



AN ANALYSIS OF PLANNING STANDARDS AS THEY APPEAR IN
MASSACHUSETTS ADJUDICATIONS

by

JULIA JEANNE BRODERICK

A.B., Pembroke College in Brown University
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Signature of Author
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Certified by
Thesis Supervisor, V

Accepted by
Chairman, Departmental Committee
on Graduate Students

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Julia Jeanne Broderick

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The thesis is an analysis of the planning standards which emerge in a selected group of Massachusetts planning cases. The object was to see if a system of planning standards exists, implicitly or explicitly in the law decisions. Three general types of standards are identified, but they do not form a consistent pattern in the cases. Those standards which do exist, relate primarily to old conceptions of land controls. The more modern planning thinking has failed to develop complementary standards. A balanced relationship between the types of standards and the phases of planning is suggested. Such an integrated system of standards will enable the planner to present his cases with more authority and will free the Courts from outmoded justifications for planning controls. Suggestions for further research are included.

Thesis Supervisor: Frederick J. Adams

Title: Professor of City Planning

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I. INTRODUCTION

It is believed that an inquiry into the meaning of planning standards is necessary for three reasons:

- a. Planning calls for the development of and allocative process through which the community's goals can be approached in an orderly and rational fashion.
- b. The generic term "planning standards" is often used but seldom defined, the results being vagueness and ambiguity.
- c. Planning literature offers little in the way of systems of standards which can be analyzed, utilized or criticized.

It is suggested that the adjudicative process may offer a body of evidence from which one can derive a system of planning standards. Through an analysis of a selected group of planning cases the paper attempts to identify these standards, to assess their roles and to indicate the gaps and inadequacies that appear.

planning and standards

A plan is a draft or form, a graphic representation or a diagram. A plan is also a method or scheme of action, a program, outline or schedule. City plans are both of these things -- pictures of the future and outlines for achieving them. Currently city plans are being developed and argued over, implemented or abandoned, by a group of people who concern themselves exclusively with the complexities of urban problems. These men have defined their occupation as follows:

"City planning may be regarded as a means for systematically anticipating and achieving adjustment in the physical environment of the city consistent with social and economic trends and sound principles of civic design. It involves a continuing process of deriving, organizing and presenting a broad and comprehensive program for urban development and renewal. It is designed to fulfill local objectives of social, economic and physical well-being, considering both the immediate needs and those of the foreseeable future. It examines the economic basis for an urban center existing in the first place; it investigates its cultural, political, economic and physical characteristics both as an independent entity and as a component of a whole cluster of urban centers in a given region; and it attempts to design a physical environment which brings these elements into the soundest and most harmonious plan for the development and renewal of the area as a whole."¹

In other words it strives to be an ideal process of continual readjustment among a hierarchy of entities and forces -- an attempt to regulate the growth and development of the neighborhood, the community and the urban complex to their mutual as well as independent benefits.

This paper is concerned with the role of standards in planning. For the course of subsequent discussion we will take these standards to be the rules by which one can measure quantity, value or quality. As a result we will be discussing the guidelines and constraints which the planner and the public use in their attempts to secure a desired level of environmental conditions. We will question the guidelines from which planning seeks to impose developmental patterns, and try to determine why a planner's decision has any special validity.

The following exchange between a prospective builder and a local planner illustrates the interdependence between planning and standards:

planner - "It does not seem unreasonable to say that the zoning of a piece of property may be recommended for change under certain conditions necessary to protect the development of the area. In this case one of those conditions is that the area be ripe for development."

builder - "And you tell me when it is ripe? By what standards?"².

By what standards indeed? How have planners met such challenges in the past? Have they developed a reasonable set of rules by which to measure their own wishes and innovations? What sort of convincing rebuttal can they offer to such charges?³

types of standards

If standards offer some hope for better and more meaningful planning, one must inquire further into their characteristics. The planner will be able to manipulate them with greater sensitivity and thus be assured of achieving desired ends once he understands their unique qualities. One hopes that these standards can be organized into a system which parallels the steps and levels of the planning process. The first step must structure standards themselves.

A basic duality appears from the very definition of a standard. Two broad and strikingly different divisions can be identified; the "objective scale" standard and the "general consensus" standard. Chapin, in his definition of planning,⁴ implicitly emphasizes the rational and efficient approach, the "scientific method" if you will, of data accumulation, analysis, and objective decision. A large number of planning studies are pre-occupied with such methodology.

Some of these studies define problems and indicate alternatives, if not answers, in a highly satisfactory fashion. They form a factual bulwark which provides some sound guidance for the planner. These are the studies in which standards have been formulated as reasonable out-growths of the factual data. Street design,

air pollution, noise control and sewer and water facilities all lend themselves to such treatment. Note that while they all relate directly to planning they have basic and measurable "engineering" components. Elements of the systems can be subjected to test situations under control conditions and performance measured on a scale. This objective scaling in turn provides a "built-in" basis for standards. The drawing of the cut-off line at a given point on the scale is determined by considerations of health and safety. The development of these objective scale standards can then be verified through direct measurement. Certainly the system has its flaws. Our measurement devices may be crude and unrealistic, and our answers may be wrong. However, it is the potential of direct measurement that distinguishes this classification.

The second category of standards encompasses the "non-measurables". This larger, more diffuse area includes the social goals, activities and mores. The social scientist has not as yet been able to construct a scale which can translate social desirability with any degree of precision. For example, how does one measure the benefits derived from having running hot water in every dwelling unit in a city? One can point to trends, to statistical comparisons between areas that have hot water and those that don't, but none of this gives any necessarily binding cause and effect relationship. To date objective scale standards cannot give any satisfaction in such problems. They must be reinforced or contradicted by a set of personal measures of desirability and "goodness" derived from background and culture and which, in aggregate, form a set of poorly defined but operationally effective standards. This second large category will be called "general consensus" standards.

A third area of controls impinges on the two groups of standards defined above. These are the loose goal statements often referred to in master plans or the master plans themselves. Clearly "goals" does not equal "standards" in every sense. For example, a population and its planners can (and often does) agree on a "standard" for a front yard, without knowing or caring what goals they are implementing. Or they can agree on a "goal" of a higher level of employment, with no need to set any "standard" in order to provide a basis for action.⁵ However, master plans and other goal statements are sometimes officially adopted by a municipality. When this happens, one can argue that the goal has in fact become a standard; a scale against which public and planner measure the merit of proposals. Those which meet the terms of this new "standard" would be considered "good" and therefore worthy of implementation; those which fail would be discarded.

This brief introduction to the characteristics of standards will be expanded as the paper proceeds. However, an early understanding of this three-way split will clarify subsequent case discussions.

FOOTNOTES

- 1 Chapin, F.S.
Urban Land Use Planning
Harper Bros., New York, 1957, p.XIV.
- 2 Haar, C.M.
Land Use Planning Casebook
Little Brown & Co., Boston, 1959, p.271.
- 3 While considerations of the timing of development do not emerge in the Massachusetts cases, and while they do have some standards of their own not treated here, the example is typical of the challenges put to planners in many phases of their work.
- 4 Chapin, F.S.
op. cit., p.XIV
- 5 Distinction suggested in comments by Prof. J.T.Howard of M.I.T., 9 January 1962.

II. THE CHOICE OF THE SAMPLE AREA

The original problem of the thesis involved a discussion and analysis of a field of planning standards which had reached a significant level of development both in terms of use and expression. As noted above such a field could not be found. There was no evidence in, for example, zoning of an articulated group of standards having been constructed and used in any regular or reliable fashion. Housing, park, and recreational facility writings all offered some loose recommendations as to desirable relationships between population and facilities, but seldom have these been constructed according to standards, used, and then re-examined to determine effectiveness.

It therefore became necessary to switch the paper's emphasis to an inquiry of what standards did (do) in fact exist, what role they fulfill and the possibility of developing a general and overall system. The planning law cases that have been adjudicated offered a field of evidence for such a topic. A substantial body of such law exists, for with our comparatively recent pre-occupation with urban life, the simultaneously changing needs and aspirations of human beings have strained and tugged at existing legal institutions and doctrines.¹ The role of the planner in this city- life- court-relationship has a strong past and the potential for a powerful future:

"The writings of students of the city have had a great impact on the form of legislative control of land activity and city development... Moreover they are frequently the lens through which the courts view these activities."²

Complementing this somewhat pro-planning sentiment, the planner approaches litigation with a basic bias -- he believes his position is right, and he wants to win. More often than not he has the buttressing support of a legislative expression, but his position must be explicitly stated and well documented to assure a victory. As a result litigation proceedings often incorporate the most carefully expressed defenses for planning innovations and conceptions that can be found. The opposition relentlessly picks holes and finds flaws putting the planning proposal to the test. Planning standards should emerge here if anywhere.

All of the planning law cases in the United States presented a broad area for inspection; too broad for the scope of this paper. Several alternative subdivisions of the area were considered. One would have used a segment of the planning field, such as zoning, housing or urban renewal and examined it on a country-wide basis. This alternative was discarded. The major problem in discussing planning standards seems to lie in their disjointedness and the hazy conceptions of how a given standard should be "plugged in" to the overall planning process. Choice of one segment as suggested above would preclude any attempt to look at this stumbling block comprehensively. A district division offered a more satisfactory vehicle for the discussion. This type of area could be taken according to court hierarchy (an analysis of those cases decided by the U. S. Supreme Court), geographical areas (those cases reported in the sectional case-books), or according to political boundaries.

Ultimately it was decided to limit the paper to a consideration of the planning law cases of Massachusetts. Several factors determined the choice. There has been a long history of adjudication of planning conflicts, with the first case before the court in 1899.³ Massachusetts early adopted zoning and has kept pace with many other planning innovations in the subsequent years. The state shows a relatively high degree of urbanization, with better than half a dozen substantial centers.⁴ In addition a decided suburban movement has put pressures on a number of small towns, and a shift to industrial park use has forced the conversion of some outlying land from single family to industrial zoning. Urban renewal, public housing and subdivision control are also represented in the state's activities. Generally the Commonwealth serves as a typical example of the pressures on land and planners and the conceptions and innovations that may be brought to bear on them. Other states offer as good or better source material. New Jersey cases represent more avant garde proposals. New York and Wisconsin also have large bodies of significant cases, but Massachusetts had the added advantage of available court records. Where evidence cited was scanty or poorly developed, recourse to the records gave a full understanding of the planning position.

the law case and planning

While the interdependency of law and planning begins to emerge in the preceding pages, one should be aware of the closeness of this relationship. The fundamental point of emphasis is that the court ultimately controls implementation. No new solution, no matter how brilliantly conceived or enthusiastically supported, will see the light of day without judicial approval. Of course there may

be a substantial time lapse between legislative approval of a proposal and litigation; but the promise of a test is omnipresent. By the same token, we must reconsider Mr. Haar's point that the writings of planners are "frequently the lens through which the courts view...legislative control of land activity and city development".⁵ The process is something of a feedback coupled with a "cultural lag". In the early part of this century the planning pioneers wrote extensively about the philosophy of planning. Happily this was more thought than verbiage. These expressions of planning philosophy controlled Mr. Justice Sutherland in his pivotal decision upholding zoning.⁶ This decision alone added needed critical momentum to the planning movement. Planners then coasted on their victory for several years, adding little of significance to these early statements. As a result courts are still deciding zoning cases on the principles of the 1920's. Since the writings of planners had the influence with the judiciary that they did, there is no reason to believe that their subsequent writings, if equally persuasive, should be less effective. This is the feedback mentioned above. Allowing some flexibility for the conservative nature of the courts (a type of cultural lag) they should still be in step with, though perhaps a few paces behind, the spokesmen for planning philosophy.

The second tie between the law case and planning relates to the question of evidence. In law it is something of a maxim that evidence wins cases. A planner's evidence mainly depends on showing that one pattern, etc. is "better" or "worse" than another.

The relative benefit or detriment to the community controls the court's determinations. The role of evidence then becomes almost synonymous with the role of standards. The more convincing the planner's case, the more closely the evidence he cites consists of expert-endorsed standards. The following case analyses will illustrate the effectiveness of standards. We will also see how a lack of standards leaves the court groping in an uncomfortable fashion and returning to old-fashioned justifications for support in its decision.

FOOTNOTES

- 1 Haar, C.M.
Land Use Planning Casebook
Little Brown & Co., Boston, 1959, p.3.
- 2 Ibid., p.42.
- 3 Attorney General v. Williams
174 Mass. 476 (1899).
- 4 Boston, Springfield, Worcester, Lowell, Lawrence,
New Bedford and Fall River are the major centers.
- 5 Haar, C.M.
op. cit., p.42
- 6 Village of Euclid v. Ambler Realty Co.
272 U.S. 365, 47 Sup. Ct. 114, 71 L.Ed. 303 (1926)
It is this case that gave rise to the term
Euclidean zoning, In the majority decision
Justice Sutherland drew the analogy between
the segregation of uses and nuisances saying,
"A nuisance may be merely a right thing in a
wrong place - like a pig in the parlor instead
of the barnyard." (see also text p.28)

III. RESULTS OF CASE ANALYSES

data sources and problems

Through the use of the "Massachusetts Digest", the "Zoning Digest", etc., it was possible to compile a comprehensive listing of Massachusetts planning cases. The list was then revised and condensed to a selected group of cases relating, in an implicit or explicit fashion, to standards. All of the cases listed have been appealed at least once and are fundamentally concerned with planning. The process of listing them pointed out the fact that the great majority were zoning adjudications. Housing and urban renewal amounted to only a very small percentage. Several factors account for this

- zoning is the oldest of the planning controls
- zoning specifically draws boundaries and determines allowed uses
- zoning may be modified only through the use of a variance or amendment
- zoning regulates in terms of the present, expressly prohibiting creeping changes in use.

~~Zoning~~
~~Planning~~ has been in effect in Massachusetts since 1907.

No other planning control, having such a general control, has existed for such a length of time.¹

One of the important characteristics of this control is its specificity. To zone is to draw boundaries and create differing districts, and inevitably every piece of land falls within one set of detailed restrictions or another. The land may lie on the edge of

the district, or have other peculiarities. These alleged inequalities of the zone restrictions are fruitful grounds for litigation. Variances and amendments offer the only relief. Legally a variance can be sought when the restrictions inflict undue or severe hardship on a single lot or parcel. The device was developed to adjust a general system to the inevitable eccentricities of particular pieces of land. The determination of just what constitutes undue or severe hardship accounts for much of zoning law.

Amendments differ as devices, adjusting the total ordinance. They re-categorize substantial areas in response to major changes in use pressures. The size of the parcel affected by the amendment plays an important part in the determination of its justness. If the area is too small, the amendment can be struck down as spot-zoning.

The use of each of these devices can be challenged by a "properly aggrieved party" and brought before the courts for review. In zoning this means that every landowner has the potential right to test a given zoning restriction and the number of opportunities soar. Housing and urban renewal differ from zoning in that they affect only a limited portion of the city. Once the legality of the procedure is established, the chances for further litigation are limited. This imbalance in the data must be taken as a "fait accompli". However, the standards encountered in each category do not seem to differ radically as to type or quality. This apparent consistency means that subsequent discussion will make "inter" as well as "intra" category comparisons with equal freedom.

Another imbalance creates more of a problem. The amount of evidence cited in a given decision varies markedly from justice to justice. A thorough perusal of the court records, with their complete accounts of evidence, would of course iron out these irregularities. However, time limitations dictated that this give way to a careful sifting of the reported decisions, supplemented only in isolated instances by the record. With this problem faced another emerges. In some cases a judge takes pains to recite extensively from the evidence of the earlier hearing; at other times he gives it only cursory notice. It would be tempting to hold that the judicial reaction serves as a measure of the quality of the evidence presented. Unfortunately this does not hold true. While expert testimony plays a compelling role, the sparseness of its appearances prevents one from drawing any general conclusions.

Of course not all "planning cases" are decided on planning grounds. The judge may look for statute violations, constitutional violations, etc. before turning to a consideration of the actual planning question. A case in point sought to enjoin the granting of a variance for the construction of a "Howard Johnson-type" restaurant. The presiding judge held that the Circle Lounge and Grille Inc. was not a properly aggrieved person and therefore could not bring action.² No other party pursued the question, and the restaurant does a thriving business today. The court commented on zoning to the extent of noting that, "The residence zone was designed to protect residence from business...It was not designed to protect business from business". The interesting planning questions of traffic generation in an already highly congested area and the aesthetic effect of the structure on park land were never considered.

There are a number of similar cases, where a potentially significant issue is side-stepped by the court. One should not infer that the court is side-stepping its duty as well as the issue; the example serves only to point out the type of role the court would like to follow, both through preference and tradition.

general characteristics of standards

We turn now to the cases that do make planning decisions. In the preceding discussion we have taken some pains to point out the relationship between evidence and standards and the part of each in judicial decision-making.

The basic "standard" controlling the courts is the aggregation of legislative expressions that has built up over the years. The courts have always recognized and fostered the right of the legislature to restrict the actions of one for the protection of the whole. Planning controls are but a small facet of the total body of law dedicated to this end. Time after time the courts reiterate the fundamental right of the people to exercise this power. In these terms they upheld zoning, subdivision controls, etc. as being for the protection of the "public health, safety, morals and welfare". Where a proposed building violated the rear and side yard requirements of the zoning code, the court ordered the building permit revoked.³ The Zoning Act stated in part that:

"In interpreting and applying the provisions of this act, they shall be held to be the minimum requirements for the protection of the health, safety, convenience and welfare of the inhabitants of the City of Boston."⁴

The court's decision merely affirmed the right of the legislature to enact such a statute. By recognizing the right to determine minimums in zoning, they apparently withdraw from examining the intricacies of arriving at a standard. If the line or boundary falls within reasonable limits, they are content to give the "benefit of the doubt" to the legislature.⁵

This presumption in favor of the statute also affects its enforcement. In zoning one of the major areas of contention is the granting or denial of a variance. In a surprisingly flat-footed statement the court dealt with the question of granting variances from the zoning code in *Pendergast v. Board of Appeals Barnstable*. The court explicitly held that, "a judge can seldom, if ever, grant a variance which has been refused by a board of appeals".⁶ The plaintiff in the case sought a variance for a beach house or bath house for commercial purposes in an area zoned for residence. The decision minced no words in stating that no one has a right to a variance. Variances, they felt, should be used sparingly and need not be granted even if a peculiar hardship is shown to exist.

The courts are equally stringent in their interpretation of spot-zoning. In planning cases this term is something of a legal swear word. The spectre of spot-zoning can send even the most brazen amendment-chaser scuttling for cover. In 1941 the New Bedford Planning Board labelled a zone change spot zoning and detrimental to the best interests of the public.⁷ The City

Council failed to take heed and passed the amendment. On appeal the court looked back to the spot-zoning charge, concurred with it and struck down the amendment. Again in Salem, an attempt to create a "funeral home district" received an equally cool reception.⁸ The trial judge found that the new district would not "promote public health, safety, morals or welfare", would not result in a "uniformity of regulations and restrictions for zones, districts or streets having substantially the same character", and was "unreasonable and capricious beyond the power conferred"; a clear case of spot zoning.⁹

The basic justification of slum clearance, urban renewal and public housing also seems tied to legislative expression. The initial findings at the administrative and legislative levels that such activities were in the best interest of the public, weighed the balance in the judicial review. Seldom does the court question the "rightness" of these findings.

Complementing this broad area of legislative expression, one finds a small area of planning theory. This is most fully developed in zoning. Three early cases outline these basic concepts as seen in Massachusetts. The first case testing a planning regulation of any importance was adjudicated in 1899.¹⁰ It concerned the erection of a building in Copley Square in Boston and its relationship to a statute setting structural height limitations. The statute prescribed that no building be erected to a height of more than ninety feet. Allowances were made for domes, spires and

sculptured ornaments to project above this height, subject to the approval of the Board of Park Commissioners. Designs for the building in question called for a top floor ceiling height slightly more than ninety feet above the ground. However, the architects planned a band-like frieze around the tope of the building, the bottom of which would start well below the height limit.

The court held that the frieze did not meet the terms of the ordinance or the allowed exceptions and then went back and examined the reasonableness of the restriction itself. Their decision affirmed the restriction without qualification, citing the following points:

- they determined that Copley Square was an open square, basically a park, which had been carved out for the use, benefit and health of the public.
- the statute was in effect taking the air rights adjacent to the park, and it seemed to be "in the nature of an easement created by the statute and annexed to the park".

But then the question arose as to the right of the legislature to take these adjacent easements. Did a public purpose exist in fact?

The court's resolution is of interest in the light of later decisions.

"The grounds on which public parks are desired are various...they are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature...their influence should be

uplifting and in the highest sense educational... their aesthetic effect never has been thought unworthy by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park, do not also justify the expenditure of money to make the park attractive... to those whose tastes are being formed...if the Legislature was seeking to prevent unreasonable encroachment upon the light and air which (the park) had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for an expenditure of public money and to justify the taking of private property."

But, the decision points out that the findings would have differed if the legislative intent had been "to preserve the architectural symmetry of Copley Square" or "merely for the benefit of private property owners".

With a height limit upheld, the next test involved actual zoning or districting. In 1904 a simple and rather unsophisticated ordinance was passed, dividing the City of Boston into varying height districts.¹¹ The case of *Welch v. Swasey* challenged the legality of such a device, on the basis of four constitutional questions:

- can the legislature limit the height of buildings?
- can it set up districts with different height requirements?

- can it delegate the power to determine boundaries?
- can it delegate the authority to permit different heights in different places?

These questions closely resemble the early challenges to zoning ordinances in other states. They are of major importance to planning because they go to the root of the power of any planning board to encourage the orderly growth of different uses in different parts of the municipality.

The court held once again that the legislature, through the exercise of the police power, may regulate and limit personal rights and property rights in the interest of the public health, safety, morals and welfare. In addition, "with considerable strictness of definition the general welfare may be a ground, with others, for interference with the rights of property..." Thus even if the general welfare be the main reason for the statute, it is also necessary to tie some considerations for health, safety and morals into the statement of statutory intent. Here one sees the beginning of a problem, alluded to in Attorney General v. Williams, that will plague the court in many subsequent decisions. How must welfare statutes be framed in terms of health, safety and morals; and, when does the welfare clause become sufficient by and of itself?

However, in this early case the question did not press the court too severely. It held that the legislature can determine if the threats to public health and safety require limitation or regulation for general protection. Apparently the

erection of very high buildings, especially on narrow streets, could materially exclude the health-giving sunshine, air and light to the detriment of the public health. Such high buildings also constituted a threat from increased danger of fire and the inability of apparatus to service such areas properly. These premises seem to stem from certain standards, which can be phrased as follows:

- sunshine, air and light have health-giving properties, and there is a determinable minimum amount of exposure to which everyone is entitled.
- spacing between buildings should be given distance because above such a point the dangers from fire are significantly increased.
- streets have a minimum width for fire-fighting equipment.

The court seems to consider these implicit in the case, for the decision continues, stating:

"We cannot say that the prohibition of the erection of a building of a greater height than 80 feet (in class B), unless its width on each and every public street on which it stands shall be at least one half its height, was entirely for aesthetic reasons. We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a

fire, may have entered into the purpose of the commissioners..."^{12.}

The "safety clause" is clear and upholds the constitutionality of height limitations. This leaves the question of varied districts unanswered. If excessive height poses such dangers, shouldn't all areas of the city be equally protected?

The answer is stated with an economic bias:

"The value of land and the demand for space in those parts of Boston where the greater part of the buildings is used for purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings is used for residential purposes."

Therefore it seemed reasonable to the court that business buildings be allowed to be higher than the residential buildings even though the streets be narrower. One standard of minimum safety could be applied to business and commerce, while considerations for family safety dictated stricter regulations in residential areas.

A similar philosophy emerges in the case of *Slack v. Wellesley*.^{13.} A by-law requiring a side yard was apparently adopted "to aid in the prevention of fires and not as a set-back line". The court seemed to be justifying itself into a cul-de-sac. There would come a time, when the overworked rationals of fire danger, health and safety would crack under the increasing needs of the

communities. This collapse was inevitable but slow in coming. Zoning spread rapidly over the cities and towns of Massachusetts: a strict and rather strait-laced zoning. What Charles Haar calls "Euclidean zoning...a system of use control through the demarcation of rigid districts, each with its own set of uses"¹⁴, was first upheld in the case of *Euclid v. Ambler*. Sutherland, writing the majority decision, said:

"The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports...which bear every evidence of painstaking consideration. (They) concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to reduce street accidents...by reducing the traffic and resultant confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc."¹⁵.

These same sentiments echo through the case of *Brett v. Building Commissioner of Brookline*.¹⁶ Brett was enjoined from

building a two-family house in a single family zone and challenged the validity of such a restriction. The court faced the problem of justifying the statute or striking it down. Deciding to support the provision they cited the by now familiar threat of fire. They held that an increase in the number of families produced a corresponding increase in the number of stoves and lights, obviously increasing the fire hazard. The decision noted that spacing between buildings, which lessened the chances of conflagration, had previously been upheld. It was deemed reasonable "that the health and general physical and mental welfare of society would be promoted by each family dwelling in a house by itself"¹⁷. The direct health benefits include the increase in fresh air, in play areas for children and in places for adults to move about. The family has the opportunity to cultivate the land, and the spread of contagious diseases is less likely. Thus single family housing operates for the general benefit of the public.

But, some die-hard might argue, doesn't such an ordinance lead to undemocratic and unconstitutional segregation of housing choice? This challenge of economic segregation was lightly treated by the court which noted:

"It is a matter of common knowledge that there are in numerous districts, plans for real estate development involving modest single family dwellings within reach as to price of the thrifty and economical of moderate wage-earning capacity."

Besides the whole town did not fall into this single family category. There was still considerable choice of alternative types of housing. A second look at the case proves that it is little more than a reiteration of the philosophy found in *Welch v. Swasey*.¹⁸ The same biases exist; the same standards control the decision.

Earlier we referred to the fact that the courts were stumbling down a blind alley in their preoccupation with "the danger of fire". But perhaps they saw the trap too. In the case of *Nectow v. Cambridge* we see the first glimmer of the court's awareness that standards could be a problem.¹⁹

"If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the locating of the precise limits of the several districts demands the exercise of judgement and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good may well differ as to the place to put the separations between different districts...Courts cannot set aside the decisions of public officers in such a matter, unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial

relation to the public health, the public morals, the public safety or the public welfare in its proper sense. These considerations cannot be weighted with exactness. That they demand the placing of the boundary of a zone 100' one way or another in land having similar features would be hard to say as a matter of law...the case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical and without foundation in reason."

This case was appealed to the U. S. Supreme Court which reviewed the low court's findings with some care.²⁰ It paid special attention to the master's findings and the city plan. It felt that it was in fundamental agreement with the lower court; and, if the boundary of the zone had been the only issue, it would not have felt justified in replacing the planner's authority with its own judgment. But the boundary was not the only issue. The Supreme Court further held that the power of government to regulate the usual rights of the landowner, by regulating allowable uses through zoning, must bear substantial relation to public health, safety, morals or general welfare. Unless such relationships exist, zoning is an unreasonable invasion of property rights. As the master's findings indicated that this relationship was lacking, the Court felt that "...the invasion of the property of the plaintiff..(as) serious and highly injurious is clearly established; and, since a necessary

basis for the support of the invasion is wanting, the action of the zoning authorities...cannot be sustained".

There is an interesting contrast between the decision of the two courts. On its face the case lacks any real planning strength. The master's findings emphasize the dubious advantage that the city gains from the ordinance. The Supreme Court stresses that the zoning board should be able to relate its determinations to some sense of the public benefit. While the state court takes pains to give weight to the local findings, and points out that standards of mathematical exactness will remain elusive, it fails to consider that the persuasiveness of these very points can be reversed. For example, if the standards used in the boundary determination were not of a definable or quantitative nature, then the observation (of the high court) that the boundary might be just as effective if shifted one hundred feet, is reasonable. The evidence implies that there were no standards involved, that the line was drawn without any thoughtful consideration. This in essence is the conclusion of the Supreme Court. However, the latter also indicates that a thoughtful and reasonable decision must be directly related to health, safety, morals and general welfare.

By 1953 the philosophy set forth in *Nectow v. Cambridge* had been modified to the point where the Massachusetts Court could blandly state, "there is nothing to show that peculiar significance should be attached to the division of the premises".^{21.}

This was the decision in a case where the zone boundary ran through a given building. Two-thirds of the building fell within the business zone, while one-third was in an apartment district. The building could be used for business, but its freight platforms were no longer serviceable as they lay within the residential zone! The lack of evidence in the case as to any unreasonable hardship which might ensue makes it somewhat special. While it cannot be tagged as a "trend-setter", it does offer an interesting contrast.

problems of "Euclidean standards"

While the court adheres to the principles of Euclidean zoning ("the demarcation of rigid districts, each with its own set of uses"²²), planners are gradually moving away from this conception of land control. In planning terms Euclidean zoning was typified by an ordinance spelling out numerous rules and regulations and a large map with colors illustrating various use districts. The pressures of variances and amendments made planners turn a forthright gaze on the zoning problem and cast about for ways of expanding the basic Euclidean concepts into a more sensitive system of controls. Henry Fagin has been the most eloquent spokesman for this need.

"The evolving demands on urban planning have forced a shift in focus from the MAP to a program of action. The ultimate master plan as the goal of planning is being replaced by a "planning process" conception, in which the master plan is regarded as an open-ended sequence of plans, describing at each successive

point in time, a desirable equilibrium among ever-changing activities...Necessarily this conception of planning involves a coordination in time as well as space, of programs as well as land areas...static space coordination is not merely inferior, it is impossible in a dynamic world."²³

Even while the planner optimistically probes these frontiers, court decisions time and time again rest on black and white Euclidean determinations. The courts do not bear the whole burden for this situation. While the planners talk in "Fagin" terms, they have not translated any of their thinking into operationally useful guides. Those standards that do exist are usually stated as follows:

- the maintenance of a satisfactory level of public services for all while preserving municipal solvency.
- the maintenance and respect of the essential framework of our institutions.
- a solution to a given problem which produces a rational pattern for the productive life of the region, taking cognizance of natural needs and interdependencies.
- the assumption by each town of its fair share of the regional growth problems and not the mere shifting of responsibility to another.
- the equalization of fiscal resources without a complete separation of tax raising and tax spending functions.

- the solutions to financing local government services having roots in political reality.²⁴

Standards such as these are reasonable, rational and leave few grounds for dispute. They are standards with a future-looking, almost utopian ring. But they seem considerably closer to statements of goals than they do means for insuring day-to-day high quality of environmental conditions. And, as far as the courts are concerned, there is little hope that such general statements can offer them ^{sound} guidance in the average litigation.

Aid to the court must come from a different corner. The numerous rules and regulations; the map boundaries and the statements of legislative intent which mouth the sentiment of the protection of the public health, safety, morals and welfare all require review and rethought. Problems arise when one tries to develop standards from these propositions and finds that they have no interrelationships among themselves. For example; a judge can apply the yardstick of "public safety" to a problem. Necessarily his own conception of the public safety governs his thinking, because no one has ever spelled out the definition(s) of the term. When faced with the danger of fire, the judge concludes that the closeness of buildings bears a relationship to the likelihood of conflagration. He then maintains that increasing the number of families in a dwelling increases the danger. But are these increases proportional to one another? Does a house with two families pose twice the threat; one with

three families three times the threat, and so on? Or how about the contrast between an apartment house of modern fireproof construction and a single family carelessly maintained frame dwelling with primitive appliances? These questions remain unanswered in the courts, as indeed they should, but they are central to the planner.

On the other hand, there is some merit in these "goal-tending" standards. One Boston case held that zoning must stand to accomplish the aims of the legislature which it identified as:

- stabilizing the use of property in different sections of the community.
- protecting property owners in various districts.
- preventing the invasion of business into residential sections. **25.**

The plaintiff in this case wished to construct a clothing store at the edge of an apartment house district. The court denied the issuance of a variance. In arriving at its decision the court followed several interesting steps. First, it examined the legislative intent in the zoning statute and was able to translate this into the above specific goals. These goals in turn were converted into decision-making guides (in a "mind's eye" sort of process). This gave the court some rule of thumb standards on which to base its decision. The case offers an interesting suggestion. Perhaps sensitive goal formulation on a number of levels will give us a flexible yet serviceable set of guides. This will be more fully considered below.

By now it should be clear to the reader that the word "standards" is loose and poorly defined in planning. This is mainly due to the fact that there is a hierarchy involved, in terms of standards, and in terms of what they control. The planning process may be divided into objectives, procedures and techniques; or the aim, the way and the how. A correlated type of standard impinges on each of these three categories. The process starts with the formulation of a goal or set of goals. When these are developed, they must then be translated into something enforceable -- hence the appearance of a standard. Charles Haar raises the question of the position of the master plan in such a scheme. He seems to be arguing that when a master plan (a community goal) is officially adopted, it becomes a kind of gross standard.²⁶ Fagin of course flies the danger flag at just this point claiming that, when the planner draws the master plan with some precision on a map, the map becomes the standard; and the whole thing becomes an awkward and inflexible mass.²⁷ The hope, rather, is to encourage the development of standards at the technique and procedural levels. This would mean that the goal had been translated into something enforceable at a level where such enforcement becomes administratively practical. Some of these standards will be quantifiable, others will not. The result is the dichotomy of objective scale and general consensus standards outlined earlier in the paper. Note, however, that dichotomy is not a "bad" word. Even two types of standards can work together in a smooth and complementary relationship.

Changes due to time, social and economic factors

While the concepts of the 1920's dominate the preceding cases, there has been some more up-to-date activity in a few planning areas. Three particular areas of change can be identified; patterns of use, housing and slum clearance, and the role of the comprehensive plan. The changes are not revolutionary, but they are profound. They may be futile stabs at sawdust dummies, or they may indicate a thoughtful trend to meet ever-growing challenges. The identification of these three areas does not mean that other states, etc. have not met the problems in other, perhaps more meaningful, ways. However, these are the only areas which emerge in Massachusetts.

The recent decades have produced two significant changes in urban patterns. On the one hand the bedroom suburbs have proliferated at astonishing rates. On the other, changes in industrial technology have produced the phenomenon of the industrial park. Both have put severe strains on the "outer belts" of our urban cores. The land sucked up in this maelstrom of development had previously been lightly used. Characteristically agriculture-oriented communities predominated, with small industries and occasional country estates mixed in. The sparse land controls affecting these areas encouraged continued low density development. With rapidly rising land pressures community reaction crystallized at two poles. Some towns embarked on a flat-footed policy of "preserving their rural character"

while others zoned extravagant areas for industrial development.

In 1941 the Boston suburb of Needham amended the town zoning ordinance to require that the minimum house lot size be fixed at one acre.²⁸ The plaintiff wished to develop a subdivision of half-acre lots and challenged the validity fo such an amendment. The town was essentially residential with little manufacturing or commerce activity. At the time of litigation there was a healthy demand for houses. In light of this demand the plaintiff argued that the amendment substantially diminished the value of his land and that he was being unfairly deprived of his rights. Both the plaintiff and the town agreed that the physical characteristics of the district in question and of the town as a whole, rendered it very suitable for single family construction. The town held that the statutory desires of the zoning by-laws to,

"...avoid congestion in the streets, to secure from fire and other dangers, to prevent overcrowding of the land, to obtain adequate light, air and sunshine and to enable (the land) to be furnished with transportation, water, light, sewer and other public necessities, which when established would...harmonize with the natural characteristics of the locality, could be materially facilitated by a regulation that prescribed a reasonable minimum area for house lots."

While this evidence supports the value of single family lot patterns, ten thousand square foot lots would seem to satisfy the zoning intent too. No so held the court, for the town showed reasonable qualitative differences:

- greater freedom from noise and traffic.
- reduction of danger from fire (sometimes the court seems pyrophobic).
- greater and better opportunity for rest and relaxation.
- better play facilities for children within their own yards.
- an increased inducement for gardening.^{29.}

Such standards are as far-fetched as any we have yet encountered. They are almost laughable until one considers the substantial sum of money that the plaintiff lost as a result of the decision. Was the court really capricious in its decision? In fairness, no. The court strengthened its position by adding that where the question is one which reasonable men might debate, the weight in the finding lies in the town's expressions of its own needs and desires. This deference to the "voice of the people" is actually the standard.^{30.}

But the planners have forsaken the courts in a rather serious fashion in these cases. Every time the court is forced to cite such inadequate evidence, the planner's position suffers a little more damage. If they do not leap into the breach with

some sort of evidence, they will find that the courts have fenced them out. *Simon v. Needham* upheld a control that means much to the planner. Acre zoning in itself may be of limited importance, but it is another variation in the theme of land control. If planners wish to have continuing judicial support, they must start to make their position more convincing.

An interesting sidelight appears in conjunction with the preceding case. In land the emphasis has always been on the regulation of minimum lot sizes. With buildings the usual concern has been with maximum height. However, one Massachusetts case was concerned with the minimum height of buildings.³¹ The cases for maximum height and minimum lot tie in closely with public health... etc. considerations. A minimum height restriction does not enjoy that connection. Indeed it plunged headlong into opposition with traditional concepts. The Brockton City Council sought to impose the minimum on its CBD, by amending the zoning ordinance. The amendment would serve to;

- encourage the most appropriate use of the land
- facilitate adequate provision of transportation
- increase the amenities of the municipality
- conserve the value of the buildings
- prevent the character of the CBD from changing due to the dispersal of the occupants of the upper stories through the construction of one story buildings.

- maintain the revenues of a hard-pressed city
- preserve the aesthetic sense of the city; a one-story building in the presence of three and four stories would create a "carnival town" atmosphere and "destroy the symmetry" of the city.

The court replied to this evidence holding that the scope of the zoning power could not encompass rulings for a general appearance ideal, or for the inflation of taxable revenue. The amendment overrode the purposes set forth in the original zoning statement (lessen congestion, prevent overcrowding of land, avoiding undue concentration of people). The intent of the amendment directly opposed the intent of the statute. The ideals of spreading people out and of alleviating crowding and congestion, which permeated the Euclidean concepts, came face to face with the somewhat avant garde concepts of "visual image", aesthetic effect and city structuring. No matter, the court stated that:

"where legislation seeks to force land to remain vacant unless the owner will erect a structure of at least two stories...the general benefit to the public must be something more tangible and less nebulous than any supposed advantages that the city has been able to bring forward in this case."

An interesting point is raised in the court's request for tangible evidence of public advantage. The decision does not claim

that the city has gone beyond its power. It merely asks for convincing justification for the proposal. The planner has not as yet come to grips with the problem of standards for aesthetic provisions in zoning by-laws. But perhaps such standards are incompatible with the zoning by-laws as currently stated, and must wait for a general revision of the statutes.^{32.}

The most startling planning innovations in recent years involve urban renewal and public housing. Not only do they startle, they embody many fundamental changes in the attitudes towards the government's role and powers in the control of land development. The planning position has met with consistent approval from the courts even though many of the cases tested rather radical proposals.

The dominant change in the philosophy concerns the interpretation of the concept of public use. Early land takings for parks, streets and schools were easily justifiable as being in the public interest because the general public had free access to them. Anyone can sit in a park or walk down a street. But when public housing was suggested, a furor ensued. How could the government take land from one group of individuals in order to build housing restricted to a different group? The answer lay in the type of land to be cleared. All of the early housing projects premised their reasonableness on the fact that they removed slums. The definitions put forth in "An Act to Relate the Massachusetts Housing Law to the United States Housing Act of 1937", illustrate^{33.}

this basic emphasis.

Low Rent Housing: decent, safe and sanitary dwellings within the financial reach of families with low income and developed and administered to promote serviceability, efficiency, economy, and stability.

Families of Low Income: families who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality...to build an adequate supply of decent, safe and sanitary dwellings for their use.

Substandard Area: any area wherein dwellings predominate which by reason of dilapidation, overcrowding faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors are detrimental to the public health, safety, or morals.

Project: the removal of buildings from a substandard area, or in providing decent, safe and sanitary dwellings for families of low income, or in a combination of the two.

The Act further declares that substandard dwellings exist in some areas and that there is an inadequate supply of low rent housing near employment areas. The situation, it states, cannot be met by the ordinary workings of private enterprise. Further a project may be undertaken only on the condition that the "...project includes the elimination of by demolition, condemnation or effective closing of unsafe or unsanitary buildings situated in the same city or town, "containing dwelling units substantially equal in number to the

number of newly constructed dwelling units provided by the project".

In the first Massachusetts test, the problem then divided into two questions, one concerning the legitimacy of slum clearance, the other the legitimacy of providing housing. The legislature noted that slums did exist and tended to increase crime and menace the health and comfort of the inhabitants. The court then developed the analogy between a slum and a public nuisance, deciding that the elimination in either case would be of direct public benefit and advantage to all people. Such elimination lay beyond the powers of private individuals and was, therefore, a bona fide area for public action.

As for the provision of low rent housing, the court held that it was only accessory to the main aim of slum clearance. Because the Act required an equal number of units, the housing was secondary. Government entered into housing only to prevent undue hardship to those whose residences were razed and for the prevention of future slums. The subtle change from public use to public benefit becomes clear.³⁴ No longer is physical use of the facility by the general public the determining quality. Slums are considered to inflict harm on the public body. Like a rotting tooth, the removal takes away a drain on the whole system. The replacement with a false tooth only facilitates chewing.

After the approval of the propriety of housing, a new extension of power developed. This was embodied in the urban renewal program. Now well established, the policy of allowing government to seize land and resell it for private development received skeptical comment from many property owners. In 1954

the case of *Papadinis v. Somerville* tested the propriety of the action.³⁵ The case involved a slum-clearance project. The plaintiff questioned whether the project could be classified as a public use or service. The area proved to be substandard and decadent, and the city approved a redevelopment plan. It involved taking land by eminent domain, clearing the buildings and subsequently reselling the parcel to private parties for private industrial use. If the city had been attempting to take the land of one individual in order to turn it over to another, there would have been a clear violation of personal rights. Then slum clearance would have been subordinate to the real purpose of the actions. However, the court felt that the primary municipal purpose was the clearance of menacing slums. The subsequent sale became incidental and perfectly proper, because the city had no obligation to hold cleared and unproductive land.

A companion case followed which tested the proposal from a different angle.³⁶ Again the plaintiff sought to enjoin the taking of his property through eminent domain. His case hinged on the fact that the area had a thickly settled residential complexion. The city's plan called for the assembling of the land into large parcels, clearing it of buildings, relocating the streets and selling it back to private persons for light industrial use only. No residence was allowed. Again the city submitted, "many detailed subsidiary findings plainly sufficient to support the general findings" that the area was substandard and decadent. The court reaffirmed the typical slum quality of the project. Further it specifically declined to

take over an administrative function and question the findings, even though the plaintiff argued that the project was activated by illegal motives; i. e.

"...the desire to change the area from one pre-dominantly residential to one exclusively industrial in order to increase taxable real estate and personal property valuations and to compete with other municipalities in the attraction of new industrial enterprises."

The court refuted the charge on the grounds that it had no evidence to show that the city was acting in bad faith. While they recognized that there were certain financial advantages to the city, these did not indicate that the dominant purpose was other than elimination of slums and the diversion of the land to its "highest and best use".

These cases put Massachusetts squarely into the public benefit camp. The conscious expansion of the public use theory gave planning yet another tool for reshaping land patterns. But once again, no development of standards complemented the advance. It may be difficult to forecast the lengths to which the courts will go in their interpretation of the public benefit. It may be too far or not far enough for the planner. A sensitive ^{system} ~~standard~~ of ^{standards} ~~systems~~ could do much to control the situation.

The third area of change stems from the emergence of of the master, or comprehensive, plan as an instrument of power

in litigations. In every case reviewed, where a proposal was in accordance with a comprehensive plan, it received court support. The plan offers a forceful medium for the introduction of new planning conceptions. Take for example the case of a town on Rte. 128, the recently developed circumferential route around Boston. Woburn rezoned an area adjacent to this belt for industrial use.³⁷ The court held that

"...the council could reasonably conclude that rezoning the areas...for manufacturing and business purposes would attract to Woburn desirable business and manufacturing establishments which otherwise would not locate there, and this would make it practicable for the city to install sewerage facilities which would also benefit the neighboring residential areas..."

Economic factors also cropped up, for with its leather trade gone, Woburn needed new industry. This would increase property values, while providing employment and decreasing taxes. More modern thinking emerged as the court noted that areas with the same character were being zoned for the same use and that the rezoning followed a comprehensive plan. There was some additional evidence that the area had ripened to the point where an alternative development should be considered. The court failed to cite findings as to the suitability of the land to industry, the effect of the increased accessibility to markets, labor force or distribution

centers, or any other unique qualifications of Woburn for such use. In the absence of contradictory evidence it is fair to argue that the court assumed that such investigations had been carried out in the formulation of the master plan. Such an assumption of planning thoroughness should be reasonable. Then the court's face value acceptance of the plan as a compelling standard becomes very important as a persuasive tool. It gives both the planner and the court a flexible yet effective basis for decision making.

FOOTNOTES

- 1 The "master plan" rivals zoning in age, but has not been as extensively used.
- 2 Circle Lounge and Grille Inc. v. Board of Appeals Boston
324 Mass. 427 (1949)
- 3 Wood v. Building Commissioner of Boston
256 Mass. 238 (1926)
- 4 Commonwealth of Massachusetts General Laws
St. 1924 c.488 #22.
- 5 Town of Concord v. Attorney General
336 Mass. 17 (1957)
Simon v. Town of Needham
311 Mass. 560 (1942)
Tracy v. Board of Appeals Marblehead
339 Mass. 205 (1959)
- 6 Pendergast v. Board of Appeals of Barnstable
331 Mass. 555 (1954)

see also:
Howland v. Inspector of Buildings Cambridge
328 Mass. 55 (1951)
Celato v. Board of Appeals Boston
332 Mass. 178 (1955)
- 7 Leahy v. Inspector of Buildings New Bedford
308 Mass. 128 (1941)
- 8 Smith v. Board of Appeals Salem
313 Mass. 623 (1943)
- 9 Court emphasizes the zoning of like areas for like uses.
Shapiro v. City of Cambridge
340 Mass. 652 (1960)
McHugh v. Board of Zoning Adjustment Boston
336 Mass. 682 (1958)
- 10 Attorney General v. Williams v.
174 Mass. 476 (1899)
While basically an eminent domain case involving compensation for air rights, it also upheld the right of the Legislature to establish a particular height and make a taking.

- 11 Welch v. Swasey
193 Mass. 364 (1907)
- 12 Welch v. Swasey
193 Mass. 364 (1907)
- 13 Slack v. Inspector of Buildings of Wellesley
262 Mass. 404 (1928)
- 14 Haar, C.M.
"Emerging Legal Issues in Zoning"
Proceedings ASPO, The Society, Chicago, 1954, p.140.
- 15 Village of Euclid v. Ambler Realty Co.
272 U.S. 365, 47 Sup. Ct. 114, 71 L.Ed. 303 (1926)
- 16 Brett v. Building Commissioner of Brookline
250 Mass. 73 (1924)
- 17 Brett v. Building Commissioner of Brookline
250 Mass. 73 (1924)
- 18 Welch v. Swasey
193 Mass. 364 (1907)
- 19 Nectow v. City of Cambridge
260 Mass. 441 (1927)
- 20 Nectow v. City of Cambridge
277 U.S. 183, 48 Sup. Ct. 447, 72L.Ed. 842 (1928)
- 21 City of Everett v. Capitol Motor Transportation Co. Inc.
330 Mass. 417 (1953)
- 22 Haar, C.M.
op. cit., p.140.
- 23 Fagin, H.
"Regulating the Timing of Urban Development"
Law and Contemporary Problems, Duke Law School,
Durham, N.C., vol. 20, 1955, pp.298-299.
- 24 Ibid., pp.300-303.
- 25 Bicknell Realty Co. v. Boston Board of Appeals
330 Mass. 676 (1953)
- 26 Haar, C.M.
"The Master Plan: An Impermanent Constitution"
Law and Contemporary Problems, Duke Law School,
Durham, N.C., vol. 20, 1955, p.353ff.
- 27 Fagin, H.
op. cit., pp. 298-299.

- 28 Simon v. Town of Needham
311 Mass. 560 (1942)
- 29 Simon v. Town of Needham
311 Mass. 560 (1942)
- 30 see note #5 above.
- 31 122 Main St. Corp. v. Brockton
323 Mass. 646 (1949)
- 32 see also interesting controversies on minimum
building size:
- Lionshead Lake Inc. v. Wayne Township
10 N.J. 165, 89 A 2d 693, (1952)
Haar, C.M.
"Zoning for Minimum Standards"
Harvard Law Review, vol. 66:1051 (1953)
- Nolan & Horack
"How Small a House?"
Harvard Law Review, vol. 67:967 (1954)
Haar, C.M.
"In Brief Reply"
Harvard Law Review, vol. 67:986 (1954)
- 33 quoted in:
Allydon Realty Corp. v. Holyoke Housing Authority
304 Mass. 298 (1939)
- 34 Suggested in comments by Prof. Charles Abrams in his
course "Land Economics", M.I.T., April, 1962.
- 35 Papadinis v. City of Somerville
331 Mass. 627 (1954)
- 36 Despatcher's Cafe Inc. v. Somerville Housing Authority
124 N.E. 2d 528 (1955)
- 37 Shannon v. Building Inspector of Woburn
328 Mass. 633 (1952)

IV. ANALYSIS OF GROSS PATTERN

While the case research may not prove exhaustive, it was extensive. Yet only one hard and fast conclusion emerges; that is the failure to discern any organized standards consistently involved in the decision making activity of the court. Perhaps one cannot expect a system, but rather should look for an implicit pattern. But no positive pattern emerges either. Rather one sees a series of gaps and holes, a negative pattern if you will, where the absence of standards compels attention. While this tells little about the complexion of standards, it does indicate the types and areas of standards needed.

general description of the existing pattern

Earlier in the paper, three categories of standards were developed. The first, the objective scale standard was defined as "that which is set up and established by authority as a rule for the measure of quantity, weight, value, extent or quality".¹ The second, "that is established by authority, custom or general consent as a model or example; test, criterion".² The third is the goal-oriented standard which has been stressed above. None of these categories have any proper effectiveness when applied singly. Indeed unilateral use can render them functionally meaningless. In concert however, they suggest a balanced program for rational activity. Prof. J. K. Galbraith

speaks to this point in his graphic description of Los Angeles:

"The city of Los Angeles in modern times is a near classic study in the problem of social balance. Magnificently efficient factories and oil refineries, a lavish supply of automobiles, a vast consumption of handsomely packaged products, coupled with the absence of a municipal trash collection service, which forces the use of home incinerators, made the air nearly unbreathable for an appreciable part of each year. Air pollution could be controlled only by a complex and highly developed set of public services -- by better knowledge stemming from more research, better policing, a municipal trash collection service and the possible assertion of the priority of clean air over the production of goods. These were long in coming. The agony of a city without usable air was the result."³

The "assertion of the priority of clean air" stood as a goal for the people of the city. But "clean air" is not enforceable. Who do the police apprehend? What do the newspapers seize upon? The goal must be translated into a program of standards. When home incinerators are prohibited, a violator can be

dealt with; when factories can release only a limited amount of cinder into the air, periodic checks are possible to determine compliance. Standards can give the goal some muscle.

The formulation of the goal however must precede the development of the standard. Otherwise the standard risks becoming a vicious threat to growth, progress and creativity. For when a standard does not have its beginnings in a goal, it can take the place of a goal, distorting the function. The only result is the ruthless imposition of a mundane status quo. As Toynbee and Ghiselen warned, society would be infected with standardization and unthinking routinization.⁴

On the other hand a goal without a standard does not pose such distressing alternatives. Though far from perfect, such a goal may become a loose and general guide for activity. The master plan sometimes has these characteristics. The protection of the "public health, safety, morals and welfare" also operates in the "goal-standard" fashion. The statement crops up continually in the preceding cases, usually embodied in the "legislative intent" clause, where such and such a provision is deemed necessary for such protection. Administrative findings are made, the legislature adopts them in the public interest, and the court sustains them as the public's desires. The pattern typifies many of the preceding cases. A related "goal-standard" appears in the gradual shift of emphasis from a dependence on the public use theory to a new reliance on the concept of public benefit. Above we asked when the "public welfare" clause would become a reasonable basis for legislation

in its own right, ending its false dependence on the health and safety phases. This finally happened in the public housing cases which sanctioned governmental action for the public benefit. The concept of general public use or service gave way; and, as the goal of government underwent a metamorphosis, the standard experienced a similar and simultaneous change.

All of these "goal-standards" are closely related to general consensus standards. Just as a goal does not lend itself to explicit quantitative formulation, its related standard can be correspondingly general. Only when one leaves the level of community objectives and goes back to the areas of technique and procedure do explicit and quantifiable standards become possible. Conceptually the easiest to understand, this area is technically underdeveloped. Quantifiable standards scarcely appear in the cases. In part this is due to the court's reluctance to question the administrative findings in a particular case.⁵ For example, the evidence that labels a residential area a slum never comes before the court, unless the plaintiff charges that the findings have been carried out in "bad faith". As for the rest standards simply do not exist.

The procedural standards have both quantitative and general consensus components. Procedure is taken to be the manner or method of a course of action, and there is a level of public interest which requires that regulations and restrictions be applied with fairness and equality. Usually these feelings

are expressed in terms of laws or principles which are commonly accepted without particular argument. Occasionally as in urban renewal, they arouse protest, and generally these procedural standards show the poorest degree of development. V. B. Stanberry decries the lack of thought and consideration spared to this field.⁶ Planning preoccupation seems to lie in technique, with some scant attention given to goals. Planning principles (or procedural standards) sit forgotten on the shelf. Stanberry points out that the sum of well-planned parts does not equal a well-planned whole. A platitude at first glance; a sensitive indictment of planning at the second. The preceding case evidence does not help to solve the situation.

Techniques, the third planning area for standards, lend themselves most readily to the objective scale type of guidance. These come closest to expression in the comfortable tenets of Euclidean zoning, the provision for safety from fire, and light and air requirements. Unfortunately none of these standards were cited in specific language in the Massachusetts cases. Some evidence came close, however, like the tests of side-yard requirements which fixed a given number of feet from the lot line as a minimum. Never straying from a ten to twenty foot range, the regulation appeared reasonable and received court approval.⁷

discussion of desirable pattern

The sketchy characteristics of the existing standards outlined above must somehow be structured into a reasonable pattern. No attempt shall be made to suggest a sophisticated form of inter-relationships. Rather the following is a rough conception of general outlines of relationships which can be refined and revised at

a future date. It serves only to organize categories and to give some form to the complexities one glosses over in blithe references to planning standards.

The preceding discussion can be expressed as a simple diagram:

<u>PLAN</u>	<u>STANDARD</u>
Objective	Goal oriented
Procedure	General consensus
Technique	Objective scale

Or alternatively the two lists could be used as cross headings for boxes, with a given standard assigned to the proper box. A standard of 300 children per elementary school could then be expressed as a general consensus -- procedural standard, etc. Not all "boxes" would have an equal number of standards. For example, conceivably very few objective scale standards would be formulated under the plan-objective category.

The structuring is vastly over-simplified and does not indicate any sensitive way to develop standards or to manipulate them. It does, however, help to sort out the confusing melee of standards and to order them with some simple connection to the planning process. Within each category a whole crop of standards can be developed with varying degrees of preciseness. It may be that one area of standards will gradually encroach on another. Perhaps measurement sensitivity can be developed to a point at which objective scale standards will predominate. The important feature is the preservation of the interrelationship of the various systems of standards. As long as the proper level of standards impinges on the proper aspect of planning the system can

FOOTNOTES

- 1 Webster's New Collegiate Dictionary
2nd Edition
G & C Merriam & Co., Springfield, Mass., 1956.
 - 2 Ibid.
 - 3 Galbraith, J.K.
The Affluent Society
Houghton Mifflin Co., Boston, 1958, p.256.
 - 4 Ghiselen, B.
The Creative Process
Mentor Books, New York, 1955, p.3.
Ghiselen states: "The human mind is prepared to wrap the whole planet in a shroud and the exercise of all our best effort and ingenuity has produced no assurance whatever that it will be deterred from that end. The prolonged failure of traditional means in dealing with this problem does not prove these means useless. It does strongly suggest their inadequacy. For as a knowledge of the creative process drives us to conclude, although a problem which stubbornly resists solution by traditional means may perhaps be insoluble, the probability is rather that those means themselves are inadequate; the concepts, attitudes and procedures employed are probably at fault and in need of being transcended in a fresh approach.
- Dimmock, M.
A Philosophy of Administration
Harper Bros., New York, 1958.
Dimmock quotes from Toynbee's A Study of History:
"...in the histories of civilizations, standardization is the master tendency of the process of disintegration...standardization is the major cause of disintegration because it stifles man's spirits and makes him incapable of enterprise and innovation." He warns against blind adherence to rules and the thoughtless acceptance of norms. Today standards tend to be set up by administrative experts based on assumptions of dominant values. As a result the standards are valid and useful only to the extent of the quality of the assumptions involved. Overstandardization and its incumbent danger pointed out by Toynbee become magnified to unrealistic proportions when the base assumptions fail to convey a true image of desired ends.

- 5 Despatcher's Cafe Inc. v. Somerville Housing Authority
124 N.E. 2d 528 (1955)
- 6 Stanberry, V.B.
"How About These Planning Principles?"
Journal A.I.P., vol. 16:11-15, 1950.
- 7 Wood v. Building Commissioner Boston
256 Mass. 238 (1926)
Slack v. Inspector of Buildings Wellesley
262 Mass. 404 (1928)

reach almost any degree of complexity, and the framework still be comprehended with ease. Those who develop standards (a vast and difficult process not touched upon in this paper) would be able to work within the categories, or among them with a feeling of "place" in the total scale. It is but a modest beginning.

V. SUGGESTIONS FOR FURTHER RESEARCH

A heading such as this makes an author aware of the limited nature of his own investigations. The ramifications of even a simple inquiry are many. To adequately cover a topic, a startling number of subjects must be woven together. Such comprehensiveness is beyond the scope of this paper, but the following suggestions indicate the type of discussion that would be relevant.

comparison across states

The discussion dealt entirely with the Massachusetts planning cases. However, many other states; New Jersey, New York, Wisconsin and California especially, have a significant body of planning law too. In many instances there are more experimental planning controls that have been tested, and circumstances casting different lights on problems similar to those of the sample state. It would be of interest to see if the same sort of pattern (or non-pattern) that emerged in Massachusetts was repeated in these states. Likewise an interstate comparison might show up consistencies and inconsistencies in any given state pattern. One could also assess the reasonableness of developing broadly applicable standards. Perhaps guides of this sort must be unique for a given locale.

relation to existing area of standards

Another area worthy of investigation is a comparison between the role of standards in the adjudication of planning cases and their role in other fields of court action; such as, labor law. The labor field has a significant number of standards that are used extensively. Do they differ in kind, or role, or degree from those that appear in planning? How were they developed? And does their coming-of-age history suggest any short cuts for bring planning standards to the same level?

Other comparisons are possible between the few planning standards that emerged in the cases and other, better developed, planning standards. These too are few in number, but the American Public Health Association has presented some for neighborhood planning, recreational facilities, and the testing of housing for sub-standardness. Building codes, housing codes, and health codes are also widely accepted standards. It would be of worth to suggest a way in which such information could be presented to the courts to aid in adjudication.

VI. CONCLUDING REMARKS

In the final analysis we are striving towards order and beauty in life. The hope is that this can pervade our urban environment, lifting the major segment of our society to a life of greater fulfillment and joy. Saarinen, in describing this fundamental principle of organic order, identified the key watchwords as: expression, correlation, flexibility and protection. Expression involves the communication of a time and a people. The truer

the expression "the more it posses those qualities that could further the growth of that cultural tree of its epoch". Correlation is like a beautiful landscape, "All these myriads of molecular particles...are brought into a single picture of rhythmic order".¹ Flexibility and protection form the bulwarks of the system; flexibility continually allowing it to accommodate to or compensate for internal and external pressures and protection acting as the overlord. Standards have the potential for such a role by attempting to organize the existing confusion; perhaps they can plug a large gap in the planning process.

In summary, the planning cases offer an interesting commentary on the current state of standards. The surprising lack of expert testimony best characterizes the total problem. The planners (in the cases reviewed) have failed to support the court with a consistent body of reasonable facts and figures. We assumed at the beginning of the paper that standards were the rules by which one could measure quantity, value or quality. No pattern of such rules exists. Yet in every case where an expert testified, the court was sympathetic.² One might do well to question the apparent reluctance of the planner to use the evidence he does have in litigations. Inadequacies notwithstanding, planners have enough information to make some sort of planning decision. Surely this evidence could give the court some sense of the problems which should be considered in reaching a legal decision. One of the ways to develop a system is to use its fragments

in situations where they will be analysed and criticized. Then a reassessment of the pieces can lead to a comprehensive system.

The role for standards has been suggested above. We find that their special roles may include clarifying the intent when a statute is drawn. The formulation of the legislation can be more precise if there is a supporting body of standards related to it. Likewise standards may help the courts define the limits of the public benefit in urban renewal programs. While many disciplines relate to such problems, planning too, has a large stake which should not be glossed over. And the establishment of enforceable minimums in housing, zoning and subdivision is clearly dependent on reliable standards. In each of these examples standards hold a unique position; they define the guidelines from which planners work and give planning decisions a special validity.

This paper has made no attempt to assess the "goodness" or value of existing standards, or to develop specific standards, or to discuss the planning guides that have been developed. Its aim was more limited. If it has pointed to the problems faced by a court in adjudicating a planning decision, if it has indicated a dearth of planning standards in such cases, if it has reminded the planner of the potential support available through the court, and if it has clarified the meaning of the word "standards" in planning, then it has met its objectives.

FOOTNOTES

- 1 Saarinen, E.
The City
Reinhold Pub. Corp., New York, 1943, pp. 8-17.
- 2 Cohen v. City of Lynn
333 Mass. 699 (1956)
Raimondo v. Board of Appeals of Bedford
331 Mass. 228 (1954)

APPENDIX

A Selected list of Massachusetts Planning Cases

Attorney General v. Williams

174 Mass. 476 (1899)

to restrain the erection of a building in Copley Sq.

to a height of more than ninety feet

Welch v. Swasey

193 Mass. 364 (1907)

upheld districting with different heights, led to

approval of later zoning

Brett v. Building Commissioner of Brookline

250 Mass. 73 (1924)

upheld zoning for single family use only

Wood v. Building Commissioner of Boston

256 Mass. 238 (1926)

upheld regulations requiring side and rear yards

Nectow v. City of Cambridge

260 Mass. 441 (1927)

zoning boundary declared reasonable, later reversed

in 277 U.S. 183, 48 Sup.Ct. 447, 72 L.Ed. 842

(1928)

Prusik v. Board of Appeals of Bldg. Dept. of Boston

262 Mass. 451 (1928)

denied variance for business use

Slack v. Inspector of Buildings of Wellesley

262 Mass. 404 (1928)

upheld side yard regulations

Town of Lexington v. Bean

272 Mass. 547 (1930)

auto repair work prohibited in a single family
zone; upheld

Coleman v. Board of Appeals of Bldg. Dept. of Boston

281 Mass. 112 (1932)

zoning does not inflict undue hardship, variance
denied

Locatelli v. City of Medford

287 Mass. 561 (1934)

no compensation when zoning annuls building
permit

Phillips v. Board of Appeals of Bldg. Dept. of Springfield

286 Mass. 469 (1934)

zoning does not inflict undue hardship, variance
denied

LaMontagne v. Kenney

288 Mass. 363 (1934)

non-conforming use can be altered only when new
use will be less detrimental and will not
enlarge the facility

Town of Lexington v. Govenar

295 Mass. 31 (1936)

upheld prohibition of professional sign through
zoning

Wilbur v. City of Newton

302 Mass. 38 (1938)

zoning of gravel pit area for residence reasonable
in light of growth pressures

Allydon Realty Corp. v. Holyoke Housing Authority

304 Mass. 289 (1939)

develops analogy between slum and public nuisance;
held that public money could be used for construction of low-rent housing

Leahy v. Inspector of Buildings of New Bedford

308 Mass. 128 (1941)

zoning amendment overruled as spot zoning

Simon v. Town of Needham

311 Mass. 560 (1942)

upheld one acre minimum lot size

Smith v. Board of Appeals of Salem

313 Mass. 623 (1943)

zoning amendment overruled as spot zoning

City of Pittsfield v. Oleksak

313 Mass. 553 (1943)

limited lumbering allowed in single family area
even though zoning prohibits intended or designed for industry, manufacturing or commerce in the district.

Town of Marblehead v. Rosenthal

316 Mass. 124 (1944)

zoning upheld, not spot zoning as charged

Town of Burlington v. Dunn

318 Mass. 216 (1945)

stripping of topsoil not allowed in single family zone

Smith v. Board of Appeals of Fall River

319 Mass. 341 (1946)

permits for the conversion of single family units
in a single family zone to multiple family
units declared invalid

Building Commissioner of Medford v. The C & H Co.

319 Mass. 273 (1946)

upheld zoning ordinance prohibiting the dumping of
rubbish etc. without the approval of the
Board of Aldermen

Olson v. Zoning Board of Appeals of Attleboro

324 Mass. 57 (1949)

upheld denial of garage permit due to violation of
side yard requirements

Everpure Ice Manftg. Co. Inc. v. Board of Appeals of Lawrence

324 Mass. 433 (1949)

upheld denial of variance for new and different
business addition to a non-conforming use

122 Main St. Corp. v. Brockton

323 Mass. 646 (1949)

declared zoning ordinance which fixed minimum
building heights invalid

Barney & Carey Co. v. Town of Milton

324 Mass. 440 (1949)

undue hardship found to exist, variance upheld

Lamarre v. Commissioner of Public Works of Fall River

324 Mass. 542 (1949)

Housing authority granted variance to construct
apartments on land zoned for single family use

Tanzilli v. Casassa

324 Mass. 113 (1949)

variance granted for the extension of a public
rental garage

Circle Lounge and Grille Inc. v. Board of Appeals of Boston

324 Mass. 427 (1949)

Lounge not properly aggrieved person, but charges
relating to aesthetics and traffic are of
interest

Caires v. Building Commissioner of Hingham

323 Mass. 589 (1949)

rezoning amendment upheld

Town of Brookline v. Co Ray Realty Co. Inc.

326 Mass. 206 (1950)

problem of land partly in Boston and partly in
Brookline, cannot use Brookline land for Boston
rear and side yard needs

Howland v. Inspector of Buildings Cambridge

328 Mass. 55 (1951)

variance denied, no undue hardship

Co Ray Realty Co. Inc. v. Board of Zoning Adjustment Boston

328 Mass. 103 (1951)

zoning amendment upheld

Attorney General v. Town of Dover

327 Mass. 587 (1951)

zoning amendment prohibiting all but non-sectarian,
non-profit schools in residence area held invalid

Gaunt v. Board of Appeals of Methuen

327 Mass. 380 (1951)

zoning does not inflict undue hardship, variance
denied

Shannon v. Building Inspector of Woburn

328 Mass. 633 (1952)

rezoning for industry upheld; in accordance with
the City's comprehensive plan

Kaplan v. City of Boston

330 Mass. 381 (1953)

zoning does not inflict undue hardship, variance
denied

Bicknell Realty v. Boston Board of Appeals

330 Mass. 676 (1953)

zoning does not inflict undue hardship, variance
denied

City of Everett v. Capitol Motor Transp. Co. Inc.

330 Mass. 417 (1953)

zoning upheld even though boundary runs through
the building

Caputo v. Board of Appeals of Somerville

330 Mass. 107 (1953)

Papadinis v. City of Somerville

331 Mass. 627 (1954)

slum area may be taken, cleared and subsequently
resold to a private developer

Pendergast v. Board of Appeals of Barnstable

331 Mass. 555 (1954)

no one has a right to a variance and the instru-
ment should be used sparingly

Morgan v. Banas

331 Mass. 694 (1954)

rezoning amendment upheld

Raimando v. Board of Appeals of Bedford

331 Mass. 228 (1954)

denial of permit to remove sand and gravel in
single family district upheld.

Despatcher's Cafe Inc. v. Somerville Housing Authority

124 N.E. 2d 528 (1955)

Court refuses to usurp Board's role in reviewing
slum findings; will examine them only under
charges of bad faith

Gelato v. Board of Appeals of Boston

332 Mass. 178 (1955)

zoning does not inflict undue hardship, variance
denied

Town of Lexington v. Simeone

334 Mass. 127 (1956)

stripping of land prohibited by zoning, ordinance
upheld

McHugh v. Board of Zoning Adjustment Boston

336 Mass. 682 (1958)

action of zoning board in changing boundaries held
to be in excess of authority

Paquette v. City of Fall River

338 Mass. 368 (1959)

upheld minimum housing code

Tracy v. Board of Appeals of Marblehead

339 Mass. 205 (1959)

small business areas may be a convenience or neces-
sity near large residential areas, not spot
zoning

Building Inspector of Falmouth v. Gingrass

338 Mass. 274 (1959)

airplane cannot be stored in garage in single
family zone

Shapiro v. City of Cambridge

340 Mass. 652 (1960)

rezoning inappropriate, really spot zoning, de-
clared invalid.

Bowker v. City of Worcester

334 Mass. 422 (1956)

declared slum clearance to be the primary purpose
of urban renewal

Cohen v. City of Lynn

333 Mass. 699 (1956)

upheld redistricting from general residence to
restricted apartment use

Raymond v. Commissioner of Public Works of Lowell

333 Mass 410 (1956)

amendment upheld as reasonable zone change

Pierce v. Town of Wellesley

336 Mass. 517 (1957)

upheld amendment expanding the uses permitted in
a single family zone

Town of Concord v. Attorney General

336 Mass 17 (1957)

upheld town's amendment of zoning; where the ques-
tion is fairly debatable the Court will not
substitute their judgement for that of the
citizen's

Rodenstein v. Board of Appeals of Boston

337 Mass. 333 (1958)

undue hardship exists and should be relieved by
a variance.

Planning Board Springfield v. Board of Appeals Springfield

338 Mass. 160 (1958)

zoning does not inflict undue hardship, variance
denied

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