THE LAW OF ZONING IN MISSOURI SINCE EUCLID V. AMBLER REALTY CO.

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It has long been the law that one must use his property in such a manner as not to injure the property of his neighbor.[1] A violation of this rule constitutes a nuisance.[2] It has been judicially stated that "any business establishment is likely to be a genuine nuisance in a neighborhood of residences,"[3] and that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[4] Thus, almost any business, not a nuisance *per se*, may become a nuisance when it is out of place. Courts of equity afford a remedy in such an instance.[5]

A lawful business or use may offend another, however, without rising or sinking to the level of nuisance. Accordingly, injunction cannot reach all or even a considerable percentage of offenses by property—indeed none, unless they are nuisances. Paradoxically, the equitable remedy is inadequate. In conse-

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1. Mugler v. Kansas (1887) 123 U. S. 623, 660; Munn v. Illinois (1876) 94 U. S. 113, 114. In Bellerive Investment Co. v. Kansas City (1929) 321 Mo. 969, 13 S. W. (2d) 628, 640, the Supreme Court of Missouri said: "Ordinarily, the citizen has the right to use that which is his own, in such a manner as he pleases, but if the use thereof seriously affects the general public, society and the laws thereof demand a surrender of a part of the individual rights for the general welfare of the public, for such is the basis of all government."

2. From the French *nuire*, to injure, hurt, or harm.

3. State ex rel. Civello v. New Orleans (1923) 154 La. 271, 283, 97 So. 440, 444.

4. Euclid v. Ambler Realty Co. (1926) 272 U. S. 365, 388, per Sutherland, J.

5. Rhodes v. A. Moll Grocer Company (Mo. App. 1936) 95 S. W. (2d) 837, 841; George v. Goodovich (1927) 288 Pa. 48, 135 Atl. 719 (enjoining erection of ten-car garage in residential district); Tureman v. Ketterlin (1924) 304 Mo. 221, 263 S. W. 202 (holding an undertaking establishment a private nuisance); Ross v. Butler (1868) 19 N. J. Eq. 294, 97 Am. Dec. 654, 657. In Aufderheide v. Polar Wave Ice & Fuel Company (1928) 4 S. W. (2d) 776, certain property owners sought to enjoin the construction of an ice plant in their residential neighborhood. The court held such a plant not to be a nuisance *per se*, and the injunction was not allowed. An ice plant may be excluded, however, from a residence district by a zoning ordinance. See note 43, infra, and text supported thereby.

quence, an ancient legal concept,[6] the police power, has been invoked. That power deals with classes; and zoning is essentially a classification of uses. Zoning may not have had its origin in this way, but the suggestion is persuasive. Mr. Justice Sutherland has observed that the question, whether or not the power exists "to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance,"[7] is to be determined, not in an abstract manner, but by considering the particular thing or use with other things and uses in the same locality. Concretely, residential buildings should be built with other residential buildings in an area naturally suited to such uses, with a view to holding that area as a residential district; and so with other uses.

Zoning seeks by fixed rule of law to prescribe how real property shall be used. Technically, it is a limitation on the use of private property. Uses or zones fall quite naturally into such classifications as residential, multiple dwelling, business, industrial, *et cetera.* Perfect classifications are not humanly possible; therefore, legal questions arise. If industrial property worth two dollars per square foot were zoned as residential property, great injustice would be done; that would amount to depriving the owner of his property without compensation. If a tract of land is industrial, made so by its proximity to a railroad, it would be arbitrary to zone it as residential property. However, should the railroad be removed, the same tract of land might become residential property by reason of the changed conditions. This improbable supposition is given to illustrate how necessary it may be to change the zoning restrictions.

Use and adaptability must be considered in so far as possible in zoning. They are taken into consideration in the valuation of private property when it is taken for public use in the exercise of the right of eminent domain.[8] If use and adaptability are not

6. Ancient, though not recognized as such until the last century. See Tiedeman, *Limitations of Police Power in the United States* (1886) sec. 96a.

7. Euclid v. Ambler Realty Co. (1926) 272 U. S. 365, 388.

8. Boom Company v. Patterson (1878) 98 U. S. 403, 407, 408, followed in St. Louis & O'Fallon Ry. v. United States (1929) 279 U. S. 461, 503, as to use and adaptability; Yonts v. Public Service Co. (1929) 179 Ark. 695, 17 S. W. (2d) 886; Illinois Light & Power Co. v. Bedard (1931) 343 Ill. 618, 175 N. E. 851, 852; Joint Highway Dist. No. 9 v. Ocean Shore R. R. (1933) 128 Cal. App. 743, 18 P. (2d) 413. In Dowsey v. Village of Kensington (1931) 257 N. Y. 221, 177 N. E. 427, 430, the New York Court of Appeals said: "Certainly an ordinance is unreasonable which restricts prop-

thus looked to, it will often become necessary to amend the zoning ordinance from time to time; or the ordinance may be subjected to damaging tests in the courts.

Zoning extends to all property in a municipality. Its objectives could conceivably be obtained by exercise of the power of eminent domain, but such a procedure would be impractical[9] if not virtually impossible. If zoning is to be established by the police power, however, certain fundamental considerations cannot be overlooked. Municipalities must have authority from the state constitution or by legislative grant to pass such ordinances.[10] If the ordinance is a reasonable exercise of the police power, property damage incidental thereto does not condemn it as offensive to the compensation requirements of the constitution. If, however, the ordinance does not come within a reasonable exercise of the police power, it is void and should be so declared by the courts. Such an ordinance amounts to the taking of property without due process of law, prohibited by the Federal[11] and state[12] constitutions. Further, private property cannot be constitutionally taken without just compensation.[13] Expressed in another way, private property cannot be taken by legislative fiat.[14] It is for these reasons that zoning ordinances do not and must not disturb uses existing at the time of the effective date of said ordinances. Thus, where an attempt was made to establish building lines on a boulevard, forty feet distant from and parallel with the north and south lines of said street, under the police

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erty upon the boundary of the village to a use for which the property is not adapted, and thereby destroys the greater part of its value in order that the beauty of the village as a whole may be enhanced. * * * The restriction itself constitutes an invasion of his property rights." There the parcel in question was on a highway, and, therefore, better suited to and more valuable for business and apartment house uses.

9. State ex rel. Oliver Cadillac Co. v. Christopher (1927) 317 Mo. 1179, 298 S. W. 720, 724.

10. See, *e. g.*, R. S. Mo. (1929) secs. 7259-7270. The Enabling Acts of all states are substantially the same. See notes 20, 48, and 70, infra.

11. " * * * Nor shall any state deprive any person of property without due process of law, * * *." U. S. Const. Amend. XIV, sec. 1.

12. "That no person shall be deprived of property without due process of law." Mo. Const. art. II, sec. 30.

13. "That private property shall not be taken for public use without just compensation." Mo. Const. art. II, sec. 21. The constitutional provisions of all states with respect to due process of law and just compensation are the same in substance.

14. Euclid v. Ambler Realty Co. (1926) 272 U. S. 365, 389, where the court held that it could not be said that the ordinance being considered passed the bounds of reason and assumed "the character of a merely arbi-

power, there being no provision in either the enabling act[15] or the ordinance of the city authorizing the condemnation of a building line or compensation therefor, both the statute and the ordinance were held to violate the state constitution.[16] In addition to the taking of property without compensation, no notice to the owners was there provided; hence, according to the court, the owners were deprived of their property without due process of law. Since the statute and ordinance did not come within the police power, the property was taken by legislative fiat. As soon as the ordinance became effective, there was a taking of property without compensation, which taking in this instance lasted until the ordinance was declared invalid. In a later case[17] where the ordinance provided that the houses fronting on a portion of a named avenue "shall be used for residences only, and no business avocation whatever shall be allowed to be followed in the same," the court again held the restrictive use invalid and "that the use of property is property itself."

In 1924, Roanoke, Virginia, amended its general zoning ordinance to establish a "building line, with relation to the street, to which all buildings subsequently erected must conform." A proviso to this ordinance reserved to the city council "the authority to make exceptions and permit the erection of buildings closer to the street." Petitioner sought to test the validity of the building line provisions by asking for mandamus to compel the council to issue a permit to occupy his lot up to the street line. The Supreme Court, pointing out that the reservation to the city council to make exceptions and to permit the erection of buildings closer to the street might avoid hardship, said:

> We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds.[18]

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trary fiat," although "some industries of an innocent character might fall within the prescribed class." See also Purity Extract Co. v. Lynch (1912) 226 U. S. 192, 204; Lowry v. Rainwater (1879) 70 Mo. 152, 159; Board of Education v. Bakewell (1887) 22 Ill. 339, 10 N. E. 378, 382; Culbertson v. Coleman (1879) 47 Wis. 193, 2 N. W. 124.

15. Mo. Laws of 1891, 47. The act provided that cities of Missouri having a population of 3,000 inhabitants or more "may establish building lines to which all buildings and structures thereon shall conform."

16. St. Louis v. Hill (1893) 116 Mo. 527, 22 S. W. 861, 863.

17. St. Louis v. Dorr (1898) 145 Mo. 466, 41 S. W. 1094, 1099, 46 S. W. 976, 981. The Enabling Act was here again Mo. Laws of 1891, 47.

18. Gorieb v. Fox (1927) 274 U. S. 603, 607. As to the proper method of amending zoning ordinances see notes 45, 46, 47, 48, and 70, and text

Probably the most significant contention in this case, however, was that the building line provision was invalid in that it deprived the petitioner of his property without due process of law. The court, however, refused to characterize the ordinance under review as clearly arbitrary and unreasonable without substantial relation to the police power.

This seems to be the only case involving a building line established by an exercise of the police power. However, zoning laws that provide for open spaces in front of private property along streets reach the same result. In *Kansas City v. Liebi*[19] a building line, thirty-five feet from either side of a boulevard, was established by eminent domain. Compensation was paid for property damaged, and, therefore, the question of due process of law did not arise.

The ordinance involved in *St. Louis v. Dreisoerner*[20] went a step further than was attempted in the *Hill*[21] and *Dorr*[22] cases. It prohibited the operation of certain business and manufacturing plants within six hundred feet of Tower Grove Park in St. Louis. As a police regulation, the ordinance was held to be unreasonable on its face, and, as applied to the calling of defendant (wood manufacturing), to deprive him of the full uses of his property

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supported by said notes. The proviso in the amending ordinance was also attacked on the ground that it violated the equal protection of the law in that it enabled the city council unfairly to discriminate between lot owners by fixing unequal distances from the street for the erection of buildings of the same character under like circumstances. The court said: "We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality." Id. at 607.

19. (1923) 298 Mo. 569, 252 S. W. 404, 407. The proceedings were attacked on the ground that a building line was not a public use. The court in sustaining the project held that "public use" is synonymous with "public benefit" or "public advantage." Nichols, *Eminent Domain* (2d ed. 1917) secs. 130, 131.

20. (1912) 243 Mo. 217, 147 S. W. 998, 1000. The fact that there was no enabling act, authorizing the ordinance, constituted one of the grounds, for the decision. In Wippler v. Hohn (1937) 110 S. W. (2d) 409, 411, Judge Gantt in speaking for the court said: "Zoning is not of purely municipal concern. It operates locally but is governmental and referable to the police power." That power came from the enabling act. That a municipality has no inherent power and that its powers must come from the constitution or by legislative grant, see Kansas City v. J. I. Case Threshing Machine Co. (1935) 337 Mo. 913, 87 S. W. (2d) 195; 1 McQuillin, *Municipal Corporations* (2d ed. 1928) 416, sec. 145.

21. (1893) 116 Mo. 527, 22 S. W. 861, 863, cited supra, note 16.

22. (1898) 145 Mo. 466, 41 S. W. 1094, 1099, 46 S. W. 976, 981, cited supra, note 17.

without compensation and due process of law. The police power was said to extend only to public safety, health, morals, and public welfare, not to aesthetic purposes.

Closely related to zoning are the billboard cases. It was held in *St. Louis Poster Advertising Co. v. St. Louis*[23] that the regulation of billboards, that is, confining them to certain heights, sizes, and positions along the streets, was a reasonable exercise of the police power. In affirming that case, the Supreme Court of the United States declared that billboards may be put in a class by themselves and prohibited in the residence districts of the city in the interest of the safety, morality, health, and decency of the community.[24]

The removal of billboards from residential districts is in effect a zoning regulation, although the basic legal reason assigned for the removal has been the prevention of crime.[25] Mr. Justice Holmes pointed out that the requirement of conformity to the building line had aesthetic considerations in view more than anything else; but as the main burdens of the ordinance professedly stood on other grounds, the Court refused to declare the ordinance void on account of any furtherance of aesthetic considerations,[26] which were dubbed as merely incidental to the safety, morality, and decency of the community.

In 1918, St. Louis passed its first general zoning ordinance, in which the city was divided into districts or uses, to-wit: (1) residence; (2) second residence; (3) commercial; (4) industrial; (5) unrestricted. The test of this ordinance came in *State ex rel. Penrose Investment Co. v. McKelvey*,[27] when the relator sought a permit to erect an ice plant in the second residence district. The court held that the ordinance imposed restrictions on the lawful uses of private property without due process. On the same day the *Penrose* case was handed down, the Supreme Court of Missouri also decided the case of *St. Louis v. Evraiff*[28] which grew out of the same ordinance. The defendant was con-

23. (1917) 195 S. W. 717.
24. (1919) 249 U. S. 269.
25. St. Louis Gunning Advertising Co. v. St. Louis (1911) 235 Mo. 99, 137 S. W. 929; Thomas Cusack Company v. Chicago (1917) 242 U. S. 526, aff'g (1915) 267 Ill. 344, 108 N. E. 340.
26. St. Louis Poster Advertising Co. v. St. Louis (1919) 249 U. S. 269, 274.
27. (1923) 301 Mo. 1, 256 S. W. 474.
28. (1923) 301 Mo. 231, 256 S. W. 489.

ducting a rag and junk yard in a section of St. Louis zoned as industrial. For this violation the city sued to recover penalties. The court held that the ordinance imposed restrictions upon the uses of private property that had no relation to the police power. Judge Graves, in a separate opinion in the *McKelvey* case, said:

> 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.[29]

According to this pronouncement, only nuisances come within the scope of zoning. Of course such a statement bears no relation to zoning laws as we know them today. It completely overlooks the fact that zoning may be legal in its general scope and yet be objectionable in particular instances where the ordinance applies in an arbitrary and unreasonable manner, as the later decisions indicate.

Not long after the *McKelvey* decision the question of the legality of zoning reached the Supreme Court of the United States in *Euclid v. Ambler Realty Company*.[30] Prior to that time the courts in a number of states had rejected zoning, but those of a greater number had approved it.[31] Under the Euclid ordinance the village was divided into classes or use districts: U-1, single family dwellings; U-2, two-family dwellings; U-3, apartments, flats, schools, hospitals; U-4, retail and wholesale business; U-5, billboards, warehouses, markets, and light manufacturing; U-6, heavy manufacturing and business in the nature of nuisances. In this ordinance there were four area districts and three height districts.[32] The appellee's land, bounded on the north by the Nickel Plate Railroad, on the south by Euclid Avenue, had an

29. 265 S. W. at 478. See, also, State ex rel. Oliver Cadillac Co. v. Christopher (1927) 317 Mo. 1179, 298 S. W. 720, 727.

30. (1926) 272 U. S. 365.

31. See discussion in Bassett, *Zoning* (1936) 47. "The Law of Zoning in Missouri," as of the date of its publication (May, 1926) was competently treated in an article by Frederick V. Wells in 34 U. of Mo. Bull. L. Ser. 3. At the time of the appearance of the article, the Euclid case was yet in the Ohio state courts. The significant changes wrought by that case merit the further discussion of Mr. Wells' subject.

32. A statute limiting buildings to a certain height in one part of the city of Boston and to another height in another part of the city was valid as a police measure in Welch v. Swasey (1909) 214 U. S. 91, aff'g (1907) 193 Mass. 364, 79 N. E. 745. Height and character of construction come within the safety measures of the police power.

area of sixty-eight acres. Adjoining this tract on both the east and west were residential districts. The southern six hundred feet was zoned as class U-2 use; the next one hundred thirty feet as U-3; and the remainder of the tract fell in class U-6 use, the latter being that portion nearest to the railroad.

In the *Ambler* case, the court pointed out early that a thing not a nuisance in itself may become one by improper location, and that "offensive trades, industries and structures likely to create nuisances"[33] may be excluded from residential areas without legal difficulty. The fact that certain industries, neither offensive nor dangerous, were prohibited by the ordinance, as were those which were offensive and dangerous, did not militate against the zoning ordinance.[34] The law is not condemned be-

33. In Reinman v. Little Rock (1915) 237 U. S. 171, the Court had held an ordinance, prohibiting livery stables within an area including the defendant's stables, was a valid exercise of the police power; that the ordinance did not deprive the defendants of their property without due process of law, nor deny them equal protection of the law, even though the defendants had been at great expense for many years in constructing buildings with a view to making the stables sanitary. In Hadacheck v. Sebastian (1915) 239 U. S. 294, an ordinance which prohibited brickmaking in a designated area of the city where the plant and tract in question were worth several thousand dollars, was held valid as a police regulation, operating alike upon all who came within its terms; "no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit." The ordinance did not, however, prohibit the removal of the fine clay. In West Bros. Brick Co. v. Alexander (Va. 1937) 192 S. E. 881, 885, an eighteen acre tract of clay land was located near residences and business houses. An ordinance prohibiting the owner of the claybeds from beginning excavations was held valid under the police power. In Ex parte Davison (Mo. 1928) 13 S. W. (2d) 40, an ordinance, which prohibited the opening and operation of a stone quarry within 300 feet of an inhabitable building, not being a nuisance *per se*, was held invalid. On the question of taking property under the police power, the Court, in Chicago, Burlington & Quincy Railway Co. v. State of Illinois ex rel. Drainage Commissioners (1906) 200 U. S. 561, 594, said: "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not taking property without compensation. * * * But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments."

34. In Hebe Company v. Shaw (1919) 248 U. S. 297, the Court said: "The power of legislation is not to be denied simply because some innocent articles or transactions may be found within the prescribed class." In Pierce Oil Corp. v. Hope (1919) 248 U. S. 498, the ordinance forbade the storing of petroleum and gasoline within three hundred feet of any dwelling house. A bulk station located on the right-of-way of the railroad, having been moved there at the request of the city, came under the zoning law ban. Held, that a state may make the place where dangerous oils are kept a criminal nuisance, notwithstanding the Fourteenth Amendment.

cause "the bad fades into the good by such degrees that the two are not capable of being readily distinguished."

The crucial question was whether or not the zoning ordinance could exclude from residential districts apartment houses, retail stores and shops, and like establishments. Before deciding this question, the court quoted approvingly from *Aurora v. Burns*[35] and from *State ex rel. Civello v. New Orleans*,[36] both of which had sustained the legality of comprehensive zoning ordinances. In the *Aurora* case it was pointed out that with the increasing complexity of industrial activities, the police power must necessarily develop within reasonable bounds to meet changing conditions; that the segregation of industries, commercial pursuits, and dwelling houses to their particular districts bear a rational relation to the health, morals, safety, and general welfare of the community for the reason that the establishment of zones may prevent congestion of the population, minimize risk of contagion, secure quiet residence districts, expedite transportation, enforce traffic regulations, suppress disorder, and lessen fire hazards. In the *New Orleans* case the court observed that the exclusion of business and commercial activities from the residence districts has a substantial relation to the police power in that segregation affords better police protection; lessens crime in the residence sections by removing open shops which invite loiterers and idlers; saves paving costs by confining heavy truck hauling to commercial streets; facilitates quiet and tends to prevent disturbances; keeps away the malodorous, as well as the unsightly, thereby tending to keep away rats, mice, roaches, flies, ants, *et cetera* from the residence districts; and enhances the safety and security of home life.[37]

For the reasons thus summarized the Court found itself unable to hold the zoning ordinance unconstitutional as arbitrary and unreasonable or as having no substantial relation to the public health, safety, morals, or general welfare:

> The court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not

35. (1925) 319 Ill. 84, 93-95, 149 N. E. 784, 788.
36. (1923) 154 La. 271, 282, 283, 97 So. 440, 444.
37. (1926) 272 U. S. 365; cf. Ryan v. Warrensburg (1938) 117 S. W. (2d) 303.

> shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.[38]
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> It is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.[39]

Very decisively, this decision settled the question of the legality of zoning in the United States.[40]

About a year after the opinion in *Euclid v. Ambler Realty Co.* was handed down, the Supreme Court of Missouri decided *State ex rel. Oliver Cadillac Co. v. Christopher,*[41] which upheld the St. Louis zoning ordinance.[42] The relator sought by proceedings in

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38. 272 U. S. at 395.

39. 272 U. S. at 397.

40. See Bassett, *Zoning* (1936) 47. The court cited but did not discuss Lincoln Trust Company v. Williams Building Corporation (1920) 229 N. Y. 313, 128 N. E. 209, which held valid a New York resolution, creating three districts: residential, business, and unrestricted, as a police measure; also Miller v. Board of Public Works (1925) 195 Cal. 477, 234 P. 381, where the court held that the establishment of strictly private residence districts, as a part of the comprehensive zoning plan, was for the general welfare of the community because it tended to promote and perpetuate the American home. Since the decision in the Ambler case the Supreme Court has held the zoning ordinance of the city of Los Angeles constitutional in its general scope. Zahn v. Board of Public Works (1927) 274 U. S. 325, aff'g 195 Cal. 497, 234 P. 388. In Nectow v. Cambridge (1928) 277 U. S. 183, it was conceded that the zoning ordinance was valid in its general scope.

41. (1927) 317 Mo. 1179, 298 S. W. 720, 725.

42. St. Louis Code (1926) secs. 152-176. The pertinent sections are as follows: "Sec. 2. In order to regulate and restrict the location, erection, alteration or use of buildings, structures or land, the City of St. Louis is hereby divided into five (5) Use Districts, known as: 1. Residence. 2. Multiple Dwelling District. 3. Commercial District. 4. Industrial District. 5. Unrestricted District.

"Sec. 3. In the residence district no buildings or premises shall be used and no building therein shall be erected or structurally altered except for the following purposes: 1. One Family Dwelling. 2. Two Family Dwelling. 3. Church. 4. Schools offering instruction in primary, secondary or collegiate courses of study. 5. Library, museum, playground, park or recreational buildings which are owned or operated by the municipality. 6. Accessory buildings, including one private garage or private stable when located not less than thirty (30) feet from the front lot line and not less than five (5) feet from any side street line, or a private garage constructed as a part of the main building * * * .

"Sec. 4. In the multiple dwelling district no building or premises shall be used and no building therein shall be erected or structurally altered except for the following purposes: 1. Any use permitted in the residence District. 2. Multiple Dwelling. 3. Hotel. 4. Private Club or Lodge, excluding any which has as its chief activity a service customarily carried on as a business. 5. Boarding or Lodging House. 6. Hospital or clinic. 7. An in-

mandamus to compel the building commissioner to issue a permit to erect a two-story building at the southwest corner of Lindell Boulevard and Sarah Street for an automobile display and salesroom for cars and accessories. The permit had been refused on the ground that the proposed building was for business and industrial purposes and therefore excluded by the zoning ordinance. The zoning ordinance was held constitutional in its basic aspects and general scope.

But the respondent contended further that the ordinance was arbitrary and unreasonable in that it attempted to exclude the proposed building from a district where there were old buildings, boarding houses, flats, apartments both large and small, as well as hotels, schools, and lodge and club buildings which were large and imposing structures; that in fact the district was a decayed residential district. The court reasoned that if flats, apartments, and hotels were to be excluded from residence districts,[43] then the people who dwell in flats, apartments, and hotels should not be subjected to the same conditions that obtain in commercial or industrial districts. However, the expediency of excluding commercial and industrial establishments from first and secondary residential districts was held to be a matter for the legislative body to determine. Thus, the classification was properly upheld.

Summarily, the foregoing decisions brought the law of zoning in Missouri to this status: Zoning in its general scope is valid as a reasonable exercise of the police power; even where the legality of the zoning ordinance in its entirety may be debatable, the courts will ordinarily uphold it; the applicability of the zoning ordinance to particular parcels is for the courts to determine in each instance.

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stitution of an educational, philanthropic or eleemosynary nature. 8. Accessory buildings, including private and storage garages when located on the same lot less than thirty (30) feet from the front line, and not less than five (5) feet from any side street line unless constructed as a part of the main building; however, it shall be permitted to maintain and operate a storage garage in the basement or on the ground floor of fireproof hotels and apartments, which garage is to be operated and maintained for the use of the guests or tenants residing within such hotel or apartment. * * * "

43. In Miller v. Board of Public Works (1925) 195 Cal. 477, 234 Pac. 381, the court held that the zoning ordinance may exclude from a strictly private residence district, apartment-or-multiple-dwelling-houses under the police power. See also Wulfsohn v. Burden (1925) 241 N. Y. 288, 150 N. E. 120.

Before examining the applications of ordinances to particular uses, an inquiry into the legal basis of municipal zoning ordinances is in order. In *State ex rel. Kramer v. Schwartz*[44] an interim zoning ordinance of Jefferson City was held invalid because it failed to comply with the Enabling Act.[45] The city council had passed a preliminary ordinance which provided for the appointment of a city planning and zoning commission to frame a comprehensive zoning ordinance, and the mayor had made the appointments. Relator applied for a permit to erect a store building on this lot, and the city refused on the theory that the parcel in question was zoned against commercial uses under the interim ordinance. But the Enabling Act had required that the zoning "commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission."[46] The statute further enjoined that a zoning ordinance should contain a provision providing for a board of adjustment.[47] The interim zoning ordinance failed to comply with these statutory requirements.[48]

Zoning imposes restrictions on property, and for that reason the legislature provided for public hearings before the enactment of such ordinances. A board of adjustment[49] was deemed neces-

44. (1935) 336 Mo. 932, 82 S. W. (2d) 63.
45. R. S. Mo. (1929) secs. 7259-7270.
46. R. S. Mo. (1929) sec. 7264.
47. R. S. Mo. (1929) sec. 7265.
48. In Wippler v. Hohn (1937) 110 S. W. (2d) 409, the court held that the amending ordinance was void because enacted by the legislative body (board of aldermen) without the notice and hearings required by the Enabling Act.
49. The St. Louis Board of Adjustment seems to be typical of such boards. Briefly, it is provided that in proper cases and within certain limitations, it shall be the duty of the board: to hear and decide appeals from the order and requirements made by the Building Commissioner; to permit the reconstruction, within twelve months, of a building located in a district restricted against its use, which building has been partially destroyed by fire or other calamity; "to permit the extension of a use or height and area district where the boundary line of the district divides a lot in a single ownership at the time of the passage of the ordinance"; to interpret the provisions of the ordinance in such a way as to carry out the intent and purpose of the plan; to vary or modify the application of any of the regulations and provisions of the ordinances where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, provided, however, that every such variation or modification shall be reported immediately to the Board of Aldermen and embodied in an ordinance by way of an amendment to the zoning ordinance

sary to the proper interpretation, enforcement, or modification of the zoning laws. With respect to the powers of a board of adjustment the Supreme Court of Missouri in *State ex rel. Nigro v. Kansas City* said:

> The board of zoning appeals is intrusted with the duty of enforcing the provisions of the ordinance; it is an administrative body, without a vestige of legislative power. It cannot, therefore, modify, amend, or repeal what the ordinance itself designates as its "general rules and regulations"; the power to do that is conferred upon the common council of Kansas City, and it can delegate no part of that power. * * * It [the ordinance] does permit and direct the board to modify or partially suspend a rule in its application to a particular case where strict enforcement would * * * constitute a practical difficulty or unnecessary hardship.[50]

Thus, it is clear that the board of adjustment has no legislative authority whatever, its powers being confined to the narrow compass fixed by the statute.[51]

The procedure provided in the ordinance in *State ex rel. Seattle Title Trust Company v. Roberge*[52] permitted the erection of a philanthropic home for children or old people in the residential district, provided the written consent of owners of two-thirds of the property within four hundred feet of the proposed building was procured. This latter proviso was held to violate the due process clause, being an unwarranted delegation of power to other property owners in that they could arbitrarily, without any standard or rule, prevent the use for the purposes intended. There was no provision for review, and the failure of the owners to give their consent was final. However, the mere passage of the permissive ordinance indicated that the establishment of the proposed building was in harmony with the public interest.

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before the same shall become effective. The Board's orders and requirements are also subject to review by the circuit court upon petition. St. Louis Code (1926) sec. 168. And see Enabling Act, R. S. Mo. (1929) sec. 7265.

50. (1930) 325 Mo. 95, 100, 27 S. W. (2d) 1030, 1032. The Kansas City ordinance designates the board as the zoning board of appeals instead of the board of adjustment, as provided in the Enabling Act. In New York, the board is known as the board of standards and appeals. Levy v. Board of Standards and Appeals (1935) 267 N. Y. 347, 196 N. E. 284 holds that said board has no legislative powers.

51. R. S. Mo. (1929) sec. 7265.

52. (1929) 278 U. S. 116. The building here was formerly a residence and would accommodate fourteen persons. The trustees proposed to remove the old structure and place in its stead a $100,000.00 building of two and one-half stories, large enough to house fifty persons.

A similar situation was presented in *Women's Kansas City St. Andrew Society v. Kansas City*[53] where the city officials refused to issue a permit to plaintiff to use its three-story, single family, residential building, located in the residence zone, as an "Old Ladies' Home." The Kansas City zoning ordinance divided the use districts into seven.[54] Class U-1 use included such as are usually zoned in the residential classification,[55] but class U-7 use was special and included aviation fields, amusement parks, philanthropic or eleemosynary uses or institutions, hospitals or sanitariums, institutions for the care of the feeble-minded, cemeteries, and garbage disposal plants. Property then devoted to class U-7 use was to continue, regardless of the use district in which the use was located, but no territory had been set aside for class U-7 use. The other six use districts were set aside for their respective uses, subject however to the power in the zoning board of appeals to permit class U-7 special uses to be located in any one of them under certain conditions.

After numerous skirmishes,[56] the plaintiff brought suit in the federal district court to enjoin the city from enforcing the ordinance as against its use of the property as an "Old Ladies' Home," and the bill was dismissed.[57] The question before the appellate court was whether or not the said seventeen room residence could be used as a philanthropic home. That court held that the restriction placed upon plaintiff's property was not essential to the zoning plan, for other uses, as enumerated in class U-7 use, might be put in any of the six classes or use districts.

53. (C. C. A. 8, 1932) 58 F. (2d) 593, 605.

54. Briefly stated the use districts were: U-1. Dwelling House. U-2. Apartment House. U-3. Retail. U-4. Light Manufacturing. U-5. Industrial. U-6. Unrestricted. U-7. Special.

55. The first residence or class U-1 use included single family dwellings, public owned parks, two-family dwellings, churches, schools, community centers, private clubs, etc.

56. Upon denial of plaintiff's application by the zoning board of appeals, it petitioned the circuit court, and again its application was denied. Having appealed to the Missouri Supreme Court, it dismissed its appeal when the Nigro case, discussed supra at note 50, was decided. There it was held that the power of the board was limited to the recommendation of modifications of the zoning ordinance to the legislative assembly. Next the plaintiff attempted to have a re-zoning bill passed, but that attempt met with a protest of more than ten percent of the property owners within the area involved. See R. S. Mo. (1929) sec. 7263. The amendment then failed to pass the necessary three-fourths of the members of the city council. 58 F. (2d) at 596.

57. (D. C. W. D. Mo. 1931) 54 F. (2d) 1071.

To place a class U-7 use in the class U-1 use district was to follow out the general plan embodied in the ordinance. Therefore, to use the property in question for the "Old Ladies' Home" was to follow consistently the ordinance unless the home would "seriously injure the appropriate use of neighboring property." The court repeated the ruling of the *Ambler* case[58] to the effect that it would not declare a law unconstitutional when it was fairly debatable as to whether or not the law was arbitrary and unreasonable. The development of the police power was then pointed to by the court. Originally, the police power extended to "public health, safety, peace, and morals," but it now includes, so it was said, "general welfare,"[59] "public convenience,"[60] and "general prosperity."[61]

As to whether or not the intended use would seriously injure the neighboring property, the court followed the case of *University Heights v. Cleveland Jewish Orphans' Home*,[62] which held that the police power was not broad enough to exclude the orphanage from the residence district. Such an enterprise was readily distinguished from factories, business houses, shops, and even apartment houses. While an orphanage may be less agreeable to the community in some respects than a school or private residence, and while some may object to old people, those circumstances do not constitute a basis for restricting the use of one's property. As the Supreme Court of Texas has said:

> Laws are not made to suit the acute sensibilities of such persons. It is with common humanity—the average of the people that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class.[63]

No essential difference was found between an orphanage in cottages and an old ladies' home for twelve in a residential building

58. (1926) 272 U. S. 365, 388.

59. Chicago, Burlington & Quincy Ry. v. State ex rel. Drainage Comm'rs (1906) 200 U. S. 561, 592-3; Bacon v. Walker (1907) 204 U. S. 311, 318.

60. Marrs v. Oxford (1929) 32 F. (2d) 134, 139.

61. State v. Wilson (1917) 101 Kan. 789, 794, 168 Pac. 679. Mr. Justice Holmes in Noble State Bank v. Haskell (1911) 219 U. S. 104, 111, said: "It may be said in a general way that the police power extends to all great public needs."

62. (1927) 20 F. (2d) 743, 745.

63. Spann v. Dallas (1921) 111 Tex. 350, 235 S. W. 513, 516. The court held that an ordinance excluding a grocery store from a residence district did not come within the ban of the police power. The reasoning of the court may not have been well applied in that case, but it dealt with fundamentals.

long used as a residence. In both instances the buildings were residential in character, and the use of both was to be residential. The particular use as an old ladies' home was shown not to come within the ban of the police power; hence the zoning ordinance in its application to plaintiff's property was "so arbitrary and unreasonable as to be void."[64]

The general zoning ordinance in *Nectow v. Cambridge*[65] was concededly valid but the classification of plaintiff's property as residential was held arbitrary and unreasonable under the police power. To the east and south of the parcel of land in question, the neighborhood was unrestricted, and industrial plants occupied part of the area. Across the streets on the north and west, the property was zoned as residential. The parcel was vacant, although formerly occupied by a mansion. The court below affirmed findings of the master to the effect "that no practical use can be made of the land in question for residential purposes," and that the zoning of the parcel as residence property was not a proper exercise of the police power. The court concluded that a serious and highly injurious invasion was clearly established; hence the action of the zoning authorities came within the ban of the Fourteenth Amendment and was not sustainable. A similar case of invasion of private property was exhibited in *Glencoe Lime & Cement Co. v. St. Louis.*[66] Property located near a railroad and used by the owner for a storage yard for sand, cinders, and other building materials was zoned as residential. In holding the ordinance void as applied to plaintiff's property, the court found no showing in the record that the use of the lot for the contemplated purpose involved the public health, safety, morals, or general welfare. The classification was characterized as almost a complete invasion of plaintiff's property. This is another instance where a zoning law, valid in its general scope, was held invalid as applied to a particular parcel. It is another instance of the taking of property without compensation under the guise

64. (C. C. A. 8, 1932) 58 F. (2d) 593, 606.
65. (1928) 277 U. S. 183, 188-9.
66. (Mo. 1937) 108 S. W. (2d) 143, 146. Although the courts hold that a zoning ordinance may, as applied to certain parcels of property, amount to an invasion, they do not hold that such ordinance or resolution is an encumbrance on property, for where properly applied it is an exercise of the police power. Lincoln Trust Co. v. Williams Building Corp. (1920) 229 N. Y. 313, 128 N. E. 209.

of an exercise of the police power.[67] However, errors of classification in the zoning laws are not sufficient to condemn zoning laws in general. It is not possible to avoid all errors in framing statutes.

A Kansas City ordinance which limited the number of automobiles that might be kept in a building used for living or sleeping quarters to three was sustained as a police regulation.[68] The ordinance showed on its face, as all should show, that it was a police regulation; but it was not apparent that the ordinance, as applied to a particular parcel, was a proper exercise of the police power. In fact, zoning regulations are supposed to segregate residences from railroad tracks, *et cetera.* The burden to show the unreasonableness of the regulation which rests on the person asserting it was held not to be discharged here, however.

The boundary lines of the zones caused dissatisfaction among property owners in *American Wood Products Co. v. Minneapolis,*[69] where the city refused to permit factories to be built in a district zoned for multiple-dwelling use. Near the appellant's property was a zone in which factory use was permitted. In holding the ordinance valid the court explicitly recognized that the line of demarcation between property to be used for industrial purposes is necessarily in any case somewhat arbitrary. A careful reading of all the facts softens somewhat any apparent harshness in the case. Perhaps better than drawing such tenuous lines would be the practice of viewing the property and of studying the application of the zones affected to the particular parcels in question.

The recent case of *Geneva Investment Co. v. St. Louis*[70] is

67. Judge Kenyon, in Women's Kansas City St. Andrew Society v. Kansas City (C. C. A. 8, 1932) 58 F. (2d) 593, 598, said: "Private property cannot under the guise of the police power be subjected to an unreasonable annoyance and arbitrary restriction of its use where public welfare can in no way recover benefits by such restriction." The situation was entirely different in Wippler v. Hohn (1938) 110 S. W. (2d) 409. There the amending ordinance, permitting a change of defendant's property from multiple dwelling to commercial use (as a garage), was held arbitrary and unreasonable in that the operation of the garage caused loud noises, noxious fumes and gases, and danger from fire and explosion, and in that the reclassification was antagonistic to the public welfare.

68. Bellerive Investment Co. v. Kansas City (1929) 321 Mo. 969, 13 S. W. (2d) 628, 640.

69. (C. C. A. 8, 1929) 35 F. (2d) 657, 661.

70. (C. C. A. 8, 1937) 87 F. (2d) 83. To sustain this ruling the court cited Marblehead Land Co. v. Los Angeles (C. C. A. 9, 1931) 47 F. (2d)

significant because an amendment of a general zoning ordinance was involved. The appellant sought to retain the enforcement of the amended ordinance which changed the classification of a certain area, including appellant's property, from commercial to residential use. The trial court found that the amending ordinance was enacted to carry into effect the purposes of the general zoning ordinance and to correct an erroneous classification therein. The appellate court held that the passage of an amending ordinance was governed by the same legal requirements as the original ordinance; that if the restrictions of the amending ordinance could have been enacted as a part of the original ordinance, then the amending ordinance was proper. Basically, the amending ordinance must be a reasonable exercise of the police power.

In *Mueller v. C. Hoffmeister & Livery Company*[71] the defendant company sought to extend its mortuary northwardly onto a thirty foot parcel purchased for that purpose. The general zoning ordinance classified the district as residential. The use of the defendant's property as an undertaking establishment existing at the time of the adoption of the ordinance and not conforming to the provisions of the ordinance was permitted to remain, provided "no structural alterations were made, except those required by law or ordinance." In order to effect the plan, an amending or spot zoning ordinance changed the use of the thirty-foot parcel from residential to commercial. Plaintiff, living adjacent to the parcel on the north, sought to enjoin the extension of the mortuary and to test the constitutionality of the amending ordinance. The court pointed out that the enabling act contemplated the same careful, serious, and intelligent consideration of an amendment to a zoning ordinance as is required in the preparation and enactment of an original ordinance on zoning. In holding the ordinance arbitrary and unreasonable, and therefore void, the court relied on *Wippler v. Hohn*,[72] where the amending ordinance

528, where the residential zone was amended to include property originally excluded therefrom. Incidentally, the St. Louis ordinance provided that if protest against changes was signed by the owners of ten per cent or more of the property within a certain area, then such amendment should become effective upon receiving a majority vote of the members of the Board of Aldermen. That provision of the St. Louis ordinance was held void as being in conflict with the Enabling Act, R. S. Mo. (1929) sec. 7263, which requires a favorable vote of three-fourths of all the members of the legislative body. 87 F. (2d) at 87.

71. (Mo. 1938) 121 S. W. (2d) 775.

72. (Mo. 1937) 110 S. W. (2d) 409.

changed the classification of two lots from "multiple dwelling" to "commercial" uses, and where the reclassification was made under influences antagonistic to the general welfare "and solely as a favor to defendant Hohn." In the *Hoffmeister* case, however, defendant, operating under a nonconforming use, sought by amending ordinance to extend that use to an adjoining parcel. In this respect the case differs from *Wippler v. Hohn.*

One of the most interesting and significant of recent cases is *Marrs v. Oxford.*[73] Plaintiff sought to enjoin the enforcement of a zoning ordinance which undertook to limit and regulate the drilling and operation of gas and oil wells within a part of the corporate limits. This ordinance limited the drilling to one well to the block and provided that one-eighth of the proceeds of the well were to be prorated among the surface owners of the block. The ordinance was held valid as a police regulation in that it prevented noises, obstructions in traffic, dangers from explosions, and incidentally unsightly structures in the city.

It appears well settled that zoning ordinances may keep all commercial activities from residential sections. An attempt to deviate from that rule was made in *Ryan v. Warrensburg.*[74] In that case the plaintiff sought to maintain his barber shop in his residence, located in a district zoned as residential. He contended that a barber shop was not a nuisance *per se,* that his business was located in a "sparsely settled neighborhood," and that therefore, the imposed restriction could have no relation to the police power. On the location of uses the court pointed out emphatically that the administrative officials could not select or locate a use in a district which was prohibited by the ordinance, and that the legislative body properly considered that a barber shop, which may cause the spreading of disease, came well within the ban of the police power. In holding the ordinance, as applied to plaintiff's property, constitutional, Judge Hyde, speaking for the court, said:

> It [the city] is merely acting to prevent the operation of any business of any kind in a district it has zoned as residential only, and from which it has excluded all business establishments. Its authority to do this is the zoning act,

73. (C. C. A. 8, 1929) 32 F. (2d) 134, 139, 140. The case is cited but to suggest the problem, which has become acute in neighboring jurisdictions. See Comment (1929) 15 ST. LOUIS LAW REVIEW 104.

74. (Mo. 1938) 117 S. W. (2d) 303.

> and not the law of nuisance. It has such authority if a valid statute grants it, and the law of nuisances has no more to do with this question than would Einstein's theory of Relativity.[75]

It has often been urged that matters of taste and beauty should be a basis for the exercise of the police power. What two courts have said on this subject seems noteworthy here. In *Women's Kansas City St. Andrew Society v. Kansas City* the United States Circuit Court of Appeals argued:

> Successive city councils might never agree to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be at a continued seesaw if aesthetic considerations were to govern the use of the police power.[76]

In *Dowsey v. Kensington* the New York Court of Appeals thus summed up the current judicial attitude:

> Public welfare is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely aesthetic considerations.[77]

The courts almost unanimously agree that matters of taste and aesthetics, being somewhat in the nature of a luxury, do not justify the exercise of the police power to take private property without compensation. It is necessity alone that justifies the exercise of that power. It is the welfare of common humanity, that is, the average person, that justifies the exercise of the police power. While aesthetic considerations alone do not authorize the employment of the police power, such considerations may apply incidentally; *i. e.*, if the law has a proper basis as a police measure, there is no objection to the aesthetic benefits flowing therefrom.

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75. Id. at 307.

76. (1932) 58 F. (2d) 593, 603.

77. (1931) 257 N. Y. 221, 177 N. E. 427, 430. What may come to be regarded as a signal case was handed down in 1935 by the Supreme Court of Massachusetts, which upheld the protection of roadside edges and rural scenery from defacement by billboards. General Outdoor Advertising Co. v. Dep't of Public Works, 289 Mass. 149, 193 N. E. 799. While not a zoning case, the opinion is notable for its analysis of aesthetic considerations in connection with billboard regulation. The case is indicative of the liberality engendered by Euclid v. Ambler Realty Co.

The interest of society justifies restraints upon the use of property just as it justifies restraints upon individual conduct. Since the decision in *Euclid v. Ambler Realty Company*, practically all cities of the United States have accordingly adopted zoning laws.[78] Although zoning has thus been approved in general, it must be remembered that it is the use of property that gives it its value, and that zoning laws restrict the use of property. If those restrictions are reasonable, that is, based upon the use or uses to which property is best adapted, then the application of the law to a particular parcel would seem justified. The law, if properly applied, as presumably it is in most instances, will stabilize the use to preserve the value of the property. But if, for example, industrial property is zoned as residential, the law is arbitrary and unreasonable and takes property without due process of law. The due process clauses of the Federal and state constitutions stand ever ready to step in to adjust the improper applications of the law.

A zoning law, if reasonable, is valid in its general scope as a proper exercise of the police power. Yet while the restriction may be valid basically, its application to particular parcels may still be the subject of inquiry by the courts.

78. See Bassett, *Zoning* (1936) 47.