THE NUMBERS GAME: GASOLINE SERVICE STATIONS AND LAND USE CONTROLS

CHARLES J. WILLIAMS†

Strange though it may be, the number of vehicles in this country continues to increase while the number of gasoline service stations to serve them remains a decreasing variable.[1] This is due to the economics of pumping gas rather than to the successful use of zoning and land use controls by local government.

This phenomenon suggests that the goals of industry and local government are joint and mutual, not separate and conflicting. In the last 25 years the petroleum industry has demolished more stations than it has built and has replaced the filling station with the modern super station. Today's retail outlet is bigger and more expensive to build than its predecessors, is capable of pumping three times as much gas and can be made quite attractive. Instead of deploring replacement of service stations and new construction, local government should seize this opportunity to plan for and locate the service station in accordance with the long-range objectives of the community. The development of a locational theory for service stations would benefit the interests of both parties.

The cluster of stations at busy intersections and the development along heavily travelled thoroughfares of the gasoline alley or ghetto is due to the fault of both the industry and local government. Bad planning or no planning at all has permitted the concentration of stations to meet the thrust of population growth without adequate control. This is aggravated by the intense competition between oil companies to be "where the action is." Site competition, in turn,

†Member, California Bar; City Attorney, cities of Benicia, Lafayette, Pleasant Hill, Yountville.

1. This Is Your Service Station Today (Shell Oil Company pamphlet).

encourages bidding from developers and investors since a good site brings a premium price.

The concern of local government over the concentration of numerous stations is evident in the variety of methods used to control the problem. In some instances, an over-reaction by local government has resulted in litigation with a result adverse to those interests seeking to control the problem of location and proliferation.

There can be a legal basis for the special treatment of service stations and the purposes here are to explore that basis and to review the zoning techniques which have implemented it. If the problem can be dealt with before it becomes acute, the solution will be much less drastic and much more likely to be accepted by the industry.

I. Substantive and Procedural Rules Related to Zoning

A. The Power to Zone

Judicial reaction to the wide variety of techniques used to control location and design of service stations has been mixed. Even within the same jurisdictions, decisions have reached opposite results. It is helpful in setting the stage, therefore, to review some basic legal principles concerning the power of local government to zone and control land use.

The power to zone is a part of the police power and is determined by the meaning and scope of the police power.[2] The police power is said to be the power to regulate the conduct of persons: one toward another and the manner in which each may use his own property.[3] The power is best explained variously in terms of its source, its limits, the purposes served by its exercise, or examples of what is or is not its proper exercise.[4] One who tries to define it abstractly must eventually conclude that there can be no such definition because, by its nature, the police power expands or contracts to meet new needs or changed circumstances.[5]

Viewed in terms of the broad purposes for which it may be exercised, the police power may be used to advance the public health,

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Miller v. Bd. of Public Works, 195 Cal. 477, 234 P. 381 (1925).

3. Munn v. Illinois, 94 U.S. 113 (1876); 4 W. Blackstone Commentaries 1623.

4. *See* 6 E. McQuillin, Municipal Corporations 438-503 (3rd ed. 1949).

5. License Cases, 46 U.S. 504 (1847); Munn v. Illinois, 94 U.S. 113 (1876); Stone v. Mississippi, 101 U.S. 814 (1880); Adair v. U.S., 208 U.S. 161 (1908).

safety, and morals or to promote the general welfare, public convenience, or general prosperity.[6] The particular land use regulation must be related to one of these purposes and must also be properly exercised so as to meet the constitutional requirements of due process and equal protection. In broad terms, these constitutional limitations mean that the regulation must not be unreasonable, arbitrary or capricious and that the means selected must have a real and substantial relation to the object sought to be obtained.[7]

These criteria for judging constitutionality have acquired meaning from decisions involving particular land use regulations. A land use regulation may be invalid if it:

1. creates a monopoly;[8]
2. restricts land to a particular use which is made unsuitable by the use of adjacent property;[9]
3. restricts land to a use which deprives the property owner of all beneficial or profitable use;[10]
4. excludes from a land use district an existing and established use which is not a nuisance;[11]
5. classifies a parcel for a more restrictive use than surrounding land so that it is an island in the middle of less restricted uses;[12]
6. fails to prescribe standards and regulations applicable to all who fall within the same class.[13]

B. Procedural Rules Supporting Validity of Land Use Regulation

There have also evolved a series of procedural rules and principles governing the scope of judicial review which have a marked tendency to support land use regulations. An attack upon the regulation is made doubly difficult by these aids supporting validity:

6. Chicago, B. & Q. Ry. v. Illinois, 200 U.S. 561 (1906); Berman v. Parker, 348 U.S. 26 (1954); Millier v. Bd. of Public Works, 195 Cal. 477, 234 P. 381 (1925).

7. Nebbia v. New York, 291 U.S. 502 (1934); Morey v. Doud, 354 U.S. 457 (1957).

8. Sun Oil Co. v. Bd. of Zoning Appeals, 9 Ohio Misc. 101, 223 N.E.2d 384 (1966); *Ex parte* White, 195 Cal. 516, 234 P. 396 (1925); Bernstein v. Smutz, 83 Cal. App. 2d 108, 188 P.2d 48 (1947).

9. Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P.2d 93 (1939).

10. Eaton v. Swenney, 257 N.Y. 176, 177 N.E. 412 (1931); State v. City of East Cleveland, 108 Ohio App. 188, 153 N.E.2d 177 (1958).

11. Dobbins v. Los Angeles, 195 U.S. 223 (1904); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

12. Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y.S.2d 544 (1948); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938).

13. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Morey v. Doud, 354 U.S. 457 (1957); Mayhue v. City of Plantation, Fla., 375 F.2d 447 (5th Cir. 1967); City of Miami v. Woolin, 387 F.2d 893 (5th Cir. 1968).

1. The burden of proof is on the one contesting the validity of the zoning regulation. In its application to particular property, the person attacking it must produce sufficient evidence from which the court can make findings as to the physical facts involved which will justify it in concluding that the regulation is unreasonable and invalid as a matter of law.[14]
2. The decision of the zoning authority as to matters of opinion and policy will not be set aside or disregarded by the court unless the regulation has no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights.[15]
3. A court will not reverse a legislative determination merely because its wisdom or correctness is debatable.[16]
4. Every intendment is indulged in favor of the validity of the land use regulation.[17]
5. There is a general presumption that the determination of the local zoning authority is correct.[18]
6. Available administrative remedies must first be exhausted.[19]

These principles give the zoning authority broad limits within which to frame its land use regulations. The courts have shown a tendency in the light of the expanding police power to uphold new zoning techniques and innovations. It is well to remember, however, that these are rules as to the scope of judicial review and that there is ample flexibility in them to accommodate stricter attitudes toward reasonableness if a court believes a regulation is unreasonable or discriminatory.

II. Special Treatment of Service Stations

A. Bases for Distinction

Whether or not a particular use of property can be singled out for special treatment is tested by the following rules:[20]

1. The legislative body has a wide scope of discretion in the adoption of police laws and the equal protection clause voids a regulation only when it is without any rational basis and is purely arbitrary.

---

14. Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946).
15. Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949).
16. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
17. Zahn v. Bd. of Public Works, 274 U.S. 325 (1927).
18. Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419 (1933).
19. Metcalf v. Los Angeles County, 24 Cal. 2d 267, 148 P.2d 645 (1944).
20. Morey v. Doud, 354 U.S. 457 (1957).

2. A classification having some rational basis does not offend against the equal protection clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who attacks the classification of the law has the burden of showing that it does not rest upon any rational basis but is essentially arbitrary.

The industry's position as to zoning policy is that the service station should be treated on an equal basis with other forms of commercial and retail business and should be permitted in the same land use districts and under the same conditions as other business. The industry is opposed to spacing and other distance regulations upon the ground that there is no proof that stations are a safety hazard.[21]

The basic supposition that one business or commercial use is the same as any other may be open to some question in the light of modern planning practice where the emphasis is upon discerning differences in uses in order to achieve maximum compatibility. For instance, the very nature of the service station activity suggests some reasons for treating the use separately:

1. It is an outdoor activity creating more noise and more light and having a much greater impact on a neighborhood than if it were entirely enclosed.
2. A service station may increase traffic volume and the nature and intensity of the traffic created may distinguish this use from other types of drive-in businesses. The traffic generated by a service station can have several consequences. A station increases the number of roadway access points. This, in turn, impairs vehicle movements and can affect the capacity of the street to carry the volume of traffic for which it was designed. The concentration of service stations along a traffic artery may compound the problem and multiply these effects.

---

21. *See* Mosher, *Proximity Regulation of the Modern Service Station,* 17 SYRACUSE L. REV. 1, 22 (1965); The Place of the Service Station in the Community, a booklet setting forth the service station zoning policy of the Division of Marketing of American Petroleum of the American Petroleum Institute, quoted in *Symposium—Gasoline Service Stations,* AM. SOC'Y OF PLANNING OFFICIALS, PLANNING 1960 167, 168 (Selected papers from the Am. Soc'y of Planning Officials National Planning Conference) [hereinafter cited as *Symposium*]. For a recent discussion of the complaints of local government and what the industry is doing, see *The Great Gas Station Dilemma,* NATION'S CITIES, Aug., 1968, at 16-19.

A service station located at an intersection increases the number of points of conflict between vehicle and pedestrian. This effect is much more marked when there is a concentration of service stations.[22]

The usual objection to a service station from the standpoint of traffic is the threat to safety and, in particular, the potential conflict between automobile and pedestrian; but the industry has an array of statistics indicating that service stations have good safety records.[23] It is also argued that a service station aids safety because it may increase visibility by opening up a corner and improving lighting.[24] In spite of these statistics the potential of hazard, conflict and accident do exist and the degree of threat depends only upon how careful people may be.

3. The service station handles a highly volatile liquid which possesses the potential hazards of fire and explosion. Improved methods of handling and storage of gasoline, it is argued, have reduced the incidence of fire to the point where fire insurance rates are as low or lower than other retail businesses.[25] Notwithstanding these low incidence statistics and fire insurance rates, the courts have accepted the legislative judgment that there is a serious hazard.[26]
4. An abandoned service station can be the source of problems which do not exist when the ordinary retail outlet goes out of business. Changing population patterns cannot always be predicted or controlled and a population shift may remove the economic base of a station. A station which no longer has the support of an economic base may pass from operator to operator. The investment in underground improvements makes the hope of a successful enterprise die slowly and offers an invitation to the naive or the uninitiated to try his luck. The station becomes a marginal operation, economically speaking, and gradually falls into disrepair. It is no longer maintained and becomes an outlet for all sorts of related retail business

---

22. *Symposium,* at 162. *See also* AM. SOC'Y OF PLANNING OFFICIALS, PLANNING, ADVISORY SERVICE, *Gasoline Station Location and Design,* Information Report No. 140 (Nov. 1960); H.K. Evans, TRAFFICE ENGINEERING HANDBOOK, 333-336 (1950); for a discussion of the role of traffic in zoning, see 29 FORD. L. REV. 768 (1961); E.C. Yokley, *Trends in Zoning,* in 2 INSTITUTE ON PLANNING AND ZONING 161 (1961).

23. Mosher, *supra* note 21, at 10.

24. In Koch v. Zoning Bd. of Appeals, 54 Misc. 2d 1090, 284 N.Y.S.2d 177 (1967), the court agreed.

25. Statistics are contained in Mosher, *supra* note 21, at 3. Industry spokesmen state that an underground tank in use has never caught fire or exploded except for two unusual cases in the early 1920's. This is Your Service Station Today, *supra* note 1.

26. Vendley v. Village of Berkeley, 21 Ill. 2d 563, 173 N.E.2d 506 (1961). But see the statistics and expert testimony summarized in that case.

activities in an effort to survive. In every aspect the use is a far cry from the one originally contemplated. Finally, when the operator can no longer survive, it is abandoned and becomes a parking lot, playground, or neighborhood dumping ground, all of which can have a blighting influence upon the area.[27] In an effort to devote the existing surface improvements to productive use, the station may be converted into some other type of drive-in activity which is equally or more obnoxious than the station itself.

5. There is the matter of aesthetics. The architecture and color schemes, forms of advertising, outdoor display of merchandise, and general appearance of disorder which can occur provide reasons for treating service stations differently.

In addition to the above, there may be other reasons based upon the community's own experience which cause it to single out service stations for restrictive treatment.

The importance of the presumption favoring validity and the burden of proof imposed upon the person opposing the land use restriction becomes quite apparent at this point. The person who attacks the zoning regulation because it discriminates by permitting one business use but prohibiting another has a difficult burden. The presumption of validity will sustain the regulation even though its wisdom is debatable. However, in framing the legislation which regulates the activity, it is vital that the regulation imposed be supported by reasons carefully thought out and having some factual basis supporting its need. The regulation must be reasonably related to the evil sought to be remedied. The courts have been quick to see and distinguish the serious and good faith attempt at regulation from the hasty and contrived attempt intended only to limit the number of stations and prevent construction of additional ones.

B. Limitations and Restrictions

1. *Number of Service Stations*

An outright limitation upon the number of service stations for the sole reason that too many stations are undesirable is improper and

27. This argument is similar to the one used in the billboard cases in which restrictions upon billboards and highway advertising have been justified upon the basis that a billboard is a source of danger because it obscures visibility, is a menace to public morals because it provides a concealed place for the commission of immoral and criminal acts, or is a threat to public health because the area behind it is a dumping ground for debris. Cusack Co. v. Chicago, 242 U.S. 526 (1917); Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); 35 MARQ. L. REV. 365 (1952).

would certainly be disapproved. The objection is that limiting the number of stations protects existing service stations from competition. The use of the zoning power as an economic tool to prevent competition or to regulate the community's economic needs has been condemned because such a regulation does not bear a substantial relation to the legitimate purpose for which the zoning power may be exercised.[28] Furthermore, authority to consider community need based upon the number of existing similar facilities, it may be argued, is analogous to the power exercised by state and federal government to determine whether a business should be authorized as a matter of public necessity and convenience. This kind of authority has not been granted to local government and it is questionable whether the regulation of gasoline retail outlets is sufficiently affected with the public interest to permit the state to grant this power even if it wished to do so.[29]

It cannot be stated, however, that under all circumstances an ordinance imposing a limitation upon the number of service stations is invalid. If the limitation on number is related in some way to a proper exercise of the police power under the particular circumstances, the regulation should be upheld. Neither the motives of the legislative body nor the fact that the limitation has the result of preventing competition should by themselves preclude validity. The weight of the argument that the regulation creates a monopoly is questionable and the role of competition factor in land use classification is still unclear.[30]

---

28. Charnofree Corp. v. City of Miami Beach, 76 So. 2d 665 (Fla. 1954); Circle Lounge & Grille, Inc. v. Bd. of Appeal, 324 Mass. 427, 86 N.E.2d 920 (1949); Pearce v. Village of Edina, 263 Minn. 563, 118 N.W.2d 659 (1962); 179 Duncan Ave. Corp. v. Bd. of Adjustment, 122 N.J.L. 292, 5 A.2d 68 (1939); Blumenreich Properties, Inc. v. Waters, 14 Misc. 2d 114, 178 N.Y.S.2d 905 (Sup. Ct. 1957); Cunningham v. Planning Bd. and Bd. of Appeals, 157 N.Y.S.2d 698 (Sup. Ct. 1956), *modified*, 4 App. Div. 2d 313, 164 N.Y.S.2d 601 (1957); State *ex rel.* Killeen Realty Co. v. City of East Cleveland, 108 Ohio App. 99, 153 N.E.2d 177 (1958); *In re* N.E. Corner of E. Center St. and Chicago Ave., 89 Ohio L. Abs. 430, 186 N.E.2d 515 (1962); State *ex rel.* Rosenthal v. City of Bedford, 74 Ohio L. Abs. 425, 134 N.E.2d 727 (1956).

29. Williams v. Standard Oil Co. of La., 278 U.S. 235 (1928) holding unconstitutional a state statute attempting to regulate retail gasoline prices and licensing retailers; Texaco, Inc. v. Bd. of Adjustment, 73 N.J. Super. 313, 179 A.2d 768 (1962).

30. Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938); Willett & Crane v. City of Palos Verdes, 96 Cal. App. 757, 216 P.2d 85 (1950). For a discussion of the competition factor as a consideration in zoning, *see* Mandelker, *Control of Competition as a Proper Purpose in Zoning*, in 14 ZONING DIG. 33 (1962).

2. *Spacing Restrictions*

A spacing restriction, often referred to as a distance or proximity regulation, establishes a minimum distance between a service station and a place of public assembly, such as a school or church, or between service stations themselves. In considering the validity of spacing restrictions, it is necessary to distinguish between the two.

a. *Requirement of Minimum Distance Between Service Station and Place of Public Assembly.* The courts have easily found that a spacing restriction between a service station and a place of public assembly bears a substantial relation to the proper exercise of the zoning power. These decisions find a reasonable basis for this type of restriction in (1) the need to avoid traffic hazards in areas where pedestrians or other vehicles may converge, (2) the risk to many lives stemming from the possibility of fire and explosion, and (3) the noise and interruption from the station which could interfere with the public activity.[31]

b. *Requirement of Minimum Distance Between Service Stations.* A spacing restriction which limits the distance between service stations is an increasingly popular method of regulation. Considering the judicial decisions considering this type of regulation, its use has been most prevalent in the East, Midwest, and parts of the South.

The spacing restrictions have varied anywhere from 300 feet (Grand Rapids, Michigan, 1926) to one mile (Dearborn, Michigan, 1957). In a number of instances, this approach to regulation has been varied by providing that only one corner at an intersection may be occupied by a service station or conversely by requiring service stations to be clustered in order to prevent undue scattering.[32]

Judicial opinion as to the validity of this type of spacing restriction varies. The courts in a majority of those states which have considered

---

31. *See, e.g.,* Vine v. Bd. of Adjustment, 136 N.J.L. 416, 56 A.2d 122 (1947); Bulk Petroleum Corp. v. Chicago, 181 Ill. 2d 428, 164 N.E.2d 42 (1960); Socony Mobil Oil Co. v. Township of Ocean, 56 N.J. Super. 310, 153 A.2d 67 (1959), *aff'd,* 59 N.J. Super. 4, 157 A.2d 2 (1960). One industry source feels that since the purpose of this kind of restriction is not to limit the number of stations, the restriction is not particularly objectionable. Mosher, *supra* note 21, at 23.

32. *Gasoline Station Location and Design,* Am. Soc'y of Planning Officials, Information Report No. 140 at 9 (Nov. 1960).

the question have upheld the restriction.[33] Even in states which have approved the validity of this form of restriction, particular regulations have been disapproved in individual cases where the record failed to show sufficient reason for excluding the use or where the regulation was unreasonable and discriminatory in its operation or failed to accomplish the purpose for which it was created.[34] Finally, the spacing restriction between service stations has been flatly rejected as a legitimate land use regulation in a few states.[35]

The conflict in these cases is due to the court's view of the scope of the police power and its opinion of the relation of the spacing limitation to the promotion or lack of promotion of the public health, safety, or welfare. The decisions upholding the spacing restriction as a proper exercise of the police power do so upon the basis of the potential fire and traffic hazards created by stations. The decisions disapproving the limitation find that the fire and traffic hazards do

33. *See, e.g.,* Food Fair Stores, Inc. v. Zoning Bd. of Appeals, 143 So. 2d 58 (Fla. 1962), *appeal dismissed,* 373 U.S. 541 (1963); City of Miami v. Walker, 169 So. 2d 842 (Fla. 1964); Socony Mobil Oil Co. v. Township of Ocean, 56 N.J. Super. 310, 153 A.2d 67, *affd,* 59 N.J. Super. 4, 157 A.2d 2 (1960); Lusardo v. Town of Harrison, 144 N.Y.L.J. No. 71, p. 17, colm. 4 (N.Y. 1960) cited in Mosher, *supra* note 21, at 14 n.62; Lynch v. Gardiner, 15 App. Div. 2d 562, 222 N.Y.S.2d 955 (1961); Plotinsky v. Gardner, 27 Misc. 2d 681, 206 N.Y.S.2d 611 (Sup. Ct. 1960); Sun Oil Co. v. Zoning Bd. of Adjustment, 403 Pa. 409, 169 A.2d 294 (1961); State *ex rel.* Newman v. Pagels, 212 Wis. 475, 250 N.W. 430 (1933); State *ex rel.* Humble Oil & Refining Co. v. Graves, Milwaukee County Circuit Ct. (Sept. 6, 1961). *See also* Denbo v. Moorestown Township, 23 N.J. 476, 129 A.2d 710 (1957). The point of view of the industry upon this question is forcefully stated in Mosher, *supra* note 21. The author's basic premise is that any regulation which has as its purpose the limiting of the number of stations is *ipso facto* discriminatory because there are no special safety or traffic reasons for doing so.

34. Township Committee of Haddon Tp., 125 N.J.L. 202, 14 A.2d 786 (1940) (sole basis of the regulation was fire prevention but there was no evidence to support the need for it); City of Miami v. Woolin, 387 F.2d 893 (5th Cir. 1968) (spacing restriction applied in only 2 land use districts; the regulation prohibited a station within a specified distance of a place of public assembly, but did not prohibit construction of a place of public assembly within the same distance of an existing station; there was also a large number of non-conforming uses, many of which the city had created by the granting of variances from the spacing restriction). *See also* Caudill v. Village of Milford, 10 Ohio Misc. 1, 225 N.E.2d 302 (1967).

35. Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98, 166 N.E.2d 41 (1960); Wynn v. City of Evansville, No. EV 59-C-27, S.D. Ind. (Dec. 21, 1959); Martin Oil Service Inc. v. City of Lincoln Park, No. 295-757, Wayne County Circuit Ct. (Mar. 25, 1958); Wagner v. City of Hazel Park, No. C-28878 Oakland County Circuit Ct., Michigan (Aug. 5, 1957); LaPash v. City of Moorehead, No. 26958, Clay County Dist. Ct., Minnesota (Feb. 29, 1960).

not exist or view the regulation as an effort to limit the number of stations and, therefore, restrict competition. For instance, the Illinois courts have had no problem in finding that the spacing requirement between a service station and a place of public assembly is a proper exercise of the police power, but such spacing regulation between service stations is viewed as an attempt to promote a monopoly.[36] The better reasoned cases uphold the distance limitation and recognize that the storage and handling of gasoline at a service station have some particular problems which justify the zoning authority in treating the use differently.

There are valuable lessons in legislative approach and draftmanship to be learned from the decisions which have disapproved spacing restrictions. Because the spacing restriction is an attempt to treat one use differently from others, there must be a basis for it and it behooves the legislative body to detail its reasons for such treatment. Legislative declarations concerning the necessity for control and the reason for the classification are entitled to respect, but there must be some basis for them. A court will not blindly accept an obvious mistake when the validity of the regulation depends upon the truth of what is declared. The regulation must be reasonable and impartial in its operation and must accomplish the purpose for which it was created without undue discrimination. Furthermore, as draftsmen, the legislators should consider the treatment of uses which are non-conforming as a result of the new regulation. A court may be suspicious of an excessive tolerance for non-conforming uses, especially where the reason for the restriction is the danger of fire and explosion. The creation of variances or uses which do not conform with the restriction should be avoided and the requirements must apply in all land use districts or a good reason must exist for the disparate treatment.

3. *Restriction upon Location by Land Use District*

The essence of the zoning power's traditional function is to separate incompatible land uses. Zoning regulations can permit a service station in one type of land use district and exclude it altogether from another. How far can the zoning authority go in restricting the number of land use districts in which a station is permitted? No precise rule can be formulated because each community differs in its

36. *Compare* Vendley v. Village of Berkeley, 21 Ill. 2d 563, 173 N.E.2d 506 (1961), *with* Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98, 166 N.E.2d 41 (1960).

needs and its desires. The long-range planning for a community's development should, however, include decisions as to where service stations can and should be located.

The task is to develop a theory of location based upon the classification of commercial land use areas and their characteristics while at the same time taking into consideration the special problems of the service station. A central business district may not be a desirable location for a service station because of the high volume of traffic and pedestrians and the importance of traffic circulation. On the other hand, a neighborhood shopping center may be a proper area for its location. In certain classes of commercial districts the station may be permitted as a matter of right. In other such classes, it may be permitted only with special approval. In still other classes of land use districts, such as residential and industrial, the service station may be entirely excluded. These decisions, once made, can be implemented by appropriate zoning regulations.

No one can quarrel with the classification of the service station as a general type of commercial or retail business use. Nevertheless, a number of cases indicate an attitude approving the exclusion of service stations from commercial land use districts.[87] The question of how different or how special the service station is because of the type of problems the use creates will determine its relationship to each land use district. Whether the zoning authority can limit the service station to one or two particular land use districts and control numbers and concentration of stations within those districts will depend upon how good a case is made for treating the station differently from other uses in the same general class and upon the relating of these distinctions to reasons for controlling numbers and concentration of service stations in districts where the use is permitted. Ideally, this should be done at the time long-range planning goals are formulated and implemented by means of zoning regulations. In this way the restriction is related to comprehensive planning. The restriction developed

37. *E.g.*, Schwartz v. City of Chicago, 19 Ill. 2d 62, 166 N.E.2d 59 (1960); Ballard v. Smtih, 234 Miss. 531, 107 So. 2d 580 (1958); Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 226 N.Y.S.2d 374 (1962); Greenpoint Savings Bank v. Bd. of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939); Suburban Tire and Battery Co. v. Village of Mamaroneck, 279 App. Div. 1084, 104 N.Y.S.2d 850 (1951), *aff'd*, 304 N.Y. 971, 110 N.E.2d 894, 113 N.Y.S.2d 449, (1952); Socony Mobil Oil Co. v. Township of Ocean, 56 N.J. Super. 310, 153 A.2d 67, *aff'd*, 59 N.J. Super. 4, 157 A.2d 2 (1960); Sun Oil Co. v. City of Clifton, 13 N.J. Super. 89, 80 A.2d 258 (1951); Dennis v. City of Oswego, 223 Ore. 60, 353 P.2d 1044 (1960); Slater v. City of River Oaks, 330 S.W.2d 892 (Tex. 1959).

in this way is much easier to defend against charges of discrimination than the "stopgap" restriction preventing further stations which is rushed to adoption after sudden realization that there are too many service stations in the wrong places. (As an example of criteria for location, design, and operation of service stations, a set of principles and standards is set forth in Appendix A.)

4. *Design Controls and Regulation of Accessory Uses*

A method used with varying degrees of success is the regulation of the design and accessory use of the service station. This is done either by the requirement of a use permit so that specially tailored conditions can be imposed or by formulating and requiring compliance with standard specifications for development and use which apply to all service stations. Both techniques give the zoning authority a measure of control over such aspects of design and operation as:

a. size of the site and location of structures,
b. location and size of signs,
c. hours of operation,
d. lighting,
e. ingress and egress,
f. fencing and landscaping,
g. prohibition of uses not properly a part of service station operation such as vehicle repair,
h. restrictions upon the display and storage of merchandise out of doors.

The regulation must contain adequate standards to provide a yardstick against which the proposal can be measured. This prevents an arbitrary grant or refusal of the request.[38] This condition having been met, the regulation can be used to correct some of the obvious problems of design and operation but represents only a piecemeal attack upon the problem. From the planner's viewpoint it should be a necessary part of the zoning regulations whether or not additional restrictions are included. (An example of the kind of condition imposed by this type of regulation is set forth in Appendix B.)

---

38. *See* Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956); State *ex rel.* Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955); Tulsa Oil Co. v. Morey, 137 N.J.L. 388, 60 A.2d 302 (1948); North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956); Youngs v. Zoning Bd. of Appeals, 127 Conn. 715, 17 A.2d 513 (1941).

5. *Requirement that Property Owners Consent to Location*

This method requires that a specified number or percentage of nearby property owners give their consent to the location of the station at the proposed site. Altering the amount of written consent or the area from which the consent is required provides needed flexibility.

Service station consent regulations have been upheld in the majority of states authorizing the method while the United States Supreme Court has sustained a similar type of requirement in connection with billboards. Two states have disapproved regulations of this sort.[39] The objection to this device is that each proposal to construct the station becomes a popularity contest and does little to insure good planning or encourage the location of a service station in the most appropriate place.

6. *Other Attempts at Regulation*

There have been other more indirect efforts at regulating the business of operating service stations. For example, regulations which prohibit gasoline storage trucks from using city streets have been declared invalid.[40] More recently, there have been attempts to adopt licensing requirements for service station operators.[41]

7. *The Role of Aesthetics*

A principal reason for the recent increased concern over service stations and how to control them is the new emphasis on aesthetics. This leads to the question of the place of aesthetics in the exercise of the police power and the extent to which aesthetics may play a part in the types of regulations discussed above.

The traditional rule is that aesthetics alone is not a sufficient basis for exercising the zoning power.[42] While paying lip service to the rule, however, the courts have gradually undermined it. With increasing frequency, courts are finding either that there is a valid police power

---

39. Cusack v. City of Chicago, 242 U.S. 526 (1917); Cross v. Billett, 122 Colo. 278, 221 P.2d 923 (1950); City of Lansing v. Smith, 277 Mich. 495, 269 N.W. 573 (1936); Epstein v. Weisseer, 278 App. Div. 668, 102 N.Y.S.2d 678 (1951); Martin v. City of Danville, 148 Va. 247, 138 S.E. 629 (1927); Drovers Trust & Savings Bank v. City of Chicago, 18 Ill. 2d 476, 165 N.E.2d 314 (1960); Schulte v. City of Garnett, 186 Kan. 117, 348 P.2d 629 (1960).

40. McCoy v. Town of York, 193 S.C. 390, 8 S.E.2d 905 (1940); City of Sedalia v. Crawford, No. 20203, Pettis County Cir. Ct. (Mo. May 9, 1957).

41. *See, e.g.*, AB 162, N.J. 1961 legislative session.

42. 6 E. McQuillin, Municipal Corporations 476-80 (3rd ed. 1949).

basis to support the aesthetic regulation or that the police power extends to the protection of property values and that aesthetic control is valid if it tends to preserve property values.[43] In a refreshing and realistic judicial approach, some court have dropped all pretense of connecting aesthetics with traditional health and safety considerations and have sanctioned land use restrictions solely upon the basis that the eye is entitled to as much recognition as the other senses.[44]

The industry is aware of the public interest in beautification and there is a marked trend in the construction of so-called "ranch", "resident" or "suburban" type stations ranging from 15 per cent to 100 per cent of company-built units.[45] The external appearance is changed by a choice of building materials, design of roof and canopy lines, toned-down colors, and reduction of the number and size of signs. In all other respects, however, it is the same as the traditional gasoline station. One can expect that more radical suggestions such as the marketing of several brands or a complete change in service station design and concept will be rejected at least for the present.[46]

III. Conclusion

How far local government can go in limiting the number of service stations or in the degree of restrictions it can impose is a subject of continuing controversy between what are supposed to be violently

43. General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 193 N.E. 799 (1935); Preferred Tires v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940); State *ex rel.* Saveland Park Holding Corp. v. Weiland, 269 Wis. 262, 69 N.W.2d 217 (1955); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272 (1963), *appeal dismissed,* 375 U.S. 42 (1963). *See also* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 Law & Contemp. Prob. 218 (1955); Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power,* 27 S. Cal. L. Rev. 149 (1954); Norton, *Police Power, Planning and Aesthetics,* 7 Santa Clara Lawyer 171 (1967). *Comment, Aesthetics as a Zoning Consideration,* 13 Hast. L.J. 374, 378-381 (1962); *See also* Kucera, *Legal Aspects of Aesthetics in Zoning,* Proceedings of the 1960 Institute on Planning and Zoning 21 (1961); Green, *New Trends in Zoning as Recognized by Court Decisions,* Proceedings of the 1965 Institute of Planning and Zoning (1966).

44. Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965); State v. Diamond Motors, Inc., 429 P.2d 825 (Hawaii 1967); Cromwell v. Ferrier, 19 N.Y.2d 749 (1967).

45. National Petroleum News, May, 1966, McGraw-Hill, Inc.

46. *The Great Gas Station Dilemma, supra* note 21. In 1966 the City of Pleasant Hill, Contra Costa County, California, commissioned an independent architectural study of how to develop aesthetically pleasing styles as opposed to prototypes of service stations. The response measured by the industry's acceptance was not encouraging.

opposing interests. Ordinances imposing spacing limitations have been adopted in parts of the country and have generally been upheld where the legislative body has found a relationship between the limitation and the needs of the public health, safety, morals and general welfare. However, there must be evidence to support the findings to justify the regulation. The more extreme the regulation, the greater the needs for evidentiary findings sufficient to justify the singling out of the service station for special treatment and the existence of a relationship between the problem and the remedy used to solve that problem.

The city's decision must be "clearly and palpably wrong" before a court should nullify the regulation under the police power. Courts should uphold zoning regulations which (1) impose spacing or distance limitations as between stations or a station and a place of public assembly; (2) exclude service stations from residential land use districts, industrial land use districts, and certain types of commercial land use districts; (3) limit the number of stations at intersections; (4) impose a conditional use permit procedure or specific detailed design and construction standards which include a reasonable measure of aesthetic control. An outright limitation upon the number of service stations in the community with no basis for justification is an invitation to a court to strike the regulation down as being invalid.

Long-range community planning with a locational theory for service stations built into it should be the ultimate goal. Local government and the petroleum industry must find a common basis for achieving that goal. Otherwise, the piecemeal regulation by government and the isolated attack by industry will continue and the general public will continue to suffer.

APPENDIX A*

Principles

1. Service stations in the City shall be located adjacent to and integrated with other commercial uses and shall not be developed in "spot" locations.

2. A service station shall be located adjacent to a major or secondary thoroughfare.

3. The siting and architectural character of a service station shall blend with the existing or proposed character of the surrounding area. Variations in building design, materials and function features (such as electroliers and fencing) shall be encouraged.

4. Service stations in the city's retail commercial areas shall be integrated with but located on the periphery of retail commercial areas.

5. A pleasing, uncluttered appearance of service stations should be assured by adherence to sign regulations, maintenance of adequate landscaping and, where appropriate, conditions restricting outdoor display of automotive accessories.

6. The size and nature of a service station may be expected to vary with the location of the service station and the market it is intended to serve.

STANDARDS

1. Not more than 2 service stations shall be located at any given intersection. With the exception of areas designated as Highway Commercial on the General Plan, when 2 service stations are proposed to be located at an at-grade intersection, they should be situated on diagonally opposite corners.

2. A service station at the intersection of 2 thoroughfare streets should have no more than a total of 2 curb cuts. Not more than 1 curb cut for each thoroughfare street frontage and not more than a total of 2 curb cuts for each non-thoroughfare frontage shall be permitted for service stations at the intersection of a thoroughfare street with a collector street.

3. Service station sites in or near community or neighborhood commercial centers shall have a minimum of 12,000 square feet of lot area with 120′ of frontage on at least one street.

4. Service stations designed to serve the trucking market should have a minimum of 300 feet of frontage on at least one street.

5. Approximatey 8% of the net area of a service station site should be improved with well-maintained landscaping elements. These elements may include but will not be limited to plant materials, street furniture (such as benches and kiosks), and decorative surfaces (variations in color and texture). Emphasis should be on a pleasing appearance, quality of design and proper balance between structure and landscape elements, rather than satisfaction of quantitative criteria. Existing specimen trees, mature ornamental shrubs, and ground cover shall be preserved whenever possible.

6. Service station driveways on thoroughfare streets should be located at least 100 feet from the nearest point of the intersection of public rights-of-way.

7. Driveways for service stations which are developed as part of or in conjunction with adjacent uses shall be located as part of the total circulation element of such adjacent uses.

8. Service stations located in the Central Business Core shall be considered integral with adjacent development if they are designed as part of a building complex with obvious pedestrian and vehicular circulation provided to surrounding activities.

9. Service stations located in Community Commercial Centers shall be situated on major thoroughfares on the perimeter of such centers.

10. Service stations (as well as all other commercial enterprises) shall be required to adhere to the sign regulations of the district in which they are located. Miscellaneous small signs and announcements should be concentrated on display structures such as bulletin boards, benches, kiosks, or others accessory type structures, which may be incorporated with the landscaping.

11. Exterior sales display and storage areas shall be considered as areas of principal business activity, and therefore they shall be required to be located and designed in a manner which will not detract from the pleasing appearance of the station. The location and amount of exterior sales display and storage areas shall be subject to the approval of the City's Site Plan and Architectural Approval Agency.

12. A service station located at a street intersection where signals are either in place or expected to be installed in the future, shall install functioning "call Detectors" for the benefit of service station patrons so that traffic exiting from the station can be detected by the signal system.

APPENDIX B

General Conditions for Service Stations**

1. The following signs, only, shall be allowed and a copy shall be limited to identification of the service station and advertising of automobile products and services sold on the premises: (specify number, location and size).

2. No signs on the premises shall be animated, rotating or flashing.

3. No flags, penants, banners, pinwheels or similar items shall be permitted on the premises, with the exception of a U.S. Flag and State Flag, after 7 days after the initial opening.

4. No merchandise shall be displayed or stored outside of an enclosed structure except for oil can racks at the gas pump locations.

5. No new or used tires, or used auto parts shall be permitted on the premises outside of an enclosed structure.

6. No major mechanical auto repair shall take place on the premises.

7. No auto body repair shall take place on the premises.

8. Only those vehicles awaiting service shall be permitted to be stored on the premises.

9. The architectural design of the service station shall be as shown on the construction plans on file with this request.

10. A landscaping plan shall be submitted to the planning department for review and approval prior to the issuance of building permits.

CONDITIONAL USE PERMIT PROVISIONS***

1. Location
   (a) The site shall have 150 feet of frontage on a major or secondary highway.
   (b) The site shall not adjoin an existing hotel or residential use at the time of its establishment.
   (c) The minimum distance from the site to a residential zone, school, park, playground, church, museum, or similar use shall be 250 feet.

2. Distance between stations. The minimum distance between automobile service stations shall be 500 feet.

3. Site Area. The minimum site area shall be 18,750 square feet.

4. Dimensions. The minimum width shall be 150 feet; the minimum depth shall be 125 feet.

5. Number of Pumps. One gasoline pump shall be permitted per 2,000 square feet of site area, with a maximum of 15 pumps permitted at any one station. A double pump stanchion shall represent 2 pumps.

6. Distance between Pumps. The maximum distance between pumps on an island shall be 10 feet.

7. Utility Trailers. Utility trailers, not exceeding 10 in number, may be stored for rent on service stations only in the C-2, C-M, and M-1 Zones, provided they are screened from view and occupy an area which is in excess of the 2,000 square feet of site area required per pump.

8. Walls. A solid masonry wall 6 feet in height shall be erected on all interior property lines, said wall to be reduced 3 feet in height within any required yard setback area or corner cutback area.

9. Paving. The entire ground area shall be paved.

10. Lighting. Light shall be reflected away from adjoining properties; lighting facilities shall be a part of or attached to the main structure and shall conform to the regulations of the City.

11. Outside Operation. Operations outside permanent structures shall be limited to the dispensing of gasoline, oil, water, changing tires, and attaching and detaching trailers. There shall be no outside storage or display of tires, banners or devices.

12. Noise. Noise shall be muffled so as not to become objectionable due to intermittence, beat frequency, or shrillness, and the decibel level measured at property lines shall not exceed street background noise normally occurring at location of site.

13. Minimum Building Area. The minimum gross floor area for each automobile service station building, not including the canopy area, shall be 1,500 square feet.

---

* Based on principles and standards used by the City of Fremont, Alameda County, California.

** Based upon a generalized set of conditions imposed by the Planning Department, County of Contra Costa, California.

*** These general conditions are imposed by the City of Palm Springs, California.