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ZONING LAWS AS EVIDENCE OF NEGLIGENCE

INTRODUCTION

The common law has provided us with much of our law of property. However, it seldom contemplated governmentally enforced limitation on the private use of one's realty. Zoning as such a limitation is a statutory development of the twentieth century.¹ The courts have allowed zoning limitations to be enforced by public agencies and private individuals alike but have refused to allow evidence of zoning violations to be used in actions for personal injuries.

The purpose of this comment is to present the idea that zoning laws should be construed as safety ordinances and that, as such, violations of them should be admissible as evidence of negligence in civil actions. A brief history of zoning and a discussion of the purposes of zoning presently recognized by the courts will be followed by a consideration of recognized safety statutes and the evidentiary significance given them by the courts as related to modern zoning laws.

ZONING FOUNDATIONS AND HISTORY

The first crude attempts at zoning were made around the turn of the century. In Chicago and St. Louis some planners, assisted by the city councils, tried to limit the types of residences built in exclusive residential neighborhoods.² These ordinances were discarded since the courts, finding that similarly situated land had no restrictions, reasoned that the ordinances discriminated against residents of the zoned neighborhood and were unconstitutional.³ Such adverse decisions convinced many would-be zoning innovators that all zoning attempts would be unconstitutional.

Pioneer zoners did, however, manage to pass state zoning enabling acts empowering municipalities to create comprehensive plans for community zoning. The first such act was in New York⁴

¹ See *Toulouse v. Board of Zoning Adjustment*, 147 Me. 387, 393, 87 A.2d 670, 673 (1952): "Before the adoption of modern zoning laws, the owners of property were restricted in the use of their property only by prohibitions of use recognized by the common law . . . as detrimental to the rights of the public."

² See E. BASSETT, *ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS* 9 (2d ed. 1940).

³ See U.S. Const. amend XIV, § 1.

⁴ N.Y. LAWS ch. 466, (1901), as amended, N.Y. LAWS ch. 470, (1914); N.Y. LAWS ch. 497, (1916).

and was upheld by the courts of that state in 1920.⁵ By that year only about thirty-five zoning ordinances had been enacted in the United States.⁶

The first comprehensive plans provided that: (1) the entire municipality should be zoned, (2) the regulations should be reasonable and not discriminatory and (3) the regulations should have a substantial relation to the health, safety, comfort and convenience of the community.⁷

1926 produced the first significant zoning decision in a federal court. Prior to that time many state courts were undecided as to the validity of zoning attempts. In that year the United States Supreme Court sustained zoning as constitutional in *Village of Euclid v. Ambler Realty Co.*⁸ In that case, counsel for the village, and counsel for the National Conference on City Planning as *amicus curiae*, presented quantities of published sociological material on the effects of congestion, the benefits of an abundance of light and air, and the advantages of separating the locations of residences, stores and factories.⁹ In accepting this evidence and upholding the ordinance, the court said:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities... [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet new and different conditions....¹⁰

⁵ *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920). Nebraska's first zoning enabling acts were passed by the legislature in 1929. Enabling acts may be found at NEB. REV. STAT. §14-401 (Reissue 1962) (for cities of metropolitan class); NEB. REV. STAT. §15-902 (Reissue 1962) (for cities of primary class); NEB. REV. STAT. §19-901 (Reissue 1962) (for cities of the first and second class and villages); and NEB. REV. STAT. §23-161 (Reissue 1962) (for county districts).

⁶ See C. RHYNE, *MUNICIPAL LAW* 811 (1957).

⁷ See E. BASSETT, *ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS* 9 (2d ed. 1940).

⁸ 272 U.S. 365 (1926).

⁹ See E. BASSETT, *ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS* 47 (2d ed. 1940) which discusses the brief submitted by James Metzenbaum, counsel for Euclid, Ohio and the brief of Alfred Bettman for the National Conference on City Planning as *amicus curiae*.

¹⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

Since that decision zoning has become an increasingly important phase of municipal law and a great share of the urban population, as well as some of the rural population, is subjected to zoning controls.

ZONING—ITS PURPOSES

Zoning ordinances have many purposes, both specifically stated by statute and expressed in decisions of the courts. Many of the judicially articulated purposes are probably a result of a combination of time, place and need.

It has been said that zoning has a purpose of fostering proper development of a district by classifying buildings and their use.¹¹ It has also been said that zoning is designed to stabilize property uses;¹² to encourage more appropriate use of the land;¹³ to conserve the value of property,¹⁴ to protect zones during the present, the transitional period, and the future;¹⁵ and to devote areas to selected uses.¹⁶

Although the courts have often relied on all of these, as well as other purposes, the most frequent argument for land use regulation is the police power—"...the power of government to enact all manner of laws in furtherance of the public safety, health, morals, general welfare and prosperity of the body politic."¹⁷ Many zoning cases as well as most zoning laws use the words "health, safety and general welfare" in stating the purposes of zoning. Very few courts, however, have ever chosen to define what is meant by any of these words, and specifically "safety". Those that have undertaken to define "safety" have chosen not to accept common meanings, such as "freedom from exposure to danger",¹⁸ but rather have simply found that "a zoning ordinance is not a safety statute in the usual sense of that term."¹⁹

Zoning statutes and ordinances give no definition for any of the terms used to designate the general purposes of their existence. When no different or special meaning is indicated by a legislative

¹¹ *State v. Rowland*, 131 Conn. 261, 38 A.2d 785 (1944).

¹² *Abbadessa v. Board of Zoning Appeals*, 134 Conn. 28, 54 A.2d 675 (1947).

¹³ *Griggs v. City of Paterson*, 132 N.J.L. 145, 39 A.2d 231 (Sup. Ct. 1944).

¹⁴ *Barkmann v. Town of Hempstead*, 268 App. Div. 785, 49 N.Y.S.2d 262 (1944).

¹⁵ *Ellicott v. Mayor of Baltimore*, 180 Md. 176, 23 A.2d 649 (1942).

¹⁶ *Hutchinson v. Cotton*, 236 Minn. 366, 53 N.W.2d 27 (1952).

¹⁷ *Clifton Hills Realty Co. v. City of Cincinnati*, 60 Ohio App. 443, 449, 21 N.E.2d 993, 997 (1938).

¹⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1998 (1967).

¹⁹ *Hutchinson v. Cotton*, 236 Minn. 366, 368, 53 N.W.2d 27, 29 (1952).

enactment the general rule of construction is that the words are to be given their natural meaning unless to do so would lead to unreasonable results plainly at variance with the evident purposes of the law.²⁰ Therefore, the word "safety" in terms of its association with the police power, should be given its everyday meaning.²¹

Even if the word "safety" is given its natural meaning when used in zoning legislation, one might still argue that it was included merely as part of a phrase establishing the enactment's general relation to the police power. However, this argument is untenable, since statutory interpretation should give effect to each of the several parts of the statute, rejecting no sentence, clause or word as meaningless if it can be avoided.²²

VIOLATIONS OF SAFETY STATUTES AND ORDINANCES IN COMPARISON

If "safety" means "freedom from exposure to danger,"²³ it would certainly seem that any statute or ordinance declaring that "safety" is one of its purposes should be considered as being enacted to protect individual members of the public from danger.

Other ordinances and statutes, not concerned with zoning, have often been held to be safety statutes. Furthermore, courts have allowed individuals to recover damages for injuries sustained by their violation. While Nebraska holds that such a violation is only evidence of negligence,²⁴ many other jurisdictions have found that such a violation is negligence per se.²⁵

Normally, only a fine or imprisonment is imposed for violating a statute or ordinance. However, under certain conditions a statute may outline a standard of conduct designed to protect others, the legislative standard being substituted for the socially acceptable standard of a reasonable man.²⁶

²⁰ *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965), *City of Lincoln v. Ricketts*, 297 U.S. 373 (1936), *State v. School Dist. of Nebraska City*, 99 Neb. 338, 156 N.W. 641 (1916).

²¹ *Cf. Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939); *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N.W. 393 (1938); *Hanley v. Fireproof Bldg. Co.*, 107 Neb. 544, 186 N.W. 534 (1922); *Hoopes v. Creighton*, 100 Neb. 510, 160 N.W. 742 (1916); *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 94 P. 995 (1908).

²² *Hansen v. Dakota Co.*, 135 Neb. 582, 283 N.W. 217 (1939), *Hagenbuck v. Reed*, 3 Neb. 17 (1873).

²³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1998 (1967).

²⁴ *See Crandall v. Ladd*, 142 Neb. 736, 7 N.W.2d 642 (1943).

²⁵ *See generally* Annot., 132 A.L.R. 863, 870 (1940).

²⁶ W. PROSSER, LAW OF TORTS 191 (3rd ed. 1964).

Recovery under this theory requires one to show he was within the class of persons for whose benefit and protection the ordinance was enacted, that there was a violation of the ordinance by the defendant and that he suffered damages as a proximate result of the violation.²⁷

The enactments which legislatures and courts have defined as safety ordinances have for some time been a basis for recovery in tort actions. Violations of such laws as those requiring fire escapes on buildings,²⁸ requiring hand railings on stairways,²⁹ or fire doors on certain structures³⁰ have been used as evidence of negligence. While these decisions indicated the courts' willingness to allow recovery for injuries sustained because of statutory violations, the courts have never chosen to allow recovery for zoning ordinance violations.

*Hutchinson v. Cotton*³¹ is one of the few cases to have dealt with violations of zoning laws as negligence. In that case the defendant lived in an area zoned for residential purposes only but was making use of his garage to manufacture a product with a power planer. A child sustained injuries when he fell into the planer and he sued to recover for them. Although the zoning ordinance involved expressly indicated that "safety" was one purpose of its enactment, the Minnesota Supreme Court considered it proper not to instruct that a violation was negligence per se. The court reasoned that since a violation of the ordinance was dependent upon the motive or purpose of the actor, here the defendant using a power planer, the legislature could not have intended that mere technical non-compliance should be a basis for recovery of damages.

Another case which discusses zoning law infractions as negligence is *Neuber v. Royal Realty Co.*³² in which the plaintiff was burned in an explosion and fire caused by her employer's negligent failure to keep the workroom free from a highly combustible waste material. The plaintiff sued the employer's landlord contending that his failure to maintain the required number of exits per square feet of floor space as directed by the local zoning ordinance was the cause of her injuries. Here the court ruled that no error was committed by refusing to admit in evidence the violation of a zoning

²⁷ *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959); *Strahl v. Miller*, 97 Neb. 820, 151 N.W. 952, *Aff'd*, 239 U.S. 426 (1915).

²⁸ See *Hoopes v. Creighton*, 100 Neb. 510, 160 N.W. 742 (1916).

²⁹ See *Shramek v. Huff*, 135 Neb. 178, 280 N.W. 450 (1938); *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N.W. 393 (1938).

³⁰ See *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, 101 N.W. 995 (1904).

³¹ 236 Minn. 366, 53 N.W.2d 27 (1952).

³² 86 Cal. App. 2d 596, 195 P.2d 501 (1948).

ordinance, saying that the purpose of such laws was "... to prevent the property of one person from being damaged by the encroachment of a neighboring property in a manner not compatible with the general locality of the two properties."³³ The court held that the zoning ordinance was not designed to protect employees from injury by fire, that such protection was afforded by fire ordinances, that a fire ordinance had not been violated and that the plaintiff was not in the class of persons the ordinance was designed to protect. To further substantiate the lack of error the court then pointed out that the fire was due to the employer's negligence and that the zoning violation by the owners of the building was not the proximate cause of the injuries sustained.

These two cases further substantiate the fact that civil recovery for violations of a statute or ordinance cannot exist where the before mentioned requirements are not present. Those requirements again were: (1) that the injured party be within the class of persons for whose benefit and protection the ordinance was enacted, (2) that there was a violation of that ordinance by the defendant and (3) that an injury proximately resulted from that violation. Had all three of these been met in *Hutchinson v. Cotton*, and *Neuber v. Royal Realty Co.* the results may have been different.³⁴

It is not difficult to imagine instances of zoning violations in which these requirements may be met, but it is difficult if not impossible to determine just how often such situations actually arise since so few cases have reached reporting levels on this specific question. Two examples of such situations follow.³⁵

EXAMPLE I: John Q. Tyre lives in a relatively new residential area zoned Class A residential.³⁶ Only single family dwellings are

³³ *Id.* at 604, 195 P.2d at 510.

³⁴ If the violation in *Hutchinson v. Cotton* had been of such a nature as could only be in derogation of the ordinance as in Example I, or if the violation in *Neuber v. Royal Realty Co.* had been the proximate cause of the injury as in Examples I and II.

³⁵ The examples are of need somewhat extreme to better illustrate the presence of the three requirements of recovery based upon violations of ordinances and to disregard as much as possible any other negligence upon which recovery could be based. More situations of any everyday nature can probably be discovered.

³⁶ An example Class A residence law as taken from the LINCOLN, NEB MUNICIPAL CODE, Ch. 27.10 allows: (a) single family dwellings, (b) parks and playgrounds and community bldgs owned or operated by the public agency, (c) public libraries, (d) public schools or private schools having a curriculum equivalent to a public school and having no rooms regularly used for housing or sleeping purposes, (e) churches (with limitations as to off-street parking), (f) golf courses, except miniature courses and driving tees.

allowed. He has found that the community in which he lives has no facilities for recapping tires and believes he sees an opportunity. He buys some used recapping equipment and attends a school to learn how to recap tires. Unable to obtain a suitable location in the industrial zones he temporarily sets up shop in his two car garage, knowing at the time that by so doing he has violated the community zoning laws.

Shortly after beginning operations, Johnny Neighbor, a youngster from next door enters the garage to watch and is severally burned when he falls and comes into contact with the tire former.

John Q. Tyre should be held liable for Johnny's injury because of the violation of the ordinance. The zoning law was enacted to protect the health, safety, and general welfare of the public. Johnny is a member of that public and without the violation of the ordinance he would not have been injured.

EXAMPLE II: Jim Grub buys a small vacant tract of land in an area zoned Class A residential, as in Example I. This tract adjoins a large section of the zone already developed. He is what the public might call a hermit collector and enjoys collecting trash and junk. Jim has a truck with which he hauls trash and garbage from homes in other parts of the city to this tract. He dumps it, intending later to sort through it for items which he can resell. This "annex to the town dump" became a breeding ground for rats and other vermin. One of the rats strayed to a neighbor's back yard and bit Mr. Jones, causing a serious infection. Jones sued Grub contending that Grub's violation of the zoning ordinance was negligence; and he (Jones) was a member of the class which the law was designed to protect and that the violation was the direct cause of the injury sustained. It was submitted that Jones should recover.

CONCLUSION

It is essential in creating, reading and interpreting zoning laws that we never lose sight of the over-all importance of their complete enforcement. "What we must be concerned with is nothing less than the physical future of the civilized world—the environment in which men live on earth."³⁷

As society becomes more complex and the world more crowded, the need for societal action to prevent injuries and deaths becomes more apparent. Man has made tremendous strides toward safety from natural dangers, but at the same time these have been replaced

³⁷ G. BREESE, D. WHITEMAN, AN APPROACH TO URBAN PLANNING 38 (1953).

by man-made dangers which often prove to be even more dangerous. Two factors increasing the danger of modern living are man's dependence upon one another, and congested living conditions.³⁸ When the world was less densely populated and everyone was more dependent on himself to satisfy his wants, what one did had little effect upon others. Today what one man does may affect many others.

Society today, more than ever before, is showing an increasing interest in the fight for safety. The public has become more conscious of accidents and injury.

A nation previously flippant about 100,000 annual accidental deaths and 10,000,000 annual accidental injuries, suddenly considers such an epidemic immoral and recognizes the need to prevent such slaughter. In response to this need, the law has only begun to throw off the legal straight jackets which have insulated negligent manufacturers from suit. A manufacturer's duty . . . has become the concern of the legal profession, which has never had occasion to examine what constituted due care.³⁹

Safety statutes are well established as bases for civil recovery. Attachment of similar effect to zoning ordinances would do much to increase the protection of the public from the man-made dangers; those brought about by increases in population, decreases in available real estate and congested living conditions.

The minimal fines provided by most zoning ordinances are insufficient to secure the desired results. It seems not unlikely that the possibility of civil liability arising from violation of these ordinances will increase compliance with the law and give the public the protection from today's dangers which society demands in this twentieth century.

There is little doubt that provision for civil liability can be made by the legislatures, the county boards and the city councils, but the courts should remember that enacting bodies do not always take the lead. It should always be realized that men and their society are moving ahead by tremendous strides leaving the laws in the trail behind them.

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³⁸ This consideration was presented in the argument to the Supreme Court of the United States in the *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, (1926), but the real effect of the facts were passed over lightly in the decision which somewhat rested on direct constitutional grounds.

³⁹ Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAWYER 1, 2 (1965).