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HISTORY AND PURPOSES

In its generally acknowledged meaning, the term "zoning" refers to governmental regulation of the uses to which private property may be put. However, in its stricter legal parlance the term is defined as the division of municipalities into districts[1]—each district representing a category of human activity in varying degrees of desirability—with an overall sort of code to restrict the extension of designated property uses beyond the territorial limits of a given district or zone. As an integral part of city planning[2] the municipal zoning power serves to stabilize and enhance property values and to improve the environment of municipal citizens.[3] The resultant benefits extend all the way from those in terms of health, safety and morals to those involving aesthetic considerations.[4]

Informal zoning practices can be traced back to the time of the Middle Ages when European cities restricted the employment of certain trade activities to specific streets and districts. At the close of the nineteenth century several German cities legislated in order to enjoin the establishment of undesirable industries in close proximity to residential areas. This initial effort was followed by the creation of so-called "protected districts" from which objectionable uses were excluded.[5] In the United States zoning ordinances were initiated at about the turn of the century when citizens of our larger cities embarked upon legislative programs aimed at restricting the uses for which property might be occupied.[6] The impetus for property use limitations came both from the recognition of a need for systematized urban growth and the realization that offensive uses in residential districts should be curbed. The zoning pattern thus established has become a standard for subsequent ordinances whose primary purpose

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1. The customary zones or districts are residential, business and industrial.

2. "Zoning ordinances are ordinarily enacted to adopt a comprehensive plan for a municipality and bring about an orderly development thereof" 58 Am. Jur. 957.

3. In sociological terms, zoning is said to promote to municipal citizens comfort, happiness, public pride and public order. This purpose is accomplished largely through an emphasis on maintaining socially desirable residential districts, either by protecting those already established or those to be developed. The difficulty arises from the fact that initially cities were not planned; their growth arose out of the necessities and desires of man without regard to systematic arrangement.

4. See *Baddour v. City of Long Beach*, 279 N. Y. 167, 18 N. E. 2d 18 (1938), appeal dismissed, 308 U. S. 503 (1939).

5. Encyclopedia of the Social Sciences (Vol. XV) 538.

6. New York City enacted the first noteworthy zoning ordinance in 1916. This statute represents the beginning of conscientious American efforts toward planned city growth.

is served by promulgation of use restrictions aimed at directing the most beneficial occupancy of both urban and rural realty.[7]

STRIKING THE BALANCE BETWEEN PRIVATE PROPERTY RIGHTS AND THE PUBLIC INTEREST IN USE RESTRICTIONS

It is inconceivable that a zoning system could be evolved without the deprivation of someone's rights and, therefore, it was inevitable that zoning ordinances would eventually have to withstand constitutional attack in the courts. Basically the constitutional problems involved in zoning ordinances resolve about an approximation of the public interest in zoning as against private interests in property.[8] When these two determinants are inharmonious the public welfare factor will generally suppress the rights which spring from ownership of private property. Thus zoning classifications or prohibitions authorized by statute which have a reasonable relation to promoting the general welfare, health, safety, morals, etc. and are not arbitrary or capricious are constitutional even though they have an adverse effect upon specific private property rights and delimit free indiscriminate uses.[9] The net result is an ability on the part of a municipality to guide the scope of private uses into those categories, reasonably arrived at, considered most beneficial to the public at large[10]—the prevention of private uses which under the circumstances are detrimental to the community as a whole.[11]

However, every interference upon private property rights which is an aid to the general welfare will not be condoned by the courts. The interference it-

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7. Rural zoning is primarily directed at restricting scattered farm settlement which would create burdens on schools, roads, and administrative functionings and most important, to secure the best possible advantages from planned utilization of natural resources.

8. U. S. Constitution, Amendments V., XIV.

9. In *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, (1926) the U. S. Supreme Court, in upholding the legality of a general zoning ordinance under due process attack from the Fourteenth Amendment, enunciated what today is the firmly established doctrine. Namely, that zoning, if reasonable and uniform, is a valid exercise of the broad and expanding police power. See *Wolfson v. Burden*, 241 N. Y. 288, 150 N. E. 120 (1925); *Baddour v. City of Long Beach, supra*, N. 4.

10. Zoning plans however do not completely do away with the power of private individuals to control the use of land by means of contract or deed. A zoning measure cannot constitutionally release land within a zoned district from lawful private restrictions affecting its use. *Worenburg v. Burnell*, 257 Mass. 399, 153 N. E. 884 (1926); *Gordon v. Caldwell*, 325 Ill. App. 170, 154 N. E. 642 (1926). Private agreements in extention of zoning prohibitions are of course ineffectual.

11. It is generally considered sufficient if it appears reasonable that the legislature in enacting the ordinance had a phase of public welfare in mind. Legislative declarations will not control but the courts realize that municipal governments are better able to estimate the need than is the judiciary.

self must not be unreasonable and should be kept within the limits of necessity.[12] Restrictions, although in the public interest, which go too far will amount to a "taking and as such must be compensated for under the terms of the Constitution.[13] Ordinances which permanently restrict the use of property so that it cannot be used for any reasonable purpose go beyond regulation and must be recognized as a taking of the property.[14] In order to guard against restrictions which approach actual expropriation, special privileges of variation of a temporary nature may be granted, either to individual property owners or owners as a class, so as to allow for a temporary productive use until the time when surrounding circumstances so change that the prohibition upon the particular property no longer remains unreasonable.[15]

NON-CONFORMING USES

One of the major problems in effective zoning is the non-conforming use, that is, one which does not comply with the use district[16] in which it is located. It had long been the accepted view that a non-conforming use existing at the inception of a zoning ordinance could not be prohibited or restricted if the use was lawful and not a public nuisance nor harmful in any way to public health,

12. *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587 (1938); *People ex. rel. St. Albans-Springfield Corp. v. Connell*, 257 N. Y. 73, 177 N. E. 313 (1931).

13. See Holmes' opinion in *Pennsylvania Coal Co. v. Mahen*, 260 U. S. 393 (1922).

14. Where a private property is "taken" it must be expropriated for public use and the owner must be afforded a just compensation for his loss. See *Cordts v. Hutton Co.*, 266 N. Y. 399, 195 N. E. 124 (1934); also see I Bflo. L. Rev. 147.

However, a temporary hardship of holding unproductive property might be compensated for by ultimate benefit to the owner or, even without such compensation, the individual owners might be compelled to bear a temporary burden in order to promote the public good. *Averne Bay Construction Co. v. Thatcher, supra*, N. 12.

15. *Supra*, N. 14. Most zoning statutes and ordinances provide for boards of appeal, review, or adjustment with power to grant variances subject to appropriate conditions and safeguards. See 58 Am. Jur. 976.

In New York a zoning variance may be granted only upon a showing that the land cannot yield a reasonable return if used only for the purpose allowed in the zone, and that the use sought will not alter the essential character of the neighborhood. But it should be noted that where the hardship caused by a zoning ordinance is general and characteristic of the entire area, the remedy lies in a revision of the ordinance through legislative action and not in the granting of a variance to a single property owner. *Taxpayers' Association of South East Oceanside et al. v. Board of Zoning Appeals of Town of Hempstead*, 301 N. Y. 215, 93 N. E. 2d. 645 (1950).

16. *Supra*, N. 1.

safety, morals or welfare.[17] It was thought that to do so would be applying the ordinance retroactively which, in most instances, would be an unreasonable, unjustifiable exercise of the police power and therefore unconstitutional.[18]

However, since it was the policy and spirit of comprehensive zoning to restrict non-conforming uses so far as possible, legislatures have provided statutory means for their gradual elimination via abandonment[19] and non use[20], destruction whether voluntary or involuntary,[21] limitations on repair and altera-

17. *Ryan v. Andriano,* 91 Cal. App. 136, 266 Pac. 831 (1928); *Village of North Hornell v. Rauber,* 188 Misc. 546, 40 N. Y. S. 2d 938 (Sup. Ct. 1947); *People v. Stanton,* 125 Misc. 215, 211 N. Y. Supp. 438 (Cty. Ct. 1926). *A fortiori,* provisions in zoning ordinances exempting from their operation uses already existing at the time of their enactment have been held valid. *Magruder v. Redwood,* 203 Cal. 665, 265 Pac. 806 (1928); *Sampere v. New Orleans,* 166 La. 776, 117 So. 827 (1928), affirmed without opinion in 297 U. S. 812 (1928); *Ballard v. Roth,* 141 Misc. 316, 253 N. Y. Supp. 6 (Sup. Ct. 1931).

18. *Jones v. City of Los Angeles,* 211 Cal. 304, 295 Pac. 14 (1931); *Pelham View Apartments Inc. v. Switzer,* 130 Misc. 545, 224 N. Y. Supp. 56 (Sup. Ct. 1927).

19. An abandonment connotes a voluntary, affirmative act. *Longo v. Eilers,* 196 Misc. 909, 93 N. Y. S. 2d 517 (Sup. Ct. 1949). There must be a concurring intention to abandon and an actual relinquishment of the right. Mere non use of property over a period of time does not amount to an abandonment. *City of Binghampton v. Cartell,* 275 App. Div. 457, 90 N. Y. S. 2d 556 (3rd dept. 1949); see also 58 Am. Jur. 1024. Some minority decisions hold the word "discontinue" in an ordinance equivalent to "abandonment" *State ex. rel. Schaetz v. Manders,* 206 Wisc. 121, 238 N. W. 835 (1931); *Haller Baking Co., Appeal of,* 295 Pa. 257, 145 Atl. 77 (1928).

20. *Franmor Realty Corp. v. Le Boeuf et al.,* ———Misc.———, 104 N. Y. S. 2d 247 (Sup. Ct. 1951) sustained the constitutional validity of a village zoning ordinance prohibiting resumption of a non-conforming use which had been discontinued for more than twelve months. c. f. *Besezedes et. al. v. Board of Commissioners of Arapohoe County,* 116 Colo. 123, 178 Pac. 2d 950 (1947). *Wilson v. Edgar,* 64 Cal. App. 654, 222 Pac. 623 (1923) held compulsory termination after 180 days non-use not to be unreasonable nor unconstitutional.

21. Zoning ordinances providing that, if more than a certain percentage of the value of a non-conforming building is destroyed by fire or other cause, the right to replace the non-conforming building is terminated, have been held to be valid. *Koeber v. Bedell,* 254 App. Div. 584, 3 N. Y. S. 2d 108, (2d dept.) affirmed, 280 N. Y. 692, 21 N. E. 2d 200 (1939); *Navin v. Early,*———*Misc.*———, 56 N. Y. S. 2d 346 (Sup. Ct. 1945); also see McQuillin on Municipal Corporations (Vol. VIII, 3rd Ed.) 382.

tion,[22] and compulsory termination within a specified time period. Compulsory termination represents the most effective method for eventual elimination of non-comforming uses. Initially, application of this type of termination was severely limited by the courts. In 1932 the Kentucky Court of Appeals in *Standard Oil Company v. City of Bowling Green et. al.*[23] unanimously held invalid an attempt to apply a municipal ordinance which established a residential zone and excluded therefrom gasoline and oil filling stations, to a station previously established within the bounds of the district. It was stated that governmental power to interfere with the general rights of a land owner by restricting the character of his use was not unlimited; and that such restriction could not be imposed in a situation where the landowner had employed the prohibited use six years before passage of the restrictive ordinance, the general welfare was not adversely affected by the use of the lot for such station and the lot's economic value would practically be destroyed if the ordinance were enforced.[24] However, eighteen years later in the case of *Standard Oil Company v. City of Tallahassee*[25] the U. S. Court of Appeals (fifth circuit) upheld a similar ordinance involving substantially the same facts under constitutional attack by the same plaintiff as

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22. The right to continue a non-conforming use necessarily embraces what is requisite for preservation such as repair and restoration. *Meixnem v. Board of Adjustment of City of Newark,* 131 N. J. L. 599, 37 A 2d 678 (1944); see also *Sitgreaves v. Board of Adjustment of Town of Nutley,* 136 N. J. L. 21, 54 A 2d 451 (1947); *Brous v. Town of Hempstead,* 272 App. Div. 31, (2d dept.) 69 N. Y. S. 2d 258 (1947). In the case of partial destruction, zoning measures commonly limit restoration to losses not in excess of a certain percentage of the value, frequently seventy-five per cent. *Incorporated Village of North Hornell v. Rauber, supra,* N. 17; *Koeber v. Bedell, supra,* N. 21; *Navin v. Early, supra,* N. 21; *Appel of Berberin,* 251 Pa. 475, 41 A 2d 670 (1945). Value has been interpreted to mean financial worth not merely physical value. *Jetter v. Hoffeins,* 190 Misc. 99, 70 N. Y. S. 2d 808 (Sup. Ct. 1947). The right to repair or replace however does not include structural alteration. *Payé v. City of Grosse Pointe,* 279 Mich. 254, 271 N. W. 826 (1937). Zoning ordinances that authorize continued use of existing non-conforming buildings usually forbid structural or substantial alteration. *A. L. Carrithers and Son v. City of Louisville,* 250 Ky. 462, 63 S. W. 2d 493 (1933); *Austin v. Older,* 283 Mich. 667, 278 N. W. 727 (1938). Structural alterations have been defined as constituting those changes which are of such nature so as to convert non-confirming buildings into new or substantially different structures or extend the existing life of the non-conforming building. Compare *Selligmen v. Von Allmen Bros.,* 297 Ky. 121, 179 S. W. 2d 207 (1944); *Cole v. City of Battle Creek,* 298 Mich. 98, 298 N. W. 466 (1941). For an extensive discussion of the topic see McQuillin on Municipal Corporations, *supra,* N. 21 at 386-396.

23. 244 Ky. 362, 50 S. W. 2d 960 (1932).

24. It is interesting to note the famous Dema Realty Company cases, *State ex. rel. Dema Realty Co. v. McDonald,* 168 La. 172, 121 So. 613 (1929), certiorari denied 280 U. S. 556 (1929); *State ex. rel. Dema Realty Co. v. Jacoby,* 168 La. 752, 123 So. 314 (1929), which provided that all the businesses then in operation within the said area should be liquidated within one year from the date of the passage of the ordinance was upheld by the Louisiana Court of Appeals. The Dema Cases have been greatly criticized and never generally accepted. See *Jones v. City of Los Angeles, supra,* N. 18; *Franmor Realty Corp. v. Le Boeuf, supra,* N. 20; also see 86 A. L. R. 688.

25. 183 F 2d 410 (5th Cir. 1950).

appeared in the *Bowling Green* case.[26] Judge McCord, speaking for the majority of the court stated:[27]

> "We find no merit in the appellant's contention that enforcement of this ordinance would entail any unjust discrimination, or would be tantamount to depriving it of its property without due process of law merely because the site was acquired and improved at considerable expense before the zoning ordinance was enacted. The general rule here applicable is that considerations of financial loss or so-called 'vested rights' in property are insufficient to outweigh the necessity for legitimate exercise of the police power of the municipality."[28]

The Tallahassee case crystallizes the modern trend of thought by law makers and city planners respecting non-conforming uses, i. e. that the presence of any non-conforming use will endanger the benefit to be derived from the zoning plan. It is to be noted however that although the court failed to mention the fact, the ordinance in question provided for a plan of amortization; that is, a plan whereby a temporary continuation of non-conforming uses is permitted with an allowance for their elimination only after the expiration of a specified period of time.[29] It is submitted that use of an amortization scheme provides the most equitable means for reconciliation of the conflicting interests in satisfaction of due process requirements and that probably in the absence thereof the Supreme Court would not be disposed to uphold the enactment.

THE SPOT ZONING CONCEPT

The legislative power to authorize the adoption of general zoning ordinances in cities is well settled.[30] That power in New York State is delegated to municipalities and empowers the local sovereign power:

> "To regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, and for said purpose to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered."

It is further provided that:

> "Such regulations shall be designed to promote the public health,

26. *Supra*, N. 23.
27. p. 712.
28. Appellant's petition for certiorari was denied by the Supreme Court. 340 U. S. 832, (1950).
29. See 99 U. of Pa. L. Rev. 1019.
30. *Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920).

> safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development *in accord with a well-considered plan.*"[31]

The implications of the enabling statute clearly indicate a strong policy that zoning should proceed in accordance with a definite policy and not in a haphazard manner. It has been held that where there has been no attempt to adopt a definite policy a sporadic regulation will not fall within the delegated authority and will be invalid.[32] Where a comprehensive zoning plan has been established under the terms of the enabling statute, indiscriminate variance provisions within a classified district will be stricken down by the court. Ergo, the rule stated has been that an ordinance cannot create an "island" of more or less restricted uses where there are no pertinent differentiating factors between the "island" and the district.[33] It is not permissible to single out one lot located within what is essentially a single district and impose restrictions upon that lot that are more or less onerous than those imposed upon the remaining portions of the same zoning district.

The crux of the problem lies in the determination of those restrictions which constitute inconsistencies or discriminations within a given district in contrast to mere reasonably determined altruistic variances. It is established that a zoning ordinance is not invalid *per se* because it permits small areas scattered throughout residential sections to be zoned for business uses, thereby permitting the residential districts to become "spotted."[34] The boundary line between invalid inconsistencies and unobjectionable spot zoning largely depends upon whether the ordinance which provides for incongruous uses within a singular district is characterized as for the good of the general public and in pursuance of a general or comprehensive plan as distinguished from the granting of a special privilege or imposition of a special restriction.[35] Therefore, the analyst's approach must be one calculated to determine whether the so-called lot or haphazard zoning firstly bears a reasonable relation to the public health, morals, safety or general welfare and secondly is in pursuance of a unified plan. Ordinarily an overriding general welfare relationship factor will not be difficult to establish and the critical element will become the existence of a comprehensive plan. It is submitted that whether or not a comprehensive plan does exist will be evidenced by:

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31. General City Law p 20 sec. 25; *Italics supplied.*

32. *City of Utica v. Hanna,* 202 App. Div. 610, 195 N. Y. Supp. 225 (4th dept. 1942).

33. McQuillin on Municipal Corporations (*Supra,* N. 21 at 145).

34. See 12 Cal. Jur. Ten Year Supp. (126-136) 158.

35. See *Bowen v. Hider,*———Misc.———, 37 N. Y. S. 2d 76 (Sup. Ct. 1942).

1—The substantiality of the public benefit[36] which is resultant from the non-district type of zoning—the less substantial the benefit the more apparent must a definite or comprehensive plan appear.[37]

2—The uniqueness of the areas within the district in regard to the district as a whole and also in regard to the municipality as a whole—fringe areas are most unique.[38]

3—Whether the words of the statute or amendment which designate the particular area describe the area by metes and bounds or describe it in general terms applicable to various places within the area. Validity is enhanced through the use of broadly termed designations.[39]

Although the spot zoning concept as such has not been awarded any great amount of judicial sanction the value of this haphazard property use control should not be lost sight of in cases where mixed zoning within a particular district is called for as a part of city planning for maximum public benefits.

CONCLUSION

I. The zoning concept gives force and effect to the historically recognized fact that municipal growth must be directed according to a well planned scheme of development. Its justification lies in the existence of resultant benefits flowing to the public welfare. When there are no concurrent public benefit factors the sovereign police power will not be evoked into the legislation and the zoning plan will fail since the zoning power must be predicated upon an exertion of the police power.

II. The sovereign's ability to restrict certain undesirable property uses may not be so extended that an actual expropriation of property takes place. Where the restrictions are of unreasonable severity the due process clause will preponder-

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36. The term "public benefit" may refer to the municipal public in toto or merely to that portion of the public residing within the district subject to spot zoning.

37. Compare *Bowen v. Hider, supra,* N. 35, and also *Marshall v. Salt Lake City,* 105 Utah 111, 141 Pac. 2d 704 (1943).

38. See *Bowen v. Hider, supra,* N. 35, and also *Marshall v. Salt Lake City, supra,* N. 37.

39. See *Eggebeen v. Sonnenburg,* 239 Wisc. 213, 1 N. W. 2d 84, (1941). Compare *Mueller v. Hoffmeister Undertaking and Livery Co.,* 343 Mo. 431, 121 S. W. 2d 775 (1938). The greatest number of cases wherein zoning laws have been sustained not withstanding their classification of small areas for purposes not permitted in the larger surrounding areas have been those where the zoning ordinance permits small areas scattered throughout residential sections to be zoned for business uses. 58 Am. Jur. 966.

ate to preclude an interference based upon the zoning power or in the alternative to require the payment of a just compensation for the taking incurred.

III. Because the necessity for zoning regulation ordinarily appears after offensive uses within a district have called for relief and zoning ordinances in that they are of a universal nature or applied to districts wherein human activity is varied, the existence of the so-called non-conforming uses and their elimination presents a perplexing question. Compulsory elimination of such uses is the most effective guarantee for procurement of uniformity in uses within a district. The court will not sanction an order for immediate discontinuance in respect to the well established non-conforming user. However, a definite trend has evolved in support of compulsory termination where the zoning authority provides for an amortization plan which embodies a reasonable period for mandatory discontinuance of the non-conforming use.

IV. The spot zoning proposition is also grounded in considerations of uniformity. Where the legislative establishment of inconsistent uses is for private aggrandizement the uses will be stricken down as improper. Nevertheless the trend in judicial thinking properly repudiates the idea that spot zoning *per se* is invalid. Consequently where there is some demonstrable benefit to the public involved and where there appears a uniformity or generality in consideration, spot zoning will be upheld as a valid exercise of sovereign authority.

V. Recent developments both as to the problems of non-conforming uses and spot zoning well illustrate a purposeful, far-sighted approach toward solution of the desire for planned city growth without prejudice either to private or public interests.

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