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EVOLVING JUDICIAL ATTITUDES TOWARD

Local Government Land Use Control*

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The year 1967 begins the second half-century of zoning in the United States. The first comprehensive zoning ordinance was adopted by New York City in 1916. In the fifty years that have elapsed, zoning has become, notwithstanding a growing disenchantment with it on the part of planners, the most widely employed technique of land use control in the United States. At the present time only Houston, of all the major cities in the United States, lacks a zoning ordinance. And, though I have not obtained precise figures, we are all familiar with the increasingly large percentage of small municipalities, many with populations less than 5,000, that have adopted zoning ordinances.

Curiously, particularly in view of the fact that zoning was largely the invention of lawyers, the legal profession has until recently, paid little attention to the legal problems of this pervasive control. Only in the last dozen years or so

have the law schools, for example, found a place in the curriculum for systematic study of zoning.

In any event, I think it is fair to conclude that this traditional disinterest has now ceased. Your presence here today is, presumably, sufficient evidence of the fact that I need not belabor the point, though it might be worth pointing out that zoning has achieved the ultimate stamp of professional acceptance -- West Publishing Company has recently incorporated it as a heading in its digests.

My assignment today, as I understand it, is to discuss with you evolving judicial attitudes toward local government land use control. Although that subject is broader than zoning, encompassing, for example, both subdivision regulation and the technique of official mapping, it seems to me desirable to focus exclusively on zoning. Important and fascinating questions are raised by these other techniques, but in the limited time available not everything can be covered and since zoning is the most widely employed technique

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of land use control, I think we can spend our limited time most profitably by dealing only with zoning.

I would like to proceed by discussing first the "traditional" view of zoning; traditional in the sense that it was the view held by the early proponents of zoning, the view that underlies virtually all of the enabling legislation in effect in the United States, and, most importantly for our purposes, the view underlying the arguments used in the early years to sell zoning to the courts. After providing this framework, I would like to discuss with you some critical issues in contemporary zoning litigation and at least some of the judicial responses to these issues.

THE "TRADITIONAL" VIEW OF THE PURPOSE AND TECHNIQUES OF ZONING

Zoning, as I have indicated, began in 1916, but a public control of land use began much earlier. The law of nuisance, largely developed by courts but with an occasional assist from a legislative body, dates back to the early days of the common law. From it we drew the command -- more frequently stated than enforced -- "use your own property in such a manner as not to injure that of another." That maxim has had, as we shall see, some importance in establishing the validity of zoning. Around the turn of the century, legislative enactments controlling land use became more common, primarily in the large cities. Use restrictions were enacted in Washington in 1889 and upheld in Boston in 1909. Welch v. Swasey, 214 U.S. 91, (1907). Often, these restrictions were uniform throughout the municipality, but different regulations in different districts were not unknown. As early as 1799 the Pennsylvania Supreme Court upheld an ordinance prohibiting construction of wooden buildings in certain popu-

lous areas of Philadelphia Res-publica v. Philip Urban Duquet, 2 Yeates 493 (1799).

The elements of zoning were, therefore, neither entirely novel nor judicially untested when New York enacted its ordinance. What was novel about zoning was its comprehensiveness. Whereas earlier ordinances attempted to deal with relatively limited problems, often in only limited areas, zoning represented an attempt to control land use in substantial detail throughout the jurisdiction. It is hardly surprising, therefore, particularly when it is remembered that zoning began in the heyday of substantive due process, that its constitutionality was much in doubt. These doubts, as we shall see, profoundly affected the draftsmen of zoning legislation--affected them in ways that have a continuing importance. But that is a matter to which we will return later.

In the decade following adoption of the New York ordinance, zoning ordinances met with mixed judicial reaction. In some states they were upheld; in others they were invalidated, but on grounds which left open the possibility that valid ordinances might be adopted; and in others, including Minnesota, zoning was held invalid as a deprivation of property without due process of law. There the matter stood when, in 1926, the case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) reached the United States Supreme Court. By a 5-4 vote, the Court, in an opinion by Mr. Justice Sutherland, upheld the validity of zoning, a result subsequently followed by virtually all state courts, and in the few states in which courts balked, by constitutional amendment.

The reasoning of the Court is instructive, for in the time-honored manner of the profession it drew upon an ancient principle to sustain the validity of this new

regulatory technique. The maxim that one ought not use his land so as to injure that of another was invoked by the Court to define the scope of governmental power to control land use. In the Court's words,

"... the law of nuisance ... may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power."

The very limited basis upon which the Court upheld zoning needs to be stressed. Zoning was sanctioned not as a device for substituting governmental allocation of land resources for market allocation--Mr. Justice Sutherland was not, in other words, sanctioning socialism. Zoning was, in effect, approved as an extension of private rights in property. The government has power to protect landowners from an incompatible use of neighboring property. The common law of nuisance did not define the limits of governmental power, but it did provide the ethical justification.

The limited basis upon which zoning was upheld by Mr. Justice Sutherland cannot be explained as the attempt of a conservative judge to limit government power. In the mid-1920's, shortly before the decision in *Euclid*, the Department of Commerce promulgated a Standard State Zoning Enabling Act which had been drafted by a group of leading zoning lawyers. Since that act provided the model for virtually all state enabling legislation, including the recently enacted Minnesota statute, a careful study of the Act will repay the effort.

An examination of the Act reveals that, although there is an occasional phrase suggesting a broader purpose, the draftsmen contemplated precisely the same role for zoning as was subsequently articulated by Mr. Justice Sutherland in *Euclid*, the pro-

tection of landowners against the incompatible use of neighboring land. That objective was to be achieved by the separation of what were thought to be incompatible uses. The illustrations discussed by the Court in *Euclid* were, undoubtedly, precisely those which the draftsmen of the legislation had in mind. Thus, Justice Sutherland justified the exclusion of industry from residential areas on the ground that it would tend to prevent street accidents by a reduction of traffic and that it would decrease noise and other conditions which produce or intensify nervous disorders. Similarly, the exclusion of apartment houses from areas of single family houses was justified on the ground that their height and bulk interfered "with the free circulation of air" and monopolized "the rays of the sun which otherwise would fall upon the smaller homes ..."

The Standard Act was based upon the assumption that these purposes would be achieved by a division of the jurisdiction into districts, with pre-stated uniform regulations applicable to each. That is, separation of incompatible uses was to be accomplished by segregating different categories of uses. Commerce was to be separated from residential areas and industry from both of these. Often, each category was further refined: residential zones, for example, were divided into zones in which only single family dwellings were permitted, zones in which single family and duplexes were permitted, and zones in which any residential use was permissible. Of crucial importance to the scheme of regulation was the fact that the regulation applicable to each district and the boundaries of each district were, as is commonly true of legal prescriptions, formulated in advance of any particular application for development. The system thus assumed that it was possible by careful intellectual ef-

fort to pre-determine to a large extent the trend of desired development.

There are two important corollaries of this critical assumption. The first involves the relationship of zoning to planning. Although it was, of course, contemplated that zoning regulations would be the product of municipal planning, it seems fairly clear that the Standard Act -- and the state acts which followed it -- did not express any coherent view about the relationship between zoning and planning. True, the Act provided that zoning regulations "shall be made in accordance with a comprehensive plan . . ." but this has been interpreted by the courts, in line with the apparent intention of the draftsmen, as requiring merely that regulation be "well-considered", or "rational", i.e., hardly more than the constitution would in any event have required. See, e.g., Kozesnik v. Township of Montgomery, 24 N. J. 154, 131 A.2d 1 (1957).

For most modern planners, there is a much clearer relationship between zoning and planning -- zoning is merely one of the tools of planning and planning, ultimately, involves the making of a plan, i.e., a document or series of documents which by map or words or both expresses the community's conclusions as to desired patterns of physical development. The function of the zoning ordinance in this view is to channel development in the manner contemplated by the plan. From a lawyer's perspective, it will be seen, such a plan would be extremely useful in ascertaining the validity of various decisions made in the adoption and enforcement of zoning ordinances. But the need for a plan to serve such a function is least when, as contemplated by the Standard Act, regulations are uniform within a district and are relatively inflexible.

This brings us to the second

corollary of the Standard Act's assumption that regulation should proceed by pre-stated, uniform regulation of all land within a district. As Professor Mandelker has written, "What is immediately striking about the American zoning pattern is that the exercise of administrative discretion was conceived as a tangential rather than an integral phase in administration. As the ordinances intended to solve most land use problems in advance, the use of the dispensing power was considered to be exceptional rather than the expected." Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 Wash. Univ. L. Q. 60 (1963). The act did, however, provide three techniques for achieving a degree of flexibility in the administration of zoning ordinances.

First, in language similar to that used in section 462.357 of the Minnesota statutes, the act provided for a Board of Adjustment authorized to issue variances from the terms of the ordinance "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." The provision for variances recognized that general regulations for districts could not take into account instances of particular hardship based on unique circumstances. The variance was thus a constitutional "safety valve."

Second, the act authorized local governments to enable boards of adjustment "in appropriate cases and subject to conditions and safeguards" to make special exceptions to the terms of an ordinance "in harmony with its general purpose and intent and in accordance with general or specific rules" contained in the or-

dinance. This is the statutory basis for the technique variously denominated the "special exception," "special permit," or "conditional use permit." Early texts do not give the device prominence. Apparently, it was not thought that the device would be widely used. Rather, it was intended to provide a means for controlling a relatively small number of uses

"considered by the legislative body to be essentially desirable (or essential) to the community, its citizenry or to substantial segments thereof, but where the nature of the use or its concomitants (traffic congestion, density of persons, noise, effect on values, safety or health) militate against its location at every location therein or in any location without restrictions or conditions tailored to fit the special problems which the use presents." 1 Rathkopf, *The Law of Zoning and Planning* 54-1 (1962).

A third method of achieving flexibility under the Standard Act was by amendment of the zoning ordinance. Thus, the governing body can achieve a considerable amount of flexibility by multiplying the number of districts, and by amendment of the map of the zoning ordinances to reclassify relatively small parcels.

Since it was not contemplated that any of these devices for achieving flexibility would be widely employed, the Standard Act provided few if any safeguards against their abuse. Procedure before the Board of Adjustment is regulated only minimally. No provision was made, for example, for even so minimal a procedural safeguard as a written opinion or findings by the Board to justify its decision. Inattention to these matters has, subsequent discussion will show, given rise to extremely troublesome questions.

With this background, we can profitably turn to the critical is-

ssues in contemporary zoning litigation and the evolving judicial attitudes toward these issues. First, the problem of flexibility.

THE NEED FOR FLEXIBLE CONTROLS

Experience has amply demonstrated the need for deviation from uniformity of regulation not only in the situations foreseen by draftsmen of the Standard Act, but in other situations as well. Pressure for flexible controls exists at virtually every point touched by zoning ordinances, most acutely in areas of change, the largely undeveloped areas on the urban fringe and decaying neighborhoods, but to some extent in relatively stable, developed areas as well.

(a) The Problem in Undeveloped Areas

Perhaps because it was initially devised to regulate land use in developed urban centers, traditional zoning has been somewhat of a misfit in undeveloped areas. Division of a municipality into districts, with varying regulations for each district, is based upon the assumption that each district has unique characteristics discoverable by experts which make it peculiarly suitable for certain purposes. The assumption perhaps has a certain validity in largely developed areas where a primary purpose of regulation is to protect existing uses against encroachment by incompatible uses. Occasionally it may also be true in undeveloped areas, when, for example, access to railroads or major thoroughfares may make certain land particularly suitable for industrial or commercial development or scenic vistas may make some land especially valuable for residential development. More frequently, however, the land is suitable for a variety of uses, at least if certain conditions are met. Under these circumstances, division of

the municipality into the traditional hierarchy of districts may create a number of problems. Local governments have the power to create districts for certain purposes, but not the power to require developers to develop the land for these purposes. In consequence, premature restrictions may create constitutional objections, see Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587 (1938), and impede the ability of the municipality to attract industry by artificially raising the cost of land designated for industrial purposes. Experience suggests also that traditional zoning controls are not well adapted to large-scale integrated development of residential, commercial, or industrial areas, increasingly the pattern of development in undeveloped areas.

Partly in response to these problems, planning theory in recent years has shifted from emphasis on a priori classification and segregation of "incompatible" uses to emphasis upon the mixture of uses and the conditions under which that might be successfully accomplished. The difficulty of foreseeing all of the relevant circumstances and the conditions under which various uses might be mixed have inevitably led to a "wait and see" attitude on the part of local officials; in other words, to a flexible approach to regulation not contemplated by the Standard Act or enabling legislation patterned after it and for which, consequently, no adequate framework was provided.

(b) The Problem in Developed Areas

Inability to impose individualized controls within a district prevents the introduction of "lower" uses into "higher" use districts even though in particular situations that might be

accomplished with no harm -- and perhaps with benefit -- to other land within the district. The problem is perhaps most acute in connection with the introduction of commercial uses into residential areas, but it is familiar in other situations also. A landowner desires to open a grocery store, or any of a dozen other neighborhood retail facilities in a residential district. The proposed store would be small enough that it would be unlikely to bring much traffic into the neighborhood or to affect surrounding property adversely in any other way; it would be a convenience to residents of the neighborhood. Neither a variance or a rezoning of the parcel is technically permissible. Rezoning of the entire neighborhood as commercial would permit introduction of uses less compatible with the residential characters of the area. Although that problem might be solved by creation of a commercial zone restricted to small, retail, convenience facilities, there remains the question whether it is desirable to open up the entire neighborhood to commercial development and to forego all community control over the location of the proposed use and the conditions necessary to fit the use into a particular setting.

Related problems are raised in "lower" use districts where lack of power to impose individualized controls deprives municipalities of the ability to cope with uses generally permitted in a district but which, in a particular situation, may pose special problems. The traditional view is reflected in Bassett's statement that "The best zoning argument for a new theatre permit is that the block is already largely occupied by theatres." Bassett, Zoning 53 (1940), Diffusion of traffic gen-

erators may, however, be of substantial importance to the community, or in some situations, diffusion may not be necessary, but the existence of a number of traffic generators may indicate the necessity for imposing conditions upon newcomers. The difficulty of foreseeing all of the situations in which the problem may occur --e.g., availability of off-street parking, character of the surrounding areas, etc.--are likely to require that the problem be handled administratively if local governments are to be enabled to deal with it at all.

JUDICIAL REACTION TO FLEXIBLE CONTROL TECHNIQUES

Local governments have responded to these problems by using both the devices for achieving flexibility provided by the enabling legislation and by inventing some devices that were not provided for. Judicial reaction to these efforts by local governments reveals no consistent pattern -- at best we can identify what may be trends in the litigated cases.

With respect to variances, an impressive series of studies in widely separated parts of the country establish that anywhere from fifty to ninety per cent of the variances granted by Boards of Adjustment (or by councils where they have assumed the function) are illegal. In general, courts have responded with a fairly rigorous statement of the circumstance justifying grant of a variance. The hardship must be substantial, it must relate to the land not the landowner, and it must be unique to a small area of land, not general within the district. But since very few cases reach the courts, the law as defined by courts has not been particularly important in practice.

Closely related is the problem posed for the courts by the growing use of "special exceptions". At first courts had difficulty in dis-

tinguishing between variances and exceptions. More recently, however, courts have distinguished the two and judicial review has centered mainly on the adequacy of the standards governing the grant of exceptions. Mandelker's review of cases shows that "nuisance standards" -- negatively phrased standards directing that uses not be allowed as exceptions if they would be incompatible with neighboring land uses -- have been approved overwhelmingly. Ordinances without any standards -- simply authorizing an administrative board to issue an exception -- generally have been held invalid delegations of legislative authority. But most zoning ordinances posit general welfare standards and here judicial reaction is mixed. (Usually the ordinance allows the board to permit any of the enumerated special uses if such action would be in accord with the purposes and intent of the ordinance and be conducive to the general welfare.) Many cases sustain such standards without any critical comment. Some courts attempt to evaluate such standards and conclude that they are certain enough in view of the technological complexities of zoning administration. A number of cases hold such standards unconstitutional or ultra vires. Confusingly, courts in the same jurisdiction, and even the same courts, render inconsistent opinions on similar standards in different cases. Mandelker, supra at 74-80; See Annot. Zoning, Delegation of Authority, 58 A.L.R.2d 1083 (1958).

The problems raised by exceptions are like those raised by variances. At base is the fear that without somewhat concrete standards landowners will be vulnerable to discrimination. In addition is the desire to have policy made by a representative body and to assure neighborhood status quo. And as with variances, courts have not been able to take solace in proced-

ural regularity because enabling acts and ordinances have not required administrative agencies to state in detail the reasons for granting or denying exceptions.

An excellent student note in 49 Minn. L. Rev. at p. 973 argues, quite persuasively in my judgment, that two comparatively recent decisions by the Minnesota Supreme Court which caused considerable consternation and confusion among municipal attorneys and planners are largely the product of the court's inadequately expressed concern with the possibilities for abuse of the special permit. I have in mind, of course, the decisions in Olson v. City of Minneapolis, 213 Minn. 1, 115 N.W.2d 734 (1962) and Golden v. City of St. Louis Park 266 Minn. 46, 122 N.W.2d 570 (1963). In each case the court invalidated a denial of a special permit in a situation in which the standards for issuance for a permit were either non-existent or inadequate, and in which no reasons were given for the decision. On these grounds, the court's decisions, if not the language of the opinions seems quite appropriate. It is true, of course, that in each case, it was the council that was responsible for grant or denial of a permit and that legislative bodies are not normally required to state reasons for their decisions, nor are standards typically required to guide them in the exercise of the discretion they possess. Yet, surely the power exercised by the council in each of these cases is not a normal exercise of legislative power, but is more akin to the powers typically exercised by administrative bodies. Under these circumstances, does it not seem more appropriate that the safeguards normally provided against abuse of administrative power should be applicable also when similar powers are exercised by the governing body? I cannot prove, of course, that these considerations actually influenced

the decision in the Olson and Golden cases, but there are straws in the wind that suggest the growing concern of courts with this problem. Perhaps the most articulate judicial statement was that by Mr. Justice Klingbiel of the Illinois Supreme Court, concurring in the Court's decision in Ward v. Village of Skokie, 21 Ill. 2d 415, 186 N.E.2d 529 (1962), a case which involved the validity of a denial by the council of a special permit for a motel:

It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government. I need not dwell at length on the obvious opportunity this affords for special privilege, for the granting of favors to political friends or financial benefactors, for the withholding of permits from those not in the good graces of the authorities, and so on. The rule is familiar enough that courts may not inquire into the motives or reasons on which the legislative body acted. See Village of Justice v. Jamieson, 7 Ill. App.2d 113, 129 N.E.2d 269.

It is because of this immunity from review that legislative bodies must confine themselves to the prescribing of general rules. If they may undertake to confer upon themselves authority to decide what in fact amount to individual or particular cases, the foundations of our legal system will fast disappear.

Concededly it is difficult in zoning matters to formulate a precise test separating legislative from administrative or quasi-judicial functions. For

one thing the legislative function of laying down general rules or regulating by district becomes less clear cut in its nature as the size of the district or the number of people affected decreases. It seems to me, however, that there can be no reasonable doubt about the special permit power with which the village attempts to invest itself here. Legislation is essentially prohibitory, operating by laying down general rules. It does not consist in the permitting of conduct or the granting of individual relief. Legislative bodies are not equipped, except in a very broad and general way, to ascertain factual questions which depend upon evidence of individual circumstances. Their function is not to grant permits but to say what facts and conditions should warrant the granting of permits. *Stone v. Cray*, 89 N.H. 384, 200 A. 517 (1938).

What is an application for special permit but a particular case? The granting or refusal of the permit does not lay down a rule or prescribe any conditions. It is simply a decision on a concrete set of facts, affecting the property of particular parties only. It is the nature of the proceeding, not the identity of the body assuming to act in the matter, which should determine the necessity for standards. Otherwise basic constitutional protections can readily be circumvented by the simple expedient of placing quasi-judicial functions in a legislative body.

Very similar considerations are involved when we turn from special permits to amendments. Amendments to the text of a zoning ordinance, normally involving large areas under multiple ownership, raise no special problem. Here the governing body performs its traditional, legislative function. But where the amendment

involves only a single parcel or at most a few parcels and is adopted with reference to a specific proposal for development, the amendment is virtually indistinguishable from the special permit device. A recent Maryland decision, *Hyson v. Montgomery County Council*, 242 Md. 55, 217 A.2d 587 (1966), in recognizing this fact, suggests an interesting possibility, that persons interested in a proposed rezoning of a parcel may be entitled to procedures of the type normally required in administrative hearings. In view of the council's actual role in these situations, that appears an eminently sensible conclusion.

The most interesting of the recent cases concerning amendments are those which involve so-called "floating zones". Under this technique, the text of the zoning ordinance provides for a certain type of district, say, light industrial. The regulations applicable to the district may be spelled out in quite some detail. What is unique is that the district is located nowhere on the zoning map. Rather, it is contemplated that a developer desirous of developing in the manner provided for by the regulations applicable to the district will apply to the governing body for an amendment of the zoning map. The governing body may then review the application and if the proposed development is in accordance with the applicable regulations and if the governing body does not object to the development on some other ground, it may amend the map to permit the development.

In an extreme application, this technique is, obviously, the very antithesis of zoning. In *Rockhill v. Chesterfield Township*, 23 N.J. 117, 128 A.2d 473 (1956), the only development permitted of right under the zoning ordinance was single-family detached dwellings. It should not, however, be assumed that this resulted from a

decision by the governing body to make Chesterfield an entirely residential community. Quite the contrary. The ordinance contemplated both commercial and industrial development, but only upon grant of a special permit by the council. The court held this scheme of regulation unauthorized by the enabling legislation and perhaps unconstitutional. As might be anticipated, the opinion relies heavily upon the opportunities for unjustified discrimination inherent in such a scheme.

A more limited use of the "floating zone" technique was examined in Eves v. Zoning Board of Adjustment of Lower Gwynedd Township, 401 Pa. 211, 164 A.2d 7 (1960). There the floating zone was a "limited industrial district". On application by a developer, the governing body amended the zoning map to permit the "light industrial" development in an area previously zoned residential. On suit by a neighbor to challenge the validity of the amendment, the Pennsylvania Supreme Court held the scheme invalid as unauthorized by state enabling legislation. The opinion stresses that such a system of regulation "would produce situations in which the personal predilections of the supervisors or the affluence or political power of the applicant would have a greater part in determining rezoning applications than the suitability of the land for a particular use from an overall community point of view". It relies also upon the potential of such a system for frustration of the reasonable expectations of neighboring landowners, since they can never know whether the "floating zone" will someday come to rest next door to them.

Perhaps most significant, however, is the court's conclusion that the ordinance is not, as required by the enabling legislation, "in accordance with a comprehensive plan":

"The adoption of a procedure whereby it is decided which areas of land will eventually be zoned "F-1" Limited Industrial Districts on a case by case basis patently admits that at the point of enactment of ordinance 28 there was no orderly plan of particular land use for the community. Final determination under such a scheme would expressly wait solicitation by individual landowners, thus making the planned land use of the community dependent upon its development. In other words, the development itself would become the plan, which is manifestly the antithesis of zoning in accordance with a comprehensive plan."

An interesting contrast to the Eves decision is provided by the decision of the Maryland Court of Appeals in Beall v. Montgomery County Council, 240 Md. 77 (1964), upholding, pursuant to a "floating zone" provision, the rezoning of a parcel from "single family detached" to "multiple family, high rise." The difference in result between this case and the Eves case can perhaps be explained as simply a difference in approach between two courts, though this would be difficult because the Maryland Court traditionally has taken a rather restrictive view of the power to adopt map amendments. A more interesting possibility is that the cases were decided differently because of differences in the two ordinances. The ordinance in the Maryland case, unlike that in the Pennsylvania, contained a careful statement of the community's objective in providing for the floating zone. Although this statement of objective did not constitute a "plan," it did provide both criteria to guide the exercise of the council's discretion and some evidence that the "floating zone" was responsive to legitimate planning needs. Both, significantly, were emphasized by

the court in upholding the "floating zone", just as the absence of these factors was emphasized by the Pennsylvania Court in the Eves opinion.

The meaning of these decisions and others that can be cited is, I think, that courts increasingly are examining zoning ordinances to ascertain whether they are the product of planning. An ordinance or action under it which is not a product of planning will not necessarily fall. If it seems fair in its procedures and its relationship to health, safety, and general welfare is relatively clear, it is likely to be upheld even though it is not preceded by planning. But there is reason to believe that courts are beginning to respond more favorably to zoning regulations that are a consequence of planning. In Appeal of Key Realty Co., 408 Pa. 98, 182 A.2d 187 (1962), the Pennsylvania Court, shortly after its decision in Eves invalidating "floating zones", sustained an amendment rezoning an area from "multiple family" to "single family". The court stressed that this amendment was the product of an overall evaluation by the council of land use within the municipality.

Lest I be misunderstood, let me make plain that I do not read the cases as requiring, to sustain the validity of a zoning ordinance, that a community have adopted a master plan. I do think, however, that there is evidence that communities which have such a plan will fare better in court than those which do not, at least if they can relate the provision under attack to the plan. Failing a full-blown plan, there is evidence that courts will respond more favorably to the ordinance if it can be shown that it is the product of careful assessment by the council of all relevant factual data and of a policy that has been articulated in advance of the litigation or of the particular application for development.

AESTHETICS

Let me turn, very briefly, to one other matter with respect to which new judicial attitudes appear to be emerging. For a time, you may recall, the Minnesota Supreme Court seemed unable to write a zoning opinion without including a statement that zoning solely for aesthetic objectives is constitutionally impermissible. This is, as you know, an accurate statement of the traditional view in the United States, at least if one is to credit the language used by courts. There is, of course, reason to believe that the language never accurately reflected the law. Regulation of billboards, patently for aesthetic purposes, has regularly been sustained by the courts, though frequently they have resorted to such fictions as that the regulation was permissible because immoral practices might occur behind billboards.

In any event, a series of recent decisions indicate a growing willingness on the part of courts to give explicit sanction to zoning for aesthetic objectives. In 1956, Mr. and Mrs. Stover, residents of Rye, New York, began hanging in their front yard a clothesline, filled with old clothes and rags, as a form of "peaceful protest" against high taxes. Each year for the next six, since taxes hardly ever go down, a new clothesline was added. Finally, in 1961, the city responded by adopting an ordinance prohibiting the erection and maintenance of clotheslines in front or side yards abutting a street. In People v. Stover, 12 N.Y. 2d 462, 191 N.E.2d 272 (1963), the ordinance was upheld by the New York Court of Appeals "as an attempt to preserve the residential appearance of the city." Stover was followed by the Oregon Supreme Court in Oregon City v. Hartke 240 Ore. 35, 400 P.2d 255 (1965), which upheld, solely on aesthetic

grounds, the exclusion of automobile wrecking yards from an entire municipality.

Our time is too short to permit a careful discussion of the problem, but I do want to suggest that these cases, particularly Stover, reveal the sterility of the long debate about whether aesthetic grounds alone can justify exercise of the police power. As the New York Court said in Stover:

Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. If zoning restrictions which implement a policy of neighborhood amenity are to be stricken as invalid, it should be, one commentator has said, not because they seek to promote "aesthetic objectives" but solely because the restrictions constitute "unreasonable devices of implementing community policy." (Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218, 231.) Consequently, whether such a statute or ordinance should be voided should depend upon whether the restriction was "an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community

-- and not upon whether the objectives were primarily aesthetic."

I think there is little doubt that in the years ahead virtually all American courts will come to this position. The danger, it seems to me, is not that the courts will refuse to recognize aesthetics, but that is doing so they will fail to assure that zoning ordinances which are adopted in furtherance of aesthetic objectives constitute reasonable devices for implementing community policy. There are, for example, two recent cases upholding ordinances which subject residential development to approval by architectural review boards. State ex rel. Saveland Park Holding Corp. v. Wieland 269 Wisc. 262, 69 N.W.2d 217 (1955); Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E. 2d 74 (1963). Such ordinances pose enormous difficulties. The necessarily subjective judgments required in their administration raise serious questions of impartial enforcement. Equally important, they provide the means for imposing a stifling orthodoxy with respect to matters of taste. I am far from saying that for these reasons the ordinances must be held constitutionally infirm, but I do think that the courts have not yet begun adequately to explore the problem or to construct adequate safeguards.