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SOME INADEQUATELY DISCUSSED PROBLEMS OF THE LAW OF CITY PLANNING AND ZONING*

By Ernst Freund†

1. *The constitutional status of zoning.*—A pamphlet published in 1928 by Messrs. E. M. Bassett and F. B. Williams analyzes about four hundred judicial decisions dealing with zoning problems, the great majority of them rendered within the last five or ten years. The number of cases shows the importance which the subject has assumed. The compilation facilitates a survey of the legal situation, confirming impressions created by a less systematic observation of the course of development, and it invites a re-examination of principles with a shift of emphasis from theories of power to considerations of equity and practicability.

The present constitutional status of the law of zoning is that the power to control the character of urban or suburban improvements is acknowledged, while the limits of that power are still undefined. There has been within the last ten years a notable liberalization of judicial thought in the direction of conceding that health and safety and the suppression of nuisances are not the only foundations of control, and in several states the grant of enlarged power has been written into the constitutions in explicit terms.

2. *Police power, general welfare, and amenity.*—The terms with which judges and writers operate indicate an unwillingness to analyze closely; in the main they content themselves with insisting upon the police power and the general welfare as grounds of justification of what is done under zoning statutes. Police power

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is a very vague concept; in a sense it merely expresses the claims of the public interest to override private right, just as due process expresses the claim of private right not to yield to every remote or alleged public interest. In the struggle between government and liberty, police power and due process merely represent opposite contentions, without otherwise contributing to the solution of the issue, although, like other catchwords, they are counted as principles in the common currency of legal and judicial reasoning.

Police power may become a more definite concept when contrasted with other powers: thus for the present it is true that the police power never justifies the taking of human life, whereas the power to administer justice does. A conceivable revolution in social philosophy might wipe out the distinction or even effect a reversal —a supposition about which it is unnecessary to speculate. The illustration merely serves to show that powers are better classified by comparison than by definition.

I wonder, however, whether there is a justification for contrasting in similar manner the police power and the power of eminent domain, as is done by some of the most distinguished leaders of the zoning movement, merely for the purpose of disposing of claims to compensation. It is true that normally the police power demands sacrifices of private owners by reason of conditions for which they may be held accountable, while under the power of eminent domain a sacrifice is demanded of the individual merely because he happens to possess something which the government needs for the satisfaction of some public interest, and this difference has normally a decisive relation to the equity of compensation. But we know that the killing of live stock to stamp out animal disease is generally attributed to the police power, and yet the present legislative practice favors compensation, while the owner of newly subdivided land practically never receives compensation for the land taken for streets, but on the contrary practically always pays for the sidewalk in front of his lot, so that some courts have treated the latter burden as an exercise of the police power,[1] whereas in other cases the matter has been worked out as an equalization of burden and benefit; but on a practical view of the situation we might as well say that here is a case where eminent domain, on equitable grounds, does not call for compensation.

Whether zoning should be regarded as an act of eminent domain or as an act of the police power, I do not undertake to determine at this point; all I contend for is that the problem of com-

1. *Dillon* "Municipal Corporations" sec. 1442.

pensation should not be attempted to be solved on the basis of a mere difference in words.

When courts, at the present time, invoke the police power to sustain zoning laws, they nearly always add a reference to the "general welfare," and a similar reference is probably never omitted where an enabling act is drawn upon approved models. It may, however, be well contended that the emphasis upon general welfare, far from clarifying the issue, rather tends to obscure one of its vital elements. For as an instrument of the general welfare, the police power respects a principle of limitation, which zoning violates, namely, that restraints upon private right, unlike taxes, are not adjusted to "capacity to bear," but operate irrespective of class distinctions—a principle which must not be made a fetish, but which certainly is too valuable to be lightly ignored. We find it argued that the one family home district is conducive to health, and to the cultivation of all kinds of civic virtues; would any one contend that under the police power the state might compel the well-to-do to bring up their children in such homes instead of exposing them to the blighting influences of hotel life? Do we recognize different requirements for high grade apartments and for tenements, for the small factory and the factory of a million dollar concern? And, if not, does not equality of restraint under the police power represent a basic principle of regulation?

If these observations are well founded, the currently advanced theories of powers give us little aid. Is it not true that the control of urban development and improvement presents a special legal problem just because the ordinary criteria of the police power fail us when we advance from traditional health and safety requirements to the novel restraints looking to a totally different object which has been happily associated with the concept of "amenity?" And is it not wiser to seek justification for an acknowledged departure from old principles than to foster the delusion that there is no departure at all?

3. *Interdependence of public and private improvements.*—The interdependence of adjoining tracts of lands is a feature of the law of real property which has not become a general qualification of the concept of ownership simply because it is not a uniform, but a highly specialized, condition; or rather, insofar as it is uniform we recognize it in the law of natural easements. So far as it is special, it is, in case of agricultural land, as a rule not sufficiently urgent that it could not be left to be taken care of by voluntary agreement. The demand for water power, drainage, or irrigation

does, however, occasionally call for the coercion of resisting owners, and when the courts recognized the validity of this legislation, a new principle of public law was established, the principle that unwilling owners may be forced into joint improvements.

In the case of urban land, interdependence and the need of cooperation has always been sufficiently urgent to demand a distinct and specific governmental organization: the city, town, or village. For centuries, it is true, the joint interests of the community related in the main to those aspects of its life which we comprehend under the term police. It was only in the nineteenth century, that an equally or more intensive control began to be exercised over the use of land, due to gradually rising standards of living, comfort, and sanitation. The most characteristic function which the modern municipality performs is no longer the maintenance of peace and good order, but the provision of what we call public improvements. We step from the police power to a power which has never been given a specific name. It is noteworthy that the provision of the typical improvements—streets, sewers, water supply—is not a legal duty of the municipality. To speak in terms used by the courts, the function is legislative, and not, like the *maintenance* of the improvement, ministerial, and the private owner who is injured by the neglect to provide urban conveniences has no cause of action for damages. This does not mean that the city is not morally and politically bound in the absence of compelling reasons to the contrary to instal the necessary improvements at the appropriate stage of development, and influences are at work which make for premature rather than tardy performance of this duty, but it means that the city is by no means a mere passive or impotent factor in the opening up of new subdivisions or building areas.[2] At the initial stage of a particular urban development we need not concern ourselves about questions of power and coercion; it is a matter of give and take, of reciprocal adjustment in the carrying forward of an enterprise in which private owners and the public are joint adventurers. The model zoning enabling act recognizes this when it proclaims as one of the purposes of the law "to facilitate the adequate provision of transportation, water, sewerage, schools and parks, and other public requirements."

An excellent discussion of this aspect of the matter is found in the 1925 report of the Board of Zoning Appeals of Baltimore. We are told (p. 72) that "in the absence of zoning the design of

2. *John R. Prince* "The Purposes of Compulsory Filing of Plats, How Far It Can Be Lawfully Required" Proceedings National City Planning Conference (1924) p. 150.

storm water sewers can be certain only by providing for 100 per cent occupancy of the lots, figuring practically 100 per cent impervious surface," while (p. 75) "since the passage of the zoning ordinance the sewer engineer of Baltimore has been designing sanitary and storm water sewers based on the zone plan."

But why, it may be asked, under the circumstances may not the city establish planning and zoning schemes merely by virtue of the commonly possessed power to make improvements without enabling zoning legislation? The reason is a technical one which may be explained by considering the differences between a street lay-out and lot improvements. Even without the legislative provisions for approval of plats which we find in many states, the city can virtually force a subdivider to conform to a city street plan simply by refusing to accept the dedication of non-conforming streets; for a full consideration of relative advantages and disadvantages will convince the subdivider that—barring exceptional conditions—his prospective purchasers will prefer public to private streets. The street being once laid out, its continuance along the lines shown on the plat is practically assured; the owner's acceptance of the condition imposed by the city is fully executed. But there is no possibility of a similar full and executed acceptance of conditions conceivably imposed by the city before agreeing to a subdivision with regard to structural improvements, still less with regard to the use thereof to be made by the owner, for that is a prospective matter and subject to change from time to time. The owner's agreement, in order to be made enforceable by the city, would have to be put in form of a restrictive or possibly even an affirmative covenant running with the land, obviously a complicated and inconvenient method of procedure which might encounter even technical legal difficulties regarding the city's contractual capacity, and the operation of covenants. It is far more simple for the city to act through regulatory than through contractual provisions, and the requisite authority is supplied by zoning legislation. It is also obvious that the legislature, in giving the necessary power, merely grants an authority which expresses the organic relation of the city to private improvements, to the full fruition of which the city's own public improvements contribute their share, or, put conversely, that the owner's submission to the city's power merely reflects the dominant position which the city naturally holds in the joint adventure. Call this police power if you will; but let us realize the specific nature of the power.

Let us also realize what among other things the term police power signified on the continent of Europe in the eighteenth century. The term included, among other things, the authority of the sovereign—a powerful monarch or a petty prince—to prescribe in detail the style and appearance of his cities and particularly the capital in which he resided. The beauty thus secured was part of good order, and the term "general welfare" would probably not have been objected to. You can see the results of this police power in the German cities of Mannheim, Darmstadt, Karlsruhe, Potsdam and parts of Dresden and Berlin, in France, in Nancy and in parts of Paris. In these cities we have the visible embodiment and permanent memorial of what was called benevolent despotism. Far be it from me to deprecate the results entirely; there is much to admire, and, if the picturesqueness of the mediaeval city was not rivaled, there was the compensation of light and air. A German author who gives us an excellent account of that phase of city building, deplores the false liberalism and sentimental individualism of the present day which makes similarly intensive control impossible.[3] I take it that zoning does not mean a reversion to such power. Not only must beauty not be purchased at the price of the "democratic way of life"; but even from the point of view of aesthetics a regimented beauty suffers in comparison with freedom that expresses itself in variety and even asymmetry.

4. *Power over improvements as a continuing power.*—The foregoing argument in favor of municipal control is based upon the assumption that the city has to deal with undeveloped areas, and it is significant that English legislation is confined to these, speaking of land "in course of development." American legislation commonly applies to cities in their entirety, and hence we speak more often of zoning than of city planning. Our less conservative attitude is perhaps due partly to the greater difficulty, owing to haphazard suburban extensions, of clearly separating developed from undeveloped areas, partly to an ambitious effort to create stability by the fiat of the law. Does this less conservative attitude destroy the theory of control that has been set forth?

It may be urged that after an area has been partly or entirely developed and the city has not availed itself of its initial opportunity, that opportunity is now lost beyond recapture. But that would be a superficial view of the situation. It corresponds far more with realities to say that improvements already made represent an implied understanding between the cooperating parties, the owners

3. *W. C. Behrendt* "Einheitliche Blockfront" Berlin (1911).

and the city, and that the power that might have been originally exercised may now be recognized as a continuing power to preserve the character of what has been voluntarily established. Such a view will sufficiently account for all the authority legitimately exercised under zoning legislation.

If, however, we thus conclude that in dealing with new improvements in settled districts, or with proposed alterations of existing improvements or uses, the city stands, or may be made to stand, substantially as it does in dealing with undeveloped areas, we still recognize that while the city holds a superior position, legitimately expressed in regulatory power, this superior position is due in the main to its dominating share in a joint undertaking. Keeping this point of view in mind we shall gain a keynote to every discussion of zoning laws and ordinances and their application: the subordination of questions of power to questions of equity.

More important, of course, even than equity is the question of practicability, particularly long-range practicability; but that may be left to take care of itself, for if a scheme does not work, it will be ultimately abandoned. If the scheme works, but only by an undue sacrifice of equities, the gain to the community is too dearly purchased; and, in any event, justice is the law's primary concern. The trouble is that the idiosyncrasies of land make equity in zoning a very difficult problem, and here there is in consequence a real temptation to override private claims by quoting the old and simple adage, *salus publica suprema lex.*

5. *Areal adjustments and the comprehensive plan.*—In the nature of things areal adjustments are likely to present intricate problems, and the simplicity of a rule is apt to be in inverse proportion to its practicability. This is illustrated by the zoning ordinance provisions for set-backs. To forbid construction closer to the street line than any existing building, as Milwaukee does or at one time did, will obviously in many cases not work. Something more particular in the way of adjustment is required, and it is probable that the more meticulous the provision, the greater will be the approximation to justice, and that perhaps no mechanical formula will be able to dispense with the exercise of powers of variation by the zoning board of appeal. It is therefore not surprising that occasionally, instead of any attempt to formulate a rule, we simply find a reference to a map showing the set-back lines, and a reference to the board of appeals for necessary variations.

Clearly one of the outstanding difficulties of the law of zoning is the irreducibility to type of the situations with which it deals.

Human relations being determined in part by free choice tend through the habit of imitation to conform to types, which, if not created by law, the law at least can utilize. By conveniently ignoring details, it is also possible to classify areas by types, but nature is not so accommodating as man, and it is rare that any one area runs true to type; in fact, except in the case of an island, the individuation of areas is artificial or arbitrary.

The irreducibility of areas to types entails the irreducibility of equities to abstract formulas, and the consequent loss of one of the main safeguards of equal justice, necessitating the search for some substitute. Fortunately the city planner can summon to his rescue another principle, less commonplace, but still effective within bounds, namely, that the standard of human performance is apt, although not sure, to rise in proportion to the magnitude of an undertaking. Hence the device of the comprehensive plan as one of the main features of zoning legislation. It gives some assurance of appropriate coordination, qualified of course by necessary respect for existing maladjustments, and by regional limitations of municipal power.

There are difficulties in the way of maintaining the integrity of comprehensive planning which will be presently discussed. But even in its initial working out, it can assure at most relative freedom from partiality or jobbery, and does not furnish a sovereign solution for difficulties inherent in the situation. There is one major problem inseparable from any plan, which has hardly received the attention it deserves—the problem, namely, of determining the boundaries of areas marked off for unit-treatment.

It does not need demonstration that with a merely geometrical dividing line, or even the dividing line of an ordinary street, the edge of a residential district where it adjoins a non-residential district is less desirable than its center and that without special positive devices, a resulting inequity cannot be avoided; it is a shifting, and not an elimination, of the inequality, if in determining set-back lines special consideration is given to corner lots. I know of no zoning law which faces, let alone solves, this problem. It is true that the final determination of boundaries is preceded by hearings, but a hearing while it tends to assure the observance of equities, cannot by itself, without additional powers, remove inequities inherent in a situation.

6. *Majority consents, and compensation.*—Occasionally we also find in zoning laws or ordinances a recourse to majority consents as a solvent for doubtful cases; but this contrivance, far from re-

moving the difficulty of differential consideration, rather accentuates it. The United States Supreme Court has made it impossible to vest a majority of owners with the power to establish a building line,[4] but holds it to be constitutional to permit a municipal prohibition to be lifted by such a majority,[5] a distinction without a difference, or at least a distinction beyond my power of comprehension.[6]

If there is a conflict in the two decisions, it at least reflects the two-faced aspect of the majority consent as on the one side an instrument of overcoming captious and unrepresentative opposition, and on the other side as an instrument of freezing out legitimate minority interests. To reconcile majority power with due process, its abuse should be guarded against. The Supreme Court of Illinois has justly held purchased consents to be invalid,[7] but difficulty of proof renders this inadequate, and the least that the law can do is to require each majority owner's consent to be accompanied by some reasonably adequate form of assurance that it was not given or obtained for a personally discriminating consideration. But even with this safeguard the majority consent is unsuitable where there are factors setting the minority interest apart for special consideration.

Theoretically, the simplest method of equalizing detriment and benefit resulting from the unit treatment of areas would seem to be the grant of compensation to the owner who is forced into a nexus which is disadvantageous to him, and the general absence of compensation provision from our zoning laws therefore calls for comment. It is of course well known that restrictions are occasionally attended by serious loss to particular owners, and that while compensation would place the validity of the restriction on a reasonably secure basis, the drafters of zoning laws prefer the risk of invalidity. It is then regarded rather as a triumph for the zoning principle if a court, though with expressions of regret, sustains a burdensome and doubtful restriction,[8] while injured owners take comfort in the recent decision of the Supreme Court, which under the Fourteenth Amendment gave the relief which the highest court of the state, in reliance upon the police power, had denied.[9]

4. *Eubank* v. *Richmond* (1912) 226 U. S. 137.
5. *Cusack* v. *Chicago* (1917) 242 U. S. 526.
6. *Quaere*, whether the Supreme Court has not practically abandoned the distinction in *Washington* v. *Roberge* (1928) 49 Sup. Ct. Rep. 50.
7. *Doane* v. *Chicago City R. R. Co.* (1895) 160 Ill. 22.
8. *American Wood Products Co.* v. *Minneapolis* (1927) 21 Fed. (2nd) 440.
9. *Nectow* v. *Cambridge* (1928) 277 U. S. 183, reversing (1927) 260 Mass. 441, 157 N. E. 618.

The English law recognizes the principle of compensation, the question and the amount of damage being, in accordance with the general practice of English legislation, settled by arbitration.[10] Compensation is, however, denied under the following circumstances: if the injurious provision is also contained in an act of Parliament, or if it would have been enforceable if contained in local by-laws (ordinances), or if the provision prescribes space, or number, height or character of buildings, or if it is one which the minister, having regard to the nature and situation of the land affected, considers reasonable for the purpose.

The last mentioned qualification would be entirely inadmissible in America; probably also the compulsion to arbitrate, without which the determination of damages would be apt to become a cumbersome matter. Altogether the circumlocutory attitude of the English statute makes us wonder whether compensation is a reality or a gesture, and throws additional light upon the American hesitation to touch the problem at all.

7. Compromise arrangements.—There remains the remedial power of the board of zoning appeals—that original and ingenious institution devised to cover a multitude of sins. It might be interesting to make a detailed study of the decisions of these boards to ascertain in what proportion of cases the relief asked was called for by the differential situation on the border of a district, and to what extent the relief given consisted in positive contrivances adjusted to that differential situation. Conceding its beneficial effects, the question remains whether a power given in such oracular terms offers, in addition to practical remedies, also a solution which is intelligible as a matter of principle—a question which involves the whole problem of a satisfactory theory of zoning.

In undeveloped districts it may be possible to eliminate the legal problem by the appropriate treatment of boundaries. Border difficulties being difficulties of proximity, the effect of distance upon amenity is a question worth studying. A thoroughfare 800 feet in width, like the Midway in Chicago, makes it a matter of indifference how the property on the other side is improved, and it is even possible that the distant view of steel furnaces gives a touch of picturesqueness to the prospect from your residence. If wide separating spaces are not obtainable, trees may be used as screens; the problem may not always be a simple one, but in laying out new subdivisions it ought not to be beyond the ingenuity of the city planner

10. Town Planning Act (1925) sec. 10.

to solve it; at any rate, it deserves greater attention than it now receives.

8. *Obsolescence and dezoning.*—Even more serious than the difficulty of border line property is that of obsolescence, if that term may be used. The neglect of this problem is perhaps due to two causes: the one the fact that zoning in America is barely fifteen years old, while even with our rapid turn-over the life of a residence district is ordinarily not less than thirty years; the other, the fond hope that zoning will put an end to obsolescence. It may, of course, be inopportune to encumber present-day projects with doubts drawn from a relatively remote future; but the illusion that zoning can fix the character of neighborhoods in permanence should not be entertained. If zoning can produce the standard of stability that is characteristic of cities in older countries, it will render a valuable service, but more than that can hardly be expected, and even such stability will mean a change in the national temperament which at present combines the lowest degree of local attachment with the highest degree of sensitiveness as to neighborhood associations.

Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not show on their face whether they are intended to remedy particular errors or hardships, or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose. The power is commonly safeguarded by provision for hearing, by giving opportunity for protest by a stated percentage (20 per cent) of the owners affected, and by the requirement of more than a simple majority of the local board or council to override a protest. The standard enabling act calls for a two-thirds majority (so also the Illinois law), the New York Town Law (Art. 17-C, sec. 349-s) for a unanimous vote; it is doubtful whether a less than practically unanimous vote affords any protection at all, and whether even the requirement of a unanimous vote is a protection in those cases, in which dezoning is not inspired by purely equitable and legitimate considerations.

I have referred to the "comprehensive plan" as one of the valuable features of zoning laws from the point of view of equity; obviously the benefit of comprehensiveness is lost in the amending process. The problem is one common to all systematic legislation: the guaranties inherent in the original coordination are jeopardized by piecemeal changes. The risk appears to be accepted as inevitable. It might be worth considering whether legitimate alterations

due to lapse of time could not be taken care of by an assured prospect of periodical comprehensive revision, leaving alterations due to particular individual hardship to be dealt with on another basis. Those who stake their faith on comprehensiveness must surely be disturbed by such an unceasing flow of amending ordinances, as we find, for instance, in Chicago; and it is not necessary to credit the rumors current as to the influences which procure their enactment to be satisfied that they tend to discredit the entire principle of zoning.

9. *Fair and unfair non-conformity.*—It is one thing to call attention to difficulties and express doubts, another thing to offer some constructive suggestion; and if I proceed to do the latter, it is naturally with hesitation.

I am inclined to think that the introduction of zoning effects a sufficient alteration in property relations to call for the formulation of a new principle. That principle must involve either the concept of amenity or the concept of conformity.

The idea of amenity carries us beyond the law of nuisance, but stops short of the securing of beauty by the fiat of the law; as regards beauty, I am willing to concede the difference between eminent domain and the police power. The common law of nuisance fails to furnish an adequate solution for the needs of inevitably offensive industries; these needs were very much better taken care of by licensing legislation than by the common law, but probably receive their only satisfactory recognition through intelligent city planning. However, industrial zoning simply removes practical difficulties, it does not create any legal problems with which we have not long been familiar.

Every one knows that the crux of the zoning problem lies in the residential district, and that when we speak of amenity we have in mind residential preference. There is another aspect of amenity in the disfigurement of places of historic or scenic interest and in outdoor advertising; but these are matter of separate consideration, and, intelligently considered, should not present any legal difficulties in the way of public regulation or control.

Residential preference is controlled by physical and by social conditions, the latter being the more powerful. As illustrating the latter, however regrettable prejudice may be, the coming of colored people into a district readily occurs to one who lives on the South Side of Chicago. Even if it were not for the position taken by the United States Supreme Court, a legal color line would probably be impossible in the Northern states; and generally speaking any

attempt to give official recognition to social differences would be utterly futile, partly because it would be repudiated by public sentiment, partly because it would be impossible to find an appropriate legal formula.

And the difficulty of finding a legal formula probably also applies to the physical conditions that constitute amenity. Rising above the mere avoidance of offensiveness, and falling short of even conventional standards of beauty, it inevitably means one thing to the person of very moderate means, and another thing to the person of great wealth. It is probably true that, generally and abstractly, amenity can never be expressed otherwise than in relative terms. And this throws us back to the concept of conformity.

Conformity not only is a relative concept, but it also is not, even in its relative operation, an absolute ideal. Indeed, could we view the matter abstractly, a strong argument could be made for placing non-conformity above conformity in the scale of moral values. If therefore in the law of zoning we operate with the idea of conformity at all, it must be done with considerable discrimination. By substituting for a duty of conformity a duty to abstain from unfair non-conformity, we at once reach clearer ground, and we gain the benefit of something like an analogy to the duty to abstain from unfair competition, which has been established by the Federal Trade Commission Act of 1914. And we are at once reminded that the law against unfair competition, and the law against restraint of competition, established by the Sherman Act of 1890, are correlative to each other, and part of the same economic policy.

So in the law of zoning, there is correlative to the duty to abstain from unfair non-conformity, the right to be free from coercion into unfair conformity. But note the peculiar way in which the law handles these equities: the duty to abstain from unfair non-conformity has only a legislative status, while the right to be free from coercion into unfair conformity has in the last resort a constitutional status. Putting it in more familiar terms, the only protection there is from unfair non-conformity is through zoning legislation and through the concrete operation of its machinery, for the zoning laws fail to establish in explicit terms any general principle of fair conformity, and no such principle is recognized by the common law; on the other hand, a right to non-conformity under appropriate conditions is recognized by the courts as part of constitutional liberty, and a resisting owner, in addition to the initial hearing and the recourse to the board of appeals, has a right to invoke judi-

cial relief resting on general principles, whether or not explicitly recognized by the zoning laws.

10. *Equity of protection from unfairness.*—The failure to place both fair conformity and fair non-conformity upon clear and equal foundations of equity is, in my view, the weakness of the present legal theories of zoning. I speak of theory rather than of practice. In practice the combined safeguards of zoning legislation and of the common law probably work out as well to protect legitimate non-conformity as can be expected, making allowance for the fact that no adequate solution has as yet been suggested to deal with the problem of the border property. So far, however, as a right to a fair conformity on the part of others is concerned, there is also a practical failure of justice due to the purely legislative status of this right, a failure occasionally manifested in the operation of dezoning ordinances. It is under the circumstances significant that the Chicago papers recently reported a circuit court decision granting an injunction against the dezoning of property. Whether the Supreme Court will take the same position, I do not know; but the decision seems to me a step in the right direction toward the recognition of a general principle which is implicit, but not explicit, in zoning legislation.

It is a further question whether the protection of districts already wholly or partly improved could not with advantage be left to the operation of general principles rather than be covered by zoning ordinances. The refusal of English legislation to cover districts other than those "in course of development" indicates inherent difficulties of which we perhaps make too light. It is worth considering whether an established residence district cannot after all be dealt with most equitably by applying the concepts of fair and unfair non-conformity. The residential district faces two species of detrimental changes: the one is of a profiteering or even blackmailing character, and should be within the prohibition of unfair non-conformity: the other, more serious and insidious, anticipates an inevitable future downward development, and means that a far-seeing owner gets out or accommodates himself without undue loss. To his neighbors who have more optimism or less perception, or who lack the same opportunity, that owner seems grossly unfair, but it may well be that he stands justified in the eyes of the impartial by-stander. It is very likely that from a series of adjudications his non-conformity will emerge as fair rather than as unfair. As the zoning laws stand now, his relief lies in dezoning which is subject to no principle at all; and if this is denied by the politically

constituted authority, he suffers loss, until the eyes of even the blind are opened to the tragic fact that the district cannot be saved.

Whether a similar system of relief on the basis of general principles could also be made applicable to the ultimate decline of areas originally developed under zoning restrictions is a question that could arise only after the lapse of many years, and would present much the same situation that exists where property has been acquired subject to restrictive covenants.

If the question of fairness of conformity and non-conformity is to be left for determination from case to case, that determination would probably have to be committed to an administrative tribunal, whose decisions would not be simply declaratory of clear rights and obligations, but would have to find solutions on the basis of compromise and positive contrivance. The present institution of the zoning board of appeals would be the prototype, and would receive a wider sphere of operation. It would also be impossible to dispense with ample revisory powers vested in courts of justice.

The foregoing observations contain nothing that is revolutionary in the law of zoning; they merely offer a somewhat new interpretation of factors and tendencies which are already at work, and which it is the fashion to gloss over. When zoning was new and had to win its way through legislatures and the courts, theories not linking up with familiar categories of power and policy would have been no help to the cause; the legal pioneers in the movement were wise to proceed as they did. But now that the battle is practically won, it is legitimate to call attention to shortcomings of the existing law and to try to put forward a more consistent and perhaps a more equitable view of the law of zoning.