PRINCIPLES AND PRACTICE
of
ZONING
by
Thomas W. Mackesey

A Thesis
submitted in partial fulfillment of the requirement for
the degree of
Master of City Planning
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MASSACHUSETTS INSTITUTE OF TECHNOLOGY
DISCLAIMER

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"Zoning is too ambitious without balance, too changeable without a plan, too undisciplined under proper appeal, but young - so young that we can forgive her."

Joseph Talmage Woodruff
Dear Dean Emerson:

In partial fulfillment of the requirements for the degree of Master of City Planning I submit herewith a thesis dealing with that control that is exercised by government over the use and development of land and buildings through the device we call "zoning." The subject was chosen not only because of the author's deep interest in this phase of city planning, but because there exists, to his knowledge, no book nor treatise that adequately covers the whole field of zoning. Much has been written on zoning in its relation to the law and on the administration of zoning ordinances; discussion of some of the other aspects of zoning is not rare. However, since the report of The Heights of Buildings Commission to the Board of Estimate and Apportionment of New York City in 1913, before that city adopted the first comprehensive ordinance in the country, there has been no comprehensive survey of zoning in all its implications and ramifications.

The research for this study has been done intermittently over a two-year period following the academic year ending in June, 1936. The factual material has been gathered from many sources. Information on zoning law and practice in other countries was gained from direct correspondence with officials of foreign governments and municipalities, from the American Consular Service of the Department of State, which was very helpful in many cases, and from existing reports and studies.

Much of the information on the status of zoning in this country was supplied by the various state planning boards. Each of the forty-six state planning boards was contacted and, with few exceptions, cooperated fully.

To get first-hand information on the way zoning ordinances are actually working out in practice in municipalities of all sizes and types, a questionnaire was sent to all planning boards and zoning boards of appeals in Massachusetts, as a sample state. The number of returns and the significant information gained therefrom justified this method.

The opinions expressed and all recommendations and proposals have grown out of the evidence that has been compiled and from the personal experience of the author as a member for five years of a city planning board, during which he sat at many hearings involving zoning problems, as a technician employed in the preparation of
municipal zoning plans and ordinances, and from service specializing in zoning on the staffs of the Massachusetts State Planning Board and the State of New York, Division of State Planning.

It would be impossible to properly give acknowledgment to the many who have supplied information or otherwise helped in the preparation of this study. Many officials and others have gone to much trouble to furnish accurate information. Without their cooperation this project would have been impossible.

The author has been especially privileged not only to study under Professor Frederick J. Adams, Dean Edwin S. Burdell, and the late Professor Joseph T. Woodruff, but also to work with each of them in connection with consulting work in zoning. To their instruction and guidance he owes much.

Very truly yours,

Thomas W. Mackesey

Albany, N.Y.
May 1, 1938.
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CHAPTER I

THE CONTROL OF PRIVATE PROPERTY OUTSIDE THE UNITED STATES

History

The control of private property in the interest of the public at large is probably as old as civilization itself. When man gave up nomadic life and began to live in communities the question of each using his property so as not to injure his neighbor arose. While we know little of the control exercised over the use and development of property in ancient times there are indications that regulations of some type were enforced in most ancient cities.

The earliest mention of the setting aside of different sections of the city for different uses is found in the Book of Ezekiel in that portion which describes the planning of the Temple. In the free rendition of Dr. James Moffat:1

Next to Judah, from east to west, shall be the reservation which you must set apart, eight and a third miles wide, and as long as one of the clan-zones from east; the sanctuary shall stand there. . . . No part of this choice land is ever to be sold or exchanged or alienated; it is sacred to the Eternal. The remaining section of the reservation, a mile and two-thirds wide and a third miles in length, shall not be sacred, it is for the city with its houses and suburbs, the city lying in the middle. The city shall measure a mile and a half square; its suburbs shall cover a hundred and forty-seven yards on each side of the square, and the remainder of the strip, over three miles on the east and over three miles on the west, stretching along the sacred reservation, shall serve to

1/ As quoted in Adams, T. Outline of town and city planning. Russell Sage foundation. 1935. p 41
support the workers in the city, and shall be cultivated by the workers in the city, belonging to the clans of Israel. . . . The rest of the territory shall belong to the prince, that is, the land on either side of the sacred reservation and of the city strip.

Building laws and regulations are found in very old Indian writings. The arrangement and height of buildings seems to have been related to the rank of the occupant. A scale of building heights for the various castes is given ranging up to eleven stories for imperial palaces.

Binode Behari Dutt states:

Now in ancient India folk planning set up an inter-relation between the site, the breadth of a street . . . and the rank of the residents in that quarter. This rule worked out in such a way that the high class people were given premises along the wide thoroughfares, while the low class people were relegated to the comparatively narrow roads, so that in all structures along the street the number of storeys was the same . . . . It is obvious that a definite proportion between the width of the streets and the heights of buildings was arranged for in practice. The height of the walls of the buildings should not be too small or too great. 2

Other regulations required that footpaths be equal in width to one-third the breadth of the house, that all houses were to face the royal roads, and that a space of three or four feet be left between houses.

The ancient cosmopolitan center of culture, Alexandria, was probably zoned to some extent for rank and race as were many other cities in the ancient world. There seems to have been a quarter devoted to royal palaces and public buildings, a section for the Egyptians and another for the Jews.

Pergamum had a law prohibiting brick fields within the city, the

2/ Dutt, B. B. Town planning in ancient India. Thacher, Spink and Co., Calcutta and Simla (India), 1925; p. 248, as quoted in Adams, op. cit. p. 43
first example we have of the regulation of the location of an industry. It is a coincidence that one of the earliest tests of the constitutionality of zoning in the United States, the Hadacheck case in California, involved the regulation of a brick yard. Owners of property in Pergamum were also required to keep their buildings in good repair.

The Romans restricted industry in central areas and also imposed height limits on buildings. Augustus first limited the height of buildings to 70 feet. This was reduced to 60 feet by Trajan and Nero set building height limits at twice the street width. Many Roman municipalities had similar regulations and while these regulations were often drafted in a haphazard fashion and not always rigidly enforced, the same may be said for similar rules in modern cities.\(^3\) Vitruvius wrote that the height of buildings should be related to the width of streets in order to secure adequate light and air.

There are evidences of zoning of a sort in some of the Italian cities of the Renaissance era. Some of the early guild regulations seem to have embodied certain zoning features. While these are found in guild regulations and not in law, the influence of the guilds was often sufficiently great to make their regulations as effective as statutory law.

The father of modern zoning, the German, Baumeister, traces use zoning back to a decree issued by Napoleon I in 1810 while Protector of the Confederation of the Rhine. This decree\(^4\) provided that establishments disseminating an unhealthy or unpleasant odor should be erected

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3/ Adams, ibid. p. 69
4/ Bulletin des lois, 1810 (second half year) No. 6059
only on administrative license. Such establishments were divided into three classes. Those in the first class could not be erected near any dwelling; the administrative authorities fixed the exact distance they were to remain from residences.

Frank B. Williams says:

This decree formed the basis of the Prussian law (Allgemeine Gewerbeordnung, passed January 17, 1845, Gesetz Sammlung, 1845, Nr. 2541) on this subject, and this law was in substance followed by the North German Confederation in its industrial law or "Gewerbeordnung" of June 21, 1869, Bundes-Ges. Bl., 1869, Nr. 312, which was the foundation for the provisions of the law of the German Empire on the same subject, the well-known "Reichsgewerbeordnung". It was under this law, administered by the state authorities, that the so-called "protected district" . . . which is the simplest and earliest form of use zoning sprang up. 

EUROPE

Germany

The zone system to regulate bulk and use was first advocated by Richard Baumeister in the 1870's. The first careful presentation of the theory of use zoning was contained in Baumeister's book "Stadterweiterungen in technischer baupolizeilicher und wirtschaftlicher Beziehung", published in 1876. It was applied in 1884 in Altona while the eminent administrator, Dr. Franz Adickes was mayor of that city. In 1891, after Adickes had become chief executive of Frankfort-on-the-Main, a zoning plan was put in effect in that city. The idea spread rapidly through Germany, Switzerland and the Scandinavian countries. As evolved in Germany, zones were usually defined by the limits of the

5/Williams, F. B. The law of city planning and zoning. 1922. p. 210 footnote
city at chronological periods as marked by old city walls or other physical features. The districts were actually more or less concentric zones with a diminishing gradation of intensity of bulk and use outward from the center. As adapted in the United States the term "zone" is somewhat meaningless; "district" is perhaps the better term.

Control of the appearance of buildings has long been exercised in many parts of Germany. The Polizeistafgesetzbuch (police law) of December 26, 1871, Article 101, of Bavaria, provided:

In the interest of beauty, building police provisions can be passed by local ordinance. Changes in building plans for this reason must not, however, materially increase the building cost.

Building heights are ordinarily regulated in Germany with relation to the width of the street upon which the building is situated with a fixed maximum limitation. An excellent discussion by Frank B. Williams of German zoning before the war is to be found in the "Report of the Heights of Buildings Commission to the Board of Estimate and Apportionment of the City of New York, 1913", and also in Williams' book "The Law of City Planning and Zoning", Macmillan, 1922.

Since the World War and particularly since the establishment of the National Socialist regime zoning laws have undergone considerable revision chiefly in the centralization of the authority supervising the application of regulations. A brief summary of the principal legislation on the subject during the last twenty years is set forth below:

1. The Prussian Dwelling Law (Wohngesetze) of March 24, 1918 (Gesetzsammlung 23), authorized the local police to take suitable

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6/ "Building police" refers to the agency which issues and administers building regulations. There are several other kinds of police in Germany - Fire, Health, Charity, etc. The police as we think of it in America is in Germany the "Safety Police".
measures to insure that all buildings erected would be up to a certain standard and would not go against the public interest. There was the restriction, however, that any property owner adversely affected thereby had a right to claim compensation.

2. Part VI of the Second Decree of the Reich President for the Security of Economy and Finance (Zweite Verordnung des Reichspräsidenten zur Sicherung der Wirtschaft und Finanzen, Sechster Teil), of June 5, 1931, (Reichsgesetzbiblatt I, pages 279, 309) was the first piece of Reich legislation which attempted to standardize certain aspects of settlement building and expropriation for purposes of town planning in the various states of Germany.

3. The Law relating to Temporary Measures to Set in Order German Settlement (Gesetz über einstweilige Massnahmen zur Ordnung des deutschen Siedlungswesens), of July 3, 1934, (Reichsgesetzbiblatt I, page 568) is the basic law on which several subsequent measures relating to both settlement and zoning are based. It gives power to the Reich Minister of Economic Affairs (later delegated by him to the Reich Minister of Labor) to take all measures which may appear desirable in the field of city planning, settlement, and public building.

4. The Decree relating to the Regulation of Building (Verordnung über die Regelung der Bebauung) of February 15, 1936, (Reichsgesetzbiblatt I, page 104), creates the legal basis for a uniform system of zoning throughout the Reich. More detailed regulations are contained in an Accompanying Order of February 19, 1936, published in the Reichsarbeitsblatt, No. 6, Part I.

5. The Decree relating to Architectural Forms (Verordnung über
Baugestaltung), of November 10, 1936, (Reichsgesetzblatt I, page 938) lays down further general principles to be followed in zoning and fixes responsibility more explicitly on the local building police and local government under the supervision of the provincial and State authorities.

A translation of the decree of February 15, 1936 follows:

Decree relating to the Regulation of Building
February 15, 1936

(Reichsgesetzblatt, Part I, page 104)

Under the Law relating to Temporary Measures to Set in Order German Settlement, dated July 3, 1934, (Reichsgesetzblatt Part I, p. 568) it is hereby decreed as follows:

Article 1

For the regulation of building construction, small settlement zones, residential zones, business zones, and industrial zones may be defined as building zones by order of the building police.

Rules are to be laid down for each building zone as to what kinds of structures may or may not be erected in it; but structures the use of which may result in considerable injury or annoyance to the inhabitants or to the general welfare shall not be permitted in small settlement zones, residential zones, or business zones.

Article 2

The building police may rule that buildings having more than one full story and attic may not be erected in a given community or part thereof.

It may also be prescribed that the erection of buildings to serve as the permanent abode of people or for certain business purposes is permitted only on lots of a certain minimum size.

Article 3

For structures to be built outside of building zones or outside of a contiguously built up part of a town
which is not zoned, a permit of the building police may be refused if the carrying out of the project would be inconsistent with the orderly development of the municipal area or with proper building construction.

This applies in particular to projects the execution of which would require uneconomic expenditure for roads and other transit facilities, supply lines, drainage plant, school provision, police and fire protection, or other public functions or the use of which would entail special economic difficulties for the inhabitants.

Article 4

The competent authority and modes of procedure are to be determined by the provisions of State law. In so far as these provisions allow the delineation of building zones or the classification of construction by categories, by communal regulations (local status, local ordinances, et cetera), this procedure may until further notice be used for the issuance of regulations to carry out Articles 1 and 2.

Article 5

More detailed regulations, especially those which permit the delineation of areas other than those provided for in Article 1 as building zones, remain unaffected.

Article 6

This decree enters into force on March 1, 1936.

The Reich Minister of Labor.

England

England has always been to the fore in town planning progress. The British Public Health Act of 1875, while not specifically town planning legislation, included provisions for the control of town

7/ "State law" refers to laws of the German States, viz. Prussia, Bavaria, etc., as opposed to the Reich Federal Law
extensions and of public health in urban areas and may be considered the forerunner of modern British legislation. The Housing Act of 1909 first enabled local authorities to prepare town planning schemes. Cities, boroughs, urban districts and rural districts were empowered to plan for the development of land likely to be used for building purposes. Regulations could not be applied to existing built-up areas under this Act. Under the Act of 1909, population densities could be controlled by restricting the number of families per acre. Open spaces about buildings could also be required for the preservation of amenities. There are no provisions for the payment of damages for land affected by such regulation. In 1919 the law was amended making it mandatory for all towns or urban districts having a population of 20,000 or more to adopt planning schemes.

In 1932 there was passed the Town and Country Planning Act which greatly widened the scope of planning. For the first time local authorities were authorized to prepare planning schemes for all the land within their control whether built up or not. Zoning is considered an important feature of the town plan and is provided for in the Act. Town planning is placed in the jurisdiction of the Ministry of Health. The Ministry has formulated a code of procedure and employs town planning inspectors to hold public hearings, approves plans and in general tends to standardize local planning throughout the country. The Town and Country Planning Act has provision for the usual type area and use restrictions of zoning regulations and in addition gives local authorities the power to prohibit or restrict building on any land where it
has been shown that it would be injurious to health to erect a new building because of absence of sewers, water supply or access or that it would cost too much to provide these essential services. There is provision also for the control of the use and development of property for a period of three or more years while a plan is in preparation. Previous powers authorizing control over the appearance of buildings have been expanded. The mandatory amendment of 1919 was eliminated in the 1932 Act but the latter Act contains certain compulsory features such as conferring on the Ministry of Health the authority to require two or more local authorities to act jointly in the preparation of a plan when in his opinion such course is justified.

In the Model Clauses issued by the Ministry of Health to be used in the preparation of schemes under the Act, it is suggested that a plan provide for two types of residential zones, two business zones, an industrial zone, one general zone and an undetermined zone. Three classes of uses are stipulated for each zone, free, permissive and prohibited. The free classification is for those uses for which the zone is primarily intended. Permissive uses are subject to the consent of the authority. This makes zoning fairly elastic and allows a large measure of discretion to municipal authorities. This device serves the same purpose as does the usual board of appeals or adjustment in this country.

The flexibility thus provided is especially desirable in land subject to subdivision. The subdivider may indicate on his plat the location of permissive uses. If his plan is approved by the planning agency it becomes binding and takes the status of law. This excellent
combination of subdivision control and zoning works out very well in practice. It spares the planning agency the task, almost impossible to do well, of working out subdivision schemes for all the undeveloped land within its jurisdiction and allocating land for various uses far in advance of probable development while maintaining control over the use pattern when it eventually becomes desirable to open up more land. Until such land is considered ready for development all building may be prohibited. When, in the discretion of the municipal authorities, the undeveloped plat is ripe for development a general development order is issued. The status of land so restricted must be reviewed every three years.

A zone may be reserved for a specific use, that is, a business zone may be for business buildings only and residences may be excluded. This is contrary to the general practice in the United States. The Ministry of Health bulletin entitled "Town and Country Planning in England and Wales" states:

The most satisfactory form of business zone is that in which shops, business premises and places of assembly are allowed freely while other buildings require the authority's consent which will only be given for adequate reasons, e.g., if the business zone proves in course of time to be unnecessarily large. It will sometimes be necessary to allow dwelling houses and residential buildings as well as shops and business premises to be built freely in business zones in order that land not immediately required for business purposes may not be unduly withheld from development.

The formal steps in the preparation of a planning scheme are outlined below:

8/ Ministry of Health. Town and country planning in England and Wales
(a) PREPARATION OF SCHEME BY THE PLANNING AUTHORITY.

The first step is the passing by the Planning Authority of a resolution to prepare a Scheme. This resolution is illustrated by a map showing the area of the proposed Scheme, is advertised, and takes effect when it has been approved by the Minister after considering any objections that are made. A draft of the actual Scheme has to be adopted within two years from the date of the Minister's approval, and must be illustrated by a map. After adoption the Draft Scheme is advertised, prescribed persons and registered owners are notified, and the Planning Authority has to consider any objections and suggestions made and, if necessary, revise the Scheme to meet them. This process has to be completed within nine months of adoption and leads to the formal making of the Scheme.

(b) SUBMISSION OF SCHEME TO THE MINISTER.

This must take place within one month of the making of the Scheme. Notice has to be given of the fact that objections may be sent to the Minister. The Scheme is usually made the subject of a local Inquiry before its approval by the Minister, with or without modifications.

(c) LAYING BEFORE PARLIAMENT.

The approved Scheme has to be laid before Parliament for a period of twenty-one days on which each House is sitting. During this time either House may resolve that the Scheme or some provision of it ought not to come into operation.

(d) OPPORTUNITY TO QUESTION VALIDITY BEFORE THE HIGH COURT.

On the expiry of the prescribed period a further notice of the Scheme has to be published. Any aggrieved person may, within 6 weeks after the publication of the notice just referred to, apply to the High Court for an order quashing the Scheme, or some portion of it, on certain grounds.

(e) OPERATION.

Unless an application is made to the Court within the prescribed time the Scheme becomes operative at the end of the 6 weeks already mentioned. Its validity can not thereafter be called in question in any legal proceedings.

While there is provision in the law for aesthetic control of buildings this power is not always used. Where it has been used there
has been considerable objection to it as interference in the matter of
taste, justifiable only under special conditions.

Contrary to the American system, in England zoning schemes may be
prepared in sections. Piecemeal or partial zoning is of doubtful
legality in the United States but in England it is the usual procedure.
Each district of the municipality is studied in detail. When regula-
tions for that particular district are finished, they are enacted into
law and another section of the municipality is studied.

It is difficult to compare British zoning with zoning in the
United States for only since 1932 has the zoning of urban areas been
possible in England, whereas in this country zoning has been restricted
almost exclusively to built-up areas. For the same reasons a compari-
on of zoning administration in the two countries is also difficult.

Ireland

Planning in Ireland is authorized under the Town and Regional
Planning Act of 1934 which is similar in many respects to the British
Act. Every county borough, every borough, urban district and every
county health district is considered a planning district under the Act.
Special planning regions are set up about Dublin and Cork. That sec-
tion of the Act dealing with zoning, provides the following:

Buildings and Other Structures.

1. Regulating and controlling, either generally or in
particular areas, all or any of the following matters,
that is to say:-

(a) the size, character, height, spacing, and
frontage line of buildings and other structures,

(b) the objects which may be affixed to structures,
(c) the extent of the yards, gardens, and curtilage of buildings and other structures,

(d) the purposes for and the manner in which structures may be used or occupied.

2. Regulating and controlling or enabling the responsible authority to regulate and control the design, color, and materials of buildings and other structures.

3. Reserving or allocating any particular land or all land in any particular area for structures of a specified class or classes or prohibiting or restricting, either permanently or temporarily, the making of any structures or any particular class or classes of structures on any specified land.

4. Limiting the number of structures or the number of structures of a specified class which may be constructed, erected, or made on, in, or under any area.

5. Providing for the demolition or alteration of structures which are inconsistent with or obstruct the operation of the planning scheme.

The Act provides that a planning scheme may contain a declaration that no compensation shall be payable for any of the restrictions quoted above except that contained in paragraph five. The Minister cannot approve any scheme that does not make provision for the continuance of non-conforming uses, nor for the reconstruction of non-conforming uses within two years after having been demolished or destroyed by fire or otherwise. For the protection and extension of amenities, provisions may be made for the following:

1. Providing for the reservation of particular lands for use as public parks, recreation grounds, open spaces, allotments, or other particular purposes, whether public or private.

2. Providing for the preservation of views and prospects and of the amenities of places and features of natural beauty or interest.

3. Providing for the preservation of structures and objects of artistic, architectural, archaeological, or historical interest.
4. Providing for the preservation or protection of forests, woods, trees, shrubs, plants, and flowers.

5. Prohibiting, restricting, or controlling, either generally or in particular places the exhibition, whether on the ground, or any structure, or any temporary erection, on any vehicle, boat or other movable object (whether on land or on or in water) or in the air, of all or any particular forms of advertisements or other public notices.

6. Preventing, remedying, or removing injury to amenities arising from the ruinous or neglected condition of any structure or by the objectionable or neglected condition of any land attached to a structure or abutting on a road or situate in a residential area.

7. Enabling the responsible authority, with the consent of the Minister, to make regulations for the prevention of injury to amenities by noise.

Compensation may be ruled out for all but paragraph one of above.

The Planning Authority is given control of all construction during the period between the passing of a planning resolution and the coming into operation of a scheme. The Planning Authority may prohibit, or may permit, with such conditions as it thinks proper, any application for construction during this period. There is provision for an appeal to the Minister of Health from any such interim restriction. Every planning scheme is subject to the approval of the Minister of Health and to each house of the Oireachtas. There is provision for appeal to the High Court within twenty days after approval by the Minister of Health. The High Court may annul part or all of these schemes if it finds that the scheme is not in accordance with the Act. The authorization for planning is so recent that it cannot yet be determined how well it works out in practice. There is nothing in the Act to prevent the adoption of zoning provisions only.
Poland

Planning has been actively practiced in Poland only since the war. The legal basis for planning is the City Planning and Housing Law of February 16, 1928, a decree issued by the President of the Republic. Under this law the following communities are required to prepare building plans:

A. Cities and towns
B. Health resorts
C. Farming and industrial settlements consisting of at least ten houses.

Most of the larger cities now have adopted plans in which zoning regulations are included. About one-third of the towns now have such regulations. The Enabling Act lays down some general regulations as well as permitting towns to adopt other regulations. There are no use restrictions, only height and area provisions, but land is often zoned for agricultural use by the back-handed method of area control. Aesthetic control is possible under the law but, as in many other places where such control is legal, it does not work out well in practice.

Estonia

The control of the construction and use of buildings is authorized and is practiced by most cities and towns in Estonia. The type of regulations in effect may be illustrated by the Construction Regulations of the City of Tallinn, the capital and principal city.

The City of Tallinn is divided into eight building zones. The
first four districts are located in the central part of the city. In them only fire-proof materials may be used in the construction of buildings. In the fifth, sixth and seventh zones wooden, stone or brick houses may be built. At the present time no construction activities may be carried on in the eighth zone.

The following table shows the percentage of the area of lots in the various zones upon which buildings may be constructed:

<table>
<thead>
<tr>
<th>Zone</th>
<th>Percentage of Lot</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>up to 85%</td>
</tr>
<tr>
<td>II</td>
<td>up to 80%</td>
</tr>
<tr>
<td>III</td>
<td>up to 65%</td>
</tr>
<tr>
<td>IV</td>
<td>up to 50%</td>
</tr>
<tr>
<td>V</td>
<td>up to 40%</td>
</tr>
<tr>
<td>VI</td>
<td>up to 25%</td>
</tr>
<tr>
<td>VII</td>
<td>Buildings for special purposes.</td>
</tr>
</tbody>
</table>

Lumber yards may not be established in the first, second and third zones.

No space may be left between houses in the first, second, third and fourth zones if such buildings are constructed more than 13.75 meters from the edge of the street. Should the fronts of buildings in such zones be less than 13.75 meters from the edge of the street, an open space at least 4.25 meters in width must be left between each building.

All building lots must possess at least one yard having a minimum area of 73 square meters and a minimum width of 8.50 meters. Lots having an area of not more than 450 square meters and located in the first zone may have a yard with a minimum area of 45 square meters and a minimum width of 5.30 meters. Exceptions to the above regulations are applicable for the yards of corner houses. The minimum width of a lot is
fixed at 14 meters in the first, second and third zones and 20 meters in the remaining districts. The minimum area of building lots in the first, second and third zones is 450 square meters; the minimum for lots in fourth and fifth zones is 675 square meters; and that in the sixth zone 1,000 square meters.

Buildings constructed of wood or wood used in conjunction with other materials such as brick and stone, may have a depth of not more than 25.6 meters, a width of not more than 15 meters and a height of not more than 8.15 meters, excluding the roof. The maximum height in the first zone is 14.5 meters. A similar provision is in effect as regards buildings in the fourth, fifth and sixth zones. In the second and third zones the maximum height is 20 meters when the buildings face upon squares. Should such buildings face upon thoroughfares, the maximum limit is 18 meters.

The City of Tallinn is also divided into three industrial zones. In the first district all types of industrial plants may be constructed. In the second zone industrial plants which are not considered as injurious to the public health, i.e., having excessive smoke, noise, odor, etc. may also be erected. No industrial plants may be built in third zone.

Yugoslavia

In 1931 there was passed the "Construction Law of the Kingdom of Yugoslavia". This law required such municipalities as might be designated by the Minister of Public Works to formulate and put into effect municipal plans, regulating, among other things, the size of building
lots, distance between buildings, distance from street line, height of buildings, et cetera. Municipalities are further empowered to prescribe special styles of architecture for buildings to be erected on specified streets, market places and squares, and to make special provisions for old buildings of artistic or historic interest. It contains also certain basic provisions with which all plans of municipalities must conform but leaves a degree of latitude to municipalities in formulating plans to meet the requirements of local conditions.

**Czechoslovakia**

Although there are several comparatively large cities in Czechoslovakia, only Prague has formulated regulations embodying zoning control. Shortly after the establishment of the Republic steps were taken to provide for the planned development of Prague, the capital city. This was vitally necessary in view of the selection of Prague, a provincial city of 223,000 people as the seat of the national government. Law No. 88 of February 5, 1920, charged the State Town Planning Commission with evolving a general development plan for the new Greater Prague, which constituted the old city and thirty-nine neighboring communities. A "sphere of interest" embracing seventy-eight other surrounding communities was to be included in the plan.

The work of the Commission seems to have been done in a thorough and intelligent fashion. The density of population in various parts of the city has been fixed so as to provide for an eventual population

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9/ The population of Greater Prague today is about 925,000.
10/ The State Town Planning Commission has published in English an excellent booklet, "The Planning of Greater Prague and Environs"
of 1,500,000, which figure is expected to be reached in about fifty years. The plan has been influenced to a large extent by physical conditions. The Commission has recognized that the most important and significant agent in the Prague building plan is undoubtedly the River Vltava and its tributaries. The comparatively deep and numerous valleys of the tributaries divide the Prague area into significant units and dictate a neighborhood type of development. The State Town Planning Commission, in cooperation with the Vltava and Tributaries Control Board, proposes to put an end to the inundations of adjacent building sites.

The sites which are being reclaimed in this way will be reserved for public services, for the Vltava has a double significance to the town; it is an important waterway of international character and an immense air-reservoir in the very center of the town....

All the Vltava banks which will not be used for navigation purposes is reserved for the green zones in which sports and children's play grounds, allotment colonies, and horticultural concerns will be located.11

It is not clear if this is accomplished by zoning or if the payment of compensation is involved.

The nature of the terrain has dictated to a large extent the zoning. The inner city has been deemed to be unsuitable for dwelling purposes because considerable heights shut that area off from atmospheric currents from the west. The exception is the two embankments where the air supply is considered sufficient for their utilization for residential purposes. A maximum density of 560 persons to the hectare has been set for the inner parts. In the new districts where tenement houses are allowed the allowable density is 500 persons to the hectare. In the detached cottage zones a

maximum density of 220 persons to the hectare has been prescribed.

The maximum height of buildings has been set at 22.50 meters on main thoroughfares and four stories in side streets. In streets less than 15 meters in width, three stories is the limit. Among the reasons given for limiting building heights are the climatic conditions in Prague. The number of clear days is small hence there is required a "much greater street width in relation to the height of building". Excessive vertical concentration has been forbidden in order to avoid the danger of congestion in the streets.

The residential quarters where the nature of the terrain and economic reasons admit of tenement houses, the plan allows three-storeyed houses. These at the favorable price of building sites, unddictated by the speculation that so often militates against hygienic dwellings, appear the most advantageous type of building from the health as well as the social and economic point of view.

When the terrain does not allow of tenement blocks open or half-open, the town plan proposes garden cottages either detached or contiguous. Terrace cottages have not yet met with favor in our country. The new positions for industrial plants have been predetermined by the direction of the prevailing winds; consequently extensive areas are being cleared in the east in Liben, Vysocany, Strasnice and Hostivar, and convenient areas have been reserved there for extensive garden colonies for employees, since it is important that the population should be concentrated according to occupation and should live at the shortest possible distance from the scene of labour. This rearrangement of the population is not only of social significance, but allows also of a more economical exploitation of the municipal transport facilities, which often suffer from "rush hours" due to scattered distribution of the inhabitants.12

Lithuania

There is no general zoning enabling act in Lithuania. Compulsory ordinances relating to building activity in each district are passed by the respective municipalities and vary according to individual requirements.

12/ ibid. p. 28.
The Supreme Construction Inspector of the Ministry of the Interior at Kaunas has issued an order requiring residential buildings to have a lot area of not less than 500 square meters and a frontage of not less than 20 meters.

Russia

The Soviet regime is consecrated to the task of converting the old backward Czarist Russia into a planned nation of collective agriculture and socialized industry. With new towns being created and established centers changing radically in character, the science of town planning has come to the fore. The Soviet government, following the paths pointed out by Marx, F. Engels and Lenin, has set up principles which are reflected in town planning practice. The gradual dissolution of large cities, the more rational distribution of the population, the unification of agricultural and industrial production, the establishment of centers of education and instruction in proximity to centers of production are among the essential basic principles of Soviet town planning.

Due to fundamental differences in the theory of government the methods used in Russian town planning cannot be compared with those practiced in America and other capitalist countries. The principal aim of Russian town planning is to establish a relationship of land uses and functions that satisfies the requirements of the communist economy. This is done by establishing zones for various uses. The Soviet theory holds that great concentrations of population are irrational and are the historic fields of capitalist exploitation. Hence the government seeks to arrest the expansion of the old cities. No new industries are allowed
to locate in these centers. In Moscow the Central Executive Committee of the Communist Party has decreed that not only will no new industrial plants be built in that city but that established factories will gradually be demolished as they become obsolete and their sites converted to public open spaces.

New towns are being built to spread the population and to provide fabricating plants at the sources of raw materials. For these towns a section of the Communist Academy has evolved a concrete town planning program. Industrial production is the most important factor in town life and everything else revolves around it. In most other countries the trading and business district is the focal point of the community; in Russia all revolves and is organized about the industrial center. The industrial zone is the starting point. It determines the location and extent of the other zones. Scientific institutions and agencies for technical instructions are logically placed in juxtaposition to the industrial district.

The industrial zone must be separated from other zones by a green belt at least 500 meters wide. The Russian point of view is apparent here for this strip is not only to protect the residential quarters from the noise, dirt and fumes of industry but also to protect machinery from the dust of the city and to facilitate transportation. Through the green belt runs an arterial road. Restaurants and clubs may be built in this zone but not more than 10 per cent of its area may be covered.

A housing zone lies beyond the green space and beyond that, or on the other side of the industrial zone, is the agricultural area.
RUSSIA
A SCHEME FOR A SOCIALIST TOWN for tractor factory in Stalingrad by Prof. Milutin

adapted from illustration in Architectural Review - May, 1932
It can be seen that these principles contemplate a linear type of development with the town strung out along the railroad and the highway with parallel bands devoted to different uses. This basic scheme is modified wherever necessary to meet special conditions of the site. The illustration on page 25 is adapted from a scheme for a socialist town by Professor Milutin, based on these principles laid down by the Communist Academy.

**France**

Height and court regulations are incorporated into the building laws of French cities. In Paris the allowable building height is determined by the street width plus an arbitrary unit of additional height. This added unit of height is in inverse proportion to the street width. On narrow streets the increment may exceed the street width. It decreases as the width of the street increases until on very wide streets it disappears. The height limit is set to the cornice line. There is a maximum of about 65 feet. Above the cornice line the building must be contained in an envelope formed by rather a simple method. An arc is drawn tangent to the facade at the cornice line. The radius of the arc is dependent upon the street width. A plane is established tangent to the arc at an angle of 45 degrees to the horizontal. The envelope is completed by repeating these operations on the rear of the building. Certain adjustments are necessary in the rear where the structure is such that light courts are required.

Where the front line of a building does not coincide with the building line, for purposes of calculation the street width is based on the distance
from the extreme projection of the facade to the opposite building line. Churches and public and private buildings of a monumental character may exceed the height limit with the approval of the authorities. A committee has been at work for some time revising these rules. It proposes to make it possible for buildings with sufficient lot area to be built to about fifteen stories. Under the new regulations it is proposed that above the cornice line a building may rise about 50 feet in addition provided that it sets back within an angle of 27 degrees to the perpendicular. This will result in a maximum height of about 115 feet.

The regulations provide also for much larger interior courts than have been required heretofore. Consequently, only buildings with a fairly large ground area will be able to take full advantage of the increased height limit.

Sweden

Zoning found favor in Sweden soon after it was developed in Germany in the latter half of the nineteenth century. The control exercised by the regional planning authority of Stockholm may be cited as an example. The metropolitan area is planned by a regional agency. Local ordinances give legal effect to the plans with the regional planning authority acting as a coordinating agency. Included in the plans are familiar use, height and density restrictions. It is the practice to establish a maximum building envelope for each individual lot at the time of subdivision. The building police, which inspects all development plans, exercises such
a degree of control that in effect many buildings submitted for approval by private individuals are redesigned by the architect of the city building police.

A more or less literal translation of that part of the Town Planning Law for Stockholm dealing with zoning follows:

In the town planning regulations shall be included the bye-laws which are found necessary for the regulations of the building of the blocks, such as:

- the use of an area for certain kinds of buildings;
- the prohibition against building on certain parts of areas;
- the profile and boundaries of buildings;
- the size of the court-yards, the number of buildings which may be erected on a site, and the position of the buildings on a site;
- the height of buildings and the number of stories and, where circumstances call for it, the number of dwellings which may be accommodated in a building; and building materials and building profiles. New buildings may not be undertaken in conflict with the regulations of the town plan, the structure plan, or the external plan; but exemption may be granted by the King in conformity with the regulations as issued by the King in the general statute, and by the authorities stated therein, when there are special reasons and the new building will not in any considerable degree embarrass the use of the land for an extended purpose.

Holland

All communities in Holland which experience an increase in population of over 20 per cent in a five year period are required by law to prepare town planning schemes. Preparation of a scheme in other communities is optional. The use of land likely to be developed is controlled by the plan.
STADT BERN
LIEBERSICHTSPLAN DER BAUKLASSEN

BAUKL. I - BAUKL. V
FÖRDERFLÄCHEN

BAUKL. VI - BAUKL. VIII
OFFENE BAUWEISE

BAUKL. VI - BAUKL. VIII
GESCHLOSSENE BAUWEISE

BAUKL. V
INDUSTRIEGEBIETE

BAUKL. VII
WALD

Für die Bauklassen Industrie- und Schutzgebiete gelten die Angaben der Beilage I zur Baugenehmigung.
Switzerland

Zoning as practiced in Switzerland is very similar to that in Germany. Establishment of use districts is practiced. Aesthetic control is exercised over all buildings visible from a highway. The zoning map of the City of Bern is shown on Page 29. There are two main classes of building districts, a close development district and an open development district; each has four classifications within it. Industrial areas are superimposed on these districts.

Italy

Zoning is practiced extensively in Italy. What may be considered the earliest modern town planning law was the Italian Town Extension Act of 1865, providing for the control of suburban developments. In Italy as in many other European countries zoning regulations are written into the building code.

AUSTRALIA

New Zealand

The Town Planning Act, 1926, makes it obligatory for all boroughs having a population of 1,000 and over to prepare town planning schemes. Boroughs with a population of less than 1000 may prepare schemes and in certain cases may be required to by order of the Governor General. The responsibility for preparing these schemes rests with the proper borough. The procedure is that a town planning scheme is prepared, provisionally approved by the town planning board, a central board appointed by the Governor General, and submitted to the public for suggestions and criticisms. Any criticisms are
adjudicated upon by the town planning board whose decision is final and binding on both the local authorities and the public. The scheme is then finally approved and gazetted, thus becoming law. Among other things, a town planning scheme may deal with "buildings with particular reference to their position on allotments and in relation to any road or street or to other buildings, their density, character, height, and harmony in design".

The model clauses prepared by the Director of Town Planning for the guidance of local authorities resembles very closely a typical American zoning ordinance. There is provision for the following types of districts:

a. special residential districts
b. general residential districts
c. local commercial districts
d. commercial districts
e. light industrial districts
f. heavy industrial districts

The special residential districts are, in effect, dwelling districts, while the general residential districts permit apartment houses. There are the usual provisions for accessory uses and for the continuance of non-conforming uses. The Borough Council is authorized, subject to the approval of the Town Planning Board to give consent for the use of any land or building for a purpose not authorized in a district in which such land or building is located. Such consent may be granted only on the ground of public convenience or to avoid undue hardship and may be for a limited period or subject to such conditions or restrictions as the Council sees
fit to impose. The most recent information available, April 23, 1937, reveals only two Town Planning Schemes in operation in New Zealand, those for Timaru and Papatoetoe. Several others are in the course of preparation.

New South Wales

New South Wales has no comprehensive town planning act comparable to that of New Zealand. Parts XI and XII of the Local Government Act, refer to building regulations and town planning respectively, authorize a certain degree of control. The City of Sydney does not come under the provisions of the Local Government Act, having an act of its own known as the Sydney Corporation Act, the provisions of which are to some extent similar to those of the Local Government Act.

The Local Government Act empowers the Governor, upon the application of a municipal or shire council, to declare by proclamation certain areas to be "residential districts" and to prohibit the erection in such districts of any building for use for the purposes of such trades, industries, manufactures, shops and places of public amusement as may be described in the proclamation. The local council is given the power to fix the number of houses per acre for future subdivisions of land within the area.

There is no provision in New Zealand for dividing a municipality into districts for various types of use. The "residential district" is all that is possible. Samples of residence district regulations, however, indicate a wide variation in permitted use, some excluding everything but those uses found in a high class American residence district and others allowing all uses but heavy industry.

15/ Act No. 41, 1919
There is contained in the Height of Buildings (Metropolitan Police District) Act, 1912, special provisions regulating the height of buildings. The Act, however, applies only to the Metropolitan Police District of Sydney, which comprises that portion of the State lying roughly within a radius of about 18 miles of Sydney. The Act provides, inter alia, that a building, church towers, chimney and ventilating stacks excepted, shall not under any circumstances be erected to a height of more than 150 feet nor shall it be erected to a height of more than 100 feet without the issuance of a permit by the Chief Secretary nor unless the skyline of the building has been approved by him and unless the Chief Officer of Fire Brigades has certified to the Chief Secretary that adequate provision has been made for protection against fire. This, of course, is not zoning but rather a blanket height limitation. Its interest is in the permissive clause relating to buildings between 100 and 150 feet in height.

The Newcastle metropolitan area has a similar regulation.

The enactment of comprehensive town planning legislation has been under consideration for some years but as yet has not come to a head.

SOUTH AMERICA

Chile

In Chile the Bureau of Public Works, under the direction of the Ministry of Promotion (Ministerio de Fomento) has supervisory authority over the enforcement of building regulations including zoning provisions. The basic city planning enabling act (Ley General sobre Construcciones y Urbanización) is No. 4882 of November, 1935. It requires that all cities
and villages with a population of more than 8,000 shall establish an official city plan which must be approved by the President of the Republic. Among other things the city plan can establish height limits by zones and fix building lines. Provisions are made for four types of use zones; industrial, commercial, residential and a workingman's zone. The residential zone for detached or multi-family houses, may establish aesthetic requirements and standards of cost and spaciousness. No business is allowed except that necessary for the convenience of the inhabitants in that zone.

A "barrio obrero" or workingman's zone is provided for the homes of that class.

**Ecuador**

Two or three of the largest cities of Ecuador have building regulations that incorporate features of zoning ordinances. The regulations of Guayaquil, capital and largest city in Ecuador, with a population of approximately 137,000, may be considered typical. Building permits are issued and construction is regulated by the Comisión de Construcción y Ornato (Building and Art Commission) of the County Council of Guayaquil. The building ordinance is found in the code of municipal ordinances (Codificación de Ordenanzas Municipales) published in 1950. The ordinance is entitled Ordenanza de Construcción y Ornato Público. The ordinance provides that industrial plants can be constructed only in the southwest end of the city. This leaves a large part of the city residential in character, although the ordinance apparently does not prohibit the use of existing structures for certain types of shops in the remaining section from which the construction of industrial plants is excluded. Articles 47 and 48 of the same
ordinance provide that buildings on three of the main streets shall not be of less than three stories and that buildings on all Plazas shall be at least two stories in height. An interpretive ruling on article 47 has required that all new structures on the principal avenue of the city, Boulevard Nueve de Octubre and on Centenary Plaza be of concrete. The ordinance also divides the city from north to south into two sections ("circuitos") for the purpose of specifying certain types of construction material to be employed in building fences and side-walks. With the exception of certain small sections of the cities, all structures must over-hang half of the side-walk so that all stories above the ground floor rest on columns forming an arcade.

Peru

Lima has certain building regulations which apply to specified principal streets. The Supreme Resolutions of November 30, 1935, and of February 16, 1937, provide for the control and restriction of the construction of houses or buildings on several of the more important avenues in the city. The avenues in question are for the most part the main thorough-fares which connect the city of Lima with the principal suburbs and the regulations aim principally at having the buildings on these avenues as uniform as possible. The regulations require a certain area of garden in front of houses on certain avenues and specify the distance buildings must set back from the street line.

Brazil

It appears that Brazil has no zoning ordinances or other property restricting ordinances. However, on June 10, 1935, there was presented
to the municipal assembly of Rio de Janeiro, a rather extensive proposal to regulate building and to define business and residential districts. It was not adopted but the local press has recently reported that this proposal, or another similar in purpose, may be passed in the near future.

CANADA

While Canada is very similar to the United States in many ways and while the development and spread of zoning in Canada was coincident and inseparably tied up with the evolution of zoning in America, there are certain fundamental differences in the governmental structure of the two countries which are reflected in Canadian zoning practice. The relationship of the Canadian provinces to the national government is based on an entirely different theory of government than that which has determined the relationship of the American states to the federal government. The provinces derive their authority from the central government at Ottawa and can exercise such powers only as are delegated to them by Ottawa. In the United States each state is sovereign and may regulate its internal affairs as it sees fit, subject to judicial review of the constitutionality of its acts by its own courts and by the federal courts. In Canada, a legislative act duly passed is law and remains law until repealed by legislative action. The courts have no power to annul a law on the grounds of unconstitutionality. The function of Canadian courts is limited to interpretation of the law. A realization of these fundamental differences in Canadian and American legislative systems is essential in studying the development of zoning in Canada in comparison with zoning in the United States.
Town planning in Canada has been influenced from two important sources - England and the United States. In general it may be said that the town planning acts of Canada have been inspired by and follow rather closely the English example, while the sections of those acts that provide for zoning parallel closely enabling acts in the United States. In practice Canadian zoning is also very much like that of this country with a few important differences.

Alberta

Zoning in Alberta is authorized under the Town Planning Act of 1929, being Chapter 49 of the Statutes of Alberta, 1929. The act provides for the adoption of zoning by-laws by the Council of any municipality. In the case of an improvement district the Minister of Public Works may make the regulations. The zoning by-laws may establish use, bulk, and area districts, maximum population densities for districts, the size of rooms and the means of lighting and ventilating the same. There is also provision for aesthetic control.

Part II, Section 30, describing the regulatory powers of the Council reads in paragraph 1 (a):

...controlling the architectural design, character, and appearance of any or all buildings proposed to be erected in any district or part of a district, or fronting upon any street or part of a street and prohibiting the erection of any building in contravention of such regulation.

The Attorney General's Department of Alberta has held that the above section does not permit a general elastic control over community aesthetics, but that it gives the power to control certain features specifically
mentioned in the local by-laws. For instance, under this section a by-law could properly require that in a residential district all buildings must be painted. As illustrative of architectural control, the Edmonton Zoning By-Law, 1955, requires that in Local Business Districts,

...all buildings shall be of a domestic architectural style and finished in a manner conforming in general to that of the adjoining district in accordance with designs previously submitted and approved by the City of Edmonton Town Planning Commission.

It would seem that in practice architectural control regulations are sufficiently broad to permit a real degree of control.

Another provision of the Alberta act prohibits:

...the erection of any buildings in any district or part of a district until provision has been made, to the satisfaction of the Council, for the supply to such building of light, water, sewerage, street transit and other facilities or any of them which the Council may deem necessary.

The prohibition of buildings altogether in certain districts has been experimented with in a few ordinances in the United States, but the legality of such regulations has not yet been tested in the courts.

Provision for hearing appeals is mandatory. A Zoning Appeal Board may be established by the by-law, otherwise appeal may be made to the Town and Rural Planning Advisory Board (Provincial board) acting as a Zoning Appeal Board. The Minister of Public Works must approve all by-laws and amendments and also the repeal of any by-law.

An interesting new development dictated largely by local conditions was described by Horace L. Seymour, Town Planning Consultant, Ottawa, at the Ottawa Planning and Housing Conference, 1957. Part of Mr. Seymour's
...Alberta established leadership by providing for Agricultural and Public Park Districts in zoning by-laws, as for example in the Edmonton Zoning By-Law, 1933.

Most cities and towns in Alberta include large areas of land within their boundaries - areas that were once subdivided, but much of which has reverted to the municipality as tax sale lands. The municipality does not ordinarily wish to have such lands pass out of direct control, and so an agricultural classification, permitting farming and farm buildings, but not more than, say, one dwelling per acre seems a logical solution of the problem. In such agricultural districts the assessment can be low, but few utilities need be provided. An agricultural belt of land surrounding, but part of, an urban centre is encouraged, as in the case of English "Garden Cities". In a Park District no buildings or uses of buildings and land are permitted except for public parks and municipal or community purposes. Most of the land so classified is owned by the municipality and more effectively held for the purpose intended than if a succeeding Council without particular thought parted with some of its land.

These "agricultural" districts are not only similar to the green belts of English garden cities but, aside from the factor of the ownership of land, parallel closely the single family zones with acre lot requirements that some progressive American towns are now establishing on their outskirts. If the Government is satisfied that it is the public interest that a local authority should prepare and adopt a zoning by-law, it may order the local authority to propose and adopt a by-law within a fixed time.

Under the Alberta act also, though not under the zoning section, the Town and Rural Planning Advisory Board can formulate regulations for any highway which is not included in any city, town or village. Such regulations may include control of the design, location and construction of filling stations, garages, refreshment stands, billboards and advertising devices.
along the highway. Under this authority the Board has forbidden signs except within two miles of a city or town and then at least 1,000 feet apart, and has decreed that all filling stations, garages, and refreshment stands set back at least sixty feet from the center line of the highway.

**British Columbia**

The Town Planning Act for British Columbia was enacted in 1925. More than any of the other Canadian planning acts, it shows a marked similarity to the usual American enabling act. A Board of Appeals of three members is required by the law. No member of a Board of Appeals can be a member of the Town Planning Commission. The non-conforming use provisions were tightened up by amendments in 1931 by providing that upon discontinuance of a non-conforming use for thirty days, the future use of the property shall conform to the regulations of the district in which it is located. The zoning by-law need not have the approval of the Provincial Government as is the case in each of the other provinces (except Ontario) where there is general town planning legislation.

**Manitoba**

Zoning is accomplished in Manitoba under the Town Planning Act of 1916. While the act contemplates comprehensive town planning schemes in practice, the schemes are nothing more than zoning plans. Twenty-five municipalities have adopted zoning regulations under the act, while there has been no comprehensive town planning scheme adopted in the province. In the areas immediately surrounding Winnipeg, zoning is effectively administered according to Mr. M. A. Lyons, Comptroller of Town Planning for
the province. In some of the smaller municipalities, especially those new town sites developed in the last ten years, and required to have a town planning scheme, authorities are lax in the enforcement of zoning regulations.

Any Manitoba municipality of any type may zone. The City of Winnipeg has special provision in its charter for zoning.

New Brunswick

The New Brunswick Town Planning Act of 1936 is almost identical in its provisions with the Alberta Act. The New Brunswick Act makes mandatory a Zoning Appeal Board and stipulates that

...the Chairman of the Board shall be a barrister of not less than five years standing.

Nova Scotia

The only authority for zoning in Nova Scotia is contained in the general Town Planning Act of 1915. Zoning is not specifically mentioned by name nor is there any separate section dealing with these matters usually found in a zoning enabling act. However, under the listing of things that a Local Board, established under the Act is required to deal with the following paragraphs are found:

#4-Limiting the number of separate family dwelling houses to the acre and the extent of each sub-division to be built upon, and securing adequate light and air to the windows of each house as far as reasonable for the purpose of this Act.

#5-Prescribing certain areas which are likely to be used for building purposes for use for separate dwelling houses, apartment
houses, shops, stores, etc., and the height or general character of buildings to be erected or reconstructed as far as reasonable for securing the amenity of such areas.

Compensation for property alleged to be injuriously affected by regulations authorized by the paragraphs above is specifically ruled out by Section 14, paragraph 2.

Property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in town planning by-laws or in a town planning scheme, which with a view to securing the amenity of the area affected by the by-laws or included in the scheme, or any part thereof, prescribe the space about buildings, or limit the number of buildings to be erected, or prescribe the height, character or use of buildings and which the Commissioner having regard to the nature of the situation of the land affected by the provisions, considers reasonable for the purpose.

This act was compulsory, making mandatory upon every Local Authority the creation of a Local Board which

...shall within three years after the passing of this Act prepare a set of town planning by-laws for adoption in its area.

The time limit was later extended to six years. In spite of the mandatory provision very little advantage has been taken of the Act and effective zoning is unknown. Good permissive legislation for those communities that want to zone is often more effective than general compulsory legis-

ation.

Ontario

Zoning in Ontario is carried on under the Municipal Act and the Ontario Municipal Board Act. The legislation provides for the zoning of any area in any municipality. Practically all of the large munici-
palities in the province are carrying on some practical scheme of zoning,
and it is quite common for a municipality to zone a small street, avenue, or area. There is little in the way of effective comprehensive zoning in the province.

**Prince Edward Island**

There is no zoning practiced in Prince Edward Island other than zoning for fire protection in the City of Charlottetown by municipal by-law enacted under direct statutory authority.

**Quebec**

The Province of Quebec has no general planning or zoning law. All of the largest cities and towns have special charters, and zoning powers are included in these charters. As a general rule the zoning powers included in a special charter are those of Article 592-A of the Municipal Code. This article grants the power to enact a building code and all the usual features of a zoning by-law including regulation of the architecture and symmetry of buildings.

**Saskatchewan**

The authority for zoning in Saskatchewan is the Town Planning Act of 1950, Chapter 123, Statutes of 1950. Any city, town or village may adopt a zoning by-law and any small municipality may adopt zoning regulations applicable to any specified hamlet within its boundaries. There are about a dozen zoned municipalities in the province but in only the larger cities is there a really effective zoning scheme.
CHAPTER II

HISTORY OF ZONING IN THE UNITED STATES

Early Experiments with Control of Property

Although it was not until the twentieth century that the idea of zoning as we now understand it was borrowed by Americans from Europe, there are evidences that from the earliest colonial days control of the use and development of private property in the public interest has been practiced here. Soon after the founding of the town of Cambridge in the Massachusetts Bay Colony it was required that "Houses shall range even and stand just six feet in their own ground from the street." 1

This is the first example of a set back or building line regulation in the New World.

In 1692 noxious industries were first brought under control and segregated. Chapter 23 of the Province Law reads:

Sec. 1. That the selectmen of the towns of Boston, Salem, and Charlestown respectively, or other market towns in the province, with two or more justices of the peace dwelling in the town, or two of the next justices in the county, shall at or before the last day of March, one thousand six hundred and seventy-three, assign some certain places in each of said towns (where it may be least offensive) for the erecting or setting up of slaughter houses for the killing of all meat, still-houses, and houses for trying of tallow and currying of leather ..., and shall cause an entry to be made in the town-book of what places shall be by them so assigned, and make known the same by posting it up in some publick places

1/ Town records, p.4
of the town; at which houses and places respectively,
and no other, all butchers and slaughtermen, dis-
tillers, chandlers, and curriers shall exercise and
practice their respective trades and mysteries ...

This regulation was primarily for the purpose of fire protection. In
1710 an amendment to the act made necessary by the growth of the colony
reveals that the reasons for segregation of the specified industries
were expanded. The Act reads:

Whereas in and by the act entitled "An Act for pre-
vention of common nuisances arising by slaughter houses,
still-houses, etc., tallow chandlers, and curriers," made and pass'd in the fourth year of the reign of
their late majesties, King William and Queen Mary, it
is enacted,...; but forasmuch as, by reason of growth
and increase of said towns, several of the houses and
places then so assigned are become inconvenient for the u
use intended, offensive, and by ill stenches tend to
breed infection; and the said act directing to that
time only for the assigning of places for those uses,
and not looking forward,-
Be it enacted, etc.

That when and so often, from time to time, as it
shall appear any house assigned or to be assigned to
and for the exercising of either of aforesaid trades
or mysteries, to become a nuisance because of offensive
and ill stenches proceeding from the same, or other
wise hurtful to the neighborhood, it shall and may be
lawful, to and for the court of general sessions of
the peace within the county, to cause inquiry to be
made there unto by a jury, and to suppress such nuisance
by prohibiting and restraining the further use thereof
for the exercise of either of the aforesaid trades or
mysteries, under a fine not exceeding forty shillings
per month...and by causing the said nuisance to be re-
moved or prevented, or any other nuisance to be inquired
of in manner aforesaid.2

This is the earliest example of the control of use of private prop-
erty in America. Although it is not truly zoning but rather a nuisance
regulation, it was nevertheless the acceptance of such regulation that
paved the way for the later introduction of the principles of zoning.

2/ As quoted in "Zoning--and Planning", Edward T. Hartman, Massachusetts
Federation of Planning Boards; Bulletin No.33, February, 1936.
An early requirement of the planned capitol city of Washington provided that houses in central areas be of brick or stone, that the buildings be parallel to the street line and be thirty feet in height.

Regulation of Objectionable Uses

Zoning is a product of urbanization. In 1800 but 3.9 per cent of our people were city dwellers; by 1860 the number had increased to 16.0 per cent; in 1900 there were 40.0 per cent; and in 1930 the census classified 56.2 per cent of the country's population as urban. As hamlets became villages, and villages became cities, and cities doubled and trebled in size, the need for effective control over the construction, location and use of private buildings became acute. Ugly slum areas, breeding spots of disease and vice became the disgrace of all of our larger cities. Expansion resulted in land speculation and unhealthy fluctuation of real estate values; industrial and business uses were indiscriminately scattered throughout residential areas, casting a blight on neighboring property; multi-family units, tenement houses, were erected with the sole purpose of providing for as many families as could be possibly crowded on the lot; towering business buildings housing hundreds and thousands of workers threatened to impose an intolerable load on narrow streets and to shut off light and air from the streets in central districts. Public control over development of private property became necessary in order to insure some degree of orderliness in the physical pattern of the city and to put a halt to the physical, social and economic conditions that were
the inevitable result of laissez-faire in real estate development.

Although the first true zoning law adopted in this country was the New York City ordinance of 1916 which was inspired largely by the German example, for many years previous various American cities had been experimenting with restrictions of property "rights" seeking a solution for the problems of urbanization.

It is to California that we must look for the earliest application of zoning principles in the restriction of property uses. The early California ordinances were not considered zoning laws and indeed their principal raison d'etre was for quite another purpose. However, in retrospect they mark the beginning of the modern zoning movement. From 1870 to 1890 was a period of violent racial feeling against the immigrant Chinese in California. Discrimination against the Chinese was sought in many state laws and city ordinances but was successfully fought in the courts. At that time, the Chinese operated laundries in all parts of San Francisco and other cities. Many of the laundries were used as clubs by the Chinese. The laundry buildings were usually of wooden construction and constituted a definite fire hazard because of the extensive use of fire within the buildings for the heating of water and irons. The disposal of wastes into inadequate drainage systems and often into the gutters was not only offensive to the eye and nose but a menace to public health. The considerations of fire protection and health promotion were seized upon by San Francisco as a basis for regulatory ordinances aimed at segregation of the Chinese. The preamble to an early San Francisco ordinance
Whereas, the indiscriminate establishment of public laundries and public washhouses, where clothes and other articles are cleansed for hire, is injurious and dangerous to public health and public safety, and prejudiced to the well-being and comfort of the community and depreciates the value of property in those neighborhoods where such public laundries and such public washhouses are situated.3

The ordinances were enacted under the police power delegated by Section II, Article II of the Constitution of the State of California. Laundries were prohibited in certain sections of the city except after special permits from the Fire Wardens, the Board of Public Health or Supervisors. This amounted to virtual prohibition since the authorities seldom granted permits. In 1885 the right of San Francisco to regulate laundries was upheld by the Superior Court of California in the matter of Yick Wo. The judgment was affirmed by the California Supreme Court upon appeal.4

The City of Modesto, California, in 1885 established a district within which laundries were to be confined. The ordinance states:

It shall be unlawful for any person to establish, maintain, or carry on the business of a public laundry or washhouse where articles are washed and cleansed for hire, within the City of Modesto, except that part of the city which lies west of the railroad track and south of G street.5

The ordinance further declared any laundry not located in the prescribed area to be a nuisance. In a test case the Supreme Court of California ruled:

The City of Modesto has authority under Section II, Article II, of the Constitution, to pass an ordinance prohibiting the carrying on of a public laundry

3/ In the matter of Yick Wo, 68 Cal. 300.
4/ In the matter of Yick Wo, 68 Cal. 294.
5/ In re Hang Kie, 69 Cal. 149.
or washhouse within the city limits, except within
certain prescribed boundaries. Such an ordinance
is not unreasonable, nor in violation of Article I,
Sections II and 21, of the Constitution because not
uniform in its operation. 5

On the basis of favorable judicial decisions in the laundry cases,
San Francisco and other California cities added to restricted uses,
dance halls, saloons, livery stables, pool rooms, slaughter houses
and like enterprises.

Throughout the country, other cities experimented cautiously with
regulations for the control of various objectionable businesses. In
1893, the courts of Missouri upheld a St. Louis ordinance restricting
livery stables. The court declared:

A livery stable is not per se a nuisance. The
power conferred on the City of St. Louis to regu-
late livery and sales stables includes the right
to limit them to certain localities and to provide
for their cleanliness so that they may not become
injurious to health. 6

The significant factor in this and other cases of those years was
the sympathetic attitude of the courts towards attempts to regulate
uses not actually nuisances. This extension of the application of the
police power helped pave the way for later acceptance of zoning.
Alfred Bettman points out that, though zoning and other kinds of prop-
erty regulation have the same fundamental basis as the law against
nuisances, "no greater fallacy could exist than that zoning is re-
stricted to or is identical with nuisance regulation". 7 Newman F. Baker
says "The reason that we have zoning today is found in the fact that
the law of nuisance has been unable to keep pace with municipal growth." 8

5/ In re Hang Kie, 69 Cal. 149
   (May, 1934) p.841
8/ Baker, "The Legal Aspects of Zoning", 1927, p.128
Height Regulations

The limitation of building heights under the police power began in Washington D.C. which by federal statute in 1899 divided the city into districts and established height limits for each district. The previous year Boston,\(^9\) by state statute, had placed a height limit of ninety feet on the buildings about Copley Square.\(^{10}\) Aesthetic reasons, rather than considerations of public health, safety or morals prompted the Copley Square restrictions and they were established under the power of eminent domain with provisions for compensation rather than under the police power. The law was contested but upheld by the Supreme Court of Massachusetts in 1906 in Attorney General v. Williams.\(^{11}\) The Court stated in part:

Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments or the exercise of police power, for the safety, comfort, and convenience of the people and for the benefit of property owners generally.\(^{12}\)

There was a plain hint here that height restrictions based on the proper considerations would probably be upheld by the court as a legitimate exercise of the police power. Boston took the hint and in 1904, by statute,\(^{13}\) the city was divided into height districts under the police power. In Welsh v. Swasey\(^{14}\) the Supreme Court of Massachusetts upheld the law, stating:

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as to materially exclude sunshine, light, and air, and thus affect the public health. It may also increase the danger to persons and property from fire and be a subject for legislation on that

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\(^9\) For complete account of evolution of height restrictions in Boston see Report of Heights of Buildings Commission, City of New York, 1913, pp.154-1
\(^{10}\) Mass. Acts of 1898, Ch. 452.
\(^{11}\) (1899) 174 Mass., 476, 55 N.E. 77.
\(^{12}\) 174 Mass., at 478.
\(^{13}\) Mass. Acts of 1904; Ch. 333.
ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good.

About the same time Baltimore and Indianapolis restricted the height of buildings in certain areas. The Baltimore ordinance was supported by the Maryland courts in 1908 in Cochran v. Preston. Virginia in 1908 passed an act permitting cities and towns to make regulations concerning the building of houses in the city or town, and in their discretion . . . in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain percentage of lots free from buildings, and to regulate the height of buildings. Under the authority conferred by this act the City of Richmond passed an ordinance requiring the committee on streets of the city council to establish a building line when requested to do so by owners of two-thirds of the property affected. The validity of this ordinance was upheld by the Supreme Court of Appeals of Virginia in 1910, but denied when carried to the Supreme Court of the United States in Eubank v. City of Richmond. The statute itself was not declared unconstitutional but merely the illegal delegation of legislative power by the council to a group of property owners.

Tenement House Laws

In a related field and brought about primarily by sociological reasons, regulation of private property was making progress in some of the larger eastern cities. Tenement houses had become open sores on the face of New York and other cities. Persistent agitation by
the social-minded finally resulted in tenement house laws. Such laws usually specified the percentage of the lot area that could be covered by a tenement house. Courts were required in many cases in order to satisfy minimum requirements of light and air.

The same phenomenon of urban concentration and congestion forced cities to experiment with building and sanitary codes and with fire zones.

**Use Districting in California**

During the first decade of the 1900's experiments with use zoning or districting were tried by several American cities. Stories of the effectiveness of the zone systems of German and Scandinavian cities reached our shores and aroused the interest of the social minded. The city of Los Angeles went further than any other in this period.

Beginning in 1909, Los Angeles enacted a series of ordinances dividing the city into residential and industrial districts. On December 28, 1909, seven industrial districts were established in Los Angeles by municipal ordinance. Practically all the rest of the city was made a residential district on January 10, 1910. Then followed a series of ordinances which brought the number of industrial districts up to about twenty-seven. The industrial districts were widely scattered throughout the city and varied in size from one area of several square miles to a single lot. In most of the industrial districts business and manufacturing of all sorts were allowed. The combined area of industrial districts equalled approximately one-tenth of the city's area. In addition there were a great number of "residence
exceptions. These exceptions were really spot zones distributed throughout the residence district. They varied in size from about one-half a square mile to a single lot. Certain specified uses were excluded from the residence district, while nearly anything was allowed in a residence exception. In order to establish a residence exception it was necessary to secure the consent of sixty per cent of the owners of neighboring property.

The Los Angeles regulations were soon tested and upheld by the court. A Chinese, one Wong Wo, was arrested for maintaining a laundry in the residence district. The California Supreme Court held in October 19, 1911:

The City of Los Angeles has power, by ordinance to divide its territorial limits into industrial and residential districts, and by subsequent ordinances to change the boundaries thereof, and to prohibit the carrying on within the residential district as so originally established or subsequently modified, of certain kinds of business, among these the business of a public laundry, when there is nothing to indicate that distinctions so made with reference to the particular localities were unreasonable and the ordinances were not intended to operate peculiarly against any particular race, and make no unlawful discrimination between persons or classes of persons, but apply equally and uniformly to all engaged in the kinds of business prohibited.19

Hadacheck Case

One case growing out of the Los Angeles ordinances was carried to the United States Supreme Court and became one of the leading cases in the field of zoning. In Ex Parte Hadacheck,20 the California Supreme Court on May 13, 1913, upheld the Los Angeles ordinance and ruled that a brick-yard which was established in a residence district before the

19/ Ex Parte Quong Wo, 161 Cal. 220.
20/ Ex Parte Hadacheck 165 Cal. 416.
the ordinance was adopted must be removed. One J. C. Hadacheck had established a brick-kiln and yard on the outskirts of Los Angeles in 1902. At that time there were no residences nor any other development in the district in which the brick-yard was established. With the expansion of the city, a residential neighborhood had sprung up around the brick-yard which had been there for several years. The right of the city to force out the brick-yard was upheld by the court.

Hadacheck thus brought suit against the Mayor of Los Angeles in an attempt to restrain the city from enforcing the ordinance. When the State Supreme Court refused to restrain the city, an appeal was taken to the Supreme Court of the United States. There the state courts were upheld. The court stated:

A municipal ordinance enacted in good faith as a police measure, prohibiting brick-making within a designated area, does not take, without due process of law, the property of an owner of a tract of land within the prohibited district, although such land contains valuable deposits of clay suitable for brick-making which cannot profitably be removed and manufactured into brick elsewhere, and is far more valuable for brick-making than for any other purpose, and had been acquired by him before it was annexed to the municipality, and had long been used by him as a brick-yard.

Here there was upheld the city's right to not only prohibit the establishment in a designated district of an otherwise lawful use, not a nuisance per se, but the right of a municipality to force the abandonment of an existing use not in accordance with the regulation of the district in which it found itself. The retractive feature of the ordinance applied only to objectionable uses in residence districts.

21/ Hadacheck v. Alexander, 169 Cal. 616.
22/ Hadacheck v. Sebastian, 239 V.S.S. 394.
Retroaction, however, is not a usual feature of zoning. Most zoning ordinances adopted subsequent to 1916 follow the cautious example of the New York model and avoid the danger of being held unreasonable by giving legal status to "non-conforming uses."

Other Early Use Districting

Grand Rapids, Michigan, established residence districts in 1910 but the ordinance was declared void by the Superior Court because there had been no delegation of authority by the legislature. The police power under which zoning regulations find justification is a power of the state and not of the city, and can be exercised by the city only upon specific delegation of authority by the state.

Zoning in California had been sustained without any specific grant of the police power by an enabling act. However, the California situation was unique in that the home rule provisions of the state constitution delegate broad powers. It was under these provisions that the early California ordinances found authorization for zoning. An enabling act has since been adopted in that State. In other states it was to bring about the proper delegation of power through an enabling act that the energies of the zoners now turned.

Massachusetts had had since 1872 a statute23 permitting municipalities to regulate the materials, construction and safe use of buildings. Ten years later when this act was incorporated into the Public Statutes of 1882 the term "safe use" became merely "use". There is little doubt, however, that at that time the word "use" was intended to mean only the safe use of building. The interpretation of the term

23/ Mass. General Laws; Ch. 143, Sect. 3.
has since broadened. In 1912 the law was amended to permit the regulation of the "height, area, and location" of buildings as well as the materials, construction, and use. The law was further stated to be in the interest of health and morals as well as for purpose of safety. With the addition of the words "health" and "morals" the implication of the word "use" changed to what we now consider the word to mean in connection with zoning. Massachusetts then in 1912 had the first comprehensive zoning enabling law.

The following year, Wisconsin passed an act authorizing cities of 25,000 or more to set aside residential districts; Minnesota enabled cities with population in excess of 50,000 to do the same. The Minnesota act was retroactive. Illinois passed an enabling act which was vetoed by the governor on advice by the attorney general that the act was unconstitutional. In the same year New York enacted a housing law for second-class cities. That law made provision for establishment of residential districts. The New York act authorized the common council, upon petition of two-thirds of the owners of property on one side of a street between two intersecting streets, to establish a residence district. The act was repealed two years later.

**Comprehensive Zoning**

Zoning both for use and bulk was first suggested and put into operation in Germany. About 1904 the German zone system was first seriously studied in this country with a view to adaption to American needs. All zoning legislation in the United States after that time was enacted with

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24/ Wis. Laws of 1913, Ch. 743.  
25/ Minn. Laws of 1913, Ch. 420.  
26/ N. Y. Laws of 1913, Ch. 774.
knowledge of the aims and results of the German system and has been more or less influenced by it.

New York Ordinance

New York City in 1913 became conscious of the chaotic and wasteful development that resulted from uncontrolled and unguided growth. Early in that year the Board of Estimate and Apportionment set up a committee to study the possibility of regulating the height and bulk of buildings and adopted resolutions which stated:

WHEREAS, There is a growing sentiment in the community to the effect that the time has come when effort should be made to regulate the height, size and arrangement of buildings erected within the limits of the city of New York, in order to arrest the seriously increasing evil of the shutting off of light and air from other buildings and from the public streets, to prevent unwholesome and dangerous congestion both in living conditions and in street and transit traffic and to reduce the hazards of fire and peril to life;

RESOLVED, That the Chairman be authorized to appoint a committee of three members of the Board of Estimate and Apportionment to take this general subject under consideration, to inquire into and investigate conditions actually existing, and to ascertain and report whether, in their judgment, it is desirable to regulate the height, size and arrangement of buildings hereafter to be erected or altered within the city limits, with due regard to their location, character or uses, to examine into the practice and the comparative experience of other cities either here or abroad, and to consider and report upon the question of the legal right of the city of New York to regulate building construction in the manner proposed; and be it further

RESOLVED, That such committee may also investigate and report whether, in their judgment, it would be lawful and desirable for the purpose of such regulation to divide the city into districts or into zones, and to prescribe the regulation of the height, size
and arrangement of buildings upon different bases in such different districts or zones; and be it fur-
ther

RESOLVED, That the committee, when appointed, may in turn appoint an advisory commission to aid it in its work, such commission to consist of as many members as the committee may determine, serving without pay, if not already in the employment of the city, but including representatives of each of the several boroughs, and that either the committee or its advisory commission may hold public hearings in each of the boroughs and may use all appropriate means to bring the subject to the attention of the taxpayers and to other persons who may be interested, etc.

An advisory commission of nineteen citizens with Edward M. Bassett as chairman was appointed. The commission made a thorough study of European methods as well as what had already been accomplished in this country and in December of 1913 submitted its report.

That report strongly urged not only the establishment of regulations fixing different height limits for different parts of the city but also recommended districting for use. The Board of Estimate and Apportionment, with the approval of the Board of Aldermen, had power under the charter of the City of New York to limit the height of build-
ings. This power was only for a uniform height restriction throughout the city and did not imply that different height limitations for dif-
ferent parts of the city or for different uses could be established.

The commission recommended that amendments be presented to the State legislature granting the city the right to establish height districts and also to prescribe the use of private property in different dis-
tricts. The necessary legislation was passed in the form of a dele-
gation of police power from the state to the city.
A new commission was established with much the same personnel as the Height of Buildings Commission and with Mr. Bassett again as chairman. Much powerful sentiment was rallied to the support of suggested regulations by those who sought to halt the invasion, then in progress, of the Fifth Avenue residential and retail district by industrial buildings, especially loft buildings housing the needle trades. On July 25, 1916, the first true zoning ordinance embodying use, height and bulk restrictions was adopted by New York City.

The New York ordinance limited the heights of buildings as a function of the street width with the regulations varying for different districts. Towers covering not more than 25% of the lot were allowed throughout the city. The area of permitted lot coverage varied with the districts. Only two use districts were establishes; residence—in which no business or industry of any kind was permitted—and business which prohibited objectionable manufacturing and public garages or stables. All the land not in either of the two use districts was unrestricted. The provisions were not retroactive. A Board of Appeals was created to vary the application of the law in cases where a strict interpretation would cause unnecessary hardship.

St. Louis adopted a zoning ordinance similar in theory and construction to the New York ordinance in 1918. Then followed many other cities with ordinances, all based more or less on the New York model.

Hoover Advisory Committee on Zoning

Great impetus was given the zoning movement during the terms of
Herbert Hoover as Secretary of Commerce. In September, 1921, an Advisory Committee on Zoning was formed in the Department of Commerce. At that time only 48 municipalities with less than 11,000,00 people had adopted zoning regulations. In August, 1922, the committee published A Standard State Zoning Enabling Act. Within a year, eleven states passed zoning enabling acts based wholly or partially on the Standard Act. By January 1, 1926, there were at least 425 zoned municipalities throughout the country, comprising more than half the urban population of the Country. The Zoning Primer also published by the Advisory Committee was distributed by the thousands and played no small part in creating a sympathetic public opinion.

Constitutionality Established—The Euclid Case

While the zoning movement was growing by leaps and bounds, there had been no decision by the highest court of the land as to the legality of a comprehensive zoning ordinance. The attitude of state courts seemed to be to look with favor on reasonable comprehensive ordinances. In California there were two important cases arising from a comprehensive Los Angeles ordinance passed in October, 1921. In Miller v. Board of Public Works,27 a proceeding in mandamus to compel the issuance of a permit to build an apartment in a district where such structure were prohibited, the court said that the police power was elastic and that the conception of the police power must broaden in order to meet changing conditions.

In its inception, police power was closely concerned with preservation of the public peace,

27/ Miller v. Board of Public Works of City of Los Angeles, 234 Pac. 381; 273 U.S. 761.
safety, morals, and health, without specific regard to the "general welfare." The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of police power. As our civic life has developed so has the definition of "public welfare" until it has been held to embrace regulations "to promote the economic welfare, public convenience, and general prosperity of the community. In brief, "there is nothing known to the law that keeps more in step with human progress than does the exercise of this power." 

In Zahn v. Board of Public Works, an attack on the same Los Angeles ordinance, the right of the city to deny a permit for construction of a business building in a district zoned as residential was sustained. Justice Lennon declared:

The enactment by a municipality of an ordinance, pursuant to a general comprehensive plan, based upon consideration of public health, safety, morals, or the general welfare, applied fairly and impartially, which ordinance regulates, restricts, and segregates the location of industries, the several classes of business, trade, or calling, and the location of apartment or tenement houses, clubhouses, group residences, two-family dwellings, and the several classes of public and semipublic buildings, is a valid exercise of the police power.

Both the Miller and Zahn cases were decided by the Supreme Court of California in 1925 and both were later carried to the United States Supreme Court where the decisions of the state court were upheld.

In Louisiana another important decision was handed down in the Civello case. The court enumerated many reasons why business establishments could be zoned out of residence districts.

In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police

28/ Miller v. Board of Public Works of City of Los Angeles 234 Pac. at 383.
29/ Zahn v. Board of Public Works of City of Los Angeles 234 Pac. 381; 274 U.S. 325.
30/ 234 Pac.
Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose.

Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc.

Not until 1926 was the Supreme Court of the United States called on to pass on the constitutionality of a comprehensive zoning ordinance in the case of Village of Euclid, Ohio, v. Ambler Realty Co. The village of Euclid, a suburb of Cleveland, on November 13, 1922, passed a comprehensive zoning ordinance. The ordinance established use, height, and area districts and was typical of the many ordinances that had been adopted throughout the country based on the New York model. The Ambler Realty Co. owned a tract of sixty-eight acres in the Village of Euclid. This land was being held for sale in the future as business or industrial property. When the village adopted zoning regulations, part of

32/ U. S. 272, 365.
the Ambler property was zoned for residence, part for apartments and part for industry. The company assailed the ordinance on the ground that it deprived the owner of his property without due process of law, thus violating the Fourteenth Amendment. The Company had a strong and well-founded argument that the ordinance had caused the value of its property to be reduced more than half a million dollars. The Federal Court of Northern District of Ohio held in favor of the realty company stating that as applied to the plaintiff's property, the ordinance was unreasonable and unconstitutional and that the plaintiff's property was taken without just compensation. The court did say, however, that it did not hold the entire ordinance to be invalid, that many of the other regulations might be valid and might be applied to the Ambler property. This seemed a reasonable decision because there seemed to be no sound reason for zoning any part of the Ambler property as residential. It seemed to be directly in the line of the expansion of the industrial area of Cleveland and a thorough and unprejudiced study of the area in question would probably tend to show that its best and logical use was industrial. The company stated:

The ordinance does not, in fact, pursue any rational plan, dictated by consideration of public safety, health and welfare, upon which the police power rests. On the contrary, it is an arbitrary attempt to prevent the natural and proper development of the land in the Village prejudicial to the public welfare.

Based on a large view of the question, that seemed true.

However the village appealed to the Supreme Court of the United States. The Court considered the ordinance as a whole and reversed

33/ Ibid.
the decision of the lower court. The court considered the relation of zoning to public health, traffic regulation, fire prevention and police protection and held that there was a relationship and that it could not be admitted that the zoning ordinance had "no substantial relation to public health, safety, morals, or general welfare."

This decision, then, from the highest court of the land sustaining an ordinance that most planners admit was poorly drawn, was a great triumph for zoning and cleared away the cloud of unconstitutionality that had been over it. Newman F. Baker says, "The case does not settle all the problems of the legality of zoning but it does hold that the ordinary comprehensive zoning ordinance does not violate the 'due process' clause of the Fourteenth Amendment."

**Extent of Zoning**

According to the National Resources Committee there were in the country on January 1, 1937, a total of 1322 zoned municipalities. Of these 954 were specified to be comprehensive ordinances. An additional 89 were in preparation. There were 38 reported zoned counties of which 31 were had use ordinances only. Ordinances were in preparation in 25 other counties.

**Resume**

Zoning is accomplished by a legal device. The history of zoning is the story of the evolution of the judicial conception of the police power as a means of controlling the social and economic evils brought about by the phenomenal growth of our cities.
ZONED MUNICIPALITIES
IN THE UNITED STATES

NUMBER BY FIVE YEAR PERIODS — 1916 - 1936
When the colonists of Massachusetts Bay achieved sufficient numbers to form towns, they found it desirable to segregate certain nuisance industries to parts of the town where they would be least offensive. It has always been possible to restrict and regulate "common law" nuisances in this country and such restriction and regulation has been widely practical.

The next step was the extension of restrictive measures to include many uses not nuisances per se but what have been called "legislative" nuisances. Public laundries and livery stables and many other enterprises and occupations were often banned from certain districts by such measures.

Further concentration of population in the cities brought about the congestion and intolerable housing conditions which led to tenement house codes.

Along with tenement house laws were enacted "building and sanitary codes" prescribing the type of construction that was permissible for different types of buildings, setting standards for plumbing, and often limiting the portion of the lot that could be built upon and establishing minimum sizes and window areas for sleeping rooms.

The excessive height of buildings, causing congestion and fire hazards and overtaxing streets and sanitary systems designed before the feasibility of sky-scraper construction had been established, became also a subject for regulation under the police power.

Fire zones were drawn about the closely built-up districts of cities in order to reduce the danger of conflagration. Within such
zones fire-proof or fire-resistant construction was required.

In retrospect then these regulations and restrictions that had been exercised in controlling the development of private property prior to zoning for use, fall into some such classification. It must not be supposed that each of these developments followed in orderly and chronological fashion. They were all more or less simultaneous, some parts of the country finding it necessary, because special local considerations, to experiment with height limitations and others, because of the peculiar prevalence of other sets of conditions, concentrated on the segregation of certain undesirable uses or on a tenement house law or on a building code or fire zone. Nor must it be imagined that the extension of public control to effect these regulations was easily accomplished. Each suggestion of extension of application of the police power was fought bitterly. Every attempt to control the development of private property for the common good was denounced and decried by some interests as "unconstitutional". Each extension, however, was demanded by new conditions brought about by the increasing concentration of people in the cities. Metzenbaum states that situation well when he says:

Each one of these and many similar enactments were occasioned by new and unfolding conditions and were necessitated by reason of greater complexity of civic life, a greater realization of the need to protect the public health, the vitality of the nation, the safety of its people and the welfare of its children, and the conservation of property.

None of these steps would have been required or appropriate in the early or colonial days, but they did become necessary and they grew appropriate by reason of the increasing population, the
growing congestion, the intensiveness of American life and the ills which have sprung from these new conditions.

The Police Power, always equal to new conditions as they arise, was necessarily invoked in order to protect the public welfare against these newly arisen conditions.

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Just as each one of those preceding steps was necessitated by the insufficiency of what there-tofore had been enacted, so it came to be recognized that unless the Use of districts could be designated the benefits of preceding legislation would be defeated and would prove to be of comparatively little value in meeting the newest conditions of American life.34

The use of districts was experimented with, gingerly at first, in the establishment of "protected" or "residence" districts in which business or industry of all kinds was forbidden. When the legal basis of such districting for use was established there seemed to be sufficient authority for what we call a comprehensive zoning ordinance and the first such ordinance was not long in appearing.

CHAPTER III

SOCIAL AND ECONOMIC ASPECTS

Zoning is intended to replace the chaotic development of our cities with a plan for orderly growth. It should result in a healthier, safer, more convenient and more pleasing community.

Health

There is now no question about the beneficial effect of sufficient air and sunshine on the human body — or rather the detrimental effects of the lack of light and air. Sunlight is a deterrent to infection. It builds up resistance to overcome the constant attack of the germ brigade to which we are all exposed. The sun rays destroy bacterial life whether the bacteria may be in the air, indoors or outdoors, or whether they may be attached to surfaces of pavements, floors or walls. To the extent that this occurs the danger from certain disease germs is lessened.

Post mortem examinations have inclined physicians to the belief that 80 or 90 per cent of all persons have had active tuberculosis lesions at some time during their lives. Numerous surveys have shown that morbidity rates for tuberculosis are highest in the most congested tenement districts.

An important feature of the accepted treatment for tuberculosis is exposure to sunlight and fresh air.

1/ For authoritative evidence establishing the relationship between light and air and health see Commission on Building Districts and Restrictions, New York City, Board of Estimate and Apportionment; Final Report, 1916; also Sunlight and Daylight for Urban Areas by Wayne D. Heydecker in collaboration with Ernest P. Goodrich; Regional Survey of New York and Its Environs, Vol. VII.
The prevalence of rickets among children has been shown by investigators to have some relationship to the lack of light in living quarters. In 1890 it was discovered by an English physician that the sunlight map of the world had a definite relationship to the rickets map. He concluded that the absence of sunlight was the main factor in the causation of rickets. Recent studies have accumulated a mass of evidence supporting those conclusions.

The necessity of living and working in darkened rooms where artificial light is necessary a great part of the time results in eyestrain with its train of physiological disturbances.

Industrial and business establishments create certain conditions that cannot be considered conducive to health. Those who live in close proximity to these places are frequently exposed to dust and dirt and fumes that are not only unpleasant but far from healthy. It has been shown in court cases involving the constitutionality of zoning regulations that certain types of business, or the rubbish which is incidental to them, attract disease bearing flies and rats. Dust may not be in itself harmful but it irritates the respiratory passages, making them more susceptible to the invasion of germs.

Noise is another factor in both physical and mental health. Nervous disorders may be caused or aggravated by the noise that is attendant upon industry and business. Noise greatly increases fatigue and is especially objectionable in residence areas where it may interfere with needed relaxation and repose.
Physicians are of the opinion that vegetation has a beneficial effect on health and comfort. Trees, grass and shrubs tend to cool the air during the heat of summer, but they cannot exist where business structures shut off the sunlight and fumes from industrial plants kill all vegetation.

Decent surroundings contribute to the physical welfare of the people in a fashion that perhaps cannot be included in the narrower interpretation of the word health. As the late Professor George C. Whipple of Harvard University, eminent authority on public health, testified before the Commission on Building Districts and Restrictions of New York City more than twenty years ago:

Health is more than the absence of disease. It is something positive, and involves physique and vitality, and it is mental as well as physical. The inherent difficulty at the present time is the absence of scientific methods of measuring this positive element in health. Yet the world knows as a matter of human experience that it is real and vital.

...While these regulations\(^2\) are likely to have their greatest use in increasing and stabilizing real estate values in the city, a more vital reason for their adoption is that they will enhance the health, safety, comfort and morals of the people.\(^3\)

Lessening of Danger from Fire

The hazard from fire is increased in congested areas not only by the fact of congestion itself but also because the close development renders it difficult to properly manipulate fire-fighting apparatus or to efficiently attack the fire. Where buildings are close together there is always the danger of a blaze spreading and resulting in a major conflagration. The

\(^2\) i.e. the New York zoning regulations.
\(^3\) Commission on Building Districts and Restrictions, New York City, Board of Estimate and Apportionment; Final Report, 1916; p.195.
open space about buildings required by yard and lot coverage limitations in a zoning ordinance facilitates fire-fighting and provides a check against the spread of a blaze.

The risk from fire is greater in an industrial plant or business than in a dwelling and also greater in a multi-family house than in one occupied by a single family. These obvious facts have more than once been cited by the courts in justification of the establishment of use zones.

Crime and Immorality

There is a relationship well-known to social workers, police officials and court officers, between overcrowded housing conditions and delinquency, crime and immorality. Zoning has its part to play in the rehabilitation of blighted areas, by preventing the rebuilding of the overcrowded tenement house districts that are the breeding spots of all delinquency and vice.

Cost of Health, Fire and Police Services

These are social considerations but they have a very pronounced economic significance. In an especially fine study made by the Boston City Planning Board in 1934 it was shown that the substandard housing areas of that city cost far more in the supplying of police and fire protection, hospitalization and health services, court costs and other necessary services than they returned to the city in revenue.

A survey in Cleveland, Ohio, by the Housing Authority of that city revealed that a substandard area containing 2.2 percent of the total population and .75 percent of the total land area, accounts for 21 percent of all murders, 26 percent of all houses of prostitution, 7 percent of all cases of juvenile delinquency, 13 percent of all tuberculosis deaths and
15 per cent of all fires. Of all municipal costs, 6\(\frac{1}{2}\) per cent of the expenditures for police protection were traceable to that area, 7 per cent for health work, 8 per cent for relief and social service, and 14 per cent for fire protection. The cost for fire protection in this area was placed at $31.47 per $1000 of appraised value of buildings as compared with $4.40 in the city as a whole. A similar survey in Cincinnati showed that the basin area, which constitutes 6 per cent of the city's area and 28 per cent of the population, accounts for 64 per cent of all major offences committed in the city and 59\(\frac{1}{2}\) per cent of the fire losses.

Wherever conditions are such that morbidity rates are high by reason of insufficient light or air in houses or work places, the community as a whole suffers an economic loss. It suffers a direct financial loss in proportion as it has to supply medical attention and hospitalization for those victims who cannot pay their own way.

Chaotic and congested urban conditions cost the city more money than necessary in adequate fire protection, in actual fire losses and in increased insurance rates. The fire risk involved in an industrial or commercial structure is several times that of a dwelling. Where such uses are not segregated but are scattered throughout the community, an increased hazard, with increased costs to control it, is spread over the city. A tabulation prepared by the National Fire Protection Association shows that for 28 municipalities in 17 states and having a total population of 6,406,000, the average loss per fire in the case of combined stores and dwellings was 2.2 times as great as the average loss in buildings used solely for dwelling purposes.\(^4\)

\(^4\) National Fire Protection Association; City planning and zoning. 1954. p. 28.
In regard to buildings crowded together with little open space about them the same organization points out:

Attention is called to conflagrations to which congested districts are subject, and to the fact that the claims on underwriters for loss due to "exposure fires" (communication of fire from building to building) are nearly ten per cent of the claims for loss due to all causes — "exposure fires" constituting the largest single cause of fire losses.\(^5\)

Insurance rates reflect the added risk in congested areas.

The crowding of buildings means increased insurance rates because of charges in rating schedules for the hazard of exposures. The enforcement of wise bulk zoning tends to eliminate such crowding.\(^6\)

Testifying before the New York Commission on Building Districts and Restrictions in 1916, Edward R. Hardy, Assistant Manager of the New York Fire Insurance Exchange, stated:

The rate of insurance in a store and dwelling building reflects greater insurance risks. The ordinary private dwelling, now accepted as a building occupied by not more than two families, changes its character, so that when the first floor or basement is occupied for a store with one family above, the insurance rate is about twice as much as when it was occupied wholly for dwelling purposes.\(^7\)

**Congestion in Streets**

Buildings of excessive height cause congestion, both vehicular and pedestrian in streets that have not been designed to carry the load thus imposed upon them. Where commercial structures and dwellings are intermingled, the accident hazard becomes much greater than where commerce and residence are segregated in district zones. Where there is not only no controlled segregation but where, in addition, dwellings are allowed to cover

\(^5\)/ *ibid.* p. 33.
\(^6\)/ *idem.*
\(^7\)/ Commission on Building Districts and Restrictions, op. cit. p. 128
all or nearly all of the lot, forcing children to play in the streets, the
danger of accidents increases. Congestion in the streets also offers a
serious hindrance to the movement of fire apparatus. The economic loss
resulting from traffic delays in the clogged streets of our large cities
has been estimated to run to several thousand dollars daily. These conditions,
caused in part by overloading the land, could have been controlled by sensible
zoning. In the interests of efficiency and economy roads should be designed
to serve the purpose that they serve. This is impossible without control
of what is built on the land.

Utilities

With a zoning plan it is possible to forecast with some degree of
accuracy the sizes of water and sewer installations. Without a plan,
the sizes of installations must be determined purely by guess work. There
is no assurance that a residential district, adequately supplied with sewer
and water lines, may not be invaded at any time by an industrial plant
requiring increased facilities which the municipality may be called on to
provide. And it has been truly said that there is little trade-in value on
a sewer, no matter how slightly used.

Some cities have based programs of municipal improvements – paving,
sewerage and water supply systems and street lighting – on zoning districts
with considerable savings. 8

Stabilization of Land Values

By fixing the future use of land, zoning has largely reduced disastrous

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8/ See Hubbard and Hubbard. Our cities today and tomorrow. p. 190
fluctuation in land values due to uncertainty as to the type of development that might come into the neighborhood. Speculative values based on anticipated commercial development have been erased and instead a sound and logical valuation based on the best use of the land as expressed in the zoning ordinance has been substituted. Frequently, before zoning protection was available, and too often today where that protection has not been accepted, the man who has invested his life's savings in a home has had the value of his property halved by reason of incompatible development on an abutting lot. Zoning may pull down land values in some cases where a less intensive classification is placed on property that is being held for speculative profit, but it increases the value of land in many other cases by providing assurance of protection of the investment in improvements. At the time of a survey directed by Professor and Mrs. Hubbard in 1929, the City of White Plains, N. Y., reported that zoning was held directly responsible for an increase of $30,000,000 in assessed property values. In Oklahoma City, an increase in property values throughout the city was attributed to zoning. Several examples of the development of vacant land for substantial apartment houses and residences soon after the enactment of zoning regulations protecting such districts from the invasion of detrimental uses were revealed by that survey.

Financial institutions have been quick to realize the value of zoning in relation to the protection of property values. Since the establishment of the Federal Housing Administration, that agency as a matter of policy, has been reluctant to make loans in unzoned communities.

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9/ Hubbard and Hubbard. op. cit.
Intangible Social Values

These are more or less tangible results of zoning or of not zoning. The greatest value, however, probably lies in those things the benefits of which cannot be measured in dollars and cents. The building of better citizens by building a better community, the protection of home life, the stimulation of community integration and civic pride, the fostering of home ownership— all of these intangible but highly desirable results come with good zoning. The prevalence of a sense of security and protection among home owners marks the zoned community.

The discussion in this chapter has been confined to urban zoning. The social and economic aspects of rural zoning are treated under that heading.
CHAPTER IV

LEGAL ASPECTS

Methods of Restricting Property

In general there are three ways by which the use and development of private property may be regulated and restricted; by private contractual restrictions, by eminent domain, and by the exercise of the police power of the state. Each is properly used in certain cases for the betterment of the community.

Deed Restrictions

Private deed restrictions have often been used to prevent undesirable use of the land and unaesthetic development. Deed restrictions are often a valuable supplement to a zoning ordinance but they cannot be considered a substitute for zoning. Private restrictions are not considered by the municipality when called on to issue a building permit. They are enforceable only by court action and breaches of the restrictions often go unchallenged because of the trouble and cost of instituting action. A few violations that go unchallenged for such reasons may be cited later to render the entire restrictive clause non-enforceable. When violations of deed restrictions are called to the attention of the courts they are often held inoperative through "laches." ¹ Deed restrictions are usually limited to a stated period of time and are difficult to renew. Also, like any other contract,

¹/ The legal term "laches" implies such inexcusable delay in enforcing one's rights in equity as works a disadvantage to another. A change of conditions or circumstances must occur during the lapsed time.
a deed restriction may be terminated at any time by the consent of the parties to it. For these reasons, private contractual agreements have little value in affording longtime protection. They are of use in supplementing zoning regulations by establishing aesthetic requirements which are not possible under the police power.

Eminent Domain

By right of eminent domain government may take private property for a public use. The owner of the property taken under eminent domain is always entitled to just compensation. The early restriction of building heights in Copley Square, Boston, was accomplished under this power. The owners of property on the square were compensated for the restriction imposed on the use of their property. There was some discussion in the early days of zoning by eminent domain. The requirement of compensation, however, made any comprehensive scheme impractical under that device. Minnesota in 1915, authorized cities to zone neighborhoods by eminent domain upon petition of fifty per cent of the owners of real estate affected. Those benefited were to be assessed to provide the compensation for those damaged.

The Police Power

Zoning is based on the police power of the state. The police power is difficult of absolute definition. It may be said to be the residuum of the whole field of governmental control of persons and property after the specification of particular powers. Baker says:

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The usual definition is that the police power is the power inherent in government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. This power is an attribute of sovereignty and exists without any reservation in the constitution and corresponds to the right of self-preservation in the individual.

Chief Justice Shaw of Massachusetts said of the police power:

It is a well settled principle growing out of the nature of well-ordered civil society that every owner of property, however absolute and unqualified may be his title, holds it under implied liability that his use of it shall not be injurious to the general enjoyment of their property, nor injurious to the rights of the community. All property is held...subject to these regulations which are necessary to the common good and general welfare. Rights of property, like other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

The police power may be exercised for the promotion of health, safety, morals or the general welfare. It cannot be exercised for purely aesthetic reasons. A fuller discussion of the relation of aesthetics to the law will be found in the chapter on "Aesthetic Control". The principles of the police power remain constant; the applications of those principles expands to meet new and changing conditions. It is not a set and hard power to meet only certain specific cases. It is elastic and the interpretation of its limits may expand to meet changing conditions and to sanction that which is held desirable by common usage and custom.

It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U.S. 518.

It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality on strong and preponderant opinion to be greatly and immediately necessary to the public welfare.\textsuperscript{5}

In our system of government the legislature and the judiciary are separate. Each functions in its own province. The courts have no right to inquire into the motive nor the \textit{wisdom} of duly enacted legislation, but only into the \textit{power} of the legislature to pass such legislation. If the legislature has the constitutional authority to enact such legislation, the exercise of that authority cannot be limited nor abrogated by the courts.

Before the courts will declare against a legislative act they must be convinced of its invalidity beyond a reasonable doubt. Chief Justice Marshall, who first used the term "police power" in this country declared:

\begin{quote}
It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality.\textsuperscript{6}
\end{quote}

The United States Courts are loath to rule against any state law which provides for the exercise of the police power of that state. This is especially true where the statute has been upheld by the state courts. The presumption is that local conditions and usage which are so important in defining the police power, are better known to local authorities than to the Federal Courts. In the legal battle over the police power limitation of building heights in Boston under the Massachusetts statute of 1904, the Supreme Court of the United States said it felt

\begin{quote}
the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the state in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they
\end{quote}

\textsuperscript{5}/ Noble State Bank v. Haskell, 219 U.S. 104 (1911)
\textsuperscript{6}/ Brown v. Maryland, 12 Wheaton (U.S.) 419 (1827).
may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. 7

Again in a case involving billboard regulation in Chicago, the U. S. Supreme Court stated that

it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. 8

The police power is inherent in the state and may be invoked by the state alone. The state, however, may grant to political sub-divisions within it the right to exercise that power in certain specified ways. A legislative act thus delegating power is known as an enabling act.

**Enabling Acts**

New York City was zoned in 1916, not under a general enabling act but under specific legislation applying to that city alone. After the passage of the New York City ordinance, a zoning enabling act was passed by the legislature extending the right to zone to cities throughout the state. Many other states soon followed with permissive zoning legislation. General enabling acts have been adopted by forty-eight states. The other two, Florida and Georgia, have special acts permitting certain specified municipalities to zone.

A Standard State Zoning Enabling Act was prepared and issued in 1926 by the Advisory Committee on Zoning for the Department of Commerce. It

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was a well-considered act drawn by men who had been associated with the zoning movement from its inception. Within a year it was adopted by eleven states. Difficulty with the courts encountered by states that attempted individualistic enabling acts increased the prestige of the Standard Act with the result that most of the State Enabling Acts today follow the Standard Act rather closely. That Act reads:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

**Constitutional Amendments**

Massachusetts in 1920 passed a constitutional amendment⁹ in order to remove any doubt as to the constitutionality of zoning in that state. Other states that have passed amendments to their constitutions specifically stating

⁹/ Constitution of 1920, Article LX
that the legislature has the power to permit zoning are Louisiana, Georgia, New Jersey and Delaware. Inasmuch as the police power is inherent in the state, constitutional amendments should not be necessary before a zoning enabling act can be passed. In these instances, however, it was felt that a definite expression in favor of zoning by the people in the form of a constitutional amendment would assure favorable consideration of zoning cases if they should come before the courts.

Zoning Under Home Rule Charter

Some states allow cities wide latitude in the exercise of the police power through a general constitutional grant for the exercise of the police power or through home rule charters. Such constitutions and such charters seem to contain the necessary authority for zoning without specific delegation of that authority from the Legislature. The early California zoning was done under such delegation of power. However, the courts seemed less willing, as a rule, to uphold ordinances of this type, than where there had been direct enabling legislation by the states. Zoning under home-rule charters was not always governed by the checks and balances and provisions for relief in cases of unnecessary hardship that are found in most of the state enabling acts. For this reason the courts were inclined to look with disfavor upon such zoning while upholding regulations adopted under an enabling act. After experiencing difficulty in home-rule zoning, most states,

10/ Constitution of 1921, Article 14, Section 29.
12/ Constitution Article IV, Sec. 6, Par. 5, Laws of 1928, page 820.
where such was the practice hastened to pass enabling legislation usually
based on the Standard State Zoning Enabling Act, and when they did so the
courts were generally inclined to uphold reasonable regulations.

Washington, D.C. and Boston are unique in the manner of adoption of
their zoning laws. Washington, because of its status as a federal terri-
tory, was zoned by a Zoning Commission authorized by Act of Congress\(^\text{14}\) and
Boston was zoned by Act of the Legislature of the Commonwealth of Massa-
chusetts.\(^\text{15}\)

**Consent of Neighbors**

Some of the early ordinances establishing use districts made the
formation of use districts or zones contingent upon the consent of a per-
centage of the property owners involved. Likewise in some cases the ad-
mittance of a use to the district was dependent upon the consent of a
stated percentage of the neighbors. Such ordinances have repeatedly been
declared void.\(^\text{16}\) The police power is an attribute of the state. When
delegated to a municipality for a specific purpose the municipality cannot
pass it on to a group of its citizens. That has consistently been held an
improper delegation of the legislative function.

It is proper, however, to require the consent of a certain percentage
of property owners in certain instances before the board of appeals may
grant a variance of a particular type. Such provision is not an improper

\(^{14}\) Act of March 1, 1920, 41 Stat. 500
\(^{15}\) Mass. Acts of 1924; Chap. 488.
\(^{16}\) William V. Cooke, 54 Col. 320 (1915)
  Dangel v. Williams, 11 Del. Ch. 213 (1916)
  People ex. rel. Friend v. Chicago, 261 Ill. 16 (1913)
  Hayes v. Poplar Bluff, 265 Mo. 516 (1914)
  Curbank v. Richmond, 110 Va. 749 (1910); 266 U.S. 127 (1912)
delegation of authority. The consent of owners does not automatically change the law or vary its application; it merely brings the requested variance before the board of appeals which may grant it or refuse it as its judgment may dictate. As a prerequisite to action by the public authorities or as a waiver of a prohibition, a provision for consent is valid.17

Like Areas Must be Treated Alike

When the science of zoning was in its infancy, some cities attempted to establish protected districts in one part of the town or in one block or along one street. The remainder of the area within the city was not included in any sort of a district. Such ordinances are known as "piecemeal" zoning as distinguished from "comprehensive" ordinances which deal with all the area within municipal boundaries. The term "comprehensive" in this sense is not to be confused with the common use of the same term to denote an ordinance embodying use, height, and area requirements.

A zoning ordinance is constitutional only when all areas similarly situated are treated similarly. This is basic. Regulations may be different for the several districts but they must be uniform throughout each district. Because piecemeal ordinances do not meet this requirement, they have often been declared void when brought to court.18 Not all piecemeal zoning ordinances taken to court have been declared invalid19 but the weight of

17/ Meyers v. Fortunato, 110 Atl. 347 (1920).
People ex rel. Keller v. Village of Oak Park, 266 Ill. 365 (1914).
Cusack Co. v. City of Chicago, 287 Ill. 344 (1915), 242 U.S. 526 (1917).

18/ Friend v. City of Chicago, 261 Ill. 16, 103 N.E. 609 (1913).
Spann v. City of Dallas, 111 Tex. 350, 255 S.W. 513.

19/ Among cases where piecemeal zoning has been upheld are:
Salt Lake City v. Western Foundry Co., 55 Ut. 447, 187 Pac. 829.
authority is unfavorable to them and they are not to be recommended in ordinary circumstances.

**Zoning Must be Reasonable**

Zoning powers lie in that battlefield between the police powers of the state and the "due process" clauses of state and federal constitutions. However, through the years of struggle in the courts it has appeared that zoning is legitimate when three conditions are satisfied:

1. There must be delegation of authority from the state.
2. The zoning scheme must be comprehensive and not piecemeal.
3. The regulations must be reasonable and not arbitrary nor capricious.

A zoning ordinance must be reasonable; it must have a substantial relation to the health, safety, morals, comfort, convenience and general welfare of the community; the regulations cannot be discriminatory or arbitrary. Many ordinances, zoning and others, have been held invalid because they incorporated regulations that could not be considered a reasonable use of the power delegated by the state.

Regulations predicated on mere opinion without factual support are more apt to be overturned in court than those that are based on a searching investigation of all the factors to be considered. That the municipality has approached the problem of zoning in a logical and scientific fashion has often been cited by the courts in support of the reasonableness of an ordinance.

Because some ordinances have been set aside because they did not satisfy the fundamental tests of legality does not impugn the constitutionality of zoning in general. As Newman F. Baker points out:

One might ask, "Is taxation constitutional?" Taxation may be so unreasonable, arbitrary, or partial as to be declared unconstitutional. But sound principles of taxation are well known. An adverse
decision is not considered to effect the taxing power but only the
particular law attempting to levy the tax.\textsuperscript{20}

Even though the regulations may be inferior in the opinion of the
court, they will probably not be overturned if there is substantial relation
to the health, safety, morals and general welfare. The court may not agree
that the legislative body has acted in the wisest possible manner, but if the
regulations have a reasonable relation to the accepted fields of regulation
of the police power, the court is not likely to seek to substitute its
judgment for that of the legislative body. The Euclid Village ordinance
was not particularly sound in its regulations, in fact most students now
admit that it bordered on arbitrariness, yet the Supreme Court of the United
States upheld the ordinance and refused to impose its judgment over the
judgment of the local legislative body.

Where the regulations are obviously unfair to an individual or a group
without reason, where they attempt to establish a monopoly, in short where-
ever they are capricious, discriminatory or arbitrary, they cannot be
supported in court.

Retroaction

Zoning regulations ordinarily apply only to new structure and new
uses of land. They are not retroactive. While almost universally existing
non-conforming uses are allowed to continue in practice, the question of the
right to make ordinances retroactive is another matter. Mr. Bassett says:

There is little doubt that under zoning ordinances municipalities,
if they wish, can succeed in ousting non-conforming uses and buildings.
If the police power can be invoked to prevent a new non-conforming
building because of its relation to the community health, safety,
morals, convenience, and general welfare, it follows that the police
power can be invoked to oust existing non-conforming uses.\textsuperscript{21}

\textsuperscript{20}Baker, op. cit. p. 116.
\textsuperscript{21}Bassett, E. M. Zoning; the laws, administration and court decisions
during the first twenty years. p. 112.
He goes on to point out that while theoretically the police power is broad enough to warrant the ousting of every non-conforming use, the courts would sensibly find a way of preventing such a catastrophe. The courts would rightly take into consideration the reasonableness of such a regulation. The test of the validity of retroactive provisions, where the enabling act does not specifically prohibit them, seems to lie in the element of reasonableness.

Most enabling acts, including the Standard Act, do not specify whether or not the regulations may be retroactive; that is left to the municipality.

One of the earliest important decisions on zoning upheld a retroactive feature of a Los Angeles ordinance. One Hadacheck had a brick yard on the outskirts of the city at the time of the passage of one of Los Angeles' many early districting ordinances. The property had been operated as a brick yard for some years. It had been established before the residences which had come to surround it. The land contained valuable deposits of clay and admittedly could be more profitably used for brick making than for any other purpose. In spite of these facts, the Supreme Court of California ruled that the ordinance under which the abandonment of the brickyard was ordered was valid and its decision was upheld by the Supreme Court of the United States.22

Mr. Justice McKenna of the United States Supreme Court, in commenting on the decision of the California Supreme Court, said:

It is to be remembered that we are dealing with one of the most essential powers of government — one that is the least limitable. It may be, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining.

There have been two cases in Louisiana where stores have been forced to vacate residential districts within a year's time.

A different angle on the question of retroaction was brought out in the Piggly-Wiggly case arising in the city of Aurora, Illinois. There the Supreme Court of that state held that the zoning ordinance which did not permit new stores in a residence district while allowing those already there to remain was discriminatory. In other words, the ordinance was held unconstitutional because it was not retroactive. If the attitude expressed in this case were to become generally accepted, it would be a death blow to zoning for retroaction would surely be closely limited by considerations of reasonableness. The Supreme Court of Illinois later granted the Aurora case a rehearing and subsequently reversed its original decision.

Many other retroactive ordinances have been attacked on the grounds of discrimination but have been uniformly upheld.

Recently in New York City an established parking lot was forced out by an amendment to the zoning ordinance prohibiting such lots in business districts.

It seems that the degree of development of the property might be the determinant in establishing the reasonableness of retroactive provisions. It would obviously be unreasonable to require the abandonment of a substantial business building or apartment house in a residential district. On the other hand a junk yard or other uses of land in which the buildings are incidental can probably be reasonably brought under a retroactive clause. Several towns on Long Island have established amortization periods for automobile junk-yards. Mr. Bassett counsels that in drafting an ordinance it is well to have the usual

Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929).
24/ City of Aurora v. Burns et al.; opinion filed Feb. 17, 1925; rehearing granted; decided Dec. 1925, 519 Ill. 84, 149 N.E. 784.
See also earlier case; Roos v. Kaul, 302 Ill. 317, 134 N.E. 740 (1922).
non-conforming clause refer only to buildings and not mention land or premises so as not to limit the municipality in case it is desirable to make some phases of the regulations retroactive.

Zoning and Racial Segregation

Certain of the southern states have attempted at various times to borrow the legal device of zoning in order to effect racial segregation. Segregation is invalid under the United States Constitution and although state courts have sometimes upheld such ordinances, the United States Supreme Court has declared racial zoning illegal.26.

Aesthetics

The police power cannot be invoked for purely aesthetic reasons. Such reasons may properly be taken into consideration but justification must rest on the traditional field of promotion of health, safety, morals and general welfare. Zoning ordinances cannot require a fixed style of architecture nor can they make any other rules in regard to appearance or cost. The whole matter of aesthetic control has been treated in a separate chapter.

Constitutionality of Regulation

The account of the development of zoning in this country in Chapter II traces the history of zoning largely through judicial opinions in leading cases. Suffice it to reiterate here that the right, under proper conditions, to regulate the use of structures and land, and the height and bulk of buildings, the size of yards and all of the other usual features of a zoning ordinance is firmly established in law. Since the Supreme Court decided the Euclid Village case in 1926 there has been little doubt of the constitutionality of a comprehensive zoning ordinance.

CHAPTER V

SPECIAL PROBLEMS

The proper treatment of a few special types of use is the cause of much misunderstanding and difficulty in drafting an ordinance. A few of these uses and the problems they involve are discussed below.

Airports

The location of an airport, like the location of other extraordinary, large-scale open-air uses, should be left to the discretion of the board of appeals. The appeal board, in allowing such a use, may impose appropriate conditions in order to safeguard surrounding property. The location of the airport itself is one problem; the treatment of the property in its vicinity is another.

The use of property in the vicinity of an airport cannot be restricted under the police power in the interests of the airport alone, but may be restricted in appropriate cases in the interest of the public. Where the airport is used by planes carrying passengers or freight on regular schedules, the general welfare is involved and reasonable restrictions on neighboring property may be considered as for the public benefit and as a valid exercise of the police power. Ordinances based on the police power are common to protect the public in using other modes of transportation. In reference to commercial aviation of such character that it may be considered a public service, a report of the Committee on Airport Zoning and Eminent Domain, U.S. Department of Commerce, Aeronautics Branch, published in 1931, says:

The adoption of ordinances to eliminate undue danger of such traffic thereby becomes a measure directly in the aid of the public welfare.
An explanatory note attached to a suggested State Airport Enabling Act, prepared by the Aeronautics Branch of the Department of Commerce and submitted with the same report, reads:

The police power may be used very effectively through the enactment of suitable zoning ordinances for the promotion of the safety of the public by insuring unobstructed air space for the landing and taking off of aircraft utilizing airports and landing fields acquired or maintained under the provisions of this act. (publicly owned or controlled.)

Where the public-service factor is not of major importance, an airport, covering a large tract and being of significance in establishing the character of the neighborhood, may be given its due share of consideration in formulating zoning regulations.

In all cases reasonableness is the determinant of validity. If the land is fairly open and moderate in price, the existing buildings low and few, and the land suited for residential development, the establishment of a residential zone with a low height limit throughout the area in which such conditions prevail is probably reasonable. In such a district it would also seem reasonable to prohibit exceptional and non-essential structures, (towers, flagpoles, radio-towers, etc.), rising about the established height limit even though such structures are ordinarily allowed in residencedistricts.

In areas in which there exist a large number of higher residential buildings or commercial or industrial structures, and where such use of land is appropriate, zoning would naturally be strongly influenced by this character of use, and the existence of an airport in the vicinity would ordinarily not sufficiently change that character to make any other regulation reasonable and valid.
At sea level, an airplane takes off and lands at an angle of seven to one; at altitudes above sea level or in the case of a heavily loaded plane, the ratio is greater. It would doubtless be held reasonable and proper to take this into consideration in establishing height regulations about airports.

In 1937 the State of Maryland added a new section, entitled "Airport Zoning", to its Aeronautics Law. That law limits the height of all buildings or structures within a distance of 5000 feet of an airport or landing field to one-fifteenth of the shortest distance from the building to the perimeter of the field.

Cemeteries

Cemeteries are properly located in open and undeveloped areas which are usually zoned for residence. A cemetery, however, should not be allowed to establish itself anywhere in a residential district. Many people object to living in the vicinity of a cemetery and the existence of a cemetery has been known to depress values of near-by land for residential purposes in some cases. Some ordinances (among others Ramapo and Greenburgh, N. Y.) have approached the situation by prohibiting cemeteries in residence zones but specifically allowing them on permit of the board of appeals. In this way discretion can be used as to their location in residence districts.

Funeral Homes

In recent years the question of what to do with the so-called "funeral home" has become one of the most troublesome of zoning problems. These establishments, reasonably enough, seek quiet and more or less spacious

1/ Md. Laws of 1937, Chap. 583
surroundings. The large and roomy mansions once occupied by the more prosperous families of the community lend themselves readily to conversion to funeral homes, and, in many cases, with changed living conditions, that is the only market they have. On the other hand, an undertaking establishment in the neighborhood has a depressing effect upon those living near it. It brings also an abnormal amount of traffic into a residence district. For these reasons it is well to prohibit funeral homes or undertaking establishments in a residence zone. They properly belong in the business zones.

Hospitals, Sanitariums, Asylums.

Some ordinances have sought to ban hospitals in residence districts. This cannot ordinarily be done under the legal justification of zoning. Anent this, Mr. Bassett says:

No use provided for in zoning ordinances has undergone more vicissitudes than the non-profit operation of hospitals. These institutions have been founded to conserve the health of human beings and yet communities seek to exclude them from residence districts on the ground that they are injurious to the health and safety of the community. Although the sick need sunshine and quiet some officials would force hospitals into industrial districts... They should be allowed as a matter of right in the sunniest and most healthful localities.

Hospitals, of course, bring some objectionable features into residence areas but the courts have rightly held that hospitals are necessary and should be allowed to locate in open and healthful surroundings.

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Asylums, or hospitals for the mentally deficient or insane are more frequently excluded from a municipality. While there may be objectionable features to these institutions they are necessary and if one municipality may prohibit them within its boundaries, every municipality may with the possible ultimate result that, although necessary to the well-being of the people, they could not be established anywhere, forbidden by ordinances supposedly enacted to promote the public welfare. The train of judicial decisions declaring unreasonable and void regulations of that sort has been interrupted by a recent decision in such a case in New York State. The zoning ordinance of the Village of Hastings was upheld by the New York Court of Appeals in a case involving the prohibition of insane asylums in residence districts. The Court gave no reason for its stand beyond a brief statement that the ordinance was a valid exercise of authority in the general welfare.5

Hospitals or institutions conducted on a profit basis may be considered as businesses and are subject to the regulations of the ordinance concerning business.6

Extraction of Natural Products

In some parts of the country regulations prohibiting the extraction of gravel, sand or mineral products are common. In Massachusetts particularly in recent years many zoning ordinances have been amended to include a provision regulating the removal of natural products. A typical Massachusetts

by-law reads:

In a single and general residence district, the removal of sod, loam, sand, gravel or quarried stone for sale, except when incidental to and in connection with the construction of a building for which a permit has been issued, shall be permitted only if permission of the Selectmen be obtained in accordance with the procedure provided in Section 8 and only under such circumstances as they may impose. 7

This seems to be a reasonable regulation and in the interest of public health and safety. Abandoned gravel pits and quarries become stagnant pools and breeding places of mosquitoes. They are dangerous, especially for children; drownings in such pools are far from rare. In spite of the benefits of regulations of this type, when brought before the courts they have usually been thrown out. 8 The courts have maintained that the extraction of earth or ore or oil is not a use of premises but a removal of the premises and cannot be controlled by a zoning ordinance. It is hoped that this narrow view will be expanded to permit a thoroughly desirable control in this direction.

Parks

Parks should not be included in any use district. They are dedicated by law to park purposes only and hence any use regulations laid down on them by a zoning ordinance would be superfluous. Parks may be zoned for height and area.

Junk Yards

Junk yards belong in an industrial district. Automobile junk yards

or "grave yards" sometimes seek to locate along the principal highways. It is unwise to permit this. There is nothing that presents such a desolate aspect along the roadway as such a junk yard. It is well to require a special permit from the board of appeals for these uses so that the protection of fences, or whatever other safeguards may be deemed desirable, can be required. The Town of Islip and several other communities on Long Island have made their zoning ordinances retroactive as regards junkyards, a period of grace of three or five years in which to effect removal being granted. So far as is known the legality of these provisions has not been tested.

Billboards and Signs

It is common practice to exclude billboards and signs in areas zoned for residence. Real estate signs of limited size alluding to the sale or rental only of the premises on which they are located are usually permitted. It is not necessary to specifically prohibit advertising signs in residence districts; the failure to list them among permitted uses is sufficient to rule them out.9 It is doubtful if billboards can be kept out of business and industrial districts by zoning and it is not usual to attempt to do so.

Filling Stations

It was not long ago that the business of retailing gasoline and oil to automobiles was universally regarded as a particularly objectionable type of business. It would perhaps not be far wrong to say that a substantial percentage of zoning ordinances in this country were first adopted through

fear of the invasion of residential streets by filling stations. Many restricted them to industrial districts. Some gave the board of appeals discretionary power to allow them in business districts. The trend in recent years has been toward stabilization of the gasoline industry. Gasoline stations being erected today are more substantial and far more attractive than those that sprang up all over the country side in the infant days of the industry. It is the author's personal feeling that a filling station, properly conducted, is a less objectionable type of business and less harmful to a residential area than many shops or other commercial undertakings. A low percentage of building coverage is characteristic and because of competition, effort is made to make the structure and premises as attractive as possible. This is especially true of those stations operated or sponsored by the larger oil companies. A filling station should be permitted in a business district without recourse to the appeal board.

The New York City zoning ordinance provided that in any district a public garage should not be permitted within 200 feet of a school or hospital. Similar restrictions against garages and filling stations within a fixed distance of schools, hospitals, playgrounds or churches have been widely adopted. Mr. Bassett holds that regulations of this sort do not belong in a zoning ordinance because they apply uniformly for all districts whereas all the other regulations of the zoning ordinance differ for each district. The regulation sometimes found that all servicing of cars must be done off the street on the premises of the station is in the same category. This is the theoretical point of view. Regulations of this sort though are under the police power the same as the usual zoning regulations and the courts have generally upheld zoning ordinances that included them.
Public Buildings

The question sometimes arises whether a public building or structure must conform to the regulations of the zoning district in which it finds itself. The general rule is that where such a building is essential to government and to the public welfare, the zoning ordinance is not binding. The setting aside of the law in such a case, however, must be warranted by the conditions. An unnecessary or capricious violation of the law is no more to be condoned in a public building than in a private one. Edward M. Bassett has pointed out:

If the Federal Government needs a post office in a residential district as shown on the zoning map, it can have its way. But if the subordinate officials refuse to comply with the yard requirements of the district, they cannot have their way. The superior right of the government desiring to disregard the zoning ordinance is limited to those things that are necessary for the community.

A municipality may act in two capacities - governmental and private or proprietary. Where it is acting in a governmental capacity it is not subject to the regulations of the zoning ordinance. Where it acts in its proprietary capacity it is bound by the ordinance just as much as an individual or a private corporation. Activities for which it receives compensation are usually considered not be governmental functions although that is not always a valid test.

The distinction has been expressed by McQuillan in his standard work on municipal corporations:

As a municipal corporation has a dual capacity...it exercises two kinds of powers, namely, public and private; public, as an instrumentality of the state in government, and as a local governmental
organ in supplying community needs, comforts and conveniences; private, as a corporation, legal entity or artificial personality. In the exercise of powers of a governmental nature, either as the agent of the state or as a local public organ, it acts in the capacity of a sovereign...In the exercise of its private powers, generally the municipal corporation is treated as a private corporation or individual and is subject to all the obligations and is entitled to all the benefits of the private law. It is often difficult to determine just when a municipality is acting in its governmental capacity. Two recent cases, involving essentially the same elements, have recently been tried, with seemingly contradictory decisions. The Supreme Court of Michigan, in 1937, held that the City of Benton Harbor was bound by its zoning ordinance and could not erect a water-tank tower in excess of the height limitation of the district in which it was proposed to be located. The Court stated that the city was acting in a proprietary rather than a governmental capacity in the matter. The Court ruled:

Although a city may in the construction, operation and maintenance of a waterworks system be acting, under certain factual circumstances, in a governmental capacity, as a general proposition the weight of authority is to the effect that in engaging in such an enterprise the city acts in a proprietary or private capacity...

Under the circumstances in this case, no sound reason is perceived why the city should not be bound by the ordinance in question so long as such ordinance is in force and defendant is not excepted from its provisions as would an individual or private corporation in attempting to engage upon the same project under the same conditions. It is undoubtedly true that under the provisions of the charter the city owes a duty to its inhabitants to maintain an adequate water system, but in so providing it cannot proceed in disregard of the plain legislative enactments of the duly elected representatives of its citizens.

In the same year, the New York Supreme Court considered a similar case involving the construction of a water tower in the Town of Harrison. The site selected for the tower was in a section of the town devoted to fine homes and estates. The plaintiffs, those living in the vicinity, contended that the tower was in violation of the zoning ordinance because a water tower is not one of the enumerated uses permitted by the local zoning ordinance: in that district. The Court held that the tower could be built, stating, that, although the question was not free from doubt, it preferred the reasoning that the town, in supplying water for both public fire protection and private consumption, was engaged in the discharge of a governmental function. 12

Public Utilities

Public utilities are private companies operating as a business but peculiar in the fact that their operation is tied up with the public interest. In this category are included railroad and other transportation companies, privately operated water companies, telephone companies and others of like character. The buildings and structures maintained by enterprises of this type can be, and in most cases should be, confined to business and industrial districts. Regulations should be reasonable and in some cases public utility buildings such as railroad stations or telephone exchanges should probably be allowed in a residence district. Rather than a blanket permission for any use of this type to settle where it will, each case should be referred to the Board of Appeals either as a matter of original jurisdiction or on appeal from the refusal to grant a permit.

12/ Wallenstein v. Westchester Joint Water Works, 1 N.Y. Supp., 2d, 111 (Supreme Court, Special Term, Westchester Co., Dec. 10, 1937)
An interesting provision concerning the location of telephone exchanges has been found in some ordinances. The Zoning By-Law of Watertown, Mass., as an example, permits in a single residence district Telephone exchanges, provided there is no service yard or garage and that the design of the building with reference to harmony with the architecture characteristic of the district be approved by the Planning Board.

The requirement of approval of the architectural design of a telephone exchange is of doubtful validity but is found in more than one ordinance. The requirement that a public utility building in a residence district have no service yards or storage facilities is common.

Camp Groups

In some parts of the country where there is much vacation travel, groups of overnight cabins offering accommodations to the traveller constitute a real problem. In general, if a hotel is a business use, and it is usually so considered, then a group of overnight cabins may also be so considered. Essentially a group of cabins is nothing more or less than a hotel broken down into its individual cubicles or rooms and scattered about a campsite. These camps however cannot do business in the usual commercial district; they must be in comparatively open country on main arteries of travel. It may be that in a plan for a town there will develop logical areas where cabin groups may be allowed without detrimental effect to the surroundings, or it may be that they should be permitted only by the board of appeals. It is reasonable to require a greater than ordinary set back and a large amount of open area about these developments.

Individual camps have been controlled in some places by defining a dwelling as a structure intended for human habitation the year round and
which stands on permanent foundations and is finished with lath and
plaster or some other similar material. Such a definition excludes
the flimsy summer camp from the term "dwelling" and hence automatically
prohibits them from residence districts in which only "dwellings" are
allowed. Where this is done a special district may be set up for summer
camps or cottages in which area requirements might be greater than in a
residence district.

Attempts are sometimes made to prohibit small camps or houses by
writing into the ordinance minimum allowable limits for floor area or
cubage of buildings to be used for dwelling purposes. This is of question-
able legality.

Trailers

The house-trailer presents a problem that each year becomes more in-
sistent. There are really two problems: that of the individual trailer
which, on its wheels or demounted and on jacks, settles on the land and
becomes a more or less permanent place of abode, and that of the trailer
camp that is conducted for profit in much the same manner as a group of
overnight cabins. The same treatment as adopted for camps or camp sites
may be applied to trailer camps. Regulations dealing specifically with
trailer camps have been adopted as separate ordinances by several munici-
cipalities in the last few years.

Trailers which are used as permanent homes may also be regulated in
much the same manner as some towns regulate camps as outlined above. Where
the building code stipulates the volume of air space required for each room

15/ See Town of Greenburgh, N.Y., ordinance.
occupied for sleeping purposes, trailers sometimes have difficulty in meeting the standard. The only court case\textsuperscript{14} involving a trailer location was decided against the trailer owner on the grounds that it violated the building code in this respect.

\textsuperscript{14} Orchard Lake, Mich., v. Gumarsol. Tried before a Justice of the Peace.
CHAPTER VI

STATUS OF ZONING BY STATES.

The growth of zoning throughout the country has been traced in Chapter II. Some states early accepted the principles of zoning and today zoning rests upon a solid foundation of opinion of the state courts. Other states have been more backward although zoning is practiced, or at least authorized in every state in the Union and in the District of Columbia.

Alabama

Alabama has 2 cities that have comprehensive ordinances, Birmingham and Mobile, and 3 others that use regulations. There has been an enabling act on the statute books since 1923.\(^1\)

Arizona

Cities and towns in Arizona are authorized to zone under Article 14 of the 1928 revised code of Arizona. A Board of Adjustment is made permissive under the statute. Only the cities of Phoenix, Tuscon and Chandler have adopted ordinances.

Arkansas

Zoning in Arkansas is authorized under Act No. 108 of 1929. This act applies only to cities of the first and second class and is a general planning act containing provisions for planning, zoning and subdivision control. Previous to 1929 zoning was authorized by the enabling act of 1924.

\(^1\) Ala. Laws of 1923, No. 435, 443.
Only two municipalities in Arkansas have taken advantage of the power to zone. Pine Bluff adopted a use ordinance in 1925 and Little Rock a comprehensive ordinance in 1925.

California

California led the way for the rest of the country with her early experiments in use zoning. Those cities that established protected districts in the early days did so without benefit of an enabling act but under home rule powers. The California enabling act\(^2\) which was adopted in 1917 is not in a sense an enabling act for it does not make a grant of power. The authority to exercise the police power on all matters within its boundaries is guaranteed to each city by Section 11, Article 11, of the California Constitution. The enabling act establishes rules of procedure which cities must follow when using the police power for zoning. This procedure must be followed in order to make an ordinance valid. There were 105 municipal zoning ordinances in effect on Dec. 31, 1936, more than in any other state in the union except New Jersey and New York. Nearly one-half of these ordinances had use regulations only.

There is no provision for a board of appeals in the California Act. Opinion in that state seems to be fairly evenly divided as to whether the law should be amended to provide for an appeal board. In each case where a variance is warranted, there must be action by the legislative body. Whereas a board of appeals varies only the application of the law as it applies to a particular property, in California it is necessary to change the law itself. The Council usually imposes restrictions with these changes even as does an

appeal board. The conditions are even sometimes of an aesthetic nature. To the author's knowledge this practice has never been tested squarely in court. In most any State other than California, the courts would probably frown on this practice but in that State judicial opinion has always been very liberal in matters involving a city's exercise of the police power granted to it in the Constitution and it may be that the practice of conditional spot zoning will be upheld when tested.

Each county in California is required to appoint a planning commission under the Planning Act of 1929. Under this statute counties are authorized to zone. Like the municipal enabling act, this is merely a zoning procedural act, for the county has the same constitutional guarantee of police power rights as does a city or town. The provision for county zoning was made because there is no local governmental unit in California outside of cities and towns. A town is a municipal corporation in that state and not a unit of local government as in some other parts of the county. The chaotic condition of land uses which increased and became more apparent in unincorporated areas as more municipalities zoned, led directly to the extension of zoning authority to the county. County zoning in California is urban type zoning and is in no sense akin to the Wisconsin type of rural zoning.

In 1936, eight counties had zoning ordinances.

Colorado

Colorado has an enabling act passed in 1923. Under it and subsequent amendments 14 municipalities have adopted comprehensive ordinances. The Colorado statute provides that a building need not conform to the regulations of the ordinance if the board of appeals is furnished with satisfactory proof

"that the present or proposed situation of such building or structure is reasonably necessary for the convenience or welfare of the public."

Connecticut

Zoning got started in Connecticut without benefit of a general enabling act. New Haven by special act\(^5\) of the legislature in 1921 was empowered to zone. A great demand from other municipalities for zoning powers resulted two years later, not in a general enabling act, but in a special act\(^6\) that applied only to certain specified cities and towns.

A general enabling act was passed in 1925.\(^7\) It seems that for some reason this was not considered enough for in the same year there were also enacted a large number of special enabling acts for cities and towns theretofore unprovided with special acts. Municipalities seem to operate under either the general act or special act or both as they see fit, although the special acts for those cities and towns that boast of them probably take legal precedence over the general act.

Zoning seems to be on a solid basis in Connecticut although, as in many other states, a large percentage of the ordinances are in need of revision. According to the last information available there are in Connecticut 38 zoned municipalities of which all but 2 have comprehensive regulations.

An interesting recent development in Connecticut is the highway strip zoning in the Town of Union, discussed in this report in Chapter XI under the head of \textit{Highway Zoning}.

\(^5\)/ Conn. Special Acts of 1921, No. 478.  
Delaware

Wilmington with a comprehensive ordinance adopted in 1924 is the only zoned city in Delaware. An enabling act was passed in 1923.8

Florida

Florida has no general zoning enabling act. 21 cities are zoned, 16 of which have comprehensive ordinances and all of which derive their authority for zoning from amendments to their charters.

Georgia

Like Florida, Georgia has no state-wide enabling act. Several cities have been authorized by amendment to their charters to zone and 7 have adopted ordinances of which 5 are comprehensive. Recent authorization for zoning in certain counties was granted by the 1938 Legislature and is discussed in Chapter XI. Under a special act Glynn County adopted a zoning ordinance in 1928.

Idaho

First and second class cities are authorized to adopt zoning regulations by Chapter 4, Title 49 of the Idaho Code Annotated. The National Resources Committee reported in 1936 that 4 Idaho cities have availed themselves of zoning powers. Clearwater County was reported as having adopted a zoning ordinance in 1936 and several other county ordinances were in preparation.

Illinois

Zoning is popular in Illinois. The first enabling act was passed in 1921.9 In 192310 it was amended to provide for a board of appeals. Since

then however the courts have taken from appeal boards the power to grant variances and to issue special permits for items of original jurisdiction, leaving only the power to reverse a determination of the building inspector or permit issuing authority where he has erred.

There were 93 municipal ordinances reported in 1936, of which all but 6 were comprehensive. The Regional Plan Association of Chicago has been active in making valuable factual studies of the zoning ordinances in that area.

County zoning of the urban type was authorized in 1935.\textsuperscript{11} The county zoning law specifically states that it does not apply to agriculture.

So far only DuPage County has a zoning ordinance, adopted in 1935.

**Indiana**

Both city and county zoning are authorized in Indiana. The county zoning act was passed in 1935.\textsuperscript{12} Eleven counties are excepted from its provisions. It is not known that any county has as yet zoned under this act. Zoning ordinances are in operation in 24 municipalities.

**Iowa**

Chapter 324 of the Revised Code of 1935 delegates zoning powers to cities, towns, and villages. Of the 16 cities of the first class, 15 are zoned; 18 of the 89 second-class cities are zoned; only 8 of the towns and villages have ordinances. The Iowa State Planning Board has recently made some excellent studies of urban land use in the state which should be of great assistance in allocating land uses in future zoning ordinances and in revising existing ordinances. There is no provision in law for

\footnotesize
\textsuperscript{12/} Ind. Laws of 1935, chap. 239.
rural zoning. In certain areas of excessive soil erosion the farmers have banded together to adopt an intelligent land use policy. The self-imposition of restrictions amounts to voluntary zoning and may lead the way for a new kind of rural zoning to meet the peculiar problems of a highly developed agricultural state such as Iowa.

Kansas

The Kansas law\textsuperscript{13} allows first class cities having a population exceeding 20,000 to zone. Where there is a planning commission that body is required to prepare the zoning scheme. There is no provision for a board of appeals.

Kentucky

Only 3 Kentucky municipalities have zoning ordinances although an enabling act has been on the books since 1922.\textsuperscript{14}

Louisiana

Louisiana adopted a constitutional amendment in 1921 to permit zoning.\textsuperscript{15} This gives the right to zone to all municipalities. Louisiana has adopted three enabling acts – one\textsuperscript{16} prior to the constitutional amendment and two subsequent. An act passed in 1924 provided for the segregation of negroes and whites.\textsuperscript{17} A New Orleans ordinance adopted under this act was battled through the courts until declared unconstitutional by the Supreme Court of the United States.\textsuperscript{18} Another famous zoning case arising in Louisiana was the so-called Civello case.\textsuperscript{19} The opinion of the court in upholding a

\textsuperscript{13} Kan. Laws of 1921, chap. 100; Rev. Stats., Article 11.
\textsuperscript{14} Ky. Laws of 1922, Chap. 99; also Laws of 1924, chap. 230.
\textsuperscript{15} La. Constitution, Art. 14, sec. 29.
\textsuperscript{16} La. Laws of 1918, Act. 27.
\textsuperscript{17} La. Laws of 1924, Act 118.
\textsuperscript{18} Harmon v. Tyler, 273 U.S. 568, 47 S. Ct. 471 (La. 1927).
\textsuperscript{19} State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440.
New Orleans ordinance forbidding business establishments in an area zoned for residence has become a classic legal justification of zoning.

In 1924 the Standard Enabling Act was adopted.\(^{20}\)

Four Louisiana municipalities are zoned.

**Maine**

Maine passed an enabling act\(^ {21}\) in 1925 applying to cities, towns, and village corporations. To date only Portland and Eastport have adopted ordinances. Both are comprehensive. The Maine Law permits regulation of construction of buildings and use of buildings and premises. It is required that zoning ordinances be adopted, not by the legislative body, but by popular vote. There is no provision for a board of appeals, but a decision of the building inspector may be appealed to the "municipal officers".

**Maryland**

In 1927 zoning powers were granted to Montgomery and Prince George Counties in the Washington metropolitan area.\(^ {22}\) Both subsequently adopted urban-type ordinances. In 1933 a general county enabling act was passed authorizing zoning in 10 counties.\(^ {23}\)

**Massachusetts**

In 1872 Massachusetts passed a law permitting municipalities to control the construction and safe use of buildings. The provisions of this act could be applied to specific areas within a municipality. Ten years later when the public statutes were enacted, the term "safe-use of buildings" in the


\(^{21}\) Me. Laws of 1925, chap. 209.


\(^{23}\) Md. Laws of 1933, chap. 599.
1872 statute became merely "use". The term use however probably meant the safe-use of buildings and not use as we now understand it in connection with zoning. By amendment in 1912, height, area and location of buildings could be controlled. The promotion of health and morals was added to the reasons for which such ordinances could be adopted. The powers of control of height, area and location were used to a certain extent but no city or town attempted to control "use" under this act.

In 1920 a constitutional amendment was passed to remove any shadow of illegality from use regulations. An enabling act concerning use only was passed immediately. In 1933 a comprehensive zoning enabling act was placed on the statute books.

Boston provided the locale for the legal battles which established the right of regulating heights, both by eminent domain and under the police power.

There are 84 cities and towns in Massachusetts with Zoning Ordinances of which 59 are comprehensive. There 13 Use Ordinances, 2 Partial Ordinances and Interim Ordinances are in effect.

Boston has the distinction of being the only city in the country that has been zoned by act of a State Legislature. Boston is exempt from the provisions of the General Enabling Act. In 1924 the Massachusetts Legislature and not the Boston City Council passed a Zoning Law for the city. The Legislature set up a unique agency, the Boston Board of Zoning Adjustment and gave to this Board the legislative power of amending the zoning law as it saw fit. This is the only case in the country where the power to amend a zoning ordinance does not lie with the general legislative body of the municipality. This provision in Boston has worked very well.
In 1933 a new enabling act was passed bringing into one statute the provisions for use regulations and for height and bulk restrictions which had previously been found in two separate acts.

**Michigan**

Michigan passed an enabling act in 1921. Fifty-three municipalities have adopted regulations under it. Detroit is the only great city in the country today that does not have a zoning ordinance, although several years ago Detroit experimented with piece-meal zoning under a home-rule charter.

In 1929 organized townships were granted zoning rights and those powers were extended to counties in 1935.

**Minnesota**

Districting legislation was first passed in Minnesota in 1913 in one of the first such acts adopted in the country. When this was held unconstitutional, the legislature enacted a law authorizing city councils to establish by eminent domain residence districts upon petition of 50 per cent of the owners of real estate in the district to be affected. Cities and villages are today empowered to zone under the police power under several enabling acts for different classes of municipalities. These powers have been exercised by 18 municipalities.

**Mississippi**

Mississippi has had an enabling act since 1924 which gives zoning power to any municipality of over 5000 inhabitants. Jackson, Tupelo, and Yazoo City have adopted use regulations.

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27/ Mich. Laws of 1935, chap. 44.
28/ Minn. Laws of 1915, chap. 98.
29/ Minn. Laws of 1915, chap. 128.
Missouri

St. Louis had the second comprehensive zoning ordinance in the United States, adopted in 1918. The St. Louis ordinance was adopted under charter powers and later declared invalid by the Supreme Court of Missouri. Zoning got back on a firm footing under an enabling act passed in 1925\textsuperscript{31} and today there are 21 zoned cities in that state.

Montana

Great Falls and Missoula are the only cities that are zoned in Montana although there has been a statute permitting zoning since 1927.\textsuperscript{32} Both ordinances are comprehensive.

Nebraska

The first Nebraska enabling act was adopted in 1921.\textsuperscript{33} Eleven municipalities have zoned under it.

Nevada

Cities and incorporated towns have authority to zone by virtue of Chapter 125 of the Laws of 1923.\textsuperscript{34} There is no provision for boards of appeals in Nevada. Reno and Las Vegas have use ordinances.

New Hampshire

New Hampshire passed an Enabling Act in 1925 for cities and towns. The Local Planning Act of 1935 extended the power of zoning to village districts. On May 1, 1937, there were seventeen cities and towns in the state with zoning regulations. Ordinances were in preparation in nineteen others.

\textsuperscript{31}/ Mo. Rev. Stats. (1929), sec. 7259-7270.
\textsuperscript{33}/ Neb. Laws of 1921, chap. 116.
\textsuperscript{34}/ Nev. Compiled Laws, par. 1274-1280 inc.
New Jersey

Although zoning in the state has traveled a rocky road beset by many adverse court decisions, New Jersey today is second only to New York in the number of municipalities zoned. The first enabling act was a composite of several statutes enacted at different times and each covering some of the features of a complete enabling act. In addition, separate acts were passed for cities of the first class, cities of the second class, and another for both boroughs and cities. These acts were alike in that they were all poorly drawn. The power to adopt zoning regulations was placed not in the local legislative body, but in the local board of public works. Some of these acts made no provision for a board of appeals. Others established appeal boards, but the powers conferred upon them were so vaguely defined that no one ever did succeed in discovering what they were.

It was such a confused state of affairs that gave rise to the Nutley case and a decision that set zoning in New Jersey back many years. The refusal of the town of Nutley to permit a store in a residence district was contested in State ex rel. Ignaciunas v. Ridley, Inspector of Buildings for the Town of Nutley.55 The Supreme Court sought for a literal relationship between the health and safety of the public of Nutley and the isolated case under consideration. It did not find it. The Court of Errors and Appeals sustained the decision saying:

We conclude therefore that the ordinance under consideration, so far as it prevents the use of the respondent's property for the purpose for which he desires to put it, is not authorized by the statute under which it purports to have been adopted and to that extent is null and void.56.

There followed a flood of adverse court decisions involving not only business

55/ 98 N.J.L. 712, 121 Att. 785.
56/ 125 Att. 121.
uses forbidden in residence districts, but also apartments in residence
districts and other use prohibitions. These cases were decided for the
most part on the precedence of the Nutley case.

In 1924, in an attempt to clarify the situation, the legislature placed
on the books a comprehensive and well-considered enabling act. Boards of
Appeals were provided for. There had been accumulated such a mass of judicial
opinion against use zoning that the new enabling act, sound as it was, was of
little value. The courts, contrary to the policy in other states, insisted
on reviewing the merits of the decisions of appeal boards and implied that
such boards were superfluous anyway inasmuch as the courts alone could decide
if each case came rightfully under the police power.

Attention was then turned to insuring the legality of zoning by amend-
ment to the New Jersey Constitution. After more confusion in the passage
through the legislature the following amendment was adopted in September, 1927:

The legislature may enact general laws under which municipalities,
other than counties, may adopt zoning ordinances limiting and restricting to
specified districts, and regulating therein buildings and structures
according to their construction and the nature and extent of their use, and
the exercise of such authority shall be deemed to be within the police
power of the state. Such laws shall be subject to repeal or alteration
by the legislature. 37

The following year a new enabling act, 38 superseding all others, was
passed in order that there might be no question that zoning was based on the
constitutional amendment.

The need for zoning in New Jersey has been great because of the highly
urbanized character of the state. Even during the discouraging years follow-
ing the Nutley case, cities and towns persisted in seeking what protection

37/ Art. IV, Sect. 6, Par. 5 of Constitution.
38/ Public Laws of 1928; Chap. 274.
the law afforded. There are now 182\textsuperscript{39} zoned municipalities in the state in which lives about 69\% of the total population. However, many of these ordinances are obsolete or inadequate.

A report of the New Jersey State Planning Board says:

Much of this zoning was done before the 1928 Enabling Act and many ordinances have been so changed as to be cumbersome and in many cases largely out-moded and of little real value. Some ordinances are deficient in administrative machinery and most of them provide excessive areas for business and industrial uses.

One reason that so many existing zoning ordinances are inadequate is that there has been so much misunderstanding of the proper procedure in planning and zoning. The zoning ordinances, in most cases, have been set up to meet some immediate consideration, with too little regard for future needs or advantages. Zoning properly comes after, or as a part of comprehensive planning. In the case of New Jersey's municipalities, an indefinite zoning procedure has been looked upon as the answer to the whole problem.\textsuperscript{40}

This comment might well be applied to most zoning that has been done in this country.

An interesting feature of the Act of 1928 is that the board of adjustment has power to grant variances only in lands abutting and within 150 feet of a district in which the requested use is allowed. In other cases the board recommends to the governing body or board of public works. A permit may be granted only on approval of the recommendation by the governing body or board of public works.

New Mexico

Santa Fe, with a use ordinance, is the only zoned city in New Mexico.\textsuperscript{41}

There is an enabiling act passed in 1927.\textsuperscript{41}

\textsuperscript{39/} National Resource Committee, Circular X; May 15, 1937.
\textsuperscript{40/} Toward a Master Plan; Second annual report of progress, 1936, p. 105.
\textsuperscript{41/} 1929 Compilation N.M. Stats. Annotated, chap. 90, 3301-3309.
New York

The State of New York has from the beginning been a leader in the zoning field. The first comprehensive zoning ordinance in this country was that adopted by New York City in 1916. The preliminary research that led to the New York ordinance was so thoroughly done and the drafting of the ordinance so carefully considered that immediately it became a model that has influenced each of the more than thirteen hundred ordinances now in effect throughout the country. The men who were instrumental in framing the New York City law — Edward M. Bassett, Frank Backus Williams, George B. Ford, John P. Fox, Herbert S. Swan, Robert H. Whitten, Nelson P. Lewis and others — became the leaders of the zoning movement and were largely responsible for the spread of the New York type of ordinance. Bassett and Lewis later served on Secretary Hoover's Advisory Committee on Zoning, which framed the Standard Zoning Enabling Act which was everywhere favorably received and adopted in toto by many states.

In 1917, the year following the New York ordinance, an enabling act was framed by the state legislature permitting cities to zone. In 1920 boards of appeals were authorized but not made mandatory. Powers enjoyed by cities were in 1921 extended to villages and the following year to towns. The town powers apply only to land outside of incorporated areas. Boards of appeal were required for villages in 1927 and for towns in 1932; they are still permissive for cities. At present the city, town and village enabling acts are identical except for the board of appeals provision and for one other minor variation in the city law.

42/ Laws of 1917; Chap. 483.
45/ Laws of 1920; Chap. 743.
44/ Laws of 1921; Chap. 464.
45/ Laws of 1922; Chap. 322.
46/ Laws of 1927; Chap. 650.
47/ Laws of 1932; Chap. 634.
The State of New York has more zoned municipalities than any other state in the Union. The best information available shows a total of 234 zoned communities in the state as follows: cities 43, villages 137, towns 54. Excluding New York City approximately 63.0 per cent of the people of the state live under the protection of zoning ordinances; if New York City is included the figure becomes 83.6 per cent.

A spot map of zoned municipalities reveals a heavy concentration in the metropolitan area and Long Island with a band up the Hudson and through the Mohawk Valley from Albany to Buffalo. Within this river belt lies a large percentage of the population of New York State and most of the zoned municipalities. There is no county zoning in New York although several counties maintain planning boards.

There is found in some New York ordinances a greater refinement in the establishment of districts than is usual elsewhere. For instance, in one town in Westchester County there are five types of residence districts, three apartment districts, two semi-business districts, one commercial district and two industrial districts. This refinement is not unusual in the suburban towns in the metropolitan area and does not seem to give rise to the practical difficulties in administration that might be expected.

The New York law has one unique feature that is very similar to the British law. In certain cases the planning board is given legislative power. The planning board can change the zoning regulations of an area proposed to be subdivided simultaneously with approval of the plat.

#37. The body creating said planning board is hereby authorized by ordinance or resolution applicable to the zoning regulations of such city or any portion of such zoning regulations to empower it, simultaneously with the approval of any such plat either to confirm the zoning regulations of the land so platted as shown on the official
zoning map of the city or to make any reasonable change therein, and such board is hereby empowered to make such change. The owner of the land shown on the plat may submit with the plat a proposed building plan indicating lots where group houses for residences or apartment houses or local stores and shops are proposed to be built. Such building shall indicate for each lot or proposed building unit the maximum density of population that may exist thereon and the maximum yard requirements. Such plan, if approved by the planning board, shall modify, change or supplement the zoning regulations of the land shown on the plat within the limitations prescribed by such legislative body in said ordinance or resolution. Provided that for such land so shown there shall not be a greater average density of population or cover of the land with buildings than is permitted in the district wherein such land lies as shown on the official zoning map. Such building plan shall not be approved by the planning board unless in its judgment the appropriate use of adjoining land is reasonably safeguarded and such plan is consistent with the public welfare. Before the board shall make any change in the zoning regulations there shall be a public hearing preceded by the same notice as in the case of the approval of the plat itself. On the filing of the plat in the office of the county clerk or registrar such changes, subject, however to review by court as hereinafter provided, shall be and become part of the zoning regulations of the city, shall take the place of any regulations established by the board of estimate or other legislative authority of the city, shall be enforced in the same manner and shall be similarly subject to change.

This is an excellent procedure, valuable both to the subdivision and the community. It should be more widely adopted. So far as is known its legality has not been questioned.

North Carolina

The North Carolina Enabling Act was adopted in 1923. Fourteen municipalities have zoned under it.

North Dakota

The authority for zoning in North Dakota is Chapter 175 of the Laws of 1925. Ordinances are effective in five cities.

48/McKinney's Consolidated Laws, Chap. 21, Art. 3, Sec. 37. Similar powers for towns and villages respectively are to be found in McKinney's Consolidated Laws, Chap. 62, Art. 16, Sec. 281 and McKinney's Consolidated Laws, Chap. 64, Art. 6a, Sec. 179.
Ohio

The leading case on zoning - the Euclid Village case - came out of Ohio. That case is discussed at some length in Chapter II. In sustaining the Village of Euclid, the Supreme Court of the United States established the constitutionality of zoning ordinances when properly drawn and reasonable in application.

The Ohio enabling act was passed in 1919. Since then 95 municipalities have zoned. There is no authorization for county zoning but there is a considerable amount of sentiment in favor of it.

Oklahoma

Oklahoma has an enabling act applying to cities and incorporated villages under which 15 municipalities have zoned.

Oregon

Oregon has an enabling act and six municipalities have ordinances. The advisability of rural zoning is being studied at the present time. As in California and Washington, there is no provision for a board of appeals in the Oregon act.

Pennsylvania

Townships of the first class and all boroughs and cities may zone in Pennsylvania. There are a series of enabling acts, the first of which was passed in 1915, for the different classes of municipalities. At the end of 1936 there were 17 zoned cities, 58 boroughs and 14 towns. Most of the ordinances are comprehensive or have use and area restrictions.

50/ Ohio, General Code, sec. 4566-7 to 4566-12 inc.
In June, 1937, Pennsylvania became the eigth State to adopt a state-wide county zoning Law. This is combined in a County Planning Act. 53

Rhode Island

An Enabling Act for Rhode Island cities and towns was passed in 1923. Provision for a Board of Review of five members was made in the 1923 Act. Two years later this provision was made mandatory. Providence and Woonsocket enacted zoning ordinances immediately after the passage of the Enabling Act. Today, six cities and twelve towns in Rhode Island are zoned. Most of the ordinances are comprehensive.

South Carolina

By authority of the Code of Laws of South Carolina, 1932, sections 7390-7397 inclusive, cities and incorporated villages may zone. Charleston, with a comprehensive ordinance, and Columbia, with use regulations, are the only two cities that have availed themselves of the law.

South Dakota

Four cities in South Dakota have comprehensive ordinances. The enabling act dates from 1927.

Tennessee

Cities in Tennessee were authorized to zone in 1921.54 During the 1935 session of the legislature, a series of planning laws were enacted including a municipal zoning act and a county zoning act for unincorporated areas. In addition to the usual urban-type zoning authority, that act grants the power to regulate.

54/ Tenn. Private Acts of 1921, Chap. 165.
...the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation or other purposes.

Six cities have zoning ordinances; no county ordinances have yet been adopted but some counties are preparing ordinances.

Texas

The Texas enabling law applies to cities and incorporated villages. It is based on the Standard Act. Ordinances have been adopted by sixteen cities and villages.

Utah

While Salt Lake City has been zoned for use since 1920, a general enabling act was not passed until 1925. Three other municipalities have zoned under the act.

Vermont

Vermont has had an enabling act for municipalities of all types (except counties) since 1951. As in Maine, a zoning ordinance can be adopted only by vote of the people. Rutland and St. Johnsbury have taken advantage of the act and passed regulations.

Virginia

Any city or town can zone under the Code of Virginia, Chapter 122A. At the end of 1956, 12 cities and towns were zoned.

Washington

Counties, towns and cities derive planning and zoning authority from

55/ Utah Laws of 1925, Chap. 119.
56/ Wash. Laws of 1935, Chap. 44.
a single act in Washington. As in the other Pacific Coast states there is no provision for boards of appeals. Zoning ordinances are found in eight cities. Some of these were adopted before an enabling act was passed, presumably under charter provisions or constitutional guarantee.

**West Virginia**

West Virginia passed an enabling act in 1931. Wheeling and Hinton have comprehensive regulations.

**Wisconsin**

Wisconsin's major contribution to zoning has been the development of rural zoning. That is discussed rather fully in the chapter of that title. The first urban zoning act in the state was passed in 1913 to provide for use districts in the larger cities. The first act has been followed by a series of others expanding the field of zoning to height and area regulation and extending grants of power to other classes of municipalities. Thirty-five cities and villages have ordinances and twenty-four counties. All twenty-four counties, except Milwaukee, have rural ordinances.

**Wyoming**

Chapter 78 of the Acts of 1923 authorizes zoning in Wyoming. To date, however, no municipality has taken advantage of the powers of this act.

**District of Columbia**

A Zoning Commission for the District of Columbia was established by Act of Congress on March 1, 1920. On August 30, 1920, the Commission, by virtue of the power vested in it by Congress, divided the District into four

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57/ Act of March 1, 1920, 41 Stat. 500.
use zones—residential, first commercial, second commercial, and industrial. Within the residential zone there are five use subdivisions varying from "A" restricted district which permits only single family detached houses, churches, and schools, to a district where all types of dwellings are permitted, including apartments and hotels. The industrial district is, in effect, unrestricted as to use. There is no provision for the granting of variances but the Zoning Commission, which is a permanent body, can amend both the text and the zone boundaries.

Height regulation in Washington was well established before the zoning regulations of 1920 were adopted. Building heights had long been limited by Act of Congress58 as a function of street widths with certain maximum heights.

The Shipstead Act of 1930 provides for some sort of architectural or aesthetic control in the Capital City. It provides that development should proceed along the line of good order, good taste, and with due regard to the public interests involved and a reasonable degree of control should be exercised over the architecture of private and semi-private buildings adjacent to public buildings and grounds of major importance.

Under this act it is required that new buildings facing several parks and government buildings in the District of Columbia be approved as to color, texture of materials, and appearance by the Commission of Fine Arts.

58/ M. S. Stat. 922, c. 322, March 1, 1899.
A good zoning ordinance is usually the product of cooperation of local officials and citizens with skilled technicians experienced in the intricacies of planning and zoning. The local people contribute a familiarity with local conditions that comes from living years with the problems; the expert or technician brings high highly specialized knowledge of the subject, a familiarity with solutions that have been tried elsewhere and, most important of all, a detached and unimpassioned point of view. The person who has lived in a given set of conditions for many years often loses his ability to see his problems in their broader aspects; his attention is arrested by intimate details. The outsider ordinarily has a better perspective and more easily sees the problems as a whole.

Some small communities have attempted to draw up zoning ordinances without the benefit of expert assistance. This is not to be recommended even for the smallest village. Almost always when the village fathers do the job themselves the true significance of zoning is lost sight of. The usual thing in a case of this sort is to copy the regulations of another municipality where they seem to be working satisfactorily. A zoning ordinance is like a suit of clothes. It is hardly advisable to acquire a suit because it looks well on another person. Each community is different; a zoning ordinance should be cut to fit the particular and special requirements of the municipality.
PART OF THE LOCAL AUTHORITIES

The Zoning Commission

Where there is a planning board, that is the logical agency to undertake zoning and most state enabling acts specifically provide that a planning board may so act. When the planning board, rather than a special agency set up for the purpose, handles the matter, there is less chance that there will be forgotten the important consideration that a zoning ordinance should be based on and be part of a comprehensive plan. When there is no planning board, one should be established before zoning is attempted. And then the zoning ordinance should not be the first and immediate concern of the board; a master plan of which the zoning plan would be one element, should be the first consideration. Where a planning board is not in existence or created for the purpose, it is usual to set up an unpaid zoning commission to prepare an ordinance for submittal to the legislative body. This commission is usually a citizen body although it often includes one or more official members.

Advisory Committee

The formation of a rather large citizens' advisory committee with unofficial or semi-official status is sometimes wise. Such a committee has a dual purpose. It serves to report to the smaller executive group, the planning board or zoning commission, the trends in current popular opinion and also serves as a body through which publicity and propaganda may be disseminated to the general public. It must be remembered that the best zoning ordinance ever written is worthless unless it can be adopted. The advisory committee may well be comprised of representatives of the civic and service associations, merchants' associations, trade unions, garden clubs, women's organizations, parent-teacher associations, and other groups of like character with an interest in the welfare of the
Community. This committee, where it is desirable to establish one, should be consulted at all stages of the work. The reactions of the committee to certain proposals may reveal that it would be disastrous to the entire ordinance to place such proposals in unmodified form before the public. The advisory committee acts as the dog on which new ideas may be tried. A large advisory committee of persons with influence in the community may be a good move psychologically. A zoning ordinance is seldom adopted without considerable debate and usually with vociferous dissension from those who for one or another reasons are opposed to it.

It is well to have as many influential citizens as possible on the zoning side from the beginning. Membership on the advisory committee makes many who are "better with us than agin us" feel that they are part of the movement. They will be valuable allies when the ordinance is up before the legislative body for adoption.

Publicity and Education

During the preparation of the scheme provision should be made for adequate newspaper publicity on the aims and purposes of zoning and the progress of the work. In the larger cities, radio broadcasts may be useful in creating a favorable public opinion. Simply worded flyers distributed at the homes of citizens have been helpful in carrying the message of zoning. Missionary work in the schools and by talks at club meetings is also valuable. All of this work of education and publicity is properly the function of the local authorities. Articles of publicity purposes may be prepared by the technician but it is unwise for him to become actively engaged in a publicity campaign. Resentment against an outsider coming in to tell the local people
what to do may be enough to cause the defeat of the ordinance. The technician's contact with the public should be only through the agency which has engaged his services.

PART OF THE TECHNICIAN.

The first concern of the zoner is to make the zoning scheme an expression of the master plan. Zoning and the location of schools, parks, playgrounds, sewer and water lines, fire stations, streets and transportation lines are mutually dependent. The technician working on a zoning scheme should never lose sight of this. This unfortunately sometimes is an altogether new and startling idea to the municipal fathers who call in an expert for consultation. Any number of things may start a zoning movement in a community but seldom is there any conception of the real significance of that science. It is often the technician's first problem to educate those who have retained him to the difference between writing just another restrictive ordinance and drawing up a sound zoning plan.

Basic Data

Base Map. It is essential to have an accurate base map of suitable scale. In most communities of fair size there is usually such a map available in the office of the municipal engineer. Very often the county engineer or some state department has a better base map of a small community than is available from local sources. Sometimes a public utility company has the most accurate map available or a commercially published atlas may have the best information. A base map from any but an official source should be checked against whatever other information is available in order to insure a reasonable degree of accuracy. Aerial photographs are valuable for checking and are an excellent source of information.
A scale of four hundred feet to one inch is a good working scale in most cases. Where the area under consideration is small a larger scale may work out better. Where there is an Official Map in states where provision for such a map is made by law, that is, of course, the thing to use.

It should not be the function of the planner or zoner to draw up a base map from field surveys. He should be furnished with a suitable base map just as an architect has a right to demand that he be provided with a survey plan of a building lot.

Topographic Map. A reasonably accurate topographic map with contour intervals of not more than five feet is needed. This information and other basic data that can be mapped should be presented on a series of prints of the base map. In some cases much of this material can be adequately shown on a reduction of the base to about eight hundred or a thousand feet to the inch.

In larger and more progressive municipalities a topographic map is apt to be plotted in the engineer's office. Where there is a sewer system there is certain to be some information at least as to grades. These may be only along street lines but that information supplemented with that which may be available from the offices of engineers practicing in the vicinity will usually be enough to afford an idea of the topography. If no more detailed information is available, recourse may be had to the United States Geodetic Survey sheets. With these in hand the experienced planner should get a reasonable idea of the contour of the land after a couple of trips about the town.

Geology. The underlying rock formations and location of outcroppings should be known and indicated on a map. Geology often has a dedided
influence in determining land use, not only directly as where land should be zoned for industrial purposes because of the presence of minerals that can be economically extracted, but it may also indirectly influence the best type of land use. Land with considerable outcropping of rock is perhaps ordinarily better fitted for park or for low-density residence than for any other purpose. The underlying rock formation may also have some bearing on the intensity of use that is permitted on the land.

Federal and State reports are the best source of information for this study.

Soil. A soil map adapted from the county soil surveys made and published by the Bureau of Soils, United States Department of Agriculture, is valuable. In some states the agricultural department of the State College may have better information on soil conditions. A soil map is indispensable in preparing a rural zoning scheme.

Land Use. The most important preliminary map to be drawn is the Land Use Map. This must be accurate. Time spent in painstakingly gathering data and in carefully presenting it will pay dividends when the actual work of establishing district lines begins. The use of property should be determined from a check in the field and recorded on field sheets. These sheets should be at a scale of from 40 to 100 feet to one inch. Tracings from insurance atlases or from assessors plats make good field sheets. On the sheets it is desirable to indicate the general use of property - single residence, two-family, multi-family, commercial, industrial, farm, woodlot, etc. - by a symbol. An approximation of the median building height along each block should be noted, yard depths and building coverage should also be noted.
The information for all this may be gathered at the same time but should be plotted on individual maps. Any special conditions should be noted on the field sheets. In ordinary cases it is not necessary to show the outline of buildings on the Land Use Map but merely indicate the use of the property. The same classification of uses on built-up lots as are contemplated on the zoning plan should be used as far as possible on the Land Use Map. The field sheets which constitute a more detailed record should be kept for reference purposes. Overlays or transparencies spotting all business alone or all industry or any other use alone are often valuable.

Land Value. The assessed value of land has an important bearing of the intensity of use to be permitted by the zoning ordinance. Of course, the value of the land should be determined by the use permitted as determined altogether from other considerations. However, planning and zoning usually deal with established areas. Existing conditions must be recognized and compromise is sometimes advisable. The value of land should be indicated in cents per square foot or front foot, grouped into a reasonable number of classifications. Where there is a scientific system of land valuation and assessment in effect, this information may be transferred to a map without too great an expenditure of time. In many municipalities the system or lack of system in assessing is such, and records are in such shape, that it would be a major project to make a worth while Land Value Map.

Utilities. The location and size of all existing and projected sewer and water mains should be shown on maps. The significance of this study is obvious. The allotment of areas for uses should take into consideration the possibility and feasibility of providing those areas with the necessary utilities. A neighborhood of single family houses may be served with sewer and water mains sufficient to take care of its needs but if that district were turned over to any more intensive use it is conceivable that the
existing lines would be altogether inadequate and that much waste and expense would be involved in increasing the size of mains. On the other hand the existence of heavy duty mains may be a factor in the allocation of an area for intensive use.

Schools. The location and effective radius of existing and proposed schools should be plotted before establishing use districts.

Transportation. In larger cities the transportation system is directly related to zoning. Transportation lines should be shown on a map. In some cases it will be desirable to indicate time zones from the business or industrial center or from some other focal point.

New Buildings. The location of new buildings and their type can be determined from the record of building permits issued and should be plotted. A map showing this information for a period of five or ten years is valuable.

Population Density. The number of families per acre shown graphically will prove of significance and should be done if the necessary information is readily available so that not too much labor is involved in plotting it.

Special Districts. Special districts of any sort - improvement districts, fire districts or areas where special and significant deed restrictions are in force--should be indicated on a map.

Other Studies. There are other studies which should be made and which cannot be or need not be recorded on maps. It is necessary to study population trends within the community and in relation to the region. An honest estimate of population growth should be made for about thirty-five years in advance. The areas allotted for various uses should have some quantitative
relationship to the needs of the anticipated population. The kind of people in the community, their habits and ways of life should be kept in mind. The zoner should early familiarize himself with the history of the community. He should check up on the zoning in surrounding communities in order to determine how it may affect the community and to provide where possible an easy transition of uses across the boundary line. The protection offered by fire fighting facilities should also be looked into. From the land use material, a tally should be made of the acreage or frontage at present used for residence, commercial and industrial purposes.

Area Allotments

It is generally acknowledged that in nearly every zoning plan made in the earlier year of zoning there was far too much area devoted to the more intensive use classifications. Frontage zoned for business usually exceeded by many times any conceivable need based on the business that a given number of people can support. It is not possible nor desirable to precisely determine and to set aside the amount of land needed for each of the uses that make up a city. To avoid monopoly there must be room for choice. However, most early ordinances had no rational economic basis whatsoever for the allotment of areas. As is stated in the preface to Harland Bartholomew's study, "Urban Land Uses", one of the first attempts to work out a scientific bases for allotting areas:

The practice of zoning has spread so rapidly in this country in the last dozen years and municipalities have in so many cases adopted zoning ordinances based on inadequate and far from comprehensive or logical considerations that the time has come to pause in advocating merely zoning as such and to promote a wider
understanding of zoning rationalized and related to sound economic policy. It is clearly impossible that all the land in a community should be developed for the uses which the individual land owner might imagine would be most profitable to him, were there no economic laws of supply and demand which must inevitably govern the amounts of land needed for the various purposes and the types of activities engaged in by citizens of any community.\(^1\)

The amount of land required for different uses varies with the type of community. The living habits of people vary greatly in different parts of the country. In some sections and detached single family house is the usual dwelling unit. The detached house is firmly entrenched in popular favor and must be accordingly recognized in the ordinance. In other cities there is no demand for detached houses; row houses are so predominant that a detached house is almost a rarity. In still other places the multi-family unit is popular. The allocation of areas for types of residential uses is dependent almost entirely upon local custom and conditions. The relationships found by Harland Bartholomew in the twenty-two cities covered in his research on land uses may serve as a guide, especially for larger cities which tend to be more alike than smaller communities. In the sixteen self-contained cities, located mostly in the middle west and ranging in population from 8700 to 300,000, included in the survey, it was found that the single family residence required the largest area of all urban land uses. An average of 56.1% of the developed area was used for single family houses. The land used for this purpose varied from 1.47 acres per 100 persons in Binghamton, N. Y., to 5.05 in Springfield, Mo., with an average of 2.955 acres per 100 persons. The average requirement for two-family dwellings was 0.14 acres per 100 persons and for multi-family dwellings 0.076. In a

\(^1\) Bartholomew, H., Urban Land Uses. Harvard City Planning Studies, IV, p.V.
<table>
<thead>
<tr>
<th>City</th>
<th>Single-Family</th>
<th>Two-Family</th>
<th>Multi-Family</th>
<th>Commercial</th>
<th>Industrial and Railroad</th>
<th>Parks and Playgrounds</th>
<th>Public and Semi-Public</th>
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<td>14.84</td>
<td>27.97</td>
<td>0.86</td>
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<td>29.5</td>
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<td>5.60</td>
<td>41.39</td>
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<td>San Angelo, Tex.</td>
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<td>0.52</td>
<td>1.44</td>
<td>9.70</td>
<td>58.55</td>
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<tr>
<td>Fort Worth, Tex.</td>
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<td>17.10</td>
<td>39.28</td>
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<td>8.48</td>
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<td>Cedar Rapids, Ia.</td>
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<td>2.07</td>
<td>1.14</td>
<td>2.09</td>
<td>11.72</td>
<td>32.94</td>
<td>7.44</td>
</tr>
<tr>
<td>Tulsa, Okla.</td>
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<td>Peoria, Ill.</td>
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<td>10.70</td>
<td>31.61</td>
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<td>San Antonio, Tex.</td>
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<td>1.07</td>
<td>2.61</td>
<td>7.38</td>
<td>30.48</td>
<td>6.01</td>
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<td>Troy, O.</td>
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<td>3.20</td>
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<td>1.14</td>
<td>12.65</td>
<td>25.78</td>
<td>8.56</td>
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<td>Binghamton, N.Y.</td>
<td>27.8</td>
<td>9.62</td>
<td>2.35</td>
<td>3.58</td>
<td>11.78</td>
<td>20.75</td>
<td>9.32</td>
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</table>

**Mean Averages**

|                  | 36.1          | 2.10       | 1.09         | 2.39       | 10.79                   | 33.61                | 6.33                   | 7.61                   |
TABLE II

PER CENT OF DEVELOPED AREA OCCUPIED BY VARIOUS USES.

Satellite Cities

From "Urban Land Uses" by Harland Bartholomew.

<table>
<thead>
<tr>
<th>City</th>
<th>Single-Family</th>
<th>Two-Family</th>
<th>Multi-Family</th>
<th>Commercial</th>
<th>Industrial and Railroad</th>
<th>Streets</th>
<th>Parks and Playgrounds</th>
<th>Public and Semi-Public</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clayton, Mo.</td>
<td>42.4</td>
<td>1.9</td>
<td>3.4</td>
<td>1.2</td>
<td>4.2</td>
<td>35.0</td>
<td>1.5</td>
<td>12.5</td>
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<td>University City, Mo.</td>
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<td>2.7</td>
<td>4.8</td>
<td>2.0</td>
<td>2.0</td>
<td>38.2</td>
<td>2.5</td>
<td>7.4</td>
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<tr>
<td>Maplewood, Mo.</td>
<td>47.5</td>
<td>3.5</td>
<td>1.7</td>
<td>2.9</td>
<td>15.2</td>
<td>25.4</td>
<td>0.9</td>
<td>3.1</td>
</tr>
<tr>
<td>River Forest, Ill.</td>
<td>44.5</td>
<td>0.5</td>
<td>0.5</td>
<td>0.9</td>
<td>4.5</td>
<td>28.4</td>
<td>2.6</td>
<td>18.3</td>
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<tr>
<td>Ferguson, Mo.</td>
<td>51.9</td>
<td>1.9</td>
<td>0.0</td>
<td>1.1</td>
<td>7.1</td>
<td>26.3</td>
<td>0.0</td>
<td>11.7</td>
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<td>Shrewsbury, Mo.</td>
<td>40.5</td>
<td>1.2</td>
<td>0.1</td>
<td>0.5</td>
<td>28.9</td>
<td>27.0</td>
<td>0.0</td>
<td>1.8</td>
</tr>
<tr>
<td>Mean Averages</td>
<td>44.5</td>
<td>2.0</td>
<td>1.7</td>
<td>1.4</td>
<td>10.3</td>
<td>29.7</td>
<td>1.3</td>
<td>9.1</td>
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TABLE III
PER CENT OF DEVELOPED AREA OCCUPIED BY VARIOUS USES

SIX IOWA CITIES

The data for this table was taken from a series of reports on Urban Land Uses in Iowa Cities Published by the Iowa State Planning Board in 1936.

<table>
<thead>
<tr>
<th>City</th>
<th>Single-Family</th>
<th>Two-Family</th>
<th>Multi-Family</th>
<th>Commercial</th>
<th>Industry &amp; Parks</th>
<th>Railroad Streets</th>
<th>Parks &amp; Playgrounds</th>
<th>Public &amp; Semi-Public</th>
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<tr>
<td>Burlington</td>
<td>23.0</td>
<td>0.83</td>
<td>0.54</td>
<td>1.82</td>
<td>16.74</td>
<td>44.47</td>
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<td>Fort Dodge</td>
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<td>7.45</td>
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<td>Keokuk</td>
<td>28.09</td>
<td>2.72</td>
<td>0.94</td>
<td>2.89</td>
<td>8.01</td>
<td>48.02</td>
<td>4.02</td>
<td>5.30</td>
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<td>Marshalltown</td>
<td>41.60</td>
<td>0.98</td>
<td>0.12</td>
<td>3.65</td>
<td>13.99</td>
<td>29.19</td>
<td>2.89</td>
<td>7.60</td>
</tr>
<tr>
<td>Muscatine</td>
<td>38.23</td>
<td>-</td>
<td>1.17*</td>
<td>3.37</td>
<td>9.60</td>
<td>33.70</td>
<td>4.50</td>
<td>9.40</td>
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<tr>
<td>Ottumwa</td>
<td>40.78</td>
<td>1.00</td>
<td>0.96</td>
<td>2.56</td>
<td>10.30</td>
<td>36.53</td>
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<td>4.48</td>
</tr>
<tr>
<td>Mean Averages</td>
<td>33.89</td>
<td>1.13</td>
<td>0.61</td>
<td>3.19</td>
<td>11.70</td>
<td>38.58</td>
<td>4.83</td>
<td>6.28</td>
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</table>

* Figure for two-family is included in multi-family total. For computation of averages the ratio of two-family to multi-family has been arbitrarily assumed at 2:1. The error in the averages will not be significant.

NOTE: In order that a comparison with H. Bartholomew's figures may be obtained, the same method of computing the mean average has been used i.e. the mean average is obtained by dividing the sum of the items by the total number of the items. Since the figures represent conditions in cities of different population size it is apparent that to obtain a true ratio it would be necessary to give proportionate consideration to the total population of each city.
group of six satellite cities investigated, five of which were located about St. Louis, Mo., and one in Illinois, it was found that all the residential requirements were higher than in self-contained cities, the areas used for single-family, two-family and multi-family dwellings respectively being 4.68, 0.18 and 0.12 acres per 100 persons. It is probable that the figures for single-family use are a little high for most eastern cities.

Area required for industrial uses, of course, varies with the character of the community. In larger self-contained cities however it seems to be true that industrial and railroad property occupy about one-tenth of the developed area of the city. This percentage appears to be fairly constant regardless of the size of the city. The average arrived at by Bartholomew of combined industrial and railroad in self-contained cities was 0.92 acres per 100 persons of total population. The requirements in satellite cities are slightly higher, 1.17 acres per 100 persons.

The determination of areas to be zoned for commercial purposes is always one of the most troublesome phases in the preparation of a zoning scheme. There is inevitably resistance from certain individuals or groups against restrictions of any kind on the development of their property. Most of these persons harbor the fond idea that someday they will be able to sell their residential property for business purposes at a nice profit. Especially the mistaken idea that all property on major thoroughfares is potentially valuable for business causes trouble. It is well established that only a certain amount of business can be supported by a community. Bartholomew's study revealed that an average of 0.179 acres per 100 persons was used for commercial purposes in the self-contained cities included in his survey and
0.13 acres in satellite cities. Or, in terms of frontage an average of 65.7 linear feet of business frontage was used per 100 persons of the general population in self-contained cities. The frontage required in the various cities varied from 47.1 to 99.9 linear feet per 100 persons. As is to be expected, the figures were somewhat less for satellite cities. A survey of fifty-four cities and villages in the Chicago region made in 1951 by the Chicago Regional Planning Association showed that the frontage used for business varied from 28.3 front feet per 100 population to 86.5, with an average of 51.8. The municipalities surveyed were all grouped about Chicago but the amount of business frontage required seemed to be independent of the residential or industrial character of the community. The figure for the City of Chicago itself was placed at 54.0 front feet per 100 persons by the Zoning Commission in 1923.

In 1955 a land utilization study in Westchester County, N. Y., showed an average of 107 front feet per 100 persons in the zoned cities, towns and villages throughout the county. At first sight the results of this survey seem incompatible with the figures brought forth by all previous land use surveys. According to Mr. Wayne D. Heydecker, who directed the Westchester survey, however, many communities in that county have been suffering badly from over-expansion of business. There are many more stores and retail establishments than are actually necessary, a condition which has resulted in many vacant business properties. Even so, the figures become more nearly reconcilable when it is discovered that the procedure in measuring frontage was not comparable with that of other surveys. The Westchester survey counted as commercial frontage the frontage of all lots upon which stood a business building. Bartholomew's survey and all others apparently
counted as business frontage only the width of the business building itself. Much of the discrepancy in results can be accounted for here.

The store frontage for Muscatine, Iowa, as determined by the Iowa State Planning Board in 1936 according to the Bartholomew method was 72.74 linear feet per 100 persons. A recent survey in Lower Merion Township, Pa., fixed the business frontage at 67.7 feet per 100 persons.

It seems that a store frontage of from 50 to 75 feet per 100 persons is sufficient for the needs of most municipalities. In allotting an area for a business zone in a zoning ordinance it must be remembered that this figure represents merely ground floor store frontage and not business lot frontage. The business lot frontage would run a little higher. Provision must be made for expansion where study indicates that a population increase may be expected. Then, of course, adequate provision for a choice of sites must be made so that the ordinance will not unwisely and illegally establish a monopoly of business sites. Another factor to be considered is the part that off-street automobile parking facilities are going to play in the shopping areas of the future. There are indications that merchants are beginning to find it profitable to furnish their patrons with a place to park their cars while they shop. If this altogether desirable tendency grows it will mean that shopping districts will require a somewhat greater area allotment in order to take care of parking. On the other hand it must be remembered that business can ordinarily be freely established in the industrial zone, and if as it may be desirable new residences are banned in industrial zones, much business would probably find itself there pending the filling out of the zone with industrial uses. Making reasonable allowance for all of these factors, it seems that 150 linear feet per 100
<table>
<thead>
<tr>
<th>Location</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average 16 self-contained cities (Bartholomew)</td>
<td>63.7</td>
</tr>
<tr>
<td>Average 6 satellite cities (Bartholomew)</td>
<td>36 †</td>
</tr>
<tr>
<td>Average 54 cities and villages (Chicago Regional Planning Ass'n.)</td>
<td>51.8</td>
</tr>
<tr>
<td>* Average 38 Westchester Co. Municipalities (Westchester Co. Planning Project)</td>
<td>107.0</td>
</tr>
<tr>
<td>Chicago, Ill. (Chicago Zoning Commission)</td>
<td>54.0</td>
</tr>
<tr>
<td>Muscatine, Iowa (Iowa State Planning Board)</td>
<td>72.7</td>
</tr>
<tr>
<td>Lower Merion Township, Pa.</td>
<td>67.7</td>
</tr>
</tbody>
</table>

* Based on frontage of business lots; others are presumably based on frontage of business buildings.
DISCLAIMER

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persons of the present population is a good working figure for determining the amount of property that should be zoned for business in an average community. About one-half of the business frontage can be expected in the central business district and the other half scattered about neighborhood units. Bartholomew's study seems to indicate that in cities in excess of 50,000 population but less than 300,000, the ratio of store frontage located in the central business district decreases directly as the city increases in population.

Other Factors in Allotting Areas

The location of zones within the municipality should be determined from a consideration of many factors. In a community largely built-up, existing conditions will, of course, play a large part in establishing reasonable zone boundaries. Here the value of a good land use map is apparent. Undeveloped areas are in most cases better zoned for the least intensive use. At one time it was the practice among some technicians to leave undeveloped areas unrestricted or to place them in an intermediate zone for, so the argument went, until there is some development there is no way of determining what the destiny of an area is and a possible future development should not be cramped by too onerous restrictions. Such a narrow point of view cannot be reconciled with the true function of zoning. Open areas should be kept open until such time as more intensive development is demanded. It is time enough then to place less restrictive regulations on them. The practice in New York of authorizing the planning board to modify within certain limits the zoning of an area simultaneously with the approval of a plot is a good way to handle the situation and finds a parallel in British practice as provided for in the Town and Country Planning Act of 1932.
Industry. The areas allotted for industry should be on fairly level ground. Proximity to transportation facilities, railroads and waterfronts and easy access to main highway routes is essential. The mistake should not be made, however, of zoning all waterfront property for industry. In the ordinary city the industrial use of the waterfront is limited and it may be of more value to the community to maintain that part of the waterfront not actually needed for industrial purposes in parks or other open development rather than have it lined with industrial plants that do not need to be on the water and which might better be located elsewhere. The direction of prevailing winds is another consideration. Industry should be so located that smoke, dust or odors will not be carried through the community. The location and capacity of existing sewer and water mains must be considered. The cost of land is another factor. Today, more than ever, due to the increasing tendency of industry to spread over the land in one-story units rather than to concentrate in high buildings, the land in the industrial zone should not be excessive in cost. Also the prevailing tendency of industry to diffuse and to locate on the periphery of urban centers rather than in the center must be taken into consideration.

Business. Business uses should be concentrated in the center - the "downtown" section which is usually well defined by existing conditions and where needed in small neighborhood units. Traffic, both pedestrian and vehicular, are important considerations for business. It should not be understood that the amount of business to be done varies directly with the number of automobiles that will pass by the doors. That fallacy has resulted in stripping both sides of some of our main through traffic arteries with
business zones. Of course, there is not enough business to support all
the zoned land and the usual result of such practice is a blight along
the highway. Land that could be well used for apartments or other residence
is either given over to shoddy commercial structures in order to get some
little return on else is kept idle. Residential development does not take
place for fear that a hot dog stand or roadhouse or filling station may be
erected on the adjoining lot and so ruin the value of the residential property.
The same fear of loss of their investments causes owners to allow existing
residential property to run down.

The traffic that is wanted in business districts is the shopping traffic —
not through traffic. There should be parking facilities to take care of the
shoppers; in some cases it is desirable that the interior of blocks be used
for this purpose. It may be well to establish in the zoning ordinance a
smaller percentage of lot coverage than has been usual in order to provide
for off-street parking.

Apartments. Apartment districts are often found on relatively high
value land situated between the business district and less intensive residential
use areas. It is reasonable in many cases to provide for apartments along main
arteries where private dwellings are not apt to be established because of noise
or high land values or other reasons. Apartment houses create problems of
automobile parking. Some few communities have required that apartments
provide off-street parking for certain specified number of cars dependent upon
the capacity of the buildings. Bronxville, N. Y., has recently amended its
zoning ordinance to require each apartment to provide parking space for one
car for each family housed. Before amendment the ordinance required parking
space for one car for each two families. Whether such a restriction is legal
is yet to be determined but it does seem to be in the interest of safety and
the general welfare.
Residence. Residence zones are best located in outlying sections free from the noise and dirt and confusion of industrial and business areas. Where industry and business are better located on flat terrain, hilly and sometimes comparatively rugged country may lend itself well to residential development. The location of schools and existing public utilities is another factor in determining the location of and the intensity of use in residential districts.

Height, Area and Density Limitations

Just as the quantitative allotment of use districts should have some scientific justification so there are certain principles that should be used as a guide in drawing up height, area and density regulations. The purpose of regulations of this sort is to assure sufficient sunlight and air for the promotion of health and also (it must be incidental in the eyes of the law) to preserve and increase the amenities. Safety from fire, the load on utilities and the overcrowding of streets are other considerations. The amount of sunlight necessary to the health of the people is not definitely known although attempts have been made to measure it. One of the best studies that has been made on this line was that done for the Regional Plan of New York and Its Environs by Wayne D. Heydecker in collaboration with Ernest P. Goodrich. The principles established in this study were later used as a guide in drawing up a series of suggestions which should govern zoning policies in open suburban or undeveloped areas. Those requirements are set forth below:

Coverage and Yard Requirements:

(1) No land should be built upon to a greater extent than 40 per cent of the gross area of any district. With a normal allotment of street and park space, this would probably be obtained by

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limiting the area of occupancy of lots to an average of 60 per cent.

(2) Land occupied by small houses, whose use may at some time be changed to permit the erection of apartments or business buildings, should be zoned so as to prevent undesirable density from occurring as a result of redevelopment coincident with the change of use. (In the evolution of cities, districts of small houses with gardens are gradually threatened with the danger of conversion into apartment or business districts. The reverse process rarely happens. The open space required in the later, more intensive, development should be fixed before the change of use is imminent.)

(3) Under the comparatively ideal conditions possible in open suburban areas, and when essentials only are considered, apartment buildings should have the same light, direct ventilation and space for movement, per family unit, as the single family residence.

(4) Open space on dwelling or apartment lots should not be less than 50 per cent of the lot area nor less than one square foot of open space for each four square feet of the gross floor area of the building. For outlying dwelling house and apartment zones the open space minimum should be 60 per cent and not less than one square foot for each two square feet of gross floor area.

(5) Business buildings should not cover more than 60 per cent of the lot with the same street area as residential buildings, but should be permitted to cover up to 70 or even 80 per cent if the street area is increased in proportion as the open space on the lot area is reduced.

(6) No part of a building used for residence should be more than two rooms deep, except that projections may be built out from the main wall on the front or rear to a depth not exceeding 10 feet and a width no greater than 25 per cent of the building; and all habitable rooms should have direct access to the outer air by a window or windows with an aggregate surface of not less than one-eighth of the floor area. (This is a most vital provision. Height and density restrictions may fail, in themselves, to give adequate light to rooms. With 50 per cent coverage the light conditions may be worse than with 70 per cent coverage unless the depth of buildings is restricted, in the main, to two rooms.)

(7) Front, side and rear yard space should be required for all residential buildings, and either front or rear yard space for all business buildings.
In many residential areas there should be uniform and definite front yard space of a prescribed minimum. On the other hand, where residential buildings face wide boulevards it may be desirable to require nearly all of the available space in side and rear yards. In the case of business buildings have one frontage on wide streets it may be desirable to have all the yard space in the rear so as to enable the rear as well as the front of the building to have a good angle of light; but in the case of those buildings that are erected on lots running through from street to street all the space would have to be in front yards.

Thus width and character of streets, particular uses and location of buildings, and other local factors will determine the proper yard requirements in each district. But, above all, the size and location of yards have to be related to the regulations fixing the area of occupancy and angle of light to buildings. Subject to the latter requirements being adequate, much freedom can be given in regard to the distribution of yard space.

There are certain essential considerations, however. Among them are the following:

(a) When front yard space has once been determined in a residential area it should not be reduced in case of conversion of such area to business use. (Although front yards cannot at present be obtained for purposes of street widening, it seems reasonable to suppose that in course of time it may be practicable to require an owner of business premises to provide front yard space for purposes connected with his business, so as to prevent encroachment on the public highway for private uses. Moreover, the considerations of health and safety that make front yards desirable in residential areas are equally applicable to many business areas.)

(b) Corner lots should have yards fronting on both intersecting streets, but it may be necessary to reduce the depth of the exterior side yard to half the front yard requirements for the adjoining lot.

(c) Side yard requirements in particular should be fixed in relation to the proposed type of construction. For instance, wooden buildings should have wider side yards than fireproof buildings, as a measure of safety.

All buildings above three or four stories (or 40 feet) in height should be fireproof. The side yard for fireproof multiple family buildings should vary with the height.

(d) Rear yard standards should vary according to the angle of light requirements at the rear of buildings, as fixed by the height and cubage restrictions.
(e) Whatever the restrictions of coverage of lots may be, not less than 10 feet in depth of yard space, at right angles to the rear of each building, should be required to be left open. (This is necessary to secure rear open space on shallow as well as on deep lots, but normally this minimum would be much increased in residential areas.)

(8) All loft, department store and office buildings should be required to have rear access from lanes so as to provide off-the-street loading and unloading space. The suggested requirements as to coverage, yard space, heights and cubage make it unnecessary to require special loading and unloading space within the building, although this will be necessary where provision is not made for adequate space in yards and lanes.

(9) Public garages and filling stations should be permitted in business or retail districts only under variances granted by a board of appeals, which should have power to require adequate setbacks and protection of adjacent property. A front yard 40 feet deep should be required wherever practicable for entrance roads, gasoline pumps and parking. Gasoline pumps should be set back at least 20 feet.

(10) Private motor garages accessory to residential buildings should be subject to special regulation so as to confine them to strictly private uses.

(11) In addition to area of occupancy, height and yard requirements, all residential areas should be subject to area-per-family requirements.

HEIGHT AND CUBAGE RESTRICTIONS:

(1) Residential buildings should not be higher than half the width of the clear open space at front and rear.

(2) The front walls of business buildings up to the first setback should not be higher than one times the width of the street, with a maximum height of 60 feet; and the height of the rear walls up to the first setback should not be higher than twice the depth of the rear yard. Above the first plane of height as determined by the width of street and the depth of the rear yard the buildings should be set back one foot for each foot of additional height, except on the 20 per cent of the lot on which towers may be erected.

(3) Towers should be permitted without limit as to height on 20 per cent of the lot area, with setbacks on all lot lines so as to secure the best angle of light obtainable on all four sides. No tower should be permitted to be less than 25 feet from any lot line.
(4) The maximum cubage in business districts measured in floor areas (inclusive of towers) should not exceed the equivalent of six to seven floors equal in size to the portion of the lot permitted to be built upon, or from 50 to 59 cubic feet for each square foot of lot, the actual maximum to be determined according to size of community and other local conditions.

These principles are set forth only as a guide in areas where the development is not intensive. Modification of these standards will be necessary in areas that are largely and intensively built up and each set of local conditions will, of course, determine to a large extent the form and character of the regulations.

Most state enabling acts provide that the density of population may be regulated and in these states many ordinances are found with some form of density limitation. There are several ways in which this can be accomplished. Of course, by prescribing lot sizes a density limit is set in districts restricted to single-family or two-family houses. To properly control apartment developments, however, and to assure open space for play or for light and air, supplementary restrictions are needed. In England density is usually controlled by limiting the number of houses per acre. A dwelling house, which is understood to be a single-family house, is reckoned as one unit. In buildings other than dwelling houses the authorities make adjustments according to the nature of the building.

In America it is more common to find density regulations expressed in terms of area-per-family. While the area-per-family method brings under control the number of families that may be housed on a given lot, it fails to a certain extent to provide open space about the building in proportion to the bulk of the building. This can better be accomplished by requiring a
fixed amount of open space for each family housed or for a unit of gross floor area. This has been done in some ordinances. The Town of Oyster Bay, N. Y., requires a ratio of open space on the lot to gross floor area of one to two. This results in restricting a three-story building to a 40 per cent lot coverage, or a four-story building to a 25 per cent lot coverage.

In certain cases it may be desirable to establish only one residential district in which all types of dwelling houses, including apartments, would be allowed. Properly drawn density restrictions would assure sufficient open space about all buildings. The principal objection to multi-family buildings is the attendant over-crowding. With the density regulated by the methods described above this objection largely disappears.

**Treatment of Edges of Zones.**

Several methods have been evolved for effecting transition from one zone to another. The various methods of treating district borders have been authoritatively discussed elsewhere. About 40 per cent of the 860 zoning ordinances analyzed by Mr. Comey in his research contained some provision for easing the line between zones. When possible a step-down of zones should be provided so that an intensive use district will not abut a highly restricted district. A narrow buffer zone of an intermediate use is sometimes practicable. That this may sometimes produce greater evils than it prevents is pointed out by Mr. Comey. Other ordinances require greater than usual yard and lot coverage restrictions for more intensive uses adjacent to a zone of higher classification. Heights of buildings in the same circumstances are also sometimes stepped down.

It is undeniable that the edges of zones require special treatment. As an alternative to incorporating in the ordinance methods of transition, the board of appeals or adjustment, where one exists, may alleviate cases of special hardship arising from such a situation. Some authorities prefer to put the whole matter in the hands of the appeal board because of the chance of exposing the ordinance to the danger of unconstitutionality by granting special privileges to some lots that are denied others in the same zone. It seems, however, that the carefully drawn ordinance could accomplish the desired effect within constitutional limitations.

All through the work it will be found that tact is as important as technical ability to the zoner. Resentment against any infringement of the "right" to do as one wishes with one's property is often encountered among the uninformed. While it is ordinarily the function of the technician to mould public opinion it must not be forgotten that the best zoning scheme ever evolved is worthless unless it can be adopted by the legislative body.
CHAPTER VIII
THE ORDINANCE

In general it may be said that the simpler the ordinance the better. Simplification should not, of course, be carried to the point of emasculation, but there should be included no unnecessary details or trimmings.

Statement of Authority and Purpose

The purpose of the ordinance should be stated in the very beginning with reference to the statute under which the ordinance is drawn. In the statement of purpose it is well to use the exact wording of the enabling act in order that there may be no question of the intention of the regulations.

Definitions

Definitions are necessary but they should not be needlessly involved nor should there be more of them than are necessary in order to avoid possible confusion. Definitions for most of the common terms encountered in zoning ordinances have tended to become standardized over the years. Unless there are special conditions, it is well to use the usual definitions that have been proven sound. Definitions are sometimes found in the front of the ordinance and sometimes in the back. The logical place seems to be in the front, just after the declaration of purpose and citation of authority.

Map Part of Ordinance

Where the zoning districts are shown on a map, it is essential that there be a declaration that the map is made part of the ordinance.
The map should be properly identified and signed and filed with the municipal clerk. Failure to state that the map was a part of the ordinance recently involved Binghamton, N.Y., in litigation in which the city came out second best. Only in very small communities is it feasible to describe the district boundaries in the ordinance without benefit of map. There should be one official zoning map only. That should be either in the Council Chamber or in the office of the municipal clerk or zoning officer.

**Districts**

In larger cities it is customary to establish separate, use, height and bulk districts, the boundaries of which may or may not coincide. In most cases, however, it is sufficient to establish only use districts and to apply height and bulk regulations within those districts.

**Form of Ordinance**

There are two general ways of setting up an ordinance where there are use districts only with height and bulk restricted within those districts. The ordinance can be set up with major headings of Use Regulations, Height Regulations, and Area, or Bulk or Density Regulations. The advantage of this system is that general provisions and exceptions applying to all the regulations of one type may be placed with those regulations to which they apply. For instance, exceptions of the height regulations in all districts for spires, towers, cupolas, etc., will be found in the same section as the height regulations. The disadvantage of setting up an ordinance
this way lies in the necessity of turning to several sections in
order to discover the various restrictions applying in any one
district.

The alternative system is to place under each district all
of the regulations applying within that district. This makes it
easier to find out all the various restrictions within a single
district. Most of those who have occasion to refer to the ordinance
are interested in the regulations for a single district only. This
form is helpful to them. On the other hand all special conditions
and exceptions applying uniformly in two or more zones must be
listed separately for each zone in which they are applicable or else
be set down separately in another part of the ordinance, in which
case they are apt to be overlooked.

In residence and business districts it is better practice to
list those uses which are permitted and to state that no land or
buildings should be used for any other purpose than to attempt to
list uses that are prohibited. Where a prohibited list is establish-
ed there is always danger of some use not anticipated becoming
established to the detriment of the district. Adjustments can
always be made and the community is protected when the ordinance is
permissive. It is usual to allow property in industrial districts
to be used for any purpose except certain listed objectionable uses.

Minimum Building Sizes

A zoning ordinance imposes limits on the maximum size of structures.
It does not ordinarily establish minimum limits. Some communities
have done this for reasons that are questionable in the eyes of the
law. The Town of Irondequoit, near Rochester, N.Y., has established minimum restrictions in order to keep out very small houses. This has been done on the grounds that such houses do not return to the community an amount in taxes sufficient to pay for the services they require. Southfield Township adjoining Detroit permits in a residence zone no dwelling of less than 10,000 cubic feet of content. Some municipalities have attempted to legislate against one-story buildings. It is difficult to see what justification restrictions of this sort have in a zoning ordinance. It is possible that there are certain minimum standards and areas that should be required for buildings used for dwelling purposes. These, however, should be uniform throughout the city or town and should not be different in different districts. They properly belong in a building code rather than a zoning ordinance.

Exclusion of Residences in Certain Areas

Milwaukee and Racine, Wisconsin, and Newark, New Jersey, exclude residences from some industrial districts. If it is not healthful nor safe for industry to be in a residential district it would seem to be equally unhealthy and unsafe for residences to be intermingled with industry in an industrial district. There are other considerations besides the health and safety factor, however. It is desirable to zone somewhat more land for industry and for business than will probably be needed for those uses in order to avoid the danger of creating a monopoly of industrial and commercial sites. If some of the excess land so zoned is vacant it is hardly
fair to deprive the owner of all return from it until it is absorbed by industrial development, if ever. Special conditions, of course, must receive special treatment but, as a general rule, it is not wise to exclude residence from the usual industrial zone.

In cases where the industrial district is on land that may be unfit for residential purposes by reason of inadequate drainage, danger from periodic flooding or for other similar cause, the prohibition of new residential building is warranted and is to be recommended. The prohibition of residences in flood plains and marsh lands, regardless of whether or not they be zoned for industry should be a valid exercise of the police power.

Accessory Uses

It is only reasonable that certain uses incidental to the principal use of the property be allowed even though they would not be permitted to operate independently. It is customary for physicians and some other professional men to have their offices in their homes. That should be permitted. There are customary home occupations that are in the same category. "Home occupation" should be rather carefully defined in the ordinance in order to prevent basement factories and other objectionable uses from operating under that guise. Sometimes it is specified that only those residing on the premises may be employed in a home occupation, the maximum number of employees is fixed in other ordinances.

Accessory buildings, including private garages should be allowed only on a lot with the principal building, otherwise they
are not accessory. The number of stalls in a private garage should be limited as well as the number of such stalls that may be rented. It is sound to permit facilities for additional cars as the lot area increases above the established minimum.

Non-conforming Uses

The legal implications discussed under the head of Retroaction in Chapter IV should govern the drafting of that part of the ordinance dealing with existing non-conforming uses. It is usual to exempt existing buildings from the provisions of the ordinance. Land or premises should not be included in the exempting clause. It is not necessary, and the right to apply the ordinance to existing uses of land may be worth reserving. Schemes for the amortization or gradual elimination of non-conforming uses have been advanced from time to time. None has been sound from the administrative if not from the legal point of view.

A limitation on the extension of a non-conforming use should be written into the ordinance. A limitation of additions to a fixed percentage of the floor area in any ten year period is one way of accomplishing this; a limitation on the value of the extension is another. It is but fair that a non-conforming building should be allowed to expand to a certain extent under proper control. It may be well to refer all extensions of non-conforming buildings to the board of appeals as a matter of original jurisdiction.

Many ordinances provide for the conversion of a non-conforming use to conformity if the use is discontinued for a stated period.
usually six months or a year. This is somewhat difficult to enforce because of the difficulty of determining what constitutes a discontinuance of use. Merely because a store is unoccupied does not necessarily mean that its use as a store has been discontinued. In New York a store constructed before the New York City ordinance went into effect but never actually occupied was deemed a non-conforming store in spite of that fact. Even if the building were used temporarily for dwelling purposes its status as a store, as determined by the form of the building, would probably not change.

A non-conforming use may usually be changed to another non-conforming use in the same class. Some ordinances allow such change only if no structural alterations in the building are necessary. When once changed to a conforming use or to a less intensive non-conforming use, a non-conforming use should not be allowed to change back to its original status.

It is usual to permit the reconstruction or rebuilding of a non-conforming structure when damaged by fire, flood, or Act of God. In cases where there is a chronic flood problem this provision is better omitted. There is no point in rebuilding a flood plain every five or ten years. Reconstruction is sometimes limited to cases where the building has not been wholly destroyed.

Buildings for which permits have been secured before the adoption of the ordinance are usually allowed to be constructed even though non-conforming. It is well to establish time limitations for successive stages of progress of the construction in order to forestall the subterfuge of securing a permit and starting construc-
tion and thus establishing a non-conforming structure which might not be completed until some time later.

Interim Ordinances

During the course of preparation of a zoning ordinance, it is sometimes advisable to establish some broad control through the device of an interim ordinance. The value of the interim ordinance lies in the check it affords to those who would hurriedly establish uses during the period of preparation that would probably not be permitted after adoption of the regulations. An interim ordinance is frankly a temporary proposition and should not be allowed to drag on for an indefinite period.

The regulations established by an interim ordinance are necessarily very general. Districts can be outlined only by rule-of-thumb method. The regulations are unavoidably arbitrary in application to many individual lots. Such regulations vary in detail. One method is to broadly designate certain streets for residence, business or industry. Another is to require the consent of a stated percentage of owners within a certain radius or distance along the frontage street for any construction other than a business or industrial structure. Perhaps the most common method is to allow no business or industrial use in any block where the majority of structures are dwellings.

They are but makeshift regulations and are frequently declared arbitrary when taken to count. However, it is sometimes necessary to resort to such an expedient in order to restrain greedy interests that in a few short months might do the community lasting harm.
CHAPTER IX

ADMINISTRATION

Urban zoning is now firmly established in law. It has been practiced long enough so that its influence is becoming apparent in the physical pattern and appearance of the community. Administration of the laws has been varied in detail. With each year, however, practical experience and a growing body of judicial opinion tend to evolve a standard of administrative practice toward which zoning throughout the country is attracted.

Enforcement Officer

The building inspector or the officer whose duty it is to issue building permits is usually designated the enforcement officer of the zoning ordinance. It is his duty, when plans for new construction are duly filed, to determine if they are in conformity with the zoning regulations of the district in which the building is to be located. If the provisions of the ordinance are satisfied, the building inspector must issue a permit. He has no discretion in the matter. It is good practice to require that an occupancy permit be secured from the building inspector after the completion of the structure before the building may be occupied. This is helpful especially in smaller communities where there is no building department that checks on a building during the progress of construction. The occupancy permit is issued after an inspection of the completed structure to make sure that it has been built in accordance with the approved plans.
In communities where there is no building inspector, an office of zoning inspector or officer may be established. This may be filled by some appropriate municipal official or a special appointment may be made to the post. The town or village clerk, police chief or fire chief is sometimes made the enforcement officer where there is no building inspector.

If the submitted plans are in conflict with the zoning regulations, the enforcement officer has no alternative, he must refuse the permit.

Board of Appeals - Powers and Responsibilities.

Nearly every state empowers the local authorities to establish a quasi-judicial body known as the board of appeals or board of adjustment. In most states such a board is mandatory. Only California, Washington and Oregon have no provision for an appeal board.

It is impossible to make a zoning plan for a municipality so perfect that every lot is treated equitably. Because this is a physical impossibility, the board of appeals is set up as a safety valve to make adjustments in the application of the law where practical difficulties or unnecessary hardship are involved in following the letter of the law.

The Standard Enabling Act, which is closely followed by many state acts gives to the board of appeals the following powers:

1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

This gives the board three fields of action; to decide where it is alleged that the enforcement officer has erred in his interpretation of the law, to sit in original jurisdiction on matters referred to it in the ordinance, and, upon appeal from the decision of the enforcement officer, to adjust the application of the ordinance in special cases.

**Original Jurisdiction**

Original jurisdiction refers to the powers of the board to decide on matters specifically referred to it by the ordinance under rules of conduct applying to the situation. It is distinguished from the appellate jurisdiction of the board under which variances may be granted in cases of unnecessary hardship. Ordinarily matters over which the board has original jurisdiction may be brought before the board directly without the formality of application to the enforcement officer, denial, and application for variance. In practice, however, all applications are usually submitted to the enforcement officer first and the usual procedure of appeal is carried out.

In each ordinance the matters over which the board of appeals may have original jurisdiction are specified. In Chapter V there are discussed some special problems over which it is often wise to grant the appeal board original jurisdiction. The consent of a stated percentage of property owners affected by a change may be properly required as a prerequisite to consideration in a case of original jurisdiction.
Appellate Jurisdiction

The limits of the appellate powers of a board of appeals are necessarily somewhat elastic. It is intended by the Standard Act that variances from the terms of the ordinance should be granted only where specified conditions apply. The Massachusetts act more clearly defines the limits within which a board may grant variances. That act grants boards of appeal power, in addition to reversing errors and granting special permits under original jurisdiction,

To authorize upon appeal, or upon petition in cases where a particular use is sought for which no permit is required, with respect to a particular parcel of land a variance from the terms of such an ordinance or by-law where, owing to conditions especially affecting such parcel but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise.¹

A lot of irregular shape where a literal enforcement of the provisions of the law would make it unnecessarily difficult or impossible for the owner to make use of his land should probably be granted relief by the board of appeals if it can be done without detrimentally affecting other property. Or there may be conditions of topography or of surrounding development that would justify a variance from one or more of the terms of the ordinance.

There is no question but that many boards of appeal abuse the discretionary powers granted to them. The board of appeals cannot usurp the legislative function, that is, it cannot grant variances where special

conditions not affecting the district generally do not obtain. Such variances, and they are unfortunately granted frequently by some boards, amount to an actual changing of the zone and its regulations as established by the common council or the town meeting or whatever the local legislative body may be. For instance, there can be no justification for the permission of a business use on a single lot in a block zoned and used for residence and where the same conditions apply to the lots generally. Such a grant would amount to the creation of a business zone comprising a single lot. Zones can be established and district lines changed by action of the legislative body only.

In some states the authority of the board of appeals has been tightly circumscribed by judicial decisions.

The Supreme Court of Illinois in 1931 ruled that the board of appeals had no right to vary the application of the ordinance in any respect. The practice of referring special cases to the board in the ordinance itself was also declared unconstitutional by the Court. The function of the board was diminished to hearing appeals where it is alleged that there has been error in a ruling of the permit issuing authority. This decision has taken from zoning ordinances in that state the elasticity and flexibility for meeting special conditions that it is impossible to treat in the ordinance itself. Since this decision, the Illinois enabling act has been amended to allow the board of appeals to hold hearings on requested changes. Their power is limited to reporting to the legislative body from whence action must come.

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2/ Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931)
In Maryland a decision similar to that in Illinois was handed down in 1933. In that state, however, the board of appeals retains the power to act on special exceptions under rules of conduct written into the ordinance. It is the practice for appeal boards in that state to refer desirable variances to the legislative body which may or may not take action.

The enabling act of New Jersey authorizes the board of adjustment to make variances only within 150 feet of a district boundary. Elsewhere the board may hear petitions for variances in an advisory capacity. It communicates its recommendations to the legislative body from which action must come. The evident purpose of the New Jersey system is to permit necessary adjustments of the boundaries between zones but to curb the indiscriminate granting of variances that have taken place in some states. In practice this method fails because of the impossibility of imposing adequate safeguards in individual cases by means of legislative enactment.

In some cities it has been the practice of the board of appeals to automatically turn down all petitions for variance of the use regulations, limiting itself to cases involving height, area and density restrictions. The reason for this is apparent although not valid. These boards are wary of running afoul of the courts, they are afraid that the grant of a variance of use may be considered tantamount to an alteration of district boundaries. This is an untenable position. Each case submitted to a board should be judged on its individual merits. There are times where the use regulations may be relaxed, with proper safeguards, to alleviate cases of particular hardship where peculiar conditions exist and where substantial justice can be done within the spirit of the ordinance.

4/ For example, Lynn, Mass.
A common argument cited in pleas for variances is that the owner cannot get a decent return on his property under the existing zoning classification, that he has always paid his taxes and should be entitled to realize a fair yield from his property by allowing him to use it more intensively. It may be true that an individual could realize more money from his property if he were allowed a non-conforming use. But unless there is evidence that the property under consideration is peculiar in this respect, the appeal board may not grant a variance. If the same argument is generally applicable to all the property in the zone it may be that the zoning should be changed by legislative action. Bassett says:

The courts have, however, gradually concluded that the deprivation of better earning by means of a non-conforming use is not an unnecessary hardship within the meaning of the law. Value is not the proper criterion. But where the environment is such that the lot cannot be profitably used for a conforming use the board can properly grant a variance permit.5

Concerning the power of a board to act in cases of unnecessary hardship, Harris H. Murdock, Chairman of the Board of Standards and Appeals of New York City has written:

The question has been asked, "What is hardship?" The Court has said that an owner is entitled to a reasonable use of his land. What may or may not be reasonable cannot be stated in any general rule. It does not mean that one owner is entitled to a special privilege by a variation that is denied others similarly situated or that will cause hardship to other owners. It doesn't mean that in time of depression his property does not carry itself. It doesn't mean that a variation can be justified because a non-conforming use will provide a greater return than a conforming use.

It doesn't mean that if the district appears to be incorrectly zoned that the owner ipso facto is entitled to a variation. The best answer to the question is that unnecessary hardship is all the elements which taken together indicate that the property under appeal is unique.

5/ Bassett, C.M., Zoning; the laws, administration and court decision during the first twenty years; 1956. p. 124.
and cannot be put to a conforming use that will provide a reasonable return under normal conditions. If this is the situation, the Board must put the application to the other tests to assure itself that, if granted, others will not be unduly injured and that the public health, safety and general welfare will be secured and substantial justice done. 6

Any hardship involved must be in the property for which the variance is sought. That it is a hardship to neighboring property to have the property in question conform to the terms of the ordinance is not a proper basis for a variance. Because a residential neighborhood may need a store in the vicinity is not sufficient reason for the board of appeals to grant a variance to a parcel in order to fill that need. That is a matter that should involve a change of the map and hence is outside the jurisdiction of the appeal board.

In states where there is no provision for boards of appeal or adjustment or where the courts have largely shorn boards of discretionary powers, there is no recourse in cases of hardship but to change the map by legislative act.

Variance with Conditions

In granting a variance an appeal board may impose such conditions as it deems wise and proper. The Massachusetts act states:

In exercising the powers under paragraph 3 above, the board may impose limitation both of time and user, and a continuation of the use permitted may be conditioned upon compliance with regulations to be made and amended from time to time thereafter. 7

It is fitting that the appeal board have the power to impose conditions if it is wisely to accomplish its function as an adjusting body. There are many cases where it would not be wise to grant a variance outright but where

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6/ As quoted by Bassett, op. cit. p. 168-169.
the limitation of the variance by appropriate conditions may grant relief to the appellant while protecting the public interest.

The conditions imposed need not find the same basis in the police power as the regulations themselves. It is not necessary that they be justified on the grounds of health, safety, morals or the general welfare. They can be designed to fit the individual case and may be for aesthetic or other reasons not tenable under the police power.

Zoning regulations must be based on the health, safety and general welfare of the community. But the conditions imposed on variance permits are not regulations. They express the protective adaptations necessary to secure the required vote in the board of appeals. They may therefore have an aesthetic quality. For instance, a regulation that a gasoline station must be of colonial design is void because not related to health or safety. But a variance allowing the station in a prohibited district could require such design where, for instance, the surrounding houses were colonial. 8

Temporary Permits

The board of appeals is sometimes specifically given the power by an ordinance to grant permits, generally or for certain uses, for a fixed period of time. This is not to be recommended. A board of appeals has power to impose whatever conditions it may deem proper when granting a permit. This includes time limitations on the validity of the permit issued. There are a few special cases where this may be desirable. It is difficult to see however just what purpose is served by allowing the board of appeals to authorize issuance of temporary permits for non-conforming gasoline stations as is done in the New York ordinance. The danger in this sort of thing is that permits may be granted for a temporary use where an unconditioned variance would be refused. Experience has shown, moreover,

8/ Bassett, op. cit. p. 129.
### Table V

**Comparative Table Showing Number of Variances Granted and Map Changes in Several Cities**

Data from various sources.

<table>
<thead>
<tr>
<th>City</th>
<th>Years Covered</th>
<th>Number of years Covered</th>
<th>Variances Requested</th>
<th>Variances Granted without condition</th>
<th>Variances denied</th>
<th>Amendments to Map</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boston</td>
<td>1924–1935</td>
<td>10 1/2</td>
<td>1665</td>
<td>1065</td>
<td>600</td>
<td>77</td>
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<tr>
<td>Cincinnati</td>
<td>1924–1937</td>
<td>13</td>
<td>1940</td>
<td>1493</td>
<td>349</td>
<td>137*</td>
</tr>
<tr>
<td>Cleveland</td>
<td>1929–1937</td>
<td>7 1/2</td>
<td>2507</td>
<td>1289</td>
<td>748</td>
<td>–</td>
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<td>Columbus</td>
<td>1925–1931</td>
<td>8</td>
<td>757</td>
<td>450</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Denver</td>
<td>1925–1937</td>
<td>12</td>
<td>1516</td>
<td>893</td>
<td>497</td>
<td>33</td>
</tr>
<tr>
<td>Des Moines</td>
<td>1931–1933</td>
<td>2</td>
<td>91</td>
<td>51</td>
<td>29</td>
<td>–</td>
</tr>
<tr>
<td>Louisville</td>
<td>1931–1937</td>
<td>6</td>
<td>445</td>
<td>237</td>
<td>208</td>
<td>20*</td>
</tr>
<tr>
<td>Lynn</td>
<td>1926–1935</td>
<td>9 1/2</td>
<td>2246</td>
<td>1973</td>
<td>–</td>
<td>105</td>
</tr>
<tr>
<td>Milwaukee</td>
<td>1924–1937</td>
<td>16</td>
<td>–</td>
<td>147</td>
<td>–</td>
<td>692*</td>
</tr>
<tr>
<td>New York</td>
<td>1916–1937</td>
<td>21</td>
<td>6800**</td>
<td>1700**</td>
<td>5100**</td>
<td>1232</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>1933–1937</td>
<td>4</td>
<td>4800</td>
<td>4000</td>
<td>700</td>
<td>249</td>
</tr>
</tbody>
</table>

* Includes text amendments.

** Estimate.
that temporary permits are temporary in name only and that once a non-conforming use is established it is almost impossible to dislodge it.

Membership of Board of Appeals

Five is the usual number of members on an appeal board. That is the number provided for in the Standard Act and most states have adopted it. Overlapping terms are recommended. In some places the city council or town board sits as the board of appeals in a capacity separate from its legislative capacity. This is not good practice. The appeal board should be separately constituted and its decision should be free from any possible political implication. It should be composed of those who have special knowledge of the subject.

Usually the members receive no compensation although in the larger cities where the volume of business makes considerable demands on the time of the members, compensation is sometimes paid. The chairman of the Board of Standards and Appeals in New York City receives a salary of $12,500 annually and each of the other three appointed members receive $7,500. A number of cities provide for payment for each meeting attended with a fixed annual maximum. Payment at the rate of $10 per meeting is made in Boston and Newton, Mass., Columbus, Ohio, and some other cities.

In Boston a peculiar situation exists by reason of that city's singular position in relation to the state legislature. Boston has both a board of appeals and a board of adjustment. The board of appeals is comprised of the same membership as the appeal board for the building code. It exercises the usual powers of a zoning appeal board. Boston was zoned, not by the city itself, but by act of the state. The state legislature did not wish to be bothered with petitions for amendment to the law and yet it evidently
did not want to delegate the authority of amendment to the Boston City Council. It set up a Board of Zoning Adjustment composed of citizen members, with the chairman of the Boston City Planning Board as chairman, and to this body gave authority to change district boundaries when in its judgment such changes were in the public interest.

In New Bedford, Mass., the board of appeals under the building code serves in the same capacity for the zoning ordinance. This doubling up cannot be considered good practice. The building appeal board is properly concerned with details only. They consider each individual case within itself. There is no consideration of anything outside of the application of the law to the property in question. The zoning appeal board should have a different attitude of mind. It should approach each case with an understanding of the broader significance of zoning. The effect of a variance on the zoning structure of the community as a whole must be considered. There is danger of a building appeal board retaining its habit of thought when made the zoning appeal board also.

In some cities (Fall River, Mass., Knoxville, Tenn., Kansas City, Mo., Indianapolis, Ind., Minneapolis, Minn.) the planning commission acts as a board of appeals. There is danger here of the planning agency becoming so involved in zoning administration that it does nothing else. It is wise, however, to have one member of the planning agency on the appeal board in order to bring to the board the broader and comprehensive point of view that the planning commission presumably has.

Vote Required for Variance

It is usual to require that a variance be granted only on a vote of a percentage of the appeal board larger than a majority. The Standard Act
requires four out of five votes to issue any order, grant a special permit, or to allow a variance. In Massachusetts the concurring vote of all the members is required.

Rezoning

The legislative body responsible for the enactment of the zoning ordinance may at any time amend or repeal the ordinance. Where the board of appeals does not exercise the power to grant variances the ordinance becomes set and rigid. Relief in cases where the application of the law should be adjusted is possible only by amendment of the ordinance, usually by changing the zoning map which is part of the ordinance. When a lot is rezoned by the legislative body, no conditions can be attached. For instance if a city council rezones a residential piece of property to permit the erection of an attractive and high-grade shop, it is powerless if the applicant changes his mind and decides to erect a fruit stand or cobbler shop or anything else that is permitted in a business district. All property in each zone must be treated alike. When it rezones a lot the council cannot impose on it restrictions that are not common to all property similarly situated. A board of appeals can impose such restrictions and therein lies its value.

Where such "spot zoning" is practiced the zoning map soon ceases to be a plan and ceases to have any substantial relation to health, safety, morals, or general welfare of the community. The Philadelphia City Council was recently called to task by the Court for such spot zoning.

The City Council rezoned a single lot in a residential district for business after the Board of Adjustment had denied a variance. It was
proposed to use the property for a funeral home. The surrounding property was residential in character. The owner of an adjoining lot appealed from the action of the City Council in court. The Supreme Court held the action of the Council to be unreasonable and unlawful and said in part:

Neither that nor other zoning cases passed upon by our courts have definitely fixed the limitations that may be imposed on the area of land in district zonings; but there is a clear implication running through them that a single lot with a building thereon is not a proper area to be classified as a district in itself.

An attempt to wrest a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood should receive the close scrutiny of the courts lest the zoning enactments, constitutional and legislative, be diverted from their true objectives.

...The action of City Council in creating a separate commercial zone in an isolated area comprising a single lot was unreasonable, discriminatory, and in violation of the scheme and terms of the ordinance.

It is common to find that a greater than majority vote is required to amend the zoning ordinance. Some municipalities require a still larger majority if the planning board objects. Most enabling acts make provision for a "twenty percent protest". This means that if twenty per cent of the property owners affected by a proposed change sign a protest, it is necessary to secure more than a majority vote in order to amend the ordinance. New York City requires an unanimous vote in case of a twenty per cent protest. The Lynn, Mass., ordinance states that no amendment shall be made except by two-thirds vote of the City Council and by a three-fourths vote if the planning board or any property owner affected protests.

Court Review

There is provision in most enabling acts for review in court on a writ

of certiorari. The courts, reviewing a determination of the board of appeals on certiorari, confine themselves to finding if the board has acted in accordance with the law. In New York and most other states, the court will also reverse a determination of the board of appeals where it finds that the board has abused its discretion. On review the courts will not attempt to substitute its own judgment for that of the board of appeals nor to judge the merits of the board's decisions except where there is arbitrariness or clear abuse of discretion.

While the court has been given express power to review the determination of the Board of Appeals and to reverse or to affirm wholly or partly, or to modify the decision brought up for review, and may even take additional evidence upon the hearing, there exists, nevertheless, a presumption in favor of the correctness of the determination arrived at by the Board of Appeals.10

In the case of People ex rel. Healy v. Leo the Appellate Court of New York reversed an order sustaining a writ of certiorari and affirmed a decision of the Board of Standards and Appeals of New York City. The Court stated its attitude in regard to abuse of discretion by appeal boards:

Applications to vary the zoning regulations in a particular case are addressed largely to the discretion of the board of appeals which will not be interfered with by the court except in clear cases of abuse of such discretion.11

In Massachusetts the courts on certiorari review only the legality of the proceedings of the board of appeals and do not inquire into the discretion of the board.

Summary

Over the years the administration of zoning regulations has evolved to a point where its strength and its weaknesses have become apparent. Good

administration is half the battle in zoning. It is beyond human wisdom to draw a zoning plan that may be laid down as a hard and fast law and which treats every piece of property fairly and equitably. A zoning plan must remain elastic and be subject to modification both in application through the agency of the board of appeals and also through legislative action. On the board of appeals to a large extent rests the responsibility for seeing that the zoning ordinance becomes in operation what it is intended to do in theory - provide a systematic and equitable plan for guiding the physical growth of the community along lines in harmony with its social and economic needs. In the main, boards of appeal throughout the country are faithfully discharging their responsibility; most are functioning honestly and constructively. There is no question but that some boards habitually exceed and abuse the discretionary authority delegated to them as quasi-judicial bodies. Because some few boards are given to arbitrariness is no valid reason for condemning a system that on the whole is working well. Mr. Bassett has stated:

Complaints will always be made against boards of appeals, and probably such boards will always abuse their discretion once in a while. If, however, a city administration is not able to establish a competent board of appeals, it probably is not able to administer a zoning ordinance fairly. An occasional wrong decision by such a board is of less importance to the community than the unrelieved arbitrariness of an iron-clad ordinance which first on one particular application and then another may be criticized by the courts.12

The arbitrariness occasionally exercised by a board of appeals is nothing to the arbitrariness which must result if there is no discretionary agency to make adjustments in the application of the law in special cases.

12/ ibid. p. 166.
Replies to a questionnaire sent to each planning board and board of appeals in Massachusetts in connection with this study indicated that those actively engaged in planning and zoning work believe that the present powers of boards of appeal are satisfactory and should neither be increased or decreased. With few exceptions the planning boards reported that the board of appeals was doing a good job. Harmony between the planning board and the appeal board was especially evident where one or more members of the planning board served also on the board of appeals. Where there is an overlapping membership the appeal board is more likely to consider requests for variances from the standpoint of the development of the community as a whole and to grant only those that are in the public interest.

It is unfortunate that some states do not provide for boards of appeals in their enabling acts and it is also unfortunate that in some states where they are authorized by statute, they have been rendered impotent by the courts. An enabling act that provides that a municipality may establish a board of appeals is not as good as a mandatory declaration.

Certain factual studies of zoning administration[^13] have revealed that there seems to be a relationship between the number of those appearing at hearings to protest a requested variance or a petition for amendment of the map, and the number of such requests and petitions granted. Where there is objection expressed to modification of the regulations, the board of appeals or the council is less inclined to act favorably. Where there is informed and active public opinion, zoning administration is more effective.

The common practice of specifying in an ordinance certain non-conforming uses for which the board of appeals may grant temporary permits cannot be

[^13]: Boston, Mass; Columbus, Ohio; Lynn, Mass.
considered sound. In cases where conditions of time are desirable to protect the public interest, the board of appeals may impose them without particular specification in the ordinance.

A record of non-conforming uses made at the time of the adoption of the ordinance is a valuable aid to administration in later years. The Wisconsin rural zoning statute requires such a record but so far as is known no urban enabling act has such a provision. In large cities the magnitude of the task of preparing a list of this sort may involve too great an expenditure of time and effort, but where it is feasible, a record of non-conforming uses should be established.

Conditions sometimes change rapidly in cities. Development impossible to foresee may occur. Extraordinary conditions, of course, may be taken care of by the board of appeals or by piece meal amendments to the map and the text of the ordinance. But this is not enough. After a while an ordinance altered from time to time by such piecemeal methods is in danger of losing any substantial relation to the health, morals, safety or general welfare. The legitimate field of zoning regulation has expanded tremendously since the adoption of the first comprehensive ordinance twenty-two years ago; there is reason to believe that zoning powers will be further expanded in years to come. Some of the early ordinances are now obsolete or at least less effective than they might be. To take care of changing conditions within the municipality and expansion in the permissible field of regulation, every ordinance should be periodically reconsidered in its entirety. While it may not be desirable to write such a requirement into law, there should be an understanding that the ordinance shall be thoroughly reconsidered and revised every ten years. This would serve to reduce the number of illegal variances and unwarranted spot zones.
CHAPTER X

AESTHETICS AND ZONING

Zoning often results in an improvement in the appearance of a community. This is not the direct object of zoning but only a by-product of orderly control of community development. A zoning ordinance cannot control the architectural design or appearance of an individual building except by the accepted means of height, lot coverage and yard restrictions. Provisions relating to the cost, design, materials or color of a structure have no legal justification in a zoning ordinance nor in any other ordinance or regulation. There is room for question on the desirability of such control but there is no question as to the attitude of the courts toward aesthetic control.

Aesthetics and the Police Power

No court has ever held that a purely aesthetic benefit, in itself, is within the scope of the police power. Aesthetic considerations have entered into some cases but it has always been necessary to establish justification for exercise of the police power by social and economic reasons. In the last few years decisions have been coming down recognizing the aesthetic as a proper and necessary objective of the general welfare and one which may be considered in formulating zoning restrictions, but no court has held that such an objective is in itself sufficient.

Individual judges have urged that the promotion of beauty should fall within the scope of the police power and that the interpretation of the law should be liberalized in this direction in keeping with public sentiment.
In a Wisconsin case involving height restrictions Justice Crownhart stated in a dissenting opinion:

...And if it pleases these business men to use the absolute rights of the soil guaranteed them by the decision of this court, they may build monstrosities thereon of such shape and design as they may desire, even placing on the tops thereof the golden calf or a Chinese Joss. All that is required of these lords of the soil is that they build their Temples of Baal or what not so that they will be reasonably secure from falling on passersby......I cannot consent to a construction of the Constitution which so exalts private rights above public rights......and I do not believe that the constitutionality of the statute need rest upon the narrower grounds of safety and health though I think them ample to sustain the present statute as an exercise of the police power. If "public-welfare" has not done so already, it is high time it took on a meaning for the courts which it has for the rest of the world.....Are we so wedded to the part that we may not appreciate a new day until it has passed?

In a Louisiana case in which a zoning ordinance was upheld as a legitimate exercise of the police power in a traditional field the court went further and said:

If by the term "aesthetic considerations" is meant a regard merely for outward appearances, for good taste in the matter of beauty of the neighborhood itself, we do not observe any substantial reason for saying that such consideration is not a matter of the general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of the property in the neighborhood. It is, therefore, as much a matter of general welfare as is any other condition that fosters comfort and happiness, and consequent values generally of the property of the neighborhood. Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing or the olfartory nerves?

1/ Piper v. Elkern (1923) 180 Wis. 586, 194 N.W. 159.
In 1935 an opinion by Chief Justice Rugg of the Supreme Judicial Court of Massachusetts on fifteen suits in equity concerning the Massachusetts Billboard Law, so-called, held that regulation of advertising devises under an amendment to the state constitution specifically granting such powers to the legislature was reasonable and constitutional. The decision is noteworthy in that it goes further toward the recognition of the promotion of aesthetics as a legitimate function of the police power than any previous sustaining judicial opinion. It states that it is within the reasonable scope of the police power to preserve from destruction scenic beauty, but the force of this acknowledgement is tempered by reference to the economic value of beautiful scenery. Nevertheless, inasmuch as the case was argued on purely aesthetic grounds, and no attempt was made to prove that billboards are a fire menace, and likely to blow over and injure passers-by, provide a screen for immoral practices, and are a refuge for foot pads and thugs—the line of argument followed in all earlier successful billboard cases—the Massachusetts decision may be considered a long step forward. An appeal to the U.S. Supreme Court was withdrawn.

In general, it seems that what is necessary for a greater measure of control in the interest of beauty is not more power but a more liberal interpretation of the powers already enjoyed. Before the police power can be invoked for aesthetic reasons, there must be aroused a general appreciation of the beautiful. Liberal court decisions will follow an enlightened public opinion. An authoritative statement of the latitude of the police power in relation to public opinion and prevailing moves is found in the case of Noble State Bank v. Haskell.
It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or by a strong and preponderant opinion to be greatly and immediately necessary to the public welfare. 3

The Supreme Court of the United States has shown a tendency to be more liberal in the interpretation of what is for public use and for public benefit than the state courts. There is a better chance of the U. S. Supreme Court upholding a more liberal interpretation of the police power than upholding changes in state constitutions extending that power. Many state constitutional changes in matters involving the police power have been thrown out by the Supreme Court but not once has the Supreme Court of the United States failed to uphold a state Supreme Court's interpretation of the police power of that state.

The police power itself is unbounded and cannot be precisely defined. It was early assumed in order to prevent the misuse of power on the part of the government that that power extended only to the health, safety, morals and general welfare of the people. While realizing that changing conditions demand a relaxation of the traditionally limited view of an indefinite power the courts have been reluctant to admit that the promotion of beauty is in itself legitimate but have instead upheld legislation where the aesthetic consideration has been unquestionably of major importance by finding some of the traditional reasons, often ridiculously far-fetched, on which to base its decisions. Newman F. Baker says:

It is predicted that the time is not distant when the courts of our country will hold that reasonable legislation affecting the property of individuals will be considered constitutional if passed to promote the well-being of the people by making their surroundings more attractive, their lot more contented, and by inspiring a greater

3/ 31 Sup. Ct. 186 (1911)

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degree of civic pride. The decisions denying that the suppression of ugliness is a necessity do not settle the matter for all time. As soon as the average person may be thought to have developed an appreciation of the beautiful, the courts will, no doubt, sanction legislation for aesthetic purposes. Whenever things, once considered luxuries, become, in the course of progress, necessities, the courts may be depended upon to treat them as such. 4

Desirability of Aesthetic Control

While there is no question but that in certain cases a measure of control over appearance of structure would be of social value it is doubtful just how far such control should extend even if the courts eventually should come to sanction it as a legitimate exercise of the police power. The approval of the design of buildings by a municipal architect or board of review is required in many European and South American countries and in some of the Canadian provinces. It is not always successful for the words of Emerson, "beauty will not come at the call of the legislature", are still true. In England, where a considerable measure of control is possible under the Town and County Planning Act of 1932, the complaint is that the authority responsible for judging and approving the design of proposed buildings too often is the local contractor who is responsible for some of the worst buildings in the town. In the larger cities it would be possible to get competent architectural criticism, but even among the most highly qualified there are sharp differences in matter of taste. While some excellent results are probably brought about by compulsory architectural control through a zoning ordinance or some other ordinance, it does not seem wise that such control should become universal in this country. As well as in giving rise to interminable controversy on questions of architectural merit, it is

conceivable that such control would retard progress in the science of building by insisting on conventional styles demanding conventional methods of construction.

Examples of Architectural Control in America

So far as is known there are just two cities in this country at the present time, where the appearance of private buildings is regulated by public authorities. Under the Shipstead Act of 1930 permits for private and semi-public buildings in Washington, D. C., facing the principal government building groups must be passed on by the National Fine Arts Commission. Washington has also had for some years an effective voluntary board of review. Local members of the American Institute of Architects have served in rotation and without compensation on an Architects' Advisory Council. The Council has examined all plans filed with building permit applications and has called to the attention of the owner and the public ill-conceived and incongruous designs. The service of the Council is only advisory but it has done much to arouse the public from its lethargy in matters of architectural design.

In 1934 the City of San Diego, Cal., passed an amendment to the building code requiring that all applications for permits to build on the principal highway must first be approved by the Planning Commission as to architectural design. This experiment has evidently met with popular approval for it has been extended to several other areas in the city. In each case, except a district about the new civic center, extension of the controlled area has been brought about by petition of the property owners. All applications
for building permits are referred by the Building Inspector to the City Planning Commission for approval as to exterior design. If the design is approved by the Planning Commission, it recommends to the Building Inspector that the permit be issued. If the design does not meet with the approval of the Commission, the applicant is called in and changes in the design are recommended to him. Where the applicant remains uncooperative, the Commission refers the application back to the Building Inspector with the recommendation that the permit be denied.

Another notable California example of architectural control was that inaugurated in Santa Barbara in 1925 and later abandoned, though not until some excellent results had been attained. This set up the first municipal board of review by law that we have had in this country. There are grave doubts as to the legality of the ordinance, as there are to all similar ordinances, but in this case it was repealed before it was tested in court. The enactment of the Santa Barbara ordinance followed a long carefully considered educational program. There had been established some time before an advisory committee of architects to pass on plans when voluntarily submitted. The educational groundwork was so thorough that the prospective builder with an unapproved plan found it difficult to borrow money through the banks. When an earthquake destroyed two-thirds of the buildings on the main street – the Estado – within two weeks an ordinance was passed establishing an Architectural Board of Review and requiring the building inspector to refer all plans to the Board for a report. If the report was favorable, the permit would be issued; if, after twenty days, no agreement had been reached, the applicant could
appeal to the City Council for a public hearing. So successful was this regulation in operation, that within eight months about two thousand permits had been issued for buildings nearly all of which were in the Old California style. The ordinance was later repealed. Perhaps one of the principle reasons for success in this case was a community drafting room where designs were furnished at cost or free when the owner had no architect.

**Improving Architectural Design by Education Rather than by Law**

The extension of zoning powers so that provisions for control over the appearance of buildings may be written into the ordinance cannot be recommended unreservedly in this country. What is needed is an expansion of the powers of zoning so that the protection of spots of scenic interest and beauty and of historic significance may be accomplished under the police power on the basis of promotion of the public welfare, without resort to the usual subterfuge of trying to find some justification on the grounds of promotion of health, safety and morals. The improvement of architecture can perhaps best be brought about by education and cooperation rather than by ordinance. It has been pointed out that the Architects' Advisory Council in Washington, D. C. has done more than a little to improve the standard of design of buildings erected in that city by advice and suggestion only.

Another interesting attempt to secure more attractive buildings through voluntary cooperation is that practiced in Sacramento, Cal. Several years ago, after the advisability of an architectural control ordinance was rejected because of the question of legality, the Planning
Commission suggested to a number of persons owning property adjacent to the state capitol buildings a voluntary agreement for the review of designs for new buildings. All the owners for a distance of approximately one-half mile immediately facing one side of the capitol buildings signed an agreement that the City Planning Commission should pass on the plans for each new structure prior to the issuance of a building permit.

There are many other similar cases of cooperation through private agreement that have resulted in good and harmonious design of buildings. Some of the most successful residential developments in the country owe much of their attractiveness to private agreements that designs of proposed buildings shall be submitted to a community architect or to an architectural jury for approval. Some of the most notable examples of communities that have been so developed are Roland Park, Baltimore; Forest Hills, Long Island; Country Club District, Kansas City; Shaker Heights, Cleveland; St. Francis Wood, San Francisco; and Palos Verdes Estates, Los Angeles.

It is felt that such methods are more satisfactory than beauty-by-law methods.
Urban-Type Zoning by Counties

Zoning was evolved as a necessary control of the use of land in urban areas. Concentration of population in great cities made inevitable restriction of individual liberty both of action and of use of property. The political boundaries of cities, however, are seldom congruent with the limits of social and economic influence of the city. Zoning is a legal device and is applicable only to that area within the limits of the adopting political unit.

It may be well here to digress for a moment in order to discuss the variation in the type and importance of political subdivisions within the state throughout the country. In Massachusetts all land is under the jurisdiction of cities or towns. The county is an overlaid unit of comparatively little importance. Its functions are confined mainly to certain judicial services and to the construction and supervision of certain public works. There is no land directly administered by the county. In New York there are cities, villages and towns. A city is a self-contained unit. A village is an incorporated built-up district within a town. There are, of course, counties as there are in every state. All the land in the state is either in a city or a town. Pennsylvania is divided into cities, boroughs and townships, all separately constituted. In New Jersey all land lies within a city, borough, town or township - all separate units. As a general rule
in the eastern states the county is comparatively unimportant; the towns or townships retain their governmental functions and all the territory within the state is administered by some minor subdivision. The towns are generally jealous of their powers and resist any attempt to extend county authority at the expense of town autonomy. In the middle west the county is usually the stronger political unit in non-urban districts. The town is often of minor importance. In California there are but few towns. Most of the land outside the limits of the city is under the direct control of the county. Other western states are similar in political structure.

In order to exercise some control over the use and development of land beyond the limits of the city, county zoning sprang up in California. In 1921 San Francisco County passed a zoning ordinance under the authority contained in its charter; Los Angeles County did likewise in 1927. The San Francisco ordinance was, in effect, nothing more than a usual city ordinance for the county of San Francisco includes only the city and the urban territory immediately adjacent thereto. It is the only California county ordinance that applies to all the land, incorporated or unincorporated in the county.

The California Planning Act of 1929\(^1\) enabled counties to zone. It is interesting to note that the word "zoning" which seems to have a certain obnoxious connotation in California, does not appear in the statute. The term "districting" is used instead. Under the enabling act 8 counties have adopted ordinances. Two other counties have interim ordinances. It must be understood that these ordinances are not rural in character but

\(^1\)/ Cal. Stats. of 1929; chap. 838
embody only the usual restrictions of urban uses applied on a county-wide scale. They are similar in purpose and in provision to some of the town zoning ordinances found in New York and other states.

Several other states have statutes permitting certain specified or all counties to zone. None with the exception of Wisconsin, Indiana and Michigan specifically permit rural zoning. The Illinois statute\(^2\) specifically states that it does not apply to agriculture. The Tennessee act of 1935\(^3\) also makes it clear that it is not intended to be applied to agricultural or privately owned lands. Indiana\(^4\), Maryland\(^5\), Michigan\(^6\), Washington\(^7\), Wisconsin\(^8\), and Pennsylvania\(^9\), also have general county zoning enabling acts. In addition Georgia\(^10\), Kentucky\(^11\), and Virginia\(^12\) have enabling acts applying to certain counties only.

**Rural Zoning**

The problems created by the unwise use of rural land are among the most serious confronting the country today. The great phenomenon of urban concentration during the last one hundred years has tended to direct attention to the problems of the city rather than to the country. It requires some startling presentation of the facts - such as that of Sir Raymond Unwin that an area 70 miles square would contain all the houses in the United States at a density of ten to the acre\(^13\) to bring about realiz-
tion of the vastness of the rural and undeveloped areas in this country. While a high percentage of the urban population of the country lives under the protection of zoning ordinances, the actual area of land regulated and controlled by zoning is almost infinitesimal when compared to the total area of the country. All but a very small percentage of the land within the United States has been and is without any public control whatsoever as to development. Great areas have been wasted and despoiled by thoughtless exploitation. Forests have been leveled and stupid agricultural practices have ruined some of our best land. Isolated settlers, demonstrating their "rugged individuality" by attempting to wrest a living from land that for one or more of several reasons cannot possibly yield a decent return, have created a serious fiscal problem in many states.

Wisconsin took the lead in applying the principles of urban zoning to rural areas in an attempt to halt the uneconomic use of rural land and to plug the holes through which a disproportionate amount of tax money was being drained.

Wisconsin in 1923 had extended her zoning enabling act to empower counties to zone. This was merely the extension of the usual powers of regulation by zoning for residential, commercial and industrial purposes. It was not intended in any way to control non-urban uses. This amendment was brought about in order to exercise control over urban uses outside the limits of incorporated cities and villages. The unrestricted and often chaotic use of land that lies without the political boundaries yet is part of the city or village from an economic and social standpoint had been a matter of concern to many incorporated places. Milwaukee was especially interested in the orderly development of peripheral land and Milwaukee County soon passed a county zoning law based on the enabling act, the
first county zoning act passed under an enabling act.\textsuperscript{14}

The counties of northern Wisconsin have for many years been beset by problems of tax delinquency, heavy relief loads, and the high cost of providing necessary public services. In 1927 the Wisconsin legislature created an Interim Committee on Forestry and Public Lands to study the situation and to recommend legislation. That committee's report, made in 1929, contained a new idea - the recommendation that counties be authorized to establish forest and recreation zones in which dwellings and agricultural uses would be prohibited.

Both the orderly development of northern Wisconsin, and the need for reducing expenditures because of tax delinquency, require that counties be given the authority to control development. Counties should have the right to give every possible aid in agricultural zones with the aim of building up prosperous farming communities. But they should have the right in sections of isolated farms, with heavy tax delinquency and numerous abandoned farms, to set such areas aside as forest and recreation zones, and be empowered to control the construction of more roads and schools.

The legislature amended the enabling act to permit county zoning ordinances to establish agricultural, forest and recreation zones and to regulate the location of schools and roads\textsuperscript{15}, causing the enabling act to read:

\begin{quote}
The county board of any county may by ordinance regulate, restrict and determine the areas within which agriculture, forestry, and recreation may be conducted, the location of roads, schools, trades and industries, the location of buildings, designed for specified uses, and establish districts of such number, shape and area, and may also establish set-back building lines outside the limits of incorporated villages and cities, as such county board may deem best suited to carry out the purposes of this section.
\end{quote}

Oneida became the first county to adopt a rural zoning ordinance

\textsuperscript{14} The counties of San Francisco and Los Angeles in California had earlier ordinances adopted under their charters.
\textsuperscript{15} Wis. Laws of 1935, chap. 303.
in May, 1933. There were established two districts (1) a forestry and recreation district and (2) an unrestricted district. In the forestry and recreation district the following uses only were allowed:

1. Production of forest products from either naturally or artifically established stands of trees.

2. Development of forest industries such as lumbering, operation of saw mills, and production of maple syrup.

3. Parks, playgrounds, camp grounds and golf courses.

4. Recreation camps and resorts, that is areas improved with buildings or tents and sanitary facilities and used for occupancy during part of the year only.

5. Private cottages and buildings used by the owner for seasonal occupancy only.

6. Hunting and fishing cabins used for a part of the year as a base for hunting, fishing and outdoor recreation.

7. Trappers' cabins.

8. Boat liveries or establishments for renting out boats and fishing equipment.


10. Hydro-electric plants, flowage areas, transmission lines and sub-stations.

All other uses including dwellings are prohibited.

In the unrestricted district, land may be used for any purpose otherwise legal.

Today a total of 23 Wisconsin counties have rural zoning ordinances and preliminary studies are underway in others. Approximately five million acres of land have been restricted against agricultural use and settlement. Some of the ordinances have three districts, - forestry, recreation and unrestricted. The recreation district is similar to the forestry district in permitted use, but permits also dwellings while forbidding agriculture. 16

16/ See Vilas County ordinance
The county ordinances are effective in those towns only which approve that section of the zoning plan within their boundaries. However, so well has this control been received in Wisconsin that of 250 towns acting on the acceptance of the provisions of a county ordinance, only 9 have voted it down.\textsuperscript{17}

An excellent aid in administration is the making of a record of non-conforming uses at the time of adoption of the ordinance.

Subsection 7 of the state rural zoning law, designed to protect established users in the right to the continued use of their property requires:

1. Preparation of a complete record of all non-conforming uses to be made immediately after the publication of the ordinance; (2) including within this record the names and addresses of owners or occupants of non-conforming land, legal description or descriptions of land, and the nature and extent of land uses; (3) publication of this list for three successive weeks in a newspaper having general circulation in the county; (4) correction of errors and omissions within 60 days of the final publication of the original record and upon presentation of proof to the county board. Thereafter, correction of errors and omissions shall be made by the county board only upon petition by any citizen or by the board upon its own motion; (5) filing the original record of established non-conforming uses in the office of the county clerk and a certified copy thereof in the office of the county clerk and a certified copy thereof in the office of the register of deeds; (6) county clerks to furnish assessors with an official list of established non-conforming uses in their towns; (7) assessors to report to the register of deeds non-conforming uses which are found to be discontinued since the assessment of the previous year as certified by the board of review; (8) preparation of a record of the discontinued non-conforming uses by the county clerk and the register of deeds as reported by the assessors. \textsuperscript{18}

The establishment of an official list of non-conforming uses with provision for periodic check of the use of property is something that may

\textsuperscript{17} Rowlands, W.A. County zoning in Wisconsin; p.12
\textsuperscript{18} Rowlands, W.A. and F.B. Trenk, Rural Zoning ordinances in Wisconsin, Wisconsin Circular 281; p.14
well be copied in urban communities.

The steps, legal and extra-legal established by practice, leading to the enactment of a rural zoning ordinance in Wisconsin are outlined below:

1. Appointment of zoning committee by county board to prepare and sponsor the ordinance. (The service of the Conservation Department and the College of Agriculture are available to this committee).

2. Preparation of proposed zoning ordinance and map.

3. A series of preliminary meetings held in the towns.

4. County-wide hearing.

5. Ordinance approved by county board and submitted to town boards.

6. Town board approval of ordinance and map.

7. Final enactment of ordinance by county board.

8. Publication of ordinance and map.


There is no provision for a board of appeals in the Wisconsin enabling act. Indeed it seems that where the regulations are as simple and broad in scope as they are in a rural ordinance that a board of appeals may be superfluous.

The enabling act contains a clause which authorizes the exchange of land acquired by tax deed for other lands in the county.

(2a) When any county acquires land by tax deeds, the county board may exchange any such lands for other lands in the county for the purpose of promoting the regulations and restriction of agricultural and forestry lands.

The legal elimination of non-conforming uses is considered an important follow up of the rural zoning ordinance in Wisconsin. The power of swapping tax title lands in unrestricted areas for non-conforming farms and dwellings has been widely used. The isolated settler is given a good
LAND USE CLASSIFICATION
AND
RURAL SETTLEMENT PATTERN
OF
FOREST COUNTY, WISCONSIN
1936

LEGEND
CLASS I  NON PROBLEM AGRICULTURAL AREAS
CLASS II  PROBLEM AGRICULTURAL AREAS
SOLUTION OF PROBLEM DEPENDS ON
Agricultural rehabilitation, provision
of supplementary income, or acceptance
of permanent public relief.
CLASS III  AREAS NOT NOW USED FOR AGRICULTURE
SOLUTION OF PROBLEM DEPENDS ON SETTLEMENT,
RELOCATION, OR ACCEPTANCE OF PERMANENT
PUBLIC RELIEF.
RURAL FAMILY
BOUNDARIES OF AREAS ZONED AGAINST
NEW AGRICULTURAL SETTLEMENT
NICOLET NATIONAL FOREST PURCHASE
UNIT BOUNDARY

SCALE 0 1 2 3 4 MILES
tract of land in exchange for his isolated sub-marginal farm. He is given not only the advantage of better land but also opportunity for a richer social life, better schools, roads and public facilities and services of all kinds. The state and federal governments have both assisted in certain cases in the relocation of isolated settlers. As has been said:

Relocation without rural zoning is a job never done. Rural zoning without relocation is a job half done. Rural zoning followed by relocation will make both a success.19

Michigan and Indiana adopted rural enabling acts modeled on the Wisconsin Act of 193520, but as yet neither has been used.

Social and Economic Justification for Rural Zoning

Rural zoning can be justified on many grounds but it cannot be denied that the principal reasons for it are economic. They may be said to be:

1. The conservation of natural resources of land, water, wild life and natural scenery; flood control and drainage.

2. The conservation and stabilization of land values resulting in a strengthened tax base.

3. The curtailment of excessive public expenditures for roads, schools, health protection and relief in sparsely settled sub-marginal areas.

It was during the administration of Theodore Roosevelt and through his vigorous efforts that the nation was introduced to the word "conservation." Till then little heed had been paid to the despoilation of forests, the pollution of streams, the extermination of wild life, the disastrous exposure of land to the ravages of wind and water. There was always more beyond. The first President Roosevelt saw the blight of man on the land and dramatically pointed it out to the people. That much has been

19/ Rowlands, op. cit.; p. 31
20/ cit. supra.
accomplished is undeniable; that the conservation program of the last thirty years has hardly slowed up the juggernaut of devastation is likewise undeniable. An authoritative recent estimate places the land ruined through erosion at 50,000,000 acres and classifies another 50,000,000 acres as being in almost as serious a condition. 21 The estimate of Stuart Chase is higher. He states that 100,000,000 acres of formerly cultivated land has been essentially ruined by water erosion - an area equal to that of Ohio, Illinois, North Carolina and Maryland combined. In addition the greater part of the productive top soil has been washed away from another 125,000,000 acres still in cultivation. Erosion by wind and water is getting under way in another 100,000,000 acres. "More than 300,000,000 acres - one sixth of the country is gone, going, or beginning to go." 22 It has been reliably estimated that not more than one-tenth of the old virgin forest remains. Approximately one-half of the original fertility of the continent has been dissipated through the action of the wind and water because of careless exploitation of the land. Morris L. Cooke has estimated that at the present rate of destruction only 150,000,000 acres of really fertile land will remain in 50 years.

Rural zoning does not, of course, claim to be the answer to all the problems arising from the misuse of land. It is a factor in conservation and on that ground alone could perhaps be socially and economically justified. Proper zoning aids in the conservation of forests and the preservation of plant and grass covers which are nature's protection against erosion by wind and water. The protection and preservation of forest areas tends to arrest floods at their source and to prevent the great economic loss, the danger to life, the disease and fire that are attendant upon floods.

21/ Parkins, A.E. and J.R. Whitaker (ed.). Our natural resources and their conservation, 1936; p. 75
Water resources including potable supply are protected by the conservation of land and forests. The protection of the State's resources of fish and game is also fostered by the reservation of forest and recreation zones. In states where recreation ranks among the major industries this consideration is of no minor economic import.

Just as does urban zoning, rural zoning tends to stabilize land values and thus strengthen the tax base. Submarginal land unwisely used for agriculture seldom can pay even a low tax; pooled with other land in a zone restricted for some use for which it is better fitted, the chances are much better of the owner getting some return and of the county collecting taxes. Rural zoning then seeks to enhance and preserve private taxable values and so to prevent the tax base from being deteriorated or destroyed. It is significant that the great wilderness area of the State of Maine, most of which is privately owned and used for continuous managed forest product, and which has no local governmental units nor services because there is almost no permanent population, not only is self-supporting but the greater part of the taxes derived from the forests is diverted for the support of towns with scattered settlements.

Not only in northern Wisconsin is found a situation of chronic tax delinquency and exhausted public treasuries. The same state of affairs exists throughout the country wherever the land has been unwisely used. In the State of New York farm land has been abandoned at an average rate of about 100,000 acres a year over a 50 year period. Actual field surveys have shown that in that state there is now a total of 5,800,000 acres of idle or submarginal farm land.23

It is hardly necessary to cite the excessively high costs of carrying on the functions and services of government in sparsely settled areas. The cost of public education is everywhere high in this country but in Wisconsin it has been found that the cost of operating a rural school for six or less children may be seven and one-half or more times as much as that of operating a rural school for thirty or forty children. 24

One study made of tax problems in northern Wisconsin revealed that in one tract of approximately 200,000 acres of primarily non-agricultural land, the cost of public education for 105 children living in the area was about $18,000 a year. If these families could be relocated and the region zoned as an agricultural district, at least $17,000 could be saved annually, making allowance for the moderate increase in cost of the schools in the agricultural area to which these families would be moved. In about three years such a saving would equal the assessed value of all the real estate owned or rented by the parents of the 105 pupils. Savings in other public services were estimated at over $7,000 annually. 25

Studies in Minnesota showed that the cost per pupil rose sharply as the density of population per square mile decreased. 26 School costs are not only higher in sparsely settled districts but studies by the Wisconsin State Department of Public Instruction indicate that the standard of instruction is lower in schools with ten or fewer pupils. 27 An authoritative survey made in 1934 showed that in three New York counties the average current expense per pupil in 33 one-teacher school districts which lay entirely in land

24/ Rowlands and Trenk, op. cit.; p.9
25/ Wehrwein G.S. and Allin, B. Possible farm tax reduction through changes in local government. Wis. Agric. Exp. St. Special Bulletin, March 1933; pp 10-11
27/ Rowlands, W.A. Rural zoning; its influence on public health and schools.
classed by the New York State College of Agriculture and the New York State Planning Board as better suited for forestry and recreation than for agriculture, was $151 as compared to $82 in school districts where less than 50 percent of the area was so classified. In the same 33 one-teacher school districts, state aid made up 84 percent of the school income while in 85 school districts which were entirely outside of land classified as submarginal, state aid constituted only 47 percent of the school income. It has been calculated that it would take only 28 years for state aid to equal the value of all the property in the 33 New York school districts which are entirely in the submarginal land class. If schools are not provided for the children of those who insist on living in isolated spots then the town or the county or the state must pay the cost of transportation to an established school. The statement has been made that individuals have deliberately taken up residence in isolated spots far from schools and even the school bus lines in order to derive an income by transporting their own children to school. The consolidation of schools and school districts has already taken place in Wisconsin as a result of rural zoning and relocation of settlers.

The construction and maintenance of roads in sparsely settled areas is a serious financial problem. The requirement for road mileage is dependent not upon the number of families to be served or upon their ability to pay, but upon the distribution of these families. The Wisconsin Taxpayer of August 1, 1933, cites some interesting instances.

Last year Oneida county spent about $4,000 to keep the roads plowed for the use of about a dozen settlers in the Town of Stella. This amount of money divided between these

28/ Lane, C.N. Submarginal farm lands in New York State. A report to the New York State Planning Board, 1935.
residents of the town would have enabled them to pay all their usual living expenses during the winter without leaving their homes.

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In Vilas County a man living at Spider Lake cost the county $1400 for snow removal. The man's farm and buildings could have been purchased for about $800.

The roads in sparsely settled submarginal areas are seldom good but nevertheless the upkeep of these roads is a serious burden on the owners of real estate in those areas as well as on the larger governmental units that contribute - either the county or state or both. In the land classified as the poorest in 38 New York towns, the average tax rate for town highway taxes was shown by the Lane report\(^29\) to be $5.43 per $1,000 of full value and for land just one degree better, $5.62. In the most intensive use classification area the average tax rate was only $4.00 for $1,000 of full value. Tax delinquency is widespread in the submarginal areas which, under the New York law, means that the county must make up to the town the delinquent taxes. It is also significant that the submarginal farmers make frequent use of the better, though less expensive per capita, roads in marginal areas while the roads through counties where the residents are few are seldom used except by those living on them.

The cost of necessary health services, of fire protection, of administering relief (in New York State outdoor relief is about one-third as frequent in the three higher land classes as in the lower two) and of providing all of the other usual and essential government services is excessively high. It is obvious that these poor areas do not pay their own way, that they are actually subsidized to a high degree by other property

\(^29\) Ibid.; page 19
in the county or throughout the state. A concrete example will perhaps emphasize the hopelessness and the cost of settling on land that is unsuitable for settlement. In one town in the Berkshire region of western Massachusetts, only 25% of the necessary town expenses is derived from taxes within the town; 75% of the revenue is state aid. Of the employable male population, 80% receives its principal employment and cash income from the town. Because of the scattered settlement there are four schools for 35 children. There are approximately 52 miles of roads cared for and kept open by the town for a population of about 70 families. One road, 5 miles long is kept in repair and plowed during the winter for 2 families. Another road is 7 miles long and has 3 families living on it, all on relief. The tax rate in 1936 was $56. Rural zoning can help in curbing the spread of such parasitic communities. This country is yet young; because certain unwise developments have become established on the land during the first 300 years or less of settlement, there is no reason why we must permit "rugged individualism" to develop to the point that it is subsidized by the state.

W.A. Rowlands has commented on the reception of the rural zoning idea in the cut-over areas of northern Wisconsin. 31

Rural zoning in Wisconsin has found favor locally almost wholly upon its promise of governmental economies. In town after town, where educational meetings have been held and the zoning principle has been explained, town officers have quickly interpreted the provisions of the ordinance in terms of very specific cases where a large part of their tax moneys were being spent on a very few persons paying little or no tax. Although these officers clearly understood that these ordinances were not retroactive, still they visualized many other possibilities of future demands upon their badly depleted treasuries.

31/ Ibid. p. 6
The chairman of one town board recalled that several years previously, a road had been built at a cost of $1200 for one isolated settler in a non-agricultural area. "This settler used the road but once - to move out of the country. No new settlers have ever come into this area."

A sensible land-use program results in economies not only to government but also to those whose location on land not suited to agriculture nor residence creates these problems. The very people who can least afford to pay are charged the most for services of all sorts because of their isolation.

While it is primarily for economic reasons as cited above that rural zoning is advocated, there is justification for it also on the grounds of promotion of health and safety of the public. It has been pointed out that improper land-use practice may materially add to the severity of floods and thus expose those not only at the source of the waters but also those even hundreds of miles away to the dangers that attend and follow floods.

The isolated settler is the cause of many fires not always confined to his own property. C.I. Hendrickson has stated that the isolated farm adds to the fire hazard in a forest area as much as does the isolated store in the residential area of a city. The Wisconsin State Conservation Commission has estimated that one-third of the forest fires in that state are caused by the clearing activities of settlers. In 1931 the Attorney General of Wisconsin stated in an opinion on the validity of the Wisconsin rural zoning act rendered to a special legislative committee of the legislature investigating forest fires and tax delinquency:

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The county zoning ordinance is undoubtedly in the public welfare. The cut-over areas of northern Wisconsin speak as eloquently against haphazard development as any city condition. The spotting of these lands with remote or abandoned farms, resulting in sparsely settled districts, with insufficient population or value to support roads and schools, or to afford the comforts of living that this day should give to all; the misdirected efforts to farm lands not well suited to agriculture, with resulting personal grief and social loss; the far-reaching economic ill-effects of stripping the state of timber; the fire-hazard of cut-over lands and the fire-hazard of human habitation in their midst, all cry out for planning, for social direction of effort.33

There is a substantial relationship between rural zoning and public health. There have been publicized many cases in northern Wisconsin where, because of the isolation of families living in the backwoods districts, disease has taken its toll of individuals and contagion has been incubated. Ordinary sanitary precautions or access to ordinary medical care or control by health authorities could have prevented many of these cases.

Less tangible, but perhaps even more important, than the conservation of physical resources or the strengthening of the tax base is the value to the county, state and nation of the conservation of human resources. The poverty, deprivation and suffering, the instability of population, the moral degradation and all the other sociological ills that result from attempting to scrape a living from poor land and from isolation from normal and healthy social intercourse may be prevented by wise rural zoning. It has been recognized that the protection of social and civic values may be justification for urban zoning,34 it is an equally important consideration in rural zoning.

33/ Vol. 20 Attorney General's Opinions, Wis. 751.
34/ State ex rel. Carter v. Harper, 182 Wis. 148, 158
   Miller v. Board of Public Works, 195 Cal. 477, 492-5
   Howden v. Mayor of Savannah 172 Ga. 833, 842
   State v. Roberge, 144 Wash. 74, 81-2
   Vol. 20 Attorney General's Opinions, Wis. 751.
Legal Considerations

The constitutionality of rural zoning has never been tested in court. The leading legal justification for it is found in the favorable opinion of the Attorney General of Wisconsin. The basic reasons for rural zoning are undoubtedly economic. Whether they are sufficient to justify the invocation of the police power in the interest of the general welfare or whether the auxiliary considerations of promotion of the public health, safety and morals are strong enough to validate such zoning are still open to question. It would seem that there is sufficient evidence of the value of rural zoning to justify it. The mere fact that in five years of operation in Wisconsin no one has sought to have rural zoning declared invalid by the courts, but that instead the idea has been seized with enthusiasm by the people, is in itself evidence that such zoning is in the general welfare and fills a real need. Herman Walker, Jr., in his article "Some Considerations in Support of the Constitutionality of Rural Zoning as a Police Power Measure", Land-Use Planning Publication No. 11 of the Land-Use Planning Section of the Resettlement Administration, 1936, presents a convincing case for rural zoning. He says

The substantive measures adopted under the rubric "rural zoning" would be in pursuance of the so-called police power of the state. The exercise of the police power involves restriction, without compensation, on private property and individual freedom in the interests of a paramount common good. Traditionally, the police power was said to be the power of State to protect the health, safety and morals of the community. Latterly there has been added to this concept another, which goes beyond the ambit of health, safety and morals, namely, "the promotion of the general welfare." Although there are still some courts which are reluctant to go beyond the consideration of public "health, safety and morals" in accepting police power regulations, the great body of court opinion has progressed so far beyond the traditional way of viewing the police power that land-use zoning should be able to stand even as a measure purely of economic control in the interests of the general welfare, quite apart

from consideration of health, morals and safety. "The assumption that the police power extends only to the health, safety, and morals of the public, which was at one time quite general, is now out of date. The modern view is that the State may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adapted to promoting the common welfare, convenience, and prosperity"...... Suffice it to say that, in favor of the principle that the police power extends as indicated, stands the opinion not only of the bulk of the State courts but that as well of the Federal Supreme Court, the highest tribunal of the land.

Conclusions

There seems to be little question that rural land-use zoning is working out well in Wisconsin. It has been pointed out that the same problems that brought about the rural zoning experiment in Wisconsin are present, perhaps not always to the same degree, in many other states. However, even when these problems are so pronounced that they cannot be ignored, other factors would probably make it unwise for the Wisconsin system to be adopted in toto in other states.

It must be borne in mind that rural zoning is not a cure-all for the problems of rural land-use. It should be one part, one cog in a comprehensive land planning scheme. Zoning in itself is not planning. It is only one instrument for giving effect to a plan. It should not stand by itself but should be an element in a sound land-use program. In some places and under some circumstances its value may be slight; in all cases zoning should be supplemented and augmented by other remedies.

Zoning is one tool in a kit of social instruments. We must give more attention to using rural zoning as one tool, in combination with other tools in the kit to reach our stated objective. Parenthetically, it should be stated that those who advocate rural zoning are frequently misunderstood to mean that they advocate zoning as a panacea for all rural ills - that is not true. Among the other tools are, for example, the following: (a) public land acquisition plus zoning for certain types of lands remaining in private ownership. We can never hope— even if it were sound policy to do so — to buy all the presently occupied lands not suitable for agriculture; (b) adjustments in
policies of taxation, State grants-in-aid, and tax delinquency and reversion of lands; (c) credit policies; (d) planning, location, construction and financing of public services, such as schools and roads; (e) exchange of lands; (f) the soil conservation district; (g) the cooperative grazing association.

A program of relocation of isolated settlers and elimination of non-conforming uses is an essential corollary of rural zoning if the economic aims of such zoning are to be achieved. It does little good to prevent new settlers in submarginal areas as long as those already established are allowed to remain. It costs as much to maintain a school for two children as it does for a dozen. A road that must be kept in repair and plowed in winter for one settler is as much a drain on the town or county treasury as if several families were living on it. Unlike urban zoning, rural zoning is apt to be futile where it should be most effective if a program of relocation is not also undertaken. The success of the Wisconsin ordinances has been due in no small measure to the relocation of those settlers who found themselves in the forestry and recreation zones.

The proper unit of government to undertake rural zoning is debatable. The zoning that has been done in Wisconsin has been done on a county-wide basis with the regulations becoming effective within each town only upon ratification or acceptance by the town. In some of the eastern states and in New England especially, the county is not a strong political unit. It is doubtful if any plan for land-use on a county-wide basis would be practical; the administrative problems that would arise would be difficult of solution. The town is the strong rural subdivision but the town usually covers so little area that any comprehensive land-use program within its limits is impossible.

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36/ Wieckling, E.H. In proceedings of the summary session of the National Zoning Conference, Chicago, Dec. 1937
Theoretically, the state is probably the most logical unit to undertake rural zoning. The conditions that call for zoning are not local nor do the problems end at the town or county line. It is rare that the problem area is congruent with a civil subdivision. The ideal plan would be for the state to draw zones without regard for the boundaries of minor political subdivisions—an overlay set upon the land as are school districts in rural areas. However, in a democracy it is not always possible, for good reason, to attack a problem in what seems to be the most direct and efficient way. There are considerations of local autonomy and home rule which are still proper and important despite an equally proper and important tendency toward centralization of governmental functions in certain fields during recent years. The matter of administration is perhaps better handled by a governmental unit no larger than the county.

From all points of view the organization of the Wisconsin system seems to be satisfactory. While the county is the unit that undertakes the zoning project, actually the directing force and guiding motive are supplied by the College of Agriculture and the Conservation Department, both of which agencies have the broad view of the problem. The services of both the College and the Conservation Department are available to any county zoning committee. The result is that while the ordinance is prepared and adopted by the county, the technical advice is supplied by those who are considering the situation in its broadest aspects. The county plan becomes one element, locally administered, fitting into a state-wide land-use program like one piece of a jig-saw puzzle. The requirement of acceptance of the regulations by the towns is in keeping with our conception of the way things should be done in a democracy. The almost unanimous approval of the towns is indication that there is nothing to fear from local opposition if
the zoning scheme is soundly drawn and if reasonable educational work has been done in the towns first.

ZONING ORDINANCE FOR FLORENCE COUNTY, WISCONSIN

An ordinance regulating, restricting and determining the areas within the county in which agriculture, forestry and recreation may be conducted, the location of roads, schools, trades and industries and the location of buildings, designed for specified uses, and the establishment of districts for such purposes and the establishment of set-back building lines outside of the limits of incorporated villages and cities, pursuant to section 59.97 of the Wisconsin Statutes.

The county Board of Supervisors of Florence county does ordain as follows:

Section 1

District and District Maps

For the purpose of promoting public health, safety and general welfare and regulating, restricting and determining the areas within which agriculture, forestry and recreation may be conducted and establishing districts which are deemed best suited to carry out such purposes, outside of the limits of incorporated villages and cities, and in accordance with the provisions of section 59.97 of the Wisconsin Statutes, the territory included in the boundaries of the following towns, to-wit: Aurora, Commonwealth, Fence, Fern, Florence, Homestead, Long Lake, and Tipler are hereby divided into three classes of use districts as follows, to wit:

1. Forestry district.
2. Recreation district.
3. Unrestricted district.

The boundaries of the aforesaid three (3) use districts are shown upon the official map of Florence county, attached hereto, being designated as the "Zoning Map showing Use Districts", Florence County, Wisconsin, dated June 28, 1935, and made a part of this ordinance. All notations, references and other things shown upon said zoning map showing use districts shall be as much a part of this ordinance as if the matter and things set forth by said map were all fully described herein.

No land or premises shall be used except in conformity with the regulations herein prescribed for the use districts in which such land or premises is located.

No building shall be erected or structurally altered or used except in conformity with the regulations herein prescribed for the use
districts in which such building is located.

Section II.

District No. 1 - Forestry District

In the forestry district no building, land or premises shall be used except for one or more of the following specified uses:

1. Production of forest products
2. Forest industries
3. Public and private parks, playgrounds, camp grounds and golf
   grounds
4. Recreational camps and resorts
5. Private summer cottages and service buildings
6. Hunting and fishing cabins
7. Trappers' cabins
8. Boat liverys
9. Mines, quarries and gravel pits
10. Hydro-electric dams, power plants, flowage areas, transmission
    lines and sub-stations
11. Harvesting of any wild crop such as marsh hay, ferns, moss,
    berries, tree fruits and tree seeds.

(Explanation - Any of the above uses are permitted in the Forestry District, and all other uses, including family dwellings, shall be prohibited.)

Section III.

District No. 2 - Recreation District

In the Recreation District all buildings, lands or premises may be used for any of the purposes permitted in District No. 1, the Forestry District, and in addition, family dwellings are permitted.

(Explanation - Any of the above uses are permitted in the Recreation District, and all other uses, including farms, shall be prohibited because of the fire hazard involved in clearing operations and spoilage of forested conditions adjacent to highly developed recreation property. Such properties demand the maintenance of a maximum of natural conditions to retain their fullest economic value.

Family dwellings are permitted in order to allow owners to protect their investment during the entire year.)

Section IV.

District No. 3 - Unrestricted District

In the unrestricted district, any land may be used for any purpose whatsoever, not in conflict with law.
Section V.

Non-Conforming Uses

The lawful use of any building, land or premises existing at the time of the passage of this ordinance, although such use does not conform to the provisions hereof, may be continued, but if such non-conforming use is discontinued, any future use of said building, land or premises shall be in conformity with the provisions of this ordinance.

The lawful use of a building, land or premises existing at the time of the passage of this ordinance may be continued although such use does not conform with the provisions hereof, and such use may be extended throughout such building, land or premises.

Whenever a use district shall be hereafter changed, any then existing non-conforming use in such changed district may be continued or changed to a use permitted in the new use district, provided all other regulations governing the new use are complied with.

Whenever a non-conforming use of a building, land or premises has been changed for a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use, unless the district in which such building, land or premises is located, is changed to a less restricted use.

Immediately following publication of this ordinance by the Board of Supervisors, there shall be prepared a list of all instances of established non-conforming uses of land, which shall be published to permit appeal on errors and omissions. Thirty days after publication of this list a final and official copy shall be recorded in the office of the register of deeds.*

Nothing in this ordinance shall be construed as prohibiting forestry and recreation in any of the use districts nor a change from any other use to forestry or to recreation.

Section VI.

Land Exchange

Lands acquired by Florence county through tax deed in the unrestricted district may be subject to exchange for privately owned lands within the forestry district or the recreation district when such exchange will promote the regulation and restriction of agricultural and forestry lands.

* The period required in the development of a Record of Non-Conforming Uses from the date of publication to the date of filing is now sixty days. Subsection 7a of Section 59.97 was added in 1935 after the Florence County Zoning Ordinance was enacted.
Section VII.

Boundaries of Districts

District boundary lines shall follow along the lines, or along lines extended, indicated on the United States General Land Office survey maps, or along meandered streams.

Section VIII.

Interpretation and Application

The provisions of this act shall not apply to buildings, land or premises belonging to and occupied by the United States, the State of Wisconsin, any town or any school district.

Section IX.

Changes and Amendments

The Board of Supervisors of Florence County may from time to time amend, supplement or change by ordinance the boundaries of districts or regulations herein established. Any amendment, supplement or change may be proposed by the Board of Supervisors of the county, or by the town board or town boards of the town or towns, in which may be situated any lands affected by such amendment, supplement or change. Any proposed changes shall first be submitted to the Zoning Committee for its recommendation and report.

Any and all ordinances which may amend this ordinance which have been adopted as herein provided shall be submitted to the town boards governing the territory affected thereby and their approval obtained before the same shall be adopted by the County Board of Supervisors.

Section X.

Enforcement and Penalties

The provisions of this ordinance will be enforced by and under the direction of the County Board of Supervisors. Any person, firm, company or corporation who violates, disobeys, omits, neglects, or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance shall be subject to a fine of not less than ten ($10.00) dollars nor more than two hundred ($200.00) dollars, together with costs of action, and in default of payment thereof, to imprisonment in the county jail for a period of not less than one (1) day nor more than six (6) months, or until such fine and costs be paid. Compliance therewith may be enforced by injunctive order at the suit of the county or the owner or owners of land within the district affected by the regulations of this ordinance.

Section XI.

Validity

Should any section, clause or provision of this ordinance be
declared by the courts to be invalid, the same shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared to be invalid.

Section XII.

Definitions

Certain terms and words used in this ordinance are defined as follows:

Words used in the present tense include the future; words in the singular number include the plural number and words in the plural number include the singular number; the word "building" includes the word "structure" and the word "shall" is mandatory and not directory.

Forest Products - Products obtained from stands of forest trees which have been either naturally or artificially established.

Forest Industries - The cutting and storing of forest products, the operation of portable sawmills and planer, the production of maple syrup and sugar.

Public and Private Parks, Playgrounds, Camp Grounds and Golf Grounds - Areas of land with or without buildings designed for recreational uses.

Recreational Camps and Resorts - Areas of land improved with buildings or tents and sanitary facilities used for occupancy during a part of the year only.

Private Cottages and Service Buildings.- Buildings designed for seasonal occupancy only and normally used by the owner together with additional structures to house materials and services.

Hunting and Fishing Cabins - Buildings used at special seasons of the year as a base for hunting, fishing and outdoor recreation.

Trappers' Cabins - Buildings used as a base for operating one or more trap lines.

Boat Liveries - Establishments offering the rental of boats and fishing equipment.

Building - A structure having roof supported by columns or walls for the shelter, support, or enclosure of persons, animals or chattels.

Non-Conforming Use - A building or premises occupied by a use that does not conform with the regulations of the use district in which it is situated.

Farm - An area of land devoted to the production of field or truck crops, livestock or livestock products, which constitute the major use of such property.
Family Dwelling - Any building designed for and occupied by any person or family establishing or tending to establish a legal residence or acquiring a legal settlement for any purpose upon the premises so occupied.

Section XIII.

When Effective

This ordinance upon passage and publication shall be in effect in the towns of Aurora, Commonwealth, Fence, Fern, Florence, Homestead, Long Lake and Tipler, each of said towns having given its approval to the provisions hereof in the manner provided by section 59.97, Wisconsin Statutes.

Adopted June 28, 1935

HIGHWAY ZONING

In recent years the widespread use of the motor car has brought about the problem of "ribbon" development along our highways. Before the development of the automobile, the railroad, operating on a fixed right of way and stopping only at certain established points, tended to concentrate population and commercial activity in those communities where it stopped. The automobile has no station points. It stops where it pleases anywhere along the highway. For this reason the highways have tended to become lined with commercial establishments and advertising devices, often unwarranted and usually unsightly. Billboards have been especially offensive and criticism has been directed particularly against them.

There are several ways in which a measure of control may be exercised over the use of land adjacent to the highway. When new roads are built they may be made either freeways or parkways. The land adjacent to a parkway, of course, can be controlled because it is publicly owned and access is limited. The freeway, by denying access to abutting property, makes the land valueless for commercial development. Billboards, however, do not need access but only visibility. In certain cases billboard control along
the TVA Freeway has been secured by easements. The parkway and the freeway are excellent where they can be used but neither is the solution to all the problems of roadside control and neither does anything about conditions along existing roads.

The regulation of billboards as such under the police power is accomplished in Maine, Massachusetts, Vermont, Connecticut, California and Florida among other states. The decision of the Supreme Court of Massachusetts holding the Massachusetts billboard law and rules and regulations adopted under it sustains the use of the police power for such purposes. It is not only the leading case on billboard control but is also a leading case for the justification of the invocation of the police power for "considerations of taste and fitness."38

Full protection of the roadside and control of all detrimental uses, however, can best be accomplished through zoning. There is ample authority in many states under existing municipal zoning enabling acts for adequate zoning along highways. In Massachusetts and New York, for instance, every square inch of ground in the state may be subject to control by a local zoning ordinance. The trouble has been with the reluctance of rural towns to exercise those powers. In 1936 there were throughout the country 1322 zoned municipalities; only 250 of these were rural. Those rural areas where the scenery is the most attractive and where control of development along the highways is needed most are the areas where no control whatsoever is exercised. Where rural town zoning is practiced there is often no uniformity nor continuation of regulations along the highway when passing from one

37/ General Outdoor Advertising Co. Inc. and others v. Dept. of Public Works, 289 Mass. 149
38/ See page 184
town to the next. In certain cases a group of towns through which a highway passes have joined together to insure adequate and uniform regulations along the highway, but such cooperation is rare.

Because of these considerations, it seems reasonable that, if the zoning of the borders of highways is desirable, it should be done by a larger unit of government than the town - either the county or the state. Such zoning might include only a strip on either side of state or county highways. A depth of from 300 to 1000 feet would be sufficient. It is realized that this involves a new principle in zoning and it is realized also that certain eminent leaders in the planning field have frowned on such linear zoning for fear that the courts would invalidate it. The courts have many times held that, in the usual type of urban zoning, the zoning scheme must be comprehensive, that is, it must embrace all the territory within the boundaries of the municipality. Piecemeal ordinances, or those covering only a part of the municipality, have been several times declared invalid.

That is the rule for urban zoning. We have here, however, a new problem - a new set of conditions. If we wait until each rural town adopts a comprehensive zoning ordinance, there never will be any adequate control over the use of land along highways. A state highway is in itself a unit. It is impossible to tell where it crosses the line from one town to another and few who travel along it care. Control by the state or the county, as here advocated, is only for those sections of the highway that lie outside an incorporated village or city. Incorporated urban areas have looked with favor upon the protection afforded by zoning and then the evils of laissez-faire roadside development, from the point of view of those using the roads, are

39/ In Massachusetts the problem is more complicated - or simpler. There are only cities and towns, no incorporated villages. The towns often include rural and urban areas.
greater in the country. The need is apparent. The reasons for the control of roadside development are too obvious and well-known to require repetition here. When the state spends vast sums to construct highways through rural districts it seems that it might take reasonable steps to protect its investment - to prevent distracting and hazardous advertising matter and to have something to say about the type of use and structure that shall be allowed to be established along the right-of-way.

In California where county zoning ordinances are ordinarily adopted by sections in piecemeal fashion, highway zoning is in effect in several counties. For instance, along the forty-mile stretch of the scenic Skyline Boulevard in San Mateo County there is a zoned strip 1000 feet wide on each side of the highway. Most of the land in the rest of the county is not zoned. The greater part of the highway zone is restricted to single family and agricultural uses. There are six small and concentrated business zones located at reasonable intervals permitting certain limited types of retail business upon special permit. There is one small zone of the usual "neighborhood business" classification of urban ordinances.

In 1934 the Town of Union in Connecticut under the general enabling act of 1930 as amended in 1931, established a "forest reservation and residential zone" along the Buckley Highway including all the land within a half-mile on either side. In this zone various enumerated commercial uses and all advertising devices are prohibited. The remainder of the town is not mentioned in the zoning regulations. This ordinance has not been tested in the courts.

An interesting enabling act was passed by the State of Georgia in the 1938 session of the Legislature. Four counties through which the Coastal

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40/ Glynn, Chatham, Bryan and Liberty. Two other counties, McIntosh, and Camden refused to be included in the enabling act.
Highway runs were given authority to zone, either independently or in cooperation with each other, a strip 200 feet from the center line of all state highways. Section 1 of that act reads:

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, that the Commissioners of Roads and Revenue of Chatham, Bryan and Liberty Counties in addition to all other powers delegated to them, are hereby empowered to regulate the height, number of stories, and size of buildings and other structures, for trade, industry, residence, recreation, public activities or other purposes, the use and condition of use or occupancy of land for trade, industry, residence, recreation, agriculture, grazing, water supply conservation, soil conservation, forestry or other purposes, within two hundred feet of the center line of any or all State Highways; and to establish setback lines for buildings and structures along the said streets and roads.

In zoning for roadside uses it is wise to make the regulations applying to billboards and advertising signs retroactive. This is possible because they may be considered hazardous to safe use of the roads and because of the small investment in and the temporary nature of such structures.

The movement for the control of roadside uses has gained so many friends that it is probable that within a few years there will be in many states adequate authority for control by the state or county or through state and county regulations in combination with local ordinances.

FLOOD PLAIN ZONING

We have learned from experience that we can expect a flood of catastrophic proportions in some sections of the country every few years. The economic loss resulting from such floods is enormous. Vast sums have been spent on flood control projects to reduce the danger to life and property from flood waters yet nowhere has the problem been completely solved.

There are several methods of attack:

41/ Participation of Glynn County is authorized by another section.
1. Proper agricultural practices and reforestation programs can retard the run-off and help to cut down floods before they get started.

2. Upstream storage reservoirs and retarding basins are useful in holding back excess water for controlled release.

3. Floodways, dikes and protective walls aid in carrying the water safely around and through communities.

4. Another possibility, approaching the problem from a different angle, is the removal of persons and property from flood plains to higher and safer lands and the prohibition of the use of vulnerable areas for dwelling purposes.

The application of the zoning principle has been suggested to prevent the settlement on land subject to flooding and to prevent further settlement and a gradual abandonment of some portions of flood plains already built up. It seems an intelligent and reasonable use of zoning. Wayne D. Heydecker, Director of State Planning, State of New York has stated:

Since it is seldom economically feasible to offer complete protection from flood damage, even by a costly system of dykes, levees, reservoirs and protective works, or even by extensive reforestation and the best agricultural practices, it would appear to be unwise to rely entirely on our efforts to keep the rivers out of the cities, villages and towns. It would seem to be only common sense to go back to first principles and see what can be done toward keeping the communities out of the way of the rivers.  

We crowd industrial plants and dwellings along the edge of the channel and then spend millions of dollars to protect them from the ravages of the high water that we know is inevitable. In considering the rights of persons to settle on the river's banks we must remember that the river too has rights and those rights must be respected.

The Engineering News-Record asks in an editorial in its issue of March 11, 1937:

.... Is it sound economics to let such property be damaged year after year, to rescue and take care of their occupants, to spend millions for their "local protection", when a slight shift of location would assure safety?

Is it right that the country as a whole should pay for local protection of such vulnerable spots as Wheeling Island, where 10,000 people insist on occupying a low-lying island that is hardly more than awash at low water? Is it right to perpetuate decrepit slum districts in the flood zones of the larger riverbank cities, peopled by masses that become refugees and relief cases in every high water?

In certain cases, for instance, the Triangle in Pittsburgh, development on flood areas is too firmly established to allow zoning to be of much help. There are many other areas now largely used for industrial purposes or for dwellings or as yet undeveloped where new dwellings may be and should be prohibited. The land so zoned could be used for park purposes, automobile parking yards, railroad yards or for certain types of industry. It would of course be desirable, where economically feasible, to wipe these areas out by clearance projects. It is usual to find that dwellings in districts subject to periodic flooding are sub-standard and may be properly described as slums. In most cases the cost of clearing the land will preclude any such program. To bring about the gradual elimination of dwellings strict provisions should be written into the zoning ordinance governing the extension or re-building of non-conforming uses. Dwellings destroyed by flood should not be allowed to be rebuilt. It might even be possible to provide for the amortization of non-conforming dwellings over a period of years.

Rural land-use zoning, roadside zoning and flood-plain zoning, as herein discussed, are all phases of the same thing, - the control over the use of land in matters that transcend local interests. They are not three separate fields, but one. The details of regulation and administration should probably remain with local authorities, in most states preferably the county, but the state planning agency should in any case supply the comprehensive and co-ordinated view of the problems and advise and cooperate with the local agencies at all stages.
CHAPTER XII

CONCLUSIONS AND RECOMMENDATIONS

Zoning as One Element of the Plan

It has been repeated many times in these pages that zoning is one element of a comprehensive plan. It should never be forgotten. Zoning has unfortunately grown up separate from that which some have been accustomed to think of as "planning", which has had mostly to do with the development of street systems, the location of parks and playgrounds, schools and other public buildings. It is obvious that the pattern for population distribution which is laid down by a zoning scheme is so closely interrelated with the problems of public spaces, buildings and services that the two should never be considered separately. The location of streets, schools, parks and utilities is dependent upon the distribution of land uses - where people work, trade and live. The corollary is also true. The plans for land use should be influenced by the location and size of public facilities and utilities for transportation, recreation and sanitation. It is perhaps not disastrous to zone without planning or to plan without zoning but it is without question unwise.

The proper relationship of zoning to the broad field of planning is more generally recognized outside of the United States than in this country. In practice the exercise of planning powers may not be so widespread in other countries as in America but the authorization for planning, especially in England and Ireland is more soundly conceived. In those countries there is one act authorizing the preparation of the planning schemes. In that act is included provision for the usual zoning controls.

In America it is the general practice to have an enabling act for planning and another for zoning. Where there is no planning board, and
in some states even where the municipality does have a planning board, the 
authority to prepare the zoning plan is conferred on a "zoning commission" 
which is charged with no other duty than drawing up the zoning plan and 
ordinance. A single enabling act granting authority for the establishment 
of municipal planning boards charged with preparing comprehensive plans, 
including, among other things, regulations for the use of land and structures, 
should be enacted by each state. The zoning commission would no longer have 
a function and would be abolished. The planning board would be charged 
with the preparation of the plan. As a practical matter, it would probably 
be necessary and wise to allow any of the elements of the plan, including 
a zoning scheme to be adopted independently of any other element. This would 
not in effect change the present practice of zoning independently of the 
other elements of planning but the mere fact that the zoning, in the law 
at least, was properly related to the plan would likely bring about better 
and wiser zoning ordinances.

Three Fields in Which Zoning May be Effective

There are three distinct levels of development in which zoning may play 
an important part in guiding proper land use; urban, rural and suburban or 
"rurban".

Urban. Urban zoning is well established in law and in practice. The 
greatest need in urban zoning is an appreciation of the broader concept of 
the control of the development of property. Zoning should aim at more than 
the mere fixation of the status quo or the elimination of speculative 
fluctuation in land values. A zoning ordinance is a legal instrument to 
achieve social and economic objectives through an orderly and efficient
physical plan for land use. The present limitations of urban zoning should be expanded in certain directions. These are discussed below under specific subjects. The theory and technique of urban zoning, however, is in the main sound.

Rural. A technique for rural zoning now has been evolved in Wisconsin and seems to be working successfully. Just as urban zoning should be part of the city plan, so rural zoning should be one factor in a land use program for rural areas.

There is no little doubt as to the legality of rural zoning. Some eminent authorities on the law of zoning have no hesitation in predicting that the Wisconsin experiment will be promptly thrown out the first time it is brought before the United States Supreme Court. Its validity has not yet been challenged in court, however, and each year that the rural ordinances remain on the books reduces the likelihood of their being declared unconstitutional. Rural zoning is unquestionably in the general welfare and the unanimity of favorable opinion with which it has been received testifies that it is filling a real need.

Rural zoning should go hand in hand with a program for soil conservation and erosion control. It may be that a rural zoning ordinance should go no further than establishing an agricultural district and that separate soil conservation districts should be established for the promotion of intelligent agricultural practices. This is now the situation. It does seem, however, that most of the soil conservation practices might be better written into a rural zoning ordinance and that agricultural districts be broken down into subdivisions in which not only the use of land but the manner of use would be specified. It is true that zoning has been established
as negative legislation. To protect the public interest it has told the individual what he could not do with his property. Why should it not, in rural areas, for the same reason, incorporate positive requirements as to the manner in which a man must use his property, if he is to exploit it at all, in order that future generations may not be deprived of the heritage of the land? Zones in agricultural land subject to erosion could be established in which strip cropping, contour tillage, terracing and other approved agricultural practices designed to protect the precious top soil against the ravages of wind and rain could be required. One of the administrative disadvantages in the system of soil conservation districts sponsored by the United States Department of Agriculture is that it sets up ad hoc authorities overlaying existing units of government. In certain cases this not only may be inefficient from an administrative point of view but it arouses the resentment of local authorities. It is realized that there are many factors and implications that have not been considered in the above discussion. The suggestion that it may be well to write positive soil conservation practices into rural zoning ordinances is not advanced as a concrete recommendation but is mentioned only as a matter which may be deserving of further study.

Rurban. Between the city and the country there is another set of conditions and problems caused by a distinctive type of development which for want of a better word we shall call "rurban". There are great areas on the fringes of all urban centers that are neither urban in character nor rural. Here is a favorite field for the land speculator and promoter. Phillip H. Cornick in his able presentation of the problems of premature subdivision of lands for building purposes\(^1\) points out that premature subdivision is a phenomenon

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\(^1\) Cornick, P. H. Problems created by premature subdivision of urban lands in selected metropolitan districts. Report to the State Planning Council of New York. 1938.
which tends to concentrate in areas where the prevailing intensity of land use is intermediate between the least intensive use which is typically urban and the most intensive use which is typically rural. It is in those intervening areas ranging in character from suburban to semi-rural that occur the most serious problems of premature subdivision with all of the disastrous ill-effects upon the economic structure of the town and county pointed out by Mr. Cornick in his monumental work. And it is in these areas where some sort of control is sorely needed that little help is found in existing urban or rural zoning techniques. It is true that in recent years some suburban and semi-rural communities have attempted to cope with the situation by extending urban zoning classifications to require lot areas of one-half acre or an acre. Some towns have even required a two-acre lot and one is known to have a five acre minimum in the least intensive residential zone. Such zoning for open residential areas, while admirable in purpose, does not squarely meet the problem. Even if it gains judicial sanction, the method is inadequate. There will be no attempt here to point out the evil consequences of prematurely cutting up for building lots acreage that is better used and more productive in wood lots, farms or estates. Mr. Cornick's authoritative report leaves no room for question on that score. The fact is that a minimum lot requirement of one or two or even five acres is not sufficient to effect the control that is needed. There are towns so situated that the best use of their land is for small farms and for estates. The techniques of neither urban nor rural zoning are designed to offer such protection. Mr. Cornick cites an example of a town which recently adopted a zoning ordinance with two residential zones - one requiring a minimum lot area of one acre, the other of two acres.

2/ In the State of New York, the Town of Harrison has a 5 acre district. Oyster Bay has a 3 acre district, and Somers has a 2 acre zone. Several towns throughout the country have 1 acre districts.
The entire town has an area of 18,000 acres. That area in 1934 was divided into 453 taxable parcels, of which 190 were vacant. The average parcel size was about 40 acres. The population in 1930 was 600. At least one subdivision plan has recently been approved for one acre lots. So far as the provisions in the ordinance are concerned, there is nothing to prevent the creation of building plots sufficient to accommodate several thousand additional families in an area with a present population of only 600 - an area, furthermore, which is so distant from the central city, and so inadequately served by transportation lines, that 600 is probably not far below the upper limit which the town is economically capable of accommodating.

In short, the new ordinance does nothing to prevent premature subdivision and all of its consequences. Worse still, it may permit conditions to arise which will make the area of the town totally unsuitable for the uses for which it has already demonstrated its availability - farms and country estates.5

There is needed a thorough study of the possible methods of bringing the rurban situation under control - a study comparable to that undertaken by the Heights of Buildings Commission in New York in 1913 before the first comprehensive zoning ordinance in the country was adopted. New methods and new techniques must be evolved but they must be based on a sound factual study just as the New York ordinance, radical and new, was built on the sound base of the reports of the Heights of Buildings Commission and Commission on Building Districts and Restrictions. A new type of zoning may be the solution.

County as the Logical Planning and Zoning Unit

In areas of urban, concentration the city or the village is the logical unit to zone. The records show that a great many have accepted the protection that is offered by enabling acts and have adopted zoning regulations. Rural communities, many of which need zoning just as badly as cities, though for different purposes, have on the whole been backward. Rural problems which

5/ Cornick, op. cit. p. 325.
proper zoning is designed to control are broader in extent than some urban problems. It is sometimes difficult to see the relationship between the individual's use of a plot of land and the larger land-use problems of the region. Urban problems are more or less confined within the city limits. On the other hand rural and rural and rurban problems, broader in scope, pay no attention to political boundaries but are regional in scope. In some states, such as Massachusetts, New York and Connecticut, enabling acts permit the zoning of every square inch of territory within the state by municipal ordinance, either city, village, town or borough. If these powers were fully exercised and regulations coordinated there would be no need of any extension of zoning powers to a larger unit of government. Rural towns have not taken any action and it is not likely that there will be any significant attack of rural problems through town zoning in the future.

The county is the smallest unit of government that can effectively deal with rural problems. Zoning powers should be conferred upon the county. These powers should be sufficiently inclusive to deal with rural areas that should be devoted to agriculture or forestry, rurban areas the best use of which is probably in farms and estates, as well as with built-up areas. Problems of flood-plains, soil erosion, roadside development and outdoor advertising could be handled in one comprehensive ordinance.

The application of a county zoning ordinance must vary according to the manner in which the political structure of local governmental units is set up within the state. In Massachusetts there is no distinction between incorporated and unincorporated land and the county as throughout New England,
is practically an administrative nonentity. All the land in the State is in either a town or a city. The town includes both the built-up section at the center and the outlying farm land. The incorporated village is unknown. California on the other hand has no towns at all. All land that is not in incorporated built-up areas is under the jurisdiction of the county. The most common system throughout the country is that the land is divided into towns or townships. Urban areas are set off as incorporated cities or villages leaving in the towns only the rural territory. With local conditions and the internal political structure, varying as much as it does within states, it is impossible to set up a general rule for the application of county zoning ordinances. Wisconsin specifies that the regulations become effective only in those towns which approve the ordinance as it applies to the particular town. In other states it may be wiser to make the ordinance apply to all the unincorporated area without the referendum provision, or it may be well in other cases to make it apply to all unincorporated subdivisions that have not already adopted local regulations, or even to unzoned incorporated areas. There can be no general rule.

State zoning has occasionally been suggested. Certainly the state should participate in determining a basic pattern for the state which county plans and zoning ordinances would tend to crystallize. To actually formulate regulations, however, seems to be better left with the county. Zoning on any larger scale would necessarily be done without the intimate knowledge of local conditions that is necessary. Regulations handed down from above would moreover be repugnant to the orderly processes of democratic government.
What We Can Learn from Other Countries

The most important lesson that we can learn from other countries is that the control of the use and development of land and buildings is one phase of comprehensive planning. The various methods of aesthetic control that are practiced in other countries may serve their purposes well (although there is evidence that they work better in theory than in practice) but the wisdom of application of any one of these methods in this country is open to grave doubts. Control of the appearance of buildings is primarily a matter of individual taste. There can be no standards. Even among experts there is a wide divergence of opinion as to what is beautiful and in good taste. "De gustibus non est disputandum." Progress in architecture is conditioned on freedom from restraint in the use of new materials and methods of construction which call for new and unprecedented design. Even among the initiated there is the danger of familiarity being made the test of the beautiful. Music heard for the first time seldom arouses enthusiasm for its beauty. The thrill of recognition has much to do with what we consider beautiful. Architecture that may be considered in good taste and fitting and beautiful today might well have been considered atrocious fifty years ago. We should not place architecture in a straight jacket by setting up any general system of architectural control. In particular situations it may be desirable to require harmonious architectural treatment in an area or for a group of reasons. Where this is desirable it should be possible to establish adequate control under the police power.

In Germany and in some other countries the absolute, not the maximum, building envelope is fixed by law. This is primarily an aesthetic regulation and the same line of reasoning may be followed here as for other aesthetic regulations.

The protection of natural beauty is another matter. Restrictive regulations designed to protect and foster the amenities should be incorporated
in zoning ordinances. Such regulations are not possible at the present time but it is conceivable that the day is not far distant when interpretation of the scope of the police power will be sufficiently liberalized to permit them.

The lower height limits in effect in almost all foreign cities tend to build up the center more solidly and to equalize land values. Most American cities are too liberal in the matter of building heights. A generally lower limit is recommended.

Administration

The zoning ordinance should at all times be flexible and capable of adjusting itself in its application to special cases and of meeting changing conditions. The board of appeals as it has developed over a twenty-year period in this country is sound in principle even though some boards occasionally exceed and abuse their powers in practice. The action of an appeal board is likely to reflect popular opinion. Better administration will come when the true aims and objectives of zoning are more generally appreciated.

Summary of Findings and Recommendations

A summary of conclusions and recommendations is below:

1. It is unfortunate that zoning has grown up apart from general comprehensive planning. It is time to bring it back into the family. All zoning ordinances written in the future should be an integral part of a sound and efficient municipal plan.

2. To assure the consideration of all phases of the problem, the work of preparing a zoning ordinance should be given only to a planning board. The zoning commission set up only to prepare a zoning ordinance should be abolished. The appointment of a planning board should be a prerequisite to zoning.
3. It is possible to determine with a fair degree of accuracy the amount of land that is required for various uses in a community. Each zoning ordinance should find some justification for the quantitative allotment of areas in the amount of land actually needed for those areas. This should not be the sole determinant but should be a guide to be adjusted as required by other considerations.

4. The section in the New York enabling acts permitting the planning board to change the zoning of an undeveloped area simultaneously with the approval of a plat is a good provision. A similar device is employed in England. It is worthy of adoption in other states.

5. Minimum restrictions on building sizes are undemocratic and likely to be held invalid by the courts. They have been used in some ordinances but are not to be recommended. The objectives of such provisions can usually be attained in less objectionable ways. Minimum room sizes and window area based on health requirements are, of course, sound but are usually found in building codes rather than in zoning ordinances.

6. Architectural control is not desirable. The general welfare of the people requires that aesthetic considerations should enter into zoning regulations and in certain cases should even be the determining factor in the provisions of the regulations. Control by zoning of the appearance and design of individual buildings, however, is not considered wise nor desirable.

7. The prohibition of dwellings in industrial or commercial zones is just as sound as the prohibition of industry and business in residential areas. More area than is actually required should be provided for industry and business in order to avoid setting up a monopoly on industrial and commercial sites. The dwellings located in such zones should not be subject to any possible retroactive clauses for a person should not be deprived altogether of the use of
his property if there is not enough commercial development to absorb it. It is reasonable, however, to refuse to grant permits for new dwelling structure in such areas.

8. All building should be banned in some areas unsafe for building purposes because of danger from flood, fire, disease or other menace. In other areas it will be sufficient to forbid dwellings but permit commercial and industrial establishments. Areas unfit for building purposes include flood plains, swamps, marshes and other poorly drained land, areas inaccessible to the necessary health, fire-fighting or police facilities and services and so apt to constitute a menace, and areas where development would increase the cost of government disproportionately by requiring a greater expense for maintenance than the development would bring in in tax revenue.

9. There is need of an investigation of the possibility of applying the zoning method to solve the problems of those urban areas where the prevailing intensity of land use is intermediate between the least intensive use that is typically urban and the most intensive use that is typically rural. In these areas, especially around metropolitan cities, the premature subdivision of such land into small parcels for building purposes has taken land away from its best and most productive use and has created serious fiscal problems that are not always confined to the offending areas but are reflected in the tax structure of the county and the state.

The mere extension of urban zoning power into the countryside through county zoning or the granting of extraterritorial powers to cities does not solve the problem. A new technique based on new principles and designed to meet a new set of conditions is needed.

10. The proper governmental unit to zone outside of urban areas probably varies in different states. In general the county seems to be the logical
unit. In the country the problems which should be met by zoning are broad and do not respect boundaries of local political subdivisions. State zoning is not considered wise nor practicable. There is nothing that could be done by the State that cannot be done equally well and with fewer practical difficulties by the counties working with the advice and guidance of the State.

11. Under a single county planning enabling act should be found authority to zone for all conditions from urban to rural. The county zoning scheme should include, among other things, regulations for the control of development of land on flood plains and along highways, including regulation of outdoor advertising, regulations to control the speculative subdivision of suburban land and should provide, where needed, for districts reserved for forestry, agricultural and estates. It might be wise to break down agricultural districts in order to include in the ordinance regulations designed to promote soil conservation and varying throughout the area depending on the physical conditions to be met, that is, soil type, degree of slope, etc.

12. An official record of non-conforming uses should be made at the time of the adoption of the ordinance. This would eliminate many a dispute in after years.

13. The board of appeals is on the whole, doing the job for which it was designed. It should be an appointive body with reasonably long and overlapping terms of office. The practice in some places of having the legislative body act as an appeal board cannot be considered good. It exposes the ordinance to the danger of becoming a political instrument the chief use of which is to provide political favors through variances. Nor is it wise that the planning board should act as a board of appeals for the planning board should not become unduly concerned with details but should retain always the broad and comprehensive point of view. However, it is highly desirable that one member of the planning board serve also on the appeal board in order to bring to that
body the perspective that is otherwise apt to be lacking in a board that considers individual and specific cases.

14. Retroaction of regulations is desirable in some instances even aside from the legal aspects but it cannot be recommended as a general principle. The placing of a time-limit on the life of non-conforming uses would be a short cut to putting the plan into effect but the practical difficulties of working out an equitable program for reversion of such property to conformity would probably be beset with so many practical difficulties as to become almost impossible to administer fairly. There are certain cases, however, where conditions bordering on the nuisance side should be zoned out. Uses of land, in which buildings are incidental and inconsequential, such as a junk-yard or an open air automobile display space, can probably be forced to relocate where the enabling act does not specifically forbid retroaction and there are cases where this power should be exercised. The limits to which it can be used are vague but some few municipalities have been testing it gingerly.

15. In order that an ordinance may be kept sufficiently elastic to meet changing conditions it is well to provide for a periodic overhauling and revision. Reconsideration at ten-year intervals seems reasonable.
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