15 Zoning

Zoning—as conceived in the United States in the second decade of this century—is the division of a municipality (or county) into districts for the purpose of regulating the use of private land. These zones are shown on a map. Within each of these districts the text of the zoning ordinance specifies the permitted uses, the bulk of buildings, the required yards, the necessary off-street parking, and other prerequisites to obtaining permission to develop. The principal objective, in its simplest form, was to ensure that commercial and industrial development was segregated from residential areas. Although this concept has been subject to enormous stress over the last five decades, the basic structure of most zoning ordinances today retains the design found in those ancestors of the early 1920s.

This chapter first discusses the history and the legal basis of zoning. Zoning is then discussed in terms of its relationship to comprehensive planning and to subdivision regulations. Next, the chapter covers in detail the basic elements covered by zoning ordinances. Zoning as an administrative process is then discussed; the traditional system is covered first, and then the text turns to more recent innovative techniques, among them planned unit development. The final section of the chapter covers exclusionary zoning: the historic New Jersey cases are reviewed and the implications for current zoning are given. A brief conclusion underscores the changing trends in zoning.

Historical background and legal basis

Zoning had been preceded in the United States by scattered efforts on the part of communities to regulate the use of private land. Ordinances to control height in designated areas had been upheld; however, ordinances to regulate uses in specified blocks of a municipality had been less successful when challenged in the courts. Zoning, however, represented the first effort on the part of the public to regulate, in a comprehensive fashion, all private land. This idea, it is believed, came from the observations made in the early years of this century by a group of New Yorkers of the system employed in some German cities. In any event, New York adopted a zoning ordinance in 1916, and in the next decade comprehensive zoning swept across most of the larger cities and many of the suburbs of this country, aided by the promulgation in 1922 of the Standard State Zoning Enabling Act—a model—by the U.S. Department of Commerce.

Enabling legislation on the part of each state was essential. Zoning is an expression of the police power—the power to regulate activity by private persons for the health, safety, morals, and general welfare of the public; and that power, under our federal system, rests with the state legislatures. Municipalities enjoy no such authority except as it may be delegated to them by the states, either through express provisions in the state constitutions or through the adoption of legislation that "enables" municipalities to regulate the use of private land through zoning. In the 1920s many states adopted such legislation. That did not settle the legal status of zoning; rather, it opened the door to a host of difficult issues that could, under our system, be determined only by the courts.

The threshold question was whether such control over the use of private land,

even when authorized by the state legislature, was valid as a constitutional matter. The Fourteenth Amendment to the Constitution provides that no person shall be deprived of his property without due process of law. In the years following the Civil War the U.S. Supreme Court had imbued this clause (originally probably intended to guarantee fair *procedure*) with a substantive content. State laws regulating various aspects of commerce were struck down because the judges believed the laws "went too far"—that is, the laws deprived the complainant of his or her property without due process. So, it was charged, did zoning regulations: no state could authorize a scheme of municipal regulation that prohibited uses of land that had never been regarded as nuisances. Zoning, in short, was said to violate the due process clause.

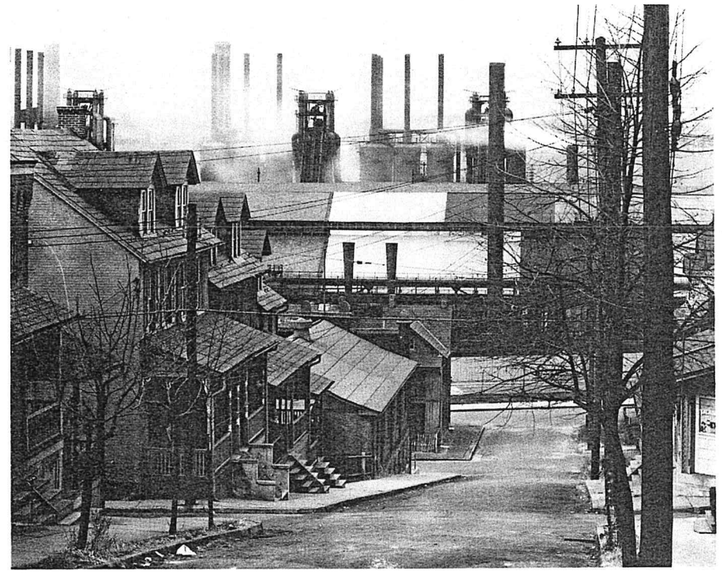

Figure 15–1 The juxtaposition of housing and steel mills in Bethlehem, Pennsylvania, in this 1930s photograph by Walker Evans, forcefully shows the incompatible uses that zoning can control. These houses and mills were built long before zoning took effect in American cities.

In the 1920s lawsuits in a number of states attacked zoning on this basis, and, for the most part, they were unsuccessful. State courts, interpreting—as they do—the federal Constitution, generally upheld zoning. But the crucial test remained: what would the U.S. Supreme Court say about zoning and the Fourteenth Amendment? The issue was settled in *Village of Euclid* v. *Ambler Realty Co.*[1] A majority of the Court reversed a federal trial court and held that zoning—in principle—was a valid exercise of delegated police power. It was a very close thing. The Supreme Court took a rare action: it ordered, on its own motion, a rehearing. On reargument the Court benefited from an illuminating amicus brief written by Alfred Bettman, a member of the Cincinnati bar, distinguished for his contributions to the rationale behind zoning in its early days.

It has been said by someone who was close to the Court in those days that the majority decision, as it finally came out, was switched from *no* to *go* by a casual conversation between two justices.[2]

If zoning had barely surmounted its principal legal hurdle, this was the beginning, not the end, of the legal disputes. If zoning was valid in principle, this did not settle the question of whether a *particular* regulation as applied to a *specific* piece of property was valid.

Six years after *Euclid* the U.S. Supreme Court in *Nectow* v. *City of Cambridge*[3] ruled that a regulation which limited a parcel of property to residential use was, under the circumstances, unreasonable—that is, invalid. For more than forty years after *Nectow* the Supreme Court did not touch zoning cases, but more than 10,000 reported zoning cases in the state courts from 1920 through 1970 illustrate the opportunities for dispute long after the principle of a matter is believed to be settled.

Standard zoning and planning enabling acts For many years the Standard State Zoning Enabling Act prepared by the U.S. Department of Commerce in 1922 and the Standard City Planning Enabling Act prepared by the U.S. Department of Commerce in 1928 reflected with remarkable accuracy the existing state legislation regulating land development in almost all of the 50 states.

The planning act covered six subjects: (1) the organization and power of the plan commission . . . ; (2) the content of the master plan . . . ; (3) provision for adoption by the governing body of a master street plan for the community and the control thereafter of private building in the bed of mapped but unopened streets and of public building in unofficial or unapproved streets; (4) provision for approval . . . of all public improvements; (5) control of private subdivision of land . . . ; (6) provision for the establishment of a region, for the making of a plan for the region and for adoption of the regional plan by any municipality in the region that desired to do so.

The zoning act authorized the classes of local governments specified by the enacting state to control the height, area, bulk, location, and use of buildings and premises. The major characteristic of this model was the authorization given to a local government to divide its territory into zones or districts with uniform regulation throughout the district but with different regulations for each district.

Source: Excerpted from American Law Institute, *A Model Land Development Code,* complete text adopted by the American Law Institute, May 21, 1975, with Reporter's Commentary (Washington, D.C.: American Law Institute, 1976), p. 1.

The fact that zoning law was made at the state level has meant that there has been a significant variation from state to state on just how far a municipality can go in regulating the use of land, a circumstance documented in Norman Williams's monumental five volume work, *American Land Planning Law*.[4]

In addition there have been historical trends in the judicial balancing between the regulatory goals of the municipality and the aspirations of the landowner. In the early decades, possibly down to the early 1950s, more often than not the municipal ordinance, when challenged in its particular application, was struck down. The courts tended to take the side of the property owner. In the following fifteen to twenty years, at least up to 1970, there was a notable swing on the part of the judiciary to a growing sympathy with municipal regulation. It has been only since about 1970 that once again there are signs of increasing judicial suspicion of municipal regulation of private land, but not—as is noted later—for the same property-oriented reasons so apparent in the opinions in the early decades of zoning.

The legal scene in zoning has also been confused by the skill of municipalities in inventing new regulatory devices—schemes of regulation not imagined when the first ordinances were drafted. These have ranged from architectural controls to the mandatory spacing of adult entertainment establishments, and they have

embraced a variety of discretionary techniques under which a landowner or developer, instead of knowing precisely what he or she could or could not do, had to negotiate with the municipality every detail of his or her development proposal. Each of these devices was bound to be litigated. It is, indeed, little wonder that zoning disputes continue to crowd the reported decisions.

Relationship to comprehensive planning

Section 3 of the model Standard State Zoning Enabling Act of 1922 provided that the zoning ordinance shall be prepared "in accordance with a comprehensive plan." Zoning enabling acts, when first enacted in most states, contained a similar clause. The notes left by the drafters of the Standard Zoning Enabling Act are not of much help in construing that ambiguous phrase, and for many years it was given little attention by either courts or commentators. This is not surprising in view of the distance in this country historically between zoning regulation and planning. (It was not until 1928, six years after the Standard Zoning Enabling Act, that the U.S. Department of Commerce issued a Standard City Planning Enabling Act.)

By and large, for four decades most municipalities and counties enacted and revised zoning ordinances with little attention to their relationship to a comprehensive planning process, however that phrase might be construed. The adoption of a zoning ordinance was usually preceded by an inventory of the existing use of land which was marked on a map. Boundaries of zoning districts then were drawn on the basis of the recommendations of a consultant, the "gut feelings" of the local decision makers, and the political pressures in the community.

Population projections, transportation policies, and capital improvements programs were hardly of concern to municipal legislators who wished to keep gas stations out of residential areas and apartments out of single family districts. If a plan was thought of, more often than not it consisted of a map of blobs vaguely suggesting how the community should look in twenty-five years. Once drawn, such a "plan" was tacked on a wall and was forgotten while the local plan commission and city council went about the pressing business of acting upon innumerable requests for changes in the zoning map.

The courts were not of much help in bridging the traditional gap between zoning and planning. In the few instances in which a litigant suggested that the state enabling act mandated that the local ordinance be based on a comprehensive plan, the courts held that all that was required was that the ordinance be comprehensive: in short, the ordinance was the plan.

The use of zoning as one tool to implement a series of articulated policies on growth was largely ignored. Of course, zoning was making planning policy of a sort. Each time a zoning change was granted or denied, unconscious policy was being made. Without a conscious planning policy such decisions were, more often than not, bound to be inconsistent, and were often unfair between applicants. The result was an accumulation of ad hoc regulatory decisions that bore little resemblance to serious planning.

There is some evidence that this helter-skelter condition is now changing. For one, state legislatures since about 1970 have begun to put some flesh on the old clause "in accordance with a comprehensive plan." In California, for example, the legislature has specified the content of a comprehensive plan, including open space, transportation policy, and a housing element.[5] Also, a number of states have clearly indicated that comprehensive planning and the zoning ordinance are not the same and that the latter must be based on and be consistent with the planning policies. Thus, in Arizona, the following is indicated:

> Each planning agency shall prepare and the legislative body of each municipality shall adopt a comprehensive, long-range general plan for the development of the municipality.[6]

Then, in a separate section, the Arizona statutes provide the following:

> All ordinances or regulations adopted under this article shall be consistent with the adopted general and specific plans of the municipality, if any, as adopted under Article 6.[7]

Some states have gone so far as to mandate communities to prepare plans. Florida laws, for example, state that "on or before July 1, 1979, each county and each municipality in this state shall prepare and adopt a comprehensive plan."[8]

And a few states have stated that zoning is permissible only after a planning process has been undertaken. In Kentucky the following prevails:

> Cities and counties which are members of a planning unit which has adopted at least the objectives of the land use plan elements may divide the territory within the area of their jurisdiction into zones.[9]

Some courts have also come to see a necessary correlation between planning and zoning, perhaps not so much because the courts view planning as a useful exercise to benefit the community but rather because the bench sees planning as a way of mitigating the unfairness that they have perceived in the zoning process.

One of the most frequently quoted judicial statements is in an opinion of the New York Court of Appeals:

> The comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more [*sic*] than just a Gallup poll.[10]

More recently an Illinois appellate court made the following observation:

> We are constrained to agree that *the failure of Cook County to plan comprehensively* for the use and development of land in its unincorporated areas, and its failure to relate its rezoning decisions to data files and plans of other related county agencies, *weaken the presumption of validity which otherwise would attach to a county zoning ordinance*.[11]

In a famous Oregon case the supreme court of that state observed:

> Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.[12]

It is reasonable to predict that with the push from the legislatures and the shove from the courts, more and more local public decision makers will begin to understand the necessary correlation between planning and zoning. This leaves unanswered the question of the relationship between those local plans and regional or statewide interests, a matter treated only briefly in this chapter but developed more intensively in Volume 2.

Relationship to subdivision regulations

It is sometimes said that while zoning generally treats of locational factors—where and how a particular private structure or use may be established—subdivision regulations concern themselves with the provision for and design of public facilities such as streets and sewers, and the layout and division of the site so as to provide protection against flooding and erosion and to ensure consistency with the development of adjacent land with respect to public facilities. Subdivision regulations also have an added purpose: to provide an orderly and simple method for effecting and recording the transfer of title to land.

This is not to say that the line between the function of zoning and that of subdivision controls is always clear. Zoning regulations deal with required lot sizes in various districts and subdivision approval usually involves the design and size of lots. Modern zoning ordinances often require a site plan review of major developments, a practice that is reminiscent of customary subdivision regulations. Some cities have adopted separate plan review ordinances. The increased use in zoning ordinances of the concept of planned unit development—a technique for the grant of development permission that departs from the customary zoning regulations—involves public review of a congeries of standards that combine both traditional zoning controls (use and bulk) and subdivision controls (street design and other public facilities). Indeed, the confusion between zoning regulations and subdivision regulations is illustrated by the risk the developer frequently runs who proposes a planned unit development. The developer may have to proceed on two local administrative tracks: zoning permission and subdivision permission. This confusion will not be resolved until a single local process for development permission is established.

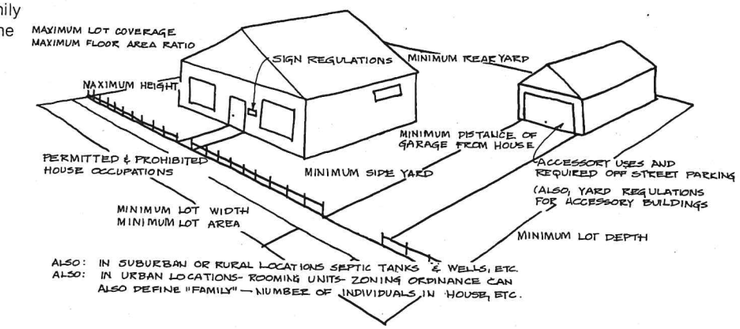

Figure 15–2 Single family house as perceived by the zoning inspector.

It is illuminating to note that subdivision regulations have encountered far less challenge in the courts than have zoning regulations. In part, this is explained because zoning is concerned with use, and use—more than the design of streets—determines land value for the landowner and most agitates those who live in the neighborhood.

Subdivision regulations have been the basis for one type of municipal regulation that has generated substantial litigation. That is the practice of requiring, as a condition of approval, that the developer–applicant agree to dedicate land for schools or parks or to make payments in lieu of dedication—which payments would be used by the community to provide such public facilities. Most courts have sustained municipal requirements of dedications or payments in lieu. These costs will, of course, be passed on to the buyers by the developer, which suggests to some commentators that those buyers are paying a double tax—that imposed on all residents of the municipality and the special cost imposed on and passed on by their seller.

Basic elements and concepts of zoning

As may be evident from what has been said thus far, a zoning ordinance consists of a text and a map or a series of maps. The text gives the substantive standards applicable to each district on the map and the procedures that govern proposals for changes in both the text and the map. The provisions of the text mean nothing to a landowner unless the landowner knows how his or her land is

classified on the map. Only by checking the map can the landowner know which sections of the text of the ordinance are applicable to his or her property.

Land use districts

In light of what has taken place in zoning in the last fifty years, it is worth noting that the first New York City zoning ordinance did not separate multifamily housing from single family housing. In the following decades no feature of zoning has remained so constant as the insulation by law of the single family detached dwelling from other types of housing. There is a multiplicity of reasons for this enduring character. Some of these reasons are related to the impact of greater densities on available public facilities, but the survival of this feature is due to the pervasive belief in this country that the single family detached dwelling deserves a protection from intrusion by other types of dwellings. The wry observation of a New Jersey court twenty years ago is not absent from public attitudes today, namely: "Apartment houses are not necessarily benign."[13]

Most zoning ordinances contain a series of residential zones—as many as a dozen in some cases—based on dwelling type, permitted density, and minimum lot sizes. (A few ordinances even distinguish among single family residential zones by house size, although this practice has come under increasing criticism from courts and commentators.) A variety of residential districts may be created, each distinguished primarily by the required minimum lot size. These lot sizes may go from a minimum of five or ten acre lots in exurban communities to 2,500 square foot lot sizes in older, more crowded cities. There will be a variety of intermediate sizes between these extremes. Minimum frontage and side and rear yards will vary accordingly. Moving up or down the scale, ordinances will also distinguish between types of multifamily zones. In one zone only single family dwelling units and duplexes will be permitted while in the next zone a larger number of dwelling units will be permitted per acre. In the ordinances of larger cities it is not unusual to find a variety of residential zones, from those permitting only a single family detached dwelling on each lot to a district where seventy dwelling units are permitted on each acre. These seemingly simple distinctions among residential districts are often interlarded with more sophisticated regulations such as those which classify residential districts not by residential type but solely by permitted densities.

Among commercial zones the early and simple classifications have also given way to a multiplicity of classifications as public decision makers and their planning consultants or staffs have perceived distinctions among commercial uses in their impact on the public interest. The past twenty years have witnessed such finely drawn distinctions as *neighborhood business, highway-oriented, central business,* and *warehouse-heavy commercial.* No one, by the way, has really solved the bugaboo of many cities—the old linear or strip commercial area, that remnant of the age of the streetcar, which is deteriorating and is packed with vacancies. This is one of the most poignant examples of the limits of zoning: a commercial classification in a zoning ordinance means little unless the market is there.

One of the most striking changes in zoning practice over the past two decades is the attitude toward the relationship between the various zones. The early ordinances generally allowed all uses permitted in the residential districts to be permitted in the commercial zones; and all uses permitted in the commercial zones were permitted in the industrial zones. This cumulative or "pour over" policy reflected the view that zoning was designed to protect the single family house from other uses, and if someone were fool enough to choose to build a house in a business or industrial district that was his own business.

More recently the conviction has grown that there is no "higher" and "lower" classification of uses; each use is entitled to be protected from threats

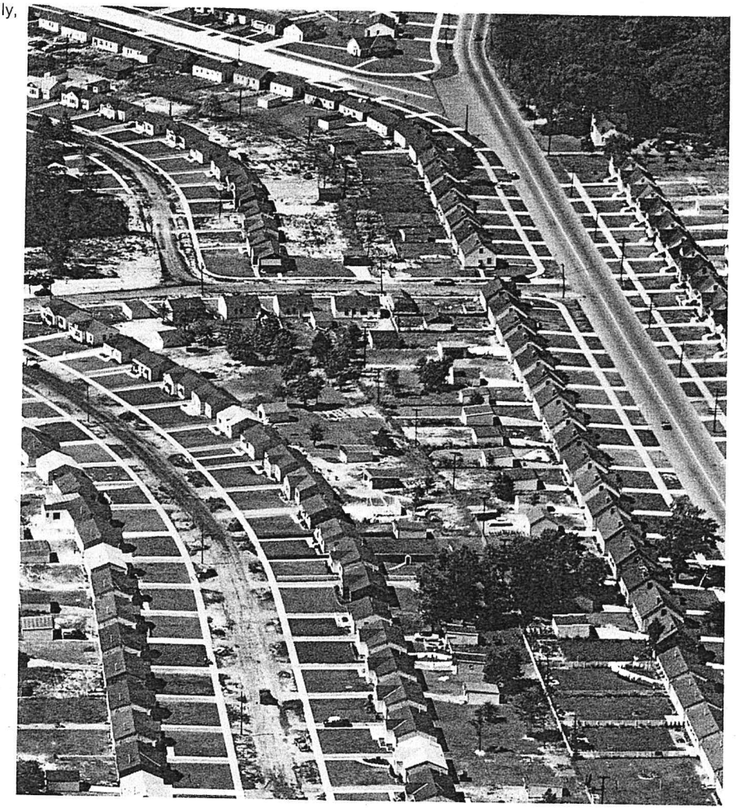

Figure 15–3 Increasingly, zoning was used after World War II to separate residential, commercial, industrial, and institutional land uses, as can be seen in this postwar residential suburban development.

to its security from the introduction of other uses. (Chambers of Commerce, for example, have concluded that allowing residences to enter industrial zones would not only encourage subdivisions that would make difficult the assembly of land for industrial development, but could also create a potential for complaints that would discourage industrial development.) From this the notion arose that each district was to be exclusive and of equal importance, a conviction that still remains but is already being modified in the face of new living styles and market demands.

Today the following question is being asked: Why, with modern technology, cannot residences, shops, and offices be located in the same building, particularly in the central business districts of our larger cities? And so we are observing the development of "vertical zones" in which, as in the case of Water Tower Place on North Michigan Avenue in Chicago, shops on the ground floor are topped by offices which, in turn, are capped by floors of condominiums. From cumulative zones, to exclusive zones, to mixed use zones—zoning has displayed a capacity to adjust to changes in the market.

Performance standards

The uncertainty and apparent vacillation that have been found in attitudes toward the rightness of segregation and the mixing of uses have reflected two de-

Provisions for site plan review and approval A. The Planning Board shall approve a preliminary or final site plan unless it makes one or more of the following written findings with respect to the proposed development:

1. The provisions for vehicular loading and unloading and parking, and for vehicular and pedestrian circulation on the site and onto adjacent public streets and ways will create hazards to safety, or will impose a significant burden upon public facilities which could be avoided by modifications in the plan.
2. The bulk, location and height of proposed buildings and structures and the proposed uses thereof will be detrimental or injurious to other private development in the neighborhood or will impose undue burdens on the public facilities, and development of the site is feasible in a manner that will avoid these detrimental and injurious results.
3. The provisions for on-site landscaping do not provide adequate protection to neighboring properties from detrimental features of the development that could be avoided by adequate landscaping.
4. The site plan fails to provide for the soil and drainage problems that development will give rise to and it is feasible to prepare a site plan that will avoid drainage and soil problems.
5. The provisions for exterior lighting create undue hazards to motorists traveling on adjacent public streets or are inadequate for the safety of occupants or users of the site or such provisions will damage the value and diminish the usability of adjacent properties.
6. An applicant for site plan approval in conjunction with a zoning amendment has failed to provide reasonable evidence of his financial capability to complete the development as planned.
7. The proposed development will impose an undue burden upon off-site sewer, water and streets, which conclusion shall be based upon a written report of the Department of Public Works on file with the Planning Board, a copy of which shall be provided the applicant, and the applicant has not submitted a reasonable alternative to relieve such burden.
8. The proposed development will create undue fire safety hazards by not providing adequate access to the site, or to the buildings on the site, for emergency vehicles. Such a conclusion shall be based upon a written report of the Fire Department on file with the Planning Board.
9. In cases where a preliminary plan has been approved, there is a substantial change in the final site plan from the approved preliminary site plan [and] such substantial change will have an adverse effect on public services, adjacent properties, or will not meet the standards provided by this Section VI.

B. All findings by the Planning Board shall be accompanied by written statements that set forth with particularity the precise reasons why the finding was made and how the deficiency could be resolved or that it is incapable of solution consistent with the applicant's objectives. Any finding that does not include such a statement shall not be entitled to a presumption of validity in any appeal from a decision of the Planning Board.

Source: Excerpted from Site Plan Ordinance, Portland, Maine.

velopments. One was an awareness that since the 1920s there had been an improvement in technology that made out-of-date old assumptions on the nuisance qualities of some commercial uses. The other development was a growing sophistication in public control over the external impacts of commercial operations that rendered obsolete old views on the offensive characteristics of some uses. A butcher shop need no longer entice rodents and flies; a paint and varnish factory could, if the owner were willing, operate without excessive odors.

The zoning literature in the 1950s suggested that the permitted uses in "light" and "heavy" industrial zones should no longer be determined by the assumed general characteristics of the particular industry, thereby relegating to the heavy industrial zone a list of necessary pariahs, beginning with *abbatoir* and ending, somewhat redundantly, with *rendering plant*. Instead it was proposed that the industrial zones be classified not by a list of uses but by performance standards: that is, by the ability of an enterprise to meet designated external characteristics. These included standards for noise, particulate matter, vibrations, glare, and fire hazard. The standards were more stringent in the light industrial zone and less severe in the heavy industrial zone. If, for example, the XYZ Paint Corporation were willing to make the investment in afterburners and other equipment designed to cut down noxious odors and particulate matter it could build in the less restrictive industrial area; its more offending competitor would be relegated to the heavy industrial zone. "It's not what you do, it's the way that you do it," became the catchword of industrial performance standards.

This was a sensible idea, but many smaller communities adopted industrial performance standards without realizing that the use of performance standards often required more costly instruments and more sophisticated staff than was available. In recent years the introduction of state and federal regulations over air and water quality has lessened the need for performance standards for industrial uses in municipal ordinances. It has come to be recognized that many offensive characteristics of industrial operations require a regulatory system that goes beyond municipal boundaries because the potential for pollution does not halt at the city's edge.

A spin-off from industrial performance standards has been the attempt in some municipal ordinances to measure the environmental impact of any large scale development and to grant or deny development permission on the basis of that impact. This has been most evident in California where the state environmental protection act has been held by the state supreme court to require an environmental impact assessment for private as well as public projects.[14]

In Minnesota, if neighbors are upset by a rezoning grant by the city council, 500 signatures on a petition are all that is needed to trigger a determination by a state agency on whether the proposed development requires a full scale environmental impact review by the state. In some communities development permission will depend on such arcane measurements as the k factor, a function of slope and soil quality. The growing interest in the use of solar energy as an energy conservation measure will undoubtedly generate new environmental standards in the name of protecting access to solar light.

The tendency of zoning to embrace the latest, and the tendency of the latest to be inserted in the zoning ordinance (for lack of a better place to put it), suggest that this fifty year old legal system is once again about to embark on an uncharted voyage. The environmental trip may be even more perilous than those that preceded it because the environmental standards are so often incapable of quantification and so full—to the lay administrator—of seemingly incomprehensible jargon. After all, it is one thing to have two land appraisers disagree about the dollar impact of a high rise on adjacent single family houses—but what do we make of two limnologists arguing the impact of two parts per billion of carbon tetrachloride on a water supply?

Density and bulk controls

Density and height have been almost as significant a purpose of zoning as use. Indeed, height regulations were established and upheld a decade before comprehensive zoning ordinances became popular. The proposed location of a high rise apartment next to a single family subdivision often caused as much (if not more) of an outcry as would a suggestion that a shopping center go up next door. From the beginning, zoning has segregated by density and height; indeed, in recent years, height controls have achieved even greater importance in the regulatory pantheon because of concern over the restriction upon views of scenic areas. (The voters in San Diego, concerned over the city council's liberality in allowing high rise developments along the ocean, imposed a height ceiling by referendum. The restriction is now in the charter where it cannot be touched by the city council.)

Closely related to density and height are equally traditional regulations over the coverage of land by buildings. This has manifested itself not only in maximum allowable lot coverage but more ubiquitously in requirements for front, side, and rear yards which may be occasion for teasing in the learned journals ("cookie cutter subdivisions") but has a place close to the house buying public's heart that has not diminished in fifty years. While there is talk of "zero lot line" zoning—a concept that proposes to do away with the alleged waste inherent in the required front yard—there is little evidence that such a new style is catching on.

An innovation of the last two decades has been the introduction of floor area ratio (FAR), a method for relating building bulk to lot area while giving the developer or architect some freedom from traditional controls over height and setbacks. If the applicable regulations allow, for example, a FAR of 2.0, a two story building may be constructed covering the entire lot, or a four story building may be built covering one-half the lot area, or any design mix may be proposed as long as the total floor area is not in excess of 200 percent of the total lot area. (The FAR may be subject to yard requirements that affect total lot coverage.)

Parking and off-street loading

All but the most rudimentary zoning ordinances impose minimum requirements for off-street parking and loading. There is not much one can say about off-street loading except that it is a necessary piece of zoning baggage in commercial and industrial zones that does not excite much attention unless overlooked, in which case its omission will result in a nasty traffic problem and, if the offending establishment abuts on a residential zone, will produce vehement protests from neighbors.

Parking requirements are a bit more delicate. Except in the single family districts, where it is assumed the driveway will take care of the overflow from the garage, the issue of how many parking spaces shall be required per dwelling unit can generate disagreement, particularly where the developer is not prepared to spend the money to construct a parking facility or put parking underground. Standards vary, sometimes from as low as one parking space per unit to as high as two and one-half spaces per unit.

Occasionally, ordinances will permit parking areas to be off site within a specified distance, and ordinances may permit required parking to locate in an adjacent and different zoning district where the use itself would not be permitted. Frequently, ordinances will permit a common parking area for two different uses, for example, a store and a church, on the theory that they will be complementary in their employment of the facility. The parking needs of churches are a source of considerable annoyance to neighbors, which may explain, in part,

why more and more churches are rebuilding on the outskirts of towns and villages where more land is available and they can, at a more reasonable cost, meet the parking requirements of the local zoning ordinance.

One of the notable twists in zoning policy in recent years has been the turnabout in parking requirements in central business districts. Until the mid-1970s off-street parking was commonly required in downtown buildings; more recent ordinances do not require off-street parking in the central business district, nor, in fact, do they prohibit it. This is a function of the desire to encourage mass transit and the role of the city as an entrepreneur in the operation of parking garages.

Signs

An entire chapter could be written on the history of the effort to regulate signs, and some of it would be quite funny. The tale of the attempt to build a rationale for control over the location of billboards goes from early claims—offered with a straight face—that they were hiding places for fornication and lurking highwaymen to more modern views that they are just downright offensive and therefore may be severely controlled if not eliminated. Billboard regulation also has its serious side. The political and economic forces behind the billboard industry are not inconsequential. Serious restrictions can affect some jobs, and attempts to regulate billboards too severely may threaten long-standing political–commercial relationships. Suggestions for regulating billboards have run from total outlawing, to mandatory clustering, to mandatory spacing. One may find almost anything one wishes to find in the zoning regulations for signs across the country.

Billboards are not, of course, the only issue regarding signs. Business signs are often a necessary service to the potential customer, and a well-designed business sign may not only serve commerce but may also improve the ambience of a commercial area. Zoning ordinances do distinguish between business and advertising signs. Most ordinances deal with the size, height, and location on the building of signs, and many ordinances regulate or prohibit flashing and moving signs. Few if any ordinances try to control the message on signs other than in residential neighborhoods where severe restrictions generally limit signs to small sizes intended to advertise the sale of a house or, when permitted, a professional office.

Signs are the most frequent object of zoning provisions that are designed to gradually eliminate (amortize) nonconforming uses, a subject discussed later.

Occasionally, sign regulation is treated separately from the zoning ordinance.

Accessory uses and home occupations

A house in a single family residential district is a principal use; a garage on the same lot would be an accessory use. An industrial plant in a manufacturing district is a principal use; the dwelling of its caretaker or security guard would be an accessory use. These are examples of accessory uses, but in some ordinances swimming pools, horse barns, and a variety of uses long identified as tributary to the principal use are permitted in the same district as the principal use. Probably the most significant purpose of the term *accessory use* is to make clear the fact that it would not be permitted in the district without the principal use to which it is an appendage. In some zoning ordinances it is forbidden to build a garage until the residence is constructed, apparently because of a concern that someone might build a garage and decide to convert it to a house rather than building the dwelling itself.

A good deal of zoning lore has grown up around home occupations. They are an exception to the protection from commercial intrusion into the single family

residential district, and the concept goes back to the earliest days of zoning. Undoubtedly, when zoning was first introduced it was recognized that many residential neighborhoods were larded with piano teachers, insurance salesmen operating out of their houses, and a hairdresser or two. It was concluded that as long as the establishment still looked like a house and the occupation remained modest in scope there was little threat to the residential character of the neighborhood. Also, the small income generated by a home occupation might be the only way to keep the house from having to be sold to someone who would try to convert it into a duplex or a boardinghouse.

Thus, the notion of limited commercial uses known as home occupations came to be accepted, and each municipality had heated debate over where to draw the line. Should the occupant be permitted or forbidden to have an employee who was not a member of the family? Or to operate any equipment not customarily found in a house? Or to advertise in the newspapers? Zoning ordinances impose a variety of regulations on "home occupations."

In an age when zoning ordinances often read like the more abstruse sections of the Internal Revenue Code, one can always turn to the definitions section and find a paragraph on "home occupations," a comforting reminder of the good old days.

Nonconformities

The early proponents of zoning were troubled by one inevitable consequence of laying a rational zoning map down on a community that was already substantially developed. The zoning districts threatened to look like Joseph's coat, as there were preexisting uses and structures within districts that did not conform to the new regulations. What should be done with them? They could be condemned and torn down—an alternative authorized in Minnesota but rarely used because of the obvious expense and some doubts as to whether such a taking would meet the "public purpose" test. They could be allowed to carry on as though there were no zoning—a sort of grandfather clause. This seemed distasteful because their expansion or increase in intensity would threaten the stability of the neighborhood that the ordinance was designed to protect.

The logical compromise was to allow these nonconforming uses and structures to remain but to circumscribe them with restrictions on expansion, to prohibit change to another nonconforming purpose and, if they were abandoned, to prevent their reopening, or should they by chance be substantially destroyed, to prevent their reconstruction or reuse except in a manner and for a purpose permitted in the district in which they were located. (This solution gave the nonconformity a certain element of monopoly, at least in a limited market—a point advanced by the opponents of zoning in one early lawsuit.)[15] The theory was that the nonconformity, hedged in as it was by restrictions, would eventually disappear. There are probably few if any reliable statistics to demonstrate that this has been the fate of nonconforming uses and other nonconformities. It is just as likely that existing nonconformities have been the excuse offered by those seeking to introduce similar developments in a neighborhood.

There is one serious legal aspect to nonconformities. The boundary lines of zoning districts must take care not to create too many nonconformities. If, for example, 70 percent of the dwellings in a single family district turn out to be duplexes, a property owner who wishes to convert his or her house into a duplex may successfully challenge the single family classification. Each time a comprehensive amendment is made to a zoning ordinance which involves a complete rewriting of the text and a redraw of district boundaries, the problem of the creation of new or additional nonconformities will arise. Substantial pressures will be exerted on the city council to leave the map as it has been; if the council does not, court challenges will undoubtedly follow.

It should be added here that a rezoning of vacant land to a more restrictive classification is not the same as the creation of a nonconforming use or other nonconformity. The practice of down-zoning has been widely followed in recent years by municipalities in an effort to correct years of overzoning for commercial or multiple family use. Parenthetically, it should be noted that there is a widespread and misplaced belief by lay persons, as well as by some lawyers who should know better, that once a vacant parcel is given a zoning classification it can never be reclassified to impose greater restrictions on development. There is no vested right in the continued enjoyment of a zoning classification unless the developer has undertaken actual improvement and often only after he or she has received a building permit.

The failure of nonconformities to disappear has led some communities to insert provisions in their ordinances to provide for the gradual amortization of nonconforming uses without compensation. For example, all nonconforming signs might be required to be removed in two or three years, all nonconforming junk yards or gas stations in four or five years, and all nonresidential buildings nonconforming because of bulk within one or two decades. Sometimes the time period is staggered depending on the assessed value of the structure. If the nonconformity is a use in an otherwise conforming building (such as a barbershop in a duplex building), the time span may be short.

Amortization has received a mixed reception in the courts, but generally this type of regulation has been sustained, particularly where the use is not very popular and the investment is not great. More often the problem with amortization provisions is that they have not been enforced; they remain unnoticed on the books—a testament to the enthusiasm of the drafters and a reminder of the reluctance of the administrators.

One final word about nonconformities is that they come in various shapes and sizes. Too often, it is customary to refer to this feature of zoning as *nonconforming uses*. There are in fact three types of nonconformities. There are nonconforming *uses* such as a liquor store in a three story walk-up located in a zone classified for apartments. There are nonconforming *structures* such as the single family house in a single family district which intrudes into the yard space that would be required if the house were to be built today. Finally, there is the nonconforming *lot,* that lot subdivided before the ordinance was adopted that has a smaller area than would now be required under the regulations applicable in the zoning district in which it is located. This last nonconformity is one of the most troublesome; the law generally requires that the owner of such a "substandard" recorded lot be permitted to build on it unless he or she happens to own an adjoining vacant lot or unless he or she created the nonconformity by conveying a part of the lot to a neighbor after the ordinance became effective.

Aesthetics

In the context of zoning regulations, *aesthetics* has usually meant controls over architectural design, the external appearance or shape of a building. No such purpose or objective was included in the purposes section of the early state enabling legislation at a time when such phrases as "avoidance of congestion in the streets" and "preservation of light and air" were representative of the public goals zoning was intended to advance. Except in such famous historical areas as the French Quarter in New Orleans and Beacon Hill in Boston, few cities sought to use the police power to impose design controls. *Aesthetics* was often a pejorative charge against various zoning regulations when a landowner wanted to protest a restriction and was hard put to find some other basis for attacking the offending regulation. To try to sustain a zoning regulation solely on the basis of aesthetics would have been a bold venture. Few courts in the early decades of zoning would have subscribed to Chief Judge Pound's dictum: "Beauty may

not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.''[16] For the most part, the courts in the early and middle epochs of zoning developed a common response to such allegations: the fact that there might be aesthetic considerations behind the regulation did not render it invalid if there were other less dubious public purposes that would be furthered by the regulation.

For many years everyone concerned with defending zoning shied away from aesthetic considerations which is why, for example, a variety of implausible fictions were concocted to justify the severe regulation of billboards when everyone knew the real motive was that they were regarded as aesthetically distasteful.

Only in the past decade have some courts ventured to justify regulation solely on the basis of aesthetics. In one delightful case the New York Court of Appeals held that an ordinance prohibiting the hanging of washing in front yards was a valid regulation and based its decision on the conviction that the ordinance did no more than regulate that which ''offends the sensibilities of the average man.''[17]

Courts in other states have upheld architectural review boards which prohibited A-frame houses in a subdivision of ranch style houses and which subjected housing projects to review for exterior colors and roof styles. Even where there is no clear authority for such architectural review such regulations flourish, and for a very good reason: only the most obstreperous of builders or landowners want to spend the time and money to litigate an issue of design. If the municipality stands firm the applicant will usually accede to the design requirements even though the applicant suspects there is no lawful basis for the regulation. That is known as municipal leverage.

Architectural controls are widespread even among suburbs not known for their sensitivity to imaginative design. The same ordinance that mandates that all shops in the business district look like Tudor England may also require that every house in a residential block vary in some aspect of its design from other houses in the same block. These ''look-alike'' and ''no-look-alike'' ordinances may come in for their knocks from commentators, but they flourish.

A more serious aspect of aesthetics arises in our larger cities where nostalgia and a desire to preserve some evidence of our past have spread west across the Alleghenies and north up the Mississippi. No longer are efforts to protect a physical record of our urban past limited to late eighteenth century enclaves. Today, early twentieth century areas of Rochester, New York, and late nineteenth century blocks in Chicago are designated as subject to architectural review, which serves to remind us that time alone may turn the ordinary into the special, particularly if we have bulldozed most of the remnants of those earlier eras.

These special architectural districts are usually under the domain of a special review board which operates independently of the local planning commission. These boards are often (and with reason) made up of residents of the special area, which leads some developers to protest that the judge is also the prosecutor. It might be more equitable to treat such boards as advocates for a point of view and to provide that the plan commission or the city council finally balance the competing interests of developer and historical area protagonists.

Open space preservation

The desire to provide for and protect open space remains an abiding American dream, even in the closing years of the twentieth century. The United States was the first country to create large national and public parks that were not the private domain of princes of wealth or birth. Its major cities contain magnificent

open areas that are testimonials to the ability of a capitalist democracy in the late nineteenth century to put amenity above profit—at least on occasion. And this interest—not solely sentimental—is evident in the struggle during the past twenty years to merge this regard for open space into a system of land use regulation when increasing land costs and greater municipal budgetary constraints have made the outright purchase of open land by the public more difficult.

Zoning was again called upon, and, again, the record is mixed.

During the 1950s a number of state courts upheld large lot zoning when persuaded that such regulations helped to preserve open space, without bothering to ask: Open space for whom? It went unnoticed that advocates of private open space often bitterly resisted proposals for regional parks out of a concern that outsiders would invade their exurban acres.

There was also the difficult task of articulating the purpose of preserving open space. Was the objective to protect prime agricultural land, to conserve sensitive ecologic areas, or to guide development in a more rational manner? Sometimes it became apparent that the police power was being stretched too far and the only lawful alternative was to condemn and pay for easements or the full fee title. And this has been done, in Suffolk County, New York, to protect the rich potato fields from being subdivided, or along the Delaware River to preserve magnificent scenic views. We occasionally need reminding that the police power—regulation—needs to be shored up with another sovereign power—the power to condemn.

It should be noted that many communities have strict regulations on development in floodplains, and in some communities there are severe controls over filling of marshlands and swamplands. Generally, recent court opinions have viewed such efforts with sympathy.[18]

Administration

After all the excitement has died down over an innovative substantive land use regulation, the heart of zoning boils down to how the local decision is made: How fair is the *process* by which permission to develop is granted or denied? For zoning is an administrative process which is unique, even given the vast proliferation of administrative agencies at all levels of government. The hallmark of zoning is the opportunity for individuals to petition for relief—to seek a change—from the general comprehensive zoning plan.

This has to be so, when the inevitability of change in the use of land is considered. Cornfields are proposed for residential subdivisions; old brownstones are sought to be demolished to make room for high rises; and a shopping center may soon be proposed on land zoned for industrial use. From the early decades of this century until today, American zoning ordinances have recognized the dynamics of land use. In response, zoning ordinances authorize, if not invite, in a manner and to an extent foreign to other municipal regulations, individual petitions for relief. There is no other system of municipal law in which the right to request a new set of rules for an individual is so dominant a feature. No building code permits a building owner to petition for relief from a requirement that all elevators have emergency brakes; no health code allows a restaurant owner to be exempt from minimum standards of cleanliness; no traffic code invites a driver to be given a ''variance'' to drive fifty miles an hour in a thirty-five miles an hour zone. Zoning, on the contrary, anticipates such petitions.

In addition, zoning, as an administrative process, is distributed among a multitude of local jurisdictions. Each municipality or county, within the broad limits established in the state enabling acts, fashions its own standards. In this way, zoning is in contrast to the laws that govern public utilities, or the laws that regulate the sale of securities which are statewide or embrace the entire nation. Finally, within each local jurisdiction there will be more than one agency em-

powered to make or influence decisions: namely, the plan commission, the board of adjustment and the city council or other local legislative body.

This disparate system, as might be expected, has come in for substantial criticism—for its casual practices and lack of a consistent administrative ethos. There is some recent evidence, however, that courts and state legislatures are seeking ways to eliminate the frequent chaos that was to be expected from such a fractured administrative process.

The traditional system

The agencies Historically, the responsibility for considering requests for changes in the applicable zoning rules was divided among three agencies: the municipal legislature, the plan commission, and the board of appeals (in some jurisdictions known as the board of adjustment). In some states a zoning commission is charged with preparing, for the consideration of the local legislature, an original zoning ordinance, and in most jurisdictions the issuance of building permits where a development meets applicable zoning laws and other municipal regulations rests with the building department. In neither of these cases is either agency directly involved in responses to requests for changes in the rules.

The local legislature The local general legislature—in all but a few jurisdictions such as Connecticut—is the agency responsible for the enactment of an amendment to the text or the map of the zoning ordinance.

The plan commission The usual role of the plan commission, under the zoning ordinance, is to hold a public hearing mandated by the state enabling act on the requested amendment, the planned unit development, or the conditional use and to make a recommendation to the local legislature, which may or may not follow the plan commission's recommendation.

The board of appeals The board of appeals, usually consisting of either five or seven persons appointed by the mayor or city council, customarily has two functions: to grant variances from the otherwise applicable rules in cases of hardship, and to hear appeals from interpretations of the ordinance in cases where, for example, the official responsible for issuing permits has denied a permit because, in his or her opinion, the proposed development is in violation of a zoning regulation.

The various kinds of changes The various kinds of changes that can be made to the zoning ordinance include: amendments, variances, and conditional uses. These are discussed immediately below.

Amendments The traditional dogma concerning amendments is that they are to be granted only where there is a showing that the amendment would be in the public interest. This is probably the source of another pervasive rule: that "spot zoning"—the granting of a rezoning that would single out a small parcel for a classification different from that of surrounding property—is invalid. In a few jurisdictions, notably Maryland, the courts have developed what is commonly known as the *change or mistake* rule. No map amendment is valid unless it can be shown that circumstances have changed in the area since the original zoning or that a mistake was made when the land was first classified.

The amendment process has had one particularly troublesome aspect in some jurisdictions. This is what is known as *conditional* or *contract* zoning. The difficulty comes about because the applicant for a rezoning often claims that if he or she is granted a map amendment to, for example, a B–3 business district from an R–1 residential district, he or she will undertake a specific use. The catch is

that, although there is no objection to the particular development the applicant proposes in the B–3 business district, there are thirty-seven other permitted uses in that district, and the city council or plan commission would not be happy if some of these other uses should become established. (The same type of problem arises when an applicant makes representations about amenities he or she intends to provide that are not required by the ordinance. Too often the development, when completed, is missing those items.) Faced with this recurring problem, some municipalities have responded by trying to bind the developer, as a part of the rezoning or amendment process, to a promise to do precisely what the developer has stated he or she will do.

The consequence is that although the zoning map appears to show that land is classified in a particular way and hence is subject only to the regulations in the text which are applicable in that district, there is a document—not a part of the zoning ordinance—that further restricts the use of the parcel. This additional restriction may take the form of a covenant in a deed, or it may be a resolution of the city council to which the applicant files a written consent, or it may be a written agreement between the municipality and the developer. Such arrangements have had mixed responses from the courts. In New York, for example, they appear to be permitted, but in Illinois the courts have for the most part regarded them as unlawful.

It should not be forgotten that in most instances in any hearing which involves a requested amendment to the zoning map the real conflict is between the applicant and the neighbors, even though, if the dispute ends up in court, it may appear that the dispute is between the applicant and the municipality.

Variances Those lawyers who first conceived and gave birth to zoning were properly concerned about the difficulties of drawing general rules over land use that would end up being applicable to innumerable pieces of property. There would be cases, for example, where a general requirement that all side yards be three feet wide would work a hardship because one or two lots might have a shape that was not consistent with the standard pattern. Therefore, the variance was included in the original zoning concept as a device to alleviate unfairness in particular cases. Permission could be granted to depart from the standard rules. In most states the legislature did not establish much in the way of guidelines for the local administrators. "Particular difficulties" and "unnecessary hardship" were generally the only standards. As might be expected, variances became a way of relaxing zoning regulations in a wholesale fashion.

The liberal practice that ensued caused some municipal councils to prohibit the grant of use variances if they could do so under the state enabling act. The prevailing attitudes of the boards of appeals toward variances have been the subject of unending criticism on the part of those who see the practice as a cross to be borne by responsible city planning, and of ongoing support from those who view the variance as a protection for the small landowner against the alleged arrogance of the technocrats.

Conditional uses Amendments and variances seemed sufficient in the first decades of zoning to take care of the need for changes in zoning regulations. Development was fairly simple in the 1920s, little development occurred during the 1930s, and during World War II zoning was generally irrelevant. With the burst of growth in the 1950s a peculiar problem became apparent: there were some uses that clearly were necessary within residential districts but for which careful scrutiny was required to ensure that they did not offend too greatly the character of the residential area. Such uses might include an electric substation, a water tower, or a heliport. Neither the amendment nor the variance process seemed to fit. Therefore, the *conditional use* or *special use* was proposed as a category that was acknowledged to be necessary but that should have a degree

of review to ensure that the design and location did not impinge too greatly upon the predominant uses in the neighborhood.

If a request for a special or conditional use was made, the plan commission (or the board of appeals) would negotiate with the applicant on various aspects of the proposed development. This was the first glimpse of a notion of licensing in zoning—of bargaining between applicant and local government. In recent years the concept of the conditional use has been greatly expanded to embrace many uses, such as gas stations, trailer parks, and halfway houses, that are believed to present problems.

More recent administrative techniques

Zoning as a legal system is like the god Janus: it looks both backward and forward. The same ordinance that contains provisions for variances that date back to 1924 will have a variety of novel administrative techniques conceived only last year. Some of these are discussed below.

The zoning administrator A very few cities, such as Los Angeles, have had an office of zoning administrator for many years. More recently this position has been created in many of the other larger cities. The office is intended to consolidate in one staff the multifaceted administration of zoning. The zoning administrator may process building permits, insofar as they involve zoning; may serve as staff to the board of appeals; and may be responsible for the publication and serving of the innumerable notices that are required at so many steps in the zoning process. In some cities, where the law permits, the zoning administrator may also be authorized to grant minor variances that are believed to be too insignificant to place on the agenda of the board of appeals. The office is one more effort to bring professionalism and rationality into the process.

The zoning hearing examiner In a few cities the zoning system is beginning to adopt a device long employed by many state and federal administrative agencies: the employment of a qualified person to hold a hearing on a request for a change, take evidence, make findings of fact, and recommend a decision to the local legislature. The office of hearing examiner has been established in such disparate places as Seattle and surrounding King County, Washington, in Indianapolis, and in Montgomery County, Maryland. The hearing examiner relieves the plan commission of the tedium of innumerable hearings, and the office greatly improves the conduct of the hearings and the quality of the findings. In places where it has been tried, the use of the hearing examiner has been well received and has not, contrary to fears in some cities, resulted in a "zoning czar."

The neighborhood zoning authority The neighborhood has received considerable attention these past ten years from sociologists, political scientists, and other students of our urban areas. It is not surprising that those who live in the neighborhoods of our larger cities have perceived zoning as one of the few municipal policies which they could understand and influence. Very often the origin of a neighborhood organization is a zoning dispute. In the offices of many urban planning departments there is a large map of the city divided into named communities or neighborhoods. The relationship between neighborhood organizations and city hall varies from warm intimacy ("We make the telephone call and run down to city hall to answer it") to downright mutual suspicion ("The neighborhoods are a pain in the neck").

Little has been done to date to delegate actual decision making in zoning to neighborhood organizations, although in Minneapolis no apartment building with more than ten units may be built without a hearing before a neighborhood

organization, and in numerous cities it is the administrative practice to refer an application for a rezoning to a community group. In Chicago an ordinance submitted by an independent alderman proposed to create zoning boards in each ward that would have the initial but not final decision on rezoning requests.

It is probable that the next decade will see the evolution of a more formal neighborhood participation in the zoning process. Zoning may not be very important in the central business districts of our larger cities, where little will stand in the way of any development, but to the residents of many neighborhoods zoning as a shield against unwanted development is regarded with the same importance as it is in many suburbs.

Innovative substantive regulations

The name of the zoning game, as was suggested earlier, is the opportunity for change, but in the early and middle years of zoning the text of the ordinance gave the appearance, at least, of rigid and inflexible districts with each use assigned to its proper place. It has only been since the later 1960s and the 1970s that the texts of many zoning ordinances have explicitly acknowledged that the municipality was prepared to bargain on the terms of permissible development. The most pervasive device to introduce outspoken flexibility has been the planned unit development, commonly known as the PUD.

Planned unit development

There are probably as many ways to define the PUD as there are drafters of PUD sections of a zoning ordinance. It may be spoken of as a way to adjust development to the particular conditions of the land or a method to ensure that there will be better design and more open space. In terms of the zoning ordinance, PUD provisions in the text provide an opportunity to develop land in a manner that does not fit into all use, bulk, and open space requirements of any of the standard zoning districts. A residential PUD—and most PUDs have involved predominantly residential development—may mix single family detached houses with town houses and possibly a high rise apartment building. Such a mix might not meet the customary standards of height, yards, or dwelling type in any district.

In most but not all cases, the PUD represents an alternative available—if granted—at the option of the developer: he or she can build in conformity with the existing regulations, can ask for an amendment to obtain a rezoning to achieve greater density, or can apply for a PUD. Generally, the provisions for a PUD will have to hold some attractions for the developer; otherwise the developer may find unpalatable the long and tortuous process of securing permission for a PUD. Such incentives might include the opportunity to obtain a few more dwelling units than would be allowable in the underlying zoning, or an opportunity to include some small retail uses in the residential development, or no more than a chance to design a development without being constrained by the rigid yard requirements prevalent in most residential zones.

It is in the nature of most PUDs to result in more common open space than would be found in standard residential developments because clustering of dwelling units, a hallmark of a PUD, leads to substantial areas not appurtenant, so to speak, to any particular dwelling unit. This requires some device to maintain the open space (which may include a recreation building for the residents), and this need usually results in the establishment by the developer of an association of the residents which assesses each resident his or her share of the cost of management of the common areas. In some municipalities the city reserves the right to enter the premises if the open space is badly kept up in order to maintain the premises and to assess each owner for the cost of municipal maintenance.

Most PUD ordinances are short on substantive standards to guide the plan commission and the council when they are considering whether to grant permission for a PUD. The ordinance will probably set forth maximum permitted densities, height and ground coverage, and permitted dwelling types. In the end, however, the decision to grant or deny a PUD is discretionary and the applicant cannot avoid the risk that a member of the commission or council may vote against the applicant's proposal simply because he or she does not like the applicant's design. Were the standards more specific, the PUD would become just another district with a series of rigid standards, and the flexibility the PUD concept was designed to introduce would disappear.

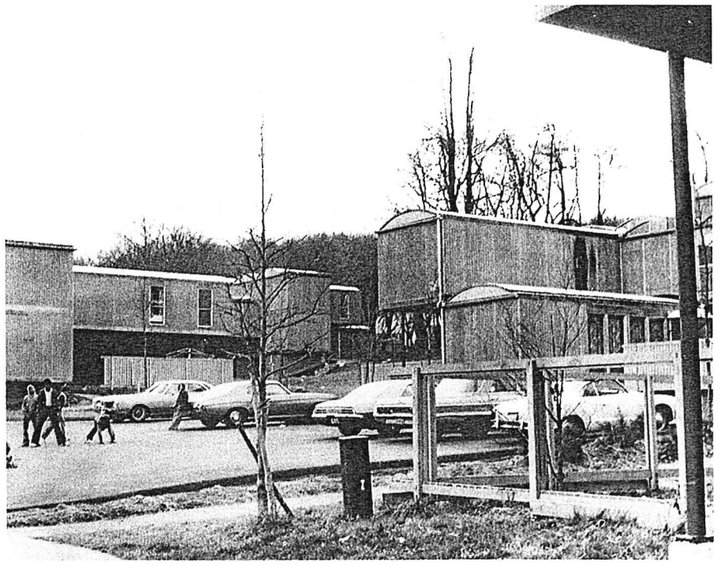

Figure 15–4 A continual and largely unresolved problem is to design good imaginative housing at low cost. Clusters of prefabs, such as Paul Rudolph's Oriental Masonic Gardens Housing Project in New Haven, Connecticut, are part of the answer.

It is feasible, however, to spell out in greater detail than has often been the case the procedural rules for processing a PUD so that both the applicant and the neighbors know the ground rules. Because delay in processing is a ubiquitous problem, some ordinances specify time frames at each step within which the commission or council must make decisions, and in such instances the ordinance will provide for presumptions of approval or disapproval if a decision is not reached within the specified time. Some ordinances, more conscientiously than others, set forth what rights are vested at each stage so that the developer knows that a decision once made will not be capriciously revoked. A few ordinances require a full written disclosure of the reasons why a particular PUD was authorized or turned down.

PUD represents a healthy departure from the old, seemingly more rigid zoning system, and PUD permits more adaptability by local ordinances to changes in the housing market. But it is necessary to remember that one person's rigidity is another person's certainty and the very flexibility of PUD requires a high degree of sophistication and a sense of fairness that has not always been present in zoning administration.

Transfer of development rights

In the early 1960s a New York developer, David Lloyd, suggested that if a community did not want development in a particular area, the community should permit the landowner to sell his or her development rights to someone who owned land in an area where the community wanted to encourage development. Lloyd's idea was largely ignored, and it was not until a decade later that a law professor, John Costonis, struggling to find a system to preserve landmarks in Chicago where there were no public funds to buy them, picked up Lloyd's idea and rationalized it. Through Costonis's articles and books, the concept of transfer of development rights (TDR) became a cause of debate among planners and others involved in land use regulation.[19]

Basically, TDR offers a person whose right to develop is restricted an opportunity to sell those rights to the owner of land in an area where the local government is prepared to allow development. TDR may be used to protect a landmark such as Grand Central Station in New York City by forbidding the demolition of the station but permitting the sale of many thousands of square feet of buildable floor space to one or more owners of land in a designated area.[20]

In New Jersey it has been proposed that the TDR concept be used to preserve open space in prime agricultural or ecologically sensitive areas by allowing landowners in those sections of the state to sell development rights to landowners in other areas where development is deemed appropriate. Of course, owners in the "transferee area" must have a market for this additional space, which means that the zoning cannot be so generous to start with that these owners have no incentive to purchase the rights. If there are no buyers, TDR will remain an academic exercise, appealing in learned journals but of little value in the marketplace.

At the very least, TDR must be accompanied by severe down-zoning—cutting back of allowable densities or floor area ratios from those that have prevailed in most jurisdictions for so many years. TDR has not been widely adopted, but it suggests one method for introducing quantitative controls into zoning, a step that is necessary and is probably inevitable as well.

Special districts

With the exception of historic districts, zoning has traditionally treated all zoning classifications as fungible by permitted use, bulk, and yard requirements. By that it is meant that it was assumed that every one of the many areas of the city that was zoned, for example, R–1, R–3, or M–1, was similar to every other similarly zoned district. In fact, many neighborhoods in our larger cities have characteristics that are unique or problems that are special but such would not be apparent from a study of the text of the zoning ordinance; every R–2 district was assumed to be similar, if the zoning ordinance was to be believed. There was another difficulty, caused by the traditional division of the municipality by the trilogy of residential, commercial, and industrial. Such classification did not adequately deal with the problems raised by large institutional uses such as hospitals and universities.

Therefore, the special district was conceived. In many cities hospital zones or university zones were created either as overlay districts, put down on top of the basic zoning districts, or as regular zoning districts. In these special zones provision was made for the needs of the institutional use, and an attempt was made to anticipate its impact on the neighborhood. The goal was to try to avoid the con-

stant bickering between the institution and its neighbors occasioned by repeated requests for changes in the traditional zoning regulations.

The other reason for the creation of special districts is more exotic. Zoning ordinances in a few cities have begun to single out specific areas for special treatment, because an area perceived that it was threatened by a particular market force, because the rest of the community wished to contain an offensive development, or because a neighborhood believed special treatment under the zoning ordinance would preserve a particular character.

The most notorious special district is the Adult Entertainment Zone in Boston, a dubious attempt to contain commercial sex. The so-called Boston Combat Zone purports to restrict pornography to a designated area, in contrast to the Detroit method that seeks to scatter these uses by the old technique of imposing minimum distances between each such use. New York City has raised the special district to an art. New York has special districts for almost any purpose: for example, the Clinton area, which protects a moderate income neighborhood from the threat of commercial encroachment; or the Little Italy district, which, by special use and bulk controls, hopes to preserve an ethnic area; or the Greenwich Street district, which sought to induce developers to provide off-site public facilities or amenities.

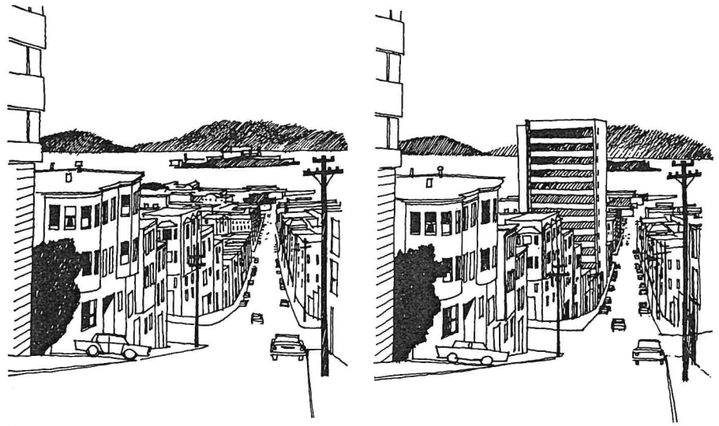

Figure 15–5 These drawings of San Francisco show that a tall building at the top of a hill (left) allows for an unobstructed view down the street and beyond, while a tall building on the slope severely restricts the view from above.

Special districts are probably the wave of the future in big city zoning. The system may impose intolerable administrative burdens on the staff, and the concept may not be everything that special district advocates believe it is, but, as with many schemes, what is *believed* to be important may be more significant than what actually takes place. And special zoning districts do provide a sense of place to the residents that was absent from most zoning policy, at least in the big cities. The technique also acknowledges that in our larger cities it is not feasible to construct a land use regulatory system that ignores the social and economic diversities of the multitudinous residential and commercial areas.

Exclusionary zoning

Twenty years ago almost no one saw zoning regulations as a device that operated to keep persons with low and moderate incomes out of a municipality.

Today many suburbs are being charged with using the zoning and subdivision ordinances, consciously or unconsciously, for just that purpose.

It is probable that the change was due in part to the escalation in housing and land costs, and the growing sensitivity in the late 1950s and the 1960s to a variety of discriminatory practices against minority groups. Some persons and organizations suddenly discovered zoning as another significant occasion for discrimination on the basis of race or economic class. The potential had been evident for many years in such not uncommon practices as minimum large lot or minimum house size requirements, or exceptionally severe subdivision standards, or a total prohibition against mobile homes. Zoning in suburban areas was discovered as a source of social injustice.

Inclusionary zoning Many scholars and critics have noted the negative effects of zoning on the economic feasibility of low and moderate income housing. In response to this problem a number of local governments include language in zoning ordinances that requires a private developer to provide a certain number or ratio of low and moderate income housing units within a proposed development.

Fairfax County, Virginia, requires that developments of fifteen multifamily units or more contain not less than 6 percent low income dwelling units and not less than an additional 9 percent of dwelling units for moderate income families. The ordinance provides a density bonus whereby one additional conventional unit will be allowed for every two low or moderate income units, provided that the density increase does not exceed 20 percent.

In Montgomery County, Maryland, all developments of fifty or more dwelling units are required to have not less than 15 percent moderately priced units. This requirement is increased to 20 percent for special planned-neighborhood or new town zones. A density bonus similar to the one in Fairfax County is also used. In addition, other incentives are provided to a developer by reducing yard and parking requirements and permitting increased height limits. In addition, duplexes and town houses are permitted in single family districts.

Los Angeles requires that all multifamily, condominium, and cooperative developments of five units or more contain not less than 6 percent low income units and not less than an additional 9 percent moderate income units. However, no further incentives or density bonuses are provided.

Source: Abstracted from Herbert M. Franklin, David Falk, and Arthur J. Levin, *In-Zoning: A Guide for Policy Makers on Inclusionary Land Use Programs* (Washington, D.C.: Potomac Institute, 1974), pp. 140–41.

The first judicial articulation of this concern was in 1962 by Justice Frederick Hall of the New Jersey Supreme Court in his dissent in *Vickers* v. *Township of Gloucester*.[21] In that case the zoning ordinance excluded mobile homes from the entire township. A majority of the New Jersey court held that a municipality could legally so zone. Judge Hall struck a note that forecast a debate that still goes on today and probably will continue.

> Certainly general welfare does not automatically mean whatever the municipality says it does, regardless of who is hurt and how much. . . . [T]he . . . general welfare transcends the artificial limits of political subdivisions and cannot embrace merely narrow local desires.[22]

Since the *Vickers* dissent, the top courts of Pennsylvania[23] and New York[24] have said that regional housing needs are an important consideration in determining the validity of suburban zoning ordinances, and even the California Supreme Court, a bench with a tradition of sympathy to municipal land use regula-

tions, has sent back to the trial court an alleged restrictive zoning system in the city of Livermore for a determination whether or not the zoning scheme has an adverse impact on housing in the city and in the region of which Livermore is a part.[25]

The most widely reported case, however, was the decision in 1975 of the New Jersey Supreme Court in *Southern Burlington County NAACP* v. *Township of Mount Laurel,*[26] and it was fitting and to be expected that the opinion was written by Justice Hall, shortly before he retired from the court.

In that opinion the court held that the whole scheme of the Mount Laurel zoning ordinance operated to exclude the poor, the young, the old, and minorities, and was invalid under the New Jersey constitution. Even more significantly, the court said that its decision was intended to apply to all "developing communities" in New Jersey and that Mount Laurel should redraft its ordinance in a manner that would correct those aspects the court regarded as exclusionary.

Of course, the *Mount Laurel* decision does not settle the matter, even in New Jersey. In more recent lawsuits arguments are arising over whether a particular township is a "developing" community, and other New Jersey municipalities are insisting that their ordinances do not operate to exclude in the manner of Mount Laurel.[27] The New Jersey legislature has not undertaken to implement the *Mount Laurel* decision with any revisions to the zoning enabling legislation,

Zoning—from the neighborhood point of view Dealing with zoning ordinances is very trying. It affects everybody over a wide area. It affects the value of their property, which is what people consider the last bastion of their rights. Usually rezoning takes a lot of time and causes friction and a lot of trouble. Many neighborhood plans involve zoning trouble; in fact, many times zoning is what neighborhoods want. Neighborhoods want us to pay attention to getting the zoning fixed up so that apartments cannot come in. Then they want us to get the traffic off the streets, and they would also, incidentally, like to have the dogs stop barking.

Source: Excerpted from Ernest Bonner, "Portland: The Problems and Promise of Growth," in *Personality, Politics, and Planning: How City Planners Work,* ed. Anthony James Catanese and W. Paul Farmer (Beverly Hills, Calif.: Sage Publications, 1978), p. 147.

and the governor of New Jersey decided not to put into effect guidelines prepared by the state department of community affairs for low and moderate income housing allocations for all New Jersey counties. Guidelines of a sort were released in May 1978, but there were no discernible results as of 1979.

It is very difficult for courts to oversee abuses in a system as fractionated as municipal zoning, particularly where the system involves the use of land with its innumerable variations in circumstances. Nevertheless, these few state courts are compelling the municipalities in those states to rethink their traditional assumptions about their responsibility—or lack of responsibility—to those who live in their region but outside their municipal boundaries. We have not heard the last of this issue in the state courts. We probably have, however, heard the last of exclusionary zoning in the federal courts.

In the 1950s and 1960s school desegregation and legislative reapportionment were viewed by many organizations as necessary reforms to be achieved through the federal courts. In the early 1970s the land use practices of suburban communities came to be regarded by some advocates as a similar cause of social and economic discrimination. And to some organizations and lawyers it seemed logical that the attack on exclusionary zoning should also be mounted in the federal rather than the state courts. From their point of view the results of this

choice have been disastrous, and, from the view of any student of zoning, they have been predictable.

Between 1928 and 1974 the U.S. Supreme Court refused to hear a single zoning case. During the same period more than 10,000 reported zoning decisions were handed down, nearly all of them by state courts. Then, in the early years of the 1970s, zoning cases began to appear in the federal courts, most of them charging that local zoning regulations were exclusionary and in violation of one or more provisions of the federal Constitution.

Between 1974 and 1977 the U.S. Supreme Court decided four cases which involved allegations of exclusion. In one case the Court narrowly limited the parties who had standing to complain about local zoning regulations,[28] and in the other three cases the Court upheld the municipality. In one the complaint was that the definition of *family* operated to exclude persons not related by blood or marriage from living together, but the Court, in an opinion written by Justice Douglas, upheld the definition.[29] In the second case a provision of municipal charter that required a referendum on every zoning change was held not to violate the Fourteenth Amendment.[30] In the third a refusal to rezone to permit a racially mixed housing project was upheld against constitutional attack because there was no proof that the municipal decision makers were motivated by racial bias.[31]

Lower federal courts have been no more sympathetic to critics of alleged municipal exclusion. They have appeared to hold that unless race is an issue and unless the persons injured are residents of the municipality, there is no basis for invalidating the municipal regulations under the federal constitution.[32] The contrast in these federal decisions with the rationales in the state court opinions could not be more striking.

In 1976, Justice William Brennan of the United States Supreme Court cautioned members of the New Jersey bar in the following words:

> I suggest to the bar that although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise state constitutional questions.[33]

The significance of these messages stems from two features of our federal system. First, the supreme court of the state is the final arbiter of that state's constitution; its opinion on the meaning of its state constitution cannot be reviewed by the U.S. Supreme Court, a constitutional imperative well understood by Justice Hall when he based the *Mount Laurel* decision solely on the New Jersey constitution. Second, where there are provisions in a state constitution that are counterparts to provisions in the federal Constitution (such as the due process and equal protection clauses), the state court is not bound by opinions of the U.S. Supreme Court which interpret that provision in identical circumstances. The California Supreme Court made the following statement in a criminal case:

> We declare that [the decision to the contrary of the U.S. Supreme Court] is not persuasive authority in any state prosecution in California. . . . We pause to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.[34]

It may be expected that, to the extent that there is an ongoing resort to the courts in disputes concerning exclusionary zoning, the selected forum from now on will be the state courts, not the federal judiciary.

This chapter should not end without an acknowledgment that some suburban communities are, on their own initiative, seeking ways of encouraging moderate and low income housing within their boundaries; that a few state governments are making efforts to pressure communities to relax their rigid standards;

and that some metropolitan areas are trying to obtain intermunicipal compacts to allocate shares of low and moderate income housing among the constituent municipalities. In one instance a New Jersey municipality, under that state's liberal variance authority, employed the variance technique to permit subsidized housing where it probably would not have authorized the same increase in density for market housing.

Occasionally, a community will adopt a policy of granting permission for additional dwelling units if the developer includes some subsidized units. Fairfax County, Virginia, tried unsuccessfully to compel a percentage of subsidized housing in any development involving more than fifty dwelling units, but the Virginia Supreme Court invalidated the provision.[35]

There has been little activity on the part of the executive or legislative branches of state government to stimulate communities to revise their land use ordinances to provide greater opportunities for lower cost housing. Massachusetts has a so-called anti-snob zoning act under which a developer whose proposal for subsidized housing is turned down by the locality can take an appeal to a state administrative agency which may, subject to the guidelines set by the state law, compel the issuance of development permission. The Pennsylvania department of community affairs has refused a request from an affluent Pittsburgh suburb for funds for open space acquisition on the grounds that the municipality's zoning ordinance is exclusionary. The authority of the department to base a denial of funds on those grounds is now before the Pennsylvania Supreme Court.

The California legislature has mandated that municipalities must prepare comprehensive plans and that those plans must include a housing element. The state department responsible for administering the legislation has issued tentative guidelines which speak of the need for local housing plans to take into consideration the housing needs of the region.

A few metropolitan areas have tried to arrange fair share proposals. The Dayton, Ohio, plan has been widely publicized—but the cutoff of most federal funds for subsidized housing has not permitted an adequate test of the effectiveness of such voluntary pacts. Some regional planning agencies which have the authority under the A-95 program to review municipal requests for funds under numerous federal programs have begun to question the appropriateness of such requests, for example, for open space or sewer improvements if the municipal applicant is dragging its feet on the question of low and moderate income housing.

A concluding observation is that although zoning practices do contribute to the difficulties of locating reasonably priced housing near jobs in many suburbs, escalating land costs, high interest rates, local real estate tax policies, and federal housing policy—or lack of it—all contribute to this serious crisis.

Conclusion

Zoning has been discussed in this chapter from the standpoint of its history, legal basis, planning context, basic elements, and administration. The importance of the legal context has been emphasized, along with the relationship of zoning to both comprehensive planning and subdivision regulations. The section on basic elements includes land use districts, performance standards, density and bulk controls, parking, signs, accessory uses, nonconformities, and aesthetic considerations. The last sections of the chapter are concerned with administration—both traditional and innovative—and with innovative regulations and, finally, with the subject of exclusionary zoning and its implications for the future.

One subject that is not taken up here is that of local land use controls and state and regional planning. This will be discussed extensively in Volume 2.

At this point a historical comment seems appropriate. For the first forty years of zoning the locus of power was in each municipality or county, and it was assumed that no municipality had to pay much heed to the impact of its land use policies on other communities. As has been observed above, this appears to be changing, not only because some courts are calling for regional considerations but also because the environmental era has generated an awareness that many practices which damage the ecology cannot be dealt with by each municipality. (State environmental regulations, however, rarely related directly to housing policies.) Finally, it is worth noting that for the first time since 1922 there is a model land development code, published by the American Law Institute in 1976.[36] Article 7 of that model clearly provides for a sharing of responsibility between municipalities and the state over the implementation of land use policy. Perhaps that model will have the same influence on state policy that was enjoyed by its ancestor in 1922.

1 *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).
2 One account states that a majority of the Court had initially voted to sustain the district court which had invalidated zoning: "Justice Sutherland, for instance, was writing an opinion for the majority in *Village of Euclid* v. *Ambler Realty Co.*, holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, I believe) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld." McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946).
3 *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928).
4 1 N. Williams, Jr., AMERICAN LAND PLANNING LAW, Ch. 6 (1974).
5 CAL. CODE ANN., Government Code, Title 7, Art. 5, § 65300.
6 ARIZ. REV. STAT. ANN. § 9–461.05 (Supp. 1975).
7 *Id.* § 9–462.01 E.
8 Fla. Session Laws, Ch. 75–257, § 4(2) (West. 1975).
9 KEN. REV. STAT., Ch. 100, § 100.201 (1971).
10 *Udell* v. *Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893, 894 (1968).
11 *Forestview Homeowners Ass'n., Inc.*, v. *County of Cook*, 18 Ill. App. 3d 230, 243, 309 N.E.2d 763, 773 (1974). (Emphasis added.)
12 *Fasano* v. *Board of County Commissioners of Washington County*, 264 Ore. 574, 582, 507 P.2d 23, 27 (1973).
13 *Fanale* v. *Borough of Hasbrouk Heights*, 26 N.J. 320, 325, 139 A.2d 749, 952 (1958).
14 *Friends of Mammoth* v. *Board of Supervisors of Mono County*, 104 CAL. RPTR. 16, 500 P.2d 1360 (1972).
15 *City of Aurora* v. *Burns*, 319 Ill. 84, 149 N.E. 784 (1925).
16 *Perlmutter* v. *Greene*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932).
17 *People* v. *Stover*, 12 N.Y.2d 462, 191 N.E.2d 272 (1963).
18 *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972); *Turnpike Realty Co., Inc.* v. *Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972).
19 Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973).
20 *Penn Central Transportation Co.* v. *City of New York*, 98 Sup. Ct. 2646 (1978)
21 *Vickers* v. *Township of Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962).
22 *Id.* at 243 and 145.
23 *National Land & Investment Co.* v. *Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 756 (1970).
24 *Berenson* v. *Town of New Castle*, 38 N.Y. 2d 102, 378 N.Y.S.2d 672 (1975).
25 *Associated Homebuilders of the Greater Eastbay, Inc.* v. *City of Livermore*, S.F. 23222, Supreme Court of California, December 17, 1976.
26 *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 67 N.J. 161, 336 A.2d 713 (1975).
27 *Pascack Association, Ltd.* v. *Mayor & Council of Washington Township*, 379 A.2d (1977).
28 *Warth* v. *Seldin*, 422 U.S. 490 (1975).
29 *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).
30 *City of Eastlake* v. *Forest City Enterprises*, 96 S. Ct. 2358 (1976).
31 *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
32 *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. den.* 401 U.S. 1010 (1971); *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291 (9th Cir., 1970); *United States* V. *City of Black Jack*, 508 F.2d 1179 (8th Cir., 1974). *Cf. Construction Industry Ass'n of Sonoma County* v. *City of Petaluma*, 522 F.2d 897 (9th Cir., 1975), *cert. den.* 424 U.S. 934 (1976).
33 Brennan, *Developments in Constitutional Law*, 99 N.J.L.J. 473 (June 3, 1976).
34 *People* v. *Disbrow*, 127 CAL. RPTR. 360, 545 P.2d 272 (1976).
35 *Board of County Supervisors of Fairfax County* v. *DeGroff Enterprise*, 214 Va. 235, 198 S.E.2d 600 (1973).
36 American Law Institute, A MODEL LAND DEVELOPMENT CODE (1976).