Zoning for Large-Scale Developments

Eldridge Lovelace

We have a serious "time lag" in planning and zoning. We have known for many years that as much as 85 per cent of all new building in our cities is taking place through development of large projects, i.e., projects including a number of buildings related to each other but frequently of different type and character, and occupying areas of 10 acres or more. We have not recognized this situation. In large part, we continue to plan and zone for the building practices of 30 to 40 years ago when cities were built building by building and lot by lot. Our zoning practice is extremely slow to adjust to this changed condition.

We have a second difficulty also, and that is that in much of the building and rebuilding of our cities through these large projects we have come to confuse size with quality. Generally speaking, the professional city planners and planning commissions and the more sophisticated parts of the public, such as the daily press and the slick-paper architectural magazines, are more than willing to praise any project just so long as it

This statement was presented at the 1962 Aspo National Planning Conference. Mr. Lovelace is a planning consultant with Harland Bartholomew and Associates, St. Louis.
is big enough. If we, however, accept anything that is big just because it is big, we will be quite likely to do our communities an extreme dis-service. Several cities are now paying the price of such actions, and at least one fairly well-known book has received quite a little public attention by pointing out this very problem.

Surely our planning and zoning practice must have advanced to a stage where it may establish reasonable and sensible criteria that will determine the form and the pattern of the urban community. Inadequate as we may be to meet the challenge, still it should be the planner and not the land speculator who determines the form and arrangement of the city. In this connection, it is easy to identify the communities that have given up and turned the task over to the speculator. They are those that include a "floating zone" in their zoning ordinance.

Proposed Zoning Policy

Becoming disturbed about this situation in our office, we prepared a study of zoning for large-scale projects. This was published by the Urban Land Institute as Technical Bulletin No. 42, Density Zoning—Organic Zoning for Planned Residential Developments. In essence, this document comes to several quite simple and fundamental conclusions.

The first conclusion is that there may be no sound approach to this problem unless a community has a comprehensive plan covering the entire area of urbanization, which provides a realistic and forward-looking design for the urban environment as a whole. Accompanying such a plan must be comprehensive zoning regulations based on the plan, setting aside specific areas for commerce and industry and providing realistic density requirements for the residential segments of the community.

It seems redundant to have to emphasize the need for a comprehensive plan and for basing zoning on such a plan. Yet, by and large, our cities are a long way from achieving this elementary objective, particularly applying controls and direction to the entire area of urbanization. Very few cities are satisfactorily and effectively doing this, and most of these are relatively small in population.

However, once these two essential elements are available (and without them no satisfactory public policy is available for large-scale projects or anything else), it is possible to institute relatively simple measures for the regulation of large-scale projects. The essence of our proposal was that the entire large-scale project be considered a "permitted use" and be treated as such. Once this is done, the problem of an intermixure of

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1Technical Bulletin No. 42 is available from the Urban Land Institute, 1200 18th St., N.W., Washington 6, D. C. The price is $5.
residential types, provision of open space, introduction of accessory shopping and commercial areas, etc., is solved conceptually. It is necessary in doing this to provide for a review and approval of the plan for the project. I believe that there should also be a reasonable requirement for eventual completion of the project by the promoter. It is absolutely essential that the number of dwelling units allowed on a particular project be limited by the over-all ordinance. It is also essential that there be a reasonable control over the total amount of land devoted to such accessory uses as shopping centers and other commercial activities.

There is nothing very new in what is proposed here. For example, in the St. Louis County, Missouri, zoning ordinance, which was enacted in 1946, a provision quite similar to this was included. Others can be found dating back to the 1930's. In the Hamilton County, Ohio, ordinance, enacted in 1949, there was a similar provision which also provided a limited number of commercial accessory uses, stating that "one area not to exceed one acre for each 100 lots . . . may be included in such plan as a shopping center. . . ." The St. Louis County provision was used only four times in subdivisions accommodating 1,000 dwelling units, while during the same period 100,000 dwelling units were built in conventional subdivisions. Up until a few months ago, the Hamilton County provision had not been used at all.

Last year a new comprehensive plan for Hamilton County, Ohio, was drafted. This plan recognized the problems inherent in the extremely rough topography of the county, and proposed that many of these problems be solved through use of the "community unit" provision. Open space and an intermixture of dwelling types could thus be provided without increasing the resulting density of population over that allowed by conventional zoning. Publicity attendant upon the new master plan and meetings with local home builders have now evoked four large projects to be developed under the community unit plan in just a few months. While I am sure that all of us might disagree in one detail or another with each of the designs, I am also sure we would agree that they represent an advance over the typical, conventional, single-family subdivision. The flexibility inherent in the community unit plan approach can bring about better neighborhood design, more amenities, better relation to topography and economies to the builder.

Through provisions such as those in the Hamilton County and St. Louis County ordinances, we know that we can do an effective job in the regulation of large-scale projects. Further, the zoning provisions required need not be long or complicated; the shorter and simpler they are the better. A sample text may be found in Technical Bulletin No. 42.
Problems in Zoning

There are three basic problems inherent in this solution to the zoning of large-scale projects:

Public Acceptance. Zoning controls have been widely criticized by the home building industry as hampering any imaginative treatment of residential areas. This simply is not so. Zoning practice is way ahead of the home builders. The major obstacle to public acceptance of many of the features found in the typical large-scale residential project has been the almost unbelievably atrocious designs found when most home builders come to develop multiple dwellings, row houses, or, in fact, anything but the single-family home.

For example, in one of the better suburbs in St. Louis a few years ago, major portions of a heavily traveled thoroughfare were rezoned from commercial use to multiple-dwelling use. Everyone thought that a step forward had been taken, as strip-type commercial use on this street had been precluded. Now that it is almost all built up with apartments, we are beginning to wonder if the right thing was done. When you look at the results, you begin to think that even a strip-type commercial development might have been better.

While the examples from St. Louis are certainly bad enough, they are not nearly as bad as some of the multiple-dwelling units that are starting to crop up in the Chicago suburbs.

So long as builders are undertaking designs of such poor quality, we cannot be surprised when the community rises in wrath at any proposal that we intermix dwelling types in a neighborhood design or introduce multiple dwellings into a single-family residential area. With the single-family dwelling on a large lot, the community knows where it is. When the bars are let down and something else is permitted, then we all too often end up with a development of very poor quality. The public reaction is intelligent and sound. This situation is the builder's and not the planner's fault.

We cannot do a satisfactory job of regulating large-scale projects and develop neighborhoods with interesting arrangements of dwelling units until we begin to do a better design job and are able to show the public on the ground an improved type of residential neighborhood. Many of the home builders do not employ adequate design talent. Many, if not most architects, and certainly almost all civil engineers, cannot do a passable job on even the most elementary type of site planning. Somehow or other we are going to have to force these people into doing a better design and development job; otherwise, our communities are going to continue to
consist of square mile after square mile of single-family subdivisions.

I don't believe that we are ready to accept public design of all new construction in the residential areas of our cities; nor do I believe this is essential in order to obtain good design. However, without satisfactory design it is going to be impossible to gain public acceptance of any forward-looking measures of zoning control for large-scale projects.

*Open Space.* Almost all of the advanced designs for new subdivisions and new large-scale residential projects involve provision of common open space, sometimes in rather large amounts. Unfortunately, much new residential construction takes place in unincorporated areas where public agencies are unable or unwilling to accept responsibility for the open space. Many home builders have contended that density control of such large projects is impractical because no one would take care of the open space provided. These problems can be overcome. First of all, most open space in large-scale projects need not be intensively developed and highly maintained, unless there is a high density of population that justifies an ornamental treatment of very limited amounts of open space. Much of it can be left in its natural condition and have very little, if any, maintenance cost, and yet contribute immeasurably to the amenities of the project.

Hamilton County has developed a standard form of trusteeship that appears to overcome this problem very successfully in areas where public ownership and maintenance are not possible. Similar systems have been in use in the St. Louis metropolitan area for many generations. Care and treatment of the open space is not an insurmountable problem.

*Assembly of Land.* In the environs of many of our larger metropolitan areas, land ownership has been cut up into so many small parcels as to make any type of good neighborhood design virtually impossible. This is an extraordinarily serious problem that receives very little attention at planning meetings. It has been solved in just a few instances, such as in the British Columbia compulsory replatting act. However, this type of land assembly may be more important to the future of many of our communities than urban renewal, and an equivalent amount of time should be given to solving it through legislation and new procedures.

**Summary**

Satisfactory zoning of large-scale projects is going to require much more time on the part of our planning staffs. And we are going to have to have much more capable planning staffs with ability in the design field. It requires much more time to properly review designs of the type, for example, that have been presented in Hamilton County, than is the case
business but completely prohibitory, and confiscated their property without compensation. The Court rejected this contention:

Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . .

This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [citations] There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, . . . it is by no means conclusive. . . . How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality . . . we find no indication that the prohibitory effect of [the ordinance] is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.

Police power.

The question, therefore, narrows to whether the prohibition of further excavation below the water table is a valid exercise of the town's police power. The term "police power" connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U. S. 133, 137 (1894), is still valid today:

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Even this rule is not applied with strict precision, for this Court has often said that "debatable questions as to reasonableness are not for the courts but for the legislature. . . ." [citation]

The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which [defendants] will suffer from the imposition of the ordinance.

A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing how much, if any thing, the imposition of the ordinance would cost [defendants]. In short, the evidence produced is clearly indecisive on the reasonableness of prohibiting further excavation below the water table.

Defendants had the burden of proof on the question of reasonable-
ness. Since they had not met it, the regulation had to stand as a valid police regulation.

Previous zoning litigation. Defendants also contended that the ordinance was unconstitutional because it deprived them of the benefit of the favorable judgment arising out of the earlier zoning litigation. The Court rejected this contention. “A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulations.”

Ex post facto regulation. Finally, defendants contended that the ordinance was unconstitutional as ex post facto legislation because it imposed, under penalty of fine and imprisonment, affirmative duties such as refilling the existing excavation and building a new fence. However, these provisions were severable from the prohibition against further excavation. Since enforcement of these provisions was not sought in this litigation, the Court did not undertake to decide their constitutionality.

Editor's Note: Four courts considered this case, and all four upheld the Hempstead regulation. The only dissenters were three judges in the New York Court of Appeals. Writing for them, Judge Van Voorhis said in part:

The plaintiff township would distinguish an invalid retroactive zoning ordinance attempting to eliminate a “nonconforming use”... from a “regulatory” ordinance which regulates the nonconforming use in the interest of public health and safety. Both lower courts applied this distinction and held that the 1958 ordinance was a proper police power regulation designed to abate a dangerous situation.

While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to force the defendants out of business. The decision... has that practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000... [A]n examination of the clauses in the 1958... Ordinance... supports the contention that it was directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object is not to promote public health or safety, but to end the operation of this business under the guise of regulation.

In endeavoring to close this pit the town says much about the safety of children. They are protected by the regulatory provision of the ordinance as it was enacted in 1945 according to a pattern prevalent throughout the county.... The evidence indicates the existence of ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences. The presence of violations of the ordinance elsewhere would not, of course, prevent its enforcement, but it confirms that the object here was not regulation but prohibition of the conduct of this business. There are some hazards in the operation of any legitimate business. Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.

Residential zoning reasonable as applied: owners had not shown that there were “no controversial or issuable facts or conditions” which could justify it.
Marshall v. City of West University Place, Court of Civil Appeals of Texas, Waco [intermediate court], Oct. 12, 1961 (rehearing denied, Nov. 2, 1961), 351 S.W.2d 257

Appellants’ 12 lots, fronting on a boulevard 200 feet wide, are part of a larger area that was zoned residential in 1937. Four of the 12 lots are occupied by single-family houses. The others are vacant.

As permitted by rezonings since 1937, there is a Y.M.C.A. at one end of the row of lots, a telephone exchange at the other, and businesses beyond the telephone exchange. Property across the boulevard, in another municipality, is used for business. Appellants’ lots are still zoned residential.

After an unsuccessful attempt to obtain business rezoning, appellants brought this action. They asserted that the denial of business rezoning was arbitrary and that the zoning ordinance was unconstitutional as applied to their lots. The trial court denied relief. On appeal, held: affirmed. Opinion by Wilson, J.

Reasonableness. Appellants contended that changes in conditions since 1937—including the nearby businesses and greatly increased traffic on the boulevard—rendered the residential zoning of their lots unreasonable. The lots would be worth four times as much for business. The trial court found them “undesirable” (but not “unsuitable”) for residences and noted that loans for residential buildings were available only at excessive rates and in limited amounts.

The trial court also found, however, that the lots could be used for residences and had a “substantial, though reduced” value for that purpose. Among other things, the court also found that city water lines, already inadequate for fire protection, would be overtaxed by business rezoning. Serious traffic conditions would be slightly worsened, and required municipal expenditures for street construction and maintenance might run to $32,000. Finally, the court found that this rezoning would be regarded as a precedent for further rezoning nearby.

Under the rule of earlier Texas decisions, an owner challenging the validity of zoning must show that there were “no controversial or issuable facts or conditions” which authorized the municipality to exercise its discretion as it did. Appellants sought modification of this rule, but the court adhered to it. It concluded that, although appellants had presented a “persuasive appeal to equity,” they had not shown the zoning to be invalid.

Neighbors’ objections. Vigorous protests by appellants’ neighbors appeared to have influenced the city’s decision to deny rezoning, but this did not render the decision invalid. As contemplated by the enabling statute, both appellants and the neighbors had had an opportunity to be heard. There was no showing that the city had relinquished its discretion to the objecting neighbors.

Residential zoning unreasonable as applied.


Plaintiff bank owns property, 220 feet wide, fronting on a busy highway. On one side of the property is a large shopping center. On the other is a greenhouse. Back of the
greenhouse is a new office building fronting on another highway. Back of plaintiff's property is a "relatively new warehouse type building." Other uses nearby include a few old houses, some American Legion lodge buildings, and a miniature golf course. Of the large block in which plaintiff's property is located, less than 10 per cent is used for residences.

The Park Ridge zoning ordinance puts the front of plaintiff's property in a 2-family residence zone, the rest in a single-family zone. Plaintiff wants to build apartments. In this action, the Supreme Court held the ordinance invalid as applied to the property. Opinion by Schaefer, J.

Shortly after plaintiff bought its property, the city rezoned adjoining property to permit construction of the shopping center. That center now dominated the entire block. Additional traffic resulting from apartments on plaintiff's property would not be significant. No one contended that the present zoning classification protected property values in the area. And all agreed that the present classification substantially decreased the value of plaintiff's property. "[T]he fact that there has been an increase in value [since plaintiff bought the property] even under that classification is not controlling."

Under all these circumstances, the court concluded that the ordinance was unreasonable insofar as it prohibited apartments "of the kind permitted under the provisions of the ordinance governing the use of commercial property."

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**Standards.** Trailer park licensing ordinance unconstitutional: did not provide sufficiently definite standards.

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_Schneider v. Wink, Court of Appeals of Kentucky [highest court], Oct. 20, 1961, 350 S.W.2d 504_

Under a Covington ordinance, the city commissioners consider each application for a trailer park license. The ordinance directs the commissioners to determine in each case whether granting the license would "jeopardize the public . . . welfare." Further, it directs them to "take into consideration the topography and density of the population of the location."

The commissioners denied Wink's application, stating only that:

- in consideration of physical installation, topography and population density of said location, and
- for other good and sufficient considerations, [granting the license] would jeopardize the public . . . welfare . . .

In the present action, the trial court held the ordinance unconstitutional in part and directed issuance of the license. On appeal, held: affirmed. Opinion by Cullen, C.

**Standards.** The ordinance did not prescribe sufficiently definite standards to control the discretion of the commissioners. The direction that they "take into consideration" the topography and population density supplied no actual standard. "The ordinance does not suggest what weight shall be given to the factors of topography and density of population, or what features of topography or what extent of density of population shall be significant."

Although other cases had upheld administrative discretion as to details of regulation, those cases were distinguishable from this one. "[R]easonably definite standards are required as a framework upon which to rest the detailed regulations."

**Nuisance.** The court also con-
cluded that the trailer park would not be a public nuisance. "There is no basis for a holding that inadequacy of streets leading to a particular parcel of property, or an overcrowding of schools by reason of the number of persons occupying the property can make the use of the property a public nuisance."

Ordinance was too indefinite to be enforced.

Zoning map inadequate.

Lane County v. R. A. Heintz Constr. Co., Supreme Court of Oregon, In Banc [highest court], Sept. 6, 1961, 364 P.2d 627

The 1949 Lane County zoning ordinance apparently zoned only part of the county. Ordinance No. 70, adopted in 1955, purported to amend the 1949 ordinance. Ordinance No. 70 began by stating that the planning commission held a "public hearing . . . concerning the zoning of areas as described below," had "voted in favor of said zoning," and had recommended "that the same be enacted into an Ordinance." These preliminary statements were followed by the enacting clause, which in turn was followed only by this:

All of those areas lying in [a described area], as shown on the following Lane County Zoning Maps: . . . Sheets Nos. 2, 5, 6, 7, 8, Township 17 . . .

Defendants own land within the area described by Ordinance No. 70. The county brought this action to have them enjoined from violating the ordinance. The trial court dismissed the county's complaint. On appeal, held: affirmed. Opinion by Warner, J.

Indefiniteness. The ordinance was too indefinite and uncertain to be enforced. It described an area, but it contained no verb to give a hint of the legislative intent concerning that area.

As the county now claimed, the commissioners could have intended to zone the described area as shown on the zoning maps mentioned in the ordinance. However, they could just as readily have intended to change or repeal the classifications shown on the maps. Their intent was not clear, and the court would not speculate on it.

Map. Moreover, even if the commissioners did intend to zone the described area, it was uncertain which zone defendants' land was in. The county presented a document titled "Sheet No. 2," which showed the letters "AGT" on defendants' land. The county claimed that this was the same "Sheet No. 2" referred to in the ordinance, and that it placed defendants' land in the AGT zone, one of ten zones established by the original ordinance. However, the court declined to rely on the county's "Sheet No. 2":

A map is a usual and valuable adjunct to a zoning ordinance. It is a graphic portrayal of the textual matter. But such a map is only supplemental to the text. The authority for each entry made thereon must be found in the written content of the basic ordinance or ordinances amendatory thereto. At best it is a pictorial illustration of the legislation as expressed in the documents to which it serves as an appendix.

The county's original zoning ordinance referred to accompanying maps. This reference, the court concluded, was to maps approved coincidentally with the adoption date of the ordinance or of subsequent amendments.

The "Sheet No. 2" on which the
county relied, however, had not been approved at the same time as Ordinance No. 70. It was dated more than a year later. Either it had been prepared a year later than the ordinance or the commissioners "in amending the zoning areas did so by the simple but unauthorized expedient of changing the map without the authority of any ordinance."

The court concluded that it was impossible to derive from Sheet No. 2 any aid to discovering the commissioners' intent when they adopted Ordinance No. 70. There was nothing to explain upon what authority the letters "AGT" were placed on defendants' land, when they were inserted, or by whom.

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**Map.** Ordinance ineffective when zoning map was not recorded either in minute book or in city's ordinance file.

*City of Waycross v. Boatright, Court of Appeals of Georgia, Division No. 2 [intermediate court], Oct. 19, 1961, 122 S.E.2d 475*

The Waycross zoning ordinance established district boundaries by reference to a zoning map, but the map was not recorded either in the governing body's minute book or in the city's ordinance file. In this action, the trial court entered judgment declaring that the records of the city did not contain any valid restriction on the use of plaintiff's property. On appeal, held: affirmed. Opinion by Jordan, J.

The city manager testified that the zoning map was on file in his office. (It was kept there, the city claimed, to make it available for almost constant use by officials and citizens.) The court noted, however, that the map was not recorded and that the existence of a municipal ordinance cannot be proved by oral evidence. "Accordingly, while the plaintiff has not proved that a zoning map was not adopted originally, and indeed the contrary appears from the evidence, he has established that no valid record of such zoning map exists as can be proved in a court of law by competent evidence." The trial court was therefore correct in concluding that the city records did not contain any valid restrictions upon the use of plaintiff's property.

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**Annexation.** Zoning ordinance did not apply to property annexed after its adoption.

*Sanders v. Snyder, Court of Appeals of Ohio, Williams County [intermediate court], Oct. 31, 1960, 178 N.E.2d 174*

The Montpelier zoning ordinance establishes only two districts: residential and nonresidential. Instead of using a zoning map to designate the residential districts, it provides:

The premises, lots and parcels of land as now laid out in platted additions to said village, and as now laid out on the county auditor's plats and maps for the taxation of the parts of said village which are not otherwise platted, which abut on . . . streets as hereinafore described in said village are hereby declared to constitute, and be residential zones . . . [Emphasis by the court.]

One of the designated residential zones is the property along East Madison Street "east of the lands owned by the Williams County Agricultural Association." Defendants own vacant lots on East Madison Street. When the ordinance was adopted, the lots were outside the village—east of the eastern village.
limit. In 1954, the lots were annexed to the village.

In this action, the court of appeals concluded that the lots were unzoned. Accordingly, it denied an injunction against nonresidential use. Opinion by Fess, P. J.

The quoted ordinance provision did not fix an eastern boundary of the residence zone along East Madison Street. The court concluded, however, that the ordinance had not been intended to apply outside the village limits.

Moreover, the ordinance had not been adopted in compliance with the statute that gives extraterritorial powers to municipalities. Consequently, the ordinance could only have been adopted under the home rule amendment to the state constitution, and that amendment confers no extraterritorial power.

Plaintiff contended that the ordinance operated prospectively so as to cover defendants’ lots when they were annexed. The court stated, however, that “in view of our conclusion that the ordinances were not intended to embrace defendants’ property lying beyond the boundaries of the village, we are not required to determine whether the ordinances would have prospective application [citing cases], nor to determine whether the village might have, in express terms, provided that, when annexed, adjacent property should be subject to the provisions of such an ordinance.”

Two months after Gross’s property was annexed to the city of Middletown, the city adopted a comprehensive zoning ordinance. The ordinance did not specifically include Gross’s property in any district.

In this action, the court of appeals refused to order issuance of a building permit for a business building on Gross’s property. On appeal to the Supreme Court, held: affirmed.

The text of the ordinance provides that “where property has not been specifically included within a district, such property shall be considered to be in the ‘R-1’ residence district until otherwise classified.” This provision clearly applied to the Gross property. Consequently, the judgment of the court of appeals was correct.

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Open meeting requirement. Noncompliance with open meeting requirement did not invalidate board decision.

Board of adjustment had statutory authority to combine 155-foot height district with residential use district.

Spot zoning not found: board had broad discretion to determine whether areas zoned for high rise buildings should be extensive or relatively limited.

Elmer v. Board of Zoning Adjustment of Boston, Supreme Judicial Court of Massachusetts [highest court], June 14, 1961, 176 N.E.2d 16

The Boston board of zoning adjustment changed the height limit in two Back Bay residence areas from 80 to 155 feet. In this action, the Supreme Judicial Court upheld the

Property not included in any district was effectively zoned residential by general text provision.

State ex rel. Gross v. Ludewig, Supreme Court of Ohio [highest court], Nov. 22, 1961, 178 N.E.2d 89

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board's action. Opinion by Whittemore, J.

*Open meeting.* Massachusetts legislation requires that notice be given of board meetings and that the meetings be open to the public. In this instance, the vote of the board was taken "at an executive session following deliberations at executive sessions, of which no notice had been given . . ." Nevertheless, the Supreme Judicial Court upheld the board's decision.

A recent statute provided that failure to comply with the statutory *notice* requirement would not invalidate board action. The same was true, the court concluded, of failure to comply with the *open meeting* requirement. When no notice is given, the public is unlikely to attend board meetings. Under these circumstances, it would be arbitrary to let the validity of board action depend on whether the meeting was technically an open one.

The court noted that the statutes do provide for enforcement of the notice and open meeting requirements. But instead of providing for the invalidation of board action, the statutes authorize the issuance of injunctions against officials who have not complied with the requirements.

*Statutory authority.* The board had statutory authority to establish a 155-foot height limit in a residence zone. The board had acted under a unique Massachusetts statute. Originally adopted in 1924, the statute prescribed 6 use districts and 5 height districts for Boston. The statute also contained a zoning map of the city, but it gave the board of adjustment power to change district boundaries.

A chart on the original zoning map showed certain combinations of the use and height districts. Since the chart did not show any combination of a residence district with a 155-foot height district, plaintiffs challenged the board's authority to make such a combination here. However, after an extensive examination of legislative history, the court concluded that the statute did give the board such authority.

*Spot zoning.* Finally, although the rezoned area was in some ways difficult to distinguish from an adjacent area, the board's action was not spot zoning. There had been less deterioration in the rezoned area than in the adjacent one, and the rezoned area was nearer to downtown shops. The board could have concluded that the rezoned area would be more acceptable to tenants in new high rise buildings.

The need for new apartment houses throughout the larger Back Bay area was not controlling. The issue was how "much of the area is now reasonably to be classified for high rise buildings."

It is peculiarly for the legislative agency to determine the probable demand for high rise sites and the effect of making the area for choice of such sites extensive or relatively limited in relation to the demand, and to guide, accelerate, or retard developing trends in accordance with its judgment of the welfare of the city, applying the stated zoning standards.

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**Board of appeals decision quashed:**

based in part on misinformation.

**Standing.** Option holder and property owner together could apply for variance.

*Cranston Jewish Center v. Zoning Bd. of Review of Cranston, Supreme Court of Rhode Island [highest court], Dec. 1, 1961, 175 A.2d 296*

Rotelli wanted to build a super-
market on a tract divided by a municipal boundary. One portion of the tract was in Cranston and was zoned residential. The other portion was in Providence.

Rotelli obtained an option to buy the tract. Then he and the owner applied for a variance and exception authorizing commercial use of the Cranston portion. The Cranston board of review granted the variance and exception after being informed by the applicants that the Providence portion of the tract was zoned commercial.

This information about the Providence zoning was erroneous. After petitioner brought this action to review the board’s decision, petitioner and the applicants stipulated that much of the Providence portion of the tract was actually zoned residential. Held: board’s decision quashed; board directed to reconsider the application on the basis of the record as corrected by the facts stipulated in this case. Opinion by Paolino, J.

Misinformation. The board had given several reasons for its decision. One of these was that the Providence portion of the tract was zoned commercial. The Supreme Court had no way of knowing whether the misinformation about the Providence zoning was a controlling influence on the board. Under these circumstances, fairness required that the board be given an opportunity to reconsider its action.

Standing. The petitioner contended that Rotelli, as an option holder, had no standing to seek a variance or exception. The court found no merit to this contention. The application had been made by both Rotelli and the owner. The fact that the owner did not appear in person at the hearing was immaterial. He was represented there by an attorney, and the statutes provide that any party may appear at board hearings in person, or by agent or attorney.

Ethnic or religious background of funeral director as factor in determining whether additional funeral home would serve public convenience.

Special permit for funeral home in residence zone upheld.

_Budlong v. Zoning Bd. of Review of Cranston, Supreme Court of Rhode Island [highest court], July 10, 1961 (as modified on denial of motion for reargument, July 19, 1961), 172 A.2d 590_.

The Cranston zoning ordinance gives the board of review broad power to grant exceptions. The board may permit any use in any zone if it finds (1) that the public convenience will be served, (2) that the appropriate use of neighboring property will not be injured, and (3) that the use will be in harmony with the character of the neighborhood.

Applicant sought an exception for a funeral home on a lot zoned for apartments. The lot, which fronts on an arterial highway, is occupied by an old house, lawfully converted into four apartments. Though the immediate area is zoned for residences and apartments, it contains several nonresidential uses, including a nonconforming factory next to applicant’s lot and a supermarket beyond the factory. A short distance beyond the supermarket is a developed commercial zone.

Making all findings required by the ordinance, the board granted the exception for a funeral home. In this action, held: board’s decision affirmed. There was “substantial evidence in the record” to support all
the board's findings. Opinion by Paolino, J. One justice (Roberts) concurred in the result. Two others (Condron, C.J., and Frost) dissented.

(Once before, the board granted an exception for a funeral home on this lot, but the Supreme Court set it aside. See Budlong v. Zoning Bd. of Review of Cranston, 153 A.2d 127, 12 ZD 60 (R.I. 1959).)

Though conflicting, the evidence supported the board's findings that the funeral home would not permanently injure the appropriate use of neighboring property and would be in harmony with the character of the neighborhood.

As required by the ordinance, the board also found that the funeral home would serve the public convenience. On this point, there was evidence "showing the percentage of one racial group to the whole population in the city of Cranston and the desire of many members of that group for more funeral homes operated by funeral directors of that particular group." The president of the state funeral directors association testified that another funeral home was needed to serve that group.

The court concluded that the evidence supported the board's public convenience finding. It explained:

We must also be realistic and recognize the obvious fact that generally ethnic and religious segments of our population, especially in time of stress and emotion resulting from the decease of dear ones, prefer the services of funeral directors of their own ethnic or religious background. This is not due to discrimination of an odious nature. On the contrary people generally have such preferences because it is part of human nature for people, in time of stress, to seek the help of those they know best.

Moreover, the funeral home would serve associates of the deceased who might attend funeral services, "regardless of the ethnic or religious background of the deceased." Apparently because of this, the court concluded that the "finding that the proposed use would serve the public convenience and welfare is not restricted to the convenience and welfare of any particular segment of the population of the city of Cranston."

The dissenters, in an opinion by Justice Frost, pointed out that a previous exception for a funeral home on this lot had been held invalid. Also, considering the public convenience finding, they noted that the evidence included a petition signed by 150 Cranston residents. This stated in part:

My family has been a client of The Thomas Gattone & Son Funeral Home, and, in case of future need would look to it for serving such need.

It would serve the convenience and welfare of the undersigned and my relatives and friends in Cranston, if a Thomas Gattone & Son Funeral Home were located in Cranston at 594 Pontiac Avenue.

Instead of showing a public need, the dissenters concluded, these petitions showed only a preference for a particular funeral director. The preference of the signers did not justify allowing applicant's business in a residential area.

Rehearing by board of adjustment.

New evidence presented at rehearing warranted board's changed decision.

Giauzde v. City of Nashua, Supreme Court of New Hampshire [highest court], Oct. 27, 1961, 174 A.2d 432

Soucy applied for a variance from yard requirements. After
formal proof of his ownership. The court disagreed, noting testimony about "conduct consistent only with ownership."

Nor was the exception invalid for lack of notice of the board's public hearing. The board gave notice of a hearing on November 22. Unable to obtain a quorum then, it recessed until November 29, when it held the hearing without giving further notice. "It is too well settled to require any discussion that a body less than a quorum, having jurisdiction as to time, may adjourn to a time certain."

Finally, the fact that one board member had testified in favor of the exception did not invalidate it. The member had disqualified himself, and there being no evidence of undue influence, plaintiffs could not be said to have been prejudiced by his testimony.

Pursuant to this provision, the board granted a special permit for a Y.W.C.A. activities building, including dormitory and recreation facilities for members. In this proceeding, the trial court upheld the board's decision (190 N.Y.S.2d 289, 12 ZD 131). The appellate division reversed (195 N.Y.S.2d 866, 12 ZD 279). On appeal to the Court of Appeals, held: reversed and decision of the trial court reinstated. Opinion by Desmond, C.J. Two judges (Fuld and Van Voorhis) dissented without opinion.

The appellate division erred in holding as a matter of law that the proposed use was not a "membership club" within the meaning of the ordinance.

It also erred when it found no support in the record for a number of the board's findings. Zoning hearings may be informal, and the positions of the contending parties need not be put into the form of sworn testimony. Here, no one offered formal testimony or objected to the unsworn statements put in by all parties. As to the substance of the proof, the Court of Appeals assumed that "under the ordinance there had to be a showing: first, of appropriate location as to transportation, water, sewerage, fire and police; second, of reasonable safeguards of neighborhood character and property values; and third, of absence of undue traffic congestion or traffic hazard."

As to the alleged destruction of neighborhood character and property values, the court noted that this was "a changing neighborhood, its pristine seclusion already ended by churches, a very large school [across the street from the proposed Y.W.C.A.], a country club [on adjoining property], business offices and hospitals and a nearby intersecting main highway. The board

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Board of appeals. Special permit properly granted despite absence of direct proof to support some of board's findings.

Club. Y.W.C.A. permitted in residence zone as "membership club."


This decision reverses the one reported in 195 N.Y.S.2d 866 and summarized in 12 ZD 279.

In the RO one-family residence district, the White Plains zoning ordinance authorizes the board of appeals to issue special use permits for:

- Golf clubs, country clubs and other membership clubs not operated for profit.

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ZONING DIGEST
went to great length to protect what quiet there remained" by imposing conditions on the permit.

As to required water, sewerage, fire and police protection, city officials had been notified of the proposed use and had raised no objection. Also, no issue as to these was raised at the hearing. Under these circumstances, the absence of direct proof on these questions could not be a ground for annulling the permit.

As required by the ordinance, the board also found that the proposed building would be appropriately located as to transportation and would cause no undue traffic congestion or hazard. The court supposed "that these board members, with the facts either known to them . . . or presented at the hearing, could make common-sense judgments as to all these matters." The court could have remanded the case so that the board could amplify its findings to include the precise facts on which it relied, but this would have been a "useless formality since the facts were commonly known to everyone concerned."

The court concluded:

This is the familiar zoning case arising out of swiftly changing use patterns in a burgeoning Westchester County city. As someone remarked at the hearing, everyone wants churches, schools (and clubs) but not in his own neighborhood. Zoning boards of appeals are made up not of theoreticians or doctrinaire specialists but of representative citizens doing their best to make accommodations between conflicting community pressures.

. . . They had in mind the wishes of the neighbors as well as the community value of the Y.W.C.A. This record shows the care with which the problem was debated and disposed of by this board. For the court to overrule the board's judgment was illegal and contrary to the settled and practical necessities of zoning procedure.

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Special permit.

*Gibbons v. Board of Appeals of Chicago, Appellate Court of Illinois, First District [intermediate court], Oct. 23, 1961 (rehearing denied, Nov. 30, 1961), 177 N.E.2d 864*

Only an abstract of this opinion appears in the reporter. The Chicago board of appeals denied a special permit for the disposal of refuse on a vacant tract. The appellate court upheld the board's decision, concluding that its findings were not against the manifest weight of the evidence.
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