CITY AND REGIONAL PLANNING PAPERS

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VILLAGE OF EUCLID *ET AL. V.* AMBLER REALTY COMPANY. BRIEF, *AMICI CURIAE.* IN THE SUPREME COURT OF THE UNITED STATES *

PURPOSE AND SCOPE OF THIS BRIEF

THIS brief is designed to discuss solely the question of the constitutionality of comprehensive zoning. We do not intend to argue any issues of either fact or law which may have been raised by the parties to the case, except as they relate themselves to this matter of the constitutionality of zoning. The attorneys for appellee suggest that this case may turn upon the reasonableness or arbitrariness of that detail of the ordinance which has placed appellee's land in a residential rather than an industrial zone. We would agree that the decision in this or any other case may turn upon the reasonableness, that is, the general appropriateness of the specific districting involved in the case. In so far as the contentions of the parties relate to the reasonableness or arbitrariness of the Euclid Village ordinance itself in its districting of the particular property of the appellee, that is, in so far as the issues of this case relate themselves specially to this ordinance and its provisions for this piece of property, we do not feel it within our province to present any statement whatever. The attorneys of the appellee, however, have not chosen to restrict themselves to an attack upon a particular provision of this particular ordinance or the special nature of its effect upon the particular piece of property of the appellee, but have attacked the constitutionality of zoning of the general type of the ordinance in this case. As they have sought to support that attack by what we deem to be fallacious arguments on constitutional law, as well as entirely mistaken citation of authorities, and as many general expressions in the opinion of the District Judge may be and are being interpreted as adverse to the validity of zoning, and as we deem zoning to be a vital necessity to the welfare of that increasing majority of the inhabitants of the United States who live in urban communities, we have availed ourselves of the leave granted by the Court to file this brief.

*1926–6.

WHAT IS ZONING?

Zoning is the regulation by districts of building development and uses of property. A typical zoning ordinance divides the territory covered by the ordinance, usually the whole territory of a single municipality, into districts, in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. By use regulation is meant a statement of the permitted or prohibited uses of property and buildings, as, for instance, residential, business, and industrial. Use districts are often further sub-classified, as, for instance, residential districts into those restricted to single-family houses and those in which multiple-family or apartment structures are permitted; business districts into central and local and those in which light manufacturing is permitted or excluded; industrial districts for light manufacturing, for heavy but non-nuisance types of industry, and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Area regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts and the extent and location of open spaces, such as building setbacks, side yards, rear yards. The typical comprehensive ordinance includes all these types of regulations.

A confusion in terminology, and, therefore, some confusion in the statements of the law has taken place by reason of an inaccurate use of the word "zoning" and by designating as "zoning ordinances" measures which are not entitled to the name. A zoning ordinance necessarily consists of a map of the zoned territory showing the boundaries of the districts, and of a text which applies the various regulations to the various districts as shown on the map. There are other types of ordinances often erroneously referred to as zoning ordinances. For instance, a customary type is one that sets forth a definition of a residential area according to the extent of actual residential development therein, and prohibits non-residential developments in any area which may fulfill the definition. This sort of ordinance is more properly termed a "block" or "residential district" ordinance; but it is not zoning. It does not district the whole or a substantial portion of the city by means of a map, allotting each type of regulation to its most appropriate territory. On the contrary, it selects certain portions of the city which have developed predominantly as residential, and protects these selected portions, without making any

provision for the remainder of the territory of the city; and thus, in effect, it permits the existing users of property in the protected areas to determine the standards of use by other property owners. Many of these block ordinances have been upheld by the courts. Obviously, however, the true zoning ordinance, which is a comprehensive distribution of the whole or a major portion of the territory of the community among all the necessary uses of every kind, each with appropriate standards of height and occupancy, all worked out as a community plan for the promotion of the common health, safety, and welfare, has elements of reasonableness which the block ordinance does not possess. Consequently the validity of a block type of ordinance shows, *a fortiori,* the validity of the comprehensive true zoning ordinance; but the invalidity of the block type does not indicate the invalidity of the true zoning ordinance. Several courts have recognized the basic difference, from a constitutional standpoint, between these types of measures. The courts of New York, Ohio, and Louisiana, for instance, uphold zoning, including the creation of exclusively residential districts, but have invalidated certain block or residential district ordinances upon the express ground that these ordinances arbitrarily selected certain districts for protection and did not represent a careful, comprehensive plan for the zoning of the city. . . .

This brief is concerned with the constitutionality of the true zoning ordinance and not with the block or residential district type.

THE REMARKABLE SPREAD OF ZONING IN THE UNITED STATES

That zoning represents a pressing need in growing American cities and urban regions is evidenced by the fact of the remarkable growth of the zoning movement. The first comprehensive zoning ordinance was that of New York City, adopted in 1916, though there were tentative types of such ordinances previous to that date, such as the Los Angeles use ordinances in 1909 and the Boston height zoning in 1904. The latest bulletin issued by the Housing and Zoning Bureau of the U. S. Department of Commerce states that on the first of January, 1926, 420 American municipalities had enacted zoning ordinances and more than 27,000,000 of our inhabitants were living under the protection of such measures. Hundreds of other municipalities are engaged in the preparation of zone plans. All but five states, as well as Congress on behalf of the District of Columbia, have passed zoning statutes. This alone dem-

onstrates the conviction, on the part of those who deal with the problems of urban living in the United States, that zoning is absolutely essential if conditions of living are to remain tolerable and healthful. These facts indicate the existence of the need, and that zoning represents the "prevailing morality or strong or preponderant opinion" of the people of this country as to the best and most just method of controlling the development of growing urban communities in the interest of the health, convenience, and welfare of their inhabitants.

VALIDITY OF ZONING HAS BEEN UPHELD BY SUPREME COURT OF OHIO AND CONSEQUENTLY THE ISSUE BEFORE THIS COURT IS RESTRICTED TO THE FEDERAL CONSTITUTIONAL QUESTION

Since the instant case was decided by the District Court, the Supreme Court of Ohio has upheld the constitutionality of zoning in the case of Pritz *v.* Messer, 112 Ohio State 628, 149 N. E. R. 30. The situation with which the court was dealing in that case was concerned with area and height rather than with use regulations; but, being the first zoning case to reach it, the Ohio Supreme Court treated the validity of comprehensive zoning as involved, and both in the opinion and in the official syllabus, which, under the practice in Ohio, has the status of the authoritative statement of the law, the court passed upon the larger question, including use regulation. The official syllabus, adopting the title of the Ohio zoning statute, reads:

> An ordinance enacted by a municipality under Article XVIII, Section 3 of the Ohio Constitution and under Sections 4366–1 to 4366–12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specific uses, the height, bulk, or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, set back building lines, and the area of yards, courts and other spaces, and for such purposes divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment.

Consequently, the conformance of zoning ordinances, of the type of the Euclid Village ordinance, with the constitution of Ohio must be treated as settled and determined, and the constitutional issue before this Court is restricted to the Federal constitutional question.

THIS COURT HAS SUSTAINED THE VALIDITY OF ZONING REGULATIONS

Zoning questions are not an entire novelty in this Court. On the contrary this Court, in two leading cases, has had occasion to pass upon the validity of ordinances of a zoning nature and in each case upheld the ordinance.

Welch *v.* Swasey, 214 U. S. 91 (1909), upheld an ordinance of Boston, which divided the territory of that city into height zones or districts and prescribed the maximum height of buildings in each of the zones. The attack on the ordinance was based on the usual claims in this type of case—that the real purpose of the ordinance was aesthetic, that there was no substantial relation to health and safety, that the zone classification was arbitrary, that no compensation to property owners was provided. This Court overruled all these claims, and held that the relation of the measure to health and safety was easily observable, and that no compensation need be provided in cases of the reasonable exercise of the police power; and affirmed the judgment of the Supreme Judicial Court of Massachusetts upholding the ordinance.

Hadacheck *v.* Sebastian, 239 U. S. 394 (1915), is analogous to the case at bar, for in that case use regulation was involved. It was concerned with an ordinance of Los Angeles, which excluded brickyards and certain other industrial uses from a residential zone. The brick plant had been located before the district became designated as residential. The ordinance was therefore retroactive in its effect (which the Euclid Village ordinance is not) and the evidence tended to prove that the owner of the property would suffer heavy financial loss in the reduction in value of his property, if the ordinance were enforced against him. The ordinance had characteristics of both the block and zoning types and might be considered a partial zoning ordinance in that it was one of a group of measures which divided the city into residential and non-residential zones. This Court affirmed the judgment of the Supreme Court of California enforcing the ordinance. This decision, as well as many state decisions which might be cited, effectively disposes of the contention of appellee that use regulation is unconstitutional though height and area regulation may not be. Obviously the Constitution makes no such distinction. Regulation of the use of property, when it bears a substantial relation to public health, welfare, etc., has exactly the same constitutional basis and justification as regulation of height and area or any other exercise of the police power over persons or property.

Since these two decisions, the technique of zoning has advanced to the comprehensive type, which includes height, use, and area regulation as parts of a single plan, based on careful surveys, made more reasonable by careful adjustment to the economic, as well as social, factors involved. In the comprehensive ordinance, the locating of the districts and the height, use, and area standards are adjusted to a carefully wrought plan for the promotion of the health, safety, convenience, and welfare of the whole community. Such an ordinance is emphatically more reasonable in the constitutional sense than the separate height or use regulations embodied in the Boston and Los Angeles measures upheld by this Court.

The extent of the zoning movement, its importance to American urban communities, and some adverse expressions in the opinion of the District Judge in this instant case warrant an extended discussion of the subject of the constitutional bases of zoning ordinances and their relation to public health, safety, convenience, morals, prosperity, and welfare, even though these two prior decisions of this Court might logically be cited as conclusive.

Before entering into this discussion, we desire to refer to and dispose of two lines of attack and denunciation which are usually invoked in police power cases, namely, the charge that the measure under attack has an effect on the value of the complainant's property which in and of itself makes the measure unconstitutional (this effect being sometimes called "confiscatory"), and, secondly, the charge that the measure constitutes a taking of property without compensation.

EFFECT OF POLICE POWER REGULATION ON VALUE OF PURELY PRIVATE PROPERTY CAN NEVER BE THE TEST OF CONSTITUTIONALITY; FOR SUCH TEST BEGS THE CONSTITUTIONAL QUESTION

The briefs of the attorneys of record contain frequent references to the effect of the ordinance upon the value of appellee's land. There is danger of confusion of thought as to the relevance and constitutional effect of evidence of this nature. The principle that pecuniary injury resulting from an exercise of the police power does not demonstrate or indicate the violation of constitutional limitations, is too well settled to require further argument or citations. To ascertain the value of the property previous to the enactment of a regulation and then to estimate the value with the regulation in effect and, if the latter figure be less than the former, to then conclude that the regulation must be invalid, is,

obviously, a begging of the constitutional question. Such a contention seeks to disprove the existence of a legislative power by assuming a right to be free from such legislative power. The question before us, for instance, is whether the community has the power, as part of a comprehensive zone plan, to restrict property in certain districts to residential uses. To contend that, if the property was acquired for a non-residential use, the purpose of the acquisition would be impaired and the legislation thereby rendered unconstitutional, is a pure begging of the question. One may not speculate upon a community's not exercising its constitutional police power and then claim a vested property right in the community's non-action. In truth, the old value for which protection is claimed may have been produced, in whole or part, by the very evils against which the legislation is directed. The right to make a noise or congest the streets or impair the living conditions of a residential neighborhood may give a specific piece of land more value than it would have for residential use; but surely there can be no such vested interest in any such right as would preclude the legislature from exercising its regulatory powers. In Hadacheck *v.* Los Angeles, *supra,* Mr. Justice McKenna, speaking for this Court, said:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precluded any limitation upon it when not exerted arbitrarily. A vested interest can not be asserted against it because of conditions once obtaining.

Consequently, whatever confiscation may mean in the constitutional sense, it can not refer to that effect on future speculative values which is a necessary incident of the very existence of the police power.

This does not necessarily signify, however, that evidence of the effect of a particular zone plan on the value of a specific piece of property has no relevance whatever to the constitutional issue. Property derives its value from its appropriateness, by reason of location, for certain uses, and the fact that a zoning ordinance causes a substantial impairment of value may be evidence, not conclusive or presumptive, but an item of evidence of arbitrary, unreasonable zoning; that is, of zoning which, in fixing the boundaries between the various zones, has been careless of or has ignored this factor of appropriateness of location. The reasonableness of the plan, in the constitutional sense of reasonableness, is, of course, in issue in any case in which the validity of the plan is attacked,

and this brings into issue the question whether the plan represents a genuine attempt to apply sound zoning standards, including a reasonable degree of consideration of the appropriateness of the various regulations to the different sections of the city by reason of location, topography, access to utilities, population trends, and other factors. But to contend that a showing of so and so much reduction in the value of a particular piece of land proves the invalidity of the ordinance, would plainly represent a confusion of thought and a begging of the constitutional question.

ZONING NOT A TAKING OF PROPERTY—QUESTION OF COMPENSATION NOT INVOLVED

The attorneys of appellee dwell considerably on the absence of provision for direct money compensation to be paid to the property owners. This is wholly beside the point. The ordinance is frankly and expressly an exercise of the police power and not of the power of eminent domain. The community is not taking or destroying any property or property rights for public use. The ordinance is exclusively regulative. As stated in Chicago, *ex rel.* R. R. Co., *v.* People, 200 U. S. 561:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which can not, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434.

In the case of Pennsylvania Coal Co. *v.* Mahon, 260 U. S. 393, 413, this Court said:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.

Appellee's attorneys seem to rely greatly on this Pennsylvania Coal Company case. But the statute involved in that case is utterly different from and remote in kind, character, and degree from a zoning law or

ordinance. In that case the statute destroyed, not regulated, but destroyed a property title or interest expressly created by and reserved in a deed. The right of the mining company to mine coal was created by specific and express deeds and the statute expressly abolished that right. In stating the facts of the case, Mr. Justice Holmes, who delivered the opinion, said, p. 413:

> As applied to this case the statute is admitted to destroy previously existing rights of property and contract. . . . It (the statute) purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.

The case at bar is in no way analogous to that case nor remotely similar. No property or contract right created by deed or other instrument is here in any respect abolished, suppressed, destroyed, or even regulated. The property rights asserted are simply those which inhere generally in all owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Zoning regulations are quite free from and outside of the scope of the Pennsylvania Coal Company case, in which specified property interests created by contract were destroyed by the statute. It is quite evident that this Court did not consider that case as having any relevancy to regulations of the nature of zoning regulations; for not only did it not overrule, it did not even mention the cases in which it had sustained regulations similar to zoning regulations, namely, Welch *v.* Swasey, *supra,* and Hadacheck *v.* Sebastian, *supra.* Surely if the Pennsylvania Coal Company decision had been conceived as in any respect modifying or overruling or affecting these cases, they would have been mentioned by this Court.

As stated by Judge Peckham in Health Department *v.* Rector, 145 N. Y. 32, 43:

> Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.

Eliminating from further consideration, therefore, these confusing contentions about compensation or confiscation, we address ourselves to

the relevant issues involved in the question whether comprehensive zoning is within the constitutional scope of the police power.

THE STATE OF THE AUTHORITIES

While there have been a few decisions adverse to the constitutionality of zoning, the favorable decisions greatly outnumber them; and the overwhelming weight of authority, as expressed in judicial decisions, is in favor of the constitutionality of zoning. Former assertions to the contrary were due to the fallacy of including, as citations, cases which do not involve true zoning ordinances but which are upon block or residential district or other types of ordinances, or cases dealing with questions of statutory power or statutory interpretation and not with constitutionality. In his opinion in this instant case in the court below, Judge Westenhaver cited numerous cases but only two which involved true zoning ordinances, one of them from Missouri and the other a California case which has been since reversed by the Supreme Court of that state.

We desire to call to the Court's attention that since the decision of the District Court in the case at bar, the highest courts of Massachusetts, California, Minnesota, Ohio, Illinois, Oregon, and Rhode Island, have each and all of them upheld zoning in clear-cut cases and with decisive opinions, and the highest courts of New York, Wisconsin, Louisiana, and Kansas have reaffirmed their previous holdings to this same effect. Any contentions in the arguments before the District Court that the constitutional issue was in an uncertain, conflicting, or indecisive stage have ceased to have any basis. Every one of these decisions upheld the creation of exclusively residential districts and the exclusion of non-nuisance industries and business therefrom, and many of them upheld the creation of exclusively single-family home districts from which apartment houses were excluded.

The following, so far as can be learned from available sources of which we know, constitute all the decisions, at the date of writing this brief (July 14, 1926), upon the constitutionality of zoning, both favorable and adverse. No case has been included in the list of favorable decisions unless it could be properly treated as a zoning case or unless decided wholly or in part upon or necessarily involving the constitutional question. Many cases on block ordinances or other types of property regulation lead logically to the upholding of zoning, but such cases have not been included. Many cases have arisen in the course of the administra-

tion of zoning ordinances, particularly in the state of New York, which necessarily assume the validity of the ordinance, but in which that issue was not raised or decided, and such cases have not been included in the list.

On the other hand, in the list of adverse cases have been included all those in which any provision of a zoning ordinance has been declared invalid or whose logic would invalidate zoning in general, even though the court expressly stated that it was not determining the validity of zoning in general or even though the court expressly upheld the validity of zoning.

In order that the list may be complete, we have included decisions of *nisi prius* courts and unreported cases.

(List omitted from this volume)

It will be noted from the above citations that the strong weight of authority, both in the highest and appellate courts and in courts of first instance, is in favor of the constitutionality of zoning; favorable decisions having been rendered by the highest courts of New York, Louisiana, California, Wisconsin, Massachusetts, Kansas, Ohio, Minnesota, Illinois, and Oregon, as against adverse decisions in Missouri, New Jersey, Maryland, Georgia, and perhaps Delaware.

General discussions of the subject and citations will be found in the following articles: (list omitted).

ANALOGIES WITH OTHER TYPES OF REGULATION OF PROPERTY

Zoning has Same Fundamental Purposes and Justification as All Other Property Regulation, Including Law of Nuisances; but Zoning is not Mere Suppression of Nuisance; It is Constructive Planning for Prevention of Developments Detrimental to Public Health, Convenience, Safety, Morals, and Welfare

Zoning is simply a modern mode or application to modern urban conditions of recognized and sanctioned methods of regulating property in the interest of the public health, convenience, safety, morals, and welfare. Zoning bears distinct analogies to the recognized and sanctioned modes of such regulation. The fallacy underlying much of the argument against zoning consists in treating the methods of the exercise of legislative power as fixed once and forever, and in declaring that whatever new

evils may grow up in the community, the community is impotent if it can not deal with the evil with exactly the same devices as those with which it dealt with other evils fifty or a hundred years ago. The analogous modes of regulation point the way, but can never fix the constitutional limitations; otherwise law would remain unchangeable and impotent.

What, for example, is the relationship of zoning to the law of nuisances? The term "nuisance" is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughter house or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substances or vibration into or onto his neighbor's property. The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections of the city in which the homes of the people are or may be appropriately located. The mode of regulation may be new; but the purpose and the fundamental justification are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of street traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise and dangers. Experience demonstrates that unregulated city growth tends to subject the home districts to offensive environment; and not much imagination is needed to realize that zoning can counteract this tendency.

The law concerning highway obstruction furnishes another analogy. The owner of property abutting on a street may be forbidden to place a permanent or temporary obstruction across the sidewalk. The owner of

a skyscraper might be held, without going beyond the bounds of reason, to contribute more than his fair share of street obstruction, by the stream of pedestrians and vehicles which he draws to or pours out from his property. The law may and does prohibit the abutting property owner from staging an attractive entertainment in his show window, such as would tend to draw a crowd to that part of the street. The very number of persons or vehicles drawn to a section of the street by the high buildings located along it may be equally obstructive. Limitations of height or of other forms of building intensity have an obvious relationship to freedom of movement on the highway and to traffic control.

The regulation of intensity of building development, as a means of preventing excessive gathering of human beings within a designated space, is a recognized mode of constitutional exercise of the police power. Tenement house and factory regulations specify standard minima of space per capita of occupant or operative. Analogously, the zone plan measures the territory of the city available for development, estimates the number of human beings who will live and work within the territory during the period of the life of the ordinance, gathers the topographic, economic, and social facts of the territory, and, applying recognized principles of health, safety, economic prosperity, and convenience to these data, determines such distribution of future residential, business, industrial, and public structures and such standards of bulk and height of buildings as will moderate unwholesome and inconvenient congestion during the process of the growth of the city's population, business, and industry. Zoning is an application to the whole territory of the community of the same basic motives and principles as justify, in the constitutional sense, the right to regulate congestion within the space of an individual piece of property or plant. Building laws specify standards of sunlight within the workshop or apartment. Building height limitation is designed, among other results, to regulate the amount of darkness which one building may throw into adjacent buildings or those across the street.

The limits of this brief do not permit an exhaustive indication of all the analogies of zoning ordinances to sanctioned modes of property regulation. The above will serve as sufficient illustrations. Perhaps another analogy might be referred to in passing, and that is the recognized power to enforce coöperation upon members of a group similarly situated, for the direct benefit of all of the group, with indirect benefit to the general

public. The classic case is that of the enforced joint guarantee of bank deposits, Noble State Bank *v.* Haskell, 219 U. S. 104, where the principle is expressed:

> It would seem that there may be other cases beside the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.

In the case of a zone plan, each piece of property pays, in the shape of reasonable regulation of its use, for the protection which the plan gives to all property lying within its boundaries. As stated in State, *ex rel.* Carter, *v.* Harper, 182 Wis. 148, a zoning case:

> Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor.

These analogies have been sufficiently discussed to show that zoning represents no radically new type of property regulation, but merely a new application of sanctioned traditional methods for sanctioned traditional purposes.

Though zoning and, in truth, all property regulation have the same fundamental basis as the law against nuisances, neither zoning nor property regulation in general is restricted to or identical with nuisance regulation. Any attempt to reduce the constitutional law of property regulation down to the law of nuisances, fails to regard the principle so well expressed in Bacon *v.* Walker, 204 U. S. 311, where this Court said:

> It (the police power) is not confined to the suppression of what is offensive, disorderly or unsanitary. . . . It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.

In other words, the police power acts not only suppressively, but also constructively for the promotion of the public welfare. As stated in Freund, *The Police Power,* Section 29:

> The common law of nuisance deals with nearly all the more serious and flagrant violations of the interests which the police power protects, but it deals with evils only after they have come into existence, and it leaves the determination of what is evil very largely to the particular circumstance of each case. The police power endeavors to prevent evil by checking the tendency toward it and it seeks to place a

margin of safety between that which is permitted and that which is sure to lead to injury or loss. This can be accomplished to some extent by establishing positive standards and limitations which must be observed, although to step beyond them would not necessarily create a nuisance at common law.

That is just what a zoning ordinance does, namely, establishes standards and limitations of building use, height, and lot occupancy for the prevention of tendencies which, if permitted to develop, will have a detrimental effect upon the public health, safety, convenience, morals, and welfare. In fact, the need of zoning has arisen to a considerable degree from the inadequacy of the technical law of nuisance to cope with the problems of contemporary municipal growth. Municipal councils are bombarded daily with pressure to prevent this or that proposed development, such as a public garage or filling station or industrial plant, which the neighbors dislike, and in the past attempted to meet such situations by block ordinances which, by reason of their attempt to protect selected neighborhoods or keep out selected types of proposed uses, may contain an element of arbitrariness and injustice. Such cases and enactments, coming before the courts from time to time, have produced such an elasticity of definition as to what is or may be declared a nuisance, that the term has ceased to have any definite meaning as a measure of legislative power. The decisions upon the definition of nuisance have become utterly irreconcilable. In *Ex Parte* Quong Wo, 161 Cal. 220, dealing with the exclusion of a laundry from a residential area, the Supreme Court of California justified the exclusion upon the principle that a laundry is "of such a nature that it may be confined in the lawful exercise of the police power within definite limits of a city," which is equal to saying that a use may be excluded if it be of a kind which may be excluded. A lawyer would often hardly hazard a guess as to whether his client's proposed industry will or will not be declared a nuisance. There is something manifestly unfair in requiring the owner of an industry to select and pay for his site, design his plant, and even build before he can obtain any degree of assurance that he will be permitted to operate. The zone plan, by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use, is decidedly more just, intelligent, and reasonable than the system, if system it can be called, of spotty ordinances and uncertain litigations about the definition of a nuisance. Certainly the constitutional scope of the police power is not limited to the common law of nuisances.

ZONING IS NOT FOR AESTHETIC PURPOSES

The Charge of Aesthetic Motives Represents a Confusion Between Considerations of Taste and Beauty and Considerations of Orderliness, Cleanliness, Quiet, and Healthfulness of Environment

Appellee's attorneys constantly refer to aesthetic considerations and the promotion of beauty; seeking, apparently, to give the impression that the promotion of aesthetic values is the chief purpose of the creation of residential districts, and that this is something to be condemned or at least something which transcends constitutional powers. This Court has held, that if a measure finds its justification in considerations of health, convenience, safety, morals, or welfare, the presence of an aesthetic ingredient in the legislative purpose would not destroy the validity of the measure. See Welch *v.* Swasey, *supra;* St. Louis Poster Advertising Co. *v.* City of St. Louis, 249 U. S. 269. On this phase of the issues, we might rest our argument on this principle and admit that zoning ordinances, in addition to health, safety, convenience, morals, and welfare, aim to improve the appearance of cities. Any such admission, however, would, in our opinion, contain a fallacious interpretation of the meaning of "aesthetic" in constitutional law, a term which has not as yet received any definite or authoritative interpretation. Zoning does aim to improve the good order of the cities, that is, the general orderliness, which is perhaps what appellee's attorneys have in mind. That is, however, something quite different from the artistic or the beautiful. An artist might prefer the slovenly streets of Naples to the neat American suburb. The essential object of promoting what might be called orderliness in the layout of cities is not the satisfaction of taste or aesthetic desires, but rather the promotion of those beneficial effects upon health and morals which come from living in orderly and decent surroundings. When we put the furnace in the cellar rather than in the living room, we are not actuated so much by dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live and the house a more generally healthful place if the furnace and the gas range and the shop, if there be one, and the other industrial, so to speak, features of the house are kept out of the living room and the sleeping rooms and the dining room. Similarly, the man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically, and morally more

healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted, and slum-like district. This assumption is indubitably correct. The researches of physicians and public health students have demonstrated the importance of our physical environment as a factor in our physical health, mental sanity, and moral strength; and the records of hospitals and criminal courts amply support these conclusions. The comparative health statistics of the planned and unplanned communities, so far as same have been gathered, tend to show more favorable results in the former than in the latter. Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself. The individual can control the conditions inside of his house; but except in the case of the rarely wealthy individual who can afford to buy large open spaces owned and controlled by himself, it is the community and the community alone which can furnish the necessary environmental protection. Besides, the conditions outside the house affect the conditions within the house, as for instance the noise of industrial traffic affects the living conditions within the house, and the light and air conditions outside largely govern the light and air conditions inside. Zoning has, amongst others, this purpose of promoting public health, order, safety, convenience, and morals by the promotion of favorable environmental conditions in which people live and work; which is something very different from aesthetic in the sense of pleasing to the eye or satisfying to artistic cravings.

GENERAL PRINCIPLES OF CONSTITUTIONAL LAW AND POLICE POWER

It is hardly necessary to enter into extensive definitions of the police power or to repeat the standard quotations concerning its scope. As is well known, the police power is the whole reserve power of the community to legislate concerning persons and things in the interest of the promotion of the public health, the public morals, the public safety, the public convenience, the public order, the public prosperity, and the general welfare. Police power is in truth little else than the whole legislative power except those specific types of power which have names and definitions of their own, such as taxing power and eminent domain. Necessarily the police power is coextensive with the public needs. Like every other legislative power, it is subject to constitutional limitations. Accurately speaking, the power does not grow; for it is always complete. New public needs, new situations necessitate new methods, new legisla-

tive devices; as, for instance, American urban conditions present problems so different from the problems of early pioneer rural life, that new types of measures become necessary to solve them.

There are certain well-known fundamental principles of the application and procedure of constitutional law which need be stated in only the most general way and for which no citation of authorities is required. The acts of a legislative body are presumed to be constitutional, and he who attacks the validity has the burden of establishing his case. All doubts are resolved in favor of constitutionality, for courts do not declare laws unconstitutional unless convinced beyond all reasonable doubts. The Home Rule clause of the Ohio Constitution grants police powers to cities, so that a municipal ordinance of a charter city, limited to the territory of that city, has all the constitutional standing of a state statute and the tests of constitutionality are the same as those of a state statute. Reasonableness means the absence of arbitrariness, that is, the honest exercise of intelligence, that is, that the measure can represent the decision of an intelligent legislator, honestly aiming to promote the public health, etc. If reasonableness depends on circumstances, such circumstances are presumed to exist, and he who attacks an ordinance as unreasonable has the burden of demonstrating that the circumstances do not exist.

RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY, CONVENIENCE, MORALS, AND GENERAL WELFARE DEMONSTRATED BY THE EXPERIENCE OF AMERICAN CITIES AND CONCLUSIONS OF PERSONS QUALIFIED UPON THESE SUBJECTS

We come then to the application of these general principles of police power and constitutional law. What are the needs which zoning is designed to meet and its appropriateness or reasonableness as a means of meeting these needs? Zoning is based upon a thorough and comprehensive study of the developments of modern American cities, with full consideration of economic factors of municipal growth, as well as the social factors. Volumes have been written on the needs, the technique, and methods with which these needs are met and the factors of the problem. We have space here for only a short outline, with reference to a few points as illustrations; and we respectfully ask the Court to consider them simply as a few illustrations. A full discussion or a reading of the literature on the subject would demonstrate that zoning takes into ac-

count both economic and social factors of modern urban conditions and is most intimately and substantially related to and promotive of every phase of public health, public safety, public convenience, public order, public prosperity, public morals, and general welfare.

Every one admits that the home and housing conditions bear an intimate relationship to health. "Own your own home" is a slogan based on this realization of the advantages, in the way of health, which come from the home which has a surrounding or environment of sunlight, air, quiet, and cleanliness. Parents prefer to bring up children in such environment, not for any snobbish or aesthetic reasons, but because it promotes the health, mental, moral, and physical, of the children.

What happens in American cities is this: American urban communities grow quickly. New business and industrial plants are established and located with great frequency. Stores or industrial plants are, with considerable frequency, placed in residential neighborhoods, not always because of any imperative economic necessity for such location, but often by reason of all sorts of whims, accidents, mistaken judgments. The neighborhood immediately declines as a residential district. Those financially able to do so move further out, thus extending the residential territory which has to be served by water, gas, and other public utilities, placing an added drain upon and increasing the cost of the community's transportation, street, light, and other utility service. The store or factory brings business and industrial traffic, which is larger, noisier, and more dangerous than the purely residential traffic. If the store or factory be simply the vanguard of a logically located business or factory district, then the district may develop promptly as a business or industrial district. But more often the locating of the store or factory in this district was a mistake or very premature or there are conditions not conducive to its upbuilding as a business or industrial area. So it declines as a residential area and does not upbuild as a business or industrial area. Land values become demoralized; the standard of living goes down. The district becomes a blighted district representing an economic loss to the community, the premature and unnecessary destruction of a healthful home district, the beginnings of a slum or mixed slum and industrial territory; in fact, all of the less healthful instead of more healthful urban conditions are speedily produced in that area. Every growing American city has these doleful and sordid and unhealthful evidences of this unnecessary and wasteful destruction of home districts by non-residential invasions.

As recently stated by Secretary Hoover in a letter to the President of the National Conference on City Planning:

> The fact is constantly brought before me as Secretary of Commerce that lack of city planning and zoning constantly hampers commerce and industry in their basic function of serving mankind. This is particularly true in connection with housing and general living conditions, while the waste and inefficiency in transportation, and losses through bad location of structures are a constant drag on our resources, and tend to retard increases in living standards.

Gradually all areas except those protected by private restrictions (these being generally limited to newer and high-priced subdivisions) become a heterogeneous mixture of business, industrial, and residential developments. This mixture places an added drain upon the police and fire departments of the community, since it takes more resources in the way of policing and fire prevention where uses of property are mixed than where they are segregated to some degree. Crime and vice increase in the blighted districts whose general conditions are more promotive of sickness and delinquency. Fewer and fewer streets are immune from the noises and dangers of business and industrial traffic. The unhygienic, unsafe, wasteful, costly, and inconvenient conditions due to slums, blighted districts, congestion, spotty development of the growing but unplanned city grow constantly more and more beyond the community's capacity to cope with them.

What is an appropriate and reasonable means for preventing the growth of these evils? Obviously it is to preserve for residential purposes territory which, by reason of land values and topographic conditions and residential utilities, is appropriate for home uses, until, by virtue of changes in land values or modes of transportation or the pressure of business and industry, the time shall have arrived when appropriately the residential areas should be moved elsewhere. By this means the healthful environment of the city's homes is protected. By this means, also, the building of homes is promoted; for residential land values are stabilized and those who finance residential construction have a security for their investment which causes them to be willing to finance more home construction. The working man, with his savings, and others, with their capital available for homes, are encouraged to build homes, because the healthful home environment receives the protection of the law. No person who believes in homes and health-

ful home surroundings can fail to believe in the stabilized residential environment.

Municipalities, however, do not exist or thrive solely for or by homes. Places of work, as well as of habitation, are necessary; also places of recreation and civic activities, and of educational and religious activities, all located so as to furnish convenient access to and from the residential areas and to and from each other. Each residential district, for instance, requires its neighborhood business center with its grocery store, drug store, branch bank, churches, schools. Therefore, in planning the districting, these local business and civic centers require to be allotted their appropriate territory, sufficiently close to the residential district to furnish convenience of access, sufficiently large to care for all the local civic and business needs of the estimated population of the neighborhood to which they are tributary, and with transportation and other utility conveniences taken into account, and with economic factor of the land value given its proper force. Consequently these local business and civic areas, though segregated somewhat from the residential areas, are placed immediately adjoining to or in the center of the residential areas.

The city needs, also, its central business, civic, recreational, educational institutions, its banks, department stores, theatres, large hotels, office buildings, central libraries, central schools, and so on. In locating these districts convenience of access to residential areas and to the manufacturing districts, the economic factor of the land value appropriate to these central business and civic uses, and numerous other factors are taken into account. The area devoted to these central business and civic purposes must be of sufficient extent to be adequate for the whole estimated population of the city in accordance with the development of the city's entire territory in accordance with the plan.

In the case of those communities which have or need industrial areas, that is, in which industry forms an appropriate part of the uses of property within the community, adequate space will be provided in the zone plan for the industrial developments. These areas need be so located as to give the necessary industrial facilities, railroads, traffic highways, and others. The economic factor of the land values appropriate to industrial development is taken into account. The area devoted to industrial use is determined so as to give ample space for full industrial development of the growing community. In the industrial district industry is legalized, thus freeing it from the injunctions and other complaints of neigh-

boring properties and stabilizing the investments in the industrial plants; all of which is promotive of prosperity. The street system can be adjusted to the districting, reducing the evils of mixed industrial and non-industrial traffic, thus promoting public convenience.

Similar considerations and factors and adjustments govern the location of railroad terminals and other utilities, parks and other recreational spaces, and the other manifold activities of urban life.

Perhaps the above is sufficient to illustrate how the zone plan is one consistent whole, with parts adjusted to each other, carefully worked out on the basis of actual facts and tendencies, including actual economic factors, so as to secure development of all the territory within the city in such a way as to promote the public health, safety, convenience, order, and general welfare. Zoning reaches real public needs, the needs of the modern growing American urban community. It seeks to meet those needs by an appropriate and reasonable method. It represents the application of foresight and intelligence to the development of the community. If the plan be well made as a result of a careful survey, it is fair and just, for in exchange of the restrictions which it places on each piece of property, it places restrictions for each piece of property, that is for the benefit of each piece of property, and protects each piece of property, as well as gives to each piece of property its share of the general health, order, convenience, and security which the whole plan brings to the community. The area of the property which the individual himself owns represents the limit of protection which the individual can provide for himself, his property, or his family or his business. The community alone, by means of a zone plan, can protect him and his family and his property and his business against the unwholesome, demoralizing, and depreciating effects which his neighbors or other property owners may bring upon him, his property, his family, or his business by the unregulated uses to which they put their properties.

In answer to the line of attack which seeks to deride the capacity of municipal councils to legislate wisely, it is sufficient to say that our constitutional system is not and can not be based upon the assumption of the stupidity or mediocrity of our legislative assemblies. On the contrary, the principle of the separation of powers requires the assumption that the legislature has sufficient intelligence to deal wisely with public needs, leaving to the courts the function of guarding against arbitrariness, insincerity, carelessness, capriciousness, and discrimination. As

stated by James Bradley Thayer, an outstandingly able lawyer, in his essay entitled, *The Origin and Scope of the American Doctrine of Constitutional Law,* p. 23:

> It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. 'It is a postulate,' said Mr. Justice Gibson 'in the theory of our government . . . that the people are wise, virtuous and competent to manage their own affairs.' Eakin *v.* Raub, 12 S. & R. 355. 'It would be indecent in the extreme,' said Marshall, C. J., in Fletcher *v.* Peck, 6 Cr. 131, 'upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of the state.' And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs—what such persons may reasonably think or do, what is the permissible view for them.

Zoning requires no greater foresight or skill than many other tasks with which the legislative bodies are called upon to deal in the ordinary run of their work, such as health codes, building codes, food and drug acts, utility regulation, taxation. The necessary professional, technical, and expert talent and experience are available to assist. A zoning ordinance, like any other measure, is subject to amendment to meet changing situations and developments. Compared to the folly which the experience of American cities has shown to be inherent in unregulated urban development, any conscientiously made zone plan is wisdom itself.

Nor does zoning interfere with private initiative (except, of course, in the sense that all law, including the law against homicide, affects the field of individual choice). Quite the contrary. While full statistics have not been collected, there has been sufficient observation of the quantities of building erected in various American cities to demonstrate beyond doubt, that the zoned cities compare most favorably with unzoned cities in the quantity of building construction for homes, stores, and industries. The most elementary process of *a priori* reasoning will disclose that the protection and stability which zoning gives to investment in buildings will increase and promote the construction of homes and stores and industrial plants. That is one of its purposes and a purpose which it is

certain to accomplish. A book published in 1923 in Cleveland entitled, *City Growth and Values,* with the express endorsement of The National Association of Real Estate Boards and written by Stanley L. McMichael, formerly secretary of the Cleveland Real Estate Board and active in the real estate business, and Robert F. Bingham, contains a chapter on zoning, which contains the following passages:

> In principle the advisability of zoning of cities can scarcely be questioned. Different classes of business and industries are segregated to districts adapted to their needs. Apartments and double houses are allotted to other territories while areas for single houses are always provided. The desirability of zoning laws in suburbs of large cities seems to be proven by the experience of many home communities where it has been tried. Retail business, manufacturing, and nuisances are not allowed to creep into residential districts, destroying home values and undermining the elements of permanency and exclusiveness, which make residential districts desirable. . . . Insofar as this discussion is concerned the two questions of interest are:
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> Does zoning help or hinder a city's growth?
>
> Does zoning increase or lower real estate values?
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> The first question may be answered by the statement that the growth of those cities in which zoning has been effective has not been, apparently, checked in any degree. The right of a city to place certain restrictive measures upon the privileges of owners to use their property is one which public policy should, to a great extent, control. If promiscuous growth is detrimental and orderly growth desirable, and a zoning law accomplishes the latter object, then it seems that zoning, properly applied, would be beneficial rather than detrimental to any growing community. Selfishness on the part of a property owner who is determined to use his land for whatever purpose he chooses, should not prevent the accomplishment of a zoning plan, if the general interest of the community is thereby advanced. In the long run he is likely to fare quite as well under a zoning law and realize just as much from his property. . . .
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> With reference to the problem as to whether zoning raises or lowers real estate values, it is difficult to believe that such a law, in its general application, can do other than raise values throughout an entire community, although in specific instances it may curtail the ambitions of property owners who hold lots near or in restricted sections who wish to use their land for a widely different purpose from that of the general neighborhood. Public welfare is paramount and the wishes of a few individuals to realize more from the sale or use of their properties for uses foreign to the character of the neighborhood should not interfere with the general application of that principle.
>
> It is significant that in cities where zoning laws have been made effective there has been great real estate activity in certain sections. Home neighborhoods which had no protection from business encroachment have taken a sudden spurt and have built up rapidly as soon as it was apparent that only residences were to be allowed therein. Likewise, as soon as certain streets were designated as business thoroughfares thus creating a limited amount of business property to be allotted to each section of the city such streets were bound to become, sooner or later, important retail arteries, restricted permanently for that use.

There is no tenable political philosophy, however much it may stress the virtues of private and warn against public action, but admits the need of public action when the nature of the problem is such that private action can not cope with it; and as we have seen, the protections which zoning affords in the modern urban community are not within the power of the individual (with few exceptions) to obtain for himself, his family, his business, his industry. Consequently, the protection afforded by the community frees his individual initiative to undertake the things that do lie within his power. The private land and building development of cities would be self-destructive, if the community did not furnish health, safety, convenience, and moral facilities and regulation. The Constitution of the United States, certainly, has not incorporated into itself any such political philosophy as deprives us of the community's help in warding off or reducing those great impairments of health, convenience, safety, morals, and prosperity which both experience and the social sciences show to result inevitably from unregulated urban development.

Enough has been stated to indicate that zoning meets actual public needs growing out of modern American urban conditions, that its purpose is to promote the health, safety, convenience, order, prosperity, and welfare of urban communities, that it is an intelligent, reasonable means of promoting these goods. In the course of the zoning movement, there has been gathered a large mass of testimony of qualified persons upon the relationship of zoning to the advancement of the public health, convenience, safety, morals, prosperity, and welfare. Public health experts, such as health officers of various cities, academies of medicine, practicing physicians, sanitary engineers, have testified that by means of districting, conditions can be produced in both residential and non-residential districts which will promote the public health and reduce the evils of unregulated urban growth. Experts on convenience, such as heads of traffic police departments and street traffic experts, have testified to the reduction or avoidance of congestion which will be produced by zoning. Safety experts, such as chiefs of fire and police departments, accident insurance actuaries, experts of fire prevention bureaus, have testified to the increase of public safety which will be brought about by means of traffic segregation and reduction of congestion resulting from zoning. Building association authorities, heads of mortgage companies, life insurance companies, and other financial institutions, have testified to the promotion of home building that will be effected by zoning. Judges of juvenile courts and probation officers have testified to the

reduction of crime and juvenile delinquency which will be afforded by the protection of residential areas and the prevention of the blighted districts. Bankers have testified to the promotion of public prosperity by the protection afforded to investments in building developments. City engineers have testified to the beneficial effects of zoning on public convenience by means of the better street and transportation systems which can be afforded in the zoned community. For years the National Housing Association has devoted a considerable percentage of its programs and energies to promoting zoning as an essential factor in the solution of the housing problem. The United States Department of Commerce, as a part of its program for improving housing conditions in this country, has created a zoning bureau, which has distributed model zoning enabling statutes similar to the Ohio law and literature promotive of zoning. Engineering colleges have established courses to train up the necessary technical and professional talent.

In addition to the numerous books by students or practitioners of city planning, many references to periodicals, city plan reports, and legislative hearings could be supplied. As an appendix to this brief, we have selected a few illustrative documents, namely: paper on *Zoning and Health,* by George C. Whipple, Professor of Sanitary Engineering of Harvard University, read at the meeting of the City Planning Division of the American Society of Civil Engineers at Detroit, Michigan, in 1924. Professor Whipple was probably the leading sanitary engineer in the United States and one of our leading authorities on public health. His essay will be found interesting and convincing. It demonstrates beyond any question that zoning has a very substantial relation to the promotion of public health in urban communities.

(List omitted)

These documents show convincingly that the nature of modern city life is such that with zoning general health is bound to be promoted; that without zoning the traffic problem becomes incurable, and with zoning it becomes, at least, subject to some effective control; that without zoning the safety of residential districts is lessened, with zoning that safety is promoted; that without zoning the risks of the depreciation of living conditions in residential neighborhoods are such that development of healthful housing conditions is retarded, whereas with zoning that development is promoted; that zoning stabilizes land values and protects land in all portions of the community for the best uses of the

land and that it protects and increases the aggregate prosperity represented by land values. Without zoning the growth of blighted districts and slum districts is unavoidable, and these in turn bring juvenile delinquency and vice due to deteriorated environment. With zoning, residential districts are protected against deterioration until appropriately needed for the progress of business and industrial growth.

In the light of even a slight or casual analysis of modern conditions of urban development, and in the light of the expressions of opinions by qualified students of the problems of public health, convenience, safety, morals, and welfare, it is utterly impossible to find any tenable ground for any claim that, in the opinion of careful, honest, reasonable, and intelligent legislators, zoning has not a substantial relation to or does not promote the public health, the public safety, public convenience, and welfare and morals.

EXPRESSIONS OF COURTS UPON THE RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY, AND OTHER PUBLIC BENEFITS WITHIN THE SCOPE OF THE POLICE POWER

The courts which have passed upon zoning cases have plainly seen some, at least, of these phases of the relationship of zoning to the promotion of public health, safety, and other public benefits which fall within the general classifications of the scope of the police power, and by way of illustration we give some quotations from the opinions of the courts which illustrate the judicial recognition of these relationships.

State, *ex rel.* Civello and others, *v.* New Orleans, 154 La. 271, 282, was a group of six cases, all on the New Orleans zoning ordinance, all involving the residential district regulations and arising out of the exclusions, respectively, of a grocery store, a fruit stand, an oyster counter, a filling station, and an ice factory. The group, therefore, involved every type of non-residential use, both business and industrial, with varying degrees of offensiveness or inoffensiveness. The state constitution expressly permitted zoning, so that the court's discussion was concerned with the Federal constitution alone. The court upheld the ordinance in every one of the cases. In the course of its opinion the court said:

> It is not necessary, for the validity of the ordinance in question, that we should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.

The attorneys for appellant have suggested considerations that might well have prompted the enactment of the ordinances in question. In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a resident neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregation need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. It is pointed out, too, that the fire hazard is greater in the neighborhood of business establishments than it is in residence districts. A better and more expensive fire department —better equipment and younger and stronger men—are needed in the business centers, where the buildings are taller, than in the residence districts.

Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. Property brings a better price in a residence neighborhood where business establishments are excluded than in a residence neighborhood where an objectionable business is apt to be established at any time.

If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.

State, *ex rel.* Carter, *v.* Harper, Building Inspector of Milwaukee, 182 Wis. 148, in which the Supreme Court of Wisconsin sustained the Milwaukee zoning ordinance, was an action in mandamus. The relator had a dairy and milk pasteurizing plant and desired to enlarge same. The proposed addition would violate the zoning ordinance and a permit was refused. The court upheld the ordinance. In the course of its opinion, p. 153, the court said:

It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to en-

able him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considered a taking of the property for which compensation must be made. . . .

Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor. . . .

The purpose of the law is to bring about an orderly development of our cities; to establish residence districts into which business, commercial, and industrial establishments shall not intrude, and to fix business districts and light industrial districts upon which heavy industrial concerns may not encroach. This is no new idea, although it has but recently taken the form of legislation. Every one who has observed the haphazard development of cities, the deterioration in the desirability of certain residential sections by the encroachment of business and industrial establishments upon and into such sections, resulting in the consequent destruction of property values and in the ultimate abandonment of such sections for residential purposes, has appreciated the desirability of regulating the growth and development of our urban communities. The home seeker shuns a section of a city devoted to industrialism and seeks a home at some distance from the business center. A common and natural instinct directs him to a section far removed from the commerce, trade, and industry of the community. He does this because the home instinct craves fresh air, sunshine, and well-kept lawns—home association beyond the noise of commercial marts and the dirt and smoke of industrial plants. Fresh air and sunshine adds to the happiness of the home and has a direct effect upon the well-being of the occupants. It is not uncommon to witness efforts of promoters to preserve the residential character of their additions by placing covenants in their deeds restricting the use of the property to residential purposes, and, in some instances, requiring the erection of a home according to specified standards. It can not be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way. The one compares to the other about as a well ordered department store compares to a junkshop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.

When we reflect that one has always been required to so use his property as not to injure his neighbors, and that restrictions against the use of property in urban communities have increased with changing social standards, and that the luxuries of one decade become the necessities of another, can it be said that an offer to preserve various sections of a city from intrusion on the part of institutions that are offensive to and out of harmony with the use to which such sections are devoted, is unreasonable? The present standards of society prompt a revolt against such unbecoming intrusions, and they constitute such a recognized interference with the rights of the residents of such sections as to justify regulation.

The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship;

they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power.

Opinion of the Justices of the Supreme Court of Massachusetts, 234 Mass. 597, was an advisory opinion upon a pending zoning enabling bill. The state constitution expressly authorized such legislation, so that the constitutional question was concerned solely with the Federal Constitution. The court in a most illuminating opinion pointed out the reasonableness and constitutionality of zoning as an exercise of police power, saying amongst other things:

In the light of these principles declared by the Supreme Court of the United States, illumined by instances of their specific application, we are of opinion that the proposed statute can not be pronounced on its face contrary to any of the provisions of the federal constitution or its amendments. The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire and which renders life less secure to those living in homes in close proximity. Health and securing from injury of children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by requiring that dwelling houses be separated from the territory devoted to trade and industry. The suppression and prevention of disorder, the extinguishment of fires, and the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residence.

Conversely, the actual health and safety of the community may be aided by excluding from areas devoted to residence the confusion and danger of fire, contagion and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Regular and efficient transportation of the breadwinners to and from places of labor may be expedited. Construction and repair of streets may be rendered easier and less expensive if heavy traffic is confined to specified streets by the business there carried on.

As will be noted from the list of cases given earlier in this brief,* the Supreme Court of Massachusetts has now had occasion to pass upon three zoning ordinances in three litigated and contested cases and has upheld the ordinance in every case. In the case of Building Inspector of Lowell *v.* Stoklosa, 250 Mass. 52, involving exclusion of stores from residential zones, the court referred to its aforesaid advisory opinion, stating:

* Omitted from this volume.

The reasons which now seem decisive and the supporting authorities are stated at length in the advisory opinion. It is hardly worth while to extend the bulk of our reports covering the same ground again. Without further present discussion, summarization, and amplification regarding the statement herein paraphrased, that opinion is adopted as the judgment of the court in the case at bar. It covers every constitutional phase which has been argued or which has occurred to us.

Amongst the most recent decisions is one by the Supreme Court of California rendered February 27, 1925, in Miller *v.* Board of Public Works of Los Angeles, 234 Pac. 381, upholding a zoning ordinance which created single-family home districts and excluded therefrom a four-family apartment building. The case is particularly pertinent in Ohio, because the authority of the California cities to enact zoning ordinances was expressly derived from the home-rule provisions of the constitution of California, identical in wording with the Ohio constitutional provision, namely:

Any city may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.

Every word of the opinion is pertinent here and informative and convincing, and we are tempted to copy the opinion in full, but for the sake of brevity, we are including only the following extracts, pp. 383ff:

. . . In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public. That is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.

. . .

So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principles upon which that right is founded. In its original and primary sense zoning is simply the division of a city into districts and the prescription and application of different regulations in each district.

. . .

It is conceded, as indeed it must be, by the opponents of the ordinance in controversy here that it is within the police power, by zoning, to banish nuisances and 'near-nuisances,' from certain districts. It is disputed, however, that the police power may be extended by any zoning ordinance, comprehensive or otherwise, to the regulation and isolation of vocations, business enterprises and residential uses

which are not intrinsically obnoxious. A perusal of the decisions in California, which have upheld the prohibition and segregation of certain businesses by means of zoning, indicates that the court has not limited the power to zone to nuisances *per se* and has held that certain business establishments, harmless in themselves, may become 'near-nuisances' because of the character of the neighborhood in which they are operating. In *Ex parte* Quong Wo, *supra*, the court justified the exclusion of a certain type of laundry from a residential district upon the theory that a laundry is 'of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city.' This is tantamount to saying that whenever the recognized purposes for which the police power may be called into play are subserved either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals, and general welfare. It will thus be seen that the police power as evidenced in zoning ordinances has a much wider scope than the mere suppression of the offensive uses of property (Des Moines *v.* Manhattan Oil Co., 184 N. W. 823), and that it acts not only negatively but constructively and affirmatively for the promotion of the public welfare. (Bacon *v.* Walker, 204 U. S. 311.)

. . .

. . . It may be safely said, we think, that it is the consensus of opinion that the regulation of the development of a city, under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community and there is no doubt, it seems to us, that the adoption and enforcement of such a plan, when fairly conceived, and equably applied, is well within the scope of the police power. The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire and health protection. Comprehensive and systematic zoning aids in the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare. Decisions upon the constitutionality of comprehensive zoning are not numerous but the weight of authority upon the subject is, however, strongly in favor of the constitutionality of comprehensive zoning. . . .

That there are reasonable minds which are of the belief that a regulation creating and establishing strictly residential districts is necessary and proper is evidenced by the passage of such ordinances in such widely varying parts of the Union as Massachusetts, Louisiana, New York, Kansas, Iowa, and Wisconsin. In each of these states the problem of the validity of the establishment of a strictly residential district was before the highest court of those respective jurisdictions and in each case such ordinance was held to be within the scope of the police power.

. . .

In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very founda-

tion of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole.

The establishment of single-family residence districts offers inducement not only to the wealthy but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment.

In Pritz *v.* Messer, 112 O. S. 628, 149 N. E. R. 30, 35, the Supreme Court of Ohio, in the course of its discussion, said:

> Reverting to our original consideration, we have to remind ourselves that the question is not whether the slum will certainly be eliminated by such zoning, but whether such zoning reasonably tends toward the elimination of the slum; not whether congestion of traffic and enhanced public health and improved public morals will certainly result from the enactment of such measures, but whether there is a reasonable connection between such measures and the public health, morals, and safety.
>
> Upon mature consideration, after two exhaustive hearings given in this case, we can not say that there is no relation between the legislation enacted and the public health, safety, and morals. It is true that the slum roots in causes deeper than the mere kind of building found therein. It is true that non-nuisance businesses might better, so far as the health of their own inhabitants is concerned, be conducted in districts where there are no apartment houses and where there is no business life. It is also true, however, that family life is promoted by the separation of families, and by their residence in districts where the open spaces, the possibility of gardening, and the freedom from the society which presses around one in a partial business and tenement district, make for health through recreation and peace of mind.
>
> The entrance of business blocks into a residence district tends to 'blight' the district and gradually to invite therein the hazards, both physical and moral, which exist in the sections which combine business with home life.
>
> We cannot say that there is no reasonable relation between the public morals and an attempt to set off for the people of a great city ample parts of the town in which they can always maintain residence districts, unblighted by industry and by the old style of tenement. In this particular instance such tracts of this kind have been reserved as will be available for the inhabitants of Cincinnati for a hundred years to come.
>
> If a law regulating the air space which must be allowed in a tenement house has a reasonable relation to health, we can not say that a measure which will save considerable districts for the city in which the air space is unblocked by massed building construction has no reasonable relation to health. The mere fact that the economic factor looms largest in determining the choice of a residence does not mean that restrictions which give space and air, light, and separation to houses will not

eventually shape the kind of building which is done, and benefit the public health. The laws which compelled tenement houses to install plumbing and sanitary conveniences did not do away with poverty, but they did compel builders in future building to conform to certain health standards. We can not assume that similar results will not occur from regulations such as these embodied in this zoning ordinance.

Furthermore, we can not say that the council did not look forward to a time when by the natural functioning of the law of supply and demand the tide of population would turn in the direction where light, air space, and health can be secured as normal living conditions, and where by these restrictions and by public demand the builders would be compelled to build homes which would make for the maintenance rather than for the deterioration of the American family.

This problem must be viewed from the standpoint of coming generations. Regarded from the limited outlook of the immediate present, it is easy to claim with some degree of cogency that there is no relation between these measures and the public health, safety, or morals. Taking a long view into the future, however, and looking back into the past, to remind ourselves what detriment the unrestricted congestion in city life, both of traffic and housing, has already done the public welfare, we do see a real relation between the substantial material welfare of the community and this effort of the city to plan its physical life.

A still more recent decision is that rendered in November, 1925, by the Court of Appeals of New York in the case of Matter of Wulfsohn *v.* Inspector of Buildings of the City of Mt. Vernon, 241 N. Y. 288, 150 N. E. R. 120. It was concerned with the height, setback, and rear-yard regulations of an apartment building in a residence A district. The court discussed chiefly the right to exclude apartment houses altogether from single-family districts, deducing from the right of such exclusion the validity of the lesser actual restrictions of the Mt. Vernon ordinance. The opinion, written by Chief Judge Hiscock, and concurred in unanimously by all the members of the court, contains the following passages:

In support of such a regulation we think the zoning authorities could assume and the courts below could have found that the orderly and advantageous development of the city of Mount Vernon and the welfare of its citizens would be promoted by fundamental division of the city into districts devoted respectively to business and residential purposes under which its dwellers might establish homes in the latter districts where they would be free from disturbing conditions and risks and deprivation of health conditions such as light and air ordinarily incident to congested business districts; that in the residential districts of Mount Vernon municipal facilities for sewage and water were liable to be overtaxed if the erection of large apartment houses was permitted; that through the construction of apartment houses whereby there would be gathered a large number of people in the space ordinarily occupied by a single family there would result a congestion of population increasing the dangers of traffic, especially to children, and multiplying the chances that through the carelessness of some individual fire and conflagration might be started or disease communicated and epidemics set on their way; that the advantages and value of

property devoted to private residences would be impaired. If we are right that such facts could be found or assumed we do not think that a court could say as matter of law that a zoning regulation excluding large apartment houses could not be justified. There would be no object in creating a residential district unless there were to be secured to those dwelling therein the advantages and that immunity from risks and danger which would ordinarily be considered as the main benefits of such residences.

Of course, zoning regulations are an exercise of the police power, and as we approach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. It is not limited to regulations designed to promote public health, public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. Bacon *v.* Walker, 204 U. S. 311, 17-18. Being designed to promote public convenience or general prosperity as well as public health, public morals, or public safety the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation for the purpose of determining whether it is arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. C. B. & Q. Ry. *v.* Drainage Commrs., 200 U. S. 561. The field of regulation constantly widens into new regions. The question (of regulation) in a broad and definite sense is one of degree. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. People, *ex rel.* Durham Realty Corp., *v.* Fetra, 230 N. Y. 429; aff'd in principle—257 U. S. 665. While the validity of police regulation certainly is not to be rested simply upon popular opinion it has been said that it has been 'put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' Noble State Bank *v.* Haskell, 219 U. S. 104.

Acting in accordance with these general principles courts on the whole have been consistently and sensibly progressive in adjusting the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. What was once a matter of voluntary submissions to restrictive covenants in grants has become a matter of compulsory obedience to ordinances having the force of statutes. It has come about that 40 states have passed laws authorizing zoning ordinances which in one form and another had, in January, 1925, been adopted by 320 municipalities. Commencing, generally speaking, where restrictive covenants commonly stopped with the exclusion from residential districts of factories and business buildings, they have developed until as in the present case they create residential districts in a large sense limited to private dwellings as distinguished from hotels and apartment houses. Thus far these regulations have been sustained as being conducive to public health, safety, and morals. With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented its appearance from being blotched by the erection of some incongruous structure

whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to approve in substance the views of the Massachusetts Supreme Court that aesthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and sufficient reasons. Welch *v.* Swasey, 193 Mass. 364; Welch *v.* Swasey, 214 U. S. 91, 108.

In attempting to apply all of these principles to the present case we deem it unnecessary to consider the proposition that zoning authorities may establish residential districts. This court has so definitely approved that proposition that we may take its decision as a starting point in the consideration of the further questions now before us. Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313.

Having the power as we thus assume to establish residential districts it seems to us that the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health, and safety of those desiring to live in such a district and enjoy the benefits thereof as we ordinarily conceive of them. Outside of large cities where more or less congestion is inevitable, we ordinarily think of a residential district as devoted to private homes rather than to commercial buildings. Such was apparently the character of the territory here involved before the zoning regulations were adopted. The primary purpose of such a district is safe, healthful, and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits. Such life goes on by night as well as by day. It includes children as well as people of mature judgment and is housed in buildings which are not ordinarily of that character most designed to resist conflagrations and where fire protection is scantier and less effective than it would be elsewhere. Welch *v.* Swasey, 214 U. S. 91, 107.

It seems to us quite in accordance with the decisions and principles to which we have referred that zoning authorities should have the right in a residential district to promote these purposes and to protect the people desiring to enjoy these conditions by excluding big apartment houses like the one proposed by appellant whereby the congestion and dangers of traffic on streets where children might be, and the dangers of disease and fires would be increased, to say nothing of other things such as the destruction of the character of the district as a residential one and the impairment in value of property already devoted to private residences.

. . .

It is not an effective argument against these ordinances, if otherwise valid, that they limit the use and may depreciate the value of appellant's premises. That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual.

CONCLUSION

According to the principles of constitutional law practice, legislation is presumed to be valid, and he who attacks the validity has the burden of proof. This is also true of municipal legislation in Ohio. But waiving aside this question of who has the burden, we believe that we have demonstrated beyond question, that by virtue of the great weight of authority of judicial decisions in zoning cases, that by virtue of the

analogies of other modes of regulating property in the interest of the public health, safety, morals, convenience, order, prosperity, and welfare, by virtue of even a casual analysis of the problems which need to be dealt with by legislation to reduce the evil effects of unregulated building development in urban communities in America, by virtue of the opinions of those qualified on the health, safety, convenience, and welfare problems of urban communities, by virtue of the recognition by the courts of the relationship of district or zone regulation to the promotion of public health and other benefits within the police power, zoning is constitutional and falls well within the constitutional scope of the powers of Ohio cities and villages.

Respectfully submitted,

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