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THE CONSTITUTIONALITY OF A GENERAL ZONING ORDINANCE

THOMAS A. BYRNE

It MUST be quite apparent to the casual observer that American cities have grown up without plan or direction. Their growth has been the result of the annexation and addition of various smaller communities to the central municipality. A haphazard and un-systematic jumble has been the result. Streets have been laid out without regularity and building lines have had no degree of uniformity. Not the least objectionable feature of this systemless growth has been the intrusion into residential districts of business establishments and industrial enterprises. Such intrusion has resulted in a decrease in property values and an instability in neighborhood characteristics. These defects in city erection became manifest some years ago to the planners of our municipalities. A resolution to improve these faults was first noticed in the increased activity of the legislatures and the courts in removing nuisances and in declaring certain structures, not nuisances per se but very discommoding to the inhabitants of the vicinity, to be within the definitions of nuisance. A further step was taken when the common councils of our cities declared certain blocks to be either residential or business. In the beginning these district regulations were restricted to a few sections of the city. Gradually it became apparent that this type of regulation was not effective and was, in effect, discriminatory of those sections not zoned. Today the effort of city planners is toward comprehensive ordinances covering the entire municipality and districting it into several kinds of uses, usually residential, local business, commercial and light manufacturing, and heavy industrial. The advantages of this type of ordinance are so clear, not only to the expert city planner, but to the casual resident as well, that zoning is becoming widespread in nature. Today, zoning, although it is pioneer legislation growing out of a recent movement, is no longer experimental. The vast majority of our city-dwellers now look to this type of legislation to foster the well-ordered growth of our urban communities and to eliminate that lack of plan and direction which has characterized their growth up to this time. It is significant that at this time over four hundred municipalities of high and low degree are protecting their future development by means of zoning ordinances. As a corollary, one of the most recent and satisfactory developments
of our law is the declaration of our courts that these ordinances are constitutional.1

Such widespread effort to systematize and beautify our cities has led to a large number of cases which have sought to determine the invalidity of this type of legislation. It is clear that a few years ago any law which imposed use regulations on a man's property would have been declared contrary to the due process and equal protection clauses of the United States Constitution. Moreover, it was very early alleged in opposition to these laws that they were taking property without just compensation. For it is easily apprehended that by the word "property" as used in the Fourteenth Amendment is meant more than the mere legal title to the land but also is meant the use and enjoyment of the property.2 But the last decade has seen quite a universal change in the attitude of the courts and today we see the police power of the state brought into play with such satisfactory results that the constitutionality of this type of legislation is no longer seriously questioned. Assuming that more and more cities will see future desirable results from the enactment of zoning laws it will not be vain labor to examine the cases with a view of determining on what grounds they have been upheld and of noting the principal objections which are made to these ordinances by those courts which do not look upon them favorably.

While zoning laws may be looked upon as innovations in legislation still municipalities have in the past looked to the comfort and happiness

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of their residents and the states have offered redress to those whose property has been injured by the existence, actual or threatened, of objectionable buildings or businesses. In law these have been known as nuisances and the power to regulate them has always been a component part of the police power of the state, although it is not within the power of the legislature to declare that to be a nuisance which is not in fact such. When authorized by legislation, whether in the municipal charter or in the general statutes, municipal corporations may enact and enforce ordinances for the abatement of public nuisances and the preservation of public health. It might be said that one of the first forerunners of the present zoning movement was the recognition of the power of municipalities to prohibit, in residential districts, industries and other uses of property, which although not nuisances per se, were generally discommoding to the surrounding area. Equity, moreover, has always given relief to those with a proper case who showed that there was to be a nuisance resulting from the proposed erection of any structure in the vicinity of their property. Where the action was at law the remedy was by way of damages. Under the common law of nuisances it has been held in Wisconsin that numerous industries were objectionable. Thus it has been held that a tannery conducted in the neighborhood of dwelling houses, which, in the course of its operations, filled the surrounding air with disagreeable, offensive, and unwholesome matter, and substantially impaired the comfort of the dwellers nearby, was a nuisance. The court came to the same conclusion in regard to a plant manufacturing acids and upon the same line of reasoning. The Wisconsin court has also decided that the conduct of an undertaking and embalming business in a neighborhood of residences operates to reduce the value of the property in the vicinity and to destroy the peace of mind of those who are obliged to witness the last rites of their fellow-men. But it refused to hold the same as to a proposed veterinary hospital on a petition for an injunction to prevent the building of the same. And a church in a residential section is not necessarily a nuisance because it does not reduce the value of the property in the section.

5 10 Minn. Law Rev. 48 and cases cited.
6 Teidel v. Schneit, 105 Wis. 470, 81 N.W. 826.
7 Pennoyer v. Allen, 56 Wis. 502, 14 N.W. 609.
8 Holman v. Mineral Point Zinc Co., 135 Wis. 132, 115 N.W. 327.
9 Cunningham v. Miller, 178 Wis. 22, 180 N.W. 531, 23 A.L.R. 733.
10 Wergin v. Voss, 179 Wis. 603, 192 N.W. 51, 26 A.L.R. 933.
11 Cunningham v. Miller, supra.
vicinity of the plaintiff’s house, the noise and dirt from which rendered the house uninhabitable was said to be a nuisance.\textsuperscript{12} But an electric light plant operating until eleven o’clock at night and emitting sound clearly audible all over the neighborhood was held not to be actionable in the absence of a showing of actual, physical discomfort.\textsuperscript{13}

The test of whether or not industry is an actionable nuisance in a particular neighborhood is whether the business is of such a nature as to cause actual, material, physical discomfort to a person of ordinary sensibilities, and this during the day and the usual hours of repose of the parties.\textsuperscript{14} Decrease in the value of adjoining property is also taken into consideration by the courts.\textsuperscript{15} But equity will not abate a nuisance for a mere diminution in value.\textsuperscript{16} And if the nuisance is common or public in nature it cannot be abated in an action by an individual unless he can show that he suffers damages peculiar to himself and additional to those suffered by the people at large.\textsuperscript{17} And the general rule is laid down that threatened nuisances, both public and private, will not be enjoined except in those cases where it appears that a nuisance will necessarily result from the act or thing which is sought to be enjoined,\textsuperscript{18} or that the nuisance will cause irreparable injury to the public,\textsuperscript{19} and will be productive of damage which cannot be adequately remedied at law.\textsuperscript{20}

Not alone the courts but also the legislatures of many jurisdictions have declared certain objectionable undertakings to be nuisances and these declarations by the legislature are now usually upheld by the courts as constitutional if they bear some definite relationship to the health, morals, or safety of the public.\textsuperscript{21} But even so brief a review of the authorities as is given above shows that there is a lack of certainty and uniformity in the decisions of the courts, such as lack, indeed, that

\textsuperscript{12} McCann v. Strang, 97 Wis. 551, 72 N.W. 1117.
\textsuperscript{13} Rogers v. John Weeks Lumber Co. 117 Wis. 5, 93 N.W. 821.
\textsuperscript{14} McCann v. Strang, supra.
\textsuperscript{15} Cunningham v. Miller, supra.
\textsuperscript{16} Janesville Bridge Co. v. Stoughton, 1 Pin. 667.
\textsuperscript{17} Greene v. Numemacher, 36 Wis. 59; Clark v. C. & N. W. R. Co., 70 Wis. 593, 36 N.W. 326; Zettel v. West Bend, 79 Wis. 316, 48 N.W. 379; Anstee v. Fuel Co., 171 Wis. 291, 177 N.W. 26.
\textsuperscript{18} Wergin v. Voss, supra.
\textsuperscript{19} State v. Carpenter, 68 Wis. 165, 31 N.W. 730.
\textsuperscript{20} Wasilewski v. Biedrzycki, 180 Wis. 633, 192 N.W. 980.
\textsuperscript{21} Cream City Bill Posting Co. v. Milwaukee, 144 Wis. 371; Thomas Cusack Co. v. City of Milwaukee, 158 Wis. 100; Mehlos v. Milwaukee, 156 Wis. 591, 146 N.W. 882, 51 L.R.A.N.S. 1009 (dance hall); previous cases referred to billboards; St. Louis Gunning Co. v. St. Louis, (1911) 235 Mo. 99, 137 S.W. 929; Thomas Cusack Co. v. City of Chicago, 267 Ill. 344, 108 N.E. 340; 3 Cornell Law Quarterly, 135 (billboards); Reinman v. Little Rock, (1913) 107 Ark. 174, aff’d in (1914) 237 U.S. 171 (livery stable); Ex parte Quong Wo, (1911) 161 Cal. 220,
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is was often difficult to predict whether or not a certain enterprise would or would not be declared a nuisance in a particular locality. The business man was subjected to the danger of erecting a costly business on a piece of property which he had been able to obtain at an advantageous price only to be perpetually enjoined from pursuing it after it had been completed and operated for a time. The owner of adjoining property could not in all cases obtain an injunction at the start of operations in such a way as to save himself the expense of litigation, protect his property from a possible decrease in value, and save the proposed enterprise from injunctive proceedings until after it was too late to save great expense. Both the owners of abutting property and the promoters of various kinds of business enterprises have suffered from the dependence of the old system of nuisance regulation upon actual litigation as a means of protecting property values.

It was only natural that the indefiniteness, uncertainty, and inadequacy of the old system would make it unfit to cope with the increasing complexity of city life and would lead to some new system of fostering healthy commercial and industrial growth consistently with proper municipal planning and the protection of the residential sections of the city. Business men were looking for safety in the location of their enterprises and home owners sought surety that their establishments would be left undisturbed by the encroachments of undesirable occupants in the vicinity. The result has manifested itself in the increase in the number of comprehensive zoning laws throughout the country. Zoning bears a very definite relation to nuisance regulation but at the same time it is based on several different considerations. Nuisance law dealt with the harmful, objectionable, or injurious use of property. Zoning deals with the injurious use of property just as did nuisance regulation but in addition it deals with mere differences in the character of activity which is to take place on the premises. It consists in the prior prescription of regulations which attempt to treat each section of the city "according to its own peculiar needs, present and prospective." 

118 Pac. 714 (laundry); Ex parte Hadacheck, supra (brick kiln); 91 Neb. 101, 135 N.W. 376, 40 L.R.A.N.S. 898 and note (1912) (brick kiln); Ex parte Montgomery, (1912) 163 Cal. 457, 129 Pac. 1070 (lumber yard); 219 Mich. 573, 189 N.W. 54 (1920) (junk yard); Brown v. Los Angeles, (1920) 183 Cal. 783, 192 Pac. 716; Meager v. Kesler, 147 Minn 182 (1920); Leland v. Turner, (1925) 117 Kan. 294 (undertaking parlors); City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823 (gasoline filling station); 263 Ill. 368, 105 N.E.315, L.R.A. 1915 D, 607 (garage); Salt Lake City v. Western Foundry Co., 55 Utah 447, 187 Pac. 829 (1920); Fertilizer Co. v. Hyde Park, (1878) 97 U.S. 659; 142 Minn. 28, 170 N.W. 853 (1919) (flour mill).

Bacon v. Walker, 204 U.S. 311.

It partakes of the character of the injunctive jurisdiction of equity to prevent nuisances, save that the regulations are statutory in nature and suit need not ordinarily be resorted to in order to work out the rights of the parties. Zoning is not so much directed against objectionable enterprises singly and of themselves but is intended to exclude them as a class. Incidentally, of course, it excludes, many things which in themselves are innocent. This incidental exclusion of innocent businesses has been one of the chief objections to the constitutionality of these laws. On this point the Supreme Court of the United States has spoken as follows:

The court cannot say as a matter of law that the end in view in the passage of a zoning ordinance was not sufficient to justify the exclusion of all industries from the sections set apart for residences although some industries of an innocent character may fall within the proscribed class. Zoning, therefore, is not an ultra-refined form of nuisance regulation. It is an extension of the police power to meet new situations which nuisance law was inadequate to control. All the efforts of the past to restrict the objectionable use of property make the zoning of today possible.

Since the constitutionality of such zone ordinances is now fairly assured it is clear from the cases that the ground of affirmance is police power rather than eminent domain. The police power has again been extended to meet changing economic and social conditions. The general welfare of the urban population has been seen by the courts to depend on the systematic regulation of city growth and it is now fairly well assured that such changes can be met and served legally by new methods of city planning made possible by the exercise of the police power of the state. As a Western supreme court puts it:

As a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed

24 Village of Euclid v. Ambler Realty Co., supra.  
25 On this point there has been an interesting development in Wisconsin. In Pera v. Village of Shorewood, (1922) 176 Wis. 261, 186 N.W. 623, the court said that zoning might be done by means of eminent domain. In Piper et al. v. Ekern, (1923) 180 Wis. 586, 194 N.W. 159, the court refused to sustain an act of the legislature prohibiting the erection of buildings more than ninety feet high in the square surrounding the state capitol on the ground that no compensation was to be paid the owner for the restricted use of the property. In State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269, the court upheld a comprehensive zone ordinance and distinguished the previous case on the ground that the restriction in that case was for the special benefit of one piece of property, the state capitol. The ground of affirmance in the Carter case was police power. A similar development took place in Minnesota. See: 10 Minn. Law Rev. 48 and cases cited.
and changing conditions. What at one time was regarded as an improper exercise of the police power, may now, because of changed living conditions, be regarded as a legitimate exercise of that power.  

So that we may conclude, very tritely, indeed, that if the constitutionality of zoning laws is to be sustained on the ground that they are a reasonable and legitimate exercise of the police power of the state, the ordinance must bear some substantial relationship to the health, morals, security, comfort, and general welfare of the people.

At the outset it may be objected, as it frequently has been in the past, that zoning is done primarily for esthetic reasons, and as done for such purposes is an invalid exercise of the police power. Probably the explanation of this objection may be found in the great wave of home building which has swept this country in the last few years. From Atlantic to Pacific, in large cities and small, there has recently been a notable increase in the number of home owners. Presently there is a great deal of subdividing going on in the suburban sections. Contractors and builders now devote considerably more attention to the architectural details of the small home than ever before. Consistent architectural design may now be had by men of moderate means as well as by the wealthier classes. The nondescript characteristics which formerly distinguished the residential neighborhoods of the working class from those of the professional and commercial classes are beginning rapidly to disappear in the newer sections of our cities. An increase of the beauty of all types of residential neighborhoods is the product of the skill of the subdivider and homebuilder and of the desire of the modest home owner to preserve the residential character of his neighborhood. On its face this modern activity would seem to have as its principal motive the beautification of the residence sections by the prescription for them of proper use regulations. Hence the proposition that zoning, being principally esthetic in character, is invalid as an exercise of the police power.

The courts, however, have not seen fit to look upon zoning ordinances as legislation based merely on esthetic considerations. But one court, that of Kansas, has seen in these laws a predominance of the esthetic, and, contrary to the weight of authority, has squarely held zoning for such reasons to be valid as an exercise of the police power. On the contrary, the courts have usually affirmed the proposition stated above that a zoning law to be valid under the police power must bear some substantial and cognizable relationship to the health, morals, security, comfort, and general welfare of the public. Courts deciding against

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26 Miller v. Board of Public Works, (Cal., 1925) 234 Pac. 381.
27 Ware v. Wichita, 113 Kan. 153, 214 Pac. 99.
zoning have not seen the relationship, courts upholding these laws have pointed out that a very definite relationship exists. Decisions, to be examined later, will show that it requires no strained reasoning or mental somersaults to see the connection between health, morals, and general welfare, and laws which segregate the various activities of a city into their properly appointed places. Once decided that there is such a substantial relationship as is referred to above the cases hold that the incidental presence of esthetic considerations does not invalidate the law. The cases recognize that in city planning, as in the great majority of other human activities, the esthetic is not easily separable from the material and the utilitarian. On this proposition the Supreme Court of Wisconsin has made a statement in State ex rel Carter v. Harper, supra, which is now widely quoted:

... it seems to us that esthetic considerations are relative in their nature. With the passing of time social standards conform to new ideals. As a race our sensibilities are becoming more refined, and that which did not offend cannot now be endured. The rights of property should not be sacrificed to the pleasure of an ultra-esthetic taste. But whether they should be permitted to plague the dominant or average human sensibilities may well be pondered.

While it is true that esthetic considerations are not alone sufficient to validate the zoning ordinance and the courts have usually upheld the ordinances on other grounds, so that it may be said to be the weight of authority still that esthetics are not a proper basis for the exercise of the police power, there is a noticeable tendency on the part of courts to inject the element of beauty into the reasoning of their opinions. They recognize that the element of beautification is not absent in the plans of city commissions. It is not hazarding too long a guess to say that many courts are unwilling to hold the ordinances constitutional on

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28 State ex rel. Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N.W. 617; State ex rel. Penrose Investment Co. v. McKelvey, (Mo., 1923); City of St. Louis v. Evraif, (Mo., 1923); State ex rel. Better Built Home and Mortgage Co. v. McKelvey, (Mo., 1923), 256 S.W. 474, 489, 495. It will be noted that the Nebraska case involved area restrictions only. "With the exception of the Missouri cases, every adverse decision is expressly limited to a single piece of property, or to a single provision in the ordinance, though the process of reasoning is logically inconsistent with the theory of zoning. The Missouri Court alone has expressly decided against zoning; but even here questions of statutory or charter powers, as distinguished from constitutional issues, were involved, and exerted a marked influence upon some of the judges of the court." Bettman, "Constitutionality of Zoning," 37 Harv. Law Rev. 834.


these grounds merely because of the numerous precedents which compel them to do so, and not because of any real reluctance to recognize the esthetic reasons for the plans. Is it not entirely possible that in the next few years we will find the courts recognizing esthetics as a proper basis for the exercise of the police power? The court of Louisiana gives us an illuminating lead in this regard, which, when added to the Kansas case cited previously, and to several others shows some slight tendency toward this recognition.

If by the term "esthetic considerations" is meant regard merely for outward appearances, for good taste, in the matter of the 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 of the neighborhood, and it sustains in a general way the value of property in the vicinity. It is, therefore, just as much a matter of the general welfare as any other condition that fosters comfort and happiness, and consequent values generally in 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 olfactory nerves? An eyesore in a neighborhood or residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise or odor, or a menace to safety or health. The difference is not in principle but in degree.

Another, and probably the chief reason, why courts have not decided the question of esthetics as a basis for the exercise of the police power, is that there are many other grounds, long recognized as proper bases for the exercise of that power, on which these ordinances can legitimately be sustained. There is an undeniable relationship existing between the health, morals, safety, and general welfare of the public, and the enactment of reasonable zoning laws. In the matter of police protection, for example, the proper zoning of large cities into residential and business districts makes for the more efficient and less costly administration of the police force. It is well known that neighborhoods consisting of homes are less in need of elaborate patrolling than are those districts in which are located stores and other businesses which are prey for the thief and the robber. Patrolmen need not be so numerous in these neighborhoods. Business houses furnish an excuse for criminals to get into residence districts, meanwhile being under no suspicion for being so there, while in a home neighborhood it would

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not be so. Shops and other business houses invite idlers, loafers, and loose characters, to congregate, thus aggravating the ever present danger from this element to the women and children whose proper sphere is in the residence section.

Another important consideration is efficiency in traffic control. Where there is a proper distribution of the large office buildings which now feature our business life there is less likelihood of traffic congestion during the "rush hours." The complete demoralization of traffic in the business sections of some of our large cities at those times when these monstrous, skyscraping buildings discharge their human armies into the streets is a clogged and halting testimonial to the lack of plan which placed these huge structures on streets which are unable efficiently to handle the numbers of people which are discharged into them. Nowadays most of the people employed in these buildings are obliged to depend on motive transportation to get them to and from their work. The impossibility of concentrating street cars and busses in the down town sections in sufficient numbers to clear the streets of the people disgorged into them at certain hours has become the despair of transportation officials. The tendency of the professional classes is more and more to drive to work in their own machines but the impossibility of providing proper parking space for these machines during those hours of the day when they are unused will put an effective stop to this practice unless something is done to remedy the situation. Of course it is obviously a hopeless task to remedy completely the situation in the older sections of the city but the hopes of the city planners, as manifested in the modern zoning ordinance, is to provide proper facilities for the future by placing limits on heights of buildings and by regulating the areas in which they may be built, so as to learn a lesson from the past in the proper distribution of traffic.

In this connection the question of street paving is important. The concentration of business and manufacturing establishments into their proper sections results in like concentration of the heavy traffic incident to these industries into the districts provided for them. Heavy traffic requires a substantial type of paving and the city is necessitated to put this kind of paving only in sections where it is most needed. Heavy trucks, as a rule, have less reason to travel in residence sections and the city may pave these parts with the cheaper materials more suited to passenger machines and light delivery trucks. This results in a decided economy to the municipality. The corresponding reduction in necessary taxes for these purposes is a benefit to the general welfare of the people in these sections and is clearly a measure reasonably within the purview of the police power of the city.
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The reasoning which is applicable to the needs of more police protection in business districts is likewise applicable to the fire-hazard. It is clear that more dangerous fires requiring heavier types of equipment are likely to occur in sections devoted to trade and industry. In the residential districts lighter equipment may be maintained at a less expense to the city. The forces of men needed to combat blazes in manufacturing centers necessarily are greater than those required to fight the ordinary residence fire. Here again there can be a substantial saving to the taxpayers as a result of a zone plan which segregates these commercial establishments from the home. And who will assert that such a promotion of the efficiency of the fire-fighting forces of a city at a lesser cost to the taxpayers is not a valid exercise of the police power?

All the reasons mentioned above have been taken into consideration by those courts which have upheld the validity of zoning ordinances. There are further reasons which may be summarized shortly. Property values in residential neighborhoods are increased and stabilized by the exclusion of business uses; the health of women and children is assured because of the absence of the smoke and noise incident to manufacturing; living conditions are improved and the handling of administrative problems is facilitated. In the words of Mr. Justice Owen of the Wisconsin Court:

The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city.

Certainly there is no undue extension of the police power of the state when it is expanded to meet the needs outlined above. All will agree that the orderly improvement of the growth of our cities is one of the most pressing needs of this stage of American municipal development.

It may be said in a general way that the police power extends to all great public needs. It may be put forth in aid of what is sanctioned by usage, or held . . . . by strong or preponderant opinion to be greatly and immediately necessary to the public welfare.

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The police power of the city in expanding to meet these new municipal needs must extend and expand within certain well-defined limits if it is to be held constitutional by the courts. It is generally well settled than an enabling act of the legislature is necessary to confer the zoning power on the cities. This is for the reason that such function is part of the reserve power of the state, properly resident in the state, and improperly exercised by the municipality unless granted to it by express legislative enactment. Most of the zoning ordinances now in force in the cities of the country are properly enabled to the legislature and the weight of the decisions is in favor of this procedure. The contrary theory holds that zoning by municipalities is a proper exercise of their function if there is no constitutional prohibition against such municipal activity. But this theory will not attain to any great degree of popularity with those courts which properly understand and interpret the constitutional and municipal law as applied to the police power. Strictly, all power possessed by municipalities is delegated power and must be strictly granted rather than by implication. There is at least one case which holds this doctrine applicable. But the Wisconsin rule seems to be that the authority of a city to legislate upon a particular subject within its police power, need not be given to such city expressly or unmistakably, but if the general terms of its charter

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26 In Wisconsin zoning by municipalities is regulated and allowed by several enabling acts of legislature. The general act for cities contained in Chap. 62, Laws of 1923, Sec. 62.23. Under the authority of this act is the City of Milwaukee adopting a comprehensive zoning ordinance of the most approved type, this ordinance being Chap. 111A, of the Milwaukee Code, Sections 26.3 to 26.77. The provisions of this act have gone to the courts in several cases, one of which, State ex rel. Carter v. Harper, cited supra, has become a leading case on zoning and is frequently referred to by courts and text-writers. The act provides for four classes of uses. The property of the relator was a business building within a residence district. The ordinance provided that no nonconforming use might be enlarged. The court, by Owens, J., held that the ordinance was valid. "We do not doubt that the attainment of these objects affords a legitimate field for the exercise of police power." The doctrine of this case is followed in Holzbauer v. Ritter, 184 Wis. 35, 198 N.W. 852, in which it was held that it was not an improper classification because the ordinance provided for the exclusion of community stores from residential districts. There are several other acts. In Chap. 61, Laws of 1923, Sec. 61.35, it is provided that villages in counties having a population of 250,000 or more may provide zoning regulations. In Section 343.461, Laws of 1925, provisions are made for the regulation of the height of buildings in all cities. This section has been held not to apply to villages or farming communities. Nor did it apply to a building partly constructed but not completed when the section was enacted. It is not retroactive and does not deny equal protection of the laws. Building Heights Cases, 181 Wis. 519, 195 N.W. 554.

show a reasonably clear purpose to clothe the municipality with such power, that is sufficient.\textsuperscript{38} The municipality, being a part or subdivision of the state, the police power of the municipality is a subdivision of the police power of the state. The state may delegate its legislative power to a municipal division of the state and not offend against the general rule that legislative power may not be delegated.\textsuperscript{39} But the very delegated nature of the power would seem to stamp as correct the doctrine that zoning power must be strictly granted by a proper enabling act.

Here we should pause for a minute and summarize what has been said thus far as to the validity of zoning laws. A zoning ordinance must bear some cognizable relation to the health, morals, security, and general welfare of the people; it must be based on an enabling act. We may now go on a bit and decide that zoning laws, although they may be constitutional as a class, must, in particular cases, be reasonable. The question of the reasonableness of a zoning ordinance is an interesting one. Upon what consideration must the reasonableness of the ordinance be determined? Obviously, all the cases which will seek to impeach the validity of such type of legislation will be based on the damage which the ordinance will allegedly do to a particular piece of property. Shall the reasonableness of the law be determined by its effect on the single piece of property, or shall not the whole law in its workings with regard to all the property in the district be the test? On this point there is a conflict in the authorities, not expressed or recognized, so much as actual. The general rule under which all cases are decided is that the restrictions imposed by the ordinance shall be uniform upon all the persons and property within the zone. The operation of the ordinance must be similar on the persons and property similarly situated.

It is obviously impossible to lay down any general rule for reasonableness at the present time. The cases have been so few and the jurisdictions so widely separated both as to geography and legal tendency that it will be some time before any settled rule of reasonableness will be announced by the courts. It is doubtful whether the courts could lay down any such rule. Every case must depend on its individual cir-

\textsuperscript{38} Mehlos v. Milwaukee, 156 Wis. 591, 146 N.W. 882, 51 L.R.A.N.S. 1009. See also City of Superior v. Roemer, 154 Wis. 345, 141 N.W. 250.

\textsuperscript{39} Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529; Brodbine v. Revere, 182 Mass. 598, 66 N.E. 607.
cumstances. It is interesting to note the few cases which have been
decided on this point to date. In Isenbarth v. Bartnett the property in
question was a piece usually and properly devoted to business uses.
Merely to preserve the vista for a certain private park the property was
zoned as residential and the value of it was reduced from $55,000 to
$17,000. This was properly held by the New York court to be un-
reasonable and arbitrary. A somewhat similar case was decided in
Wisconsin. An act of the legislature prohibited the erection of build-
ings over ninety feet high around the state capitol building in order to
lessen the fire hazard to the capitol and the valuable records contained
therein. Plaintiff, an owner of property on the square, sought to
restrain the operation of this act against his property. Even despite
the fact that the act was designed for the protection of the state capitol
the court refused to hold that this was a proper exercise of the police
power and remarked that some compensation should have been paid
for the property which was to be taken in this way. There is some
similarity in these cases in that they both concern regulations which
were intended for the benefit of a single piece of property.

A radically different view of the situation is taken in Ex parte Had-
acheck where the question concerned the reasonableness of a pecuniary
injury done by a use ordinance to the property of the plaintiff. The
property was a brick yard which had been built years before the passage
of the ordinance on land considerably removed from the settled section
of the city. As a brick yard the property was worth $800,000; as resi-
dential property it was worth but $60,000. Later the city built out to
the location of the yard and the city passed a use regulation directed
against brickyards. The ordinance was upheld by the California court
and the decision of that tribunal was upheld by the United States Su-
preme Court when the case was taken there on appeal. The most
recent case, Village of Euclid v. Ambler Realty Co., involved a com-
prehensive zoning ordinance not an isolated use regulation such as was
at issue in the Hadacheck case. The land in question was located in
an unimproved portion of the village and ordinarily would have been
used for commercial or apartment purposes. The zoning ordinance of
the village declared the property to be residential as to a substantial

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41 Piper et al. v. Ekern, 180 Wis. 586, 194 N.W. 159, 34 A.L.R. 32, discussed
in 8 Minn. Law Rev. 248 and 10 Minn. Law Rev. 48.
part. The rest of it was to be apartment or commercial. In the ordinance every section of the city zoned as "Residential I" might include only single-family dwellings. The contention of the relator was that the exclusion of apartment uses from his property constituted a discrimination since the property would normally have been used for those purposes. In a decision reversing the United States court for Ohio the Supreme Court held that the ordinance was not unreasonable.43

These cases bring up the question of the effect of the ordinance on property values as bearing on the reasonableness of the law. The Isenbarth case was correctly decided. There the application of the ordinance to the particular piece of property was arbitrary and unreasonable. The Piper case, while not strictly a zoning case, is a correct decision on the application of the police power to the property in question. The rule in the Hadacheck case, that pecuniary injury from the exercise of the police power does not indicate violation of the constitutional limitations, is now well settled. There is no vested right in the proper exercise of the police power, and if the plan is genuinely comprehensive and reasonable as a whole, the fact that it may incidentally affect adversely the values of one or more pieces of property, does not invalidate the ordinance. Moreover, as soon as the courts enter into the reasonableness of zoning laws with such minuteness and detail as to determine the value of each property affected by it, the courts become administrative rather than legal tribunals. Were the law to be tested by this process of questioning the comprehensive nature of the ordinance is lost sight of and the forest cannot be seen on account of the trees. It has been held that in such cases as are brought up by zoning regulations the determinative question is not so much private rights as it is the reasonableness and advantage of the entire plan considered as a whole.44

The reasonableness of the plan would also seem to be dependent to some extent on the comprehensiveness of the ordinance. One of the stages in the history of zoning is marked by the introduction of the block or district type of zoning regulation by which a certain isolated street was declared to be residential or business. These ordinances have been held constitutional by some courts but it is clear that45 they are

44 Jardine v. City of Pasadena, 248 Pac. 225 (Cal).
45 State ex rel. Banner Grain Co. v. Houghton, 142 Minn. 28, 170 N.W. 853; Salt Lake City v. Western etc. Works, 55 Utah 447, 187 Pac. 829; Knack v.
not so reasonable as is a comprehensive ordinance. As stated before, they are in effect discriminatory as to the property not zoned. Many courts have seen this and have declared these block ordinances invalid.\(4\) The growth of zoning has brought it to our attention that a zoning law need not contain all the modern comprehensive ordinance contains in order to be held constitutional. It may regulate height alone and be valid.\(4\) A use regulation was upheld in the Hadacheck case\(4\) while set-back lines were declared constitutional in Town of Windsor v. Whitney.\(4\) It is well settled by the later cases that an ordinance may contain regulations for height, use, and bulk. The comprehensive law is entitled to be called constitutional because it is not in fact so arbitrary or discriminatory as is the block districting ordinance. Under the latter type of plan property in one “zone” or part of the city receives different treatment than does the same kind of property in another part of town. The piecemeal ordinance is the result of no plan; it is haphazard; it is but slightly more effective than no regulation at all. But the comprehensive ordinance is based on an extensive survey of the needs of the city both present and future. It takes into consideration all the facts of the city’s future growth, population, distribution, traffic conditions. In other words the ordinance which contains all types of regulation—height, bulk, and use—is the more effective type of ordinance and hence the more reasonable. The comprehensive ordinance is the plan of the entire municipality seeking the best possible districting for the benefit of all.

In answering the question which was previously asked whether the reasonableness of the plan should depend on its thoroughness as a whole or upon its effect on individual pieces of property it is necessary to conclude from the history of the movement, from the decisions of the courts, and from the logic of the situation that the comprehensive type

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\(4\) Supra, 165 Cal. 416, 132 Pac. 584, 239 U.S. 394.

\(4\) 35 Conn. 357, 111 Atl. 354.
of ordinance is more reasonable than the piecemeal law by reason of its very comprehensiveness. Following this logic further we should conclude that the thoroughness of the entire plan as applied to the whole municipality should be the test of the reasonableness of the ordinance. Certainly all the facts which entered into the adoption of the plan by the Planning Commission should be taken into consideration in determining its reasonableness. A scheme which considers the future of the city along social and economic lines; which considers the channels which the future growth of the city will take, which has been honestly made so as to facilitate this future expansion, is a plan best calculated to be reasonable in its operation. For these reasons the survey on which the plan is based, and the testimony of the experts who made the survey as to just how the final ordinance will further the health, morals, and general welfare of the city, are evidence of the reasonableness of the plan. The Wisconsin court in upholding a height ordinance solely, stated that "a zoning law would be a more scientific and satisfactory way of regulating the height and character of buildings."\(^5\)

Of course the ordinance cannot entirely disregard the rights of the private owner. In the last analysis both the entire thoroughness of the plan and its immediate effect upon single pieces of property are evidences of reasonableness. Mr. Bettman, one of the leading authorities in the country on the law of zoning, has this to say:

The failure to realize the significance of the comprehensive nature of the ordinance in some cases has led, and until corrected, will continue to lead courts into an illogical attitude of keeping their eyes solely on the piece of property of the plaintiff and the immediately adjacent or neighboring lots, thus permitting the constitutionality of the plan of a city to turn on evidence concerning a very small fraction of its territory.

And again, at another place he says, speaking of the decisions adverse to the constitutionality of zoning ordinances:

With the exception of the Missouri cases every adverse decision is expressly limited to a single piece of property . . . . though the process of reasoning is logically inconsistent with the theory of zoning.\(^6\)

These statements clearly indicate the views of Mr. Bettman that the comprehensive and entire reasonableness of the plan is the test of its constitutionality and that the element of damage to the property of any

\(^5\) *Atkinson v. Piper*, 195 N.W. 545.

individual should be secondarily considered. This theory is, on the whole, correct. But there is in it a very great danger, a danger which manifests itself to the conservative rather than to the progressive mind perhaps, but a danger which is first considered by the person whose regard for the sacred rights of property is paramount in his mind to considerations of public welfare. No one will deny, much less the writer, that the effect of zone plans on our American cities is bound to be beneficial in its entirety. But the question occurs when one reads the Hadacheck case and the Euclid case as to just where we are going in our jealous regard for the rights of the individual to the full use and enjoyment of his property. This question may resolve itself at some future time into a conflict between those two philosophical camps, the one insisting strongly on the general welfare and the other insisting equally as vigorously on the protection of the rights of the individual. The contention of the present writer is that the benefits of the plan should be obtained for the municipality if such end can be attained with no substantial impairment of individual property rights. To be sure the thoroughness of the plan should be one of the elements in the proof of its reasonableness, but the court should never neglect to inquire into the application of the scheme to the property in the instant case. It would seem that there are two tests of the reasonableness of a zoning ordinance: first, is the plan as a whole sound, that is, is the plan reasonably related to the health, morals, or general welfare, and second, is the scheme of classification and districting applied fairly and equally in each instance.52

The basis of the foregoing criticism, of course, is the depreciation in the monetary value of the petitioner's property due to the passage of the zoning ordinance, without any corresponding compensation from the public for whose benefit the property is taken. The answer to this objection is that really the property is not being taken for public purpose at all53 and that no compensation need be paid. But the owner is compensated by the like restrictions which are placed on the property of his neighbors. His property is treated in exactly the same way as the lot next door, and so on, down the block and throughout the zone. The enforced co-operation of all those similarly situated for the common good will, save in rare cases, operate to increase the value of

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52 Miller v. Board of Public Works, (Cal.) 234 Pac. 381.
53 See Pontiac Improvement Co. v. Board of Commissioners, 104 Ohio St. 447, 135 N.E. 635.
the plaintiff's property rather than to decrease it. Whether or not the monetary value of the property is increased certainly the beauty and usefulness of the land is enhanced by the like restrictions which are placed on all the property in the vicinity. All the property being zoned as residential, for example, all business uses are excluded, noise and smoke are eliminated from the life of the district, the esthetic effect is increased, life is made more livable and worthwhile, and the general efficiency of the neighborhood for the residential purposes for which it was set aside, is considerably increased. It is only in the exceptional case that zoning decreases the value of the property; but it is submitted that values, both monetary and personal, are, on the whole, sustained by zoning ordinances, and that the unregulated use of property causes more depreciation than does the scientific districting of a municipality.

In the case of State ex rel Carter v. Harper, supra, an interesting question of reasonableness is raised. Under the Milwaukee ordinance any building or other structure may be erected and used in any location by a public service corporation for any purpose which the state Railroad Commission may decide is reasonably necessary for the public convenience or welfare. Relator contended that this was unreasonable because of an improper and invalid classification which resulted in a discriminatory treatment of property. On this point the court said:

When it is remembered that such buildings are erected to promote the comfort and convenience of the public, and that it is within the power of the state to compel such erection, it would appear that this constitutes a reasonable and valid classification. It must be apparent that an ordinance enacted pursuant to state authority which prevents the erection of buildings or the conduct of business deemed inimical to the public interest, need not also prohibit the erection of buildings and the conduct of business which is essential to the comfort and convenience of the public, and which the duly constituted authority of the state determines to be necessary for the public service, which a public utility is required to render. A similar provision received consideration in the Opinion of the Justices where it was said that the provision "is within the settled principles of legislative control over property devoted to that use."

Having seen in a general way that regulations of the height, bulk, and use of property, now referred to as zoning laws, are constitutional as a class if they are properly enabled and are reasonable, it would be well to inquire just how far these ordinances may go in the division of

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54 Milwaukee Code, Sec. 26.46.
the city into height, bulk, and use districts. Just what may be the bases for the districting and how must the boundaries be determined? It was early recognized that use regulations which excluded obnoxious uses from residence districts were constitutional as a reasonable protection of health. Some of these isolated regulations were noted above. But zoning laws usually exclude non-obnoxious uses as well. Here lies the dangerous question of constitutionality. This usually arises in connection with the regulation of residential districts where, for example, the ordinance excludes all but single family homes from a section zoned as "Residential A." It will be admitted that the term residential would include all types of structures used as residences—single family houses, duplex flats, tenements, and apartments. Is it reasonable and proper, therefore, for the council to classify such residences and require that homes containing more than one family be built in a section of the city separate and apart from that occupied by single homes? If it is proper on what grounds may such action be based?

There is high authority that such legislation is reasonable and constitutional. The reasoning of some of the cases, it is true, is rather strained, based on the idea that apartment houses in residence sections partake of the character of nuisances. In the Euclid case Mr. Justice Sutherland remarks that they come "very near to being nuisances." At any rate the courts see in multiple family dwellings many obnoxious features from the point of view of the owner of a single house. They point out that these larger structures shut out the light and air from the smaller buildings; they clog the streets with many automobiles, both parked and moving, due to the increased occupancy of the neighborhood; they generally reduce property values in the vicinity and make the neighborhood less desirable for the single family home; soot and smoke are spread around; and the fire hazard is undoubtedly increased. Courts see many advantages in the pride of ownership which comes to the man with his own property; there are manifest advantages to the children who have private yards in which to play, yards in which there are grass and flowers to make life more natural and beautiful; a better citizenship, they say, will result in neighborhoods where the young children have light and air and something more to look at than the four walls and decorated entrance of a modern apartment house. In the promotion of the fast degenerating family life environment plays

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a great part and the courts are not the first to have said that one of the reasons for so little family life today is that the modern family has no home which it can call its own. The writer, for one, has always believed that the apartment house of today is the incarnation of selfishness, the graveyard of domestic interests, and the destroyer of that sense of domestic responsibility which served so well to weld families together in those past ages when there were more marriages than divorces. The preservation and promotion of the family is one of the first interests of the state. Admitting the very close relationship between the home and the family it is impossible to see why any measure which serves to preserve the family is not a valid exercise of the police power.

That the apartment frees people from some cleaning and firing tasks which at one time were considered indispensable family inconveniences it is readily admitted. But life in an apartment is a community of restrictions—restrictions which must be borne in order to enjoy the freedom from responsibility which the apartment offers. And there is little doubt in any one’s mind that the freedom of arrival and departure which the apartment offers to its single residents has been no small contributing factor in the violation of the moral laws. The more thickly occupied is a residential section the less easy is it to detect such violations. Any police officer will testify that the work of the vice squad has been increased tremendously since the advent of the apartment. It has tended, moreover, to create a floating element among the citizenry of the country. Seeking an apartment so that they may shirk domestic inconvenience they begin to shirk their social, civic, moral, and religious obligations as well. They take less interest in the civil government and the public schools. They have no pecuniary attachment to the community by way of taxes to compel their interest in the administration of the public agencies. On the other hand home-owning brings up an altogether desirable citizenry; it aids in the rearing of children; it stabilizes the home—and the stability of the home is the strength of the nation. Of course, to some the apartment is desirable and to others well-nigh indispensable. But the fact that they are necessary to some does not make them desirable to others. They are not homes in the sense in which some people use the word. There is a sufficient distinction between them and the single home to warrant their separation into a district in which they may exist unhampered by the disappointed protests of the home-lover. This separation would seem to be warrantable aside from any consideration of nuisance. The charge that the courts have gone too far in sustaining these laws is unfounded.
The separation of the various sections of the city into different use districts being a proper exercise of the police power a delicate question is raised when the boundaries for these districts are attempted to be determined. The territory of a city is usually not marked out by any such natural boundaries as distinguish one country from another on the map of the world. All the ground covered by one municipality is very much the same. Hence a certain degree of arbitrariness in the location of zone boundaries must be expected. The question has been raised, and will continue to be raised, where the boundary of the zone separates two pieces of property similar in nature, putting one piece in a single house section and the other in a flat or apartment district. In such case the court will not substitute its judgment as to the reasonableness of the boundary for the judgment of the legislative body which enacted the ordinance. It is easily seen that were such objections to govern the courts in their interpretation of the reasonableness of the ordinance no boundaries could ever be set for the zones. If the mere fact that outside the permissive district there existed property similar in nature to that within the district would authorize the court to determine that this constituted an arbitrary discrimination no territorial classification of this kind could ever be made. Nor is the size of the district and the thickness or sparsity of its population an exclusive criterion of the reasonableness of the zone boundary. But while the power of the legislative body to fix the boundaries of the zones and their size is widely discretionary it must be exercised within some limitations. The boundaries of the zone must be reasonable in view of all the uses within the district; adequate provisions must be made in order to foster all the purposes of the zone. And the zone, as created, especially in presently existing business districts, must not be such as to create a monopoly in favor of already existing establishments by the exclusion of the same type of business from the section still to be occupied. But necessarily different treatment of the same kind of property in different sections of the city is no ground for declaring the law invalid as class legislation.

Another interesting problem in connection with zoning cities already largely built concerns the permission which is given by most of the ordinances for the exemption of non-conforming uses from the operation of the law. A non-conforming use is any structure or business which, were it to be erected after the passage of the ordinance, would

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67 Brown v. Los Angeles, 183 Cal. 783, 192 Pac. 716.
68 State ex rel. Morris v. Osborne, supra.
69 Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714.
70 Zahn v. Board of Public Works, (Cal. 1925) 234 Pac. 388.
71 Bettman, 37 Harv. Law Rev. 834, and cases cited.
be in violation of its terms. Such, for example, would be an apartment house already constructed in a section later zoned only for single family dwellings. There is authority to the effect that the ordinance may require the removal of all non-conforming uses in existence at the time of the passage of the ordinance. There would seem to be no question that the removal of non-conforming uses might be required if there was any element of nuisance in the thing to be removed. This inference is inescapable in view of the cases which we have seen above authorizing the removal of nuisances by particular legislation for that purpose under the police power of the municipality. But on this reasoning some element of nuisance would have to be present, and zoning ordinances are not based on nuisance regulation exclusively. Carrying to its logical conclusion the reasoning about general welfare which has been used by the courts to sustain zoning as an entirety it would seem to be entirely proper for the legislative body to order the removal of all uses which interfere with the operation of the plan. In large cities the removal of all non-conforming uses would mean that part of the city would have to be rebuilt and this would clearly result in great hardship to numerous owners of property. There are indications that this resulting hardship would be construed as unreasonable and unnecessary by the courts. In one Wisconsin case it was held that prior building permits were not invalidated by subsequent changes in zone boundaries. Any extended attempt to make the ordinances retroactive will meet with opposition from the courts on the ground of unreasonableness and may result in declaring against the constitutionality of the ordinances as a whole. No doubt it is for this reason that most of the ordinances exempt presently existing non-conforming uses from the operation of the law. It has already been objected that this exemption constitutes a discrimination against those business establishments of the same kind which are prohibited in districts yet to be built up or forbidden to be built in the future in those parts of the city in which they now exist. It is contended that if there is to be a valid classification it must operate uniformly upon all establishments like in nature and operation and that no exception may be made in favor of a use merely because it is in existence at the time of the passage of the ordinance. But the general opinion seems to be that if the authority to zone exists, the ordinance enacted pursuant to that authority need not require that all non-conforming uses be removed. The constitutional requirement of uniformity simply means that all the persons affected by the law applying to a particular class

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62 Ware v. Wichita, 113 Kan. 153.
63 Wasilewiski v. Biedrzycki, 180 Wis. 633.
shall be uniformly treated on and after the passage of the ordinance. The fact that such legislation is not made retrospective will not render the ordinance invalid because of discrimination.64

The Milwaukee ordinance seems to have arrived at a satisfactory solution of this difficult problem. It provides that no non-conforming use may be enlarged after the district has been zoned. This provision of the ordinance was upheld by court65 on the theory that no one has a vested right to enlarge his business merely because the business was initiated before the ordinance forbidding its enlargement was enacted. Mr. Justice Owens reasoned that if every small business in such section of the city had a vested right to enlarge itself it might grow to mammoth proportions very largely defeating the purpose of the regulation.

In this connection it is to be noted that the attempts of some ordinances to evade the protests of property owners who wish to have the ordinance inoperative as to a certain non-conforming use to be erected after the passage of the law, by providing that upon the written petition of a percentage of property owners in the vicinity of the proposed use, such use may be allowed and the ordinance suspended as to it, have been held invalid as unlawful delegations of the legislative power vested in the common council. In State ex rel Nehrbass v. Harper66 the ordinance enacted that no garage might be erected in any residential section unless the builder first obtained the written consent of two-thirds of the owners within three hundred feet of the proposed use. If such signatures were obtained the operation of the ordinance as to that garage was to be suspended. This was held invalid as an unlawful delegation of the legislative power of the common council.

The delegation of this power to adjacent property owners, without any restriction or limitation whatever, vests in such property owners the power to say as a matter of discretion that another property owner shall not be allowed to use his property in a certain way. No attempt is made to place it on a ground of public welfare, or public health, or any other interest which the public might have in the matter, but the determination is left to the desire, whim, or caprice of the adjacent owners.

The same conclusion was reached in the case of Eubank v. Richmond by the Supreme Court of the United States.67 Incidentally in this case the court said that there was no question of the right of a city to establish set-back lines. But the set-back in this case was to be de-

64 Zahn v. Board of Public Works, (Cal. 1925) 234 Pac. 388.
66 162 Wis. 589, 156 N.W. 941.
67 226 U.S. 137.
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termined by the consent of two-thirds of the owners in the block. The reasoning of the court is much the same as in the Wisconsin case. No standard is set up by which the adjacent owners shall determine whether the use shall be allowed or not and their decision is largely based on their personal likes and dislikes. No discretion is left in the body which administers the law. It has been held in Wisconsin that the taxing power cannot be delegated\(^{68}\) and the same reasoning would seem to apply to adjacent owners determining the use to which others shall put their property. These decisions are carefully reasoned and it is well that the courts have declared unconstitutional these conditional provisions of zoning ordinances. To determine the rights of one by the whims of another is not putting the ordinance on any ground of public welfare, and, moreover, no comprehensive ordinance will serve the ends it was intended to promote if it is everywhere to be changed to suit the desires of property owners. Zoning ordinances can be very properly placed on definite and absolute grounds of general welfare after a survey of the needs of the municipality. Once decided that certain provisions of the law are valid, proper, and necessary, it should not be left to other owners to say whether or not the ordinance shall be made effective as to a certain piece of property.

Rather than attempt to delegate any power to property owners the council should create a board or commission for the administration of the many details which arise in the enforcement of a zoning ordinance. If the council attempts to lay out the whole scheme of the municipality the first time the ordinance is enacted and then hold to this form of development during the period of the ordinance the city will be formed into an unchangeable mould which, with the growth of the city which is bound later to occur, is bound to give rise to hardships which will cause the law to be attacked in many cases because of its unreasonable application in particular instances. There are many thousands of situations in the planning of a city which will need adjustments from time to time as the growth of the city warrants. There will arise situations which are unforeseeable at the time of the passage of the ordinance. To take care of these changing conditions provision must be made for an administrative board which will have power to make exceptions as it deems necessary consistently with the object of the entire plan of the law. Zoning ordinances will have to be amended from time to time and this commission should have the power to recommend such amendments and should also have discretion to suspend or alter the operation of the ordinance without an amendment. If this type of board is provided for the administration of the law it

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\(^{68}\) State ex rel. Carey v. Ballard, 158 Wis. 251, 148 N.W. 1090.
will result in less attacks being made on the constitutionality of the ordinance as a whole and will reduce the attacks to reviews of the propriety of the application of the ordinance to a particular situation. Where a discretion is vested in a board of this kind and under this power the board makes a finding as to a particular piece of property which finding is unsatisfactory to the aggrieved owner the court will not consider the ordinance as an entirety but will only review the exercise of the discretion of the board. Its action will be allowed to stand as final unless there is a clear abuse of the discretion. In this way the zoning ordinance will be placed on a firm ground of constitutionality. It must be added here, however, that the ordinance should prescribe the legislative policy which is to guide the board so that it may decide the individual cases after a proper consideration of the facts which entered into the adoption of the ordinance. If an absolute discretion is vested in the board without any corresponding legislative policy by which the board may be governed the work of the board will depend on the theories of the men rather than on the plain intent of the ordinance. The result will be an arbitrary administration of the ordinance. It is imperative that the actions of the administrative body should be guided by a proper legislative policy, else the results will be an arbitrary confusion dangerous to the whole movement.

By way of summary it may be said that the modern zoning law is the outgrowth of the traditional police power of the municipality over nuisances. The modern comprehensive ordinance bears an analogous relationship to nuisance regulation but is sustained today because it bears a substantial relation to the health, morals, security, and general welfare. The weight of authority is to the effect that esthetic considerations alone are not enough to sustain the ordinance. The ordinance must be enacted as a result of a proper enabling act. It must be reasonable and there are two tests to determine this reasonableness. Is the ordinance thorough as an entirety? Does it lack discrimination and arbitrariness in its applications to particular pieces of property? In the establishment of districts and the determination of boundaries the judgment of the legislative body will control unless there is a clearly arbitrary or unreasonable provision or unless the boundaries as established create a monopoly. Non-conforming uses may be required to be removed but the majority of the cases seem to indicate that if this procedure is attempted the ordinance will be declared unconstitutional because unreasonable. The fact that non-conforming

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6 Jardine v. Pasadena, (Cal.) 248 Pac. 225, and also the well reasoned dissent of Bond, C. J., in Goldman v. Crowther, (Md.) 128 Atl. 50.

uses are allowed to exist and that the law is not made retroactive does not render the ordinance invalid. An administrative board should be created for the administration of the ordinance. The creation of such a board will assure the constitutionality of the ordinance because the court will then review only the use of the discretion of the commission rather than the ordinance as an entirety. Lastly, the operation of the law may not be delegated to the property owners in the municipality.