ZONING AND THE CONSTITUTION

Times of political and economic transition sometimes necessitate change in the supreme law of the state. The Constitution of Missouri for 1875 provided for a convention to make needed revisions of the state constitution.[1] In anticipation of the proposed submission to the electorate of the question concerning such a convention and in further anticipation of an affirmative majority, it becomes apparent that subjects of state-wide interest should be considered with constitutional changes in view. The rapidly advancing scope of zoning is among those subjects which may well demand attention.

It has been said that "The idea [for zoning] came from one of the most progressive German cities of that day, Frankfort-on-the-Main, where the general principle of controlling the use of private property has been put into operation, with conspicuously advantageous results, under the leadership of Burgomaster Adickes."[2] This idea spread and became firmly entrenched in this country for the first time in New York.[3] Since that time, zoning practices have passed through times of uncertainty and change,[4] but in ever increasing extent and favor[5] such ordinances have been enacted covering city property, and with the enactment of the California Planning Act of 1927,[6] together with further extension in the Wisconsin County Zoning Act,[7] zoning entered a new era of expansion.

In zoning's era of uncertainty, the history of zoning legislation in the state of Missouri had an interesting development. In Missouri the first zoning ordinances were passed by St. Louis[8]

1. Article XV, section 4 provides for the submission of the question, "Shall there be a convention to revise and amend the Constitution?"

2. Munro, A Danger Spot in the Zoning Movement (May 1931) 155—Part II The Annals of the American Academy of Political and Social Science 128, 133.

3. Metzenbaum, *The Law of Zoning* (1930) 150. New York was also the locale of the first decisions upon comprehensive zoning. Lincoln Trust Co. v. Williams Bldg. Corp. (1920) 229 N. Y. 313, 128 N. E. 209, holding the zoning resolutions were not such encumbrances as would be a defense to a specific performance action against the proposed purchaser, since it was a *proper* exercise of the police power.

4. Bassett, *Zoning* (1936) 15-16.

5. 8 New York State Constitutional Convention Committee, *Problems Relating to Executive, Administration and Powers* (1938) 327.

6. Cal. Stats. (1929) c. 838; Cal. Gen. Laws (Deering, 1937) act 5211b provides the machinery for county planning and requires all counties to use it.

7. Wis. Stats. (1937) c. 59.97, §1.

8. Wells, The Law of Zoning in Missouri (1926) 34 Law Ser. Mo. Bull. 1, 8.

operating under a home-rule charter. In the case of *State ex rel. Penrose Inv. Co. v. McKelvey*,[9] the Missouri Supreme Court held the St. Louis zoning ordinance unconstitutional. The court took the strict view of the police power in holding the attempt to zone in the absence of an enabling act was unconstitutional under the Missouri Constitution of 1875.[10] The decision is, therefore, not to be regarded as hostile to zoning; rather, it holds that the charter provisions were not broad enough to sustain a comprehensive zoning ordinance of this type.[11] This case was followed in rapid succession by two other cases holding similarly, and based upon the same reasoning.[12] To remedy the chaotic condition which followed these cases,[13] an enabling act to authorize zoning was passed in Missouri, April 4, 1925.[14] In 1926, in *Village of Euclid v. Ambler Realty Co.*,[15] the United States Supreme Court was called to rule upon the validity of a comprehensive zoning ordinance, similar in scope to that held invalid by the Missouri Supreme Court, and held it to be a valid application of the police power, constitutional under the Fourteenth Amendment. Although this decision has been criticized by some,[16] it has often been favorably cited in succeeding cases.[17] When the question of comprehensive zoning again confronted the Missouri Supreme Court in the case of *State ex rel. Oliver Cadillac Co. v. Christopher*,[18] that body reversed its former position. Yet after the first cases,[19] no one of the judges was called on to change his

9. (1923) 301 Mo. 1, 256 S. W. 474. This case was an original proceeding in the Supreme Court of Missouri brought to require the Building Commission of the City of St. Louis to issue to the relators a permit for the erection of an ice manufactory. The commission refused to issue because of St. Louis, Mo., Ordinance No. 30199 (July 1918). This ordinance was passed under the powers given by art. I, City Charter 1914, p. 540.

10. Mo. Const. (1875) art. II, §21. "Private property shall not be taken or *damaged* for public use without just compensation. * * * "

11. Baker, *Legal Aspects of Zoning* (1927) 128; Bassett, *Zoning* (1936) 15; Metzenbaum, *The Law of Zoning* (1930) 201; Bettmann, Constitutionality of Zoning (1924) 37 Harv. L. Rev. 834.

12. State ex rel. Better Built Home Co. v. McKelvey (1923) 301 Mo. 130, 256 S. W. 495; St. Louis v. Evraiff (1923) 301 Mo. 231, 256 S. W. 489.

13. Bartholomew, Present Status of Zoning in Missouri (1924) 13 Nat'l Municipal Rev. 672.

14. Mo. Laws of 1925, 308 to 313; R. S. Mo. (1939) §§7412 to 7423.

15. (1926) 272 U. S. 365.

16. Baker, *Legal Aspects of Zoning* (1927) 144.

17. Gorieb v. Fox (1927) 274 U. S. 603, 273 U. S. 687; Nectow v. City of Cambridge (1928) 277 U. S. 183; American Wood Products Co. v. City of Minneapolis (C. C. A. 8, 1929) 35 F. (2d) 657; Knickerbocker Ice Co. v. Sprague (D. C. S. D. N. Y. 1933) 4 F. Supp. 499.

18. (1927) 317 Mo. 1179, 298 S. W. 720.

19. State ex rel. Penrose Inv. Co. v. McKelvey (1923) 301 Mo. 1, 256 S. W. 474; State ex rel. Better Built Homes Co. v. McKelvey (1923) 301 Mo. 130, 256 S. W. 495; St. Louis v. Evraiff (1923) 301 Mo. 231, 256 S. W. 489.

opinion, because the retiring members had composed the original case's majority, and the new members joined with the minority judges.[20] That the court remained reluctant to recognize the validity of zoning is evidenced by the case of *Aufderheide v. Polar Wave Ice and Fuel Co.*[21] where the court when asked to give a perpetual injunction against an anticipated nuisance from the operation of an ice factory held that since the zoning ordinance covering the property had been held unconstitutional, "therefore, [it] became a rule of property, and so the rule of stare decisis applies, at least so far as the use of the lot now in controversy, as affected by that zoning ordinance is concerned." However, it must be recognized that the legality of zoning in Missouri is firmly established.[22]

While this tergiversation was taking place in Missouri, other very important advancements in zoning were occurring in widely separated states,[23] especially California and Wisconsin. California's Constitution of 1879[24] first made the zoning of "any county, city, town, or township" possible, and the first ordinance enacted pursuant to the constitutional provision was passed in Los Angeles County in 1925.[25] Wisconsin in 1923 passed the first enabling act permitting counties to zone the land outside the incorporated villages and cities.[26] The act was later revised and

20. In State ex rel. Penrose Inv. Co. v. McKelvey (1923) 301 Mo. 1, 256 S. W. 474 the opinion was written by Walker, Woodson and D. E. Blair concurring therein, and Graves concurred in the result in a separate opinion. White dissented with Ragland and J. T. Blair concurring. J. T. Blair and Woodson retired, and were replaced by Atwood and Gantt. Then in State ex rel. Oliver Cadillac Co. v. Christopher (1927) 317 Mo. 1179, 298 S. W. 720, in which the court upheld the constitutionality of a zoning ordinance, the opinion was written by Ragland, and concurred in by Atwood, Gantt, and White. Graves dissents in a separate opinion, with D. E. Blair concurring in his results. Walker dissents.

21. (1928) 319 Mo. 337, 4 S. W. (2d) 776.

22. Metzenbaum, *The Law of Zoning* (1930) 203.

23. Cal. Gen. Laws (Deering 1937) §5211b, Stats. (1937) c. 665; Colo. Sess. Laws (1939) c. 67; Fla. Laws (1937) c. 17833; Ga. Laws (1937-38) pt. II, tit. II, p. 767 (Chatham, Bryan, and Liberty Counties), p. 823 (Glynn County); Ill. Rev. Stats. (1939) c. 34, §152i; Ind. Acts (1935) c. 239; Kan. Laws (1939) c. 164; Ky. Carroll's Stats. (1930) §3239f-1; Mich. Mason's Comp. Laws (1935 supp.) c. 54, §2642; R. S. Mo. (1939) §7412; Minn. Sess. Laws (1939) c. 187 (towns), c. 340 (counties); N. Y. Consolidated Laws (Thompson's 1939) c. 62, art. 16; Penn. Laws (1937) act 435; Tenn. Pub. Acts (1935) c. 43 (counties), Pub. Acts (1939) c. 158 (unincorporated communities); Va. Acts (1938) c. 415; Wash. Sess. Laws (1935) c. 44; Wis. Stats. (1937) c. 59.97.

24. Art. XI, §11: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

25. Los Angeles County Ord. No. 1270 N. S. adopted in April 1925.

26. Wis. Laws of 1923. c. 388, Wis. Stats. (1937) c. 59-97, §1.

strengthened in 1935, among other things, to make more specific the section in regard to cooperation between the county boards and the town boards of the towns in which the lands are located.[27] Missouri, in due time, following this trend, took its first step toward zoning extension with the passage of an act creating a State Planning Board[28] to "make and adopt plans for the purpose of bringing about coordinated development of the state in accordance with the present and future economic and social needs * * * in a manner which will conserve the natural resources of the state and which will best advance the health, convenience, prosperity and welfare of the people * * *."[29] But this act, though an advance, still lacked means of enforcement. The legislature therefore created a County Planning Commission[30] consisting of a county court judge, the county highway engineer, the chairman of each municipal planning body in the county and one resident free-holder appointed by the county court of each unincorporated part of each township in the county.[31] This commission was to adopt a master plan "to conserve the natural resources of the county to insure efficient expenditure of public funds and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants."[32] It further provided that after the adoption of the master plan "no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the planning commission and receiving their written approval and recommendations * * *."[33] Violation is made punishable as a misdemeanor.[34]

The Missouri statutory provisions, though making great strides toward unified state-wide planning and zoning, are too narrowly limited, for only counties having "a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants" are authorized to prepare and carry out a county plan.[35] It is well recognized that population is a justifiable basis of classification,[36] but even courts have ex-

27. Wis. Laws of 1935, c. 303. Wehrwein, County Zoning and Consolidation (1935) 11 Wis. L. Rev. 136.
28. Mo. Laws of 1935, 393, R. S. Mo. (1939) §15391.
29. Mo. Laws of 1935, §394, §2; R. S. Mo. (1939) §15392.
30. Mo. Laws of 1939, 622 et seq., R. S. Mo. (1939) §§15348 to 15362.
31. R. S. Mo. (1939) §15349.
32. R. S. Mo. (1939) §15351.
33. R. S. Mo. (1939) §15352.
34. R. S. Mo. (1939) §15363.
35. R. S. Mo. (1939) §15348.
36. State v. Wilson (1915) 265 Mo. 1, 175 S. W. 603; Randolph v. City of Springfield (1923) 302 Mo. 33, 257 S. W. 449, 31 A. L. R. 612.

pressed the necessity for a comprehensive plan[37] to avoid piecemeal zoning which might very well increase confusion and hinder, rather than help, development.[38] Cooperation between county and city is effectuated by a provision that the chairmen of municipal planning bodies are members of the county planning board.[39] Such cooperation is not effectuated, however, between the county-city agencies and the state. The existing enactments make no provision for the submission of plans by the county agency to a central (state) agency where conflicts may be reconciled and a central philosophy of state planning be maintained.[40] There is much which could be said for such an over-all plan. Under present constitutional provisions, however, such a central agency probably could not enforce a comprehensive plan, since constitutional obstacles[41] might be encountered if such central agency were given a veto power over the programs of constituted departments.

Heretofore, most of the emphasis in the field of zoning has been on urban problems, but the rapid growth of zoning by the cities led to the locating of many uses of land prohibited by city zoning in the unincorporated fringes of the cities.[43] Though county zoning rests upon the same principles as urban, yet it has a greater breadth and depth. It has been termed "economic geography moulded by a concept of a social purpose," because it must include the conservation and interrelation of mineral, forest and water resources, soils, climate, topography and ecology on the one hand and the social, economic and administrative systems on the other.[44] Some doubt has been expressed as to zoning being the correct tool to meet the problems facing suburban or rural communities[45] and as to the constitutionality under the police powers of such drastic limitations in the public interest

37. See City of Youngstown v. Kahn Bros. Bldg. Co. (1925) 112 Ohio State 654, 148 N. E. 842.

38. Chamberlain, Zoning Progress (1929) 15 A. B. A. J. 535.

39. R. S. Mo. (1939) §15349.

40. 8 New York State Constitutional Convention Committee, *Problems Relating to Executive, Administration and Powers* (1938) 330; 4 New York State Constitutional Convention Committee, *State and Local Government in New York* (1938) 356.

41. Mo. Const. (1875) art. VI, §36. See State ex rel. Buckner v. McElroy (1925) 309 Mo. 595, 274 S. W. 749.

43. 4 New York State Constitutional Convention Committee, *State and Local Government in New York* (1938) 355.

44. Pomeroy, County Zoning under the California Planning Act (May 1931) 155—Part II The Annals of the American Academy of Political and Social Science 47, 48.

45. 8 New York State Constitutional Convention Committee, *Problems Relating to Executive, Administration and Powers* (1938) 329.

without provisions by direct constitutional expression.[46] However, it must be borne in mind that zoning legislation, as based upon the police power,[47] a power inherent in the states unless limited by constitutional provisions,[48] is a power which can be delegated by statute or charter.[49] It must be noted, also, how broadly the scope of the police power has been expanded in recent years. While the police power at one time justified restrictions of the use of property or of liberty only to protect the health, safety or morals of the community, the courts have lately approved exercise of the police power to promote "the general welfare,"[50] "public convenience"[51] or "general prosperity."[52] In recent years courts have recognized the lawfulness of zoning regulations about as rapidly as organized communities have found them necessary,[53] so long as they were not unreasonable or arbitrary.[54] The above statements should be considered in light of the fact that the validity of specific provisions in zoning ordinances is tested only as cases arise in which they are directly involved and in which a decision on the question of validity is necessary.[55] There is a presumption that zoning ordinances are proper exercises of the police power, so that the one attacking the ordinance has the burden of showing that it rests upon no reasonable basis.[56] In addition, courts are reluctant to interfere with the zoning authorities by substituting their own judgment for that of the zoners.[57]

46. 4 New York State Constitutional Convention Committee, *State and Local Government in New York* (1938) 355.

47. 8 New York State Constitutional Convention Committee, *Problems Relating to Executive, Administration and Powers* (1938) 318.

48. Baker, *Legal Aspects of Zoning* (1927) 113; Metzenbaum, *The Law of Zoning* (1930) 18.

49. Cass County v. Jack (1872) 49 Mo. 196; Ex parte Roberts (1901) 166 Mo. 207, 65 S. W. 726; Ex parte Berger (1906) 193 Mo. 16, 90 S. W. 759; State v. Missouri Pac. Ry. (1912) 242 Mo. 339, 147 S. W. 118. Mo. Const. (1875) art. II, §2 provides "That the people of this State have the *inherent*, sole and exclusive right to regulate the internal government and *police* thereof, * * *."

50. Ex parte Lerner (1920) 281 Mo. 18, 218 S. W. 331; Kansas City v. Case Threshing Mach. Co. (1935) 337 Mo. 913, 87 S. W. (2d) 195; Ex parte Williams (1940) 345 Mo. 1121, 139 S. W. (2d) 485.

51. Chicago, B. & Q. Ry. v. People of the State of Illinois (1906) 200 U. S. 561.

52. Bacon v. Walker (1907) 204 U. S. 311.

53. Noble State Bank v. Haskell (1911) 219 U. S. 104; Max Factor & Co. v. Kunsman (1936) 5 Cal. (2d) 446, 55 P. (2d) 177; Wertheimer, Constitutionality of Rural Zoning (1938) 26 Cal. L. Rev. 175.

54. Bassett, *Zoning* (1936) 17.

55. State ex rel. Vogt v. Reynolds (1922) 295 Mo. 375, 244 S. W. 929; Bellerive Inv. Co. v. Kansas City (1929) 13 S. W. (2d) 628.

56. State ex rel. Helseth v. DuBose (1930) 99 Fla. 812; City of Jackson v. McPherson (1932) 162 Miss. 164, 138 So. 604.

57. American Wood Products Co. v. City of Minneapolis (1929) 35 F. (2d) 657; Marblehead Land Co. v. City of Los Angeles (1931) 47 F. (2d) 528.

A liberal and expanding attitude in the courts in indicated, and must be considered in predicting validity of zoning without further constitutional changes. This attitude is further verified by considering the validity of ordinances passed with aesthetic purposes as their primary basis, and though most courts aver that zoning cannot be upheld upon this basis alone,[58] yet many of the same courts have given extremely broad definitions of the police power to uphold them,[59] and a few by *dicta* say that aesthetic purposes alone are sufficient to justify the use of the police power for zoning.[60]

In view of this liberality, it becomes increasingly difficult to predict with any degree of certainty just what direction the courts will take when confronted with a specific zoning problem, for even when constitutions have provided for zoning in certain instances the courts have been known to permit zoning in situations not mentioned in the constitutions,[61] indicating that zoning is exercised under the police power rather than under constitutional provision.[62] But it has been suggested that certain reprehensible practices should be curtailed by constitutional safeguard, for example, the practice of "spot zoning"[63] which has been almost universally criticized.[64] Though "spot zoning" has been held

58. Nectow v. City of Cambridge (1928) 277 U. S. 183; Mueller v. Hoffmeister Undertaking and Livery Co. (1938) 343 Mo. 430, 121 S. W. (2d) 775; Women's Kansas City St. Andrew Soc. v. Kansas City, Missouri (C. C. A. 8, 1932) 58 F. (2d) 593.

59. Village of Euclid v. Ambler Realty Co. (1926) 272 U. S. 365; Nectow v. City of Cambridge (1928) 277 U. S. 183; Women's Kansas City St. Andrew Soc. v. Kansas City, Mo. (C. C. A. 8, 1932) 58 F. (2d) 593.

60. General Outdoor Advertising Co. v. Department of Public Works (1935) 289 Mass. 149, 193 N. E. 799. Though this case is not a zoning case, the opinion may be said to advance aesthetic considerations by its analysis. Ware v. City of Wichita (1923) 113 Kans. 153, 214 Pac. 99.

Tilton, Regulating Land Uses in the County (May, 1931) 155—Part II The Annals of the American Academy of Political and Social Science 123, 133 says: "The courts recognize an aesthetic basis, but for security they seek arguments related to health or safety upon which to justify approval of such legislation."

61. State ex rel. Civello v. New Orleans (1923) 154 La. 271, 97 So. 440; State v. Houghton (1920) 144 Minn. 1, 14, 176 N. W. 159; State ex rel. Carter v. Harper (1923) 182 Wis. 148, 196 N. W. 451.

62. Building Inspector of Lowell v. Stoklosa (1924) 250 Mass. 52, 145 N. E. 262; Spector v. Building Inspector of Milton (1924) 250 Mass. 63, 145 N. E. 265; Brett v. Building Commissioner of Brookline (1924) 250 Mass. 73, 145 N. E. 269; Wood v. Building Commissioner of City of Boston (1926) 256 Mass. 238, 152 N. E. 63. Mass. Const. (1922) art. LX provides for zoning of buildings, making no mention of land, yet land is regulated much the same as in states having no constitutional amendment for zoning.

63. Bassett, *Zoning* (1936) 17.

64. "Spot zoning" is the arbitrary devotion of small areas within a district to a use which is inconsistent with the use to which the district is

invalid[65] in Missouri, yet an ounce of prevention might be worth a pound of cure. And to obviate the chance of any question under the state constitution, provision might well be made allowing the state to zone the land "use" and provide the measure of control which the state may exercise over it.[66]

It is submitted, however, that in the constitutional revision too much should not be provided in relation to zoning practices, for zoning has just been born into a rapidly changing world and to hedge it in with too stringent limitations, or those that may in the future become so, could gravely hinder its growth toward the public good.

R. J. W.

THE PROBLEM OF EXCESS CONDEMNATION

Excess condemnation is a subject which has been widely discussed[1] and greatly controverted. Under the present Missouri constitutional provision,[2] which is representative of the majority of states, property may be taken only when it is reasonably necessary to the specific purpose of the public improvement for which the condemnation was instituted, and when the improvement could not be accomplished without the use of such property.[3] Excess condemnation would give the state or municipal government the authority to condemn in excess of property directly

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restricted; but a use which is different without being inconsistent is not "spot zoning." Higbee v. Chicago, B. & Q. Ry. (1940) 235 Wis. 91, 292 N. W. 320.

65. Munro, A Danger Spot in the Zoning Movement (May 1931) 155—Part II The Annals of the American Academy of Political and Social Science 202, 205: "The practice of spot zoning has been responsible for much chicanery and political favoritism at the city hall. Small parcels of land, sometimes single lots, are lifted bodily out of one zone and placed in another, while all the surrounding land remains as before. * * * There is need for a halt in the freehanded practice of spot zoning for the benefit of anyone who happens to have sufficient influence with the public authorities. The inconsistencies and the palpable inequities which accompany this practice are fraught with danger to the whole zoning movement." Bassett, *Zoning* (1936) 122 and 145.

66. Mueller v. Hoffmeister Undertaking and Livery Co. (1938) 343 Mo. 430, 121 S. W. (2d) 775.

67. 4 New York State Constitutional Convention Committee, *State and Local Government in New York* (1938) 363.

1. See, e. g., Cushman, *Excess Condemnation* (1917); 1 Nichols, *Eminent Domain* (2d ed. 1917) 177, §63; Steiner, Excess Condemnation (1938) 3 Mo. L. Rev. 1; Note (1932) 18 Va. L. Rev. 580; Note (1932) 6 U. Cin. L. Rev. 196.

2. Mo. Const. (1875) art. II, §20.

3. See cases cited note 12, infra.