

## CONSTITUTIONAL VALIDITY OF ZONING UNDER THE POLICE POWER.

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### 1. *Questions outlined.*

Concerning the constitutional validity of zoning laws and regulations thereunder, apart from those authorizing the employment of the delegated power of eminent domain, the fundamental question is the extent Public Authority may go in restricting the use of private property under the police power in order to safeguard the public welfare even in its most comprehensive sense. Zoning laws are to be tested by development and developing principles relating to the legitimate exercise of the police power. Speaking generally the questions in all such cases are first, whether the ordinances emanate from ample grant of power by the state to the city or town; second, whether they have any reasonable tendency to promote the public safety, health or morals, and recent cases rightly include the public comfort, welfare and prosperity, and third, whether the power in the given case has been reasonably exercised with due regard to property rights.

Specifically one question is: May the police power be exercised by so-called zoning, comprehensive or limited, so as to exclude from designated districts or zones lawful occupations and businesses and buildings and structures which are not intrinsically obnoxious or likely to become obnoxious by the manner in which they are conducted or used, and place them in designated districts or zones? This, of course, is apart from the need of safeguarding the public health, safety, morals or the indefinite term, general welfare. The other question is: May the police power be exercised for the above purpose to impose use regulations on real estate and buildings?

In the first place it should be said that many of the basic legal tests to determine the constitutional validity of such laws have been reasonably well settled. But apart from the applicable underlying principles it should be remembered that each case must be determined on its own facts as they appear in the record before the court. Assuming ample grant of power to enact a regulation, to be valid it must be clear from such record, first, that the purpose of the regulation is fairly within the range of the police power; second, that it is being carried out, respecting the property involved, in a reasonable manner; and

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third, that it is uniform, free from unreasonable discrimination. The points usually urged are that regulations, restrictions or prohibitions on the use of property (1) constitute an unreasonable interference with rights of property, or (2) deprive property owners of "due process of law" or the "equal protection of the laws."

These restrictions may be considered from three points of view. (1) Their effect on the land owner, (2) their effect, if any, on those to be benefited by the regulation, as those owning property on residential streets or in residential districts, and (3) their effect on the public.

## 2. *Federal constitution as test.*

In investigating the constitutional validity of zoning laws, in view of the provisions of the United States Constitution, it should be said at the threshold that it is not important whether the power to enact them emanates from the state constitution, or state statutes, or the municipal charter, because the state cannot violate the United States Constitution by its own constitution, hence, it cannot by its constitution repeal, modify or suspend the due process of law clauses or the guarantees of personal and property rights contained in the fifth and fourteenth amendments.<sup>1</sup>

Therefore the determination by the people of a state in their constitution as to what constitutes proper exercise of the police power or the power of eminent domain in zoning regulations is not final or conclusive, but in view of the Federal Constitution it is subject to supervision by the Supreme Court of the United States. This fundamental principle of our system was emphasized recently by the highest court of Massachusetts in testing the constitutionality of a statute authorized by a late amendment of the constitution of that state conferring upon the state legislature express "power to limit buildings according to their use or construction to specified districts of cities and towns." This court pertinently observed that, since "the Constitution of the United States, within the sphere covered by it, is supreme over all the people and over each act of every instrumentality of government established within or by the several states, the constitution of a state stands no higher or stronger in this particular than any other act of the state."<sup>2</sup>

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1. *Guinn v. United States*, 235 U. S. 347; *Scott v. McNeal*, 154 U. S. 34, 45; *New Orleans Water Works Company v. Rivers*, 115 U. S. 674, 681; *Fisk v. Jefferson Police Jury*, 116 U. S. 131.

2. *Opinion of the Justices*, 234 Mass. 596.

### 3. *Municipal power to zone.*

Under our form of government the police power belongs exclusively to sovereignty and inheres in the state without reservation in the constitution, and may be given expression directly by the people in their organic law, or by the initiative in legislation, or indirectly by their state legislature, which latter is the customary method. Thus within the concept of the term "police power" is usually meant a power of sovereignty inherent in the state without reservation. What particular police powers, therefore, any given city or town may exercise and the manner of the exercise thereof will depend upon the language of the grants, and their reasonable construction in accordance with the policy of the particular state, as shown by its organic and statutory provisions and its judicial decisions relating to the subject. All such powers, of course, must be exercised not only consistent with the state constitution and laws, but also within the orbit of the Constitution, treaties and laws of the nation. This is merely to say that a city or town can legislate or exercise powers only on matters authorized. It has no inherent power to enact police regulations.<sup>3</sup>

Hence, before a city can proceed with a comprehensive zoning plan it is indispensable that it should have the necessary power in its charter, whether constitutional or legislative, or in the state constitution or legislative act applicable to the particular city. The city may have under its police power ample authority to regulate the height, size or bulk, material and method of construction, and use of buildings relating to safety and health and to prevent such property from becoming offensive or public nuisances, and also ample power to make other reasonable restrictions and regulations in the interest of the public safety, health, morals and welfare. But such power alone is not sufficient to enable the authorities of the city to proceed with an extensive zoning plan. Piecemeal zoning might be of some advantage, but such attempts would fall far short of the requirements of most urban centers. To proceed with a broad zoning plan the city should be empowered to impose different regulations for buildings and structures and for the uses of land and buildings and structures in different districts. Under the usual police power possessed by cities such classification is not authorized.

### 4. *Exclusive residential districts.*

In order to establish an exclusive residence district, among others, these regulations, restrictions or prohibitions are important:

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3. *Clements v. McCabe*, 210 Mich. 207, 216; *Marion v. Criolo*, 278 Ill. 159; *United States Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34.

1. Excluding all kinds of business therefrom.
2. Establishing a building line uniform on certain streets.
3. Conforming new buildings (and those reconstructed, altered or extensively repaired) substantially, or as near as practicable in class or character, to those already erected in the locality.
4. Prescribing distances buildings are to be from each other.
5. Excluding heavy traffic from certain streets.

Courts uniformly hold that unreasonable restraints on the right to use and enjoy property cannot be imposed, nor can they be imposed for the benefit of adjacent or neighboring property,<sup>4</sup> nor, it has been held in West Virginia, to effect symmetry of the city streets or sections, otherwise than under the power of eminent domain allowing compensation, if at all.<sup>5</sup>

Excluding substantially all business from exclusive residential districts is perhaps one of the most important features of city planning and zoning in its broad aspect. However, under the police power so far developed in principle and application, it is probable that its lawful exercise will not permit the exclusion of all business from such districts, unless it is made to appear that the business sought to be excluded is in fact a nuisance or detrimental to the welfare of the district or likely to become so by reason of the manner in which it is conducted or by reason of the conditions surrounding the conduct of the business.

Among the reasons for excluding all business from a residential district the following may be mentioned:

1. It would insure better police protection. Business places afford an excuse for criminals and the evil disposed to go into the neighborhood unobserved, where without this pretense it might be that this class would be scrutinized with more care. The gathering of idlers and loiterers in and about shops and business establishments, moreover, require additional police protection.

2. The risk of fire is greater in a business than in a residence district.

3. It is sometimes suggested that less expensive street pavement is needed in the residence district than in a business section where heavy hauling is required, and thus economy in this matter may be advanced.

4. Business places may become decidedly detrimental or even nuisances. Some are more or less noisy, some unsightly, some mal-

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4. *Eubank v. Richmond*, 223 U. S. 137.

5. *State v. Stahlman*, 81 W. Va. 335.

odorous and some may bring rats, flies and other objectionable vermin into the neighborhood.

5. Property in a restricted residence district always commands a better price for residence purposes than in neighborhoods unrestricted.

At present it is no longer seriously questioned that all things detrimental to public safety, health, morals and welfare (confined within reasonable limits) may be excluded, but the law is not so clear as to innocuous occupations.<sup>6</sup>

All business is not necessarily unlawful carried on at a particular location because forbidden by law. A mere prohibition by ordinance cannot make that unlawful which is not unlawful per se.<sup>7</sup>

So a mere declaration in a statute or ordinance that it is enacted to protect public safety, health, morals or public welfare will not render such law valid as being within the police power unless there is some reasonable relation between such purpose and the regulation prescribed.<sup>8</sup> But as the application of the police power has been extended in the past decade, and is now freely exercised and everywhere sustained by the courts, it may be said that the only limitation on the power of the city pursuant to reasonable regulation to declare that, in particular circumstances and in particular localities within the municipal area, a necessary and lawful occupation though not a nuisance in itself shall be deemed a nuisance in law and fact, is that the power cannot be exerted arbitrarily or with unjust discrimination. However, in all cases where the exercise of the police power affects the free use and enjoyment of property courts agree that it should be closely scrutinized.<sup>9</sup>

By virtue of sufficient grant of power the courts of last resort have ruled that a city may, by ordinance, create a residence district in a particular locality and exclude therefrom industrial plants, as a foundry,<sup>10</sup> a four-family flat building,<sup>11</sup> a grocery store,<sup>12</sup> a business

6. *Adams v. Tanner*, 244 U. S. 590.

7. *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *St. Louis v. Dreisoerner*, 243 Mo. 218, 223; *St. Louis Gunning Co. v. St. Louis*, 235 Mo. 147.

8. *Youngstown v. Kahn Bros. Bldg. Co.* (Ohio), 148 N. E. 842, 843.

9. *Palmberg v. Kinney*, 65 Ore. 220; *People v. Chicago*, 260 Ill. 150.

10. *Salt Lake City v. Western Foundry Stove Repair Works*, 55 Utah 447, invoking the doctrine of *Hadacheck v. Sebastian*, 239 U. S. 394, which sustained the exclusion of a brick yard from a described portion of a city.

11. *State ex rel. Seery v. Houghton* (Minn.), 204 N. W. 56. *Contra*, *State v. Minneapolis*, 136 Minn. 479, 162 N. W. 477.

12. *State v. New Orleans*, 154 La. 271, 97 So. Rep. 445, 33 A. L. R. 260; *Aurora v. Burns*, Ill. Sup. Ct., Dec. 16, 1925.

building,<sup>13</sup> an automobile gasoline and oil filling station,<sup>14</sup> but the latter was denied in Texas.<sup>15</sup> However, without special grant of power attempts to exclude all business from certain streets or districts have generally been regarded by the courts as an unwarranted invasion of property rights.<sup>16</sup>

In Minnesota it was first held that a four-family flat building could not be excluded.<sup>17</sup> But lately under grant of broad power to zone this court held the reverse.<sup>18</sup> And the Minnesota court held that the erection of a three-story brick apartment building in a residential district could not be prevented under general police power,<sup>19</sup> nor could a building suitable for a small factory.<sup>20</sup> However, under special power to zone, in view of the latest ruling in this state, these decisions would not be followed by its courts.

Ordinances, unsupported by grant of power to segregate or zone, prohibiting store buildings to be erected in main residential sections have been condemned as void.<sup>21</sup> Nor in Texas can warehouses be excluded from residential districts where it does not appear that they are detrimental or in fact constitute a nuisance.<sup>22</sup> The Colorado courts said that a store building is in no sense a menace to the health, comfort, safety or general welfare of the public,<sup>23</sup> and the Illinois court remarked that there is nothing inherently dangerous to the health or safety of the public in conducting a retail store.<sup>24</sup> But lately the latter court sustained a comprehensive zoning ordinance, authorized by statute, which excluded from an established residential district a grocery store.<sup>25</sup>

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13. *Ware v. Wichita*, 113 Kan. 153, 214 Pac. Rep. 99.

14. *Des Moines v. Manhattan Oil Company*, 193 Iowa 1096, 184 N. W. 823; *Liberty Oil Co. v. New Orleans (La.)*, 97 So. 446; *Contra, Marshall v. Dallas (Tex. Civ. App.)*, 253 S. W. 887, following *Spann v. Dallas*, 111 Tex. 350.

Without special grant of power automobile battery station may not be excluded. *Clements v. McCabe*, 210 Mich. 207.

15. *Marshall v. Dallas (Tex. Civ. App., 1923)*, 253 S. W. 887, following *Spann v. Dallas*, 111 Tex. 350.

16. *People v. Roberts*, 153 N. Y. Supp. 143 155 N. Y. 1333; *St. Louis v. Dorr*, 145 Mo. 466.

17. *State v. Minneapolis*, 136 Minn. 479.

18. *State v. Houghton (Minn., July 3, 1925)*, 204 N. W. 569.

19. *Vorlander v. Heganson*, 145 Minn. 484.

20. *Meyers v. Houghton*, 137 Minn. 481.

21. *St. Louis v. Dorr*, 145 Mo. 466; *State v. New Orleans*, 142 La. 73; *Calvo v. New Orleans*, 136 La. 448; *Spann v. Dallas*, 111 Tex. 350; *Dallas v. Burns (Tex. Ct. of App., 1923)*, 250 S. W. 717.

22. *Hill v. Storie (Tex. Civ. App.)*, 236 S. W. 234.

23. *Willison v. Cooke*, 54 Colo. 323.

24. *People v. Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292.

25. *Aurora v. Burns*, Ill. Sup. Ct., Dec. 16, 1925.

An ordinance cannot limit, in the opinion of the highest court of New York, the right to erect and occupy buildings for a lawful purpose, as "buying, selling, dealing in and otherwise disposing of vehicles, automobiles, motorcycles, and other personal property."<sup>26</sup>

The highest court of Maryland has declared that an automobile salesroom cannot be excluded from a restricted residence district.<sup>27</sup>

In New Jersey ordinances restricting a residence zone to the erection of dwellings to be occupied by one family only have been held unreasonable.<sup>28</sup>

An ordinance of Louisville districting and restricting residential blocks so that the white and negro races should be segregated was held by the United States Supreme Court to be in violation of the fourteenth amendment.<sup>29</sup> And this in face of the fact, as mentioned by Judge Westenhaver, that "the blighting of property values and the congesting of population wherever the colored or foreign races invade a residential section, are so well known as to be within judicial cognizance."<sup>30</sup> An undertaking establishment, it has been held in Minnesota, may be excluded from a residential district by statute.<sup>31</sup>

Under a comprehensive ordinance duly authorized by law it has been held legal to forbid the use of buildings for any other purpose than dwellings, tenements, hotels and similar uses, and consequently a one-story business building may be excluded,<sup>32</sup> and also a store building.<sup>33</sup>

##### 5. *Status of ownership of property and uses thereof.*

In this country the court is the arbiter between the Public Authority and the property owner. It is not so in European states. In England, France, Germany, Belgium and in others an act of the supreme legislative body is authoritative; it is law ipso facto when duly passed. Of course, this accounts for the exercise in these countries of broader powers by administrative authorities in planning and zoning, and indeed, in all municipal regulations affecting private property. Many think the same rule should prevail here, but they overlook our constitutions, and as a consequence in planning and zoning frequently

26. *People v. Strobel*, 209 N. Y. 434.

27. *Stubbs v. Scott*, 127 Md. 86.

28. *Nelson Building Company v. Binda* (N. J. Sup. Ct., 1925), 128 Atl. 218; *Losick v. Binda* (N. J. Sup. Ct., 1925), 128 Atl. 619.

29. *Buchanan v. Warley*, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210 Ann. Cas. 1919A, 1201.

30. *Ambler Realty Company v. Euclid*, 295 Fed. 307, 313.

31. *St. Paul v. Kesler*, 146 Minn. 124.

32. *Zahn v. Board of Appeals* (Cal.), 234 Pac. 388.

33. *Holzbetter v. Ritter*, 184 Wis. 35, 198 N. W. 852.

untenable and even extreme positions are sometimes taken. Many fail to recognize the necessity of the protection of personal and property rights. The concept of property embraces of course not only ownership, but as well unrestricted right of use, enjoyment and disposal. Thus it follows that government powers are not absolute but always restricted to their true purpose.

The courts uniformly reject the view so often urged by some zoning authorities, that "so long as the owner remains clothed with the legal title thereto and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated."<sup>34</sup> But as said by the United States Supreme Court, "There can be no conception of property aside from its control and use." "Property is more than the mere thing which a person owns. It is elemental that it includes the right to acquire, use and dispose of it. The Constitution protects the essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."<sup>35</sup>

Some seem to think that the guaranty of equality in the United States Constitution is unfortunate, since it requires the law to prevail rather than the will of the individual. Some would have the city planners and zoners, directing the public authorities, a law unto themselves. As such despotic power cannot be assumed by the individual in either his personal relations or in his property rights, so it cannot be assumed by Public Authority. Our written constitutions, federal and state, settle that. Public as well as private authority is restricted. The limitation on Public Authority fixed in organic law, we know, is America's distinct political contribution to the world. Because the law demands "reason" for imposing different restrictions in different parts of the municipal area and exacts that all property in the same situation be treated alike, it does not allow public officers to do as they please. Vested and property rights continue to be protected by the courts. At present, it is true, a somewhat different opinion prevails than that heretofore existing. There is a growing purpose to restrict the uses of property for the welfare of the community. It is a phase merely of the ascendancy of the principle of Collectivism, or rather public or community interest, over Individualism; and moreover, restrictions on the use of property and property rights appear in all the humani-

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34. *Ambler Realty Co. v. Euclid*, 297 Fed. 307, 313.

35. *Buchanan v. Warley*, 245 U. S. 74, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201.



tarian regulations, products of the past decades, as limiting hours of labor, especially of women and children, requiring proper sanitation, safe methods to protect employees, forbidding the crowding of humans into flats, tenements and factories and like limitations and prohibitions. Therefore, it must be remembered, as the courts point out, that the legislation authorizing so-called zoning ordinances is of comparatively recent origin, and it is not unnatural that those adversely affected should regard them as an unjust and unwarranted interference with their property rights.

6. *Effect of regulation on the property owner.*

Regulation, restriction or prohibition relating to the use of real property based upon the police power, to quote the words of the Supreme Court, "must have some fair tendency to accomplish, or aid in the accomplishment of some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. . . . If the means employed, pursuant to the statute, have no real substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the court will declare their invalidity."<sup>36</sup>

Again, if the property itself sought to be regulated, or the use thereof, is not a public nuisance, or likely to become such, or is in no way detrimental to individuals and their personal rights, or other property and rights therein, or public safety, health, morals or welfare, or likely to become so, restriction or prohibition imposed thereon concerning location or use will not be sustained by the courts. The constitutionality of any zoning plan, like that of any police regulation, to quote again the emphatic language of the Supreme Judicial Authority, "must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose." And on the other hand, this tribunal has also said, with equal emphasis, the police powers knows no limitations "when not exerted arbitrarily," and that "a vested interest cannot be asserted against it on account of conditions once obtaining,"<sup>37</sup> because so to hold "would preclude development and fix a city forever in its primitive condition. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."<sup>38</sup>

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36. *Welch v. Swasey*, 214 U. S. 91, 105.

37. *Chicago & Alton R. Co. v. Tranbarger*, 238 U. S. 67, 78.

38. *Hadacheck v. Sebastian*, 239 U. S. 394, 410.

7. *Public protection, fire limits, height and building lines.*

"Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs. An arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable. No general zoning plan, however, can be inaugurated without incurring complaints of hardship in particular instances. But the individual whose use of his property may be restricted is not the only person to be considered. The great majority, whose enjoyment of their property rights requires the imposition of restrictions upon the uses to which private property may be put, must also be taken into consideration. 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 which often inhere in unregulated municipal development."<sup>39</sup>

Fire limit regulations have been in force in all the larger cities of the country for many years. Such regulations are a simple form of zoning, and when reasonable and uniform constantly approved by the courts. Zoning insofar as it relates to the heights of buildings (assuming ample grant of power), and also offensive occupations and industries which constitute a nuisance per se, or which are likely to become such in their conduct, would be legal. Whether non-observance of an established building line in the erection of a structure in a residence district, for example, or the establishment of a store or shop in a district set apart exclusively for residences, for another example, would come within the prohibition of the police power would necessarily depend upon the circumstances; that is to say, whether non-compliance in either instance, under the facts of the case before the court for decision, had any relation to the public safety, health, morals or general welfare.

Some advocates of city zoning give forth expressions pointing to the conclusion that the promotion of the public safety, health, morals and general welfare depend alone, or mainly at least, on zoning. Whether, for example, as concerns the future health of the city, the most important part of city planning is the districting of the city into zones, or whether such districting is the only practical method of preventing the spread of contagion, would depend, of course, in the view

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39. *Aurora v. Burns*, Ill. Sup. Ct., Dec. 16, 1925.

of the law, on the existing conditions in the particular city to which the zoning was sought to be applied. The facts in the particular case presented to the court for decision would direct the judgment. It may not be readily understood, for illustration, how the public health could be affected to any extent by the establishment of building lines in exclusively residential districts, or the exclusion from such districts of the ordinary stores or shops that are conducted properly and which are neither unwholesome nor offensive per se. But as to the latter concerning safety, a different phase of the public welfare which the police power might be brought into play to protect would be involved.<sup>40</sup>

#### 8. *Public welfare.*

The ancient Greek and the Roman seemed to see the purpose of the state in the public welfare. The term, it must be conceded, is uncertain and indefinite. When it is sought to be applied too broadly and perhaps bears quite hard upon property owners they are inclined to think, in the words of the great iconoclast Thomas Paine that "government even in its best state is but a necessary evil."

"In this day none will dispute that government in the exercise of the police power may impose restrictions upon the use of property in the interest of public health, morals and safety. That the same restrictions may be imposed upon the use of property in promotion of the public welfare, convenience and general prosperity is perhaps not so well understood, but nevertheless is firmly established by the decisions of this and the federal Supreme Court."<sup>41</sup> Concerning the employment of the police power in the interest of public welfare, convenience and community prosperity a few quotations from judicial opinions follow. "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity."<sup>42</sup> It "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of the people."<sup>43</sup> Under this power "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good."<sup>44</sup> It "is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of

40. See observations, *Opinion of the Justices*, 234 Mass. 597, 127 N. E. 525.

41. *State ex rel. v. Harper*, 182 Wis. 148, 155, 196 N. W. 451.

42. *Chicago, B. & Q. R. Co. v. Drainage Comrs.*, 200 U. S. 561, 592, 26 Sup. Ct. 341.

43. *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289.

44. *Munn v. Illinois*, 94 U. S. 113, 124.

society.”<sup>45</sup> In the decided cases “the police power is held to include all those regulations which promote the general interest and prosperity of the public generally.”<sup>46</sup> In a late California case it is said the regulation of the development of a city under a comprehensive and carefully considered zoning plan “tends to promote the general welfare of a community.” It is for the general welfare in the opinion of the court whether the plan establishes exclusive residential districts, “because it tends to promote and perpetuate the American home.” “The general welfare of a community is but the aggregate welfare of its constituent members, and that which tends to promote the welfare of the individual member of society cannot fail to benefit society as a whole.”<sup>47</sup> “Circumstances may so change in time . . . as to clothe with a public interest what at other times . . . would be a matter of purely private concern.”<sup>48</sup>

Thus from the above, largely obiter dicta, that is, from the expression of opinion and assertions of the courts, it appears that under circumstances of particular cases, public welfare includes public convenience, general prosperity, the greatest welfare of the public, all the great public needs, “what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary,”<sup>49</sup> what is required for the public good, suppression of all things hurtful to the comfort and welfare of society, and finally all regulations which promote the general interest and prosperity of the public.

In assertions and expression of opinions by judges concerning the scope of the police powers, if read apart from the facts of the case before the court, many irreconcilable statements appear, even by the same judges in different cases, as is true to be sure, more or less, in all departments of the law, but it is likely true that greater conflict is found in recent years than formerly, especially where the regulation, restriction or prohibition rests mainly or alone upon what we term the public good, welfare or general interest. Zoning cases are replete with these seeming inconsistent phrases. We can learn only what was really decided of course by understanding the facts of the particular case and the judgment given because the facts were thus

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45. *State ex rel. v. Burdge*, 95 Wis. 390, 398, 70 N. W. 347.

46. *Trading Stamp Cases*, 166 Wis. 613, 625, 166 N. W. 54.

47. *Miller v. Board of Public Works (Cal.)*, 234 Pac. 381, 383, 385, 387.

48. *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.

49. *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 39 Sup. Ct. 299.

and so. This is the source of the law rather than the expressions of opinion.<sup>50</sup>

"We doubt, but we do not here decide, that under our Constitution the state under the police power has the right to pass regulations purely to promote the public convenience or the general prosperity to the disadvantage and detriment of the individual property holders."<sup>51</sup> "It is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when this is done the difficulty disappears."<sup>52</sup> What beyond the health, peace, morals and safety of the community, "the general phrase—public welfare—in its relation to the police power may include is to be determined from the decided cases in the light of each one's facts, and when new facts arise from the processes of reason which the judicial mind brings to bear on the question."<sup>53</sup> The Minnesota Supreme Court once said that the words "comfort, convenience, welfare and prosperity are somewhat speculative; they are not susceptible of precise definition."<sup>54</sup>

Plainly, lessening congestion in the public streets and promoting the public health and safety—the expressly declared purposes of zoning laws—are fairly within the range of the police power. But whether the regulations and restrictions contemplated by such laws unrelated to a recognized subject of the police power would be advancing the public welfare would depend wholly upon the particular facts of each case when sought to be applied. Courts interpret the term public welfare with some strictness. It does not include mere expediency, whim, caprice, sentimental objects or purely aesthetic purposes, nor usually mere convenience. So far as courts have given utterances expressive of their attitude on these matters it is an open question to what extent "public welfare," apart from a recognized basis justifying the exercise of the police power, would embrace the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development. In view of the present state of the judicial decisions, every mariner, therefore, who enters upon an unexplored portion of the unsafe and somewhat treacherous sea of the police power frequently finds himself without sound rudder

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50. Note the cautionary remarks as to "public welfare," and like general terms in *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136; *Wilmington v. Turk* (Del. Ch.), 129 Atl. 512, 515, 516.

51. *Fitzhugh v. Jackson*, 132 Miss. 585, 70 So. 190, 33 L. R. A. 279.

52. *Ambler Realty Co. v. Euclid*, 297 Fed. 307, 314.

53. *Wilmington v. Turk* (Del. Ch.), 129 Atl. 512, 516.

54. *State v. Houghton*, 124 Minn. 226.

or certain compass. But in any event it is nevertheless true that there must be an essential public need for the exercise of the police power in order to justify its use.<sup>55</sup>

If the zoning or any part thereof is to promote public safety, health, order or morals, and is valid in other respects, it will be sustained, or such parts thereof which are separable from void parts as relates to these subjects; but if it relates alone to the public interest or general welfare, terms of uncertain import, the regulations will be closely scrutinized by the courts, and the conditions inducing the regulations must justify them, otherwise they will be pronounced void.

In recent times there is a disposition greater than ever before to use the police power to secure objects strongly desired by the public or an aggressive minority thereof. This attitude of mind restricts personal liberty and property rights and assumes that a public desire, when strong and persistent, is the equivalent of a real, vital and compelling public need. There is great danger involved in overlooking the constitutional guarantees and neglecting to give them full force and effect as designed. Indeed these guarantees, the result of years of struggle and sacrifice, have been made the very heart of our governmental process. Though the exercise of the police power in its very nature, as the power to govern, includes an indefinite and indefinable element of public welfare which the legislatures may in the first instance determine, subject to the adjudication of the courts, which have shown in late years an increasing disposition to sustain, it must be remembered that this essential power has its limitations.

Experience has demonstrated the wisdom of placing restrictions upon "the use of the police power and eminent domain that those charged with the conduct of public affairs may not in disregard of the rights of the individual render the government despotic." "Constitutional inhibitions must not be set aside or wiped out by every wave of popular clamor. There is too much disposition to set aside and ignore the organic law when there is a popular wave demanding such course. It is for the courts to steady the ship of state and hold the organic law intact."<sup>56</sup>

The police power necessarily "has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental powers must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in

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55. *Youngstown v. Kahn Bros. Bldg. Co.* (Ohio), 148 N. E. 842, 844.

56. *State ex rel. v. McKelvey*, 301 Mo. 1, 16, 38.

judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution."<sup>57</sup> However, in no event can constitutional guaranties "be dissolved and avoided by the application of the police power of the state."<sup>58</sup>

We should not suffer it to be used to destroy, little by little, the organic safeguards of personal and property rights until they all disappear. If we are not pleased with private ownership of property and personal liberty as the foundation stones of our political system and wish some other basis, we should frankly ask for a change by amendment of our constitutions and not try to effect change by indirection in invoking legislative infringements often brought about by propaganda, but worst of all when the courts in adhering to their highest judicial functions are compelled to hold many of these imperceptible legislative encroachments contrary to the will and purpose of the people, as plainly expressed in their organic laws, a campaign is started at once to coerce, weaken or destroy the most vital organ of our government.

Many judgments of the United States Supreme Court, and many in the state courts of last resort exist warning against the legislative disposition, prompted by special interests, groups or classes, to extend the police power so as to destroy private property and annihilate the guaranties of the Constitution.<sup>59</sup>

We must avoid the belief that under the police power "all private property is held subject to the temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies."<sup>60</sup>

Rather the admonition of Mr. Justice Holmes, speaking for the Supreme Court of the United States, should be heeded. He says, "The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more

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57. *Eubank v. Richmond*, 226 U. S. 143, 33 Sup. Ct. 77, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192.

58. *Goldman v. Crowther* (Md.), 128 Atl. 50, 54, 55.

59. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103, *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Buchanan v. Warley*, 245 U. S. 60, 38 Sup. Ct. 16, 62, L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201; *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973.

60. *Ambler Realty Co. v. Euclid*, 297 Fed. 307, 314.

and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not strong enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>61</sup>

It will be noted that such language and the implications therefrom are quite different from expressions of the same Justice in an earlier case, constantly quoted to justify the exercise of the police power almost without limit.<sup>62</sup>

Not only do our constitutions, federal and state, forbid the taking of private property without just compensation, but the consensus of opinion throughout the land cries out against such unfair, arbitrary, oppressive action entirely out of harmony with the spirit of just government.

The force of public opinion as to regulation and restriction of property uses, to some extent at least, may be taken into account by the courts. When it is sound, enlightened and persistent in a steady and undeviating direction of a higher plane of concrete justice, community progress and civic betterment it is certain to influence modifications of judicial views theretofore entertained of organic principles and guarantees. But we can scarcely say that constitutional provisions are thereby changed. Rather in the precise language of the Supreme Court of the United States, they "are extended in their operation to new matters and conditions as the modes of business and the habits of life of the people change each succeeding generation."<sup>63</sup>

Thus although the precepts of our constitutional law are stated in fixed terms their application varies with the growth of society. Accordingly our constitutional law, as is true of all law, so often said, is constantly in the making.

The courts are constantly developing the police power. They have wide power of finding, interpreting and applying the law as fresh conditions arise. They combine relative certainty in public regulation with the capacity for growth. In dealing with the subject they have been

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61. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415, 416, 43 Sup. Ct. 158, 67 L. Ed. 322.

62. *Noble State Bank v. Haskell*, 219 U. S. 104, 111, quoted above.

63. *Debs Case*, 158 U. S. 564, 591. "The judges are not conceived as making new laws—they have no right or power to do that—rather they are but declaring what has always been law." F. W. Maitland, *The Constitutional History of England*, pp. 22, 23, speaking of the common law. "Judges ought to remember that their office is *ius dicere*, not *ius dare*; to interpret law and not to make law or give law." Bacon's *Essay on Judicature*.



cautious, and to avoid restriction on its necessary and reasonable use within the limits of organic law, as the exigencies and requirements develop from time to time demanding restriction or prohibition they have consistently refrained from attempting to circumscribe with accuracy an orbit within which such power may freely play. This has been the position of the Supreme Court of the United States from the beginning, yet that court, perhaps in a larger sense than other courts has taken judicial cognizance of the everyday facts of modern complex social and industrial life and has responded thereto with less apparent reluctance than most of the courts of last resort of the several states.<sup>64</sup>

With an experience of a century and a third it is plain that our written constitutions tend to stabilize as they were designed, our advancement, and do not unreasonably hinder, as many believe, adequate regulation essential to a progressive people. Some feel that the courts are too conservative in protecting private property and its use, but the thoughtful and reflecting will incline to believe that it is better so rather than to suffer municipal authorities, oftentimes superinduced by unwise or interest propaganda, unreasonable zeal or inordinate obsession to rush pell mell into unknown or unexplored domains of regulation beyond the vision of the mental and moral standards of the community without careful deliberation and due regard to tried and sound organic provisions which in the main approximate the epitome of human experience. Nor should we suffer our course and rate of progress to be dominated by the swiftly changing passions of the hour reckless of such experience. The genuine progressive and forward looking must have the mental vision to see the Star of Hope not only but as well the safe road that leads thereto. He should seek to anticipate pitfalls ahead, as men have or have not done before. A knowledge of the fate of mankind on the same old road will tend to steady his steps and keep his feet on firm ground.

#### 9. *Aesthetic purposes.*

Some cases appear to support the conclusion that aesthetic considerations alone justify the exertion of the police power.<sup>65</sup> Others regard it legitimate to take them into account but deny that they can furnish the real basis for the exercise of police power.<sup>66</sup> Undoubt-

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64. Goodnow, *Social Reform and the Constitution*, 325 et seq.; Williams, *The Law of City Planning and Zoning*, 25.

65. *Ware v. Wichita*, 113 Kan. 153, 214 Pac. 99; *State ex rel. v. Houghton*, 144 Minn. 1, 13, 174 N. W. 885, 176 N. W. 159.

66. *St. Louis Poster Adv. Co. v. St. Louis*, 249 U. S. 269, 39 Sup. Ct. 274; *Welch v. Sweasey*, 214 U. S. 91, 29 Sup. Ct. 567, 193 Mass. 364, 79 N. E. 745; *Opinion of the Justices*, 234 Mass. 597, 127 N. E. 525.

edly the law has undergone a decided change in this respect in recent years.<sup>67</sup> However, so far as it appears from judicial judgments, apart from general expressions on the subject, restrictions on the use of property contained in zoning regulations solely for purely aesthetic purposes are regarded as invasions of private property rights.

In construing the basis for the exercise of the power in zoning under the Massachusetts statutes, namely, that it "will tend to improve and beautify the city or town" and "will harmonize with its natural development," the court observed: "Enhancement of the artistic attractiveness of a city or town can be considered in exercising the powers conferred by the proposed act only when the dominant aim in respect to the establishment of districts based on use and construction of buildings has primary regard to other factors lawfully within the scope of the police power; and then it can be considered, not as the main purpose to be attained, but only as subservient to another or other main ends recognized as sufficient under amendment sixty (constitutional), and the general principles governing the exercise of the police power."<sup>68</sup>

In the necessary and desirable exercise of the police power, especially during the past two decades, its expanding capacity and productive energy is everywhere in evidence in municipal regulation and restriction, and as a consequence we cannot fail to observe the constantly changing attitude of the court relating thereto. But notwithstanding its vigorous development and I may say its present gigantic proportions it has not reached the point of including within its compass in promoting the public welfare, even in the broadest sense, purely artistic and aesthetic purpose. Until this goal is attained unsightly structures will continue to offend the eye without municipal means of suppression. If, however, the restrictions rest upon the substantial ground of a reasonable police regulation, as height of building or billboard limitations, the fact that they have artistic and aesthetic purposes in view will not invalidate them. These are matters, as the courts have frequently recognized, of public and governmental concern, yet standing alone in the light of the present development of this branch of the law they are not sufficient to support unreasonable or doubtful restrictions concerning the lawful use of private property, nor will they standing alone sanction the taking or injuring of such property, in the language of federal and state constitutions, without "due process

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67. *Civello v. New Orleans*, 154 La. 271, 284, 97 So. 440; *Chandler*, "Attitude of the Law Toward Beauty," *American Bar Assn. Journal*, Vol. 8, p. 470.

68. *Opinion of the Justices*, 234 Mass. 597, 605, 127 N. E. 525.

of law," or in denying the owner thereof the "equal protection of the law." As put by the courts the distinction is between matters of luxury and indulgence and necessity, the latter being regarded at present as the sole motive for the exertion of the power to govern.

It is a matter of general information that much municipal legislation and regulation of late years have been induced largely by these considerations and this desire to render the cities and towns more attractive and beautiful has found a firm lodgment in the popular mind. It is destined to increase with the years, and in the growth of the law in this respect courts will be inclined to give a broader interpretation of these objects, and I have no doubt finally sanction restrictions imposed solely to advance material attractiveness and artistic beauty. Nevertheless, perhaps I may predict that in the present development of the law relating to this subject courts in adhering to their legalistic method of thinking—a method at once safe and sane constituting a wholesome restraint on rash and radical legislative and administrative action—are certain to be slow in sustaining police regulations as constitutionally valid which seem to deprive the owners of property of what are now regarded as its lawful uses because of a supposed public advantage which at present rests largely alone on the sentiment of a particular class due to superior cultivation. For some time until this class increases in number to such an extent as to create a healthy, mature community opinion that such restrictions are necessary or desirable to advance the public welfare, courts will be disposed to say, as they have so often said in the past, "Before this can be done there must be compensation first made." But to what extent public art, aesthetic matters, architectural harmony and beauty alone should enter into the consideration of the public welfare as a ground for extension of governmental powers to regulate or restrict property uses is a problem as yet unsolved. On this subject there is written expression in full, heaped and rounded measure, and obiter dicta in abundance, but no authoritative judicial judgments announcing a formula applicable to all cases as they arise.

On this subject in a recent zoning case the Supreme Court of Wisconsin observed, "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. That is not because the subject outlawed is of a different nature, but because our sensibili-

ties have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may we ponder."<sup>69</sup>

In a late zoning case the Missouri court aptly said that while the reasoning of the courts "recognizes the aesthetic their rulings following the principles which had their origin in the common law concerning individual and property rights, are definitely utilitarian."<sup>70</sup> And in the latest Ohio zoning case this language appears: "It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified." The police power is based upon public necessity, and hence "public health, morals or safety, and not merely aesthetic interest, must be in danger in order to justify its use."<sup>71</sup>

#### 10. *Property values.*

While the protection of property values may be a concern of government so far it has never been expressly decided by the courts that it is a proper subject of the police power standing alone, aside from public health, safety, morals, or what has been compendiously declared by the courts to be the public welfare. To support legislation designed to protect property values, therefore, it would be necessary to include this subject within the other economic subjects already recognized by the courts. To what extent the courts will take into account the protection of property values as a subject of the police power, in view of the present development of the law, may not be determined readily. However, numerous expressions abound in court opinions to the effect that in particular situations and conditions in the exercise of the police power to advance the general interest, courts will incline to give at least a nod of recognition to the safeguarding of property values. Quite recently the Supreme Court of Louisiana remarked that courts recognize the fact of common knowledge that property brings a better price in a residence neighborhood where business establishments are excluded than in such locality where an objectionable business is apt to be established at any time, and hence an exclusive residence district sustains in a general way the value of neighborhood property. The court expressed the opinion that this is as much a matter of gen-

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69. Owen J. State ex rel. v. Harper, 182 Wis. 148, 159, 196 N. W. 451.

70. State ex rel. v. McKelvey, 301 Mo. 1, 19.

71. Youngstown v. Kahn Bros. Bldg. Co. (Ohio), 148 N. E. 842, 844.

eral welfare as is any other condition that fosters comfort or happiness, and consequent values generally of the property in the locality.<sup>72</sup>

Some two years ago the Utah Supreme Court put forth like expressions.<sup>73</sup>

As to flats and apartment buildings in exclusive or restricted residence streets or districts, which laws seek to forbid, it may be said that such structures are a decided detriment to dwellers in their immediate vicinity. Among other inconveniences, it is a matter of common knowledge, whether or not courts will take judicial notice thereof, that such structures tend in some degree at least to interfere with the light and air of residences in the immediate neighborhood, increase to some extent the fire hazard, and destroy the privacy and quietude of the street or district by the frequent deliveries of articles and by the number of persons going in and out of the apartments. Moreover, as to some such structures it is likely true that the danger of the spread of infectious diseases may be increased. The disadvantages arising from one apartment house in an exclusive residence neighborhood, although considerable, would be greatly augmented by the multiplication of such structures in the locality. Common experience proves that the first flats or apartments usually drive out the single residences adjacent thereto, and thus make space for and encourage the erection of more apartments, so ultimately the desirability of the locality as a residence section is destroyed, and as a direct consequence, the residences built at great cost depreciate in value. Other exclusive residence districts that may be created may suffer like fate.

As to the exercise of the police power to protect property values, it should be said that most of the state courts are adverse to excluding all business from residence districts, but the United States Supreme Court has not passed directly upon the question. As applied to one or two or a few only of property interests it is not likely that it would appeal strongly to the courts. If, however, there was involved in the record before the court a comprehensive zoning plan, well matured, reasonable in all respects, showing upon its face that it was designed to promote that part of the public welfare represented by the property owners of the particular district, and would in fact stabilize values and prevent the destruction of property rights resulting from action on the part of those unmindful of the general interest in making use of their property; and, moreover, if the plan also showed that by excluding business of all kinds from the district proper locations for

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72. *State v. New Orleans*, 154 La. 271, 97 So. 440, 33 A. L. R. 260.

73. *Salt Lake City v. Western Foundry Stove Repair Works*, 55 Utah 447.

such businesses had been maturely worked out and designated, and that no loss could possibly result to those excluded therefrom, there would be some chance that it would receive the favorable consideration of the courts. In such case those things likely to occur in the ordinary course of events could be taken into account by the court, and, with such a plan, it would clearly appear that benefit would accrue to all of the residents of the district; that is to say, the welfare of the public, or a large part thereof, would be advanced, in that their comfort, convenience and economic welfare, and even safety, especially of the old and young, in being free from dangers more or less apparent incident to the conduct of many kinds of enterprises, even stores and shops, would be promoted thereby, without undue interference with the property or personal rights of those excluded therefrom.

11. *Present status of court judgments.*

Zoning ordinances involve new and perplexing questions relating to the police power constantly expanding in its application to the rapid development of urban centers, and it is not at all strange to find court opinions upon them quite divergent. Some judges declare in a general way that under the usual protection of property rights found in state constitutions the state cannot grant power to its cities to zone under the police power, without compensation for property damaged by use restrictions. On the other hand, some courts go so far as to say that "so thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question," that "the police power as evidenced in zoning ordinances has a much wider scope than the mere suppression of the offensive use of property, and that it acts not only negatively, but constructively and affirmatively, for the promotion of the public welfare."<sup>74</sup> "Zoning statutes are becoming common. . . A restriction, which years ago would have been intolerable, and would have been thought an unconstitutional restriction of the owner's use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex, restrictions on individual rights become more common. With the crowding of population in the cities, there is an active insistence upon the establishment of residential districts from which annoying occupations, and buildings undesirable to the community, are excluded. . . The trend of authorities is in the way of sustaining legislative regulations. . . Zoning ordinances, fair in their requirements, are generally sustained."<sup>75</sup>

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74. *Miller v. Board of Public Works* (Cal.), 234 Pac. 381, 384.

75. *State v. Houghton* (Minn.), 204 N. W. 569, 570.

Various phases of restrictive measures and the characteristics of zoning regulations have been considered and decided by courts of last resort of several states with varying conclusions.<sup>76</sup> Though the Supreme Court of the United States so far has had no occasion to pass upon the constitutional validity of city and town zoning, comprehensive or limited, except as to building regulations, height of structures and so forth and detrimental uses of property, nuisances and things hurtful to health, safety, morals and welfare, it appears that decisions of the courts of last resort in California, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, New York, Ohio Utah and Wisconsin have sustained as constitutionally valid restrictions on the use of real estate in specific instances contained in zoning statutes and ordinances based upon ample grant of power, applicable to all parts of the municipal area or to portions thereof only, where found from the record of the case presented for judgment to have been reasonably exercised.<sup>77</sup> Other states, namely, Colorado, Delaware, Maryland,<sup>78</sup> Michigan, Mississippi, Missouri, Nebraska, New Jersey,<sup>79</sup> Texas<sup>80</sup> and West Virginia, seem either to be against or leave the question in doubt.

In Delaware a comprehensive zoning ordinance of Wilmington, authorized by ample statutory power, by its terms excluded hospitals from residential districts established. The hospital sought to be excluded was a private one to be maintained in a private residence. The chancellor put the question: "Is the ordinance as applied to defendant a constitutional exercise of authority? If valid it must rest upon the police power of the state for its support." The court found that the hospital was not a nuisance and in no wise offensive, that it "is of such kind and character and is so conducted as not in the least manner to be an offense or annoyance of any kind to anyone." Finally, the

76. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 44 L. R. A. (N. S.), 1030; *Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735; *Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354, 12 A. L. R. 669.

77. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 317, 128 N. E. 209; *Holzbauer v. Ritter*, 184 Wis. 35, 198 N. W. 852; *Spector v. Milton Building Inspector* (Mass.), 645 N. E. 265; *Brett v. Building Comr.* (Mass.), 145 N. E. 269; *Building Inspector v. Stoklosa* (Mass.), 145 N. E. 262.

78. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216; *Goldman v. Crowther* (Md.), 128 Atl. 50, with court opinion and dissenting opinion, fully reviewing zoning cases.

79. *Handy v. South Orange*, 99 N. J. Law, 118 Atl. 838; *Vernon v. Westfield* (N. J. Sup.), 124; *Cliffside Park v. Cliffside*, 96 N. J. Law 278, 114 Atl. 797.

Statute authorizing towns to enact zoning ordinances, held constitutional. *Schait v. Senior*, 97 N. J. Law 390, 117 Atl. 517.

80. *Spann v. Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387.

court denied that the right of private property could be "taken away when the circumstances of its use are inoffensive and of injury to no one," and refused to exclude the private hospital from the residential district.<sup>81</sup>

In Maryland a comprehensive zoning ordinance excluding in terms all business from a residential district was adjudged unconstitutional and void. In the case before the court the effect of the restriction was to prevent the use of a basement of a four-story dwelling for the repair of used clothing in a residential district which was denied.<sup>82</sup>

In a Michigan case, which involved a zoning ordinance of Detroit, the city had no power granted it to zone. The court said: "No such inherent zoning power exists or can be implied in this state from the mere incorporation of a city as such. . . . To whatever extent this proposed zoning system may be desirable and might prove feasible, power to enforce it is not a necessary power yet recognized as essential to local government." In the particular case mandamus to compel the issuance of a permit to construct an automobile battery service station in which it was proposed to keep, sell and repair automobile storage batteries in a residential district or zone was sustained.<sup>83</sup>

In a Mississippi case a comprehensive ordinance of Jackson sought to exclude from residential districts or zones all business enterprises of every character unless the residents and property owners within a certain area of the place where the proposed business would be conducted should petition or consent thereto in writing. All "structures whatsoever for business enterprises, even though the same might be in part used for residential purposes," were excluded. The complainant desired to erect a building and conduct a retail grocery store in the district. The court concluded that "such a sweeping ordinance . . . is not a valid exercise of the police power of the municipality," and is in violation of the state constitution. One using property "for the purpose of conducting a retail grocery store in a lawful manner," said the court, "does not injure, in the legal sense, the property of his neighbor." Regarding the police power in the broadest sense, the court expressed the opinion that the ordinance could not be said "to

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81. *Wilmington v. Turk* (Del. Ch.), 129 Atl. 512, reviewing and commenting on numerous decisions.

Other hospital cases are: *Hall v. House of St. Giles, The Cripple*, 154 N. Y. Supp. 96, affirmed 158 N. Y. Supp. 1117; *Lawrence v. Nissen*, 173 N. C. 359; *Cook v. Fall River*, 239 Mass. 90, 93, 94; *Everett v. Pashall*, 61 Wash. 47; *Cherry v. Williams*, 147 N. C. 452.

82. *Goldman v. Crowther* (Md.), 128 Atl. 50, 33 A. L. R. 1455, with one Judge dissenting.

83. *Clements v. McCabe*, 210 Mich. 207, 177 N. W. 722.



promote the public convenience or the general prosperity of the municipality or its inhabitants." On the other hand, the "ordinance is an arbitrary interference with the individual use of private property by the owner thereof."<sup>84</sup>

In Nebraska, under a statute empowering cities of the metropolitan class to divide the city into districts and imposing regulations, usual in zoning, by ordinance "designed to secure the safety from fire and other dangers, and to promote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air and convenience of access," it was held that a comprehensive zoning ordinance of Omaha dividing the city into five classes of area districts, imposing a restriction upon the owners of property with respect to the area of such real estate that may be covered by a proposed building, namely, to twenty-five per cent of the surface of the lots in the zone or district involved, was unreasonable. In the particular case the property owner sought a permit to occupy 37½ per cent of the area of the lots in question, which were in a residential district, and the court sustained the granting of a mandamus to issue the permit. The court said that the ordinance went "beyond the scope of authority conferred by the legislature. That part of the ordinance which confines the building area to 25 per cent of the lot is so restrictive that it is an unreasonable exercise of the power granted by the legislature, and for that reason that part of the ordinance must be held to be invalid."<sup>85</sup>

In West Virginia, a zoning ordinance of Bluefield excluded from a designated residence district all business without consent of a named percentage of property owners. It was held that the ordinance "constitutes an unreasonable and discriminatory exercise of the police power and is therefore unconstitutional and void."<sup>86</sup>

There are two recent Missouri cases which arose under the St. Louis comprehensive zoning ordinance. St. Louis has a so-called home rule charter, authorized by the state constitution, drafted by a board of freeholders and approved by the electors. It invested itself with broad police powers but no specific power to zone. It has wide power to define and prohibit, abate, suppress and prevent or license and regu-

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84. *Fitzhugh v. Jackson*, 132 Miss. 585, 601, 602, 605, 609, 611, 97 So. 90, 33 A. L. R. 279, approving *Quintini v. Bay St. Louis*, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

85. *State v. Edgecomb*, 108 Neb. 859, 189 N. W. 617, 27 L. R. A. 437.

A dissenting opinion was filed in which the dissenting Judge expressed the opinion that the ordinance "had its origin in an exalted conception of civic life," that the goal "was public improvement, leading to better, healthier, more comfortable and happier conditions." P. 865.

86. *Austin v. Thomas*, 96 W. Va. 628, 637, 123 S. E. 590, 38 A. L. R. 1490.

late all acts, practices, conduct, business, occupations, callings, trades, uses of property, and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants, and also nuisances and the causes thereof. Also power to prescribe limits within which business, occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare may lawfully be established, conducted or maintained.

The ordinance divided the area of the city into five classes of districts or zones, extending over the entire municipal territory, namely, first residence, second residence, commercial, industrial and unrestricted. The ordinance by its terms excluded a definite business—a building in which to install and conduct an electrically driven ice manufactory—from the district or zone involved, namely, a second residence.

The question as stated by the court is, "is the ordinance valid in that it constitutes such an exercise of the police power as will sustain the limitation therein prescribed in regard to the use of private property by the owner of the same? It is pertinent, although perhaps elementary, to say that the power here sought to be exercised by the city is to regulate the mode of living of the inhabitants, and thus, viewed from a sociological vantage, to provide for their health, comfort and welfare." In passing on the power contained in the charter the court said: "Certainly no more can be meant from the terms employed in the prohibition and suppression of certain callings than those which detrimentally affect the material welfare of the people (as distinguished from aesthetic considerations); and the limiting of certain occupations and callings to a prescribed territory must in reason be subjected to a like interpretation. If this be true, and these charter provisions lend no other reasonable coloring to the conclusion as to their meaning, then this ordinance, the avowed purpose of which is simply an arbitrary exclusion of a definite business from a prescribed district, is in excess of the power with which the city saw fit to invest itself when it framed its organic law."

After approving an Illinois case, denying the right of a city under the police power to prohibit the establishment of a retail store in a residential district because as urged it would be detrimental to the public health, morals, comfort and general welfare,<sup>87</sup> the court said:

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87. *People v. Chicago*, 261 Ill. 16.

"An ice manufactory, electrically conducted, in the absence of any objectionable feature connected with its operation, is certainly no more subject to prohibition or restriction than a retail store."<sup>88</sup>

A concurring opinion recites: "The value of property is dependent upon the uses to which it may be put. To limit the use is a restriction upon the right of property, and should not be made without compensation, unless the right restricted would, if exercised, rise to the plane of a public nuisance. The ordinance here goes much farther. It restricts the use of property (a vested property right) without reference to the deleteriousness or harmfulness of the uses eliminated by the terms of the ordinance, and this without compensation or even inquiry as to the damages that might be done."<sup>89</sup>

On rehearing the court said that the ordinance "provides for the taking of private property for a public use without compensation and without a judicial hearing. It is not a regulation which falls within the reasonable exercise of the police power. It is a confiscation, pure and simple."<sup>90</sup>

It thus appears that it was not the lack of charter power but the protection of property rights by the constitutions, state and federal, which invalidates the ordinance.<sup>91</sup>

The ordinance, in the other Missouri case, prohibiting the erection or use of private property for the storage of scrap iron, rags and junk in an industrial district, but permitting its use for such purposes in an unrestricted district, was held void. The court reasoned: "It is clear that the exercise of the police power in reference to private occupations is limited to such regulations as may be reasonably necessary for the protection of the peace, health and comfort of society. Livery stables, dairies, laundries, soap and glue factories, in short, all trades and occupations prejudicial to the health, morals and good government of the citizens may be restricted. But in all cases whether the business or occupation is a nuisance or not is a question of fact." The opinion denied the validity of regulations based upon aesthetic considerations. The ordinance as sought to be applied was held "unreasonable and oppressive, that it imposed restrictions upon the use of private property that have no relation to the health, safety, comfort or welfare of the inhabitants of the city, that it is an unlawful deprivation of the use of defendants' property without compensation or due process of law, a

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88. *State ex rel. v. McKelvey*, 301 Mo. 1, 15, 17, 19, 20, 256 S. W. 474.

89. *Ibid.*, pp. 22, 23.

90. *Ibid.*, p. 41.

91. One Judge filed two dissenting opinions, one at the original hearing and one at the rehearing. *Ibid.*, pp. 24-36, 41-49.

denial of the enjoyment of the gains of their own industry, and that the enactment of the ordinance is not within the powers delegated to the city.”<sup>92</sup>

A late decision of a United States District Court dealt with a tract of 68 acres of unimproved and unallotted land in the village of Euclid, lying a short distance east of the easterly limits of the city of Cleveland. The ordinance restricted the present and future use of the land, part of which fronting on a named avenue to a depth of 150 feet was restricted to a single-family dwelling, the next 470 in the rear thereof was restricted to two-family dwellings, the next farther in the rear might be used only for apartment dwellings, excluding any form of trade or industry, and the remainder might be used for industrial and manufacturing purposes. In addition there were restrictions as to the height of any and all kinds of buildings, as to the lot area which might be built on and which must be left free, and as to setback distances from street and lot lines. The land of the entire village of Euclid, comprising nearly sixteen square miles and at present largely farm land was in like manner restricted to six different classes of uses. The court found from the evidence that “the normal and reasonably to be expected use and development of plaintiff’s land along Euclid avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the residue, including the restricted area, is for industrial and trade purposes.” The court also found that the restrictive provisions of the ordinance “impairs the salability of the land and depresses its market value to the extent of several hundred thousand dollars,” and further, that if the restriction should be sustained it would “prevent the normal and reasonably to be expected increased value due to the availability of the land for trade, industrial and commercial purposes.”

Notwithstanding the village, as the court found, had all the police power that the state legislature could confer (which, it should be said, was as broad as any city or town does or can have), the ordinance was held to be in violation of both the United States and state constitutions, in that it deprived the land owner of his property “without due process of law.” The court remarked, “it can be sustained, if at all, only as an exercise of the power of eminent domain and on condition of making just compensation.” “It takes the plaintiff’s property, if not for private, at least for public use without just compensation.”

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92. *St. Louis v. Evraff*, 301 Mo. 231.

In no just sense is it a "reasonable or legitimate exercise of the police power."<sup>93</sup>

Lately the Supreme Court of California, under ample grant of power by the state, sustained a municipal ordinance enacted pursuant to a general comprehensive zoning plan, based upon considerations of public health, safety, morals and the general welfare, which it was found would be applied fairly and impartially, regulating, restricting and segregating the location of industries, the several classes of business, trades or callings and the location of apartments or tenement houses, clubhouses, group residences, two-family dwellings, and the several classes of public and semi-public buildings. Municipalities of California have power granted by fundamental law and by a legislative enabling act to create districts or zones, etc. The ordinance, a comprehensive zoning plan of the city of Los Angeles, permitted in the district or zone involved the erection, alteration, etc., of two-family dwellings only, whereas the land owner desired to erect a four-family flat dwelling. The court said, "The sole question presented is whether or not the ordinance in controversy is a rightful exercise of the police power conferred upon municipalities." It was sustained as constitutional and within the police power.<sup>94</sup>

Recently the Illinois Supreme Court sustained as constitutional a comprehensive zoning ordinance of Aurora passed by virtue of a statutory grant of power. Under such ordinance the exclusion of a grocery store in an established residential district was sanctioned.<sup>95</sup>

In Kansas a comprehensive zoning ordinance may exclude store buildings<sup>96</sup> and apartment houses from a residential district.<sup>97</sup>

In Louisiana power to zone has been granted by constitution and statute to certain cities, including New Orleans, and the highest court of that state has held that the statute does not deprive citizens of property without due process of law, take property for public use without just compensation, or deny equal protection of the laws within the meaning of the state or United States constitutions, since, in the opinion of the court, the provisions affect alike all persons similarly situated.<sup>98</sup>

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93. *Ambler Realty Co. v. Euclid*, 297 Fed. 307, 309, 310, 312, 317, January 14, 1924. Northern District of Ohio, Eastern Division.

94. *Miller v. Board of Public Works (Cal.)*, 234 Pac. 381; *Zahn v. Board of Public Works (Cal.)*, 234 Pac. 388, 391.

95. *Aurora v. Burns*, Illinois Sup. Ct., Dec. 16, 1925.

96. *Ware v. Wichita*, 113 Kan. 153, 214 Pac. 99.

97. *West v. Wichita*, 118 Kan. 265, 234 Pac. 978.

98. *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440, 33 A. L. R. 260.

In the first Massachusetts opinion on the subject of zoning it should be observed that it was merely an opinion to the state legislature as to the validity of a proposed grant of power to certain classes of cities to zone by virtue of constitutional authorization, which, in view of a favorable opinion, was subsequently conferred. The court opinion said: "It is easy to imagine ordinances enacted under the assumed authority of the proposed act which would exceed the constitutional limits of the police power and be an indefensible invasion of private rights."<sup>99</sup>

Recently the Minnesota court, reversing its former position, held constitutional a comprehensive zoning ordinance of Minneapolis, authorized by statute, which excluded from a designated restricted residential district a four-family flat building which a property owner sought to erect therein.<sup>100</sup>

The Ohio decisions were conflicting, especially in the subordinate courts,<sup>101</sup> until lately the Supreme Court sustained the constitutional validity of a comprehensive zoning ordinance of Cincinnati.<sup>102</sup> But a provision in a zoning ordinance which related only to a certain small district of the city of Youngstown—a so-called block ordinance—creating a residential district and excluding therefrom all buildings to be used for dwellings, except as a single or two-family dwelling, this court on the same day held unconstitutional, and an apartment house was permitted to be erected therein. The court found nothing in the record of the case "to indicate that the health, safety or morals of the district or of the city will be impaired by the building of this apartment house unless it be conceded that an apartment house is a nuisance per se," which the court denied. The ordinance was held bad because it had no reasonable relation to the public health, morals or safety. The ordinance was treated as "a case of a use restriction pure and simple."<sup>103</sup>

The Milwaukee ordinance established four classes of use districts designated residence, local business, commercial and light manufactur-

99. Opinion of the Justices, 234 Mass 597, 127 N. E. 525.

100. State ex rel. Seery v. Houghton (Minn., July 3, 1925), 204 N. W. 569, following State v. Houghton, 144 Minn. 1, 13, 174 N. W. 885, 176 N. W. 159, 8 A. L. R. 585, but opposed to the result in State v. Minneapolis, 136 Minn. 479, 162 N. W. 477.

101. See Pontiac Co. v. Commissioners, 104 Ohio St. 447, 135 N. W. 635, 23 A. L. R. 866; Lucas v. State, 21 Ohio Law Reporter, 363 (holding a zoning ordinance invalid); State ex rel. v. East Cleveland, 22 Ohio N. P. (N. S.) 549, holding zoning ordinance valid.

102. Pritz v. Messer, ——— (Ohio) ———, 149 N. E. 30.

103. Youngstown v. Kahn Bros. Bldg. Co. (Ohio), 148 N. E. 842, 844-846.

ing and industrial. Complainant's property was in a residence district. He conducted a dairy and milk pasteurizing plant and sought to enlarge it as his business required by erecting an addition to the present building. He asked for a permit, which was denied because in violation of the zoning ordinance, in that the building to be erected was in a residence district. The ordinance emanating from ample grant of power to the city was sustained as a proper exercise of the police power as applied to the facts of the particular case before the court.

Tested by fundamental principles relating to the exercise of the police power within the limits of the organic laws, the court considered the constitutional validity of the particular zoning regulations by answer to the inquiry, whether the regulations have any reasonable tendency to promote the public morals, health or safety, or the public comfort, welfare or prosperity.<sup>104</sup>

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104. *State ex rel. v. Harper*, 182 Wis. 149, 196 N. W. 451, 455.