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Constitutionality of Rural Zoning

A NEW and important application of zoning¹ has appeared in Wisconsin and has attracted widespread attention of agricultural economists and land-use planners. In 1929 the legislature of that state empowered counties "... by ordinance [to] regulate, restrict and determine the areas within which agriculture, forestry and recreation may be conducted"² Pursuant to that enabling act, "twenty-three northern and central Wisconsin counties have . . . planned, developed and enacted comprehensive country-wide rural zoning ordinances. A total of more than five million acres of land—much of it tax delinquent and most of it non-agricultural—has now been officially closed to agricultural development and legal settlement."³ The areas zoned were the cut-over areas once heavily timbered but in recent decades supporting scattered settlers and a moribund agriculture.

¹ Zoning has been defined as "the creation by law of districts in which regulations differing in different districts prohibit injurious or unsuitable structures and land and uses of structures and land." BASSETT, TECHNICAL PAMPHLET SERIES, No. 5 (Revised, National Municipal League 1922).

² Wis. Laws 1929, p. 468. The act enabling counties to zone the territory outside of incorporated cities and towns was passed in 1923. Wis. Laws 1923, p. 666. As the act then stood it was primarily designed to serve counties wishing to control suburban land uses adjacent to cities. In 1931, (Wis. Laws 1931, p. 370) and in 1935, (Wis. Laws 1935, pp. 443, 615) the county zoning act was amended. Subsection (1) of section 59.97, Wis. STATS. (1937), now reads: "The county board of any county may by ordinance regulate, restrict and determine the areas within which agriculture, forestry and recreation may be conducted, the location of roads, schools, trades and industries, the location, height, bulk, number of stories, and size of buildings and other structures, the percentages of lot which may be occupied, size of yards, courts, and other open spaces, the density and distribution of population, and the location of buildings designed for specified uses, and establish districts of such number, shape and area, and may also establish set-back building lines, and may further regulate, restrict, and determine the areas along natural water courses, channels, streams, and creeks in which trades and industries and location of buildings for specified uses may be prohibited, and may adopt an official map. . . ."

³ Rowlands and Trenk, *Rural Zoning Ordinances in Wisconsin* (July, 1936) CIRCULAR 281, EXTENSION SERVICE OF THE COLLEGE OF AGRICULTURE, UNIVERSITY OF WISCONSIN, at p. 3.

For material on the historical background and economic aspects of rural zoning in Wisconsin, see: *Making the Best Use of Wisconsin Land Through Zoning* (March, 1934) SPECIAL CIRCULAR; *County Zoning in Wisconsin* (Nov. 1934) SPECIAL CIRCULAR; *Story of Zoning Langdale County* (April, 1934) SPECIAL CIRCULAR. (These Bulletins are from the Extension Service of the College of Agriculture, University of Wisconsin, Madison, Wis.) And see Jesness and Nowell, *Zoning of*

A typical zoning ordinance, that of Florence County adopted June 28, 1935,⁴ divides the county into three classes of use-districts: a "Forestry District," a "Recreation District," and an "Unrestricted District." The ordinance provides:

"In the Forestry District no building, land or premises shall be used except for one or more of the following specified uses:

1. Production of forest products
2. Forest industries
3. Public and private parks, playgrounds, camp grounds and golf grounds
4. Recreational camps and resorts
5. Private summer cottages and service buildings
6. Hunting and fishing cabins
7. Trappers' cabins
8. Boat liveries
9. Mines, quarries and gravel pits
10. Hydro-electric dams, power plants, flowage areas, transmission lines and sub-stations
11. Harvest of any wild crops such as marsh hay, ferns, moss, berries, tree fruits and tree seeds.

"(Explanation—Any of the above uses are permitted in the Forestry District, and all other uses, including family dwellings, shall be prohibited.)

"In the Recreation District all buildings, lands or premises may be used for any of the purposes permitted in District No. 1, the Forestry District, and in addition, family dwellings are permitted.

"(Explanation—Any of the above uses are permitted in the Recreation Districts, and all other uses, including farms, shall be prohibited because of the fire hazard involved in clearing operations and spoliation of forested conditions adjacent to highly developed recreation property. Such properties demand the maintenance of a maximum of natural conditions to retain their fullest economic value.

"Family dwellings are permitted in order to allow owners to protect their investment during the entire year.)

"In the unrestricted district, any land may be used for any purpose whatsoever, not in conflict with law."

A variety of reasons has been advanced in support of the social desirability of these land-use regulations. They include prevention and control of isolated and scattered settlement with its attendant evils of disproportionately high governmental expenditures for roads and schools, prevention of tax delinquency, curbing serious fire hazards, making police surveillance more effective, combatting inadequate regulation of public health, overcoming the lack of social and community facilities available to more compact settlement, control of erosion, conservation of natural resources and the desirability of making the "best use" of land.⁵

Minnesota Lands (August, 1934) SPECIAL BULLETIN 167, AGRICULTURAL EXTENSION DIVISION OF THE UNIVERSITY OF MINNESOTA.

⁴ Rowlands and Trenk, *op. cit. supra* note 3, at 34-38.

⁵ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE TO THE NATIONAL

Assuming that these and additional reasons would make it desirable for the counties of California to set up similar land-use regulations in California, two questions must be considered: first, the authority of the counties to enact such regulations under the terms of the California Constitution and present statutes; and, second, the validity of such land-use regulations under the due process clause of the Federal Constitution.⁶

In California, power of cities and counties to zone is derived from section 11 of article XI of the constitution which provides:

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

RESOURCES BOARD (1935) Part VII, pp. 125-126.

The National Resources Board was created by EXECUTIVE ORDER No. 6777, dated June 30, 1934, pursuant to authority vested in the President by the National Industrial Recovery Act (48 Stat. (1933) 195). It was provided that, "The functions of the Board shall be to prepare and present to the President a program and plan of procedure dealing with the physical, social, governmental, and economic aspects of public policies for the development and use of land, water, and other national resources, and such related subjects as may from time to time be referred to it by the President." The National Resources Committee was created by EXECUTIVE ORDER No. 7065, dated June 7, 1935, pursuant to authority vested in the President under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (49 Stat. (1935) 115, 15 U. S. C. A. 728, note). Its functions and duties prescribed by the President were, in part, "To collect, prepare and make available to the President, with recommendations, such plans, data and information as may be helpful to a planned development and use of land, water, and other national resources, and such related subjects as may be referred to it by the President." The personnel, property, records, rights, etc. of the National Resources Board were transferred to the National Resources Committee.

The Attorney General of Wisconsin, relying in part on the leading case on the validity of urban zoning in Wisconsin, *State ex rel. Carter v. Harper* (1923) 182 Wis. 148, 196 N. W. 451, stated: "The county zoning ordinance is undoubtedly in the public welfare. The cut-over areas of Northern Wisconsin speak as eloquently against haphazard development as any city condition. The spotting of these lands with remote or abandoned farms, resulting in sparsely settled districts, with insufficient population or value to support roads and schools, or to afford the comforts of living that this day should give to all; the misdirected efforts to farm lands not well suited to agriculture, with resulting personal grief and social loss; the far-reaching economic ill effects of stripping the state of timber; the fire hazard of cut-over lands, and the fire hazard of human habitation in their midst, all cry out for planning, for social direction of individual efforts." (1931) OPS. ATT'Y GEN. OF WIS. 751. The Attorney General of Minnesota approved a proposed bill authorizing counties to zone certain areas with conditions similar to those in Wisconsin for conservation purposes and to prohibit new agricultural enterprises within such areas. (1933-1934) OPS. ATT'Y GEN. OF MINN. No. 181.

⁶ The Fourteenth Amendment to the Federal Constitution protecting life, liberty and property from invasion by the state without due process of law and guaranteeing equal protection of the laws is used as a test of validity when the legislature acts under the police power. CAL. CONST., art. I, § 13 provides, "no person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

It has been held that this section of the constitution is a direct grant of the police power to the municipalities, and as such includes the power to zone.⁷ In *Boyd v. Sierra Madre* the court said of a city ordinance prohibiting livery stables in residential districts:⁸

"The power so conferred [by § 11, art. XI] is as broad as that possessed by the legislature itself, subject to the two exceptions that its exercise by any city must be confined to the municipality and must not be in conflict with the general laws of the state."

So it has been held that the enumeration in a city charter of the trades, callings and occupations which may be prohibited does not preclude enactment of an ordinance prohibiting the carrying on of certain other kinds of business in residential districts.⁹ Of an ordinance requiring a permit from the city council for the erection of a public garage, the court said:¹⁰

"But even in the absence of such a charter provision [giving the city council power to make and enforce local police and sanitary regulations] the city is vested with full power to make and enforce police regulations. Such power is derived directly from section 11 of Article XI. . . ."

Procedure for the enactment of zoning ordinances by cities organized under the Municipal Corporations Act is prescribed by the Zoning Act of 1917.¹¹

Section 11 of article XI refers to counties as well as to cities and townships, and it must follow that the constitution grants power to counties to zone.¹² The Planning Act of 1929 provided for the establish-

⁷ *Miller v. Board of Public Works* (1925) 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479; *Zahn v. Board of Public Works* (1925) 195 Cal. 497, 234 Pac. 388, *aff'd* (1927) 274 U. S. 325; *Hurst v. City of Burlingame* (1929) 207 Cal. 134, 277 Pac. 308; *Gilgert v. Stockton Port Dist.* (1936) 7 Cal. (2d) 384, 60 P. (2d) 847.

⁸ (1919) 41 Cal. App. 520, 523, 183 Pac. 230, 232.

⁹ *In re Montgomery* (1912) 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130 (lumber yards prohibited in residential districts).

¹⁰ *Parker v. Colburn* (1925) 196 Cal. 169, 175, 236 Pac. 921, 924.

¹¹ Cal. Stats. 1917, p. 1419. *Hurst v. City of Burlingame*, *supra* note 7.

¹² In *Smith v. Collison* (1931) 119 Cal. App. 180, 6 P. (2d) 277, the court considered a county zoning ordinance which had been passed in 1925 covering that part of Los Angeles County known as Altadena. In 1927 a comprehensive county zoning ordinance for Los Angeles County was passed. In passing on the 1925 ordinance the court took for granted the power of the county to zone without discussing the question other than to say that power to zone was inherent in the police power. In 1925 no state law existed setting up zoning procedure for counties. In 1927 the precursor to the Planning Act of 1929 (Cal. Stats. 1929, p. 1805) set forth zoning procedure for counties (Cal. Stats. 1927, p. 1899). Because this statute made establishment of county planning commissions permissive instead of mandatory, it was deemed unconstitutional as in violation of the provision of the California Constitution requiring uniformity of county governments (CAL. CONST., art. XI, § 4). *Coulter v. Pool* (1921) 187 Cal. 181, 201 Pac. 120. For this reason it was succeeded and repealed by the 1929 Planning Act.

In *In re Smith* (1904) 143 Cal. 368, 77 Pac. 180, a county ordinance of Los Angeles County restricting gasworks within certain boundaries was held void, not on the ground of lack of any power of the county (the court in fact agreed that

ment of county planning commissions¹³ and set up the procedure for the adoption of county zoning ordinances.¹⁴ By section 4 of that Act county planning commissions were empowered to make and adopt "master plans" which might include "districting plans." This section provided that: "Such plan shall be comprehensive and shall show proposed districts in which the use, height and bulk of buildings and premises are limited; *provided*, that ordinances and amendments thereto establishing such districts shall be adopted only after the making of the reports, holding the public hearings and following the same procedure as described in chapter 784 of the statutes of 1917, as amended, for cities . . ." ¹⁵ The "master plan" contemplated a broad scheme of development. Section 4 set forth among its parts "major traffic street plans," transit plans, transportation plans, park and recreation system plans. Inclusion of "districting plans" appeared illogical, as the inclusion among the proper subjects of the "master plan" of what was really a police regulation designed to carry out and effectuate the "master plan" or its parts.

The Planning Act was amended at the last session of the California Legislature by Assembly Bill 722.¹⁶ Powers of the county and city planning commissions have been expanded to include as parts of the "master plan" a "Conservation Plan" and a "Land Use Plan."¹⁷ The former is a plan "For the conservation, development and utilization of natural resources, including water and its hydraulic force, forests, soils, rivers, and other waters, harbors, fisheries, wild life, minerals and other natural resources. Such plan shall also cover the reclamation of land and waters, flood control, prevention and control of the pollution of streams and other waters, regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan, prevention, control and correction of the erosion of soils, beaches and shores, and protection of watersheds." The "Land Use Plan" is to be: "An inventory and classification of natural land types and of existing land cover and uses, and comprehensive plans for the most desirable utilization of land." The old "districting plan" is deleted from section 4 of the act as amended, but section 6.6 as amended provides: "The planning commission may from time to time prepare precised sections of master plans or detailed or precise plans based thereon and may recommend

the power to enact legislation of this type was derived from section 11 of article XI of the constitution), but on the ground that the particular ordinance was unreasonable.

¹³ Cal. Stats. 1929, p. 1807, §§ 2, 3.

¹⁴ *Ibid.* at 1808, §§ 4, 5, 6.

¹⁵ *Ibid.* § 4.

¹⁶ Cal. Stats. 1937, p. 1817, effective Aug. 27, 1937.

¹⁷ Cal. Stats. 1937, pp. 1817, 1820, § 8, recasting section 4 of the Planning Act.

such plans to the legislative body [of the city or county] for adoption [by ordinance] as official plans. Such precise plans may include proposed regulations limiting the uses of land, the uses of buildings, the height and bulk of buildings, the open spaces about buildings, the location of buildings and other improvements with respect to existing or planned rights of way and other such matters as will accomplish the purposes of this act, including the procedure for the administration of such regulations." Ample power and adequate machinery for the enactment of rural zoning ordinances, therefore, exists today in the California counties.¹⁸

¹⁸ In addition to the cases noted, *supra* notes 7, 8, 9 and 10, that the power to zone is derived directly from section 11 of article XI of the constitution, subject to the enactment of general laws, the following cases may be noted as shedding light on the power of counties to zone and on the interpretation of the exception noted in section 11 of article XI: In *Ex Parte Daniels* (1920) 183 Cal. 636, 641, 192 Pac. 442, 445, the court said: "... a mere prohibition by the state legislature of local legislation upon the subject of the use of the streets, without any affirmative act of the legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state constitution to a municipality to enact local legislation." In *Sawyer v. Board of Supervisors of Napa County* (1930) 108 Cal. App. 446, 453-454, 291 Pac. 892, 896, the court, noting that the Dam Act of 1929 (Cal. Stats. 1929, p. 1505) specifically forbade regulation of dams and reservoirs by the counties and cities, said: "It is conceded, of course, that the prohibition contained in the section purporting to limit the power of cities and counties is ineffective unless the field has been occupied by legislative enactments. . . . The whole act must be considered, also, in determining the extent of the field covered by the general law." In *In re Iverson* (1926) 199 Cal. 582, 586, 250 Pac. 681, 682, a Los Angeles ordinance which limited filling prescriptions of intoxicating liquor to eight ounces was argued to be in conflict with the Wright Act which allowed such prescriptions to an amount not to exceed 16 ounces, but the court sustained the local regulation, saying, "The only way the Legislature can inhibit local legislative bodies from enacting rules and police regulations is by the state itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with the state act. . . . Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable." To the same effect, that "... if the subject of the legislation is not essentially criminal but is merely regulatory in its nature then the municipal corporation may enact more stringent regulations covering the same general subject matter," see (1927) 15 CALIF. L. REV. 345. See also *Ex parte Hong Shen* (1893) 98 Cal. 681, 33 Pac. 799; *In re Hoffman* (1909) 155 Cal. 114, 99 Pac. 517; *Mann v. Scott* (1919) 180 Cal. 550, 182 Pac. 281; *Ham v. County of Los Angeles* (1920) 46 Cal. App. 148, 189 Pac. 462.

Section 11 of article XI and the cases noted remove any doubt about the power of the counties in California to enact rural zoning ordinances, assuming the ordinances to be valid exercises of the police power. The situation here is different from that in states, where, as in Wisconsin, police power reposes in the state and an act of the legislature is necessary in order to grant this power to the counties. *Supra* note 2.

For a list of states authorizing counties to zone see Hendrickson, *County Planning and Zoning: Lists of Enabling Acts and Commissions* (mimeograph, U. S. Dept. of Agr., June, 1936). For a discussion of county zoning in California to date, see

We turn now to consideration of the question of the constitutionality of the type of zoning ordinance enacted in Wisconsin. It has been noted that urban zoning has been held by the courts to be an exercise of the police power.¹⁹ Whether an ordinance prohibiting agriculture within certain districts in rural areas will be held valid by the courts will depend, first, upon whether the objectives of such land-use regulations are within the valid purview of the police power; second, whether the measure bears a reasonable and substantial relation to the objectives; and third, whether the particular ordinance is reasonable and not arbitrary.

Before examining the objectives of rural zoning and the relation of such land-use regulations to those aims, it is advisable to consider the decisions upholding the type of land-use regulation embodied in urban zoning ordinances. Two reasons make this desirable. In the first place, urban zoning, like rural zoning, regulates the use of land by districts, whether it regulates the use of land directly, or indirectly by regulating the use of buildings or structures. In the second place, the objectives of urban zoning ordinances which have been approved by the courts as valid objects of the police power will be found to be similar to the objectives of rural zoning regulations.

The validity of comprehensive urban zoning ordinances was established in California in 1925 in the companion cases of *Miller v. Board of Public Works*²⁰ and *Zahn v. Board of Public Works*.²¹ The next year all doubt as to the constitutionality of urban zoning was resolved by the decision of the Supreme Court of the United States in the *Euclid Village* case.²²

In the *Zahn* case²³ the court declared that:

"... an enactment by a municipality of an ordinance, pursuant to a general comprehensive zoning plan, based upon considerations of public health,

text, *infra* p. 184, and Tilton, *The Districting Plan of Orange County, California* (1936) 12 J. LAND AND PUB. UTIL. ECON. 375. For areas of possible application of rural zoning, see text in *infra* pp. 186-187.

¹⁹ Cf. Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning* (1929) 24 ILL. L. REV. 135.

²⁰ *Supra* note 7 (building permit refused for four-family dwelling in district restricted to two-family dwellings). The court relied in part upon *Welch v. Swasey* (1909) 214 U. S. 91 (height of buildings regulated); *Barbier v. Connolly* (1885) 113 U. S. 27 (laundries within certain districts prohibited from operating from 10 P. M. to 6 A. M.); *Soon Hing v. Crowley* (1885) 113 U. S. 703 (regulation of public laundries in certain districts; same ordinance considered in *Barbier v. Connolly*, *supra*); *Reinman v. City of Little Rock* (1915) 237 U. S. 171 (livery stables prohibited in certain districts). See *Thomas Cusack Co. v. City of Chicago* (1917) 242 U. S. 526 (billboards conditionally prohibited in certain districts) and *Nectow v. City of Cambridge* (1928) 277 U. S. 183.

²¹ *Supra* note 7 (business building excluded in district permitting only hotels, tenements and dwellings).

²² *Euclid v. Ambler Realty Co.* (1926) 272 U. S. 365.

²³ *Supra* note 7, at 502-503, 234 Pac. at 391.

safety, morals, or the general welfare, applied fairly and impartially, which ordinance regulates, restricts, and segregates the location of industries, the several classes of business, trade, or calling and the location of apartment or tenement houses, clubhouses, group residences, two-family dwellings, and the several classes of public and semi-public buildings, is a valid exercise of the police power."

The evils aimed at by urban zoning ordinances have been examined by the courts and sustained as valid objectives of the police power. Said the Supreme Court in the *Euclid* case:²⁴

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

"The Supreme Court of Louisiana, in *State v. City of New Orleans*,²⁵ . . . said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. . . .

"'Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . .'

"The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development

²⁴ *Supra* note 22, at 391, 393, 394-395.

²⁵ (1923) 154 La. 271, 282-283, 97 So. 440, 444.

in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which have sometimes resulted in destroying the entire section for private houses purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of large portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very nearly to being nuisances.”

The legal questions involved in urban zoning have been before the courts for some time, and the usefulness of this type of regulation is attested to by its widespread adoption.²⁶ New York City passed the first comprehensive city zoning law in 1916.²⁷ The Land Planning Committee of the National Resources Board reported in 1935:²⁸ “At the close of 1930 more than 1,100 municipalities had enacted zoning ordinances. At the present time all cities of half a million or more population, except Detroit, have zoned. The cities of 100,000 to 500,000 are all zoned except three, Camden, N. J., Tacoma, Wash., and Tampa, Fla. The population of zoned cities of more than 100,000 was over 34 million in 1930. The total population of all zoned municipalities is approximately 50,000,000.”

The “urban type” of zoning has been extended to territory outside of cities and its validity has been upheld.²⁹ Zoning of suburbs of mu-

²⁶ Cf. *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 111.

²⁷ Modesto, California, in 1885, passed an ordinance which provided: “It shall be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house where articles are washed and cleansed for hire, within the city of Modesto, except within that part of the city which lies west of the railroad track and south of G Street.” *In re Hang Kie* (1886) 69 Cal. 149, 150, 10 Pac. 327. This is the first municipal ordinance embodying the essential principle of zoning, viz., segregation of unsuitable uses of structures and land to certain districts. See Pollard, *Outline of the Law of Zoning in the United States* (1931) 155 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Part 2, 15-33.

²⁸ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 124.

²⁹ *Village of Western Springs v. Bernhagen* (1927) 326 Ill. 100, 156 N. E. 753

nicipalities and along roadsides has in recent years grown apace. In some cases the object of the regulation is to protect urban development of unincorporated communities. Ordinances of Monterey, Santa Clara, San Mateo, Los Angeles and Orange Counties include such regulations, and prohibit or regulate animal raising in rural residential districts.³⁰

Other zoning regulations restrict the use of land in suburbs or along roadsides by regulating the erection of billboards and the use of land for "hot-dog" stands, filling stations, auto dumps, junk yards and other business or commercial uses. These are designed to preserve scenic or recreational values or assure safe travel along highways. The Roadside Agricultural District of the Orange County Districting Plan is described as "... designed for use along primary and scenic highways to restrict outdoor advertising and scattered commercial uses and to preserve the fundamental non-urban character of the highway frontage."³¹

Before considering whether the specific aims of rural zoning regulations are within the purview of the police power, it may be well to note how broadly the scope of the police power has been expanded in recent years. While the police power at one time justified restrictions of the use of property or of liberty only to protect the health, safety or morals of the community, of late the courts have approved exercise of the police power to promote "the general welfare," "public convenience" or "general prosperity." In *Chicago, Burlington & Quincy Ry. v. Illinois*,³² the railway company was compelled, pursuant to a statute providing for compulsory draining of cultivable lands at private expense, to remove a bridge and culvert or otherwise comply with a drainage plan so as to permit enlargement of a channel under the bridge to make a slough cultivable. The Supreme Court said, in answering the question of whether there was a taking for a public use or an incidental injury to private rights resulting from the exercise of governmental powers reasonably for the public good:³³

"We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

(filling station prohibited in residential zone in suburban residential community).

³⁰ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit.* *supra* note 5, at 126.

³¹ Tilton, *op. cit.* *supra* note 18, at 382. And see by the same author *Regulating Land Use in the County* (1931) 155 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Part 2, 123-136; Pomeroy, *County Zoning under the California Planning Act* (1931) 155 *ibid.* 47-59; Pomeroy, *Roadside Control in California Through County Zoning* (1937) 5 ROADSIDE BULLETIN No. 1, 21.

³² (1906) 200 U. S. 561.

³³ *Ibid.* at 592.

The Supreme Court has reaffirmed this position on numerous occasions.³⁴ In the classic statement upon the subject Mr. Justice Holmes said:³⁵

"It may be said in a general way that the police power extends to all the great public needs . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The courts in California have expressed themselves in equally broad language:³⁶

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and the general prosperity of the community'."

Recently the supreme court of this state declared:³⁷

"The police power is no longer limited to measures designed to protect life, safety, health and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity."

It should be pointed out, however, that language may be found in the decisions on the scope of the police power signifying limited as well as almost unlimited powers. An examination of the facts of each case and of the question actually decided is necessary in order to determine the limits of the zoning power.³⁸

We come now to a closer examination of the reasons advanced to support the social desirability of rural zoning from the standpoint of whether they constitute purposes for which the police power may be exercised. This will entail, of course, consideration of whether rural zoning regulations are reasonably related to the ends sought to be effected.

Probably the chief evil aimed at by rural zoning has been that of scattered and isolated settlement. Not only do settlers frequently find themselves upon farms unsuitable for cultivation but scattered settlement makes for unduly high costs for roads, schools and public services. The frequent unsuitability of the land for agriculture makes for tax

³⁴ *Bacon v. Walker* (1907) 204 U. S. 311; *Nebbia v. New York* (1934) 291 U. S. 502. That the declaration of the legislature as to what is within the general welfare is entitled to greatest respect, see *Block v. Hirsch* (1921) 256 U. S. 135, 154; *Lawton v. Steele* (1894) 152 U. S. 133; *Nebbia v. New York*, *supra*.

³⁵ *Noble State Bank v. Haskell*, *supra* note 26, at 111.

³⁶ *Miller v. Board of Public Works*, *supra* note 7, at 485, 234 Pac. at 383. *Odd Fellows' Cemetery Association v. City and County of San Francisco* (1903) 140 Cal. 226, 231, 73 Pac. 987, 988.

³⁷ *Max Factor v. Kunsman* (1936) 5 Cal. (2d) 446, 461, 55 P. (2d) 177, 184.

³⁸ Note (1936) 11 Wis. L. Rev. 543. *Weaver v. Palmer Bros. Co.* (1925) 270 U. S. 402, 414: "Every opinion is to be read having regard to the facts of the case and the question actually decided."

delinquency, high relief loads and small contribution by the beneficiaries of public services to the state or county in the form of taxes. This problem was particularly pressing in the cut-over regions of Wisconsin where the financial problems attendant upon scattered settlement were the principal reason for the enactment of those laws.³⁹ And similar conditions characterize scattered and isolated settlement elsewhere.⁴⁰

In Wisconsin a study of eighteen townships revealed that where the population was 29 per square mile, road mileage per farmstead averaged 0.32 and school costs per family \$51.00 per pupil; where the township population was 1.6 per square mile, road mileage per farmstead was 2.48 and school costs per pupil \$146.00.⁴¹ Thus, areas of scattered settlement required nearly three times greater expenditures for schools and eight times greater for roads. In Minnesota in the cut-over areas, during the school year 1931-1932, the public expense involved in transporting the children of twenty-eight isolated homes, selected at random, in one county averaged \$185.00 per family, the average tax levied on these farms was only \$10.00 and the tax collected approximately \$6.00.⁴² The cost of roads for thirteen isolated families selected at random averaged \$90.00, the tax levied on these farms was \$19.00, the amount collected \$7.00.⁴³ The cost of providing schools and roads for a similar area in Mississippi was \$14,478 and the taxes paid by the local residents \$1,806.⁴⁴

A survey made in 1934 of 3,000 isolated families in northern Wisconsin reported the average family income to be \$291.03 for the year, of which, the farm contributed less than \$100.00; and a similar study of ninety-three farmers in northern Minnesota showed the annual receipts per family from the sale of products, labor off farm and family living contributed from the farm amounted to \$586.⁴⁵

These conditions are not confined to Wisconsin or Minnesota. Similar areas exist in California where the acute financial problems so frequently characteristic of isolated areas already exist or are of threatening imminence. The Land Planning Committee of the National Resources Board

³⁹ Rowlands, *County Zoning in Wisconsin* (Nov. 1934) CIRCULAR No. 154, EXTENSION SERVICE, COLLEGE OF AGRICULTURE, UNIVERSITY OF WISCONSIN.

⁴⁰ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 119, 132.

⁴¹ Rowlands, *County Zoning for Agriculture, Forestry and Recreation* (1933) 9 J. LAND AND PUB. UTIL. ECON. 272.

⁴² Jesness and Nowell, *op. cit. supra* note 3, at 3. JESNESS AND NOWELL, A PROGRAM FOR LAND USE IN NORTHERN MINNESOTA (1935) 140.

⁴³ JESNESS AND NOWELL, *op. cit. supra* note 42, at 141.

⁴⁴ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 125.

⁴⁵ MALADJUSTMENTS IN LAND USE IN THE UNITED STATES, (1935) SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE TO THE NATIONAL RESOURCES BOARD, Part VI, p. 27.

includes as areas, in which families are now residing, as too poor to remain in cultivation, and by the same token, too poor to support further settlement, the Western cut-over area, which includes parts of the coast range of California, the foothills on the eastern slope of the Sierra Nevadas, and broad areas of non-irrigated land in the great interior valley of California.⁴⁶ Portions of the foothills and low mountain areas of Southern California are also described as areas containing farms that are isolated and that require high-cost public services. Erosion is proceeding at a rapid rate in the southern foothills area. Much of the area has little value for grazing and none for forest production, but is badly needed for watershed protection and has high recreational value.⁴⁷

Although such lands offer little prospect of furnishing a livelihood, yet the Land Planning Committee of the National Resources Board further reported that with the depression, migration to rural areas increased and the areas which played the dominant role are the poor subsistence farming areas.

"It is particularly significant that an important proportion of these people moved to areas, not too remote from industrial and urban centers where opportunity existed for a subsistence type of farming. Such areas are characterized by poor or commercial agriculture and offer meager prospects for an adequate living . . . With little exception, the lowest income counties include well-known problem areas. In the poorest quarter of counties, representing 21 per cent of the school census of all agricultural counties, in the five Middle Western States (Iowa, Missouri, Wisconsin, Michigan and Ohio), school population decreased about 10 per cent from 1922 to 1929, and increased about 7 per cent from 1929 to 1933. In the best quarter of counties, school population declined only 4 per cent between 1922 and 1929, and increased only 2 per cent between 1929 and 1933 . . ."⁴⁸

In a recent press release Mr. Walter A. Duffy, Regional Director for the Pacific Northwest States, United States Resettlement Administration, reported that in the Northwest refugees from drouth areas are settling on isolated farms, are losing savings, and are unable to get rehabilitation loans because farms are insufficient to provide a livelihood. This settlement will result in more tax delinquency, added county costs for maintenance of public services and increased relief loads.⁴⁹

There would seem to be adequate support in the decisions of the courts for use of the police power through rural zoning to effect public economies. Control of the pattern of occupancy in rural areas will prevent disproportionate school, road and other public service costs. Con-

⁴⁶ CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 105.

⁴⁷ MALADJUSTMENTS IN LAND USE IN THE UNITED STATES, *op. cit. supra* note 45, at 38.

⁴⁸ *Ibid.* at 53, 54.

⁴⁹ April 8, 1937, United States Resettlement Administration, Press Release.

finement of settlement to suitable lands will reduce rural relief loads.⁵⁰ Effectuation of public economies in street construction and in police and fire protection has been given substantial weight by the courts in sustaining urban zoning ordinances.⁵¹ Just as lately the courts have found justification for the use of the taxing power to set up funds for the protection of the unemployed and the impecunious aged and for safeguarding the state against the enormous demands necessary for their maintenance, it may be expected that with the growing awareness of these and similar problems of destitution the courts will be more inclined to approve police regulations designed to mitigate or eliminate excessive financial burdens upon the state.⁵² In sustaining the California Unemployment Insurance Law⁵³ the court said:⁵⁴

"If it be within this reserved power of the state to care for those in need when the actual need is present, and as to this there can be no question, it would seem to be likewise true that to anticipate the necessities of the future is not only a reasonable but a wise and salutary governmental policy. . . ."

If wise precaution to meet financial burdens be a "public purpose" within the scope of the taxing power, it would seem to be a legitimate objective of police regulation likewise aimed at meeting such problems.

The prohibition of agriculture in certain districts may be justified as a measure designed to conserve natural resources. Rural zoning can effectively serve this purpose in a multitude of ways. Cultivation of land unsuited to agriculture may cause erosion. Plowing up the virgin sod on such lands often results in erosion by wind or water or by both; in silting of streams and in ultimate spoilage of the land unwisely cultivated. Moreover, neighboring land may be subjected to spreading gullies or dust dunes. Rural zoning may prevent the unwise cropping of land

⁵⁰ Walker, *Some Considerations in Support of the Constitutionality of Rural Zoning as a Police Power Measure* (1936) LAND USE PLANNING PUBLICATION No. 11, United States Resettlement Administration, Washington, D. C., at 20. The writer is indebted to this work for an exhaustive collection of the cases.

⁵¹ *Euclid v. Ambler Realty Co.*, *supra* note 22; *State ex rel. Civello v. New Orleans*, *supra* note 25. *Contra*: *Mayor and Council of Wilmington v. Turk* (1925) 14 Del. Ch. 392, 415, 129 Atl. 512, 522, where the court said on the matter of economy in street paving and police protection as a ground of justifying exclusion of business from residential districts: "To require the owner of property to cease using it in an unobjectionable manner, solely because it is desired to save citizens generally from paying more taxes for street and police expenditures approaches very closely, if not completely, to a taking of private property for public use without just compensation." This language may, however, be regarded as *obiter dictum*, for on the facts of that case the zoning ordinance appeared clearly unreasonable. This case was decided in 1925 and the *Euclid* case in 1926.

⁵² *Gillum v. Johnson* (1936) 7 Cal. (2d) 744, 62 P. (2d) 1037; *Charles C. Steward Machine Co. v. Davis* (1937) 301 U. S. 548; *Carnichael v. Southern Coal & Coke Co.* (1937) 301 U. S. 495; *Helvering v. Davis* (1937) 301 U. S. 619, 672.

⁵³ Cal Stats. 1935, p. 1226.

⁵⁴ *Gillum v. Johnson*, *supra* note 52, at 761, 62 P. (2d) at 1044.

once abandoned because unprofitable. Land best suited to watershed protection and unsuited to agriculture because of the likelihood of erosion if agriculture is attempted, may be preserved for that purpose where attempted cultivation or overgrazing of slopes means destruction of the water-retaining sod, speedy run-off, serious hill-side erosion and siltation of the water supply.

Prevention of erosion to conserve land and water is a matter of vital and increasing importance. H. H. Bennett, Chief of the United States Soil Conservation Service, has said that we are squandering our soil resources more rapidly than any other nation civilized or barbaric. He stated:⁵⁵

"Unless we make rapid advance against the inroads of soil erosion, the cumulative cost to the nation during the next fifty years is likely to exceed 20 billion dollars and it may easily extend to 30 billion dollars. 100 million acres are already ruined or seriously impoverished and erosion has gained headway on another 200 million acres. Three-fourths of the agricultural land in the United States is affected in some degree by erosion."

There is a close relation between floods and erosion. Eroded land cannot absorb its share of water. Gullies become streams supplementing headwaters which, roaring into the great rivers of the nation, spread catastrophic destruction wholesale throughout the land.⁵⁶

Extensive areas of California have been affected by erosion and this destructive process is continuing. Because different physiographic conditions from those obtaining in the Great Plains exist in this state, spectacular dust storms have not afflicted us, but good California farms are being stripped of fertile topsoil which is being washed into streams and on to highways.⁵⁷

Legislation aimed at prevention of the waste of our natural resources can clearly be justified. "Regulation of a business to prevent waste of the state's resources may be justified,"⁵⁸ said the Supreme Court of the United States recently. In *Tulare Irrigation District v. Lindsay-Strath-*

⁵⁵ Press release, March 6, 1937, United States Department of Agriculture, Washington, D. C.

⁵⁶ LITTLE WATERS—THEIR USE AND RELATION TO LAND (Nov. 1935, Revised April, 1936) Soil Conservation Service, Resettlement Administration, Rural Electrification Administration, Washington, D. C.

⁵⁷ SOIL EROSION—A CRITICAL PROBLEM IN AMERICAN AGRICULTURE (1935) SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE TO THE NATIONAL RESOURCES BOARD, Part V, pp. 58, 59.

The total land area of California, exclusive of large cities and water, is 99,634,672 acres. On 52,112,417 acres, of which 19,175,640 are in national forests, there is little or no man-induced erosion. Sheet erosion has affected 38,020,668 acres or 38.1%. There has been a loss of from one-fourth to three-fourths of the topsoil on 34,914,320 acres or 35.0%, and a loss of over three-fourths of the topsoil and some subsoil on 3,106,348 acres or 3.1%. Wind erosion has affected 1,999,164 acres—2.0%.

⁵⁸ *Nebbia v. New York*, *supra* note 34, at 528.

*more Irrigation District*⁵⁰ the California supreme court said: "That the protection and conservation of the natural resources of the state are in the general welfare and serve a public purpose, and so constitute a reasonable exercise of the police power, is now so well settled that no further citation of authority is necessary."

⁵⁰ (1935) 3 Cal. (2d) 489, 529, 45 P. (2d) 972, 988. In *Townsend v. State* (1897) 147 Ind. 624, 47 N. E. 19, and in *State v. Ohio Oil Co.* (1898) 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627, legislation was upheld forbidding waste of natural gas by burning "flambeau" lights or by permitting the flow of gas to escape into the air on the ground that title to natural gas does not vest in any private owner until it is reduced to actual possession and while it is underground, like animals *ferae naturae*, it belongs to the public as a whole. The Supreme Court of the United States in affirming the latter decision, *Ohio Oil Co. v. Indiana* (1900) 177 U. S. 190, rested its decision on the ground that gas and oil while beneath the surface and until reduced to possession belong in common to all the surface owners; that there is thus a common fund and the legislative power "can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like ends by preventing waste." *Ibid.* at 210. *Contra*, in part on the ground that the owner of the surface land enjoyed rights in fee to gas and oil beneath the surface: *Gas Products Co. v. Rankin* (1922) 63 Mont. 372, 207 Pac. 993. In *Commonwealth v. Trent* (1903) 117 Ky. 34, 77 S. W. 390, legislation restraining waste was upheld on the ground of preventing waste of a natural resource and injury to the public even where the gas had been brought to the surface and reduced to possession. In *People v. Associated Oil Co.* (1930) 211 Cal. 93, 105, 294 Pac. 717, 723, our supreme court, after previously holding on the authority of *Acme Oil Co. v. Williams* (1903) 140 Cal. 681, 74 Pac. 296, that on account of their migratory character no absolute title was obtained to gas and oil until reduced to possession, said, "Whatever refinements may be suggested as to the definition of the nature of the property right in gas and oil beneath the surface and uncaptured, we are entirely satisfied that the waste of these natural resources may be regulated and the unreasonable waste thereof may be prohibited in the exercise of the police power of the state . . ." The Supreme Court of the United States, however, in *Bandini v. Superior Court* (1931) 284 U. S. 8, relying upon the theory enunciated in *Ohio Oil Co. v. Indiana*, *supra*, upheld the California Oil and Gas Conservation Act on the theory of protecting correlative property rights of adjoining surface owners and pointed out that in *People v. Associated Oil Co.* (1931) 212 Cal. 76, 81, 297 Pac. 536, 537-538, the California court had said: "We reiterate that the legislation in question has lawfully vested in the superior court the power to determine what wastage of gas in the production of oil is reasonable or unreasonable. Whether such wastage be reasonable or unreasonable is a question of fact and should be determined in view of the necessity of the land owner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels and in view of the rights of the public to prevent waste of that which cannot be replaced." And see *Champlin Manufacturing Co. v. Commission* (1932) 286 U. S. 210. But *cf.* *Walls v. Midland Carbon Co.* (1920) 254 U. S. 300, 319, 323. Regulation of waste of carbonic gas from underground waters was upheld in *Lindsley v. Natural Carbonic Gas Co.* (1910) 220 U. S. 61, on the ground of protection of correlative rights of adjoining property owners in percolating mineral waters. But the regulation of waste of underground waters was disallowed in *Huber v. Merkel* (1903) 117 Wis. 355, 94 N. W. 354, and in *St. Germain Irr. Ditch Co. v. Hawthorne Ditch Co.* (1913) 32 S. D. 260, 143 N. W. 124, on the ground that ownership of percolating waters belonged to the surface owner. California upheld a statute preventing the waste and flow of water from artesian wells in

Conservation of land and soils would clearly be within the purview of the police power. In *Kroon v. Jones*⁶⁰ an Iowa statute⁶¹ authorized the boards of supervisors of counties of the state to establish drainage districts and to establish: "embankments, revetments, retards, or any other approved system of construction which may be deemed necessary adequately to protect the banks of any river or stream, within or adjacent to any county, from wash, cutting, or erosion."

The board of supervisors of an Iowa county established a district under the statute and provided for the placing of retards in the Missouri River to deflect the current and protect the bank from erosion. To the objection that the erosion was a private matter affecting only the land lying along the river and therefore that its prevention was outside the police power of the state, the court replied:⁶²

"It is quite clear, we think, that the benefit to be naturally expected from the proposed improvement is not confined to the land immediately at the river bank, which will be protected from actual present destruction by erosion, but that there is a very appreciable benefit to the lands in the district generally. This results, not only from the fact that the improvement will, in the proportion that it is successful in preventing erosion and checking the movement of the river channel to the east, remove the danger of the destruction of the land by future encroachments of the river, but by lessening the danger to be apprehended from high waters, protecting the present levees, and creating a condition that will enable further work of that character to be carried out. In short, from a careful examination of the record, we are satisfied that the proposed improvement comes within the purview of the statute; that it is of public utility and conducive to the public health, convenience, and welfare."

Our soil is a basic natural resource and nowhere is its conservation more essential than in a great agricultural state like California.⁶³ The courts have long displayed a lively solicitude for the promotion of cultivation of good land. Legislation providing for the creation of drainage, reclamation and irrigation districts has as its principal objective the increase of the value of our land and soils. The Supreme Court of the United States in passing upon the Wright Act providing for the creation

Ex parte Elam (1907) 6 Cal. App. 233, 237, 91 Pac. 811, 812, the court asseverating that ownership was in the public until actual possession is acquired, "or at least that portion of the public who may own the surface of the soil within the artesian belt."

⁶⁰ (1924) 198 Iowa 1270, 201 N. W. 8.

⁶¹ IOWA CODE (1924) §§ 7421-23. Now IOWA CODE (1935) § 7423.

⁶² *Kroon v. Jones*, *supra* note 60, at 1276, 201 N. W. at 11; A STANDARD SOIL CONSERVATION DISTRICTS LAW (1936), Soil Conservation Service, United States Department of Agriculture, Washington, D. C. And see the collection of cases in the opinion of the constitutionality of the proposed act under Section 1, "The power of the state under the 'police power' to provide for the prevention and control of soil erosion." *Ibid.* at 39-44.

⁶³ *Ibid.* at 41: "It may be noted here that where the State is predominantly agricultural the courts are more readily willing to extend the police power to include protection of agricultural interests," citing cases.

of irrigation districts in California said:⁶⁴ "Millions of acres of land otherwise cultivable must [lacking irrigation] be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State."

Rural zoning, in so far as it conserves the land by preventing erosion, would serve the same purpose.

By zoning areas against agriculture where the land is covered with growing timber and is best suited to its continued cultivation, conservation of the timber supply will be effected. This has long been recognized as within the general welfare. In *Opinion of the Justices*⁶⁵ a proposed statute of the state of Maine regulating the cutting or destruction of trees growing on wild or uncultivated land was approved. In *Perkins v. Board of Commissioners of Cook County*⁶⁶ and in *State v. Donald*⁶⁷ the creation of forestry preserve districts was held to be for a public purpose. In the latter case the court said:⁶⁸

"First, the acquisition, preservation, and scientific care of forests and forest areas, by the state, as well as the sale of timber therefrom for gain, in accordance with the well understood canons of forest culture, is pre-eminently for a public purpose. It would be a mere affectation of learning to dwell upon the value to a state of great forest areas. That has been established long since and is not open to question. The lamentable results which have followed the cutting of forests over large areas, the serious effects of such cutting upon climate, rainfall, preservation of the soil from erosion, regularity of river flow, and other highly important things which go to make up the welfare of the state, are matters of history. They need not be descanted upon."

And in *First State Bank of Sutherlin v. Kendall Lumber Co.*⁶⁹ the owner of timber land was required to patrol for fire during the danger season and to remove brush and debris likely to cause fire, or if in default the state board of forestry could do so and charge the owner up to 5 cents an acre per annum which would be a lien upon his land.⁷⁰ Forest industries, too, produce pay rolls and taxable wealth.

⁶⁴ Fallbrook Irrigation District v. Bradley (1896) 164 U. S. 112, 161; Hagar v. Reclamation District (1884) 111 U. S. 701; Houck v. Little River Drainage District (1915) 239 U. S. 254, 261-262; O'Neill v. Leamer (1915) 239 U. S. 244, 253.

⁶⁵ (1908) 103 Me. 506, 69 Atl. 627.

⁶⁶ (1916) 271 Ill. 449, 111 N. E. 580.

⁶⁷ (1915) 160 Wis. 21, 151 N. W. 331.

⁶⁸ *Ibid.* at 158-159, 151 N. W. at 377, per Winslow, C. J., concurring.

⁶⁹ (1923) 107 Ore. 1, 213 Pac. 142.

⁷⁰ FREUND, THE POLICE POWER (1904) § 423, p. 450, suggests: "Forests which are essential to the physical protection of the country may be regarded as subject to

Zoning can conserve water and prevent floods indirectly by the preservation and conservation of forests and other soil cover and so control floods at their source. It can protect water supplies directly by zoning for "watershed protection", "setting aside zones in critical areas in which all uses of the lands might be restricted for the purpose of preventing floods, too rapid run-offs, and siltation of streams and reservoirs."⁷¹ Conservancy, river-regulating and flood control districts have generally been held to be established for a public purpose.⁷² Of the California constitutional amendment of 1928⁷³ limiting riparian rights to reasonable, beneficial use of water, the supreme court of California said:⁷⁴

"The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the life blood of its existence."

An incidental result of comprehensive rural zoning through the establishment of forestry or conservation districts from which agriculture would be prohibited should be the improvement of the habitat of wild game and fish and hence conservation of part of the state's food supply. Regulations designed to attain these ends have been repeatedly upheld by the courts.⁷⁵

a natural easement for that purpose, and the person who acquires them takes them *cum onere*."

⁷¹ Walker, *op. cit. supra* note 50, at 15. A statute providing that anyone owning land or timber within four hundred feet of a watershed owned by a city or town for its water supply must be kept clear of waste timber not desired to be taken for commercial or other purposes was upheld in *Perley v. North Carolina* (1919) 249 U. S. 510. In *Bountiful City v. De Luca* (1930) 77 Utah 107, 292 Pac. 194, the court upheld a city ordinance which established a zone of land within three hundred feet of the stream from which the city drew its water supply and forbade stock owners to allow their animals to run at large therein. In these cases certain uses of land within certain districts were prohibited in order to protect municipal water supplies.

⁷² *Orr v. Allen* (S. D. Ohio, 1917) 245 Fed. 486; *Board of Black River Regulating District v. Ogsbury* (1922) 203 App. Div. 43, 196 N. Y. Supp. 281; *People v. Lee* (1923) 72 Colo. 598, 213 Pac. 583; *State v. Donald*, *supra* note 67; *Kroon v. Jones*, *supra* note 60.

⁷³ CAL. CONST., art. XIV, § 3, adopted Nov. 6, 1928.

⁷⁴ *Gin S. Chow v. Santa Barbara* (1933) 217 Cal. 673, 702, 22 P. (2d) 5, 16. See *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal. (2d) 489, 529, 45 P. (2d) 972, 988; *Fall River Valley Irr. Dist. v. Mt. Shasta Power Co.* (1927) 202 Cal. 56, 68, 259 Pac. 444, 449. In *Ex parte Elam*, *supra* note 59, regulation designed to conserve underground water was sustained.

⁷⁵ *Ex parte Kenneke* (1902) 136 Cal. 527, 69 Pac. 261; *In re Florence* (1930) 107 Cal. App. 607, 290 Pac. 652; *Geer v. Connecticut* (1896) 161 U. S. 519; *People v. Monterey Fish Products Co.* (1925) 195 Cal. 548, 234 Pac. 398; *Bayside Fish Flour Co. v. Gentry* (1936) 297 U. S. 422; *State v. Rodman* (1894) 58 Minn. 393, 59 N. W. 1098. FREUND, *op. cit. supra* note 70, § 422, p. 447, says, "While the constitutionality of fish and game laws is maintained on the ground that the state is the real and ultimate proprietor of animals *ferae naturae*, it is also recognized that in their enactment the state exercises a police power for the public welfare in preserving a species of natural wealth which without special protection would be

The prohibition of certain land uses may have the effect of preserving forest and timber areas for recreational purposes. There is a close correlation between public health and adequate recreational areas. With the increased leisure to be anticipated from general shortening of hours of work the courts should come to give greater recognition to the desirability of preserving such areas. "Playgrounds and places of recreation are essential to the welfare and health of a community."⁷⁶ Furthermore, such zoning should have the effect of preserving scenic beauty. "Grandeur and beauty of scenery contribute highly important factors to the public welfare of a state."⁷⁷ Recreational land means taxable wealth for it will attract summer homes and resorts, and the proximity of recreational areas should enhance values of adjacent residential areas.

Conservation of such basic resources as land, water, timber, recreational areas and the food supply should serve to protect and strengthen the tax base. The courts upon occasion have adverted to this as a public purpose within the meaning of the police power.⁷⁸ In *Chicago, Burlington & Quincy Ry. v. Illinois*⁷⁹ the Supreme Court said, in considering the constitutionality of a drainage law:

"We assume . . . without discussion—as from the decisions of the state court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is

liable to extermination," citing *State v. Rodman, supra*, and *Geer v. Connecticut, supra*. In the latter case the court said, at page 534, "The right to preserve game flows from the undoubted existence in the state of a police power to that end. . . . Indeed, the source of the police power as to game birds . . . flows from the duty of the state to preserve for its people a valuable food supply." See *County of Los Angeles v. Spencer* (1899) 126 Cal. 670, 59 Pac. 202 (statute designed to permit abatement of fruit orchards infected with pests); *Graham v. Kingwell* (1933) 218 Cal. 658, 24 P. (2d) 488 (destruction of apiaries permitted to prevent spread of bee diseases). In *Miller v. Schoene* (1928) 276 U. S. 272, a Virginia statute was approved which required destruction of ornamental cedar trees infected with cedar rust if within a two mile zone of any apple orchard, and in *Upton v. Felton* (D. Neb. 1932) 4 F. Supp. 585, 589, a similar Nebraska statute was approved by a federal court which described the measure as "something in the nature of rural zoning."

⁷⁶ *Howden v. Mayor of Savannah* (1931) 172 Ga. 833, 845, 159 S. E. 401, 407; *Walker, op. cit. supra* note 50, at 25, 26.

⁷⁷ *General Outdoor Advertising Co. v. Department of Public Works* (1935) 289 Mass. 149, 185, 193 N. E. 799, 816. Preservation of scenic beauty and places of historic interest was one of three grounds relied upon for sustaining regulation of billboards along roadsides in that case. And see *Simpson, Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 218-219. In *Welch v. Swasey, supra* note 20, the court observed that the presence of aesthetic considerations would not invalidate an ordinance regulating height of buildings; and to the same effect see *St. Louis Poster Adv. Co. v. St. Louis* (1919) 249 U. S. 269, at 274. See (1937) 26 CALIF. L. REV. 155.

⁷⁸ *Walker, op. cit. supra* note 50, at 12. See *supra* note 51.

⁷⁹ *Supra* note 32, at 585. In *Turlock Irr. Dist. v. Williams* (1888) 76 Cal. 360, 368-369, 18 Pac. 379, 379-380, discussing the constitutionality of an irrigation dis-

a public purpose, to accomplish which the state may by appropriate agencies exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by 'the subjection of such lands to cultivation, *they are made to bear their proportionate burden to the support of the inhabitants and commerce of the State. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased*'.⁸⁰

Just as rural zoning, therefore, may be justified as a measure that enhances taxable land values by keeping land in its most appropriate use, so, too, in preventing deterioration or destruction of the tax base it may find an additional ground of justification.⁸¹ Depreciation of the value of property adjacent to land or structures put to unsuitable use is one ground for sustaining municipal zoning ordinances.⁸² Mounting governmental expenditures should incline the courts to view with approval measures aimed at conserving tax resources.⁸³

Prevention of fire, and protection of public health and safety are well-recognized grounds for sustaining municipal zoning regulations. Like considerations may well bolster justification of rural zoning ordinances. Prevention of scattered settlement should make law enforcement in rural areas less difficult.⁸⁴ Cultivation of isolated land in the middle of forest

trict law, California's supreme court said, "The results to be derived from a drainage law, and one which has for its purpose the irrigation of immense bodies of arid lands, must necessarily be the same, as respects the public good; the one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general purposes of state government, by reason of too much water flowing over, or standing upon, or percolating through, them.

"The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, most of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp land and over-flowed lands.

"Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burden of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, would seem to redound to the common advantage of all the people of the state, to a greater or less extent." (Italics added.)

⁸⁰ Citing *Chicago, B. & Q. Ry. Co. v. People* (1904) 212 Ill. 103, 119, 72 N. E. 219, 225.

⁸¹ Walker, *op. cit. supra* note 50, at 13. *Colby v. Board* (1927) 81 Colo. 344, 349, 255 Pac. 443, 446; *State ex. rel. Twin City Bldg. & Investment Co. v. Houghton* (1920) 144 Minn. 1, 19, 176 N. W. 159, 162.

⁸² Text, p. 183, *supra*.

⁸³ Text, p. 188, *supra*.

⁸⁴ Preservation of public order was one of the objectives of the statute considered in *Pyramid Land & Stock Co. v. Pierce* (1908) 30 Nev. 237, 95 Pac. 210. In *Bacon v. Walker*, *supra* note 34, an Idaho law created a zone of two miles in radius around the dwelling of the owner of a "possessory claim" within which sheep herding was prohibited in order to avert clashes. A law of the same character was upheld in *Omaechevarria v. Idaho* (1918) 246 U. S. 343.

areas often necessitates clearing by brush fires and prohibition of this land use should reduce the forest fire hazard.⁸⁵ Prevention and control of fire is a common objective of urban zoning ordinances,⁸⁶ and regulations have been sustained where the purpose was to prevent forest fires.⁸⁷ Prevention of scattered settlement should make administration of sanitary and public health laws easier and should make for more certain and expeditious medical service.⁸⁸ More compact settlement should foster a healthier community spirit through the enhancement of the possibility of the enjoyment of fuller community advantages.⁸⁹

Settlement on lands ill adapted to agriculture is not infrequently the result of wild-cat land promotion schemes. Prevention of fraud and deception have long been recognized as being within the power of the state,⁹⁰ and in so far as rural zoning, by directing the pattern of occupancy to suitable land, would prevent these abuses, it would find another basis for justification.⁹¹

An additional ground in support of the social desirability of rural zoning ordinances has been advanced. Zoning has been supported as an aid to making the "best use" of land. It has been said that "Zoning stabilizes and enhances land values within each zone or district because it promotes the *orderly utilization* of land for agriculture, forestry and recreation."⁹² Further analysis of this concept reveals that it can be translated into terms that have hitherto been approved by the courts as grounds for the regulation of private property by the exercise of the police power. Prohibition of agriculture on lands not suited to agriculture may be justified, we have seen, as a conservation measure, as a means of inhibiting either actual or threatened waste of a natural resource. "Putting land to its best use" is another way of expressing the

⁸⁵ Hendrickson, *Rural Zoning* (mimeograph, U. S. Dept. of Agr., 1935) 6: "The isolated farm adds to the fire hazard in a forest area as much as the isolated store does in a residential area in a city. The Wisconsin State Conservation Commission estimated that more than one-third of the forest fires in that State were caused by the clearing activities of settlers."

⁸⁶ Welch v. Swasey, *supra* note 20; Euclid v. Ambler Realty Co., *supra* note 22.

⁸⁷ First State Bank of Sutherland v. Kendall, *supra* note 69.

⁸⁸ Rowlands, *Rural Zoning: Its Influence on Public Health and Schools* (1936) SPECIAL CIRCULAR, EXTENSION SERVICE, COLLEGE OF AGRICULTURE, UNIVERSITY OF WISCONSIN. In Jacobson v. Massachusetts (1905) 197 U. S. 11, a statute providing for compulsory vaccination was sustained.

⁸⁹ Miller v. Board of Public Works, *supra* note 7, at 492-493, 234 Pac. at 386-387: "... we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home . . . and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole."

⁹⁰ Hall v. Geiger-Jones Co. (1917) 242 U. S. 539.

⁹¹ Cf. CALIFORNIA REAL ESTATE BROKERS LAW, Cal. Stats. 1919, p. 1252.

⁹² Rowlands and Trenk, *op. cit. supra* note 3, at 10-11, *The Future of the Great Plains*, H. R. Doc. No. 144, 75th Cong. 1st Sess. (1937) 80-81.

desirability of avoiding such waste. And here not only the physical consequences of cultivation of unsuitable lands ought to be considered, the economic reasons justifying restrictions of agriculture are material. Land is "misused" where its use in agriculture is likely to entail the maladjustments attendant upon scattered settlement.

There is, however, an additional consideration implicit in the decisions sustaining drainage and irrigation laws which will give legal support to the validity of this objective of rural zoning.⁹³ Such laws as these are fundamentally designed to make a "more orderly utilization" of our natural resources and so to put land to its "best use," and are justified in large part on the ground that they enhance the wealth of the community.⁹⁴ Freund has referred to the aim of legislation of this character as "compulsory joint improvement."⁹⁵ Rural zoning will differ from these cases in that it is not a case of "compulsory joint improvement" for it is an attempt to put land to its "best use" by restraint of individual use.⁹⁶ But though its method is different its purpose is parallel. Of compulsory individual improvement, Freund writes,⁹⁷ "It is not impossible that with regard to some forms of property and especially with regard to land, the courts may come to recognise such an exercise of the police power, if practical methods can be devised of enforcing such a duty . . ." Where the compulsion consists of restraint of use rather than compelled individual action, insuperable administrative difficulties of enforcement would seem to be absent.⁹⁸

⁹³ Hagar v. Board of Supervisors of Yolo County (1874) 47 Cal. 222 (reclamation district); Turlock Irr. Dist. v. Williams, *supra* note 79 (irrigation district); O'Neill v. Leamer, *supra* note 64 (drainage district); Fallbrook Irrigation District v. Bradley, *supra* note 64 (irrigation district).

⁹⁴ *Supra* note 64.

⁹⁵ FREUND, *op. cit.* *supra* note 70, at 467-469.

⁹⁶ Walker, *op. cit.* *supra* note 50, at 10-11. The United States Supreme Court speaks of "reciprocity of advantage" as justifying the decisions in the drainage and irrigation district cases, *Pennsylvania Coal. Co. v. Mahon* (1922) 260 U. S. 393, 422, per Brandeis, J., dissenting.

⁹⁷ FREUND, *op. cit.* *supra* note 70, at 467.

⁹⁸ Wehrwein, *Enactment and Administration of Rural County Zoning Ordinances* (1936) 18 J. OF FARM ECON. 508. In *Ex parte Elam*, *supra* note 59, at 241, 91 Pac. at 814, the court said: "It is further contended that a discrimination exists because of the provision which permits the maintenance of ponds for the propagation of fish, as distinguished from the maintenance of ponds for other purposes. The propagation of fish has always been recognized as a legitimate pursuit and as an effort to increase the food supply of the world, and the use of water therefor a beneficial use, which, like the use for irrigation or domestic purposes, is declared by the act to be the highest use to which this natural element may be applied. The legislature has the right to determine *what uses are superior in kind*, and to protect the same, and it is within its province to determine that certain uses of this *public property* are of a higher character and superior in right to other uses." (*Italics added.*) So long as the particular ordinance under consideration is not unreasonable, the same legislative discretion should be applicable to uses of private land.

In concluding the analysis of the legality of land-use regulations prohibiting the practice of agriculture in certain zones or districts, attention should be directed to the case of *Marblehead Land Co. v. The City of Los Angeles*, decided by the Federal Circuit Court of Appeals for the Ninth Circuit in 1931.⁹⁹ Certain land in Los Angeles County was included in an area zoned for residential purposes. An ordinance was passed by the City of Los Angeles excluding a portion of the land of the plaintiff from the residential zone. Relying upon that ordinance the Standard Oil Company of California spent \$65,000 for an oil lease of part of the acreage involved and \$136,000 for preliminary drilling operations. The land was worth about \$10,000 for residential purposes; there was a strong possibility that oil and gas were present and the court decided the case on the assumption that they were. Subsequently, the ordinance excluding the portion of the land in controversy from the residential district was repealed. The court upheld the action of the city council, saying¹⁰⁰ that "If there is any difference between the taking of the unearned increment by zoning ordinance and the taking of the inherent value of the soil or its contents . . .", the problem is not one of lack of power in the legislative body, but solely a question of the reasonableness of its exercise. Because natural gas can be produced only where found whereas gasworks can be erected in suitable zones, an ordinance permitting the establishment of gasworks or oil refineries in certain zones and prohibiting them in others might be reasonable where an ordinance prohibiting the production of gas or oil from the land in which it was located might be unreasonable; but, continued the court, the legislative body had the inherent right to prohibit production provided it was exercised reasonably and not arbitrarily. Said the court:¹⁰¹ "there does not seem to be any distinction in principle between depriving an owner of the right to develop such inherent qualities of the land and a regulation which prohibits an owner from erecting upon his land structures which he believes will, and which in fact will, enhance the value of his property."

It is true that in the *Marblehead* case there were elements of nuisance present. The operation of the well would have been unsightly, noisy and would have omitted noxious gases and might have been a fire hazard. In this respect the basis for the decision is similar to that of the *Hadacheck*¹⁰² case. The reasoning of the court in the *Marblehead* case, however, is

⁹⁹ (C. C. A. 9th, 1931) 47 F. (2d) 528, *cert. den.* (1931) 284 U. S. 634.

¹⁰⁰ *Ibid.* at 532. Rudkin, J., dissenting, at 537, said that there was a distinction between taking the unearned increment and the inherent value of natural resources on the ground that the community created the former value and so could take it back.

¹⁰¹ *Ibid.* at 532.

¹⁰² *Hadacheck v. Sebastian* (1915) 239 U. S. 394, 412, *affirming Ex parte Hadacheck* (1913) 165 Cal. 416, 132 Pac. 584. In the *Hadacheck* case the United States

applicable to rural zoning. While rural zoning may be distinguished from urban zoning on the ground that the object of rural zoning is to prevent an individual from doing a harmful act to his own property rather than preventing him from performing an act which has a harmful effect on the property of another,¹⁰³ recognition of the principle that the legislature may by its regulations take "the inherent value of the soil" as well as the "unearned increment," or deprive the owner of the right to develop its "inherent potentialities of mineral wealth" as well as the right "to prohibit structures which will enhance its value," indicates that there is no such difference in principle between urban and rural zoning as would justify a different treatment by the courts. The distinction between the two types of zoning becomes still more nebulous when it is considered that rural zoning may aim at curbing threatened harm to adjacent property owners from erosion or fire hazard, and that the decisions upholding urban zoning ordinances do so at least in part on the ground of threatened injury to the community at large where economy in street paving and in police and fire protection is accepted as a reason for sustaining such ordinances. In each case the sole question before the court is one of the reasonableness of the regulation.

It may fairly be said, then, that the exclusion of agriculture from certain areas in the circumstances we have been considering by means of the type of land-use regulation set up in rural zoning ordinances is a valid exercise of the police power. The social evils sought to be eliminated or ameliorated have been held to be justifiable objectives of the police power in the decisions of the courts on the validity of urban zoning ordinances and in decisions upon measures restricting the use of private property for identical or similar reasons. Obviously, the more valid objectives a rural zoning ordinance tends to effect, the greater the likelihood of its approval by the courts. The reasonableness of the relation of rural zoning regulations to the ends striven for is clear.

It may be well, at this point, to consider certain suggested extensions of the application of the type of land-use regulations set up in

Supreme Court noted that the prohibition was not against removal of the clay but only a prohibition against manufacture of bricks within the designated locality "And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance was broader, and our opinions on such questions, we reserve." In the Marblehead case none of the judges talked about nuisances, and the majority said the regulation could be based on the police power to regulate public safety and on the zoning power to prohibit industrial and manufacturing uses. See Note (1930) 39 YALE L. J. 735, 738, n. 19. The Marblehead case was quoted with approval in *Sunny Slope Water Co. v. Pasadena* (1934) 1 Cal. (2d) 87, 94-95, 33 P. (2d) 672, 675-676, where a permit for a steam boiler and a permit to drill a well in a residential zone were denied even though the company offered to take every precaution to construct the pump-house underground, to sound-proof the pump-house and to landscape the area.

¹⁰³ Walker, *op. cit. supra* note 50, at 11.

rural zoning ordinances which so far has been confined to the prohibition of agriculture in certain areas. In semi-arid areas, as for example, in the Great Plains, plowing up the soil and intensive cultivation for production of crops may cause destruction of the soil resources. Physiographic conditions may make attempted crop production a highly precarious venture. On the other hand, the land may be suited to less intensive forms of agriculture, such as grazing. Attempted cultivation of crops on this land may eventually destroy the range and may make the land more subject to erosion than it would be if protected with a good grass cover. The devastating effect of such practices in the past has led to the suggestion that rural zoning, which so far has been tried "in areas where it is possible to make a clear-cut differentiation between agricultural and non-agricultural uses . . . may be . . . used as a means of control between different alternative agricultural uses for an area."¹⁰⁴ It has accordingly been proposed that an area may be zoned as to its uses for arable and non-arable agriculture.¹⁰⁵ As a corollary to this suggestion zoning has been proposed as a supplementary aid to a grazing district's program.¹⁰⁶ Grazing associations undertake to operate co-operatively large tracts of land best suited to extensive grazing where, because of the small holdings and checker-board pattern of land ownership, individual operation of the large scale units necessary to successful grazing is difficult or impossible. Land which experience has proved will not in dry years permit of profitable crop production, where plowing involves a risk of permanent impairment, where to permit such use is to encourage speculation, but which can make up part of an economically feasible grazing district might reasonably be zoned for the non-arable use.

Further differentiation by zoning of the types of permissible agricultural uses through, for example, control of the type of crop in the interest of soil conservation, may carry compulsion too far.¹⁰⁷ The Agricultural Adjustment Administration operating through the Soil Conservation and Domestic Allotment Law,¹⁰⁸ and the proposed state Soil

¹⁰⁴ Saunderson, Haight, Peterson and Willard, *An Approach to Area Land Use Planning* (1937) LAND USE PLANNING PUBLICATION No. 16, UNITED STATES RESETTLEMENT ADMINISTRATION, at 25, 26.

¹⁰⁵ *Ibid.* at 26; *The Future of the Great Plains*, *supra* note 92, at 81; CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 126.

¹⁰⁶ *The Future of the Great Plains*, *supra* note 92, at 81; CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 126. Montana Laws 1935, pp. 425, 429.

¹⁰⁷ *The Future of the Great Plains*, *supra* note 92, at 80; CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, *op. cit. supra* note 5, at 126. Cf. *United States v. Butler* (1935) 297 U. S. 1.

¹⁰⁸ 49 STAT. (1935) 163-164, 16 U. S. C. A. §§ 590 a-f; 49 STAT. (1936) 1148-1151, 16 U. S. C. A. §§ 590 g-o.

Conservation Districts Law¹⁰⁹ afford more suitable means for effecting this type of control.

Another legal problem is propounded by a further suggested extension of land-use regulations through zoning. Granted that agriculture may be excluded from certain areas, may urban uses of land be excluded from agricultural areas adjacent to cities and towns? The problem here is somewhat similar to that of protecting industrial or business uses established in proper zones against the home-owner or business man seeking to move into an industrial area or the residential use intruding into a business area. The courts have so far failed to extend to established business or industry this protection.¹¹⁰ If industries or business can be operated so as not to constitute a private nuisance, the balance of interests may justify courts in regulating use so as to eliminate nuisance. But where industry or business cannot be so operated the question is broader. Some planners believe that where a business or industrial type of use is permitted all "more desirable" uses must be permitted. True comprehensive planning would not seem to justify this position but would rather seek to protect established industrial or business uses from intrusion. Extension of residences into industrial zones entails added costs for police and fire protection in those areas just as much as does the extension of industrial and business uses into residential areas. Pavements, schools, traffic, lot sizes, water and sewage facilities, spur tracks, public utilities, all require different treatment in industrial as distinguished from residential zones and this should justify the municipality in preserving the distinction between zones. Prevention of the extension of residences into industrial or business zones would protect the industrialist or business man from threatened loss of property values, similar to that in-

¹⁰⁹ *Supra* note 62. This proposed legislation aims at control of soil-destroying practices and the fostering of soil-conserving practices by boards of supervisors of districts organized somewhat like irrigation and reclamation districts.

¹¹⁰ Pollard, *op. cit. supra* note 27. In *Williams v. Blue Bird Laundry* (1927) 85 Cal. App. 388, 392, 259 Pac. 484, 485, a laundry had been established for a number of years in an area zoned to permit such use. Plaintiff, who subsequently became a resident of that neighborhood succeeded in obtaining an injunction against operations from 9 P. M. to 6 A. M. and against operation so as to produce odorous fumes, soot, noise, etc. The court said: "It seems to be assumed that because the premises on which the laundry is situated were zoned to permit the maintenance of such establishments, all persons building residences in that vicinity must submit to such discomforts and injuries as are ordinarily incident to the operation of similar industries in the manner in which they are customarily conducted. We do not understand this to be the law. The doctrine of coming to a nuisance was long ago exploded. The operation of a business under municipal permission does not justify the creation of continuance of a private nuisance." To the same effect: *Martin Bldg. Co. v. Imperial Laundry Co.* (1929) 220 Ala. 90, 124 So. 82. And in *Fendley v. City of Anaheim* (1930) 110 Cal. App. 731, 294 Pac. 769, the court, in abating as a private nuisance at the instance of a residential owner the operation of a gas-engine and compressor, overruled the defendant's contention that because the defendant's

curred by the owner of the brickyard in the *Hadacheck*¹¹¹ case and would protect homeowners from running into the unpleasantnesses and inconveniences incident to residence in an industrial or business zone.

So far as protecting agricultural lands from intrusive urban uses is concerned, setting aside the question of intrusions that are nuisances, the distinction between the type of problem met by urban and by rural zoning is again observed. In the former case the use to which the building or land is put may have a serious effect upon neighboring property owners; in the latter, where the use is more extensive, its control must ordinarily rest upon prevention of injury to the public. Preservation of agricultural areas for agricultural uses may be socially desirable to prevent premature settlement or speculative subdividing. In the absence of these considerations, however, it seems doubtful that the courts will sustain an attempt to restrict the land to its more extensive uses except in the remote possibility of a shortage of land for the particular type of agriculture. As a practical matter, however, protection of agricultural uses may be desirable. Thus, planners point out that dairymen and hog ranchers are prone to resist vigorously the creation of districts in which this type of farming is prohibited. A zoning ordinance which established residential districts from which these uses were excluded might also establish districts in which such uses were insured protection against the efforts of future home-owners to have them ousted as offensive or as nuisances. Such an ordinance would seem altogether reasonable as part of a comprehensive land-use plan.¹¹²

Assuming that the objectives of rural zoning are within the police power and that the type of land-use regulation is reasonably related thereto, it must be kept in mind that any particular ordinance must be reasonable and not arbitrary. Decisions in municipal zoning cases have developed criteria of reasonableness that will be applicable to rural zoning ordinances. Zoning ordinances must be "general, uniform and comprehensive."¹¹³ The requirement that the ordinance must be comprehensive does not preclude the enactment of interim or emergency ordinances.¹¹⁴ As an exercise of the police power the zoning ordinance must not be unreasonable or discriminatory. In *Miller v. Board of Public Works*¹¹⁵ the court suggested two questions that were to be answered in determining the validity of an ordinance:

property was in an official "semi-industrial zone" he was in a better position than if none existed, citing the Blue Bird case.

¹¹¹ *Supra* note 102.

¹¹² *Cf.* note 113, *infra*.

¹¹³ *Biscay v. City of Burlingame* (1932) 127 Cal. App. 213, 15 P. (2d) 784; *Miller v. Board of Public Works*, *supra* note 7, at 495, 234 Pac. at 388.

¹¹⁴ *Miller v. Board of Public Works*, *supra* note 7, at 496, 234 Pac. at 388; *Smith v. Collison*, *supra* note 12, at 185, 6 P. (2d) at 278.

¹¹⁵ *Miller v. Board of Public Works*, *supra* note 7, at 489, 234 Pac. at 385;

"(1) Is the scheme of zoning as a whole sound, that is to say, is the method of classification and districting reasonably necessary to the public health, safety, morals or general welfare? and (2) has the scheme of classification and districting been applied fairly and impartially in each instance?"

And, like any other police regulation, a zoning ordinance is not invalid because it results in diminution of the market or use value of the property affected.¹¹⁶ Ample provision is made by the Planning Act as amended in 1937 for notice and hearing by both planning commissions and boards of supervisors prior to the enactment of any rural zoning ordinance.¹¹⁷

It is, furthermore, a well established principle of constitutional law, often honored in the breach, that every presumption in favor of the validity of legislation is to be indulged in and that where the propriety or necessity of an enactment is a question upon which reasonable minds might differ, its propriety, wisdom, necessity or reasonableness is a matter of legislative determination.¹¹⁸ In sustaining any police power regulation adequate development of the basic data, showing its necessity or reasonableness in any particular case, will be absolutely essential.¹¹⁹ Furthermore, the support of public opinion and general acceptance of

Radice v. New York (1924) 264 U. S. 292. In *Reinman v. Little Rock*, *supra* note 20, at 177, the Court said: "... and so long as the regulation in question is not shown to be clearly unreasonable or arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth amendment."

¹¹⁶ *Zahn v. Board of Public Works*, *supra* note 7; *Euclid v. Ambler Realty Co.*, *supra* note 22; *Marblehead Land Co. v. City of Los Angeles*, *supra* note 99; *Hadacheck v. Sebastian*, *supra* note 102 (property worth \$800,000 as a brickyard, \$60,000 for residential purposes); *American Wood Products Co. v. City of Minneapolis* (D. Minn. 1927) 21 F. (2d) 440, *aff'd* (C. C. A. 8th, 1929) 35 F. (2d) 657. Said Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, *supra* note 96, at 413: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power."

¹¹⁷ *Supra* note 17, §§ 11, 15. And see *Berrata v. Sales* (1927) 82 Cal. App. 324, 255 Pac. 538.

¹¹⁸ *Miller v. Board of Public Works*, *supra* note 7; *Standard Oil Co. v. Marysville* (1928) 279 U. S. 582; *Laurel Hill Cemetery v. San Francisco* (1910) 216 U. S. 358, in which Holmes, J., at 365, spoke of "... the propriety of deferring a good deal to the tribunals on the spot..." See cases cited *supra* note 34.

¹¹⁹ *Euclid v. Ambler Realty Co.*, *supra* note 22, at 394.

a regulatory practice strengthen its chances before a court of last resort.¹²⁰ In the *Euclid* case¹²¹ and in the *Miller* case¹²² the courts made special note of the extent and general popular acceptance of municipal zoning regulations, for clearly it is difficult to call unreasonable a type of regulation that has received widespread support and enactment.

It seems advisable to comment here upon the legal problem presented by the non-conforming use. Urban zoning ordinances cannot operate retroactively to prohibit uses existing at the time of the passage of the ordinance, which are made non-conforming by the ordinance, where the non-conforming use is not a nuisance or where there would be a serious and substantial impairment of property values.¹²³ The Wisconsin county ordinances exempt lawful uses of buildings or land existing at the time of the passage of the ordinances but provide that if the non-conforming use is discontinued, future uses must conform, or if the non-conforming use is changed for a more restricted use or to a conforming use it cannot thereafter be changed back to a less restricted use.¹²⁴ By analogy to similar practices in municipal zoning which have been approved by the courts,¹²⁵ such a provision would be upheld as valid. Where a non-conforming use amounts to a nuisance, it is subject to abatement.¹²⁶ Accordingly, where maintenance of agriculture as a non-conforming use means danger to neighboring lands of soil drift from erosion or menace from a serious fire hazard, such use might be restrained as a nuisance.¹²⁷

A few words in conclusion. To make a rural zoning program effective it is necessary to supplement it with a plan for the purchase of the land

¹²⁰ *Noble State Bank v. Haskell*, *supra* note 26, at 111.

¹²¹ *Supra* note 22, at 391.

¹²² *Supra* note 7, at 485, 486, 234 Pac. at 384.

¹²³ See the authorities collected in Note (1930) 39 YALE L. J. 735, and in *Jones v. City of Los Angeles* (1930) 211 Cal. 304, 295 Pac. 14. See also BASSETT, ZONING (1936) 112-116.

In *Jones v. City of Los Angeles*, *supra*, at 321, 295 Pac. at 22, the court said: "Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of the police power."

In *State v. McDonald* (1929) 168 La. 172, 121 So. 613, and in *State v. Jacoby* (1929) 168 La. 752, 123 So. 314, a New Orleans ordinance was sustained in which businesses in residential zones were given one year within which to move. See the comments on these cases in Note (1930) 39 YALE L. J. 735, 739, and in *Jones v. City of Los Angeles*, *supra*, at 317-318.

¹²⁴ See Florence County Ordinance § V, *Rowlands and Trenk*, *op. cit. supra* note 3, at 35-36.

¹²⁵ *Wilson v. Edgar* (1923) 64 Cal. App. 654, 222 Pac. 623; *Appeal of Ward* (1927) 289 Pa. 458, 137 Atl. 630; *State v. Hillman* (1929) 110 Conn. 92, 147 Atl. 294; *City of Earle v. Shackelford* (1928) 177 Ark. 291, 6 S. W. (2d) 294.

¹²⁶ *Brown v. Grant* (Tex. Civ. App. 1928) 2 S. W. (2d) 285, 287.

¹²⁷ On the problem of the non-conforming use and the administration of rural zoning ordinances, see *Wehrwein*, *op. cit. supra* note 98.

of existing non-conforming users or for the exchange of their land for land elsewhere. The presence of non-conforming users makes for difficulties of administration of rural zoning ordinances and makes the administration of compact recreation and forest areas awkward. So long as they remain isolated and scattered, such users will demand, and so long as they have votes, will receive high cost governmental services.¹²⁸

While it is true that "... a statute in providing against some particular danger need cut off all possible ways of incurring it . . .",¹²⁹ it is desirable that rural zoning as a means of controlling land settlement be supplemented by modification of the laws providing for state subventions for schools and roads, so that through the exercise of discretion by the appropriate administrative agency such subsidies may be an effective means for making the most orderly utilization of land from the economic and social aspects as well as the physical. Modification of tax delinquency laws to permit the administration of lands chronically delinquent because of the attempt to put them to an unsuitable use, as distinguished from tax delinquency caused by cyclical depressions, so that they may be taken off the market and put to their most suitable use by the appropriate administrative agency will buttress rural zoning as a means of developing the orderly use of land. And to supplement the possibilities of rural zoning as a method of controlling erosion, legislation of the type proposed by the Standard Soil Conservation Districts Law should be enacted.¹³⁰

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¹²⁸ *Ibid.*

¹²⁹ FREUND, *op. cit. supra* note 70, at 137; *Central Lumber Co. v. South Dakota* (1912) 226 U. S. 157.

¹³⁰ *Supra* note 62.