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## SOME LEGAL ASPECTS OF CITY PLANNING\*

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WHEN the city planner takes his mathematics, his compass, his transit, his drafting pen or other implements in hand, he depends upon exact and unfailing results. His mathematics and these instruments are dependable in his problem of tabulating and planning. But when it comes to figuring *costs* he has a variable if he is working where ownerships are involved—and few are the cases where the city planner works with one ownership in laying out a plan. Occasionally a city planner is turned loose in a large tract of so-called virgin land under a single ownership.

Most frequently, in fact generally, the city planner is a repair man, a re-designer, or the first real designer on a map cluttered up with narrow streets and a "patch upon patch" design of some community that, like Topsy, "just grewed." Under such circumstances the unreliable variable must be dealt with. It is this: How far does the police power go? How much will it accomplish? When must the community pay? How much can be done under zoning, safety ordinances, height measures, setback lines, etc., without adding eminent domain costs to the costs of the plan?

I believe the liveliest and most important problem before the city planner is the question of costs; and without a doubt, that question swings today on a very unstable pivot due to the unsettled condition of the law. The law is going through a process of development; but the future cannot be guessed with any degree of certainty and the development is and must be bench made. What is the "taking" of private property for a "public use," is a judicial question and not a legislative problem.

Those of us who have been studying the question and practicing in the field for the short space of twenty years have seen the police

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power attach first to billboards. It moved them a safe distance, then required them to be windstrong, then moved them off some streets entirely—first giving as a reason that they blow over or that thugs hide behind them, then finally and openly saying that the æsthetic senses have a place in the police power field.

We saw the police power move next to building heights, hobbling along on such crutches as "fire hazard," "shadows" and "pure air," etc., when every man who was honest with himself knew that there were other and more important reasons; but the lawyers have been slow to put the truth of their reasons because they were afraid of the courts.

No one had the nerve to say (out loud) that building heights should be limited to one hundred feet to solve the traffic problems and to spread the city out so as to make it workable—that was too far ahead of the development of police power, and the arguments had to be placed, sometimes almost humorously, on the old catch phrases. No one dared to say to a property owner who drew up plans for a twenty-five story building "take off the top fifteen floors because you will help bring so many people into these streets as to congest them beyond saturation." We put our tongues in our cheeks and said to such a one as proposed such a building "you will cast shadows which keep the streets damp and unhealthy. You are increasing the fire hazard," and we made similar feeble remarks.

Strange to say, however, building height regulation had, and has, that foundation as far as the court decisions are concerned. Someday some judge will write up his investigation of a city like Los Angeles and his observations to the effect that the most fortunate thing that ever occurred to that city was the limitation of building heights, early in its history, because with higher buildings the streets simply could not care for the people and the traffic. They are congested now. Then this judge will observe that a city has the police power to look out for and guard against street congestion. The common council will figure out how many people can safely be accommodated in a block surrounded by forty-foot streets, sixty-foot streets, etc., and the building height regulations will finally be on a sensible basis.

I mention the matter in this form because I realize that most of this audience are not lawyers. We cannot develop law like other sciences. The law must lag behind. It takes a gradual and steady growth, step upon step, to finally say to a brick yard which is running at a profit in a location where a city is rapidly growing to and around it "Now you must get out, you make smoke, dirt and noise here. Move on. No, we will not pay you any money because the police power is driving you out and police power pays you for nothing." That is, to all practical effects, a decision of the Supreme Court of California con-

firmed by the Supreme Court of the United States in the most far reaching zoning case which has yet been decided. It is a case which is well known to most engineers who are interested in city planning.

To get back to my point that the law must lag behind, let me remind you that that decision had to wait for the growth of Los Angeles. The smoke, noise and dirt had to be there. They had to wait until the city actually surrounded the brick plant. The decision could not be prophetic. That is where the engineer does not understand the law. The engineer calculates growth in advance. He estimates density of population in the future. He calculates this and that and prophecies conditions. He then fails to understand why the law can only deal with the results after they occur. He moves quickly to new methods, new designs, new machinery, new processes, and fails to understand why his lawyer friend cannot jump just as rapidly. A little reflection will show you that the lawyer has an entirely different kind of a job on his hands. While the engineer has possibly his full power in the premises, he at the most has only to get the O.K. of a board of directors; the lawyer is up against years of precedent. His arguments for an extension of a rule involve vast property rights and interest which are not even represented in the case. There is no such thing as a hypothetical decision of a court dealing with mere calculated results. After results have been more or less accomplished the lawyer must then take the conditions and become a pioneer in the law field. To pioneer is dangerous and generally disappointing to the first advances. A precedent can only be changed by a clear change in public thought and the pioneer attempting to change the law in accordance with the public thought is not generally taken seriously because he is generally too far ahead of the parade. This has been true with all reform movements. It is just as true in the law field where an effort is being made to get the courts to write into their decisions language that reflects a change of order and different comprehension of matters that have theretofore either been decided or hinted at.

We have had many zoning cases some years ago that met with disaster because they were ahead of the parade; although the courts have now gone much farther than was then asked of them.

Let us look at property rights for a moment. We must look at property rights because the comprehension of property rights has been the thing that has slowed up the zoning and set back line development; because naturally the effort has been to get by with the expenditure of as small amount of money as possible and likewise naturally the effort has been to do most of the remedial city planning under the police power to avoid the payment of eminent domain compensation. Not many years ago the rule was that a man's house was his castle and he was absolute monarch there over his private domain. He

could do with it as he pleased. He gave no thought to sewage disposal and threw his garbage out to the wild animals and blowflies. He disregarded his distant neighbor. About the first development of the law that gave his neighbor any interest in his land or made the owner realize that he could not do exactly with his land as he pleased, was the easement of lateral support. He finally found out if for any reason he excavated near his neighbor's land he was under an obligation to support the natural soil of the adjacent owner and could be held in damages if his excavation caused the property or undersoil to subside. Here is the foundation of the development in the law that made inroads upon the theory of absolute ownership of private property.

The sovereign of the country was supposed to have some rights also as against this private ownership and these rights were in a rather indefinite state at the time the Federal Constitution was adopted almost one hundred and fifty years ago. That unsatisfactory condition of the law directly caused this language to be written into the Federal Constitution: "No person shall be . . . . deprived of . . . . property without due process of law; nor shall private property be taken for public use, without just compensation." The same unsatisfactory condition of the law as to private property rights caused the state constitutional convention in Wisconsin about seventy-five years ago to write the following into the Wisconsin state constitution: "The property of no person shall be taken for public use without just compensation therefor."

During all this time, however, the development of the police power was constantly making inroads upon the private property rights. Quarantine was depriving men of their liberty; houses were being dynamited to prevent the spread of fire; gradually the courts were saying to men that they could not build noisy and smelly factories in residence communities; contaminated meat was being destroyed. Finally sour milk was confiscated and poured into the sewer. In none of these cases was any compensation made because the police power was being stretched to cover the situation.

City planning in its most prevalent form being a redesigning of an existing community would run into prohibitive cost if it were not for this invasion of private property rights in favor of the general welfare. A further mention of some of the various phases of the so-called police power will serve to show how prohibitive the cost would be if private property rights had continued as they were a few generations ago, and if the clauses from the constitutions which I quoted a few moments ago had been supported to the very letter by the various courts of the land.

1. Taking zoning for instance—without police power what would

it cost to take away the right from thousands of lot owners to build business houses on thousands of city lots in a city the size of Milwaukee. Suppose the courts had gone off on the strict construction tangent and had continued to hold that when you say to a man that he shall not build a business house on his property for the good of the community, that you have said to him that his property right is being taken for public use or that thereby his "property" is taken.

2. Take air space for consideration. The Schroeder Hotel property in Milwaukee is worth several thousand dollars a foot, yet the police power compels air space and setbacks above a certain height, without any compensation whatever to the owners.

3. Take the recent case in the Supreme Court of Wisconsin where the fifteen-foot setback line was applied to both sides of a corner property, as a matter of zoning, being the case of *Hayes et al v. Hoffman*, 192 Wis. 63. How easy it would have been for the courts to have held that this fifteen-foot setback was the taking of property. In fact, if you will read that case you will see that the court headed off the constitutional question by stating it was not properly raised in the lower court. As lawyers, we do not feel very secure about that. All the owner can do with it is run a lawn mower over it; there isn't enough left for a building—has the property been taken?

4. For a further examination take an earlier case, *State ex rel Carter v. Harper*, 182 Wis. 148, where a milk depot was driven out of a residence district *without compensation* because that section of the Milwaukee zoning ordinance which prohibited repairs to be made to a milk depot in a residence district was sustained under police power. How easy it would have been for the court to have said that the driving of this milk depot out of a residence district for the good of a community was taking property for a public use and that compensation must be made to the owner.

5. Making a little closer examination of city planning, let us look at setback lines in street widening cases for just a moment. There is already one setback line law in Wisconsin which has not been decided in the courts, however, which boldly provides for no compensation to the abutting owners. (See subdivision 63.23, Wisconsin Statutes.) There are other setback line laws which do provide for compensation. Right there you have the subject balanced on the very fine point that is involved. History only and not prognostics will aid the engineer in his calculation of costs, with this inevitable condition in mind. We cannot always remain in this twilight zone. Whether or not these various progressive elements of city planning can be carried on indefinitely under the police power is the big problem before the lawyers and the courts today and the engineers will have to wait. Speaking from the point of view of past history there is one thing that is

noticeable and that is that no paragraph or phrase has ever been taken out of the Federal Constitution or the State Constitution with reference to property rights. It is accurate then possibly to say that the constitutional provisions are immovable. The growth of the police power seems to be irresistible. So you engineers have before you a pet case of the irresistible force meeting the immovable body, and it is anybody's guess as to what the final outcome is going to be.

We lawyers say that the police power is less than half grown. It is like a puppy with long, clumsy legs and a slim belly, all of which merely indicate rather indefinitely what it is going to look like when it rounds out into final form. In some respect the police power is even humorous in its present ungainly development. I will give you an illustration. To make it short we will suppose that right here on a freight depot platform are some cans of sour milk. Presumably this milk is intended for human consumption although it may be headed toward a cheese factory. The confiscation of this milk and the dumping of it into the sewer without compensation to anybody has been sustained by the court under the police power. Now turn right around and on this depot platform are the same number of cans of sweet milk and right around the corner is a starving baby. The police power has not yet been developed to permit the municipal authorities to take that sweet milk (even if compensation is granted) and go around the corner and save the life of the starving baby. Now if the police power comes to a sensible development so that a can of sweet milk can be taken at current price to save the starving child together with the present rule that the sour milk can be thrown into the sewer without cost, we can expect at most some further extension in favor of these problems of the city planner.

I predict that the next development in the police power will be to protect valuable property rights against monstrosities in design and color. I think the next development will be the passage and sustaining of ordinances that prohibit freak houses in communities otherwise sane and sensible. I think the prevention of obnoxious design and color schemes is just as important as zoning setback lines, height regulations, breathing space and other rules to which the police power has been so rapidly extended. Speaking personally, my eyes are far more sensitive than my ears or my nose; yet the police power ignores my sensitive eyes and gives me considerable relief for my ears and my nose. Personally I would rather have a planing mill or a tannery across the street from my house than have a freakish design of a house with a hideous paint; but at present the police power gives me no protection from the latter no matter how hideous it may be.

We had a case at the northwest corner of Park Place and Downer Avenue in Milwaukee as follows: The zoning ordinance prohibited

the owner from building a business house on the corner. He was on the edge of the business district. Across the street to the south and across southeasterly there were flourishing business houses. North of Park Place, affecting his property, the zoning ordinances limited him to the building of a residence. The values were very high but nothing could be done with the lot on a profitable basis for private residence purposes. The owner made various visits to a certain lawyer's office and got an education on the present development of the police power. He built a cheap shack in the middle of this lot, painted it black with white window sashes and rented it to negroes. There is a crystallization of some of the awkward growth of the police power. There was nothing that could be done about it, as long as the negroes did not get too noisy. There was no question about the damage done to values in the community but it is just an illustration of how the law has developed along some lines and has not developed along others.

I cannot close this paper without making mention of the excess condemnation laws of Wisconsin. We have what I think is the best constitutional amendment in the country on excess condemnation. There has been some use made of it in Milwaukee and further use is now in the planning. The subject affords material for more minutes than are allowed for this discussion. I mention it in conclusion because I have stated every other problem in its true condition of doubt, while here is something that seems to be very well settled and something which, in my opinion, should be fearlessly and boldly used by city planners while the lawyers are feeling the way through the other problems which are involved on how far the police power is going to make inroads upon the private rights of property and constitutional guarantees against the taking.

I think the city planner and the city attorney owe it to the community and to the law to hurry along some of these unsettled problems rather than to avoid them and evade them. I am anxious to get a setback case into the courts where actual street widening is attempted through the setback theory where no compensation is paid to the owner. I have a personal belief that our traffic problems are just as dangerous as the spread of fire, the spread of disease or the absence of pure air and light. It may be that the courts will draw the line when we undertake to widen a street to relieve a traffic situation and say what is in fact a taking of private property for public use that requires eminent domain compensation, and if they are going to draw the line, for the sake of the city planner and for the sake of enabling him to accurately figure his costs, I say that the sooner it is done the better.