tive action in placing the fraudulent party in a position to perpetrate the deed. Furthermore, the owner seems to be in a more advantageous position to protect the goods.[26] These considerations apply as logically in cases involving impersonal agents as in those involving bona fide purchasers. In addition it would seem that the agent's compensation would not make title investigation economically practical.

The commercial wisdom of expanding the protection for agents has not gone unchallenged. It has been pointed out that if brokers are held liable to the owner for selling encumbered securities and goods, they will examine the title carefully and thereby afford a good deal of protection to owners of negotiable instruments. It is contended that the resulting delay in transactions due to such a requirement is minimal on the whole since almost all honest sellers have such familiar relations with brokers that it would be unnecessary to check their titles.[27] A realistic survey of agents, commission brokers, and factors in the commercial society of today would seem to indicate otherwise. Non-discriminatory statutes, such as the Packers and Stockyard Act, have further decreased personal relations between agents and principals. Furthermore, making the broker liable in order to increase his vigilance may serve to lessen the owner's incentive to be vigilant in many situations where placing the duty on the owner would be more fruitful in preventing the loss.

From the standpoint of sound commercial policy a more convincing argument for placing the burden of the risk of these losses on the agencies is that they are in a relatively better position than the owners to insure against the loss and account for the insurance as a cost item in determining fees and commissions. The brokers can thus assume a cost determining and allocation of risk function that, in most cases, cannot be undertaken by sellers with a high degree of certainty because of the smaller number of transactions usually involved.[28]

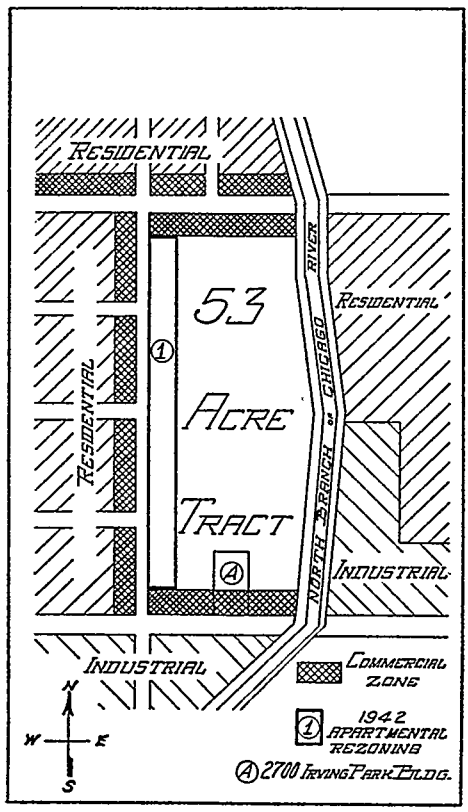
Zoning—Municipal Rezoning Amendment Invalidated—"Best Use" Test Adopted by State Supreme Court—[Illinois].—In 1941 the plaintiff, seeking an industrial site, purchased part of a fifty-three acre vacant tract of land, originally zoned in 1923 for manufacturing use. This purchase is shown as A on the accompanying diagram. In 1923 the tract was occupied by two brick-manufacturing companies. This use was later abandoned. Facing the tract on bordering

[26] Cowen v. Pressprich, 117 N.Y. Misc. 663 (1922) illustrates such a situation. Judge Lehman's dissent was adopted by the Appellate Division in reversing the decision holding the defendant liable for conversion. 194 N.Y. Supp. 926 (1922).

[27] Warren, Trover and Conversion, an Essay, 95 (1936); Warren, Margin Customers, 129 (1941). Professor Warren also argues that it is not sensible to hold the negotiable instrument broker not liable for conversion while the chattel agent is held liable for conversion. The chattel owner as a result is given a remedy against both buyer and agent while the negotiable instrument owner is left with a claim against no one but the thief. Ibid. at 132, 133.

[28] See Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584, 720 (1929).

streets were commercial-use districts. A number of the dwellings in these districts had been allowed to deteriorate and three factories occupied portions of the commercial strips to the west. Two of the plants had been built within one year prior to the plaintiff's purchase. The surrounding area to the north, west, and east was residential; the land to the south was occupied and zoned for indus-



trial use. In 1942, after the plaintiff purchased tract A, but before he began construction, the City Council of Chicago passed a comprehensive zoning amendment which included a provision rezoning a 125-foot strip on the western side of the tract as property limited to apartment use.[1] The area is indicated on the accompanying diagram. In 1943 the City Council passed a spot-zoning amendment which applied to the remainder of the fifty-three acres rezoning the entire area for apartment use.[2] The plaintiff brought suit to set aside the new zoning

[1] Comprehensive Amendment to the Chicago Zoning Ordinance, Chicago Rev. Code (1946) § 194A.

[2] Chicago Rev. Code (1946) § 194A-1.

restrictions as constituting a taking of property without due process of law. The lower court upheld the plaintiff's contention. On appeal to the Supreme Court of Illinois, *held*, that since the trend of the immediate neighborhood surrounding the fifty-three acre tract had been industrial for the previous twenty years, the rezoning ordinance was void with respect to such tract. Judgment affirmed, *2700 Irving Park Bldg. Corp. v. Chicago*.[3]

Studies made by the Chicago Regional Planning Association in 1938, fifteen years after Chicago's original zoning ordinance, indicated that the amount of commercial and industrial area provided would meet the needs of a city with ten million residents.[4] Chicago was not alone in planning and hoping for an industrial boom.[5] Generally in the early days of zoning, authorities elsewhere were unnecessarily liberal in setting aside land for industrial development while greatly underzoning for residential use.[6] Overzoning tends to have two immediate effects. First, since the need for industrial area is far below the available supply the surplus is left for whatever other use its owners can make of it. Being without zoning restrictions that can apply, the surplus industrial property is left literally in the same status as before zoning, to develop under no plan at all.[7] Second, since the areas available for industrial and commercial use are large and widely scattered, an unnecessarily large number of residentially zoned sections become less desirable because they border industrial areas. These effects are readily observable in Chicago where they have been an important factor in the

[3] 395 Ill. 138, 69 N.E. 2d 827 (1946).

[4] This estimate was made on a basis of fifty feet of industrial frontage per hundred population—a figure arrived at by comparison with the needs of other cities. The Amendment of Zoning Ordinances, 4 Legal Notes on Local Government 10 (1938). In 1923, 28.64 square miles were zoned for commercial and industrial uses but in 1936 only 12.54 square miles were used commercially. Amortization of Property Uses Not Conforming to Zoning Regulations, 9 Univ. Chi. L. Rev. 477, 490 (1942).

[5] The surplus of industrially zoned land is readily understandable when it is realized that the market value of such property was from two to three times that of residential land in 1923. Therefore special interests exerted considerable pressure to increase the value of their land. In the instant case the plaintiff's tract was valued in 1942 at $30,000 as industrial and approximately $12,000 as residential property. See Twentieth Century Fund, American Housing 124 (1944). The spirit of the period is indicated in the statement that "it was recognized that the city depends upon its commerce and industry, that retail business service and residential developments are the important by-products. Where properties now used for residence are best suited to manufacturing purposes and where the improvements have badly depreciated, they have in many cases been zoned for manufacturing, that use being regarded as the highest and best use of the land. Other properties in the outlying areas now undeveloped have been zoned for manufacturing, so that the expansion of the city's industries will not be jeopardized. Indeed, such procedure will encourage the establishment of new industries." Tentative Report of Chicago Zoning Commission 5 (Jan. 5, 1923).

[6] Bassett, Zoning 56 (1940).

[7] Since a piece of property may be employed for any more restricted use than its zoning classification, development will be haphazard when actual use is of a more restricted character than that permitted by the classification.

spread of slum and blight areas.[8] Persons seeking residential land refuse to invest in and improve the unprotected areas and move to outlying regions instead. One of the major problems facing large metropolitan cities today is to prevent migration to the suburbs. Zoning, properly used, is one of the instruments necessary to encourage and protect residential development within a city. Proper use today requires rezoning to establish a reasonable proportion between residential and industrial use areas, to protect slum clearance and redevelopment efforts and to adjust the land-use pattern to some "master plan" such as commissions in nearly all major cities have adopted as a guide to city development.[9]

The Chicago Corporation Counsel chose to test the city's first major attempt at rezoning[10] in a situation containing political implications disadvantageous to the city's cause. In the past the Chicago City Council has zoned in a manner open to criticism.[11] Evidence introduced by the plaintiff in the *Irving Park Bldg.* case tended to show that the tract involved was rezoned more as a result of political pressure than as a consequence of the city's rezoning plan.[12] Witnesses for the plaintiff and the defendant testified that the purpose behind both rezoning ordinances was to preserve the tract for future use as a city park, not to make it available for apartment use. The city was attempting to use zoning to accomplish the function of condemnation proceedings. The plaintiff had good cause to complain at such tactics, since by rezoning the city prevented him from using the property as he desired, yet by waiting to institute condemnation proceedings at its own leisure it prevented him from disposing of the property to

[8] Some other influences found in nearly all the central cities of metropolitan areas which contribute to the same trend are the grid system of platting which permits every street to become a traffic thoroughfare; rigid building codes which force builders from otherwise desirable sites to areas beyond code jurisdiction; and high taxes which result from and, in a chain reaction, further the trend. Twentieth Century Fund, American Housing 16–23 (1944).

[9] Bassett, The Master Plan (1938).

[10] The 1942 ordinance was so comprehensive that the plaintiff attacked it as being not an amendment under the enabling act but rather an entirely new zoning ordinance. Since the procedure necessary to enact a new zoning ordinance was not followed, the plaintiff claimed that the enactment was void in its entirety. The Illinois Supreme Court ruled against the plaintiff on this point. 2700 Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 152, 69 N.E. 2d 827, 834 (1946).

[11] Freund, Some Inadequately Discussed Problems in the Law of City Planning and Zoning, 24 Ill. L. Rev. 135, 146 (1929); Zoning Ordinances—Amendment, 25 Ill. L. Rev. 817, 821 (1931); Metropolitan Housing Council, Zoning and Zoning Administration in Chicago 8 (1938). A strongly critical discussion of Chicago zoning by political fix appeared in 12 American Society of Planning Officials Newsletter 65, 67 (1946), commenting on a newspaper report concerning eight recent zoning cases. Five charges were quashed, two were continued, one fine of $1 was levied. Chicago Sun, p. 21, col. 7 (July 19, 1946).

[12] The court said that "shortly after the plaintiff purchased the property in question, news of the transaction and the proposed plan to erect a factory on the property was circulated among residents of the 40th ward. A group of these residents started some agitation to have the tract rezoned in order to prevent the plaintiff from carrying out its plans. The 1942 amendment was conceived as a stop-gap to prevent development of the property until the entire 53-acre tract could be converted into a park or playground." 2700 Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 146, 69 N.E. 2d 827, 831 (1946).

the only purchaser willing to take it as rezoned. The city could be thus squarely accused of using rezoning in the instant case for strictly political dog-in-the-manger purposes.[13]

Faced with the charge that desire for a park was the real motive behind the rezoning, the city failed to offer a justification based upon the over-all picture of its future zoning plans. The plaintiff introduced two expert witnesses, both well known Chicago real-estate appraisers, who testified that the tract was "unfit for apartment use" because of the character of the adjacent commercial and industrial property and the "condition of the soil," that the uses in the bordering commercial strips made the "trend" industrial in the neighborhood, that "the highest and best private use" of this land was "industrial," and that the plaintiff would lose approximately $20,000 in land valuation if the ordinances were sustained. The city introduced two expert witnesses, a local real-estate appraiser and the executive director of the Chicago Plan Commission, who gave opinion evidence that the "highest and best use" of the tract was "residential." One of the city's witnesses testified that a program based on studies of the Chicago Plan Commission had been conceived for the improvement of the entire ward, including the fifty-three acre tract.[14] But the corporation counsel failed to emphasize this point. He did not indicate the problem faced by the city in its attempt to plan orderly metropolitan development through the use of rezoning. Instead he permitted the issue to remain on the narrow point of "the highest and best use" for the particular tract of land as shown by the "trend" of the immediately surrounding blocks rather than the predominantly residential character of the entire ward. It would seem a fair criticism to state that the city selected an inappropriate case to test its first comprehensive rezoning ordinance in view of the undercurrent of questionable political activity accompanied by enactment of a spot-zoning ordinance of dubious virtue. Having done so, it also failed to press arguments that were in its favor.

The Illinois Supreme Court did not speak in terms narrowly restricted to the questionable character of the two zoning amendments as they applied to the fifty-three acre tract. Rather the court proceeded to decide whether these amendments were good zoning, establishing its own test of desirability. The court adopted a narrow test which considers the trend of the immediately surrounding blocks, ruling out consideration of the tract in relation to the entire community.[15] Having determined the proper criterion upon which to base a zoning ordinance, the court made its own value judgment that the "highest and

[13] The Chicago Park District has now acquired title to eighteen acres of the fifty-three acre tract, and condemnation proceedings are pending on the balance. Chicago Park District v. Trust Co. of Chicago, Doc. No. 46 C 6477, Circuit Court of Cook County, Illinois.

[14] Abstract of Record 457–59, 2700 Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 69 N.E. 2d 827 (1946).

[15] As shown on the diagram, the court considered the immediately adjacent commercial strips to the north and west and the industrial areas to the south. The court did not find that the completely residential nature of the areas to the north, east, and west was important.

best use" of the property in question was industrial and therefore the rezoning ordinances were void as regards the plaintiff's tract.

The Illinois Supreme Court has not been consistent in its approach to zoning.[16] The court has asserted that it is not a zoning commission and that "it is primarily the province of the municipal body to which the zoning function is committed to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed, and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested, in the absence of a clear showing of abuse of that discretion."[17] The holding of the instant case indicates a considerable shift from this policy. The decision in the *Irving Park Bldg.* case was a usurpation of the legislative function since the court not only rejected the zoning ordinances before it for consideration, but also in effect enacted its own ordinance as a replacement. Such action is particularly unfortunate since the court can deal with only a fragment of a zoning plan in any single case. Judge-made zoning can never result in comprehensive and intelligent city planning.

Other courts in recent cases have taken a more realistic view of the problem facing city planners. In *Cassel Realty Co. v. Omaha*,[18] the Nebraska Supreme Court considered a case where a tract, which had first been commercially zoned, was rezoned as residential property after the previously existing commercial use had been abandoned. This action decreased the market value of the property. The contention was made that since commercial establishments continued across the street from the land, the rezoning was arbitrary and unreasonable. If the Nebraska court had restricted its examination of the case to the "immediately surrounding" blocks it could easily have held the ordinance to be confiscatory. But the court refused to base its decision on such narrow grounds. Rather, it pointed out that the area "in every direction for many blocks from the location involved . . . . was zoned, used and being developed for residence purposes."[19] Therefore the rezoning ordinance was recognized as a valid exercise of Omaha's municipal police power.

[16] In one line of cases the court has asserted that if the validity of the legislative classification in zoning cases is fairly debatable, the legislative judgment must be allowed to control and the court will not interfere. Mercer Lumber Co. v. Glencoe, 390 Ill. 138, 60 N.E. 2d 913 (1945); Zadworny v. Chicago, 380 Ill. 470, 44 N.E. 2d 426 (1942); Neef v. Springfield, 380 Ill. 275, 43 N.E. 2d 947 (1942); Evanston Best Co. v. Goodman, 369 Ill. 207, 16 N.E. 2d 131 (1938); Minkus v. Pond, 326 Ill. 467, 158 N.E. 121 (1927); Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925). This doctrine is in accordance with the view of the United States Supreme Court. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In an opposing line of cases the Illinois Supreme Court has given little weight to legislative judgment and instead has taken a decidedly critical view of zoning, establishing in each case its own standard rather than that of the city council. La Grange v. Leitch, 377 Ill. 99, 35 N.E. 2d 346 (1941); Harmon v. Peoria, 373 Ill. 594, 27 N.E. 2d 525 (1940); Taylor v. Glencoe, 372 Ill. 507, 25 N.E. 2d 62 (1940); Reschke v. Winnetka, 363 Ill. 478, 2 N.E. 2d 718 (1936); Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 827 (1933); Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932).

[17] Minkus v. Pond, 326 Ill. 467, 480, 158 N.E. 121, 126 (1927).

[18] 144 Neb. 753, 14 N.W. 2d 600 (1944).

[19] Ibid., at 762 and 605.

In a recent New York case before the Appellate Division, *Ulmer Park Realty Co. v. City of New York*,[20] the plaintiff contended that the zoning classification and use of neighboring properties made impractical the use of its land as zoned for residential purposes. Had the court looked for the "highest and best use" of the particular piece of property, a holding for the plaintiff might logically have followed. But the opinion flatly refused to consider the "best" use for the land, stating in a memorandum opinion that "proof that the property could be more profitably or more beneficially used for industrial purposes than for residential purposes is not sufficient to warrant a declaration that a zoning resolution is confiscatory and unconstitutional. Where the suitability of plaintiff's property for residential use presents a debatable question the court may not substitute its judgment for that of the local legislative body."[21]

A similar view was taken by the California Supreme Court in *Wilkins v. San Bernardino*.[22] There the plaintiff owned a block of land, one frontage being zoned for two-family dwellings and commercial use, the other frontage on the next street being zoned for one-family houses. The plaintiff attempted to use the entire block for two-family buildings. The court, recognizing the threat to efficient city planning raised by restricting relevant zoning considerations to the physical characteristics of the immediately surrounding property, stated that "the drawing of boundary lines of zones within a municipality must of necessity be more or less arbitrary."[23] The court further asserted that "fixing boundaries of a zone is a legislative act committed to the sound discretion of the legislative body . . . . [and] the fact that nearby business property has the same characteristics as the parcel involved in the proceeding does not justify the court in substituting its judgment for the legislative judgment. The mere fact that business property is located across the street or even adjoining the residential property involved does not determine that the ordinance is invalid."[24]

If the Illinois Supreme Court limits its holding in the *Irving Park Bldg.* case to the peculiar facts relating to political activity, the court can still consistently follow its decisions which recognize the importance of zoning to city welfare. But if the case becomes general zoning law in Illinois, the efforts of city councils to readjust their zoning maps will be effectively defeated. Illinois city planners will be left without an essential working tool. Since slum clearance and urban redevelopment plans must presuppose adequate zoning protection,[25] such im-

[20] 270 App. Div. 1044, 63 N.Y.S. 2d 143 (1946).

[21] Ibid., at 1044 and 144. This decision is in accord with recent New York Court of Appeals decisions. Franklin v. Floral Park, 294 N.Y. 862, 62 N.E. 2d 488 (1945); Kraft v. Hastings, 285 N.Y. 639, 33 N.E. 2d 558 (1941).

[22] 162 P. 2d 711 (Cal., 1945).

[23] Ibid., at 714.

[24] Ibid., at 717.

[25] Chicago Plan Commission, Housing Goals of Chicago 136 (1946); Urban Redevelopment, 54 Yale L.J. 116 (1944).

provement efforts will be seriously handicapped. Continued growth of blight districts will be aided by requiring the city to justify a zoning ordinance on the basis of an immediately surrounding area. By requiring the plaintiff to bear the burden of proof in showing that any questioned rezoning ordinance has no relation to the development of an entire community, the court could help, instead of hinder, conservation of city property value. In the present housing shortage the cities are already experiencing difficulty in securing sufficient suitable land for residential construction. The decision of the Illinois Supreme Court may very well constitute another exasperating obstacle.[26] When the merits of a rezoning amendment are debatable, the doubt should be resolved in favor of the legality of the city council's action both as a matter of sound social policy and fundamental constitutional law.

[26] "The City Council should immediately undertake a thorough revision of the zoning ordinance in order to eliminate unnecessary and unwise restrictions with regard to the location of residential and apartment dwellings. It is particularly essential that many areas now unreasonably restricted to commercial and industrial purposes be opened up to housing developments." Mayor's Emergency Housing Committee Report (Chicago) 7 (Mar. 11, 1947).