

## Municipal Planning - A Decade of Reappraisal

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# MUNICIPAL PLANNING

*So may the city that I love be great  
Till every stone shall be articulate.*

—WILLIAM DUDLEY FOULKE, *The City's Crown*.

## MUNICIPAL PLANNING—A DECADE OF REAPPRAISAL

SAMUEL T. LAWTON, JR., AND EDWARD S. STERN

RECOGNITION BY THE Illinois courts of the importance of community planning has been one of the significant developments of the last decade in the field of municipal law. The zoning ordinance correlated to comprehensive municipal objectives the earlier legal restrictions on land use found in the licensing ordinances, private restrictive covenants, and the common law of nuisance.<sup>1</sup> In recent years, the zoning ordinance itself has become a true adjunct and tool of the overall planning process.<sup>2</sup> Zoning regulations and the restrictions on the subdivision of land by local governments are now tested by the courts in terms of their relationship to the development of the community as a whole and no longer solely in terms of the economic loss to the individual landowner resulting from the restrictions placed upon the use of his property.

After World War II, agricultural and unimproved lands in the areas adjacent to the major urban centers began to feel the effects of the great movements of population and, to a lesser extent, industry, away from the larger cities into the outer limits of the surrounding metropolitan areas.<sup>3</sup> Communities, confronted by the breakup of farm land

<sup>1</sup> METZENBAUM, ZONING 1-51 (1955).

<sup>2</sup> Note, 28 IND. L. J. 544, 547 (1953).

<sup>3</sup> It was estimated in 1957 that by 1960 the population of the City of Chicago would represent approximately 61% of that in the Chicago Standard Metropolitan Area (Lake, Cook, Kane, DuPage and Will Counties in Illinois, and Lake County, Indiana),

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into residential and industrial sites and by the onrush of former city dwellers and other new residents who came to live or work in the community, turned to the tools of planning, zoning, and subdivision regulation to control the effect of the invasion.<sup>4</sup>

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and that by 1980 it would be only 52%, although there would be an overall population increase of approximately 1,500,000. In 1950, the population of the city represented approximately 67% of that of the Metropolitan Area. NORTHEASTERN ILL. METROPOLITAN AREA LOCAL GOVERNMENT SERVICES COMM'N, GOVERNMENTAL PROBLEMS IN CHICAGO METROPOLITAN AREA 35 (1957).

The population of Cook County outside of Chicago increased 62½% from 1947 to 1957. BOARD OF COMMISSIONERS, COOK COUNTY, A COMPREHENSIVE PLAN FOR REZONING COOK COUNTY 2 (1957). The population of Lake County, Illinois, increased 61.6% between 1950 and 1960. LAKE COUNTY REGIONAL PLANNING COMM'N, PRELIMINARY POPULATION REPORT, Table III (1960).

In the eight years from 1947 through 1954, 400 new firms were established in the metropolitan ring as compared to 268 new firms in Chicago. "This fact illustrates the tendency of newer firms to locate in the ring in a pattern of diffusion, while Chicago has drawn upon expansion of existing establishments to continue to build up its base." NORTHEASTERN ILL. METROPOLITAN AREA LOCAL GOVERNMENT SERVICES COMM'N, *op. cit.* *supra* at 41. See also CHICAGO AREA TRANSPORTATION STUDY 5-15 (1960).

<sup>4</sup> Gulick, *Goals for Metropolis*, 49 NAT'L CIVIC REV. 586, 587 (1960) states: "It is customary to credit this explosion to the automobile. This is only part of the story. Other things are involved, principally the rise of family incomes, the ubiquitous transmission of electricity and communications, all-weather roads and expressways, septic tanks and driven wells, and social changes, especially the shorter workday and week and new techniques of corporate organization and management. When these changes made it possible to get skilled urban labor in the suburbs and urban customers in the 'country,' dispersed factories and shopping centers added their influence to the scatteration. . . .

"Unless we can quickly develop community controls which we do not yet have in most areas, much of suburbia will soon be destroyed by its very popularity."

Further, in NORTHEASTERN ILL. METROPOLITAN AREA LOCAL GOVERNMENT SERVICES COMM'N, GOVERNMENTAL PROBLEMS IN THE CHICAGO METROPOLITAN AREA 5 (1957):

"The automobile is commonly cited as a major cause of this expansion outside the central city and within the ring. Not only has it helped to stimulate suburban residence, as earlier suggested, but it has stimulated suburban location of industry by lessening the need for physical proximity of plant and labor supply. But the automobile is far from the only factor which has contributed to this development. Decentralizing forces include the fact that, as new industries and new plants seek a location where there will be contact with the industrial and commercial facilities already developed in a city, they are not always able to find suitable sites within the municipal boundaries. The development of one-story plants, appropriate to modern assembly-line production, has added to the need for space.

"Technological changes which have been under way for a long period have had their influence. Location near a railroad, to make coal available for the generation of steam power, is no longer a necessity since the invention of the electric motor, which can, at distant points, use centrally generated power. The use of trucks for supplies and distribution of products has also relieved some industries from the need of a railroad location.

"It is an error, however, to assume that, because of the forces attracting population and industry to the areas surrounding central cities, the centralizing forces are exhausted or that, because of them, our great cities are collapsing. While the population increase in the ring of the Chicago Metropolitan Area, for example, during the last census period was 446,000, and that within the City of Chicago was 224,000 persons, this

## "COMMUNITY PLANNING"—DEFINITION AND DEVELOPMENT

Community planning is the science, or perhaps, the art, of placing the various physical components of a community in their proper relationship to each other and of providing for their continued harmonious existence in this relationship. Planning consists not only of making provisions for the location and development of residential areas but also of providing (a) adequate industrial, commercial, retail, and service areas to serve the economic needs of the community, (b) convenient school sites to provide for its educational needs, (c) parks and other open areas to maintain its beauty and serve the recreational needs of its citizens, and (d) public buildings and other public facilities to enable the local government to provide the required services.<sup>5</sup> Planning is more than subdivision control and zoning regulation, but these are the principal legal tools for implementing the plan that has been established for the community.<sup>6</sup> Whereas, subdivision controls regulate the division of land into buildable lots and the establishing of requirements for streets and other public facilities to serve those lots, zoning determines the size of lots, the manner in which they may be developed, and the location of the various uses which are necessary to the life of the community. Both devices determine how land may be developed to promote the public welfare.

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increase within the city itself is greater than the total population of Syracuse and only some 20,000 less than the population of such cities as Dayton, Oklahoma City, and Omaha. The increase in population per square mile within Chicago's 213 square miles in that decade was 1,105, while in the 3,617 square miles of the ring area it was 82. There were almost three times as many new manufacturing plants established within the city proper between the last two censuses of manufacturing as in the ring area. Retail sales within the city increased by almost two and a half times as much as in the metropolitan area outside the city."

Between 1947 and 1957 over 140,000 homes were built in Cook County, excluding Chicago. BOARD OF COMMISSIONERS, COOK COUNTY, *op. cit. supra* note 3.

<sup>5</sup> For a definition of municipal planning, see *Grosso v. Board of Adjustment*, 137 N. J. L. 630, 631, 61 A.2d 167, 168 (1948). See also, AMERICAN SOC'Y OF PLANNING OFFICIALS, *PLANNING* 1959 at 38 (1959); Fisher, *For Tomorrow's City*, 50 NAT'L CIVIC REV. 12 (1961).

<sup>6</sup> A typical municipal plan may also include various studies of land use, population distribution, transportation facilities, topographical features, and sewage and drainage areas in addition to a street plan, a public facilities, school, and park plan, and possibly a separate business district and off-street parking plan and a public transportation plan. See, for example, CITY OF HIGHLAND PARK, ILL., *OFFICIAL CITY PLAN* (1947). Within the past several years a number of Illinois communities have been incorporated solely for the purpose of exercising the planning and zoning function. This phenomenon has been particularly prevalent in Lake County, Illinois, where fifteen such villages were

Zoning from its inception was looked upon by the courts and local officials as a means of protecting residential districts from the degenerative impact of commercial uses.<sup>7</sup> Early zoning ordinances were thus negative in concept. The newer ordinances are, on the other hand, designed for positive planning, as devices for establishing suitable areas for all uses while at the same time setting up safeguards to enable the various uses to exist along side each other without suffering ill effects by reason of this proximity.<sup>8</sup> Urban developments in the expanding metropolitan areas of Illinois have encountered many problems which might never have arisen if the available tools of community planning had been properly applied in the first instance by local government officials.<sup>9</sup> During the last decade, the professional city planner has

organized between 1956 and 1960. These communities may be identified by their small populations either concentrated in a very small area or in a relatively large area as evidenced by the following density statistics:

	<i>Date of Incorporation</i>	<i>Population</i>	<i>Density per square mile</i>
Long Grove .....	1956	631	102
Lincolnshire .....	1957	550	1,058
Lindenhurst .....	1957	1,282	806
Vernon Hills .....	1958	124	1,240
Old Mill Creek .....	1958	135	37
Hawthorn Woods .....	1958	236	138
Indian Creek .....	1958	238	118
Kildeer .....	1958	168	81
Barrington Hills .....	1959	293	101
Lake Barrington .....	1959	176	96
North Barrington .....	1959	281	331
Deer Park .....	1959	465	213
Riverwoods .....	1959	234	289
Mettawa .....	1960	125	74
Oak Grove .....	1960	198	233

LAKE COUNTY REGIONAL PLANNING COMM'N, PRELIMINARY POPULATION REPORT, Table II (1960).

This article has not attempted to take up the subject of annexation as a device used by municipalities in planning for their ultimate growth and development. During the past decade annexation has been used by many municipalities for this purpose. See article on expanding cities, *Wall Street Journal*, Dec. 9, 1960, p. 1, col. 6.

For a discussion of subdivision control legislation see Note, 28 *IND. L. J.* 544 (1953).

<sup>7</sup> *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

<sup>8</sup> Babcock, *The New Chicago Zoning Ordinance*, 52 *Nw. U. L. Rev.* 174 (1957). Most of the newer ordinances contain provisions for the amortization of non-conforming uses and structures which serve to reduce their blighting effects. Comment, 26 *U. CHI. L. Rev.* 442 (1959).

<sup>9</sup> Comment, 48 *Nw. U. L. Rev.* 470, 474 (1953); BOARD OF COMMISSIONERS, COOK COUNTY, *op. cit. supra* note 3.

come into his own. More and more, his advice is being sought by local governments to assist them in planning for development yet to come and to help solve the problems caused by lack of planning in past years.<sup>10</sup>

#### SUBDIVISION CONTROL LEGISLATION

In Illinois, subdivision controls have not been scrutinized by the courts to the same extent as zoning regulations. It was not until 1956 that the first case involving subdivision controls was decided by the Supreme Court of Illinois. This case, *Petterson v. City of Naperville*,<sup>11</sup> involved the extra-territorial power granted to cities and villages to control subdivision of lands located within one and one-half miles of their corporate limits. The case also involved the power granted under section 2 of the City and Villages Plan Commission Act<sup>12</sup> to prescribe reasonable requirements for public streets, curbs, and gutters in the interests of the health and safety of the inhabitants of the city. The court found that subdivision controls were a legitimate exercise of the police power and that the legislature could grant cities and villages the power to control the development of subdivisions outside their corporate limits by requiring them to install paved streets and curbs and gutters within the subdivision.

It became evident to local government authorities early in the post-war subdivision boom that tax revenues, which were derived by the schools and other public bodies from new subdivision developments, did not provide sufficient funds for the services rendered. Furthermore, there was a tax lag between the time that the homes were occupied and the time that the taxing bodies received the first tax revenues from newly improved property.<sup>13</sup> Attempts were made by several communities to

<sup>10</sup> In 1950, 77.38% of 862 municipalities of over 10,000 population reporting planning data to the American Society of Planning Officials, Chicago, Illinois, had official planning agencies; whereas in 1960, 91.22% of 1,002 reporting municipalities had official agencies. 24.59% of the same reporting municipalities spent over \$1,000 for planning services in 1950, while 59.98% spent in excess of such amount in 1960. INTERNATIONAL CITY MANAGERS ASS'N, THE MUNICIPAL YEAR BOOK (1960); INTERNATIONAL CITY MANAGER'S ASS'N, THE MUNICIPAL YEARBOOK (1950).

A regional plan commission was organized in Lake County, Illinois, for the first time in 1957. In the same year the Northeastern Illinois Metropolitan Area Plan Commission was created. ILL. REV. STAT. ch. 34, §§ 3051-89 (1959). The commission has advisory planning jurisdiction over the six counties in Northeastern Illinois (Cook, Lake, McHenry, Kane, Du Page, and Will).

<sup>11</sup> 9 Ill.2d 233, 137 N.E.2d 371 (1956).

<sup>12</sup> ILL. REV. STAT. ch. 24 § 53 (2) (1959).

<sup>13</sup> ILL. ASS'N OF SCHOOL Bds., SCHOOL INCOME IN ILLINOIS (1959).

require payments per lot to school authorities as a condition of approval of the plat of subdivision. This practice was held invalid in *Gould v. City of Park Ridge*,<sup>14</sup> decided by the Circuit Court of Cook County in 1956.

The Illinois Cities and Villages Act authorizes municipalities to adopt plans establishing "reasonable requirements for public streets, alleys, ways for public service facilities, parks, playgrounds, school-grounds, and other public grounds."<sup>15</sup> It was not until 1960 that the court intimated that under this section a community might require a subdivider to provide public facilities in addition to streets, sewers, and curbs and gutters as a condition of approval of his subdivision plat. The subdivision control ordinance of the Village of Downers Grove required subdividers to dedicate for public use one acre of land for each seventy-five building sites but not less than one acre for each seventy-five family units, and in addition required dedication of land for educational purposes to facilitate the establishment of school facilities convenient to the proposed subdivision. The Circuit Court had held the entire ordinance invalid and also enjoined the village and its officers from requiring a certificate of compliance from the Boards of Education in the village as a prerequisite to the approval of a subdivision plat. In *Rosen v. Village of Downers Grove*,<sup>16</sup> the Supreme Court reversed in part, holding that the Circuit Court erred in holding the public grounds dedication provision invalid, but affirmed the invalidity of the "educational facilities" provision and the requirement of monetary contribution in lieu of dedication of land as unauthorized by statute. In what may be a landmark statement for metropolitan planning in Illinois, the court said:

The provisions of the statute with respect to reasonable requirements for public streets, school grounds and the like, appear to be based upon the theory that the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public.<sup>17</sup>

<sup>14</sup> No. 56 C 12430, Cir. Ct., Cook County, Sept. 7, 1956. The decision of Judge Cornelius Harrington was not appealed. But, see 1959 amendment to § 277 of the New York Town Law specifically authorizing as a condition to approval of the plat compulsory dedication by subdividers of land for recreational purposes or payments to the town in lieu thereof. 61 N.Y. CONSOL. LAWS § 277 (McKinney 1951).

<sup>15</sup> ILL. REV. STAT. ch. 24, § 53 (2) (1959).

<sup>16</sup> 19 Ill.2d 448, 167 N.E.2d 230 (1960).

<sup>17</sup> *Id.* at 453, 167 N.E.2d at 233.

The court warned that "it does not follow that communities may use this point of control to solve all of the problems which they can foresee," and called attention to the distinction made in a California case<sup>18</sup> between the dedication of facilities required to serve the subdivision and the dedication of facilities which will benefit the community generally. It is clear that the court felt that requiring dedication for the broader purpose would be unconstitutional. Although the court held that to require dedication for "educational purposes" was improper, it did not decide whether a municipality could require dedication for "school grounds," a narrower purpose.<sup>19</sup>

The validity of reasonable subdivision requirements is now assured. The courts, however, have not permitted municipalities to require contribution from subdividers to the initial cost of public facilities located outside the subdivision to serve the needs of the residents of the area being subdivided, or the dedication for public purposes of lands within the subdivision for the benefit of the entire community.

#### ZONING DECISIONS—A TURN IN THE TIDE

Turning from subdivision control to zoning, one finds a marked change in emphasis in the decisions rendered within the last ten years. In a majority of the more recent decisions, the courts have supported the municipal authorities.<sup>20</sup> In the earlier cases, a property owner likely would be victorious if he was able to prove that the market value of his property was decreased, even slightly, by the regulation, the court declaring the regulation invalid and permitting the property owner to proceed with the development of his land in whatever manner he

<sup>18</sup> *Id.* at 453, 167 N.E.2d at 234. The California case referred to by the court is *Ayers v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949).

<sup>19</sup> In August 1960, a landowner sought a writ of mandamus to compel the Village of Mt. Prospect to approve his plat which did not conform to the section of the village's official plan requiring the dedication of public grounds, in addition to streets, alleys, and parking areas. In *Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 60 C 837, Cir. Ct., Cook County, August 1960, the court stated that the prerequisite of dedication of public ground as a condition for approval of a plat clearly constituted "a taking of private property for public use," that "the benefit of public lands benefits the whole community," and that a regulation which requires the donation of land for the benefit of the general community is not an exercise of the police power. The *Mt. Prospect* case is pending on appeal before the Illinois Supreme Court as Docket No. 36151. The case has been argued but no decision has been rendered as of this date.

<sup>20</sup> Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. CHI. L. REV. 87 (1947); Cf. Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U. L. REV. 174, 175 (1957).

desired.<sup>21</sup> This emphasis on the monetary value of land is no longer the sole basis for the decisions. Although the change is not always apparent in any one case, the Supreme Court of Illinois can now be counted on in anything but an extreme situation to follow the rule so aptly stated in *Reitman v. Village of River Forest*:

To overcome the presumption of validity it is incumbent on the property owner to prove by clear and affirmative evidence that the restriction is arbitrary and unreasonable.<sup>22</sup>

No longer is the validity or invalidity of a zoning regulation determined solely by its effect on the property zoned. The test now is: "Is the regulation justified in the public welfare as viewed by the legislative authorities of the municipality?" If the regulation benefits the community, then the property owner must accept the consequences of the regulation to his property. Only when the court determines that the benefit to the general welfare is relatively small as compared to the detriment to the property owner resulting from the zoning regulation, will the court consider the loss in value to the landowner or the resulting limitation on the use of his property as reasons for holding the regulation invalid.<sup>23</sup>

<sup>21</sup> *Midland Coal Corp. v. County of Knox*, 1 Ill.2d 200, 115 N.E.2d 275 (1953).

<sup>22</sup> 9 Ill.2d 448, 452, 137 N.E.2d 801, 803 (1956).

<sup>23</sup> The authorities upon which the courts rely when upholding the legislative discretion of the municipality are reviewed in *First Nat'l Bank v. County of Lake*, 7 Ill.2d 213, 130 N.E.2d 267 (1955), wherein the court stated: "Where the proper authorities adopt a zoning ordinance pursuant to a legislative grant, a presumption favoring its validity always obtains." *Id.* at 225, 130 N.E.2d at 274. For other cases upholding the legislative action of the municipality, see *Kinney v. City of Joliet*, 411 Ill. 289, 103 N.E.2d 473 (1952); *Miller Bros. Lumber Co. v. City of Chicago*, 414 Ill. 162, 111 N.E.2d 149 (1953); *Reitman v. Village of River Forest*, 9 Ill.2d 448, 137 N.E.2d 801 (1956); *Wehrmeister v. County of DuPage*, 10 Ill.2d 604, 141 N.E.2d 26 (1957); *Bolger v. Village of Mount Prospect*, 10 Ill.2d 596, 137 N.E.2d 801 (1957); *Jacobson v. City of Evanston*, 10 Ill.2d 61, 139 N.E.2d 199 (1956); *Village of Lake Bluff v. Horne*, 24 Ill. App.2d 343, 164 N.E.2d 217 (1960); *Stratford Aire Ass'n v. Hibser*, 26 Ill. App.2d 214, 167 N.E.2d 586 (1960).

It is suggested that the authorities last cited be compared with the argument of the court in the cases holding municipal zoning regulation unconstitutional. For a review of the case cited as authority when the zoning ordinance is held invalid see *Bauske v. City of Des Plaines*, 13 Ill.2d 169, 148 N.E.2d 584 (1958) (wherein it was stated: "It is not the monetary loss to the plaintiffs which here compels a finding of invalidity, but that such loss is utterly unrelated to any substantial public benefit to be derived." *Id.* at 181, 148 N.E.2d at 591); *LaSalle Nat'l Bank, Trustee v. County of Cook*, 12 Ill.2d 40, 145 N.E.2d 65 (1957). (The court there stated: ". . . the public welfare does not require the restriction and resulting loss. . . . [The] presumption of validity is dispated." *Id.* at 47, 145 N.E.2d at 69); *People ex rel. Alco Deree Co. v. City of Chicago*, 2 Ill.2d 350, 118 N.E.2d 20 (1954). (The court in the *Alco* case said: "Construing the

The last decade saw the renunciation of an established zoning doctrine, the judicial recognition of a doctrine previously given tacit approval, and the creation of a new doctrine. Courts over the last twenty years have given grudging approval to the "frontage consent" ordinance, a provision enabling residents within a specified radius of a tract of land to effectually prevent the establishment of a proposed use.<sup>24</sup> Frontage consent requirements pertained to uses which the

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evidence most favorably to plaintiff, it merely shows a legitimate difference of opinion as to the reasonableness of the amendatory zoning ordinance." *Id.* at 357, 118 N.E.2d 24; *Galt v. County of Cook*, 405 Ill. 396, 91 N.E.2d 395 (1950); *Krom v. City of Elmhurst*, 8 Ill.2d 104, 133 N.E.2d 1 (1956); *Dalkoff v. City of Rock Island*, 17 Ill.2d 342, 161 N.E.2d 292 (1959); *Exchange Nat'l Bank v. County of Cook*, 6 Ill.2d 419, 129 N.E.2d 1 (1955); *Langguth v. Village of Mt. Prospect*, 5 Ill.2d 49, 124 N.E.2d 879 (1955); *Chicago Title & Trust Co. v. Village of Franklin Park*, 4 Ill.2d 304, 122 N.E.2d 804 (1954).

It is significant that in the cases upholding a zoning restriction strong emphasis is placed upon the burden on the property owner in each instance to prove the regulation arbitrary, confiscatory, or discriminatory. *Bolger v. Village of Mount Prospect*, *supra*. In the cases holding ordinances invalid the emphasis is on existing uses and zoning of nearby property (*Krom v. City of Elmhurst*, *supra*); the extent of which property values are diminished by the particular zoning restrictions (*Midland Elec. Coal Corp. v. County of Knox*, 1 Ill.2d 200, 115 N.E.2d 275 (1953)); the extent to which the destruction of property value promotes the health, safety, morals, or general welfare of the public (*Chicago Title & Trust Co. v. Village of Franklin Park*, *supra*); the relative gain to the public as compared to the hardship imposed on the individual property owner (*Hannifin Corp. v. City of Berwyn*, 1 Ill.2d 28, 115 N.E.2d 315 (1953)); the suitability of the subject property for zoned purposes (*Langguth v. Village of Mt. Prospect*, *supra*); and the length of time the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property (*Krom v. Village of Elmhurst*, *supra*).

<sup>24</sup> *E.g.*, CHICAGO ILL., MUNICIPAL CODE ch. 40, § 40-5 (1957):

"No person shall locate or construct on any lot fronting on any street or alley in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building, structure or place used for the following purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley.

"A gas reservoir, manufacture of gas, stock yards, slaughter house, packing house, smoke house or place where fish or meats are smoked or cured, soap factory, glue factory, size or gelatine factory, renderies, fertilizer factory, tannery, storing or scraping of raw hides or skins, lime kiln, cement or plaster of paris factory, oil cloth or linoleum factory, factory for the manufacture of rubber from the crude material, saw mill or planing mill, wood working establishment, starch factory, glucose or dextrine factory, textile factory, laundry run by machinery, factory combined with a foundry, iron and steel works, brass or copper works, sheet metal works, blacksmithing or horse-shoeing shop, boiler making, foundry, smelter, metal refinery, machine shop, stone or monument works run by machinery, asphalt manufacturing or refining, paint or varnish factory, oil or turpentine factory, printing ink factory, tar distillation or manufacture, tar roofing, tar paper or tarred fabric factory, ammonia, chlorine, or bleaching powder factory, celluloid factory, place for the distillation of wood or bones, lamp black fac-

municipality felt had potentials of danger or nuisance, such as garages and filling stations, machine shops, taverns, and amusement activities, giving the adjacent owners *ad hoc* zoning jurisdiction by requiring their consent to the establishment of the use. The procedure would come into play only if the zoning ordinance permitted the use, producing the curious anomaly of a municipality expressly allowing the landowner to use the property in a specific manner and, by requiring frontage consents, granting the neighboring landowners the power to prevent the use. Efforts were made to nullify the entire concept, but the most that the courts would do was to vacate its application to the specific property involved. When done, the court held either that the development of the area in question was such that it would be unreasonable to prohibit the proposed use or that the use was not one that justified the frontage consent requirement. The court continually adhered to the view that the frontage consent doctrine was not invalid *per se*.<sup>25</sup>

In *Drovers Trust & Sav. Bank v. City of Chicago*,<sup>26</sup> the Supreme Court came to the conclusion that the frontage consent ordinance was unconstitutional, holding that such provisions did not encompass any governmental objects not already included within the scope of the zoning ordinance. It found that the frontage consent ordinance was an invalid delegation of legislative power and that the ultimate determination of the detriment to the public welfare must be made, not by individual landowners, but by the municipality.

Early zoning ordinances were of the cumulative type, taking as their point of departure the then unquestioned premise that single-family residence was the highest zoning classification and industrial the lowest.<sup>27</sup> Between these two extremes were generally found multiple-family, apartment, business and commercial districts. It was assumed that as one went down the ladder, lower classifications became increasingly "bad" and accordingly all higher uses could be permitted in

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tory, sulphurous acid, sulphuric acid, nitric or hydrochloric acid manufacture, factories or other manufacturing establishments using machinery or emitting offensive or noxious fumes, odors or noises, storage warehouses, storing or baling of junk or scrap paper or rags, shoddy manufacture or wool scouring, second hand store or yard, medical dispensary, or incineration or reduction of garbage, offal, dead animals or refuse."

<sup>25</sup> See *Valkanet v. City of Chicago*, 13 Ill.2d 268, 148 N.E.2d 767 (1958).

<sup>26</sup> 18 Ill.2d 476, 165 N.E.2d 314 (1960).

<sup>27</sup> *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925); e.g., Highland Park, Ill., Zoning Ordinance, Feb. 24, 1947; CHICAGO ILL., MUNICIPAL CODE ch. 194A (1942).

the lower classifications, an attitude which maintains today in many ordinances. In recent years, with the advent of new restricted zoning classifications,<sup>28</sup> it became increasingly evident that enlightened zoning and planning, in addition to limiting industrial and commercial uses in residential districts, should likewise prohibit the so-called higher residential uses in the non-residential districts. Accordingly, the concept of exclusive zoning districts evolved. The classification would not be considered as high or low but would stand by itself and would not embrace any of the other uses permitted in other classifications.<sup>29</sup>

In 1959, the Village of Morton Grove adopted an ordinance prohibiting residential development in commercial and industrial districts. A developer desiring to establish residential units in a commercial district challenged the ordinance in a mandamus proceeding. The Supreme Court of Illinois, in an opinion of first impression,<sup>30</sup> found the exclusive zoning classification a valid exercise of the police power. Recognizing that the ordinance was a departure from the stereotype of the past, the court accepted the exclusive zoning concept, as correlated with the basic tenets of zoning regulation.<sup>31</sup>

In the effort to make zoning ordinances comprehensive and to include within each zoning district compatible activities, it became evident that there were particular uses which could not be placed properly in any specific zoning district but nevertheless should be provided for in the ordinances. These uses often were those which were

<sup>28</sup> *E.g.*, Highland Park, Ill., Zoning Ordinance—Office, Research, and Compatible Uses, art. 11A, Feb. 1, 1960; Highland Park, Ill., Zoning Ordinance—Planned Business Center, art. 14, § 14-22.01, July 14, 1958; Bannockburn, Ill., Zoning Ordinance—Commercial Park Dist., § 5.9, June 13, 1960. Communities throughout the State of Illinois recently have been considering such innovations as "Flood Plain" zoning, which imposes restrictions in areas subject to periodic flooding, and "Cluster Plan" zoning, whereby area requirements in particular districts can be lessened in return for dedication of property for public use, without an increase in the density per acre of the population in the development.

<sup>29</sup> *E.g.*, CHICAGO, ILL., MUNICIPAL CODE ch. 194A (1957), and particularly art. 10, covering manufacturing districts, which expressly prohibits residential development other than units incidental to the principal manufacturing use.

<sup>30</sup> *People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove*, 16 Ill.2d 183, 157 N.E.2d 33 (1959).

<sup>31</sup> ". . . In short, whether industry and commerce are excluded from the residential areas, or residences from industrial and commercial areas, it is not unreasonable for a legislative body to assume that separation of the areas would tend in the long run to insure a better and more economical use of municipal services, such as schools, providing police protection, preventing and fighting fires, and better use of street facilities. The general welfare of the public may be enhanced if industry and commerce are provided with a favorable climate." *Id.* at 188, 157 N.E.2d at 36.

large in size, quasi-public in nature, and occasionally had obnoxious characteristics.<sup>32</sup> Examples were public and municipal buildings, garbage dumps, schools, hospitals, utility and telephone stations, transportation terminals, some private amusement enterprises, and trailer camps. Most modern ordinances have provisions for allowance of "special uses" not confined to any particular district which are allowed only when their use would be compatible to the public welfare and not detrimental to the interests of adjacent landowners. The procedure for allowance of special use is generally similar to that for amendments, providing for a hearing before the Plan Commission or Zoning Board of Appeals which in turn recommends allowance or disallowance to the corporate authority.<sup>33</sup> The special use procedure has been employed extensively in Illinois, notwithstanding the absence of express provision in either the County<sup>34</sup> or Cities and Villages Enabling Acts.<sup>35</sup>

In *Kotrich v. County of DuPage*,<sup>36</sup> a special permit was granted for country club operation under provisions of the DuPage County Zoning Ordinance. Adjacent landowners sought a declaratory judgment, contending *inter alia* that the procedure was invalid. The Supreme Court in upholding the ordinance confirmed what all zoning practitioners had assumed, that the special use was a valid form of zoning. In meeting the contention that the County Zoning Enabling Act did not expressly

<sup>32</sup> CHICAGO, ILL., MUNICIPAL CODE ch. 194A, art. 11.10-1 (1957), preamble to Special Use section:

"Purpose. The development and execution of a comprehensive zoning ordinance is based upon the division of the City into districts within which districts the use of land and buildings and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are variations in the nature of special uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts, without consideration in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location. Such variations in the nature of special uses fall into two categories:

- "(1) Uses either municipally operated, or operated by publicly regulated utilities or uses traditionally affected with a public interest; and
- "(2) Uses entirely private in character but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities."

<sup>33</sup> Bannockburn, Ill., Zoning Ordinance, §§ 9.10-1, 9.10-5, June 13, 1960 (hearing before Plan Commission with final allowance by ordinance); Cf. CHICAGO, ILL., MUNICIPAL CODE ch. 194A, arts. 11.10-1 to -6 (1957) (special uses classified as variations with final jurisdiction in the Zoning Board of Appeals).

<sup>34</sup> ILL. REV. STAT. ch. 34, §§ 3151-61 (1959).

<sup>35</sup> ILL. REV. STAT. ch. 24, §§ 73-1 to -13 (1959).

<sup>36</sup> 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

authorize the employment of the special use technique, the court found that there were uses which could not be allocated to specific districts and that their allowance by established procedures was a proper method of zoning.

Following World War II, challenges to zoning classifications intensified.<sup>37</sup> Notwithstanding the amendment and variation provisions available, most cases attacking the ordinances originated in court. Challenges to the ordinances were by injunction, mandamus, or declaratory judgment, the allegations being that the limitation on use was an unconstitutional deprivation of property. The decrees found the ordinances void as applied to the subject properties. In *Bright v. Evanston*,<sup>38</sup> the Supreme Court established as a precept of zoning law that one could not seek judicial intervention while administrative relief on the local level was available and unsought. The plaintiff, proposing to construct an apartment building in a single-family residence district, brought a declaratory judgment action against the City of Evanston, contending that the limitations as applied to his property were void. A lower court decree in favor of the plaintiff was reversed, the Supreme Court holding that variation provisions contained in the Evanston zoning ordinance<sup>39</sup> which were available to plaintiff had not been utilized, and until sought, the court proceeding was premature. The Evanston zoning ordinance permitted the City Council to vary the ordinance after a hearing before the Zoning Board of Appeals pursuant to optional provisions contained in the statute.<sup>40</sup> No limitation precluded a variation to allow multiple-family structures in a single-family residence district. The basic rationale of the court was that until local remedies were sought it was not possible to determine whether a justiciable controversy existed. Conceivably, the municipality could grant the relief sought, making resort to court unnecessary. The court held that where the attack was on the application of the ordinance to a specific parcel of land, exhaustion of available administrative remedies was required. Excluded from application of the doctrine were those cases where attack was upon the ordinance in its entirety, or where the challenge was to the text of the ordinance in its general terms and not merely to

<sup>37</sup> Lawton, Jr., *Procedural Implications of Recent Zoning Decisions*, 40 CHI. B. REC. 15 (1958).

<sup>38</sup> 10 Ill.2d 178, 139 N.E.2d 270 (1956).

<sup>39</sup> Evanston, Ill., Zoning Ordinance § 15, March 25, 1940.

<sup>40</sup> ILL. REV. STAT. ch. 24, § 73-4 (1959).

its application to specific property. Where no suitable variation provisions existed in the ordinance to permit the use proposed, the *Bright* case doctrine was not applicable.<sup>41</sup> Following *Bright*, in *Bank of Lyons v. County of Cook*,<sup>42</sup> the court held that the plaintiff was obliged to seek a use variation for a trailer park before coming to court, notwithstanding the fact that the Cook County Zoning Board of Appeals, which had final authority, had never granted use variations, had told plaintiff informally that his request would be futile, and had failed to urge non-compliance with the *Bright* case doctrine in defense of plaintiff's suit.

The *Bright* case posed the question of whether exhaustion of administrative remedies required plaintiff to seek an amendment to the zoning ordinance before taking court action, and secondly, whether plaintiff who had sought an amendment had complied with the doctrine. In *Herman v. Village of Hillside*,<sup>43</sup> the court held that where the landowner had sought amendment, the *Bright* case doctrine was satisfied and the aggrieved plaintiff need not seek a variation. Here the same body heard applications for both variations and amendments which were subsequently passed upon in each case by the corporate authority. On analysis the result of the decision appears contrary to the *Bright* doctrine. A municipality unwilling to amend its comprehensive ordinance at the request of an individual might be disposed to grant a variation. The court, however, characterizes such multiple procedures as giving "lip service to a technicality,"<sup>44</sup> albeit a technicality which the court took elaborate pains to create.<sup>45</sup>

<sup>41</sup> Eckhardt v. City of Des Plaines, 13 Ill.2d 562, 150 N.E.2d 621 (1958).

<sup>42</sup> 13 Ill.2d 493, 150 N.E.2d 97 (1958).

<sup>43</sup> 15 Ill.2d 396, 155 N.E.2d 47 (1958).

<sup>44</sup> *Id.* at 408, 155 N.E.2d at 59.

<sup>45</sup> *Fox v. City of Springfield*, 10 Ill.2d 198, 139 N.E.2d 732 (1957), first brought into focus the problems of the landowner who had complied with *Bright*, had still not gotten what he wanted, and desired to go to court. It would seem obvious that where the zoning board of appeals has only an advisory function, with the ultimate variation jurisdiction vested in the corporate authority, the Administrative Review Act (ILL. REV. STAT. ch. 110, §§ 264-79 (1959)) is inappropriate. This would seem to be the sole holding of the *Fox* case. In such case plaintiff can seek the so-called traditional remedies of injunction, mandamus, and declaratory judgment to challenge the constitutionality of the classification, or the propriety of the variation denial. Whether the landowner, previously unsuccessful before the zoning board of appeals having final jurisdiction, can then proceed with injunction, declaratory judgment, or mandamus has not been answered by the Supreme Court. The question has been answered in two ways in the Appellate Court. In *Believers of Islam, Inc. v. City of Chicago*, 19 Ill. App.2d 480, 154 N.E.2d 311 (1958), the plaintiff, having been denied a variation before a zoning board of appeals with final jurisdiction, was told by the Appellate Court that his only recourse was under the Administrative Review Act and a declaratory judgment pro-

A new procedural doctrine applicable to zoning matters is found in three cases, *Franklin v. Village of Franklin Park*,<sup>46</sup> *Nelson v. City of Rockford*<sup>47</sup> and *Sinclair Pipe Line Co. v. Village of Richton Park*.<sup>48</sup> Previously, the court had held that where a zoning ordinance was declared void in injunction and declaratory judgment procedures, the decree could provide only that the ordinance was void as applied to the subject property. A zoning vacuum was thereby created, as no particular use could be specified in the decree. Where this was done, the decree itself would be held void.<sup>49</sup> This condition led to several unsatisfactory results. The decree creating a zoning vacuum left no limitation on the use of the property. A plaintiff originally proposing an apartment building in a single-family district could establish an industrial use without limitation. Likewise, where a zoning "void" was decreed, the municipality could re-classify the property to fill the gap with a classification different from the one declared invalid, yet so limited as to preclude the successful plaintiff from proceeding with his desired use. In the *Richton Park* case, the court concluded that the two foregoing situations required a departure from previous decisions and permitted a decree to specify the contemplated use:

In such cases the relief awarded may guarantee that the owner will be allowed to proceed with that use without further litigation and that he will not proceed with a different use.<sup>50</sup>

The court recognizes that what it is permitting is not substantially different from the type of decree entered in a mandamus proceeding where the municipality is directed to issue a permit for a particular use or where the Administrative Review Act is used to direct the granting of a variation.

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ceeding was not available to him to challenge the ordinance on constitutional grounds in an original action. In *People ex rel. Builders Supply v. Village of Maywood*, 22 Ill. App.2d 283, 160 N.E.2d 689 (1959), the Appellate Court by way of dicta indicated that traditional remedies were available to the unsuccessful applicant for variation before the zoning board of appeals with final jurisdiction. The latter view seems proper. The *Bright* case having been satisfied by resort to variation, the landowner should not be foreclosed from testing the ordinance on constitutional grounds in a de novo action merely because of the fortuitous circumstance of where the municipality has placed its variation jurisdiction.

<sup>46</sup> 19 Ill.2d 381, 167 N.E.2d 195 (1960).

<sup>47</sup> 19 Ill.2d 410, 167 N.E.2d 219 (1960).

<sup>48</sup> 19 Ill.2d 370, 167 N.E.2d 406 (1960).

<sup>49</sup> *LaSalle Nat'l Bank v. City of Chicago*, 4 Ill.2d 253, 122 N.E.2d 519 (1954).

<sup>50</sup> *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill.2d 370, 379, 167 N.E.2d 406, 411 (1960).

## CONCLUSION

The discernible pattern of court decisions on the subject of municipal planning during the last decade has been to support the efforts of the corporate authorities to correlate land use to the public welfare. Where reasonable efforts were made, the court would find a basis for allowance, notwithstanding the fact that the techniques employed represented a departure from more conservative and pre-tested doctrines. This would seem to maintain whether the innovation was procedural or substantive. In short, the burden has shifted from requiring the city to justify every act, to a recognition of prima facie validity, with the complainant obliged to demonstrate arbitrary action. The future would seem to indicate adaption of the now recognized principles to larger and more comprehensive geographic areas. Overall metropolitan area planning is beyond the drawing board stage and should receive far greater attention in the next decade from both the courts and local governmental authorities.<sup>51</sup>

<sup>51</sup> Studenski, *Metropolitan Areas 1960*, 49 NAT'L CIVIC REV. 467, 537 (1960).