Chapter 6

PUBLIC CONTROL OF LAND USE

Section 1. INTRODUCTION

[p*1013] The variety of legislative and administrative law curbing an owner's freedom to do as he would please with a plot of land is, today, immense and increasing exponentially. Any attempt to list some of the more important examples would quickly get out of hand: air and water pollution standards, noise ordinances, licensing provisions, sanitation codes, zoning codes, subdivision regulations, housing and building codes, tax policies, public programs of land acquisition for highways, housing and urban renewal. With time and imagination, one could go on for pages. All that we undertake here is a quick look at a few of the tools employed by public bodies to shape the pattern and tempo of land development and redevelopment within their jurisdictions—to influence what is done where and when. In that quick look, however, we shall attempt to identify some of the fundamental issues of land use control which recur throughout the full catalogue of ordinances, codes, and programs.

A major division, both practical and legal, separates controls which take the form of regulation from those which employ government ownership. While the focus here is on regulation, we shall try, from time to time, to draw attention to the relationship between these two modes of control. They are often alternative ways of attaining the same object, but not always; there are situations in which courts will hold a bit of regulation invalid, making it quite clear that condemnation would be appropriate.

Because of the strong ties, historical and conceptual, between the major regulatory devices and nuisance law, we shall deal with them first.

Section 2. PUBLIC NUISANCE

TOWN OF PREBLE v. SONG MOUNTAIN, INC.
Supreme Court of New York, Cortland County
62 Misc.2d 353, 308 N.Y.S.2d 1001 (1970)

LEE, J. The plaintiff Town of Preble seeks judgment in this action against the defendants "enjoining them from in any manner promoting or conducting any open air band concert, rock festival or similar event at the premises occupied by the defendant corporation or elsewhere in the Town of Preble". . . . [p*1014]

The plaintiff's complaint alleges that the defendant Song Mountain, Inc. owns and occupies land in the Town of Preble, and did own and occupy land in the town prior to the enactment of a

zoning ordinance which "became effective on the 7th day of July, 1966 and is still in full force and effect"; that the property, "located within a district designated by said ordinance and set forth on said map [Town of Preble Zoning Ordinance District Map] as an agricultural and residential district", has and is being used as a ski center, restaurant and for other recreational activities; that the use of the property "does not conform to any of the uses permitted by said ordinance to be conducted in an agricultural and residential district and is a 'non-conforming use' as defined in said Zoning Ordinance"; that, "upon information and belief", the defendants "intend to conduct one or more open-air band concerts commonly known as 'rock festivals' at said premises at which at least 30,000 persons are expected to attend within twelve hours", and alleges that the concerts or festivals "would constitute a menace to the public health, safety and welfare of the residents of the Town of Preble, would constitute an unlawful extension and enlargement of a non-conforming use of the premises occupied by the defendant corporation", and "would constitute both a public and a private nuisance and would otherwise violate federal, state and local laws and ordinances." The individual defendants are "officers, agents and employees of the defendant, Song Mountain, Inc." . . .

The questions for determination in this action [properly raised by defendant's answer] are: 1. Whether the Zoning Ordinance of the Town of Preble "was enacted in accordance with law". Is it a valid ordinance? 2. If the ordinance is a valid one, will the proposed open-air concert or festival "constitute an unlawful extension and enlargement of a nonconforming use of the premises occupied by the defendant corporation?" 3. If the ordinance was properly enacted, and is a valid ordinance, does it "deprive defendant Song Mountain, Inc. of its property without due process of law", or "deny defendants the equal protection of the laws, all in violation of the Constitutions of the United States and of the State of New York?" 4. Does the proposed concert or festival constitute a nuisance?

The ordinance in question here, and similar laws and regulations, must find their justification in some aspect of the police power, asserted for public welfare, as zoning ordinance restrictions on the use of private property are in derogation of the common-law right of the owner of realty to use his property as he pleases.

The Constitution of the State of New York (art. IX, § 2, subd.[c], par.[ii], subpar.[10]) empowers local governments, including towns, to enact local laws relating to the "government, protection, order, conduct, safety, health and well-being of persons and property". The Municipal Home Rule Law, (§ 10, subd.1, par.[ii], subpar.a, cl.[11] [now cl.12]), authorizes towns and other municipalities to adopt laws relating to the "protection, order, conduct, safety, health and well-being of persons or property" within the town. The enabling legislation by which the Legislature has delegated to the towns the power to enact zoning regulations is set forth in article 16 of the Town Law. The defendants assert that the zoning ordinance "is inoperative and void"; and the burden of proof on the issue of the validity of the ordinance rests with the defendants; the burden of proof rests with the defendants to overcome the presumption that the ordinance is valid.

Article 16 of the Town Law, in addition to including the enabling sections, comprehensively prescribes the procedure and substantive requirements for zoning property in a town, and provides in section 266 that the board may not pass a zoning ordinance until it first appoints a zoning [p*1015] commission which must hold hearings and make a preliminary report before the Town Board may act. The defendants argue: That no zoning commission was duly appointed; that no preliminary report was made; that no public hearing on a preliminary report was held; that no final report was filed with the Town Board by a zoning commission; that the purported zoning ordinance was not a part of a comprehensive plan, and was not properly published and posted, and that the purported zoning map is incomplete on its face and "inconsistent with the text of the purported zoning ordinance."

Section 271 of the Town Law authorizes but does not require the appointment of a planning board. Section 266 of the Town Law provides that a planning board may be appointed as the zoning commission. Though the terms "planning board" and "zoning commission" were frequently used interchangeably by witnesses when testifying upon the trial, there is satisfactory proof that a zoning commission was, indeed, appointed on January 4, 1966, by the Preble Town Board, and the court so finds.

The Zoning Commission met weekly and their meetings were open to the public. There was published in a newspaper on May 28, 1966, a notice of a public hearing to be held on June 9, 1966, by the Zoning Commission "for the purpose of presenting and reviewing the regulations of the proposed zoning ordinance and the various districts laid out on the proposed map as recommended by the Zoning Commission." . . . Whether a hearing was held on June 9, 1966 is uncertain as there was no record of such a meeting available and no witness could recall the meeting. However, there was testimony by one of plaintiff's witnesses that no report was submitted to the Town Board by the Zoning Commission until the night of July 7, 1966, the date the ordinance was adopted; while there was other testimony, by the Town Clerk, that there was a special meeting of the Town Board on June 21, 1966 to examine the "Planning Board's" proposal, and to set a date for a public hearing. A notice of "a public hearing upon a proposed zoning ordinance" to "be held * * * on the 7th day of July, 166 [sic] at 7:30 p.m." was published in a newspaper on June 23, 1966. After the public hearing on July 7, 1966 there was a special meeting of the Town Board at which the Zoning Commission made their final report. The final report was in the form of a proposed zoning ordinance, 18 pages upon which is typed the proposed ordinance, not signed by any member of the Zoning Commission, but which was presented to the Town Board with an oral report that the proposed ordinance was what had been arrived at. The ordinance was adopted on July 7, 1966, by the Town Board as presented, and was published in a newspaper on July 9, 1966. . . .

The ordinance . . . in article III, "Section 3—Establishment of Districts" under the heading "Districts", provides:

"For the purpose of this ordinance the Town of Preble is hereby divided into five (5) types of districts as follows:

"Residence Districts
"Camp and Cottage Districts
"Business Districts
"Agricultural Districts
"Industrial Districts

"Said Districts are set forth on the map accompanying this ordinance, entitled Zoning Map, dated July 7, 1966 and signed by the Town Clerk. This [p*1016] map and all explanatory matter thereon is hereby made a part of this ordinance."

In the ordinance, "Section 4—District boundaries", reference is made to "the various districts as shown on the Zoning Map", and states that "the boundary line shall be determined by the use of the scale of the Zoning Map", and there are other references to "the Zoning Map". The zoning map referred to is approximately four and one-half by three feet in size. . . . On the map there is written in ink "Zoning Map", and this was written on the map "recently", within the past few months. The map, "taken from original Cortland County survey 1853", in the lower left corner has a red line approximately one inch long, to the right of which is printed "Residential District", and below that is a blue line of approximately the same length, to the right of which is printed "Industrial District". No other legend or "explanatory matter" appears on the map. The map is signed by the Town Clerk, however, her title does not appear with the signature and the date "July 7, 1966". Though the ordinance refers to "Agricultural Districts", and the plaintiff's

complaint alleges that the property of "defendant corporation is located within a district designated by said ordinance and set forth on said map as an agricultural and residential district", there is no legend for nor reference to "Agricultural Districts" on the "Zoning Map". There are many numbers printed on the map about which only one witness, one of the plaintiff's witnesses, the Supervisor, was asked to explain, and the witness did not know and was unable to state what the numbers indicate. . . . The numbers referred to . . . may well have significance to members of the Preble Fire Department as the map has printed on it "Town of Preble Fire Department", and it was in the town hall or hung in the Fire Department before it was used as a zoning map, and has been in the fire hall "most of the time" since July 7, 1966, unfolded and on display. It should also be noted that the roads in the area of the premises of the defendant Song Mountain, Inc. are marked with red pencil, "Residential District".

Generally, procedures set forth in zoning statutes must be strictly adhered to; however, it has long been established that only a "departure, in substance, from the formula prescribed by law vitiates the proceedings." [Citations omitted.]

The enabling statute applicable to towns, section 263 of the Town Law, requires that zoning regulations be in accordance with a comprehensive plan. It is pointed out in Zoning Law and Practice in New York State, by Professor Robert M. Anderson (§ 5.02 in part): "The notion that zoning regulations should be imposed only in accordance with a comprehensive plan is founded on the basic premise that zoning is a means rather than an end. The legitimate function of a zoning regulation is to implement a plan for the future development of the community. This was the aim of zoning regulation as it was conceived by its earliest proponents, and it remains as the modern justification of such regulation."

A "master plan" is not required, and whether a plan may be submitted orally need not be discussed, however, it is noted that zoning regulations should implement planning. [Citation omitted.]

The defendants have sustained their burden of proof that there was no comprehensive planning by the Zoning Commission and that the regulations were not "made in accordance with a comprehensive plan", and the court so finds.

The official map, too large for the Town Clerk's bulletin board, but which was hung and displayed in her office at her home during the process [p*1017] of publication, and to which reference is made in the ordinance, was not entered "into a book . . . known as the 'ordinance book'." (Town Law, § 30.) Nor was a copy of the zoning ordinance "entered in the minutes of the town board" as the statute, section 264 of the Town Law, requires. [Citations omitted.] A map and ordinance must necessarily be prepared and written in broad terms; however, on the map in question the districts are not "set forth", as recited in the ordinance. The court finds that the statutory requirements, the minimal requirements, were not met in adopting the zoning regulations, and because of the several omissions and defects, which are more than mere irregularities, the court is constrained to conclude that the zoning ordinance at issue is invalid, void and not binding on defendants.

Whether the outdoor concert or festival that defendants propose to conduct will be "an unlawful extension and enlargement of a non-conforming use of the premises" or merely an increase in the volume of defendants' business need not and, under the circumstances, is not reached or passed upon. . . .

[This is true as well of] the issues pertaining to the constitutionality of the zoning ordinance . . . .

The plaintiff's complaint alleges, as noted, "that the proposed rock festival would constitute both a public and a private nuisance and would otherwise violate federal, state and local laws and ordinances." The complaint further alleges "that by reason of the premises the plaintiff and its

residents are in danger of suffering irreparable damage for which they have no adequate remedy at law."

There is no substantial dispute as to the material facts relating to this aspect of the controversy. Before noting or discussing the facts relating to the open-air concert or festival that defendants propose to conduct, however, it should be noted that, generally speaking, a public nuisance is an act which interferes "with the rights of the general public in the vicinity to the quiet enjoyment of life and property", and is defined as any act or omission "which obstructs or causes damage to the public in the exercise of rights common to all." (*New York Trap Rock Corp*. v. *Town of Clarkstown*, 299 N.Y. 77, 80, 81; see, also, Prosser, Torts [3d ed.], p. 605.) "If the danger threatens the public, the nuisance is classified as common; private, if it threatens one person or a few." (*Khoury* v. *County of Saratoga*, 243 App.Div. 195, 199, affd. 267 N.Y. 384.) In either instance, both public and private nuisances, substantial interference with the interest involved must be demonstrated.

Whether any particular act, activity, event or business constitutes a nuisance cannot be determined by any fixed general rules, but depends upon the facts of each case. In considering whether or not an activity, event or business is a nuisance the location and surroundings must be considered with the other circumstances, as an activity carried on under some circumstances, in a particular location and surroundings, may be reasonable and appropriate and not subject to being enjoined, while, on the other hand, the same activity, in another location and in other surroundings, though an innocent act in itself, might very well be inappropriate and subject to being enjoined by a court of equity. "A nuisance may be merely a right thing in the wrong place" (*Euclid* v. *Ambler Co*., 272 U.S. 365, 388).

The premises of the defendant Song Mountain, Inc., located in the Town of Preble, a rural area, consists of approximately 386, "roughly 400", acres of land on which there are buildings, and on which equipment and machinery used in the business carried on there are kept. Most of the land used by defendants is owned by the defendant corporation, except a small area, "in [p*1018] the neighborhood of 15, 20 acres", or "40 to 45" acres on the top of the mountain, where part of a ski lift is located, which is leased with an option to purchase. The premises are on the south side of a county road referred to as the Song Lake Otisco Road, except for about 30 acres, on which there is a small house referred to as "the chalet", north of that county road. Much of the area is wooded, estimated on trial to be "between 250 and 300" acres wooded, and on the slopes of the mountain there are ski trails used in the ski operation. The larger buildings used in connection with the defendants' business are located at the base or the foot of the mountain. There was considerable testimony during the trial as to the property, and the property was viewed by the court in the presence of counsel. One building referred to as a "lodge" is a two-story building with "probably 10,000 feet of space which is used for the lodge for the customers of Song Mountain", and there are a cafeteria, bar and ski schools in the building. Another building, about 2,500 square feet, is used as a private ski club. There is another building, about 3,000 square feet, in which equipment and machinery are kept, and there are "various lift houses and so on that house the machinery that run the lifts."

. . . During the winter months the premises are used primarily for skiing purposes. On Friday nights during the past several years, "three years at least", music has been furnished on the premises by rock bands or rock groups. At times the bands or groups have entertained the customers or patrons while playing inside the "lodge" and the music was piped outdoors. On other occasions the groups played outdoors, on the porch. On Saturday nights for the past "four or five years" Dixieland bands have entertained the patrons or customers. During the off-season, when there are no ski activities, there have been clambakes, picnics, luncheons, parties and other affairs conducted on the premises.

The premises on which Song Mountain, Inc., conducts its business is located in the northern part of the Town of Preble, Cortland County, approximately 500 to 1,000 feet, as estimated by one of the witnesses during the trial, from the Onondaga County line, southwest of the Village of Tully. The population of the Town of Preble is now "around 1,200" and was 969 at the time of the last census. There are several lakes in the area, including Song Lake, Tully Lake, Crooked Lake and Green Lake. On Song Lake, the nearest to the defendants' premises, about a half mile from the premises, there are "at least 50" cottages and houses, some of which are occupied the year-round, and there are other houses occupied the year-round in the area of Song Mountain. Access to the area is by county roads, the Song Lake Otisco Road having pavement 16 feet wide and shoulders of 2 feet, and also by using State highways, including Interstate Highway 81. On a "normal ski weekend", from Friday noon through Sunday, about 7,500 to 10,000 people are at Song Mountain, and on some days about 3,000 to 3,500 people are there. The largest crowd that has been in attendance was about 10,000 people who attended ski races on the premises. The parking lot on the premises "will handle about a thousand cars", or "hold about 1200 cars." Except for some fencing for cattle, there is no fence around the property.

The defendants propose to conduct on May 23 of this year an open-air concert and would hire a "name band" to entertain those in attendance, and would also have "five or six lesser name bands." The period of entertainment originally considered was from noon to midnight and was, after conferences, discussions and meetings, shortened, though not definitely decided, to "run it from 2:00 o'clock in the afternoon to 10:00 o'clock at night with major emphasis of music over at 9:00 o'clock and some rock group to [p*1019] entertain the group as they left the premises . . . [and] would run the name band around 7:00 o'clock in the evening and the name band would play for 40 minutes."

The defendants "thought that 30,000 people would be a satisfactory enterprise". A "survey" by defendants indicated that "subject to the quality of the entertainment [they] might get anywhere from 5,000 to 50,000 or 60,000, if the entertainment was a caliber that would attract this number of people—because [they] have been thinking on the basis of 30,000."

During the trial of this matter, "Woodstock" was frequently mentioned, referring, of course, to the Woodstock Festival at Bethel, New York, during the past year, . . . where an estimated 400,000 to 450,000 persons attended a music festival. The testimony demonstrated, however, that there are numerous dissimilarities between "Woodstock" and the concert or festival that defendants propose to conduct, *e.g.*, the number of name bands; the quality of the talent; the time the concert would be held; the length of the program, and other differences. Each case must, in any event, as noted, be determined upon its own facts.

The defendants' plans for the concert or festival proposed to be held on May 23 include the sale of tickets in advance; the tickets would include the admission fee and, if the ticket purchaser desired transportation to and from the site in a chartered bus or shuttle-bus to be furnished by the defendants, "a round-trip bus ticket" could be purchased. Parking facilities for automobiles would be provided in an area two or three miles from the site, and buses would be available to transport to the site, the defendants' premises, those persons going to the concert by auto. The defendants' plans include having "between 175 to 200" acres near Routes 81 and 281, between Tully and Preble, available for parking. "Fifty acres hold about 7,500 to 10,000 cars." Parking on the premises would not be permitted, except for those in charge of or performing some duty or task in connection with the enterprise. Several roads in the area, including a State highway, would be closed off by barricades at 12 or 13 key points; they would be "limited access" roads, open only to those who live in the area. The food and beverages for the patrons would be provided at tents on the north side of the Song Lake Otisco Road, across the county road from the area where the entertainment would be provided; fresh water would be provided on the premises; portable chemical toilets to accommodate a gathering of 60,000 people would be available. The testimony

was that the age group of those that would attend the concert "runs from 16 to 25 * * * primarily college students and anybody else in this age bracket." There was also undisputed testimony that the college enrollment in the "area of about 60 miles of Song Mountain" is approximately or "slightly less than 100,000." The defendant corporation would employ 100 to 125 persons for the purpose of "internal security." The "internal security" personnel would include "thirty people to man the road barriers" and "another seventy people * * * in cars to patrol the area" within a three-mile radius.

The plaintiff's counsel notes in a memorandum submitted that the proposed concert would not permit through traffic on State Highway 281 between the Hamlet of Preble and the Village of Tully, a distance of about five miles, and urges, among other things, that: "Users of this much traveled highway [State Highway No. 281] would be required to detour a distance of two miles out of their way to U.S. 11. Travelers on 281 would not have access to the Preble interchange of Interstate Route 81 but would have to detour by way of U.S. 11 as indicated to get upon Interstate 81 at Tully. Farmers taking their milk or other produce to market and the residents of the [p*1020] area would be interfered with in leaving the area to shop, go to church or travel for other purposes."

The court recognizes that the defendants have important property rights in the use of the premises owned by the defendant corporation, as others do in their property, and the court will not deny the equal protection of the law to them; however, it should be noted and made clear that the other property owners and residents in the Town of Preble, and in the Town of Tully, in the area around defendants' premises, have rights which must also be respected. . . . In balancing the equities there must be considered the rights and the interests of the defendants in conducting the proposed event, on the one hand, and, on the other hand, the serious consequences of permitting the defendants to conduct the proposed event in the particular surroundings and location they have chosen; the inconvenience and danger imposed upon the community by having important roads and highway blocked with crowds of people; the potential drain upon hospital personnel and facilities; the potential drain upon medical personnel and upon Sheriffs' personnel, of men needed throughout the counties for the performance of their regular duties. The potential for harm to the community, the public, far outweighs any good which might be derived from such an event.

The court concludes and finds that the proposed open-air concert or festival that defendants propose to conduct on May 23 would, if conducted, interfere substantially with the rights of the general public in the vicinity, and would obstruct the exercise of rights common to all, and should be enjoined.

The plaintiff seeks judgment enjoining defendants "from in any manner promoting or conducting any open-air band concert, rock festival or similar event at the premises". However, bands, both rock and Dixieland, have been engaged at the premises for several years, playing indoors with the music piped outdoors and playing outdoors, and, of course, it may not be said, nor is it urged, that such entertainment is in anyway involved in this action, nor that it should be enjoined. During the trial some effort was made to define "rock festival", but no definition or description of what is or what is not considered a "rock festival" was offered, though the term was frequently used. "Festival" could be defined, and "rock" could be defined, loosely, but "rock festival" was not. Absent any satisfactory definition or description, understood by all concerned, clearly informative as to what might be enjoined, the court should not enjoin "any open-air band concert, rock festival or similar event", though the concert or festival that defendants propose to conduct on May 23, 1970 in the Town of Preble should be enjoined. . . .

Notes and Questions

The concept of "public nuisance" is even more amorphous than that of its cousin "private." In part this can be blamed on the many uses made of the term. [This proposition is demonstrated in DKM3, pp. 1020–27, but that is all that you need to know for purposes of this course.]

Section 3. ZONING—AN INTRODUCTION

NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 199–201 (1968)

[p*1027] *Prezoning . . .*

In 1867 the first New York tenement legislation was enacted, a year after the city health department had been established. The 1867 law slightly restricted the tenement's lot coverage, and further legislation in 1879 and 1901 reduced coverage to 65 percent. Within a few years, New Jersey, Pennsylvania and Connecticut passed comparable laws, and between 1905 and 1908, Chicago, Boston, and Cleveland adopted similar ordinances.

Other cities were restricting building heights and land use in the interests of public health and safety. San Francisco and Los Angeles passed ordinances in the 1880's limiting the location of laundries. In 1889 height restrictions were placed on buildings in Washington, D.C. In Boston, height regulations were enacted in 1903 and upheld by the U. S. Supreme Court in 1909 as a valid exercise of the police power.[1] Fire district ordinances, prohibiting the building of wooden structures in designated areas, were also becoming increasingly common.

The park planners, meanwhile, were pressing for other public action to improve the quality of urban environment. The crusade for parks took hold [p*1028] after 1860. The Columbian Exposition of 1893 stimulated the "city beautiful" movement that was to produce such influential plans as the Senate Park Commission's replanning of Washington in 1901 and Burnham's Chicago plan of 1909.

Zoning grew up against the background of these developments—and out of the efforts of property owners to prevent unwanted change of their neighborhoods. In 1907, a group of Fifth Avenue merchants banded together to try to protect the fashionable shopping district from encroachment by the new factories of garment manufacturers. The Fifth Avenue Association joined forces with city planning advocates to bring about the establishment of the Advisory Commission on Height and Arrangement of Buildings, which in turn laid the foundation for the drafting and adoption of the New York zoning resolution. That resolution, adopted in July 1916, set the basic pattern for zoning ordinances to the present day.[2]

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[1] *Welch* v. *Swasey*, 214 U.S. 91 (1909). An earlier effort to control height in Boston through use of the eminent domain power was upheld in *Attorney General* v. *Williams*, 55 N.E. 77 (1899), *aff'd*, 188 U.S. 491 (1908). The Massachusetts court indicated by way of dicta that the police power could be used to limit building heights.

[2] Los Angeles had in fact "zoned" its entire area in one way or another by 1915. The city was divided into one large residence district in which only the very lightest manufacturing was permitted; 27 industrial districts, permitting all uses; and about 100 residence exception districts permitting all but heavy and objectionable uses.

The spread of zoning

Zoning spread quickly during the 1920's. By 1925, 368 municipalities had passed ordinances; and by the end of 1930, more than 1,000.

State enabling legislation, giving municipalities specific authority to zone, became common during the 1920's. This State action was substantially aided by the Federal Government. In 1921, Herbert Hoover, then Secretary of Commerce, appointed an Advisory Committee on Zoning in the Department of Commerce. In 1924, the Committee issued the Standard State Zoning Enabling Act, a model upon which a great deal of State zoning legislation is still based. By 1925, 19 States had adopted statutes substantially similar to the model. By the end of 1930, some or all localities in every State were legally empowered to adopt zoning ordinances.

The reaction of the courts was a central preoccupation of zoning's founders, and early judicial response in the State courts was mixed. Constitutional doubt about the concept of zoning was settled in 1926, however, when the Supreme Court of the United States decided the landmark case of *Village of Euclid* v. *Ambler Realty Co*[, *infra*, p. S489].

U. S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926)

SEC. 1. Grant of Power.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

SEC. 2. Districts.—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building [p*1029] throughout each district, but the regulations in one district may differ from those in other districts.

SEC. 3. Purposes in View.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

SEC. 4. Method of Procedure.—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

SEC. 5. Changes.—Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 percent or more either of the area of the lots included in

such proposed change, or of those immediately adjacent in the rear thereof extending feet therefrom, or of those directly opposite thereto extending feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

SEC. 6. Zoning Commission.—In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city planning commission already exists, it may be appointed as the zoning commission.

SEC. 7. Board of Adjustment.—-Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act, may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

The board of adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after a public hearing. Vacancies [p*1030] shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken, and with the board of adjustment, a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board of adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

3. To authorize, upon appeal in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

In exercising the above-mentioned powers, such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or may modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken. [p*1031]

The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board. . . .

SEC. 8. Enforcement and Remedies.—The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

Notes and Questions

1. This model proved to be not only a quick success but durable. Zoning enabling acts now exist in all fifty states, and in most the resemblance to the Standard Act remains strong. With time, of course, tension has grown between what communities have sought to do and this framework, now over a half century old. Increasing numbers of states have responded by altering the framework, but even in the newer comprehensive planning codes the mark of the Standard Act adheres. The Report of the President's Commission on Housing in 1982 voiced new concerns about the contribution of zoning to the dearth of affordable housing in the United States. The Commission suggested that zoning enabling acts should be revised so that development of housing could be stopped only when a "vital or pressing" government interest is at stake. REPORT

OF THE PRESIDENT'S COMM'N ON HOUSING 200 (1982). Some commentators expressed doubts as to the wisdom of the proposal. *See, e.g,* Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH.U.J.URB. & CONTEMP.L. 5 (1986). One, however, drafted a model zoning enabling act incorporating this standard, see Kmiec, *Implementing the Recommendations of the President's Commission on Housing—A Proposal for a New Zoning Enabling Act*, 9 ZONING & PLANNING L.REP. 1 (1986). To date no state seems to have taken up the challenge.

2. At this point it might be useful to go back to a part of the *Song Mountain* decision that we have as yet ignored. The New York court held the Preble zoning ordinance invalid, in part, because it was not "made in accordance [p*1032] with a comprehensive plan." What precisely does that mean? Would the failure be fatal under the Standard Act?

The court says some things on this score which may well have puzzled you. For example, it explains that a "master plan" is not required but that zoning should implement planning. The term "master plan" comes from the Standard City Planning Enabling Act, another product of the Department of Commerce, first issued in 1928. This legislation authorized local units of government to establish planning commissions with "the function and duty . . . to make and adopt a master plan for the physical development of the municipality."

While nearly all who have addressed the question, including the draftsmen of the Standard City Planning Enabling Act, have taken the view that zoning ought properly to be tied to the planning process and perhaps a "master plan," the courts which have been forced to construe the language found in section 3 of the Standard Zoning Enabling Act have been equally strong in the view that it does not require a community to have a planning commission, engage in the creation of a master plan, or have such a document as a precondition to adoption of a zoning ordinance. Sequence almost compels such a conclusion. Issuance of the Standard State Zoning Enabling Act preceded publication of the Standard City Planning Enabling Act by a number of years. The latter clearly recognized that in most states planning enabling legislation would be enacted after communities had already been authorized to zone, and this was the case.

Local governments have acted accordingly. In the mid-fifties Professor Haar calculated that roughly half the communities with zoning had no "master plan". Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV.L.REV. 1154, 1157 (1955). Today, no doubt, the percentage would be much higher. But the point is that, given this history, courts have, understandably, refused to construe the requirement that a zoning ordinance "be in accordance with a comprehensive plan" as an insistence that the community have a master plan or that the zoning ordinance conform to it. Enabling acts in a few states deviate from the Standard Act and insist the zoning follow creation of a master plan and conform to it. *See, e.g.*, Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); NEV.REV.STAT. § 278.250 (1981). A somewhat different issue is presented in those jurisdictions that do not require a master plan but where the local government has adopted one. *Compare* Giger v. City of Omaha, 232 Neb. 676, 442 N.W.2d 182 (1989) (city may allow a large development project that could not have been foreseen at the time master plan was drawn up, when project was compatible with surrounding area) *with* Machado v. Musgrove, 519 So.2d 629 (Fla.1988) (any inconsistency between a proposed change and the master plan requires strict judicial scrutiny, leading to invalidity in this case). In the absence of a master plan, the words "in accordance with a comprehensive plan" in the Standard Act have come to mean little more than that the ordinance must comply with the fourteenth amendment and its state counterparts. *See, e.g.*, Speakman v. Mayor & Council, 8 N.J. 250, 256, 84 A.2d 715, 718 (1951) ("The specific requirement of a 'comprehensive plan' is intended to avoid an arbitrary, unreasonable, or capricious exercise of the zoning power."); Haar, *supra*. As such it has on occasion been held to say something about the process leading up to adoption of an

ordinance, its geographic scope, the validity of a particular amendment, the soundness of a particular classification and so on.

There is, of course, an entire literature on the planning process, its techniques, scope, and proper relationship to authoritative public land use decisions. For an introduction to the subject, outline of the major controversies, and [p*1033] starting bibliography, see D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 1–38 (2d ed.1986).

3. In 1975, the American Law Institute adopted a Model Land Development Code, with hopes it would prove as influential as the two standard acts. Drafting the code proved to be an enormous task, taking over ten years. *See* MODEL LAND DEV.CODE (1975). While the model code has not yet had significant legislative acceptance, it has had some impact on the courts. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

VILLAGE OF EUCLID v. AMBLER REALTY CO.

Supreme Court of the United States
272 U.S. 365 (1926)

SUTHERLAND, J. The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farm lands or unimproved acreage. . . .

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds, and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theaters and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle [p*1034] repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or

motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper, and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble-minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4, or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2, and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories, or thirty-five feet; in class H-2, to four stories, or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards, and advertising signs. . . .

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theaters, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height, and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts. . . .

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations [p*1035] or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement [citation omitted].

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the

market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that propective buyers of land for industrial, commercial, and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial, and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is, or may be, a demand for any part of appellee's land for any of the lastnamed uses; and we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class. . . .

A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a [p*1036] present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. [Citations omitted.]

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?"

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as

applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim '*sic utere tuo ut alienum non laedas*,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis* v. *Bridgeman*, L.R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. [Citation omitted.]

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area [p*1037] which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey*, 214 U.S. 91; [further citations omitted].

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. [Citations omitted.] The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. . . . Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but [p*1038] those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. . . .

The decisions [supporting the broader view] agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on. . . .

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to

take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [Citations omitted.] [p*1039]

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. . . .

The relief sought here is . . . an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more or the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them. . . .

Decree reversed.

VAN DEVANTER, J., MCREYNOLDS, J., and BUTLER, J., dissent.

Notes and Questions

1. Before the Supreme Court upheld a typical zoning ordinance in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), it had already upheld quite a variety of local land use

regulations, but only the sort of narrow extensions of public nuisance doctrine considered above in connection with *Song Mountain*. *See, e.g.*, Welch v. Swasey, 214 U.S. 91 (1900) (height limits). Despite this authority, a fair number of the state courts which had, by 1926, heard challenges to zoning declared such ordinances unconstitutional. *See, e.g.*, Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925); State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 158 N.W. 1017 (1916). *See generally*, Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP.PROB. 199, 200–03 (1955).

Whatever their earlier views, the state courts fell quickly into line with *Euclid*. By 1930, zoning was legislatively authorized and judicially tolerated in nearly all the states. *See* BUILDING THE AMERICAN CITY, *supra*, p. S485.

We mentioned earlier that one of the more fundamental questions to be pondered in this section is the extent to which regulation and exercise of the [p*1040] power of eminent domain are alternative techniques of land use control. The point can be picked up here. Before *Euclid*, a few states in which zoning had met with actual or threatened judicial disfavor set up similar schemes employing the technique of condemnation. Local governments were given authority to create residential districts by condemning restrictive covenants. To see how such a system might work *see* MINN.STAT.ANN. §§ 462.12–.17 (West 1991). Some cities apparently still have districts controlled in this fashion. *See* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo.1969). *See generally* Annot., 41 A.L.R.3d 636 (1972). Where this is true, there is by now an overlay of conventional zoning. Confirmation of the exercise of the police power put a quick end to experimentation with such use of condemnation.

2. Nearly as important as *Euclid* is a decision that followed two years later, Nectow v. City of Cambridge, 277 U.S. 183 (1928). *Euclid* established the constitutionality of some of the dominant features of the typical zoning ordinance. *Nectow* established the possibility that a valid ordinance might be held unconstitutional in some aspect, or as it affected an individual plot.

Having launched this proposition, the Supreme Court left it almost completely to the states to give it life. Between *Nectow* and the mid-1970's, the Supreme Court, with but a few exceptions, stayed away from cases challenging zoning or other local land use regulations on fourteenth amendment grounds. In nearly all those that it took it upheld the ordinance. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (regulation that, in effect, required the closing of plaintiff's quarry for safety reasons sustained, even though it rendered the land, for all practical purposes, worthless). Beginning in the mid-1970's the cases have increased in number, and the results are more mixed. *Compare, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977), discussed *infra*, pp. S518–520. For a long period, then, and even today, a landowner seeking to escape the command of a zoning ordinance is more likely to get a hearing in a state court than in a federal, and the landowner's suit in state court has been successful often enough, at least in some states, that it continues to be an active avenue of appeal. *See* p. S500 *infra*.

3. The district judge characterized Euclid's ordinance as a strait-jacket for 16 square miles of undeveloped land. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D.Ohio 1924). It has hardly proven to be that. What does it tell you about the reasonableness of the districts challenged by Ambler Realty and the efficacy of zoning in general that:

(a) heavy industrial growth has occurred between the tracks of the Nickel Plate and New York Central railroads;

(b) the property once owned by Ambler Realty is now owned by General Motors, occupied by the Fisher Body Euclid Plant, and, of course, zoned "industrial"?

See C. HAAR, LAND USE PLANNING 190 (4th ed.1989).

Section 4. REASONABLE MEANS, LEGITIMATE PURPOSES

PIERRO v. BAXENDALE
Supreme Court of New Jersey
20 N.J. 17, 118 A.2d 401 (1955)

JACOBS, J. In 1939 Palisades Park adopted a zoning ordinance which divided the borough into residential, business and industrial districts. District AA was generally restricted to one- and two-family dwellings and [p*1041] District A to one- and two-family dwellings and apartment houses. Hotels and motels were not expressly permitted in Districts AA and A although "boarding and rooming houses" (and other limited uses not pertinent here) were expressly permitted. The ordinance defined a boarding house as "any dwelling in which more than six persons not related to the owner or occupant by blood or marriage are lodged and boarded for compensation"; it defined a rooming house as "any dwelling where furnished rooms are rented to more than six persons for compensation, provided however, the lodging of relatives, by blood or marriage, of the owner or occupant of such dwelling shall not come within these terms."

The plaintiffs are the owners of land located within residential District A. On May 19, 1954 they applied to the building inspector of the borough for a permit to erect a 27–unit motel on their land but the application was denied; no administrative appeal from the denial was taken by the plaintiffs nor did they ever seek a variance under N.J.S.A. 40:55–39. On May 25, 1954 the borough adopted a supplemental zoning ordinance which expressly prohibited the construction within Palisades Park of "motels, motor courts, motor lodges, motor hotels, tourist camps, tourist courts, and structures of similar character intended for similar use." On May 28, 1954 the plaintiffs filed a complaint in the Law Division seeking a judgment directing the issuance of a permit to them in accordance with their application to the building inspector and setting aside the supplemental ordinance. . . .

On February 10, 1955 the matter came on for trial before the Law Division but no oral testimony was taken; instead, the parties in open court entered into a short stipulation on which the judgment ultimately entered must rest. The stipulation set forth that the Borough of Palisades Park is approximately a mile square and is located about a mile and a half south (west) of the George Washington Bridge; it is a residential community composed principally of one-family homes and "is zoned percentagewise as follows: 80 percent for residential purposes, 9 percent for business purposes, 3 percent for light industry, and 8 percent for heavy industry, which area lies solely west of the Northern Railroad tracks"; there are no motels in Palisades Park but there are motels in the Borough of Fort Lee (which lies immediately to the north (east) thereof) and in other nearby communities; the plaintiffs' property is located on Temple Terrace in a residential area "and on the same block, or immediately adjacent to the property, there is a two-family house with considerable shrub area immediately adjacent to it," and "on the opposite side of Temple Terrace there is a large ranch type house presently being built"; "both sides of (nearby) Sunset Place have been built up with one-family residences, many of them within the last 4 or 5 years"; and "another large ranch type home is being built on East Edsal Boulevard near the property in question." In answer to an interrogatory submitted by the plaintiffs, the Borough of Palisades Park stated that it had issued 19 tavern licenses and 12 licenses for the sale of alcoholic beverages for off-premises consumption; apparently all of these establishments are in the business district.

After considering the arguments and briefs of counsel the trial judge expressed the view that "a motel is a rooming house" and that there is no "fair and reasonable discrimination between a motel as a rooming house and some other type of rooming house"; he therefore concluded that the supplementary ordinance was invalid and that the plaintiffs were entitled to a building permit for the erection of a motel on their property in residential District A, provided its manner of

construction was in conformity with the [p*1042] borough's building requirements; he entered final judgment to that effect and the defendants duly served and filed their notice of appeal . . . .

The plaintiffs do not attack the validity of the 1939 ordinance which placed their property in a residential zone. And in the absence of an affirmative showing of unreasonableness they admittedly could not attack the right of the borough to exclude all private business operations, including boarding and rooming houses, hotels, motels and tourist camps, from the residential zones within the borough. [Citations omitted.] They do, however, deny the borough's right to permit boarding and rooming houses in residential zones and at the same time exclude motels therefrom; as we view the terms of the 1939 ordinance the borough contemplated the exclusion of hotels, motels and similar businesses from the residential zones without, nevertheless, curbing the right of dwelling house owners or occupants to use their premises for boarding and rooming house purposes. If this classification by the borough has no reasonable basis then it must fall as the plaintiffs contend; if, on the other hand, it has reasonable basis then it may be permitted to stand and serve to exclude the operation of a motel in a residential zone as proposed by the plaintiffs. . . . [L]egislative bodies may make such classifications as they deem necessary and as long as their classifications are based upon reasonable grounds "so as not to be arbitrary or capricious" they will not be upset by the courts. . . .

. . . [I]t seems clear to us that motels may without difficulty be differentiated from boarding and rooming houses. Motels are business institutions which cater to members of the general public and by and large are obliged to serve them indiscriminately. As such business institutions they possess, in substantial degree, the attributes which have led to the exclusion of businesses generally from residential zones. On the other hand, boarding and rooming houses may select guests with care and are admittedly "less public in character." [Citation omitted.] They are located in buildings which have the outward appearances of private dwelling houses and their commercial features and incidents are insignificant when compared to those of motels. . . .

The officials of Palisades Park viewed boarding and rooming houses as being consistent with residential areas and motels as being inconsistent therewith; it seems clear to us that their views may not be said to be wholly without reasonable basis and that the lower court's conclusion to the contrary was erroneous. It must always be remembered that the duty of selecting particular uses which are congruous in residential zones was vested by the Legislature in the municipal officials rather than in the courts. Once the selections were made and duly embodied in the comprehensive zoning ordinance of 1939 they became presumptively valid and they are not to be nullified except upon an affirmative showing that the action taken by the municipal officials was unreasonable, arbitrary or capricious. [Citations omitted.] No such showing was made in the instant matter and, consequently, the plaintiffs were not legally entitled to the building permit which they requested for the construction of a motel in a residential zone.

The judgment entered in the lower court not only directed the issuance of the building permit but also set aside the supplemental ordinance enacted on May 25, 1954. In support of this action the plaintiffs have advanced the far-reaching contention that no municipality in the State has power to exclude motels from all zoning districts within its territorial limits and that the supplemental ordinance must, therefore, be deemed void on its face. . . . [p*1043]

The environmental characteristics of many of our beautiful residential communities are such that the establishment and operation of motels therein would be highly incongruous and would seriously impair existing property values. We know of no sound reason why such communities may not, as part of their comprehensive zoning, reasonably exclude such enterprises. On the other hand, there are many communities which are so constituted and located that they could not properly advance any sound objections to motels within their borders; although such communities may not entirely exclude them, they may reasonably confine them to compatible districts. In the instant matter the parties have not given us any oral testimony with respect to the characteristics

of Palisades Park and its surrounding territory, nor have they suggested that we take judicial notice thereof. They have told us in their short stipulation that the borough is mostly residential with part of its territory zoned for business and industrial purposes, but we know little or nothing about the nature of its residences or the nature of its businesses and industries or the need for additional motel facilities in the general area. The burden of the attack by the plaintiffs has not been directed against the supplemental ordinance in its particular application to the evidence before the lower court; instead their contention has consistently been that the supplemental ordinance is void on its face and should therefore be stricken without more, and that they are entitled to construct and operate their proposed motel within an area which has long been zoned for residential purposes. This contention has been rejected by us in both of its aspects. . . .

Reversed.

HEHER, J. (dissenting). . . .

By the supplement to the zoning ordinance adopted May 25, 1954, "motels, motor courts, motor lodges, motor hotels, tourist camps, tourist courts, and structures of a similar character intended for a similar use, by whatever name the same may be called, whether one or more stories in height," are forbidden within the borough.

The preamble to this local legislative act recites that the mayor and council deemed such uses "contrary to the best interests of the people of the Borough." Conceding that motels "as such are admittedly not immoral per se," it is said in argument that it is the "expressed conviction" of the mayor and council that "such structures offer great temptation to the conduct of immoral actions" and the design of the supplement was to "remove such temptation," and to avoid the "potential evils" attending on occasion the operation of such facilities, unfavorable publicity and police action, and "For such valid and legitimate purposes as motels may serve the traveling public, accommodations may be had in the neighboring municipalities of Fort Lee, or in other communities nearby," thus acknowledging a legitimate public need that must be denied because lax operation of such facilities gives rise to police problems of supervision, a "burden" to be borne by the neighboring communities.

But this community-wide interdiction evinces, I would suggest, a basic misconception of the philosophy of zoning and the constitutional and statutory zoning process. The supplement is *ultra vires* the local municipal corporation. . . .

The essence of zoning, we have so often said, is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division. Due process demands that the exercise of the power shall not be unreasonable, arbitrary or capricious, and the means selected for the fulfillment of [p*1044] the policy shall bear a real and substantial relation to that end. There must be a rational relation between the regulation and the service of the common welfare in an area within the reach of the police power. . . .

. . . [I]t is generally recognized that in the nature of the business and the accommodations furnished, there is no substantial difference between motels or bungalow courts and hotels or multiple dwellings. Zoning ordinances permitting the operation of hotels or multiple dwellings in certain areas have been held to apply with equal force to the maintenance of motels or bungalow courts. [Citation omitted.]

Here, my brethren say: "(A)s we view the terms of the 1939 ordinance the Borough contemplated the exclusion of hotels, motels and similar businesses from the residential zones without, nevertheless, curbing the right of dwelling house owners or occupants to use their premises for boarding and rooming house purposes"; and "If this classification by the Borough has no reasonable basis then it must fall as the plaintiffs content: * * *."

But in District A . . . "multiple family dwellings," "group houses" and "garden-type apartments" are permissible uses, and "boarding and rooming houses," as well.

It cannot be that motels are beyond effective regulation. They are now in general use throughout the country, providing in many areas reasonably priced, comfortable living facilities on a par with hotel service, in keeping with the highest standards of conduct—in many cases serving a distinct public need. [Citations omitted.] The fact that there are occasional operational faults and lapses does not justify the complete suppression of the use as a public nuisance, or otherwise a peremptory requirement in the essential public interest; there is no showing here that such is the case. [Citation omitted.] If and when the need arises, the police power may be exerted to supply the remedy. . . .

. . . [H]ere we have, by the supplement to the ordinance, not a regulation, but rather a prohibition of the motel use throughout the community, in a residence zone by express provision open to multiple-family dwellings, group houses, garden-type apartments, and boarding and rooming houses, and in the business and industrial zones as well; and so, I submit, the rule of the supplement is utterly unreasonable, arbitrary and discriminatory, at odds with the constitutional and statutory zoning policy and violative of the basic standards of due process and equal protection. . . . There is in all this no distinction of substance reasonably related to any of the constitutional and statutory considerations to be served by zoning; the classification is illusive and unreal. [Citations omitted.]

I would affirm the judgment.

OLIPHANT and BURLING, JJ., join in this opinion.

Notes and Questions

1. The sort of challenge resolved in the instant case falls somewhere between Ambler Realty's attack on an entire ordinance and Nectow's concentration upon an individual lot and the appropriateness of its zoning designation. *See* note 2, p. S495 *supra*.

A suburban community, fragment of a large metropolitan area, enacts a zoning ordinance containing a large district A in which it permits:

(a) most types and sizes of single family residences but not mobile homes (*see, e.g.*, Cole v. City of Osceola, 179 N.W.2d 524 (Iowa 1970); *cf.* Vickers v. [p*1045] Township Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962)); or

(b) a wide range of commercial uses but not "drive-in establishments" (*see, e.g.*, Fogg v. City of South Miami, 183 So.2d 219 (Fla.Dist.Ct.App.1966); Frost v. Village of Glenn Ellyn, 30 111.2d 241, 195 N.E.2d 616 (1964));

(c) a wide range of commercial uses but not gas stations (*see, e.g.*, Beaver Gasoline Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501 (1971), *infra* p. 502); or

(d) commercial or industrial uses but not residences (*see, e.g.*, People ex rel. Skokie Town House Builders v. Village of Morton Grove, 16 Ill.2d 183, 157 N.E.2d 33 (1959)); or

(e) a home doctor's office as a "home occupation," but not a home beauty parlor or a home pet shop (*see, e.g.*, Dobres v. Schwartzman, 191 Md. 19, 59 A.2d 684 (1948); *see generally* Annot., 24 A.L.R.3d 1128 (1969)).

A landowner (or tenant?) in the district objects, contending that the ordinance as applied is arbitrary and hence unconstitutional. The matter is brought to the proper court in the proper form. (Some important details of administrative law are being finessed right here. *See generally* D.

HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 236–44 (1971).[1]) What is the likely outcome? Unfortunately, the question does not permit a simple, straightforward answer.

The "law" in point is well-settled throughout the United States. *Pierro v. Baxendale* contains the full litany:

(a) so long as the legislative classifications are not "arbitrary or capricious" they will be sustained;

(b) the ordinance is entitled to the presumption of validity accorded all legislative acts; and

(c) if the wisdom or rationality of the classification is debatable it should be sustained.

But without an elaboration of what is arbitrary, what it takes to rebut the presumption or establish that a feature of an ordinance is clearly irrational, not just debatable, such statements have little or no predictive meaning.

Denied the guidance of continued Supreme Court attention to these matters, states have gone their several ways. Indeed, some state supreme courts have adopted a similar hands-off attitude allowing lower-level state courts to go their several ways. Looking at the results, it is possible to rate the performance of state courts on a spectrum running from very strict at one end (i.e., more likely to overturn zoning provisions) to very tolerant at the other. Professor Mandelker notes for example that "[a]ppellate courts in Illinois, Pennsylvania, and sometimes Michigan . . . have been known for their conservative tone." D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 647 (2d ed.1971). Another authority notes that California lies to the other extreme. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 213 (1971).[2] There appears to be a clear relationship between a court's general stance and the number of unhappy property owners who seek judicial relief. In 1968 the *Zoning Digest* contained abstracts of 43 zoning decisions from Illinois, but only 14 from California. *See id.* at 211 n.14. [p*1046]

In the average state a constitutional challenge to a zoning restriction works often enough to make it a worthwhile gamble in the right case, especially if the stakes are high. The important question is how does one identify the right case. What factors are likely to push a court toward the conclusion that the legislative judgment, although it may reflect an unmistakable community preference—a tolerance of hotels, but not motels, or of small homes but not "mobile homes"—is arbitrary? Or is the process of judicial review so ad hoc that such analysis is futile? These basic questions will stay with us through the following cases.

2. Any analysis of the reasonableness of a use classification, or for that matter some other feature of a zoning ordinance, that gets off dead center must get pretty quickly into "what the legislature was attempting." (The Standard Enabling Act raises the same issue directly by listing certain purposes which an ordinance can be used to serve (§ 3, p. 485 *supra*). Williams, *Planning Law and the Supreme Court: I*, 13 ZONING DIGEST 57, 64 (1961) observes:

> Under the modern interpretation of substantive due process, as spelled out in the more coherent decisions, four questions must be answered:
>
> (1) What the regulation involved is really trying to do.
>
> (2) Whether this is a legitimate aim or public policy; and, further, where this stands in the hierarchy of social values.

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[1] The promised chapter on this topic in the 2d ed., D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (2d ed.1986), has not yet appeared.

[2] *See* n.1 *supra*.

(3) Whether the regulation involved may reasonably be regarded as one possible way to promote such a policy.

(4) Whether the burdens imposed on the property owner are reasonable, or are out of all proportion to the public benefits involved.

At the same time it is commonly said that legislative motive is irrelevant to the validity of a zoning ordinance. *See* Annot., 71 A.L.R.2d 568 (1960). How is a court to identify what the legislature is trying to do (often labeled legislative "purpose") without slipping into the forbidden area of motive? *See* Wital Corp. v. Denville, 93 N.J. Super. 107, 110–11, 225 A.2d 139, 141 (1966) (" . . . [T]he rule which prohibits, in the case of an attack on an ordinance which is valid on its face, inquiry into legislative motivation . . . does not bar what is sought here, a judicial inquiry into the 'purpose' of the ordinance.") Is an inquiry into motive ever justified? Or to put the question in its boldest form, is the distinction between purpose and motive a meaningful one at all? Try to hold onto these questions, too, as you work through the subsequent cases; but as a starter consider the problem posed by *Pierro*. In that case the dissenting judge, but not the majority, refers to a concern of the mayor and council of Palisades Parks with the "temptation to conduct of immoral actions" presented by motels. Is it possible to say that the purpose of the challenged exclusion was to protect public morals? Frequently, there are statements by council members or others involved in the zoning process suggesting a particular concern or problem was quite important to those enacting a provision. If the particular concern is one which would not by itself support the regulation (as for example a concern with ugliness or a significant increase in the number of black residents, *see* pp. S505, S517 *infra*) should a court take such statements as indicative of the legislative purpose? Should it do so in the face of a preamble to the ordinance reciting such matters as traffic, noise, and lights? What if a successful applicant for a zoning change is a business associate of members of the zoning board or makes campaign contributions to the city council? *See* Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L.REV. 161 (1989).

The issue is fundamental and therefore forever recurring. A zoning ordinance prohibits signs. Should statements by council or planning commission members evincing an aesthetic preoccupation be taken as indicators of the legislative purpose or should a court consider other possible and plausible [p*1047] grounds for the regulation—a concern for auto safety, for instance. A zoning ordinance requires large lots in district *A*. Where is a court to find the purpose of the requirement? After the fact, the community suggests such grounds as need for adequate septic drainage; the attackers argue that the provision's purpose is to exclude low-income families and especially minorities. *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970). The problem becomes even more severe when other constitutional values are arguably at stake. *See*, *e.g.*, G & A Books, Inc. v. Stern, 770 F.2d 288 (2d Cir.1985) (adult bookstore may not raise issue of city's motivation for Times Square Redevelopment Project). *See generally* Note, *Relevance of Improper Motive to First Amendment Incidental Infringement Claims*, 61 NOTRE DAME L.REV. 272 (1986).

It is commonly asserted that the property owner attacking a zoning ordinance has both the burden of persuasion and of producing evidence showing its unreasonableness. This amounts in many cases to the insurmountable burden of proving a negative, i.e., that every conceivable purpose which might be imagined for the act (not just those mentioned by the legislators whether formally in a preamble or in unofficial discussions) would fail to support it. *See* Piper v. Meredith, 110 N.H. 291, 296–97, 266 A.2d 103, 107 (1970) ("[T]he purposes stated in the preamble, although entitled to weight, are not determinative of the type or constitutionality of the ordinance [Citations omitted.] Nor are the motives of the legislative body determinative of the validity of the ordinance."). As it is ofttimes put: "it is well settled that when the constitutionality of an ordinance is challenged all reasonable intendments must be indulged in favor of its validity." Cole v. City of Osceola, 179 N.W.2d 524, 528 (Iowa 1970).

3. The instant case puts in prominence another possible item of the reasonableness equation, for the ordinance in question did not merely exclude motels from one district but banned them throughout the community. What view does the majority take of the importance of that fact? The dissenting judge? Suppose the plaintiff's land had been in the nine percent of Palisades Park zoned for business or the eight percent zoned for heavy industry; would the May 25, 1954 supplemental zoning ordinance still have been treated as reasonable?

While some authority can be found in support of Judge Heher's proposition that total exclusion of use like motels is beyond the scope of standard enabling act authority, most of the authority is to the contrary. *Compare* People *ex rel*. Trust Co. v. Village of Skokie, 408 Ill 397, 97 N.E.2d 310 (1951) (beyond the scope) *with* Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957) (within the scope). But that doesn't resolve the question—should such a total exclusion be treated differently when being challenged on constitutional grounds? At least one state court has held it should. In Beaver Gasoline Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501 (1971), the Pennsylvania Supreme Court was faced with a zoning ordinance that excluded gas stations from all three districts in the borough, including a commercial district. Owners of a lot in the latter district attacked the restriction as unconstitutional:

> We are not prepared to, nor do we, abandon our established policy that the validity of zoning ordinance is presumed and that the burden of establishing its invalidity is upon the party who seeks to have it declared invalid. However, requiring an applicant for a building permit to establish by affirmative evidence the nonexistence of a proper zoning purpose in the total prohibition of an otherwise legitimate business activity would be to place upon him an unrealistic and insurmountable burden. . . . [p*1048]
>
> In situations involving the total prohibition of otherwise legitimate land uses, which, by common experience, appear to be an innocuous as the land use here contested, the applicant has met his burden overcoming the presumption of constitutionality by showing the total ban. Thereafter, if the municipality is to sustain the validity of the ban it must present evidence to establish the public purpose served by the regulation.

Id. at 574–77, 285 A.2d at 503–05.

STATE *ex rel*. STOYANOFF v. BERKELEY
Supreme Court of Missouri
458 S.W.2d 305, 41 A.L.R.3d 1386 (1970)

PRITCHARD, COMM'R. Upon summary judgment the trial court issued a peremptory writ of mandamus to compel appellant to issue a residential building permit to respondents. The trial court's judgment is that the below-mentioned ordinances are violative of Section 10, Article I of the Constitution of Missouri, 1945, V.A.M.S., in that restrictions placed by the ordinances on the use of property deprive the owners of their property without due process of law. Relators' petition pleads that they applied to appellant Building Commissioner for a building permit to allow them to construct a single family residence in the City of Ladue, and that plans and specifications were submitted for the proposed residence, which was unusual in design, "but complied with all existing building and zoning regulations and ordinances of the City of Ladue, Missouri."

It is further pleaded that relators were refused a building permit for the construction of their proposed residence upon the ground that the permit was not approved by the Architectural Board of the City of Ladue. Ordinance 131, as amended by Ordinance 281 of that city, purports to set up an Architectural Board to approve plans and specifications for buildings and structures erected within the city and in a preamble to "conform to certain minimum architectural standards of appearance and conformity with surrounding structures, and that unsightly, grotesque and unsuitable structures, *detrimental to the stability of value and the welfare of surrounding property, structures and residents*, and *to the general welfare and happiness of the community*, be

avoided, and that appropriate standards of beauty and conformity be fostered and encouraged." It is asserted in the petition that the ordinances are invalid, illegal and void, "are unconstitutional in that they are vague and provide no standard nor uniform rule by which to guide the architectural board," that the city acted in excess of statutory powers (§ 89.020, RSMO 1959, V.A.M.S.) in enacting the ordinances, which "attempt to allow respondent to impose aesthetic standards for buildings in the City of Ladue, and are in excess of the powers granted the City of Ladue by said statute."

Relators filed a motion for summary judgment and affidavits were filed in opposition thereto. Richard D. Shelton, Mayor of the City of Ladue, deponed that the facts in appellant's answer were true and correct, as here pertinent: that the City of Ladue constitutes one of the finer suburban residential areas of Metropolitan St. Louis, the homes therein are considerably more expensive than in cities of comparable size, being homes on lots from three fourths of an acre to three or more acres each; that a zoning ordinance was enacted by the city regulating the height, number of stories, size of buildings, percentage of lot occupancy, yard sizes, and the location and use of buildings and land for trade, industry, residence and other purposes; that the zoning regulations were made in accordance with a [p*1049] comprehensive plan "designed to promote the health and general welfare of the residents of the City of Ladue," which in furtherance of said objectives duly enacted said Ordinances numbered 131 and 281. Appellant also asserted in his answer that these ordinances were a reasonable exercise of the city's governmental, legislative and police powers, as determined by its legislative body, and as stated in the above-quoted preamble to the ordinances. It is then pleaded that relators' description of their proposed residence as " 'unusual in design' is the understatement of the year. It is in fact a monstrosity of grotesque design, which would seriously impair the value of property in the neighborhood."

The affidavit of Harold C. Simon, a developer of residential subdivisions in St. Louis County, is that he is familiar with relators' lot upon which they seek to build a house, and with the surrounding houses in the neighborhood; that the houses therein existent are virtually all two-story houses of conventional architectural design, such as Colonial, French Provincial or English; and that the house which relators propose to construct is of ultra-modern design which would clash with and not be in conformity with any other house in the entire neighborhood. It is Mr. Simon's opinion that the design and appearance of relators' proposed residence would have a substantial adverse effect upon the market values of other residential property in the neighborhood, such average market value ranging from $60,000 to $85,000 each.

As a part of the affidavit of Russell H. Riley, consultant for the city planning and engineering firm of Harland Bartholomew & Associates, photographic exhibits of homes surrounding relators' lot were attached. . . . In substance Mr. Riley went on to say that the City of Ladue is one of the finer residential suburbs in the St. Louis area with a minimum of commercial or industrial usage. . . . The homes are considerably more expensive than average homes found in a city of comparable size. The ordinance which has been adopted by the City of Ladue is typical of those which have been adopted by a number of suburban cities in St. Louis County and in similar cities throughout the United States, the need therefor being based upon the protection of existing property values by preventing the construction of houses that are in complete conflict with the general type of houses in a given area. The intrusion into this neighborhood of relators' unusual, grotesque and nonconforming structure would have a substantial adverse effect on market values of other homes in the immediate area. According to Mr. Riley the standards of Ordinance 131, as amended by Ordinance 281, are usually and customarily applied in city planning work and are: "(1) whether the proposed house meets the customary architecture requirements in appearance and design for a house of the particular type which is proposed (whether it be Colonial, Tudor, English, French Provincial, or Modern), (2) whether the proposed house is in general conformity with the style and design of surrounding structures, and (3) whether the proposed house lends itself to the proper architectural development of the City; and that in applying said standards the

Architectural Board and its Chairman are to determine whether the proposed house will have an adverse affect [sic] on the stability of values in the surrounding area."

Photographic exhibits of relators' proposed residence were also attached to Mr. Riley's affidavit. They show the residence to be of a pyramid shape, with a flat top, and with triangular shaped windows or doors at one or more corners.

. . . [R]elators' position is that "the creation by the City of Ladue of an architectural board for the purpose of promoting and maintaining 'general [p*1050] conformity with the style and design of surrounding structures' is totally unauthorized by our Enabling Statute." (§§ 89.020, 89.040, RSMO 1959, V.A.M.S.).[1] It is further contended by relators that Ordinances 131 and 281 are invalid and unconstitutional as being an unreasonable and arbitrary exercise of the police power (as based entirely on aesthetic values); and that the same are invalid as an unlawful delegation of legislative powers (to the Architectural Board). . . .

Relators say that "Neither Sections 89.020 or 89.040 nor any other provisions of Chapter 89 mentions or gives a city the authority to regulate architectural design and appearance. There exists no provision providing for an architectural board and no entity even remotely resembling such a board is mentioned under the enabling legislation." Relators conclude that the City of Ladue lacked any power to adopt Ordinance 131 as amended by Ordinance 281 "and its intrusion into this area is wholly unwarranted and without sanction in the law." . . .

As is clear from the affidavits and attached exhibits, the City of Ladue is an area composed principally of residences of the general types of Colonial, French Provincial and English Tudor. The city has a comprehensive plan of zoning to maintain the general character of buildings therein . . . . § 89.040 [refers] to the character of the district, its suitability for particular uses, and the conservation of the values of buildings therein. These considerations, sanctioned by statute, are directly related to the general welfare of the community. . . . The preamble to Ordinance 131, quoted above in part, demonstrates that its purpose is to conform to the dictates of § 89.040, with reference to preserving values of property by zoning procedure and restrictions on the use of property. This is an illustration of what was referred to in Deimeke v. State Highway Commission, Mo., 444 S.W.2d 480, 484, as a growing number of cases recognizing a change in the scope of the term "general welfare." In the Deimeke case on the same page it is said, "Property use which offends sensibilities and debases property values affects not only the adjoining property owners in that vicinity but the general public as well because when such property values are destroyed or seriously impaired, the tax base of the community is affected and the public suffers economically as a result."

Relators say further that Ordinances 131 and 281 are invalid and unconstitutional as being an unreasonable and arbitrary exercise of the police power. It is argued that a mere reading of these ordinances shows that they are based entirely on aesthetic factors in that the stated purpose of the Architectural Board is to maintain "conformity with surrounding structures" and to assure that structures "conform to certain minimum architectural standards of appearance." The argument ignores the further provisos in the ordinance: " * * * and that unsightly, grotesque and unsuitable structures, *detrimental to the stability of value and the welfare of surrounding property, structures, and residents, and to the general welfare and happiness of the community, be avoided*, and that appropriate standards of beauty and conformity be fostered and encouraged." (Italics added.) Relators' proposed residence does not descend to the "'patently offensive character of vehicle graveyards in close proximity to such highways'" referred to in the Deimeke case, *supra* (444 S.W.2d 484). Nevertheless, the aesthetic factor to be taken into account by the Architectural

[1] [These sections are with a minor exception, not relevant to this case, identical to sections 1 and 3 of the Standard State Zoning Enabling Act, *supra* p. S461. Ed.]

Board is not to be considered alone. Along with that inherent factor is the effect that the proposed residence would have upon the property values in the area. In this [p*1051] time of burgeoning urban areas, congested with people and structures, it is certainly in keeping with the ultimate ideal of general welfare that the Architectural Board, in its function, preserve and protect existing areas in which structures of a general conformity of architecture have been erected. . . .

In the matter of enacting zoning ordinances and the procedures for determining whether any certain proposed structure or use is in compliance with or offends the basic ordinance, it is well settled that courts will not substitute their judgments for the city's legislative body, if the result is not oppressive, arbitrary or unreasonable and does not infringe upon a valid preexisting nonconforming use. [Citations omitted.] The denial by appellant of a building permit for relators' highly modernistic residence in this area where traditional Colonial, French Provincial and English Tudor styles of architecture are erected does not appear to be arbitrary and unreasonable when the basic purpose to be served is that of the general welfare of persons in the entire community. . . .

Relators claim that the . . . provisions of the ordinance amount to an unconstitutional delegation of power by the city to the Architectural Board. . . . Ordinances 131 and 281 are sufficient in their general standards calling for a factual determination of the suitability of any proposed structure with reference to the character of the surrounding neighborhood and to the determination of any adverse effect on the general welfare and preservation of property values of the community. . . .

The judgment is reversed. . . .

Notes and Questions

1. *The Enabling Act and Architectural Control*. The property owners in the instant case made the standard two-pronged attack on a zoning ordinance, non-compliance with the enabling act and unreasonableness of constitutional proportions. Are you persuaded by the court's treatment of the first? The Stoyanoffs' arguments of statutory non-compliance had several points, namely that neither the purpose of the ordinance nor the feature regulated could be found among those listed in the state enabling act and further that this type of delegation was not authorized. On the same points contrast the New Jersey decision of Piscitelli v. Township Committee, 103 N.J.Super. 589, 597–99, 248 A.2d 274, 278–79 (1968).

2. *The Constitutionality of Aesthetic Regulation*. Fifty years ago few courts would dissent from the proposition that a land use regulation based solely or primarily on aesthetic considerations was unconstitutional. Today a fair number would, although there are many which still, at least nominally, hold to that view. What is the position of the Missouri court?

For a good statement of the traditional view see City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 657–62, 148 N.E. 842, 843–44 (1925). As the Youngstown decision, itself, observes, the traditional view, not so difficult to state, can be very troublesome to apply, for it requires a court to determine whether or not the sole or principal purpose of a legislative act was aesthetic. As already noted (*see* p. S500 *supra*) judicial determination of legislative purpose can be a sticky business, especially where the stakes are validity. How is a court to determine what a legislative body was up to? [p*1052]

During an era of hostility to public land-use regulation, a common sense approach was often employed—something akin to Professor Dukeminier's blind man test:

> While it is difficult to determine what is the primary offense of much land use, the simulation of blindness affords a simple rule-of-thumb: if a use is offensive to persons with sight but not offensive to a blind man in a similar position, the use is *primarily* offensive aesthetically.

Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP.PROB. 218, 223 (1955). When ordinances regulating or prohibiting billboards first appeared early in the century, courts using such a test saw them as regulations with at least predominantly aesthetic objectives and struck them down. *See* Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 A. 342 (Sup.Ct.1904); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905). From this perspective, much of the typical zoning ordinance might be deemed aesthetically based. In fact, that is exactly what some of the early state decisions adverse to zoning said. *See* Goldman v. Crowther, 147 Md. 282, 128 A.50 (1925).

While complete rejections of zoning on this basis are now a thing of the past, quite a range of zoning regulations have been struck down by some court somewhere on this ground:

(a) no display of cars for sale on open lots: Gionfriddo v. Windsor, 137 Conn. 701, 81 A.2d 266 (1951);

(b) height restriction: Federal Elec. Co. v. Zoning Bd. of Appeals, 398 Ill. 142, 75 N.E.2d 359 (1947);

(c) exclusion of mobile homes; Wright v. Michaud, 160 Me. 164, 200 A.2d 543 (1964);

(d) minimum building height: 122 Main Street Corp. v. Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949);

(e) minimum floor area for a residence: Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954);

(f) prohibition of front yard fences in residential district: Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1958).

Early on, communities began arguing that legislation attacked as aesthetic regulation in fact rested upon more substantial police power concerns—that billboards, for example, can be fire hazards, a collection point for trash, cover for criminal activities or immorality, and a highway safety problem. Generally it worked. *See* St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913). *See also* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 193 N.E. 799 (1935). *But cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (municipal regulation of non-commercial billboards found unconstitutional on first amendment grounds.) In such a case it is said to follow, as a more or less obvious extension of the standard presumption of validity, that proving aesthetic considerations were involved in the drafting of a regulation is not enough; the challenger must go further and knock down the other arguable grounds for the ordinance—often an impossible task. *See*, *e.g.*, Murphy v. Westport, 131 Conn. 292, 297–98, 40 A.2d 177, 179 (1944):

> Whether or not esthetic considerations in themselves would support the exercise of the police power, there can be no question that, if a regulation [p*1053] finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that esthetic considerations play a part in its adoption does not affect its validity. The challenger's burdens are compounded as the list of permissible objectives grows: The police power is not to be confined narrowly within the field of public health, safety or morality. In sustaining the right of the legislature to require that automobile junk yards be screened from public view, we said that "it is within the police power to regulate occupations or businesses which, owing to their nature, the manner in which they are conducted, or their location, if exercised or conducted without restriction, are or may be materially injurious to the public health, morals, comfort, prosperity or convenience, or otherwise detrimental to the general welfare."

Id. at 298, 40 A.2d at 180.

It is a short step from here, or some would suggest none at all, to:

> It is now settled that aesthetics is a valid subject of legislative concern and that reasonable legislation designed to promote the governmental interest in preserving the appearance of the community represents a valid and permissible exercise of the police power . . . [as long as such legislation] bears *substantially* on the economic, social, and cultural patterns of the community or district.

People v. Goodman, 31 N.Y.2d 262, 265–66, 338 N.Y.S.2d 97, 100–01, 290 N.E.2d 139, 141–42 (1972) (sustaining defendant's conviction for violation of village ordinance banning signs larger than four square feet in its commercial area).

In most jurisdictions that step has not, at least explicitly been taken, so there continues to lurk a theoretical, sometimes actual, possibility that a land-use regulation may be held invalid because it is found to rest on aesthetic considerations. *See* Mayor & City Council v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828 (1973). For a recent attempt to line up the jurisdictions on this issue see Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L.REV. 1013 (1990). A thoughtful recent piece suggests that strict judicial scrutiny of aesthetic zoning is required to prevent it from becoming a mask for exclusion of "undesirables." Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH.L.REV. 355 (1982).

On the closely related area of historic preservation zoning, see pp. S527–536 *infra*.

3. Another use of zoning about which doubts are frequently expressed is the control of competition. *Compare* Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969) *with* Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962). *See generally* Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIGEST 33 (1962).

4. In 1908 the city of Richmond, Virginia adopted the following ordinance:

> [W]henever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line. . . . And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line.

The U.S. Supreme Court struck it down, not because it set a building line but because: [p*1054]

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. . . . It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912). The issue was muddied by a subsequent billboard case, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), which upheld an ordinance banning billboards from certain districts but allowing the restrictions to be removed with the consent of a majority of the neighboring owners. The case leaves the impression that the critical distinction is a formal one—an ordinance cannot allow property owners to set a restriction on the basis of no standard but it can set a restriction which owners are

empowered to let stand or remove on the basis of no standard. *See* Valkanet v. City of Chicago, 13 Ill.2d 268, 148 N.E.2d 767 (1958). Note, *Consent Provisions in Modern Zoning Statutes*, 1954 U.ILL.L.F. 309. The Supreme Court has also distinguished and upheld zoning changes subject to, or accomplished by, a community-wide referendum. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). The state courts are also divided on the issue. *Compare*, *e.g.* Arnel Dev. v. City of Costa Mesa, 28 Cal.3d 511, 620 P.2d 565, 169 Cal.Rptr. 904 (1980) (zoning by initiative is appropriate because zoning is a legislative act) *with* Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989) (zoning by initiative conflicts with planning requirements of Hawaii's Zoning Enabling Act). *See generally* Note, *Rezoning by Initiative and Landowners' Due Process Rights*, 70 CALIF.L.REV. 1107 (1982).

Despite *Eastlake*, there remains plenty of apparently viable state precedent that standardless delegations to neighbors, committees, zoning boards and so on are unconstitutional. In at least one case, an architectural review scheme quite like the one in the instant case was upset on this ground. Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill.App.2d 218, 244 N.E.2d 369 (1968). *But see*, in addition to the principal case, Town of Deering *ex rel*. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964) ("impair the atmosphere"); State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955) ("not be so at variance with . . . the exterior architectural appeal and functional plan of the structures . . . in the immediate neighborhood . . . as to cause a substantial depreciation in the property values of said neighborhood").

5. Does the first amendment set any limits on community control of architectural design? *See* p. S522 *infra*.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P v. TOWNSHIP OF MOUNT LAUREL

Supreme Court of New Jersey
67 N.J. 151, 336 A.2d 713, *cert. denied* 423 U.S. 808

HALL, J. This case attacks the system of land use regulation by defendant Township of Mount Laurel on the ground that low and moderate income families are thereby unlawfully excluded from the municipality. The trial court so found [citation omitted] and declared the township zoning ordinance totally invalid. Its judgment went on, in line with the requests for affirmative relief, to order the municipality to make studies of the housing needs of low and moderate income persons presently or formerly [p*1055] residing in the community in substandard housing, as well as those in such income classifications presently employed in the township and living elsewhere or reasonably expected to be employed therein in the future, and to present a plan of affirmative public action designed "to enable and encourage the satisfaction of the indicated needs." Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.

The township appealed . . . and those plaintiffs, not present or former residents, cross-appealed on the basis that the judgment should have directed that the prescribed plan take into account as well a fair share of the regional housing needs of low and moderate income families without limitation to those having past, present or prospective connection with the township. . . .

The implications of the issue presented are indeed broad and far-reaching, extending much beyond these particular plaintiffs and the boundaries of this particular municipality.

There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families. The situation was characterized as a "crisis" and fully explored and documented by Governor Cahill in two special messages to the Legislature—*A Blueprint for Housing in New Jersey* (1970) and *New Horizons in Housing* (1972).