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The History of Zoning--A Thumbnail Sketch

James Metzenbaum

The History of Zoning—"A Thumbnail Sketch"[1]

By James Metzenbaum

IN THE early colonial days when the colonists had settled but a mere fringe along the Atlantic coast, they set themselves to clearing the land and building their rude log cabins. Regrettably, fires sprang up all too frequently, with the result that many settlements were completely wiped out in only a few hours. As these tiny settlements grew into hamlets and villages, the frequent fires took more and more toll. Parliament, sitting in England, took note of that situation, and way back in 1692, during the reign of William and Mary, the first kernel of zoning was introduced into American soil, for it was ordained that:

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> Because of Great Desolation and Ruins having sundry times happened by Fire breaking out in the town of Boston, principally occasioned by Reason of the nearness of Buildings, being mostly of Timber, and covered with Shingles.
>
> BE IT ORDAINED that henceforth, no Dwelling-House, Shop, Ware-House, Barn, Stable, or any other Housing of more than eight feet in length, and seven feet in Height, shall be erected and set up in Boston, but of *Stone* or *Brick* covered with *Slate* or *Tile.*

Here was the first step constituting a "Building Code" regulation.

FIRST FIRE ZONES

Naturally, those hardy settlers were put to the necessity of providing much of their food, by way of hunting, so that powder was a common necessity in every cabin in those early days. This, too, added to the frequency of fire and ensuing explosions as the flames ran from cabin to cabin bringing desolation to entire settlements. Thus, the very first Act by the State of Massachusetts, after the forming of the United States,

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[1] The writer is the author of a three-volume work entitled THE LAW OF ZONING (1954). The citation of authority has been held to a minimum in this "thumbnail" sketch. Those desiring to investigate this field more thoroughly are therefore referred to the author's exhaustive work in this field. This article presents the substance of speeches given and being given before Bar Associations all over Ohio.

regulated the "Prudent Storage of Gun Powder" within the town of Boston. This enactment represented the first step toward a "Fire Zone" ordinance. The storage of powder was wisely banished to the outskirts and was no longer permitted within the city itself.

In the wake of such legislation, came the "Tenement House Code" enacted by the State of New York. Though the necessity for the curbing of the inexpressibly congested tenement houses on the east side of New York cried aloud for the regulation, the highest court of New York State turned its back upon those most necessary restrictions and decreed that they constituted "the taking of private property without compensation" and that, therefore, they were unconstitutional. Those interested in curbing the lack of sanitation, the mere one-toilet-for-an-entire-floor of families, the windowless bedrooms, the crowding of families into the tiniest of spaces, the lack of fire preventions, and the filth that went with all of those conditions, persisted in their efforts, so that when — at the end of another ten years — virtually the same tenement house codes were represented to the highest court of the Empire State, its members had become much better informed and — sensing the indescribable conditions which should have never been permitted to prevail — upheld and sustained those tenement house restrictions. The result was that Chicago, San Francisco, and other cities quickly enacted and enforced their own tenement house codes.

Restrictions Upon Nuisances

Trying to cope with that engulfing tide of city confusion and injury, one municipality after another strove not only to forbid "Common Law Nuisances" but ventured much further, as in the notable New Orleans "Slaughter House Cases"[2] which arose out of the banning of such uses within that municipality. Thus, the list of interdicted "Nuisances" grew and lengthened almost daily, from the Atlantic to the western coast.

As part of the continuing effort to promote the public health and safety, city after city across the country passed "Sanitary Codes," which specified at least the minimum of toilet facilities, of bedroom space, of air and of light.

None of these preceding codes really arrested the unwarranted conditions in large municipalities and so there came to the fore the then-newly-conceived "Building Codes." Indeed, there is hardly a sizable village that does not now have its own "building code" and most commonwealths have enacted their own "state building codes" so that townships and the

[2] The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 U.S. (16 Wall.) 36 (1873).

smallest of communities are guarded at least to such extent as is provided by the state requirements.

As cities grew and grew and as small factories and places of business were daily being constructed on streets where houses alone had stood, the danger of fire grew more and more pronounced, with the result that almost every large city enacted so-called "Fire Zone Ordinances," which prohibited the construction of any building within such a fire zone unless it were built of nonflammable materials. In those days preceding 1900, the cost of brick and stone was strikingly greater than that of mere wood, so that the owners of land within such fire zones stoutly protested that their constitutional rights were being taken from them, because they could not build at a price comparable to the cost of buildings which would be constructed of wood just outside of such fire zones. Indeed, in Cleveland, these fire zones brought on not only much litigation in the courts but aroused tremendous clamor on the part of the land owners within the new fire zone, but the ordinance was upheld.

In this fashion some municipalities added "Height Ordinances," while in other cities, such as New York, "Set Back Ordinances" were established so as to prevent streets from being darkened by the towering walls of buildings and so as to minimize the "stealing of light," by each successive building which stood taller and taller than its preceding neighbors.

Notwithstanding these and many other restrictive legislations, stores moved in among residences, factories were erected among stores, apartments crowded themselves alongside houses, so that neighborhoods continud to be blighted, values continued to be torn down, the "general welfare" and the "public safety" were — everywhere — being injured. All of the preventive measures and all of the restrictions that had gone before came to stand forth as being plainly insufficient to safeguard municipalities for the present or for oncoming generations. "Hodge-Podge Development" was the rule and the order of the day.

Fortunately, the City of New York — which was itself being irremediably injured and, in some areas, virtually ruined, appealed for the right to have a study made as to what could be done toward arresting the decline. As a result thereof, a commission was appointed by the state which spent six years from 1910 to 1916 in preparing two volumes of information and of data, constituting a compendium of information.

This commission heard reports from the foremost authorities on fire-fighting, police protection, the supplying of water, and the installation of sewage facilities. The tax authorities and the building commissioners from over the country testified and the foremost eye doctors reported that there was scarcely a woman who worked at the needle machines in the factories that had been allowed to take possession of large store buildings

whose eyes were not strained by the inadequate artificial lighting made necessary by the lack of natural light. Indeed, those possessed of singular knowledge in almost every walk of life were summoned before that commission.

At the end of the sixth year, the committee reported that the only feasible way to bring order out of municipal chaos was to integrate all of the previously established restrictive enactments and to introduce a "new" regulation — the regulation of the *USE* of property, so that municipalities could prescribe certain areas for the *USE* of homes, certain appropriate districts for the *USE* of stores; other parts of a municipality for the *USE* of industry and factories.

First Comprehensive Zoning Ordinance

When, as the result of that study, the City of New York, in 1916 passed the first comprehensive regulation of the *USE* of property within prescribed areas of that city, it was promptly assailed as offending the state and the Federal constitutions in that it was "the taking of private property without compensation."

The highest court of New York state held that it was a proper exercise of a municipality's so-called "Police Power" and that it did not violate constitutional limitations. Within a few years, four states — where zoning regulation had been enacted — upheld them, while three states tended in the opposite direction.

The very able Honorable Newton D. Baker — just out of the cabinet of President Woodrow Wilson — was employed by the great industrial, railroad, and commercial interests (which *then* stood in fear of zoning) to lay the axe to the very root of zoning.

It was recognized all over the land, that this proceeding would be *decisive,* for if the Federal courts were to hold zoning to be violative of the Constitution of the United States, all favorable state decisions would fall like mere dominoes standing on end, because no legislation — though validated by the highest court of a state — could stand if it offended the Federal constitution.

As special counsel for the village of Euclid in the test case of Ambler vs. Euclid,[3] the writer was informed, during the first hearing by the Supreme Court, that since it had never before had a case on zoning, it wished to be enlightened for "we do not even know what zoning means," they said.

In the midst of the writer's argument, he referred to "Realtors," whereas, other times, he spoke of "Real Estate Men." What is the dif-

[3] Euclid v. Ambler Realty Company, 272 U.S. 365 (1926).

ference, asked the Chief Justice? Trying to save every precious moment of the time allotted for his presentation, the writer endeavored to make the shortest possible answer by saying:

> I presume it is about the same difference as that between a Statesman and a Politician.

"Pretty good, pretty good," replied Justice Taft as, repeatedly, he shook with laughter. Thus, three coveted minutes were lost instead of time being gained.

Sensing that a singularly erroneous impression had been built into the case by the opposition during the concluding moments of that first presentation in Washington, the writer determined to send a telegram which — seemingly — had some effect and which read as follows:

> Enroute to Cleveland, January 29, 1926 To the Honorable Chief Justice, William H. Taft, c/o The Supreme Court, Washington, D. C. In Ambler against Village of Euclid, it is felt that the Village ought to file a Reply Brief to answer the concluding portion of Ambler oral argument and of Ambler brief. Wanted to ask this privilege while in your court, but hesitated. Upon reflection and because of the importance of the cause and for not any mere purpose of winning, am compelled by conscientious duty to request permission to file short reply brief within such time as you may stipulate.
>
> Ambler brief was served and filed so few days before hearing, that Reply Brief was impossible. Intended telephoning to a Washington attorney to appear in your court and move this request, but that will be impossible, because prevailing storm has delayed train so many hours, train will not arrive in Cleveland in time to permit telephoning and appearance, when Court opens. Understand today is last session before Court recesses and therefore take this manner of making application. Please forgive this method of request, as no disrespect or violation of rule is intended.
>
> Respectfully,
> Village of Euclid

On the evening of the fifth day, a telegraph message said:

> Washington, D. C.
>
> February 2, 1926
>
> The court allows you one week in which to file a reply brief and serve it upon your opponent, and gives him a week in which to reply to you after service. Please advise opposing counsel of this telegram.
>
> William H. Taft

When court reconvened a few weeks later, the dispatches signalled that the opposition had been held in check, for the Supreme Court had refused to make any ruling and had done the unusual in ordering the entire cause to be re-argued and re-presented.

Speaking through its then-Justice Sutherland, the Supreme Court finally held zoning, if *reasonably* exercised, to be within the "Police Power"

of municipalities, for the general welfare and not offensive to the Federal or State Constitution.[4]

Lest there be any false impression as to the importance of the zoning services on the part of the writer, it may be well to refer to the tale of the little son who asked his father to tell the story of the World War from which he had just returned, whereupon that veteran began a tale which went on and on, so that when he finished, the youngster, looking up, said: "But, Daddy, why did they need all those other soldiers?" So, too, there were men like Edward M. Bassett and other splendid folk who fought and struggled for zoning long before the writer ever heard of the subject.

Housekeeping for municipalities is, under zoning, finding an orderliness. Zoning is merely keeping the kitchen stove out of the parlor, the bookcase out of the pantry and the dinner table out of the bedroom. It provides that houses shall be built among houses, apartments in apartment zones, stores in store zones, and industry in zones set aside for industry.

NAPOLEON FIRST SET UP USE ZONES

Americans, prone to be chauvinistic, may believe that zoning had its inception in this country. The truth is that Napoleon was the first man to set up use districts in France, from which Frankfort and Coblenz in Germany quickly borrowed the pattern.

But zoning is *not* a panacea. It is merely a step in the right direction. It must be exercised, in its every phase, with *reasonableness.*

The tenuous degree to which zoning is now being carried, may readily be gathered from the fact that, in Louisiana, there was the proprietress of a small neighborhood drug store which had been there for many years. The area surrounding her location was now zoned for residential purposes. An amendment to that zoning ordinance ordained that even a long established business made nonconforming by the ordinance would be required to vacate within one year. Upon suit being brought to enforce that amendment, by a real estate firm which had only recently become owner of its own property, the banishment of that little store was enforced. Not only in the Southland but even in New York and in federal courts, such "Death Sentences" have been held to be valid. To the writer, this is inconceivable.

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[4] Since that validation, zoning has gone forward by leaps and bounds in small as well as large municipalities. It now embraces many townships as well by virtue of the County Rural Zoning statutes [OHIO REV. CODE § 303.01-.99] which were passed by the Ohio Legislature under the leadership of Charles P. Baker, Jr., of Painesville.

So, too, in the comparatively recent Ohio case of Morris vs. Roseman,[5] the Cuyahoga County Court of Appeals held that, under the Home Rule provisions of the Ohio constitution and under Section 713.14 of the Revised Code "the emergency zoning ordinance passed by the village council of Oakwood, upon the event of its becoming a village (without requiring any public hearing and without publicizing of any notice), was a proper exercise of the power conferred upon the village by Article XVIII, Section 3 of the Ohio Constitution and is in all respects a valid ordinance." That an entire municipality, large or small, can find its every parcel zoned without the public having the opportunity to express itself and without notice, makes one wonder what has become of "due process" and of the right of property. Ohio's Supreme Court reversed that decision,[6] but upon a different ground.

CONCLUSION

It is essential that there be kept in mind the ever-true doctrine that the owner of property *does* have some inalienable rights. A corollary of this doctrine is that it is the duty of the lawyer to fight for the preservation of such rights and not to permit overly zealous zoning experts who draft ordinances nor obliging Councils who pass them, to promulgate legislation which is unreasonable or which unlawfully tends toward the divestment of the property owners' constitutional rights.

[5] 118 N.E. 2d 429, 432 (Ohio App.) (1954).

[6] Morris v. Roseman, 162 Ohio St. 447, 123 N.E. 2d 419 (1954).