§9.8.b)
Vernal, UT	Data center (§16.04.173)
Wenatchee, WA	Cryptocurrency mining; Data center (§10.08)

POTENTIAL MODEL APPROACHES

It would be difficult to find a community with more experience with data centers than Loudon County, Virginia. And the county's approach to zoning for data centers serves as a potential model for other communities with suitable sites and sufficient infrastructure to accommodate data center development. In contrast, Missoula County, Montana, was one of the first local jurisdictions to craft zoning regulations for cryptocurrency mining operations. And its emphasis on mitigating the potential climate impacts represents a different type of potential model.

Loudon County, Virginia

Northern Virginia's Data Center Alley, primarily clustered around Routes 7 and 267 in Loudon and Fairfax Counties is the largest data center market in the world (Fray and Koutsaris 2022). Its combined power consumption capacity is more than 1.6 gigawatts (GW), nearly twice as much as the next largest market. And within Data Center Alley, Loudon County has the highest concentration of data centers. As of October 2021, data centers occupied more than 25 million square feet, with another 4 million square feet in development (LCDED 2022).

Several important factors have driven demand for data center development in Loudon County. It is home to the Equinix internet exchange, one of the largest internet access points in the world and a successor to Metropolitan Area Exchange, East, the first U.S. exchange. The county has abundant (and redundant) fiber optic infrastructure, relatively cheap power, and sufficient water. Additionally, it has a high concentration of skilled technology workers and businesses that support the data center industry.

By the year 2000, there was already an emerging data center cluster in Loudon County. However, the county did not define and regulate data centers as a distinct use in its zoning code until 2014 (ZOAM 2013-0003). According to Acting Planning & Zoning Director James David, prior to this, the county defined data centers as commercial offices.

The latest version of the county's zoning ordinance permits data centers by right in Planned Office Park, Research and Development Park, Industrial Park, and General Industrial districts and as a special exception use in Commercial Light Industry districts. New data centers (without vested rights) must comply with a set of use-specific standards governing façade design, screening of mechanical equipment, exterior lighting, pedestrian and bicycle facilities, and landscaping, buffering, and screening (§5-664).

According to David, these standards are intended to improve the aesthetics of data centers, minimize visibility from nearby residential areas, and ensure continuous sidewalk and trail networks. Overall, they represent a light-touch approach that has, so far, worked well for a county with enormous demand for data centers and relatively modest competition for space from other commercial and industrial uses.

However, in February 2022, county officials directed staff to research regulatory options to prevent new data centers in the

EXAMPLES OF USE-SPECIFIC STANDARDS FOR DATA CENTERS AND CRYPTOCURRENCY MINING

Jurisdiction	Use-Specific Standards
Alpharetta, GA	Requires evidence of compliance with noise standards; specifies exterior lighting fixture design; establishes minimum building height; requires building façade design elements; establishes other fencing, screening, and landscaping requirements to minimize visibility from adjacent roads and properties (§2.7.2.1)
Anne Arundel County, MD	Establishes minimum lot size and setbacks; prohibits residences on the same lot; establishes limit on outdoor storage (§18-10-119)
Fairfax County, VA	Requires all equipment to be enclosed within a building; establishes maximum floor area by zoning district (§4102.6.A)
Frederick County, MD	Establishes criteria for reducing setbacks; specifies building design standards; specifies landscaping, screening, and buffering requirements; clarifies parking, loading, signage, and lighting standards; establishes criteria for private roads; establishes noise and vibration standards (§1-19-8.402)
Moses Lake, WA	Clarifies review process for business license; prohibits container storage; requires evidence of electrical utility approval; requires evidence of electrical permit and inspection; establishes environmental performance standards, addressing noise, heat, and electric and magnetic fields; limits amount of exposed equipment on facades (§18.74)
Pitt County, NC	Limits height; requires separation from sensitive uses; requires noise study and compliance with noise standards; requires underground wiring; requires security fencing and vegetative screening; requires evidence of electrical utility approval; clarifies signage standards; requires notification of abandonment (§8(UUUU))
Plattsburgh, NY	Requires fire suppression and mitigation techniques; limits internal ambient temperature and the direct release of heat on colder days; establishes permissible noise levels (LL 6-2018)
Prince George's County, VA	Requires building façade design elements; specifies exterior lighting fixture design; requires screening for security fencing and limits fence height; requires compliance with landscape manual; clarifies applicable off-street parking standard; clarifies signage standards; requires an acoustical study; specifies additional site, locational, and noticing requirements for facilities in rural residential districts (§27-5102(e)(4)(B))
Somerville, MA	Establishes special review criteria related to aesthetic impacts and employment opportunities (§9.8.b)
Vernal, UT	Requires fencing and structural screening for electrical generators; requires noise mitigation plan for facilities near residential zones or existing hotels or motels (§16.20.250)
Wenatchee, WA	Clarifies review process for business license; prohibits container storage; requires evidence of electrical utility approval; requires evidence of electrical permit and inspection; clarifies blank wall limitation standards; requires an affidavit verifying operating sound levels (§18.48.310)

Route 7 corridor. While data center demand remains high in this area, the county's comprehensive plan designates most of this corridor as Suburban Mixed Use, which envisions a compact, pedestrian-friendly mix of commercial, residential, cultural, and recreational uses. Furthermore, the existing electricity network infrastructure is insufficient to accommodate the existing demand for new data centers (LCDED 2022).

The county is working on its first complete overhaul of its zoning code since 1993. And it intends to incorporate any new regulations for data centers into the new code, which officials hope to adopt by the end of 2022.

The heart of Northern Virginia's Data Center Alley in Ashburn, Virginia.

The former Bonner sawmill in Missoula County, Montana, was once home to the HyperBlock cryptocurrency mine.

Missoula County, Montana

In April 2019, Missoula County, Montana, adopted an interim zoning resolution that established a cryptocurrency mining overlay (Resolution No. 2019-026). The county had one large cryptocurrency mine already, and its low electricity rates and cool climate made it an attractive area for prospective miners. While a few other jurisdictions had already defined cryptocurrency mining in their zoning codes, Missoula County appears to be the first to explicitly position its zoning approach as a response to climate change.

According to county planner Jennie Dixon, AICP, local officials originally took an interest in regulating cryptocurrency mining as a distinct use after multiple complaints of noise from cooling fans at an existing Bitcoin mine operating out of a former sawmill in unincorporated Bonner. Soon, though, the county expanded its focus to include energy consumption and electronic waste.

Montana law only authorizes interim zoning in the case of an emergency involving "public health, safety, morals, or general welfare" (§76-2-206). Dixon says the Intergovernmental Panel on Climate Change's 2018 Special Report on *Global Warming of 1.5° C* helped justify climate change as a local emergency that warranted interim zoning to mitigate greenhouse gas emissions (and other potential environmental impacts) from cryptocurrency mining.

The interim zoning regulations defined cryptocurrency mining as a distinct use and created a Cryptocurrency Mining Overlay Zone, mapped to the entire unincorporated geographic extent of the county (which includes some un-zoned areas). The overlay restricted cryptocurrency mining operations to industrial districts and required operators to obtain a discretionary use permit if the mine was adjacent to a residential district or within 500 feet of a residential property boundary. These regulations also required all mining operations to verify that all electronic waste be handled by a licensed recycling firm and that all electricity use be offset by new renewable energy production.

Caroline Lauer, the county's Sustainability Program Manager, stresses the importance of this last requirement. If cryptocurrency miners purchased existing supplies of renewable energy, it could actually displace existing utility customers to dirtier sources. While most of the county's electricity comes from hydropower, coal accounts for much of the remainder.

Missoula County's 2016 *Growth Policy* plan includes an objective to "reduce the county's contribution to climate change" (4.1) and lists policies that promote alternative energy development (4.1.3) and reduce energy use and waste generation as implementation actions (4.1.6). A day before it adopted the interim cryptocurrency mining regulations, the county further strengthened its policy rationale by adopting a joint commitment with the City of Missoula to achieve 100 percent clean electricity use by 2030.

County officials extended the interim zoning for another year in 2020 before adopting the same regulations as a permanent zoning amendment in March 2021 (§1.04

& §5.05). According to Dixon, the Bonner mine ceased operations during the interim zoning period, but not because of the county's zoning. It declared bankruptcy two days after the "Black Thursday" Bitcoin crash in March 2020, leaving the tribal-owned independent power producer that provided its electricity with a $3.7 million unpaid bill (Rozen 2020).

CONCLUSIONS

The rapid rise in data center development has coincided with dramatic decreases in the costs of producing solar and wind power. This, in combination with a growing trend toward clean power commitments among technology companies, has blunted some of the climate impacts of an increased demand for data storage and processing.

The increased digitalization of life virtually guarantees that data centers will continue proliferating in strategic locations across the country (Gomez and DeAngelis 2022). Soon, communities may start seeing a sharp increase in interest in very small edge data centers that could fit in underutilized commercial spaces or even be collocated with other telecommunications infrastructure, such as small cell facilities, in public rights-of-way (Sowry et al. 2018).

The future of cryptocurrency mining facilities is less certain. Bitcoin and other energy-intensive cryptocurrencies are facing social pressure to transition to more energy-efficient transaction verification methods, and several existing cryptocurrencies already use these methods. However, we are still at the very beginning of the cryptocurrency story. While this form of currency currently exists primarily as a speculative investment vehicle, this could change rapidly if valuations stabilize and large numbers of goods and service providers accept cryptocurrencies for payment.

Not every community will see the value in defining data centers or cryptocurrency mines as distinct uses in their zoning codes. Nevertheless, doing so can give local jurisdictions a leg up when it comes to signaling preferences to developers and operators and minimizing or mitigating potential adverse impacts.

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HOW DOES YOUR ZONING TREAT DATA CENTERS AND CRYPTOCURRENCY MINES?

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CHAPTER THREE

State Preemption of Local Zoning Laws as Intersectional Climate Policy

Since the inception of zoning in the early twentieth century, municipal governments have dominated land use decisionmaking. Cities and towns decide where, what, and how to build, almost entirely without state oversight. This system, which has contributed to the housing crisis Americans face today, goes largely without question.[1]

That may soon change. Recently, several states have considered or passed laws that impinge on this area of traditionally local power.[2] These laws, which have surfaced in both blue and red states, preempt restrictive local zoning regulations in favor of regulations that encourage the development of denser housing. Most typically, these states mandate that any land zoned for single-family housing — the majority of residentially zoned land in the United States[3] — allow "middle housing," typically defined as duplexes, triplexes, and the like.[4] Advocates of these laws hope that by removing barriers to multifamily housing, developers will build more units of housing at more reasonable prices.[5]

These laws merit attention for their potential to mitigate climate change. Today, transportation accounts for the largest share of America's emissions; urban sprawl contributes heavily to the problem.[6] Single-family homes located far from city centers are energy inefficient and, more importantly, force residents to drive longer distances.[7] Denser zoning reduces greenhouse gas (GHG) emissions on both accounts,[8] but the climate benefits of encouraging density are not always discussed by those who advocate for density-enhancing measures.

This Chapter identifies recent state attempts to preempt local zoning regulations, situates them within the broader framework of climate

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[1] *See* Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 182 (2020) (describing how "many residents have become so accustomed to local control [of zoning] that they perceive it as something akin to a birthright").

[2] *See infra* ch. III, section B.1, 1601–05.

[3] Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/MD3W-KCNP].

[4] *See infra* ch. III, section B.1, 1601–05.

[5] *See, e.g.*, Jim Perras, Opinion, *"Missing Middle" Can Offer More Housing Choices*, CT MIRROR (Sept. 13, 2019), https://ctmirror.org/category/ct-viewpoints/missing-middle-can-offer-more-housing-choices [https://perma.cc/M35E-4C5B].

[6] Brian Yudkin et al., *Our Driving Habits Must Be Part of the Climate Conversation*, ROCKY MOUNTAIN INST. (Aug. 24, 2021), https://rmi.org/our-driving-habits-must-be-part-of-the-climate-conversation [https://perma.cc/XEW6-CNN2].

[7] *See infra* pp. 1598–99.

[8] Adie Tomer et al., *We Can't Beat the Climate Crisis Without Rethinking Land Use*, BROOKINGS INST. (May 12, 2021), https://www.brookings.edu/research/we-cant-beat-the-climate-crisis-without-rethinking-land-use [https://perma.cc/9FHW-2EJH].

policymaking, and analyzes whether this type of state preemption is normatively desirable. Section A opens with a short history of U.S. zoning law, explaining how it emerged at the beginning of the twentieth century largely as a response to wealthy homeowners' attempts to isolate themselves from poor people and people of color. In the following decades, restrictive, single-family zoning continued to spread, causing the sprawl, segregation, and unaffordability that characterize the American housing market today. One consequence of this pervasive sprawl is high levels of GHG emissions. This section concludes by summarizing the research regarding the link between zoning and climate, which, while mixed, supports the contention that denser zoning leads to lower rates of vehicle use.

From there, section B describes the recent spate of state zoning legislation in more detail and explains how this legislation, though not always described in climate terms, is ultimately climate policy. In fact, this type of policy, which addresses the multiple overlapping crises of climate change, housing unaffordability, and racial segregation, is exactly what policymakers should advocate for. Not only does this type of "intersectional" climate policy better utilize scarce funding sources, but it may also be more politically palatable across the ideological spectrum, as it could appeal to constituencies who do not prioritize climate change as a policy problem and could motivate actors who do care about climate change, but have yet to devote adequate attention to the problem.

The Chapter ends by addressing arguments against the use of state zoning preemption. Section C contends that state preemption of restrictive local zoning policy is justifiable in ways that preemption of other local prerogatives, such as the regulation of hydraulic fracturing ("fracking") or antidiscrimination measures, is not. When localities prevent dense housing, they impose externalities on the rest of the state that warrant a centralized response. This is especially true given that, because of collective action dynamics and the nature of local government, municipalities are unlikely to act on the issue themselves. Furthermore, while zoning preemption in itself is unlikely to meaningfully increase housing density, preemption combined with progressive state housing policy is another matter. If they take seriously their responsibility to provide for the general welfare, state governments should do what it takes to provide their populations with livable, sustainable housing.

A. Land Use and Climate

1. A Brief History of U.S. Land Use Law. — Although zoning is now an integral part of municipal policymaking, this wasn't always the case. In 1916, New York City became the first municipality to enact a comprehensive zoning law after New York State passed a law enabling the

City to do so.[9] Zoning's popularity quickly increased, especially after 1923, when the U.S. Department of Commerce disseminated the Standard State Zoning Enabling Act.[10] The publication, zoning law's "fundamental DNA," provided states with model statutory language they could use to enable municipal zoning.[11]

Four years later, the Supreme Court vindicated the law's purposes in *Village of Euclid v. Ambler Realty*,[12] which recognized as legitimate a locality's state-delegated right to exclude undesirable uses from certain areas. According to the Court, a state's power to separate different types of uses stemmed from its ability to police public nuisances.[13] Unfortunately, what uses states considered undesirable hinged largely on the race and socioeconomic status of those undertaking the uses.[14] *Euclid* is filled with barely coded language about the dangers of allowing poor people and people of color into suburban life.[15] Indeed, *Euclid* can be viewed

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[9] Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996). Like many zoning ordinances, New York City's emerged because of racist and/or classist concerns. In particular, this ordinance responded to "Fifth Avenue merchants' fears of being overrun by immigrant garment workers." *Id.* at 1082. America's earliest zoning measures appeared a few decades earlier "as an effort to curb the spread of Chinese laundries in Modesto and San Francisco." *Id.*

[10] ADVISORY COMM. ON ZONING, DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) (1922).

[11] Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 755, 758 (2020). This authorization was necessary because at the time, states followed Dillon's Rule, which prevented local governments from acting unless the state explicitly delegated the relevant authority. *Id.* at 755. Although fewer states today follow Dillon's Rule, localities in most states still derive their power from the delegation of state authority. JOHN R. NOLON, CHOOSING TO SUCCEED: LAND USE LAW & CLIMATE CONTROL 23 (2021). Even in states where municipalities have been granted home rule authority, or the "right of self-governance in local matters," DAVID J. BARRON ET AL., RAPPAPORT INST. FOR GREATER BOS., DISPELLING THE MYTH OF HOME RULE 1 (2003) (quoting MASS. CONST. art. LXXXIX, § 1), courts frequently interpret this authority narrowly, Stahl, *supra* note 1, at 187 & n.28.

[12] 272 U.S. 365 (1926).

[13] *See id.* at 388; *see also* Serkin, *supra* note 11, at 757 (noting that the Court concluded zoning "was analogous to an application of nuisance law and therefore was justified as a valid exercise of the state's police power"). The Court's conception of a nuisance was broad and included apartment houses located in single-family neighborhoods. *Euclid*, 272 U.S. at 394–95. In a recent article, Professor Molly Brady traces the historical connection between apartment buildings and nuisance law, finding that it was not until the early twentieth century that courts began to conceive of apartment buildings as nuisances, and that this shift was largely a response to the push for more zoning. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1663–73 (2021).

[14] *See* Allison Shertzer et al., *Zoning and Segregation in Urban Economic History*, REG'L SCI. & URB. ECON. (forthcoming) (article in press at 5), https://doi.org/10.1016/j.regsciurbeco.2021.103652 [https://perma.cc/YK79-G4N2] (arguing that "racial considerations influenced the earliest zoning ordinances, and that de jure race-blind land use regulations were implemented to a discriminatory effect").

[15] For example, the opinion, written by Justice Sutherland, describes apartment buildings as "mere parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of [a] district." *Euclid*, 272 U.S. at 394. It warns that the coming of apartment buildings into a neighborhood "utterly destroy[s]" the "residential character of [a] neighborhood and its desirability as a place of detached residences." *Id.* In one

as a direct response to the 1917 case *Buchanan v. Warley*,[16] in which the Supreme Court held that the freedom of contract promised by the Fourteenth Amendment prohibited municipalities from barring the sale of property to Black people.[17] *Euclid* ratified the racist zoning policies that localities enacted in response to *Buchanan*'s moratorium on explicitly racial zoning ordinances,[18] policies that localities continue to enact today.[19]

The trend toward racialized suburbanization that *Euclid* identified and endorsed continued and gained even more speed after World War II.[20] In the 1950s and 1960s, laws like the Federal Aid Highway Act[21] enabled city dwellers with means to relocate further from their places of work.[22] Once the largely white upper and middle classes made it to the suburbs, they enacted land use policies that entrenched sprawl.[23] These policies included single-family zoning mandates and minimum lot-size requirements.[24] Frequently, when making zoning decisions, localities concerned themselves primarily with keeping property values high,[25] which resulted in exclusionary housing policy by suppressing the total housing supply.[26] Importantly, these localities did not themselves face the consequences of their policies, as potential residents simply looked elsewhere for housing.[27]

Today, the desire for low-density, socioeconomically homogenous neighborhoods continues to dominate U.S. land use policy. Zoning has continued to grow more restrictive into the twenty-first century.[28] In most U.S. cities, three-quarters of land is zoned only for single-family

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particularly evocative line, the majority implies that constructing apartment buildings in single-family suburbs is akin to placing "a pig in the parlor instead of the barnyard." *Id.* at 388.

16 245 U.S. 60 (1917).

17 *See id.* at 81; *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW 45 (2017). It should be noted that many cities, especially those in the South, ignored this decision and continued to administer racial zoning laws for decades after. *Id.* at 46–48.

18 Serkin, *supra* note 11, at 757 (describing *Euclid* as "zoning's original sin").

19 Kimberly Quick, Commentary, *Exclusionary Zoning Continues Racial Segregation's Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work [https://perma.cc/K4XZ-2QZ5].

20 Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls to Reduce Automobile Emissions*, 2 SUSTAINABILITY 1742, 1745–46 (2010).

21 Pub. L. No. 84-627, 70 Stat. 374 (1956).

22 Frug, *supra* note 9, at 1068.

23 *See* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 539 (2020) (describing how land use decisions "create path dependency and cannot easily be reversed").

24 Medina & Tarlock, *supra* note 20, at 1745–46.

25 One scholar describes this behavior as "[h]omeowner cartelization." Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 510 (1977).

26 *See id.* at 402.

27 *See id.* at 403.

28 David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674 (2013).

detached housing.[29] This statistic includes cities like Chicago (79% of residential land zoned for detached single-family housing), Seattle (81%), and San Jose (94%).[30] The sprawl that restrictive zoning policies engender, combined with a lack of investment in public transit infrastructure,[31] has fueled America's overreliance on cars, which themselves take up space. Certain cities devote over one-third of their land area to parking lots;[32] Des Moines, Iowa, possesses around seven parking spaces per resident.[33] Restrictive policies also exacerbate the country's widespread lack of housing, resulting in the affordability crisis that the United States faces today.[34] Nearly half of all renters spend over 30% of their pretax income on housing, and around one-quarter spend over 50%.[35] For reference, a "broad consensus" exists that American families should spend no more than 30% of their incomes on housing, lest they be unable to afford other necessities.[36]

Furthermore, even though the United States no longer permits race-based zoning[37] or race-based covenants,[38] restrictive zoning has resulted in de facto housing segregation.[39] For years, Black tenants faced violence when they attempted to desegregate neighborhoods;[40] municipalities known as "sundown towns" forbade Black people from living within

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[29] JENNY SCHUETZ, BROOKINGS INST., TO IMPROVE HOUSING AFFORDABILITY, WE NEED BETTER ALIGNMENT OF ZONING, TAXES, AND SUBSIDIES 2 (2020), https://www.brookings.eduwp-content/uploads/2019/12/Schuetz_Policy2020_BigIdea_Improving-Housing-Afforability.pdf [https://perma.cc/J6G6-XBTP].

[30] Badger & Bui, *supra* note 3.

[31] Shill, *supra* note 23, at 538.

[32] *Id.* at 547.

[33] *Id.* at 545.

[34] Architect Daniel Parolek describes this phenomenon as the "missing middle housing." DANIEL PAROLEK, MISSING MIDDLE HOUSING 8 (2020).

[35] RICHARD D. KAHLENBERG, THE CENTURY FOUND., UPDATING THE FAIR HOUSING ACT TO MAKE HOUSING MORE AFFORDABLE (2018), https://tcf.org/content/report/updating-fair-housing-act-make-housing-affordable [https://perma.cc/J44J-2R9L].

[36] Matthew Desmond, *Heavy Is the House: Rent Burden Among the American Urban Poor*, 42 INT'L J. URB. & REG'L RSCH. 160, 160 (2018).

[37] *See* Buchanan v. Warley, 245 U.S. 60 (1917).

[38] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

[39] *See* Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 916–19 (2018) ("Blacks and Latinos still tend to live in neighborhoods where the majority of residents are people of color." *Id.* at 916.); *see also* Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1133–34 (2010) (finding that restrictive zoning is significantly and negatively associated with income segregation); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009) (finding that restrictive zoning is associated with residential segregation).

[40] Shertzer et al., *supra* note 14 (article in press at 2) ("The historical record is filled with examples of real estate agents colluding with developers, white communities threatening black families, arson and other property damage, and even mob violence.").

their town limits.[41] Even after the Civil Rights Era and passage of the Fair Housing Act,[42] cities and towns effectively excluded people of color from certain neighborhoods by imposing zoning restrictions that made purchasing a home unaffordable for many people of color.[43] Today, municipalities, states, and the federal government perpetuate racial segregation by both engaging in exclusionary zoning and adopting regulations like crime-free housing ordinances, which prohibit or discourage landlords from renting to people who have criminal records and disproportionately target people of color.[44]

While all levels of government contributed to this broken state of affairs, only local governments have traditionally wielded power over zoning, arguably the most immediate cause of unaffordable housing and racial segregation.[45] When the federal government did try to make land use policy more inclusive and coherent, it quickly failed. In 1973, Congress considered the Land Use Policy and Planning Assistance Act,[46] which would have offered states money to create more careful processes to determine land use.[47] Opposed by both states and localities, the bill failed.[48] This bill was one of several proposed or enacted around the same time that attempted to incentivize regional coordination around land use and development policies by offering grants and loans for projects conducted with "some comprehensive regional review and comment process."[49] A few years later, the U.S. Department of Housing and Urban Development (HUD) proposed to withhold federal infrastructure funds from municipalities that would not eliminate exclusionary zoning policies or allow subsidized housing, but President Nixon

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[41] Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 183–84 (2019).

[42] Pub. L. No. 90-284, tits. VIII–IX, 82 Stat. 73, 81–90 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

[43] *See* James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 43 URB. LAW. 179, 184 (2010/2011).

[44] Archer, *supra* note 41, at 175–76; *see also* Layser, *supra* note 39, at 919 (analyzing how the federal low-income housing tax credit and the mortgage interest deduction cause housing segregation).

[45] *But see* Andrew H. Whittemore, *How the Federal Government Zoned America: The Federal Housing Administration and Zoning*, 39 J. URB. HIST. 620, 625 (2012) (describing how the Federal Housing Administration's refusal to insure mortgages in nonwhite areas and unzoned areas contributed to the rise in single-family housing).

[46] S. 268, 93d Cong. (1973).

[47] *Id.* § 103; *see also* A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 656 (2007).

[48] Tarlock, *supra* note 47, at 656.

[49] *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1148 (1996).

quickly shut down the effort.[50] Since then, the federal government has done little to address the problems associated with exclusionary zoning[51] and has largely discontinued its regional planning initiatives.[52] And except for certain isolated efforts,[53] states have also avoided intervening.

2. Zoning Law's Climate Impacts. — Land use decisions undeniably impact the world's climate.[54] Policies that foster sprawl, loosely defined as development characterized by low population density,[55] are particularly harmful. Sprawling land patterns increase the distance that people must travel from place to place, like from home to work. These distances increase total vehicle miles traveled (VMT), a key determinant of GHG emissions from transportation.[56] Dispersed housing also requires the construction of more municipal infrastructure, like streets and sewers,[57] and encourages the construction of larger houses with correspondingly larger energy demands.[58] These homes, which are typically detached, lack the energy efficiencies associated with shared walls and

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[50] SOLOMON GREENE & INGRID GOULD ELLEN, URB. INST., BREAKING BARRIERS, BOOSTING SUPPLY 5 (2020), https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_0.pdf [https://perma.cc/RC2K-4XEM].

[51] Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENV'T L. 1159, 1173 (2010) ("Congress has almost always steered clear of establishing anything that remotely resembles a federal land use regulatory program . . . .").

[52] GREENE & ELLEN, *supra* note 50, at 5 ("HUD has exerted very narrow and limited oversight of local land-use regulations only in a handful of actions enforcing the Fair Housing Act of 1968, and it has done so inconsistently over the years."); Briffault, *supra* note 49, at 1148.

[53] Among state initiatives, Massachusetts's 1969 adoption of Chapter 40B is most notable. MASS. GEN. LAWS ch. 40B, §§ 20–23 (2020). This measure allows the state to override decisions made by local Zoning Boards of Appeal under certain conditions, including if less than 10% of a municipality's total housing units are not low- or moderate-income. Ryan Forgione, Note, *A New Approach to Housing: Changing Massachusetts's Chapter 40R from an Incentive to a Mandate*, 53 SUFFOLK U. L. REV. 199, 207 (2020). Although Chapter 40B allows only marginal state intervention into local decisions, it "remains the 'principal vehicle' for creating affordable housing in Massachusetts." *Id.* at 208 (quoting Kara L. Dardeno, Note, *Chapter 40B Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129, 139 (2008)).

[54] *See, e.g.*, Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 710–11 (2010) (highlighting the relationship between sprawl and vehicle use). In addition, a robust literature describes the potential for land use decisions to facilitate resilience in the face of climate change. *See, e.g.*, Sarah J. Adams-Schoen, *Beyond Localism: Harnessing State Adaptation Lawmaking to Facilitate Local Climate Resilience*, 8 MICH. J. ENV'T & ADMIN. L. 185 (2018). This Chapter focuses not on land use policy's adaptive potential but instead on its mitigation potential.

[55] *E.g.*, ORG. FOR ECON. COOP. & DEV., RETHINKING URBAN SPRAWL: MOVING TOWARDS SUSTAINABLE CITIES 5 (2018), https://www.oecd.org/environment/tools-evaluation/Policy-Highlights-Rethinking-Urban-Sprawl.pdf [https://perma.cc/FL5T-Q67M].

[56] Grant Glovin, *A* Mount Laurel *for Climate Change? The Judicial Role in Reducing Greenhouse Gas Emissions from Land Use and Transportation*, 49 ENV'T L. REP. 10,938, 10,938–39 (2019) (describing the climate impacts of sprawl).

[57] Trisolini, *supra* note 54, at 714.

[58] NOAH KAZIS, NYU FURMAN CTR., ENDING EXCLUSIONARY ZONING IN NEW YORK CITY'S SUBURBS 7–8 (2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [https://perma.cc/B6AS-X5SH]; Tomer et al., *supra* note 8.

increased insulation.[59] One study finds that, for example, households living in detached housing use 54% more energy to heat their homes and 26% more energy to cool their homes than otherwise comparable households living in multifamily units.[60] Furthermore, sprawling housing patterns reduce the benefits of constructing low-carbon public transport.[61]

Research generally finds that relaxing zoning restrictions leads, in the long run, to denser housing.[62] This finding makes sense intuitively: the demand for housing exceeds supply in many areas,[63] and the limiting factor appears to be buildable land,[64] so permitting more construction should lead to more housing. Many studies look at the effects of zoning restrictions in specific localities; for example, a study of towns in the Boston area finds that as average minimum lot size increases by one-quarter of an acre, housing supply decreases by around 10%.[65]

Today, due in part to widespread sprawl,[66] transportation accounts for 29% of America's emissions, more than any other sector.[67] One literature review finds that smart city design can reduce VMT by between

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[59] Tomer et al., *supra* note 8; *see also* Benjamin Goldstein et al., *The Carbon Footprint of Household Energy Use in the United States*, 117 PROC. NAT'L ACAD. SCIS. U.S. 19,122, 19,124–25, 19,128 (2020).

[60] Reid Ewing & Fang Rong, *The Impact of Urban Form on U.S. Residential Energy Use*, 19 HOUS. POL'Y DEBATE 1, 20 (2008).

[61] Goldstein et al., *supra* note 59, at 19,128.

[62] *See, e.g.*, Hongwei Dong, *Exploring the Impacts of Zoning and Upzoning on Housing Development: A Quasi-experimental Analysis at the Parcel Level*, J. PLAN. EDUC. & RSCH., 2021, at 1, 11 (finding that upzoning leads to a higher likelihood of development and higher rates of density); Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 273 (2009) (finding that as a town increases the minimum average lot size by one acre, the number of new housing permits decline by about 40%); Christina M. Locke et al., *Zoning Effects on Housing Change Vary with Income, Based on a Four-Decade Panel Model After Propensity Score Matching*, 64 LAND USE POL'Y 353, 356–57 (2017) (finding a small but significant effect of relaxing zoning restrictions on housing units built); Michael Manville et al., *Zoning and Affordability: A Reply to Rodríguez-Pose and Storper*, 59 URB. STUD. 36, 40–45 (2020) (critiquing a recent study that found that relaxing zoning regulations would not lead to more housing); Virginia McConnell et al., *Zoning, TDRs and the Density of Development*, 59 J. URB. ECON. 440, 451 (2006) ("[A] 10% increase in the number of permissible lots through zoning would tend to increase the actual number of lots by about 2.5%.").

[63] *See* JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2021, at 1–2, 9–10 (2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf [https://perma.cc/2W24-R6V3].

[64] Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, *in* 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289, 1291–92 (Giles Duranton et al. eds., 2015).

[65] Edward L. Glaeser et al., *Regulation and the Rise of Housing Prices in Greater Boston* 4 (Rappaport Inst. for Greater Bos. & Pioneer Inst. for Pub. Pol'y Rsch., Policy Brief No. 2006-1, 2006).

[66] Although America still contains a large amount of sprawl, according to one analysis, sprawl peaked in the mid-1990s. Christopher Barrington-Leigh & Adam Millard-Ball, *A Century of Sprawl in the United States*, 112 PROC. NAT'L ACAD. SCIS. U.S. 8244, 8244 (2015) (measuring sprawl using street network connectivity).

[67] Yudkin et al., *supra* note 6. According to one study, if the world is to limit global warming to 1.5°C, the United States must reduce VMT by 20% before the end of the decade. *Id.*

3% and 25%.[68] A different analysis finds that, compared to denser development, urban sprawl is associated with 20% to 60% more VMT.[69]

Similarly, relaxing zoning restrictions leads to lower home prices. This phenomenon, in which increasing the number of units built decreases the price of surrounding units, is known as the "supply effect."[70] Two reviews of several papers investigating the price impact of new market-rate development find that increasing development tends to decrease the price of surrounding properties, albeit not by a large amount.[71] Some of these studies likely underestimate the impact of density on overall housing affordability because they do not address the fact that by increasing the housing supply, new development may cause those in the middle and upper-middle classes to move, potentially opening up opportunities for lower-income buyers and renters outside the development's immediate vicinity.[72]

Studies produce mixed results on the impact of upzoning — altering a zoning code to allow more development — on housing density, affordability, and GHG emissions,[73] but there is reason to believe that they generally understate the benefits of zoning reform. As Professor Alice Kaswan points out, these studies "generally isolate the impact of individual factors, like density or neighborhood design, without considering the multiple characteristics necessary for compact development to reduce VMT successfully."[74] Still, critics are almost certainly right that

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[68] TRANSP. RSCH. BD., DRIVING AND THE BUILT ENVIRONMENT 68 tbl. 3-1 (2009), https://www.nap.edu/read/12747/chapter/5 [https://perma.cc/HWU5-3GWG].

[69] TODD LITMAN, GLOB. COMM'N ON THE ECON. & CLIMATE, ANALYSIS OF PUBLIC POLICIES THAT UNINTENTIONALLY ENCOURAGE AND SUBSIDIZE URBAN SPRAWL 3 (2015), https://newclimateeconomy.report/workingpapers/wp-content/uploads/sites/5/2016/04/public-policies-encourage-sprawl-nce-report.pdf [https://perma.cc/YN8L-87NW]; *see also* DAN HODGE & BENJAMIN FORMAN, GATEWAY CITIES INNOVATION INST., THE PROMISE AND POTENTIAL OF TRANSFORMATIVE TRANSIT-ORIENTED DEVELOPMENT IN GATEWAY CITIES 8 (2018), https://2gaiae1lifzt2tsfgr2vil6c-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/TTOD-Report.pdf [https://perma.cc/35FJ-UZEM] (finding a 37% to 43% drop in VMT within transit-oriented development areas in Massachusetts).

[70] SHANE PHILLIPS ET AL., UNIV. OF CAL., L.A. LEWIS CTR. FOR REG'L POL'Y STUD., RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS 4, 15 (2021).

[71] *Id.*; Arpit Gupta, *The Hyperlocal Effects of Real Estate*, ARPITRAGE (Dec. 6, 2020), https://arpitrage.substack.com/p/the-hyperlocal-effects-of-real-estate [https://perma.cc/X85T-GL8N].

[72] *See* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1328 n.77.

[73] *See* Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 759 (2020); *see also* Alex Baca & Hannah Lebovits, *No, Zoning Reform Isn't Magic. But It's Crucial.*, BLOOMBERG: CITYLAB (Feb. 5, 2019, 1:50 PM), https://www.bloomberg.com/news/articles/2019-02-05/why-that-new-zoning-study-shouldn-t-deter-yimbys [https://perma.cc/F8ZV-5V8Q] (describing how "the efforts of local residents, relationships between politicians and developers, and state-wide policies" all affect development).

[74] Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 263 (2009).

state-level zoning laws alone will not substantially increase housing density or affordability.[75] For this reason, both housing affordability and climate policy advocates generally recommend state zoning laws as "one strategy among many,"[76] policies that, while not "magic," are still "crucial" to the sustainability transition.[77] Section C briefly discusses further steps that state governments can take to increase density in addition to preemptive zoning reform.

B. State Zoning Preemption as Intersectional Climate Policy

Over the past few years, a growing number of states have passed, or at least considered, land use policies directed at increasing the availability and density of housing.[78] Most of these policies preempt the ability of localities to limit housing density; examples include laws that forbid localities from enforcing single-family zoning and that cap localities' ability to impose minimum parking requirements on new housing development. This section describes these measures and explains why they are an especially useful type of climate policy, one that represents the intersectional strategy that should characterize climate initiatives moving forward.

1. State Preemption of Local Zoning Decisionmaking. — Recent state zoning initiatives take several forms, but all preempt local zoning authority to some extent. Some of these laws have already been passed, many have died in committee, and others are currently being debated.

The most aggressive of these laws fully preempt municipalities from prohibiting multifamily housing in areas zoned for single-family housing. Oregon, California, Virginia, and Washington have all proposed or passed this variety of law. Weaker zoning preemption bills bar cities from prohibiting multifamily housing in certain locations, such as near transit stations, permit structures like accessory dwelling units[79] (ADUs) as of right, or require municipalities to create development plans focused on increasing affordable housing. These proposals have cropped up in Connecticut, Nebraska, Maryland, Utah, and Washington.

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[75] *See* Sara C. Bronin, *Zoning by a Thousand Cuts: The Prevalence and Nature of Incremental Regulatory Constraints on Housing*, CORNELL J.L. & PUB. POL'Y (forthcoming 2022) (manuscript at 94–95), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792544 [https://perma.cc/FTY7-687D]; *see also* KAHLENBERG, *supra* note 35.

[76] Kaswan, *supra* note 74, at 266.

[77] Baca & Lebovits, *supra* note 73.

[78] One scholar describes this trend as a "not-so-quiet revolution in land use regulation." John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019). This name references the "quiet revolution" in land use regulation that occurred in the 1970s, when states mobilized to address the lack of affordable housing. *Id.* at 828, 836–44. As evidenced by the housing crisis we face today, none of these efforts were particularly successful.

[79] ADUs, broadly defined, consist of "self-contained units located on the property of a single-family home." John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 54 (2014).

Oregon has passed the most ambitious zoning preemption law to date. In 2019, the state became the first to preempt local zoning policy by passing House Bill 2001.[80] The law defines "middle housing" — duplexes, triplexes, quadplexes, cottage clusters (detached housing units clustered around a common courtyard), and townhouses — and requires every city of at least 25,000 people and every city within a "metropolitan service district" to allow "[a]ll middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings" and "a duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings."[81] The law also applies to a lesser extent to cities of between 10,000 and 25,000 people that do not fall within a metropolitan service district.[82]

California, a state with some of the most unaffordable housing, has tried several times to liberalize residential zoning over the past few years, and only recently succeeded. In 2020, for the third year in a row, the California State Senate rejected a bill that would have required cities to allow the development of mid-rise apartment buildings near transit stations and job centers, and quadplexes in most areas zoned for single-family use.[83] The bill drew ire from advocates on both the left and right, with some feeling as if the law would unnecessarily impinge upon local control and others concerned that the law did not do enough to address affordability.[84] However, activists and policymakers persisted, and in 2021, Governor Gavin Newsom belatedly signed into law a bill that eliminates single-family zoning throughout the state by allowing landowners to split their lands and/or convert their homes to duplexes through a prescribed process.[85] In doing so, the law removes these types of actions from the ambit of the California Environmental

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80 H.R. 2001, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

81 *Id.* § 2.

82 *Id.*

83 Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for the Third Year in a Row*, L.A. TIMES (Jan. 30, 2020, 4:49 PM), https://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short [https://perma.cc/B4SY-RQ88]; *see also* Benjamin Schneider, *YIMBYs Defeated as California's Transit Density Bill Stalls*, BLOOMBERG: CITYLAB (Apr. 18, 2018, 12:55 PM), https://www.bloomberg.com/news/articles/2018-04-18/california-housing-bill-sb-827-dies-an-early-death [https://perma.cc/75KD-G8N4] (describing how a predecessor bill died in committee).

84 Lauren Sommer, *Why Sprawl Could Be the Next Big Climate Change Battle*, NPR (Aug. 6, 2020, 9:00 AM), https://www.npr.org/2020/08/06/812199726/why-sprawl-could-be-the-next-big-climate-change-battle [https://perma.cc/Z6WK-AX5H].

85 S. 9, 2020–2021 Leg., Reg. Sess. (Cal. 2021); Henry Grabar, *You Can Kill Single-Family Zoning, But You Can't Kill the Suburbs*, SLATE (Sept. 17, 2021, 5:38 PM), https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html [https://perma.cc/L9B3-GXNY].

Quality Act,[86] a procedural law that opponents of residential development have co-opted to prevent the creation of affordable and transit-oriented housing.[87]

Also in 2021, the Connecticut legislature introduced three bills that would each, to some extent, preempt local zoning authority. The most ambitious of the three would have required all municipalities to allow multifamily developments with at least four units in at least 50% of lot area served by water and sewer infrastructure and within half of a mile of transit.[88] Neither that bill, nor a bill that would have required municipalities to develop their fair share of affordable housing,[89] passed. The legislature did manage to pass the third bill, which requires municipalities to allow accessory apartments as of right on lots zoned for single-family housing, limits how many parking spaces municipalities can require per home, and obligates each municipality to adopt an affordable housing plan that "specif[ies] how the municipality intends to increase the number of affordable housing developments."[90]

Two traditionally red states, Nebraska and Utah, also managed to pass preemptive zoning policies. In 2020, the Nebraska legislature passed the Municipal Density and Missing Middle Housing Act.[91] The Act requires any city with a population of at least 20,000 to issue biennial reports to the state "detailing its efforts to address the availability of and incentives for affordable housing through its zoning codes."[92] The law also requires every city to develop an affordable housing action plan that includes goals for the development of middle housing.[93] If a city fails to develop a plan, it must then allow the development of middle housing on land zoned for single-family use.[94] In a related law, the Middle Income Workforce Housing Investment Act,[95] the legislature created a state fund to support the development of "workforce housing," which the law defines as housing with an after-construction appraised

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[86] CAL. PUB. RES. CODE §§ 21,000–21,006.

[87] Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 21 (2018). Sadly, avowed environmentalists often use laws and regulations designed to protect the environment to block the development of affordable and middle-income housing. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 260 n.179, 271–73 (1997).

[88] S. 1024, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

[89] H.R. 6611, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

[90] H.R. 6107, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021), 2021 Conn. Legis. Serv. P.A. 21–29 (West). The law does, however, allow municipalities to opt out of several key provisions. *Id.*; Jacqueline Rabe Thomas, *CT Legislators Underwhelmed with Housing Reform Bill that Passes House*, CT MIRROR (May 20, 2021), https://ctmirror.org/2021/05/20/ct-legislators-underwhelmed-with-housing-reform-bill-that-passes-house [https://perma.cc/DYF2-URAC].

[91] Leg. 866, 106th Leg., 2d Sess. §§ 1–6 (Neb. 2020).

[92] *Id.* § 4(1).

[93] *Id.* § 3(6).

[94] *Id.* § 5(2).

[95] *Id.* §§ 11–19.

value between $125,000 and $275,000.[96] Both laws were preceded by a failed bill with stronger density provisions that would have required all cities to allow middle housing on land zoned for single-family use.[97]

The next year, the Utah legislature passed two laws designed to increase affordable zoning. The first creates a small fund to incentivize the development of low-income housing and requires municipalities to create a "long-range general plan . . . for moderate income housing growth."[98] The second bars municipalities and counties from prohibiting or overly regulating ADUs and establishes a pilot program that would guarantee loans taken out to finance the construction of ADUs designed for low-income people.[99]

Virginia, Washington, and Maryland have struggled to preempt local zoning decisionmaking. The Virginia Generaly Assembly recently tabled a bill that would have required all localities to allow the development of "middle housing" — "two-family residential unit[s], including duplexes, townhouses, [and] cottages" — on land zoned for single-family use.[100] Because the proposed law would have allowed middle housing on all land zoned for single-family use, not just in larger metropolitan areas, it was even more ambitious than what passed in Oregon. The Virginia bill was introduced alongside several housing measures designed to increase density,[101] including one that would have required all localities to allow the development of one ADU per single-family dwelling.[102]

Washington has experienced a protracted battle to pass zoning reform. Over the past few years, the state legislature has considered several preemptive zoning measures, most of which have failed. The first, introduced in 2019,[103] would have required almost all municipalities to allow ADUs on land zoned for single-family use;[104] the proposal resembled what actually passed in Connecticut. The second, introduced two days later,[105] would have required cities with populations greater than 10,000 to adopt some combination of zoning changes, which could have included authorizing duplexes, triplexes, courtyard apartments, and

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[96] *Id.* § 13(10).

[97] Leg. 794, 106th Leg., 2d Sess. (Neb. 2020).

[98] S. 164, 64th Leg., Gen. Sess. § 2 (Utah 2021); *see id.* § 8.

[99] H.R. 82, 64th Leg., Gen. Sess. §§ 4, 12 (Utah 2021).

[100] H.D. 152, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

[101] Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG: CITYLAB (Dec. 20, 2019, 8:03 AM), https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing [https://perma.cc/MG8V-CDMT].

[102] H.D. 151, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

[103] *Bill Information, SB 5812*, WASH. STATE LEGISLATURE, https://app.leg.wa.gov/billsummary?Year=2019&BillNumber=5812 [https://perma.cc/4FGY-6D9N].

[104] S. 5812, 66th Leg., Reg. Sess. § 3 (Wash. 2019).

[105] *Bill Information, HB 1923*, WASH. STATE LEGISLATURE, https://app.leg.wa.gov/billsummary?Year=2019&BillNumber=1923 [https://perma.cc/S6TU-4S6X].

ADUs in areas zoned for single-family use, or authorizing development of at least fifty residential units per acre in areas located within half a mile of a transit station.[106] The third, introduced in 2020,[107] would have required all cities with a population of at least 15,000 to authorize the development of "[d]uplexes, triplexes, quadplexes, sixplexes, stacked flats, townhouses, and courtyard apartments" in areas zoned for single-family use.[108] The fourth, which did pass in 2021, preempted city ordinances limiting the number of unrelated people who can live together; however, the law does not authorize additional housing construction, and as such, it is relatively weak.[109]

Finally, in Maryland, the Planning for Modest Homes Act of 2020[110] would have required cities to address the need for affordable housing, defined as workforce housing, low-income housing, and middle housing (itself defined as duplexes, triplexes, quadplexes, cottage clusters, and townhouses).[111] An earlier version of the bill would have preempted certain local regulations that prevent the development of multifamily housing.[112] This bill was part of a set of draft bills, the Homes for All package, which would have also created a fund for public housing and strengthened tenants' rights.[113]

2. Zoning Preemption as Climate Policy. — This Chapter is not the first analysis to recognize this trend in state land use law.[114] However,

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106 H.R. 1923, 66th Leg., Reg. Sess. § 1 (Wash. 2019).

107 *Bill Information, SB 6536*, WASH. STATE LEGISLATURE, https://apps.leg.wa.gov/billsummary?BillNumber=6536&Chamber=Senate&Year=2019 [https://perma.cc/M7XV-7XLK].

108 S. 6536, 66th Leg., Reg. Sess. § 1(1) (Wash. 2020); H.R. 2780, 66th Leg., Reg. Sess. § 1(1) (Wash. 2020). A later version of the bill weakened the provision to require authorizing that range of housing only within a half mile of transit. Levi Pulkkinen, *Make Way for Duplexes: Washington Bill Would Mostly Ban Single-Family-Only Zoning*, CROSSCUT (Feb. 14, 2020), https://crosscut.com/growth/2020/02/make-way-duplexes-washington-bill-would-mostly-ban-single-family-only-zoning [https://perma.cc/8TJK-P8TS].

109 S. 5235, 67th Leg., Reg. Sess. (Wash. 2021).

110 H.D. 1406, 2020 Leg., 441st Sess. (Md. 2020).

111 *Id.*

112 H.D. 1406, 2020 Leg., 441st Sess. (Md. 2020) (as introduced on Feb. 7, 2020).

113 Kriston Capps, *Denser Housing Is Gaining Traction on America's East Coast*, BLOOMBERG: CITYLAB (Jan. 3, 2020, 6:00 AM), https://www.bloomberg.com/news/articles/2020-01-03/maryland-s-ambitious-pitch-for-denser-housing [https://perma.cc/48KR-LQHA].

114 See Diana Budds, *Will Upzoning Neighborhoods Make Homes More Affordable?*, CURBED (Jan. 30, 2020, 1:00 PM), https://archive.curbed.com/2020/1/30/21115351/upzoning-definition-affordable-housing-gentrification [https://perma.cc/A75N-JM4U]; and Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, BLOOMBERG: CITYLAB (May 21, 2019, 7:00 AM), https://www.bloomberg.com/news/articles/2019-05-21/to-tackle-housing-inequality-try-upzoning [https://perma.cc/2DFB-6JF4], for popular accounts of the trend. As mentioned *supra* note 78, Professor John Infranca gives the trend a scholarly treatment, labeling it the "not-so-quiet revolution" in land use law. His account focuses particularly on new state measures that allow owners of land zoned for single-family housing to develop ADUs. Infranca, *supra* note 78, at 847. Infranca explains that these measures are different from previous state-level land use laws because they "expressly preempt or displace specific elements of local land use regulation" and "tend to streamline local development approval processes, rather than add planning and procedural requirements or

existing scholarship exploring the "New State Zoning" tends to focus primarily — or exclusively — on its implications for affordable housing.[115] These academic accounts elide the importance of state land use policy in mitigating climate change. In this way, they mimic the political debates around state preemption laws, some of which similarly deemphasize land use policy's potential to mitigate the climate crisis. As this section explains, despite the relative lack of discussion about the connection between housing density and climate, these recent state zoning laws function as climate policy.

Coverage of zoning density initiatives frequently — although certainly not always[116] — fails to identify those initiatives' climate benefits. Take, for example, Oregon's ban on single-family zoning;[117] even news outlets that regularly report on climate change and related policy largely failed to discuss the law's climate benefits.[118] One of its sponsors, Representative Julie Fahey, circulated a two-page informational flyer in support of its passage that discussed the urgent need for more housing but failed to mention either climate or the environment.[119] The same phenomenon occurred in Connecticut[120] and Nebraska.[121]

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additional layers of review." *Id.* at 875–76. Infranca's piece focuses exclusively on the implications of land use policy for housing availability and affordability. In contrast, this Chapter identifies state-level land use policies as mechanisms to address the intersecting crises of climate change, housing affordability, and racial segregation.

115 *See generally* Infranca, *supra* note 78; Stahl, *supra* note 1.

116 In California, measures to increase housing density and affordability are regularly advertised as good for the climate. *See, e.g.*, Anna Caballero & Michael DeLapa, *How to House People and Achieve California's Climate Goals*, CALMATTERS (Apr. 7, 2021), https://calmatters.org/commentary/my-turn/2021/04/how-to-house-people-and-achieve-californias-climate-goals [https://perma.cc/V92Q-Z9BH]; Scott Wiener & Daniel Kammen, Opinion, *Why Housing Policy Is Climate Policy*, N.Y. TIMES (Mar. 25, 2019), https://www.nytimes.com/2019/03/25/opinion/california-home-prices-climate.html [https://perma.cc/96CX-SRAB]. The same is true in Connecticut, where one major advocate for zoning reform, Desegregate Connecticut, cites "climate justice" as one of its primary goals. *About Us*, DESEGREGATE CONN., https://www.desegregatect.org/about [https://perma.cc/84MQ-P4H2].

117 Laura Bliss, *Oregon's Single-Family Zoning Ban Was a "Long Time Coming,"* BLOOMBERG: CITYLAB (July 2, 2019, 9:03 AM), https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning [https://perma.cc/UF9T-GVCV].

118 *See, e.g.*, Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning [https://perma.cc/TM8V-45WA] (describing the legislation and quoting various Oregon legislators, none of whom discuss climate).

119 Floor Letter, Or. Rep. Julie Fahey, Yes on HB 2001B, With -21 Amendment (June 20, 2019), https://olis.oregonlegislature.gov/liz/2019R1/Downloads/FloorLetter/2924 [https://perma.cc/SR37-L4AN].

120 *See* Bruce Redham Becker, Opinion, *Zoning and Connecticut's Future*, CT MIRROR (Feb. 3, 2021), https://ctmirror.org/category/ct-viewpoints/zoning-and-connecticuts-future [https://perma.cc/J759-5FYM] (failing to mention climate change or the environment); Perras, *supra* note 5 (same).

121 *See* Kriston Capps, *Nebraska's Battle over Single-Family Homes Is Not Much of a Battle*, BLOOMBERG: CITYLAB (Feb. 12, 2020, 3:58 PM), https://www.bloomberg.com/news/articles/2020-02-12/what-happens-when-nebraska-argues-about-upzoning [https://perma.cc/6H2V-NSE7]

State legislatures rarely mentioned climate change when these bills came up for discussion. When Nebraska's bill was presented to the legislature's Urban Affairs Committee, Senator Matt Hansen, the bill's sponsor, discussed neither climate nor the environment, even though the Sierra Club and Green Omaha Coalition both supported the measure.[122] When a supporter of the bill did raise the issue of transit — the primary means through which density reduces GHG emissions — the supporter simply stated that fewer cars and parking lots would make Omaha "a nice place to live."[123]

Regardless of how these recent laws and proposed laws are portrayed, they should undeniably be recognized as climate policy. As described in section A.2, housing density is intimately connected with the GHG emissions that result from transportation and building energy requirements. In fact, the development of state zoning preemption demonstrates the broader truth that if humans are to adequately decarbonize and adapt to the impacts of the worsening climate crisis, there can be no difference between climate-related and non-climate-related policy: every important policy must be enacted with climate in mind. Laws that reduce GHG emissions should also be designed to solve an array of societal problems, such as increasing affordable housing, desegregating neighborhoods, and improving public health.[124]

Not only is this type of policymaking necessary to address the magnitude of the climate crisis, but it may also be more politically palatable. Climate change is a polarizing issue that does not appear first on many people's list of priorities.[125] Most Republicans might not find climate

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(failing to mention climate or the environment); DaLaun Dillard, *The Missing Middle: Omahans Struggling to Find Affordable Single-Family Housing*, KETV OMAHA (Feb. 3, 2020, 12:43 AM), https://www.ketv.com/article/the-missing-middle-omahans-struggling-to-find-affordable-single-family-housing/30745695 [https://perma.cc/S92D-LYQG] (same).

[122] *Hearing on Leg. 794 Before the Comm. on Urb. Affs.*, 106th Leg., 2d Sess. 44–45 (Neb. 2020), https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Urban/2020-02-04.pdf [https://perma.cc/FV8G-88GJ] (statement of Sen. Matt Hansen, Member, Comm. on Urb. Affs.).

[123] *Id.* at 27 (statement of Patrick Leahy, Nebraska chapter of the American Institute of Architects).

[124] This "zoning law as climate policy" is a welcome change from the prevailing paradigm of "zoning law as segregation."

[125] Sedona Chinn et al., *Politicization and Polarization in Climate Change News Content, 1985–2017*, 42 SCI. COMMC'N 112, 120 (2020); *Most Important Problem*, GALLUP, https://news.gallup.com/poll/1675/most-important-problem.aspx [https://perma.cc/6ZTE-WB5X].

change mitigation a particularly motivating concern,[126] but almost everyone agrees that housing is too expensive.[127] Perhaps for this reason, red states like Utah and Nebraska, which rarely consider legislation designed to address climate change, both managed to pass laws advertised as affordable housing measures; the Utah measure was even sponsored by a Republican lawmaker.[128] In blue states, preemptive measures designed to enhance housing density have similarly received bipartisan support.[129]

Even blue states, where more people ostensibly view climate change as a pressing problem, could benefit from more intersectional — and therefore more widely appealing — climate policy. Democratic politicians claim to care deeply about climate change, but many of their policy choices, especially when it comes to housing, do not reflect that concern. After all, the relatively liberal states of Washington, Virginia, and Maryland each failed to liberalize their zoning laws. Despite Democrats' assertions that climate change is a top priority, according to a 2017 study, only eight states spend more than 1.5% of their operating expenditures on climate mitigation and adaptation,[130] a low percentage considering climate change's economic and social magnitude. Several of the bluest states and cities possess the most restrictive zoning laws,[131] and recent

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[126] Brian Kennedy & Courtney Johnson, *More Americans See Climate Change as a Priority, But Democrats Are Much More Concerned than Republicans*, PEW RSCH. CTR. (Feb. 28, 2020), https://www.pewresearch.org/fact-tank/2020/02/28/more-americans-see-climate-change-as-a-priority-but-democrats-are-much-more-concerned-than-republicans [https://perma.cc/H2XF-QCGM] (finding that while almost 80% of Democrats believe that climate change should be a top priority for the President and Congress, only 21% of Republicans agree).

[127] Michael Hendrix, *Metropolitan Majority: The Survey*, MANHATTAN INST. (Sept. 14, 2021), https://www.manhattan-institute.org/metropolitan-majority-poll-costs-crime-classrooms [https://perma.cc/6WUA-TKDP] (finding that cost of housing and homelessness are "leading concerns across the 20 fastest-growing metros in America").

[128] Tony Semerad, *Major Housing Bill Narrowly Passes Utah Senate*, SALT LAKE TRIB. (Feb. 26, 2020, 4:30 PM), https://www.sltrib.com/news/2020/02/26/major-housing-bill [https://perma.cc/CQV6-NAQ7] (noting that the Utah bill was sponsored by a Republican).

[129] *See, e.g.*, Pulkkinen, *supra* note 108 (noting how the Virginia measure was supported by Republicans); Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Historic Legislation to Boost California's Housing Supply and Fight the Housing Crisis (Sept. 16, 2021), https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis [https://perma.cc/C4C3-J5GK] (noting that California's Senate Bill 9 was bipartisan).

[130] Elisabeth A. Gilmore & Travis St. Clair, *Budgeting for Climate Change: Obstacles and Opportunities at the US State Level*, 18 CLIMATE POL'Y 729, 737 (2018).

[131] *See* Randy Shaw, *Will Progressives End Racist Zoning?*, BEYOND CHRON (June 16, 2020), https://beyondchron.org/will-white-people-protesting-racial-injustice-also-end-racist-zoning [https://perma.cc/8V5M-NW2Q].

research finds that, across every demographic, including political identification, people prefer single-family housing.[132] By linking climate policy with other public priorities, advocates can appeal to voters who might otherwise be hesitant to use scarce resources on a contested policy problem, engaging in a type of "fusion politics" to achieve common goals.[133]

Progressive advocates have already come around to this realization. The Green New Deal, a federal resolution introduced by Representative Alexandria Ocasio-Cortez and Senator Edward Markey,[134] recognizes that "the United States is currently experiencing several related crises" and calls for the federal government to decarbonize the economy in a manner that guarantees jobs with livable wages and provides for universal health care.[135] The Sunrise Movement, which organizes around the Green New Deal, similarly emphasizes that climate policy must be intersectional and all-encompassing.[136] Academics have also jumped on board.[137] State legislatures should continue to exploit the synergies between climate change and the housing affordability crisis to enact laws that can win broad-based support.

C. Should States Preempt?

Several arguments against state preemption of local policymaking complicate this account. Municipalities usually implement zoning policy on their own. Many people take issue with state preemption of local policy, a phenomenon that has occurred frequently as of late. Taking away the power of cities to control zoning decisions does away with an

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[132] Jessica Trounstine, Research Note, *You Won't Be My Neighbor: Opposition to High Density Development*, URB. AFFS. REV. ONLINEFIRST 1, 2, 4 (2021), https://journals.sagepub.com/doi/pdf/10.1177/10780874211065776 [https://perma.cc/SQ4Q-9WVV].

[133] The minister and activist Reverend William J. Barber II uses this term to refer to political activities that unite disparate coalitions — here, people who care about climate change and people who care about affordable housing. Richard D. Kahlenberg, Opinion, *The "New Redlining" Is Deciding Who Lives in Your Neighborhood*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/04/19/opinion/biden-zoning-social-justice.html [https://perma.cc/CV64-QWQH].

[134] Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html [https://perma.cc/3PSK-WS46].

[135] H.R. Res. 109, 116th Cong. (2019).

[136] *See* WINNING THE GREEN NEW DEAL (Varshini Prakash & Guido Girgenti eds., 2020); *see also* Jonas J. Monast, *The Ends and Means of Decarbonization: The Green New Deal in Context*, 50 ENV'T L. 21, 24, 26 (2020) ("Proponents of the most expansive iterations of a [Green New Deal] argue that it is not possible to separate justice and economic considerations from environmental policy, and that politics and equity require addressing the economic impacts of climate policy as part of a comprehensive decarbonization effort." *Id.* at 24.).

[137] *See, e.g.*, Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENV'T L. 1, 4 (2013).

important form of direct democracy that is particularly close to the people, and risks diluting the power of racial minorities and undermining local autonomy.[138] Preventing localities from developing their own housing policy may also stifle beneficial innovation.[139]

Furthermore, from a policy-preference perspective, advocates on the left may not want to set a precedent of state preemption: liberal cities must more frequently fight off the efforts of more conservative state governments to preempt their policies than the inverse.[140] Structural arrangements account for this reality. Importantly, the success of Republican gerrymandering efforts has made it all but impossible for Democrats to secure majorities in certain state legislatures.[141] But as Professor Jonathan Rodden observes, partisan gerrymandering explains only part of the problem.[142] Americans' personal geographic choices also matter for state legislature composition. While Republicans are usually dispersed relatively evenly through suburban and rural areas, Democrats tend to cluster in dense city centers.[143] Thus, even were Democrats to somehow win back enough power to redistrict, state legislatures would still likely be more conservative than most city dwellers might prefer.

Indeed, there is good reason to worry about state preemption of local prerogatives. In an influential essay, Professor Richard Briffault identifies a "new and aggressive form of state preemption of local government action."[144] Recently, state governments have thwarted attempts by more liberal cities to enact progressive local policy. In the environmental sphere, states have preempted municipalities from regulating or banning fracking, the process by which natural gas or oil is extracted from the earth by pumping high-pressure fluid down a hole drilled in

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138 Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2009, 2018 (2018).

139 Archer, *supra* note 41, at 181 ("[L]ocal governments have historically broken new ground in public health, education, sanitation, and infrastructure development.").

140 *See, e.g.*, Nestor M. Davidson, Essay, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 958–59, 964 (2019) (describing the "double-edged sword of localism," *id.* at 958); Mary Bottari & Brendan Fischer, *The ALEC-Backed War on Local Democracy*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/the-alec-backed-war-on-lo_b_6961142 [https://perma.cc/G5DG-GTWC] (describing conservative efforts to preempt progressive municipal-level policy).

141 Sam Levine, *Republicans Poised to Rig the Next Election by Gerrymandering Electoral Maps*, THE GUARDIAN (July 27, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/jul/27/gerrymandering-republicans-electoral-maps-political-heist [https://perma.cc/NSC7-TXUG]. Today, 61% of state legislatures are Republican-controlled. *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2022), https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx [https://perma.cc/KFP5-JV2V].

142 JONATHAN RODDEN, WHY CITIES LOSE 166–67 (2019).

143 Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241 (2013).

144 Briffault, *supra* note 138, at 1997.

the ground.[145] Fracking has both health and environmental effects, including groundwater and drinking water contamination and air pollution; to combat these problems, many of which particularly burden local communities, a range of localities have regulated or banned the practice.[146] Some states, including Pennsylvania, New York, West Virginia, Ohio, Texas, and Colorado, have each, to some extent, attempted to preempt the ability of municipalities to regulate or ban fracking.[147] States have also blocked cities from imposing restrictions on the use of plastic bags[148] or requiring homeowners and landlords to report on their energy usage.[149]

Beyond environmental policy, states have recently preempted a host of progressive local ordinances. According to a survey by the National League of Cities, over half of all states prohibit cities from establishing their own minimum-wage standards.[150] Granted, some of these states did not explicitly preempt cities from taking action on the minimum wage and simply never delegated this power to municipalities.[151] But other states did actively thwart attempts by cities to raise the minimum wage.[152] States have also preempted city action relating to paid leave, antidiscrimination protections, and municipal broadband.[153]

More specifically applicable to this Chapter, Professors Christopher Serkin and Richard Schragger have warned against state preemption of local zoning power. Serkin explains that municipal zoning restrictions protect the expectations of residents by regulating the pace at which neighborhood change occurs; zoning restrictions also allocate the costs of new development to newcomers.[154] Schragger takes a different tack, writing against state preemption because it has previously failed to make

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[145] *The Process of Unconventional Natural Gas Production*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/uog/process-unconventional-natural-gas-production [https://perma.cc/5YHT-XGAR].

[146] Shaun A. Goho, Commentary, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 PLAN. & ENV'T L., July 2012, at 4; Hannah J. Wiseman, Response, *Governing Fracking from the Ground Up*, 93 TEX. L. REV. 29, 39 (2015) (citing fracking regulations in Arlington and Fort Worth, Texas, and Sante Fe County, New Mexico).

[147] Goho, *supra* note 146, at 5–8.

[148] Henry Grabar, *Phoenix Has Beef with Arizona*, SLATE (Sept. 19, 2016, 4:16 PM), https://slate.com/business/2016/09/phoenix-mayor-greg-stanton-is-fed-up-with-arizona-pre-empting-his-citys-laws.html [https://perma.cc/K2HL-MXYE]; Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html [https://perma.cc/6ZUP-TTPA].

[149] Grabar, *supra* note 148.

[150] NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 6 (2018), https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf [https://perma.cc/8AL8-76J3].

[151] *Id.*

[152] *Id.*

[153] *Id.* at 4.

[154] Serkin, *supra* note 11, at 752–53.

housing more affordable, it has a fundamentally free-market orientation, and it does not get at the core cause of housing segregation.[155] As he points out, Houston proves problematic for those advocating for zoning deregulation;[156] although the city employs little land use regulation, its extensive sprawl is characterized by single-family homes and a lot of driving.[157] Why, Schragger asks, should we advocate for zoning-preemptive policies if the result will be a country full of Houstons?

These critiques merit attention. The idea that strong state preemption favors conservative policymaking is particularly worryisome for those concerned about climate change. The best response to this problem is likely that state preemption of municipal law should be used sparingly and only under certain conditions or for certain types of policy problems. Advocates may want to reserve preemption, as Professor Paul Diller proposes, for when it is "the product of a credibly majoritarian lawmaking process."[158] Or advocates might reserve preemption for problems with negative statewide effects,[159] problems that, because of collective action dynamics, a municipality will not address on its own. In other words, statewide preemption may be desirable when individual municipalities make decisions that impose costs on other municipalities, costs that the acting municipalities have no reason to internalize and for which voluntary regional cooperation is therefore infeasible.

Zoning appears to satisfy these requirements. First, it possesses statewide spillover effects; even ignoring its impact on climate,[160] the less housing one town offers, the more others will need to provide to satisfy the population's housing needs. Motivated cities can — and

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155 Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 128–32 (2021).

156 *Id.* at 159.

157 Hilary Ybarra, *How Urban or Suburban Is Sprawling Houston?*, URB. EDGE (Sept. 21, 2017), https://kinder.rice.edu/2017/09/21/how-urban-or-suburban-is-sprawling-houston [https://perma.cc/YH7P-GQSL].

158 Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 346 (2020).

159 Professor Nestor Davidson justifies state preemption of local law by appealing to the normative provisions that appear in state constitutions, such as individual rights and general welfare. Davidson, *supra* note 140, at 986–93. He explains that a locality's exercise of power delegated to it by the state must "reflect consequences that affect the state as a whole." *Id.* at 991. When localities "offend" a state-held value, states are justified in stepping in to limit the "externalities that can be produced by local parochialism." *Id.* at 992. Davidson notes that the New Jersey Supreme Court's landmark decision in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), drew on the state constitutional constraint to legislate for the general welfare and the importance of housing to individual existence to require municipalities to take on their fair share of regional housing needs. Davidson, *supra* note 140, at 993–94.

160 Climate change, of course, is the ultimate collective action problem. Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RES. J. 195, 196 (2007).

do — pass ordinances designed to increase housing density.[161] But big cities need surrounding suburbs to ease their housing burden. One of the reasons why cities like Boston are so expensive is because their suburbs do not take their fair share of the metropolitan population.[162]

Second, it is unlikely that individual municipalities will be motivated to change the status quo. The zoning actions of one town are unlikely to produce enough additional housing to meaningfully lower either housing costs or GHG emissions. This collective action problem is worsened by the fact that the constituents who are lucky enough to own single-family housing are unlikely to vote against their own perceived interests to increase the supply of housing in their communities.[163] These "homevoters," who are overrepresented in local governments,[164] tend to oppose any action that might endanger home values, such as the construction of multifamily housing.[165] Zoning is therefore different from other policy areas in which a municipality's voters feel at least some of the costs of their actions, such as when residents of a town that permits fracking experience noxious smells and water contamination.[166]

When municipalities will not internalize the negative consequences of their decisions or face coordination problems, states can intervene. Municipalities can engage in zoning only because their state governments enable them to.[167] If they abuse that privilege by preventing the construction of enough housing to accommodate the state's population or by promoting sprawling land use that leads to GHG-emitting travel, states should assert their prerogative and responsibility to provide for the general welfare.[168] This assertion comports with subsidiarity, the

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161 *See, e.g.*, Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265 [https://perma.cc/5LRM-MTGS].

162 *See* Glaeser et al., *supra* note 65, at 2.

163 *See* Briffault, *supra* note 49, at 1147–50 (explaining why individual municipalities are unlikely to see the benefits of giving up local control over land use regulations).

164 David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 OHIO ST. L.J. 883, 911 (2020); *see id.* at 888. These voters are also "richer, whiter, and more likely to own homes than the general population." *Id.* The unrepresentativeness of local government, combined with its problem of "shockingly low" voter turnout, *id.* at 911, poses problems for defenders of municipal autonomy who cite to the more low-to-the-ground, democratic nature of local lawmaking. *See id.* at 910–11.

165 Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 346 (2019). Homevoters try to obstruct zoning reform at the state level as well, but at least there, their presence is diluted by a more diverse constituency, and the policymaking process provides them with less access. *Id.* at 347–48.

166 *See generally* ELIZA GRISWOLD, AMITY AND PROSPERITY (2018). Relatedly, municipalities that allow fracking also experience the benefits of doing so, like increased employment and tax revenue. This is not a situation in which a municipality experiences only the costs of a decision and the state only the benefits, in which case we might be more hesitant to allow preemption.

167 *See* John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RSRV. L. REV. 995, 999 (2013).

168 *See* Davidson, *supra* note 140, at 961, 990–92.

"notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved."[169]

In response to the critiques articulated by Serkin and Schragger, Professor David Schleicher offers several convincing counterarguments.[170] Yes, Serkin is right that zoning protects resident expectations, but there is a strong normative case to be made that protecting the expectations of upper- and upper-middle-class suburbanites should not dictate zoning policy, as it has for the past century.[171] Schragger's arguments are less normatively questionable, but they mostly take issue with state zoning preemption as insufficient to solve the problem of housing affordability — for example, we do not need more Houstons — instead of arguing against zoning reform's underlying goals. That is fair; deregulatory zoning alone will not meaningfully reduce GHG emissions or increase housing affordability. But Schragger's critique arguably makes the case for more, not less, state action on housing.

States possess a variety of tools, potentially more than any other level of government, which they can use to promote dense, affordable housing. They could subsidize affordable housing[172] or institute rent controls. They could change how local schools are funded or impose high taxes on land.[173] They could establish regional governments to coordinate local decisionmaking within certain metropolitan areas, giving populous cities a say in the zoning choices of surrounding towns and maybe even access to a portion of town revenues.[174] They could enact minimum zoning mandates, refusing, for example, to allow new single-family development in certain areas close to transportation or business centers.[175] They could establish damages remedies against municipalities with exclusionary policies.[176] They could even pass state constitutional amendments that recognize affordable housing as a right, which could facilitate challenges to exclusionary zoning policies.[177] No, liberalized

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[169] Briffault, *supra* note 49, at 1165 n.217 (quoting George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994)).

[170] *See generally* Schleicher, *supra* note 164.

[171] *See id.* at 890.

[172] *Cf.* SCHUETZ, *supra* note 29, at 4 (discussing federal housing subsidies).

[173] *See id.* at 3 (describing how a land value tax, which charges a higher tax rate on land and a lower tax rate on structures, can encourage density).

[174] *See* Briffault, *supra* note 49, at 1164–71.

[175] *See* JOSHUA D. GOTTLIEB, HOW MINIMUM ZONING MANDATES CAN IMPROVE HOUSING MARKETS AND EXPAND OPPORTUNITY 3 (2018), http://users.nber.org/~jdgottl/MinimumZoningMandates.pdf [https://perma.cc/Z8G6-GZWQ].

[176] *See* Ellickson, *supra* note 25, at 436–37.

[177] *See generally* Note, *Addressing Modern Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104 (2022).

zoning alone will not accomplish much — but that is not what progressive advocates and scholars of zoning policy are asking for.[178] On the other hand, liberalized zoning, plus a suite of other progressive housing measures, could make a difference. As such, states are perfectly within their rights to withdraw some of the zoning discretion that localities currently possess, discretion that, at the end of the day, ultimately derives from state authority.[179]

Conclusion

State preemption of single-family zoning will not solve climate change or housing affordability — no one policy will. Still, interventions that make dense zoning possible are necessary to reduce the copious emissions that sprawl engenders. And increasingly, those interventions are coming not from municipalities, the traditional sources of zoning policy, but from state governments passing policies that preempt local density restrictions. While some doubt the desirability of preventing municipalities from making their own policy, zoning may be a special case that warrants an exception: exclusionary zoning imposes externalities on the rest of a state, and collective action problems make it likely that municipalities will not incentivize denser housing on their own initiative.

States should continue to prohibit municipalities from allowing single-family zoning, but they must go further in order to spur the development of dense, environmentally friendly housing. In addition to subsidizing the development of affordable housing, they should use tax incentives to encourage developers to build dense housing located close to transit and require housing to contain a certain minimum number of units. States could go even further, employing zoning policy not only to mitigate climate change, but also to make cities and towns more resilient to climate change's inevitable impacts.[180] Such adaptive policies should, for the same reasons already articulated, also be designed to address a range of societal problems. Only with a comprehensive effort, worthy of the problems that we face today, will states do what is necessary to address housing affordability, segregation, and climate change.

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[178] Katherine Levine Einstein, *The Privileged Few: How Exclusionary Zoning Amplifies the Advantaged and Blocks New Housing — And What We Can Do About It*, 57 URB. AFFS. REV. 252, 261 (2021) (describing how "[m]ost observers concerned about the deleterious effects of land-use regulations on the housing market" want "*changes* in land-use regulations — not necessarily their elimination").

[179] As one California politician observed, local control over zoning "isn't biblical." Stahl, *supra* note 1, at 180 (quoting Scott Wiener, *Senator Wiener's Statement on Huntington Beach Suing to Overturn Housing Streamlining Law He Authored, SB 35*, MEDIUM (Jan. 27, 2019), https://scottwiener.medium.com/senator-wieners-statement-on-huntington-beach-suing-to-overturn-the-housing-streamlining-law-he-bb4c43573868 [https://perma.cc/8YFU-67LA]).

[180] *See* Glicksman, *supra* note 51, at 1173 (describing how "restrict[ing] development in areas vulnerable to flooding or . . . preserv[ing] open space to provide connective corridors for migrating wildlife species" are two examples of how zoning can be used to adapt to climate change).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Sullivan Properties, Inc. v. City of Winter Springs, M.D.Fla., September 25, 1995

47 S.Ct. 114
Supreme Court of the United States.

VILLAGE OF EUCLID, OHIO, et al.
v.
AMBLER REALTY CO.

No. 31.
|
Reargued Oct. 12, 1926.
|
Decided Nov. 22, 1926.

Synopsis
Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr. Justice Butler dissenting.

Appeal from the District Court of the United States for the Northern District of Ohio.

Suit by the Ambler Realty Company against the Village of Euclid, Ohio, and another. From a decree for plaintiff (297 F. 307), defendants appeal. Reversed.

West Headnotes (11)

[2] **Constitutional Law** Meaning of Language in General

The meaning of constitutional guaranties never varies, though scope of their application may expand or contract to meet new and different conditions.

35 Cases that cite this headnote

[3] **Zoning and Planning** Architectural or Structural Designs

Power to forbid erection of particular building or for particular use is to be determined, not by abstract consideration of building or use, but by consideration in connection with circumstances and locality.

97 Cases that cite this headnote

[4] **Zoning and Planning** Propriety of classification and uniformity of operation in general

Zoning and Planning Classification of property; size and boundary of zones

Zoning and Planning Classification of property

If validity of legislative classification for zoning purposes be fairly debatable, legislative judgment must be allowed to control.

238 Cases that cite this headnote

[5] **Zoning and Planning** Matters affecting validity in general

Zoning and Planning Standards governing conduct of administrative officials

Zoning law, drawn in general terms and providing reasonable margin to secure effective enforcement, will not be held invalid because individual cases may turn out to be innocuous in themselves.

38 Cases that cite this headnote

[6] **Zoning and Planning** Matters affecting validity in general

That zoning ordinance of village, which is suburb of city, will divert industrial development of city from course which it would naturally follow does not render it invalid.

38 Cases that cite this headnote

[8] **Zoning and Planning** Matters affecting validity in general

Zoning and Planning Public health, safety, morals, or general welfare

Zoning ordinance must be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals, or general welfare before it can be declared unconstitutional.

937 Cases that cite this headnote

[10] **Constitutional Law** Scope of inquiry in general

Constitutional Law Necessity of Determination

It is the policy of the Supreme Court in considering matters of constitutional law not to formulate rules or decide questions beyond necessities of immediate issue.

19 Cases that cite this headnote

[8] **Zoning and Planning** Regulations in general

Zoning and Planning Pleading, petition, or indictment

Where injunction against zoning ordinance is sought on broad ground that ordinance adversely affects plaintiff, court will not examine ordinance to determine constitutionality of minor provisions.

75 Cases that cite this headnote

[9] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Zoning and Planning Injunction

Suit to enjoin enforcement of zoning ordinance will lie, though plaintiff has made no effort to obtain building permit or to obtain relief under terms of ordinance.

47 Cases that cite this headnote

[10] **Constitutional Law** Particular issues and applications

Zoning and Planning Uses permitted or excluded

Zoning ordinance, excluding apartment houses from desirable residential district, was not arbitrary and unreasonable. U.S.C.A.Const. Amend. 14; Const. Ohio, art. 1, § 19.

189 Cases that cite this headnote

[11] **Constitutional Law** Zoning and Land Use

Zoning and Planning Uses permitted or excluded

Zoning ordinance, excluding apartment houses, business houses, retail stores, and shops from residential district, held not invalid.

204 Cases that cite this headnote

Attorneys and Law Firms

****115** ***367** Mr. James Metzenbaum, of Cleveland, Ohio, for appellants.

***371** Messrs. Newton D. Baker and Robert M. Morgan, both of Cleveland, Ohio, for appellee.

Opinion

***379** Mr. Justice SUTHERLAND delivered the opinion of the Court.

The village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately 3 1/2 miles each way. East and west it is traversed by three principal highways: Euclid avenue, through the southerly border, St. Clair avenue, through the central portion, and Lake Shore boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid avenue, and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, ***380** industries, apartment houses, two-family houses,

single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries, and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds, and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, ****116** studios, telephone exchanges, fire and police stations, restaurants, theaters and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs, and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks), and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning, and dyeing establishments, ***381** blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesroom; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper, and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble-minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4, or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative-that is to say, uses in class U-2 include those enumerated in the preceding class U-1; class U-3 includes uses enumerated in the preceding classes, U-2, and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses; that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of 2 1/2 stories, or 35 feet; in class H-2, to 4 stories, or 50 feet; in class H-3, to 80 feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 ***382** districts, the limites are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side, and rear yards, and other matters, including restrictions and regulations as to the use of billboards, signboards, and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family, and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semipublic buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theaters, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive. [1]

***383** Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height, and area districts, from which it appears that the three classes overlap one another; that is to say, for example,

both U-5 and U-6 use districts are in A-4 area district, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one, and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying ****117** south of Euclid avenue is principally in U-1 districts. The lands lying north of Euclid avenue and bordering on the long strip just described are included in U-1, U-2, U-3, and U-4 districts, principally in U-2.

The enforcement of the ordinance is intrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various ***384** provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement, 297 F. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path or progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinanceattempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that propective buyers of land for industrial, commercial, and residential uses in the metropolitan district of Cleveland ***385** are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial, and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses, to which perhaps should be added-if not included in the foregoing-restrictions in respect of apartment houses. Specifically there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries, and other public and semipublic buildings. It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last-named uses, and we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered. It is

also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

***386** We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

[1] A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief, as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled, the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming ****118** the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See Terrace v. Thompson, 263 U. S. 197, 215, 44 S. Ct. 15, 68 L. Ed. 255; Pierce v. Society of Sisters, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid, in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory'?

[2] **[3]** **[4]** Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in ***387** urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common low of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining ***388** the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See Welch

v. Swasey, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923; Hadacheck v. Los Angeles, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; Reinman v. Little Rock, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900; Cusack Co. v. City of Chicago, 242 U. S. 526, 529, 530, 37 S. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Am.Ann.Cas. 1917C, 594.

[5] Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U. S. 297, 303, 39 S. Ct. 125, 63 L. Ed. 255; Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 500, 39 S. Ct. 172, 63 L. Ed. 381. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise ***389** valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are ****119** not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' Purity Extract Co. v. Lynch, 226 U. S. 192, 204, 33 S. Ct. 44, 47 (57 L. Ed. 184). Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

[6] It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities ***390** separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

[7] We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

As sustaining a broader view, see Opinion of the Justices, 234 Mass. 597, 607, 127 N. E. 525; Inspector of Buildings of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262; Spector v. Building Inspector of Milton, 250 Mass. 63, 145 N. E. 265; Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269; State v. City of New Orleans, 154 La. 271, 282, 97 So. 440, 33 A. L. R. 260; Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209; City of Aurora v. Burns, 319 Ill. 84, 93, 149 N. E. 784; Deynzer v. City of Evanston, 319 Ill. 226, 149 N E. 790; ***391** State ex rel. v. Houghton, 164 Minn. 146, 204 N. W. 569; State ex rel. Carter v. Harper, 182 Wis. 148, 157-161, 196 N. W. 451, 33 A. L. R. 269; Ware v. City of Wichita, 113 Kan. 153,

214 P. 99; Miller v. Board of Public Works, 195 Cal. 477, 486-495, 234 P. 381, 38 A. L. R. 1479; City of Providence v. Stephens (R. I.) 133 A. 614.

For the contrary view, see Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A. L. R. 1455; Ignaciunas v. Risley, 98 N. J. Law. 712, 121 A. 783; Spann v. City of Dallas, 111 Tex. 350, 238 S. W. 513, 19 A. L. R. 1387.

As evidence of the decided trend toward the broader view, it is significant that in sime instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare State ex rel. v. Houghton, supra, sustaining the power, with State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1917, L. R. A. 1917F, 1050, State ex rel. Roerig v. City of Minneapolis, 136 Minn. 479, 162 N. W. 477, and Vorlander v. Hokenson, 145 Minn. 484, 175 N. W. 995, denying it, all of which are disapproved in the Houghton Case (page 151 (204 N. W. 569)) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and **120 safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on.

*392 The Supreme Court of Illinois, in City of Aurora v. Burns, supra, pages 93-95 (149 N. E. 788), in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two family dwellings, churches, educational institutions, and schools, said:

'The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions. * * *

'* * * The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. * * *

'* * * The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses, in order to prevent, or at least to reduce, the congestion, disorder, and dangers *393 which often inhere in unregulated municipal development.'

The Supreme Court of Louisiana, in State v. City of New Orleans, supra, pages 282, 283 (97 So. 444), said:

'In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy is street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. * * *

'Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. * * *

'If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot-not the courts.'

***394** The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from ****121** their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, ***395** apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

[8] If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, supra, pages 530-531 (37 S. Ct. 190); Jacobson v. Massachusetts, 197 U. S. 11, 30-31, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

[9] It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not ***396** made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. Turpin v. Lemon, 187 U. S. 51, 60, 23 S. Ct. 20, 47 L. Ed. 70. In Railroad Commission Cases, 116 U.S. 307, 335-337, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636, this court dealt with an analogous situation. There an act of the Mississippi Legislature, regulating freight and passenger rates on intrastate railroads and creating a supervisory commission, was attacked as unconstitutional. The suit was brought to enjoin the commission from enforcing against the plaintiff railroad company any of its provisions. In

an opinion delivered by Chief Justice Waite, this court held that the chief purpose of the statute was to fix a maximum of charges and to regulate in some matters of a police nature the use of railroads in the state. After sustaining the constitutionality of the statute 'in its general scope' this court said:

> 'Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company.'

Quoting with approval from the opinion of the Supreme Court of Mississppi, it was further said:

> 'Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented.'

And finally:

> 'When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid.'

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations, or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated ***397** uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more or the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands, is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

[10] And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must ****122** be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER dissent.

All Citations

272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, 4 Ohio Law Abs. 816

Footnotes

1 The court below seemed to think that the frontage of this property on Euclid avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: 'The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630(620) feet wide north of Euclid avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory.'