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STUDENT NOTE

Diminishing Property Rights

If Americans held land in a truly allodial fashion, each landowner could do as he pleased without concern for the rights of others. However, this is impossible in an organized society. As the growing importance of the community dawns upon man's consciousness, the individual's rights must yield to the best interest of society. As changes in political philosophy increase the importance of the state over the individual, limitations on his property are necessarily increased.¹ This paper examines several areas in which property rights have diminished. Because several of these areas have their roots in common law, it is necessary to examine briefly the historical development of real property law in England.

¹ 1 THOMPSON, REAL PROPERTY § 3 (4th ed. 1964).

Anglo-American land law starts with the system of land ownership which had been brought to England from northern Germany by the Angles and Saxons in a series of migrations from about 450 to 600 A.D. Entire communities were transferred, establishing in England the Germanic village community.² The Germanic customary law of land ownership under which these village communities were organized and governed developed the concept of individual ownership. The usual freeholder owned a house, out-buildings and land for cultivation.³ This land was allodial, owner absolutely with no tenure or holding of an overlord or King.⁴

However, the Norman Conquest of England in 1066 changed the course of English property law. Initially, William, the Norman leader, had only a small area of land, beyond which was a hostile populace. His primary need was to keep his followers from returning to their homeland — to insure their loyalty. He accomplished this by exploiting the basic medium of life — land.⁵

William declared all the land in England forfeited to him. He then subjected the land to tenurial land holding devices, with the king as the paramount lord—granting tracts to various lesser lords in return for their allegiance.⁶ An analysis of the tenurial system makes it clear that throughout its history the common law doctrine of estates recognized the state as the underlying owner of real property.

Passage of time eliminated the original needs which fostered the feudal system and the continued existence of many tenurial “incidents” became a source of unnecessary abuse. Through wars which resulted in the deaths of many mesne lords and the Statute of Quia Emptores, which abolished the process of subinfeudation, much of the feudal system disappeared. Finally in 1660, Parliament enacted a statute which abolished the feudal incidents by converting all land into socage tenure with the result that only three aspects of the tenurial system remained: escheat, relief and the basic idea that land is held rather than owned.⁷ Even today the concept that the

² WALSH, A HISTORY OF ANGLO AMERICAN LAW 6 (2d ed. 1932).

³ DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 5 (5th ed. 1847).

⁴ Hecht, *From Seisin to Sit-in: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964).

⁵ *Id.* at 444.

⁶ WALSH, *op. cit. supra* note 2, at 33.

⁷ HECHT, *supra* note 4, at 450.

state alone retains ultimate ownership of reality remains embedded in the English common law.

The English colonists in America brought with them the elements of the English common law of real property. The land grant was held in free and common socage and not in capite by knight service. The owner was required to pay homage to no one. However, even though the feudal system had been essentially discarded, many aspects of our real property law require for their understanding a remembrance that our law is based on English common law which grew up while the feudal system was in force.⁸ Of primary importance is the fact that land held allodially is owned subject to certain rights reserved in the state including the police power, taxation, eminent domain and escheat.⁹ It is through a development of these and other reserved rights of the state that there has been a gradual diminution of property rights.

Blackstone defined a property right as that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the rights of any other individual in the universe.¹⁰

Complete property as described in the Restatement of Property is the totality of the rights and privileges, powers and immunities that a person may have with regard to a particular tract of land.¹¹ However, in America the theory of absolute ownership is not a prevailing one,¹² and dominion over, use, development, misuse or other treatment of land by an owner in fee simple has materially diminished in recent years.¹³ The result has been a relegation of the landowner to a position which "hesitatingly embodies an ingredient of stewardship."¹⁴

It is the purpose of this note to examine briefly several areas in which the ancient idea that one who owned property could use the property as he pleased without regard to the rights of others has

⁸ 1 THOMPSON, *op. cit. supra* note 1, §39.

⁹ *In re Waltz*, 197 Cal. App. 263, 240 Pac. 19 (1925).

¹⁰ 1 BLACKSTONE, COMMENTARIES 329 (Cooley's ed. 1871).

¹¹ 1 RESTATEMENT, PROPERTY §5 (1936).

¹² MACCHESNEY, CHANGING CONCEPTS OF PROPERTY, 24 A.B.A.J. 70 (1938).

¹³ 5 POWELL, REAL PROPERTY 494 (1962).

¹⁴ CROSS, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955).

been subordinated to greater rights. Several of these areas have descended to American property law from English common law while others have resulted from our highly developed civilization. But almost all the areas are intrinsically interwoven.

Police Power

Police power is as old as civilized governments. Blackstone defined police power as:

the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations.¹⁵

As a general rule, the owner of real estate in fee simple has the right to use it for any lawful purpose.¹⁶ His use is limited only by the proper exercise of the police power.¹⁷ No rule in constitutional law is better settled than the principle that all property is held subject to the rights of the state to regulate its use under the police power to secure the safety, welfare, good order and morals of the community.¹⁸ Moreover, police power is a dynamic concept, enlarging and adapting itself to the emerging view of vital social needs.¹⁹ Evidence of this is readily apparent in the zoning area which will be discussed as an independent topic in this note.

The exercise of the police power may not only result in the loss or limitation of a right once possessed by the property owner, but the owner may very well receive no compensation for his loss. This is because the regulation is not a taking, but rather a limitation on the owner's use or certain purposes considered injurious to the community.²⁰

In *Mugler v. Kansas*,²¹ the state had forbidden the manufacture and sale of intoxicating liquor. The claimants' breweries, built

¹⁵ 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 162 (Lewis ed. 1902).

¹⁶ *England v. Atkinson*, 196 Ga. 181, 26 S.E.2d 431 (1943).

¹⁷ *Lee v. City of Chicago*, 390 Ill. 306, 61 N.E.2d 367 (1945).

¹⁸ *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁹ HECHT, *supra* note 4, at 453.

²⁰ *Sax, Takings and The Police Power*, 74 YALE L.J. 36, 38 (1964).

²¹ 123 U.S. 623 (1887).

when it was lawful to manufacture beer, were of little value for other purposes. However, the court held that the claimant was not entitled to compensation for the loss of this property right. This was not a taking of property, but merely a limitation on the owner's use.

With increasing frequency, the police power is used as the derivative authority for entering new areas in which prior existing property rights are restricted. Illustrative of this is the soil conservation and erosion control programs which are nationwide. Regulation of the use of land for erosion control is obviously within the scope of the police power because it, at one and the same time, conserves natural resources, protects public lands and prevents impairment of dams — all of these having been held appropriate ends of the police power.²² In *Benshoter v. Hakes*,²³ the authority of a state to pass a statute which provided for automatic renewal of farm leases in the absence of four months notice of termination was questioned. The statute was designed to increase stability of farm tenure and lessen the waste and exploitation that was found to be a concomitant of insecurity of tenure. In finding the statute to be an appropriate exercise of the police power, the court stated:

It is quite apparent that during recent years the old concepts of duties and responsibilities of the owners and operators of farmland have undergone a change. Such persons, by controlling the food source of the nation, bear a certain responsibility to the general public. They possess a vital part of the national wealth, and legislation designed to stop waste and exploitation in the interest of the general public is within the sphere of the state's police power. . . .²⁴

Just as the duties and responsibilities of the farm dwellers increased, likewise, the duties of city dwellers have also increased. In the exercise of its police power in the interest of public safety, comfort and convenience, legislatures frequently regulate the erection of buildings on private property.²⁵ Also regulated is the use to which a building already constructed might be put. In *Swade v.*

²² Ferguson, *Nation-Wide Erosion Control: Soil Conservation Districts and the Power of Land Use Regulation*, 34 Iowa L. Rev. 166, 179 (1948).

²³ 232 Iowa 1354, 1363, 8 N.W.2d 481, 487 (1943).

²⁴ *Id.* at 1363, 8 N.W.2d at 487.

²⁵ *Kemp v. D'Oench*, 174 Mass. 476, 18 N.E. 862 (1888).

zoning Bd. of Adjustment of Springfield Township,²⁶ the court refused a variance to an applicant who sought to conduct a prohibited business enterprise in the barn on his property in a residential zone. Although the business did not adversely affect the health, safety or morals of the public, the general welfare of the public was considered sufficient grounds for the holding.

Police power is based upon the concept that all property within the jurisdiction of a state, is held on the implied condition or obligation that its use shall not be injurious to the rights of others in the use and benefit of their own property.²⁷ And, as populations increase, more land is developed and cities expand — so likewise must the police power grow in keeping with the maxim, “sic utere tuo alienum non laedus,”²⁸ and more property rights will disappear.

Aviation

“Cujus est solum, ejus est usque ad coelum” is a maxim which translated means “he who owns the soil owns everything above and below, from heaven to hell.”²⁹ It has been traced back as far as 1200 A.D. and cases citing it go back as far as 1586 A.D.³⁰ The expression was first quoted in a case which held that when a landowner erects a house so close to a window in an adjacent building that the light is cut off, the injured landowner cannot complain even though his building had been built forty years earlier.³¹ However, maxims are not law and no court has ever said that ownership of airspace extends upward an indefinite distance.³²

The maxim, “Cujus est solum, ejus est usque ad coelum,” in its practical application merely safeguarded the proprietary rights of the landowner over the air space immediately above his land, such as for building purposes and for protection against the encroachments of trees and fences on adjoining land.³³ Although the courts, at times, have spoken of a landowners ownership of airspace super-

²⁶ 392 Pa. 269, 140 A.2d 597 (1958).

²⁷ *Nebbia v. New York*, 291 U.S. 502 (1934). *Sweet v. Rechel*, 159 U.S. 380 (1895).

²⁸ “Use your own as not to injure another’s property,” 66 C.J.S. *Nuisances* §8 (1950).

²⁹ Annot., 69 A.L.R. 316, 317 (1930).

³⁰ Comment, 21 NOTRE DAME LAW. 143 (1946).

³¹ *Bury v. Pape*, 78 Eng. Rep. 375 (1586).

³² *Supra* note 30, at 143.

³³ *Supra* note 29, at 318.

adjacent to his property, it is perhaps more appropriate to set forth this concept in terms of property rights which are incidental to land ownership.³⁴ Evidence of this is abundant because of the litigation which has arisen as a result of the advent of aviation. If the maxim had been unlimited, the development of aeronautics would have been thwarted. However, the courts have disregarded such a liberal interpretation, and the result is a further limitation on the rights of property owners.

As early as 1822, it was decided that ascending in a balloon was not an unlawful act, but when the balloonist descended in a garden and crowds rushed in and damaged plants, he became liable for damages as a trespasser.³⁵ In *Johnson v. Curtiss No. W. Airplane Co.*,³⁶ the plaintiff sought to enforce the maxim "whose the soil is, his it is from the heavens to the depths of the earth," and claimed that no matter how great the altitude of airplane flights over his land they were trespassing. The court repudiated the maxim stating:

This rule, like many aphorisms of the law is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development, by the courts of England long prior to the American Revolution, as a comprehensive statement of the landowner's rights, at a time when any practical use of upper air was not considered or thought possible . . . A wholly different situation is now presented . . . The upper air is a natural heritage common to all people, and its reasonable use ought not to be hampered by an ancient and artificial maxim such as here invoked.³⁷

In *United States v. Causby*,³⁸ the court found that flights over private land were not a taking of a private right unless so low and so frequent as to be a direct interference with the enjoyment and use of the land. So too, in *Smith v. New England Aircraft Co.*,³⁹ it was held that flights of aircraft over one's land at heights in excess of the minimum fixed by law were lawful where there was

³⁴ Note, 24 U. Prrt. L. Rev. 603 (1963).

³⁵ *Guille v. Swan*, 19 Johns. R. 381, 10 Am. Dec. 234 (1822).

³⁶ 1928 U.S. Av. 42. (1923).

³⁷ *Ibid.*

³⁸ 328 U.S. 256 (1946).

³⁹ 270 Mass. 511 170 N.E. 385 (1930).

no harm to the landowner or interference with any valuable function for which the land was usable.

However, where there is no physical contact, yet enjoyment of the property is interfered with, for example, by frightening horses, it cannot be doubted that the court's interference could be obtained to restrain such annoyance and damage caused by the flight of an airplane over a man's property.⁴⁰ Repeated trespasses of the space over one's real property, which interfere with the proper enjoyment of the surface of the land, constitute a private nuisance.⁴¹

One prominent problem with reference to aviation is what is the vertical extent of the area of ownership of nearby land proprietors when an airplane is taking off or landing at an airport. In *United States v. Causby*,⁴² the Supreme Court made it clear that the vertical extent of the area owned by the surface owner can reach into the zone necessary for approach and take-off. In this case liability was imposed on the basis of flights which were found to be a direct and immediate interference with the enjoyment and use of the land.

However, all levels of government are attempting to minimize the expense of airport operations, particularly with reference to approach and take-off. This has been done by prohibiting the erection of structures of such a height as to interfere with the normal use of the airport.⁴³ This differs from control by any other zoning laws and its propriety is to be tested in terms of the reasonableness of the exercise of the police power.⁴⁴ Moreover, if necessary, the involuntary relinquishment of the area by the private owner can be compelled through condemnation pursuant to statutory authority. This, too, is a further limitation of the landowner's freedom where public needs are involved.⁴⁵

Navigable air space means air space above the minimum altitudes of flight prescribed by regulations issued under this

⁴⁰ Annot., 69 A.L.R. 316, 320 (1930).

⁴¹ *Gay v. Taylor*, 1934 U.S.A. 146 (1932).

⁴² 328 U.S. 256 (1946).

⁴³ Cross, *supra* note 14, at 517.

⁴⁴ Young, *Airport Zoning*, 1954 ILL. L. F. 261.

⁴⁵ Cross, *supra* note 14, at 517.

chapter and shall include airspace needed to insure safety in take-off and landing the air craft.⁴⁶

In this Congressional declaration that there is a right to use airspace necessary for landing and taking off, the loss of nuisance as a protection for the landowner may result.⁴⁷ Once again modern developments conflict with the established rights of a property owner resulting in a further diminution of property rights.

*Eminent Domain*⁴⁸

The right of the sovereign to acquire private property for public use upon making just compensation is known as the right of eminent domain.⁴⁹ The word itself, "eminens domium," countenances a resumption by the government of its reserved rights over lands parceled out to individuals. The name appears to have been first applied to the doctrine in 1652 A.D. by Grotius to designate the power of the sovereign state to take property within its jurisdiction for public use without the owner's consent.⁵⁰

Eminent domain is an attribute of sovereignty which is as enduring and indestructible as the state itself.⁵¹ It exists independently of any constitution for no state can exist without it.⁵² As the term itself connotes, it is superior to all private rights⁵³ and it is exercised by the sovereign for the common good and general welfare of all the people.⁵⁴

It is fundamental law in the United States that private property can be appropriated under the power of eminent domain only if the

⁴⁶Federal Aviation Program, 72 Stat. 737 (1958), 49 U.S.C. §1301(24) (1965).

⁴⁷*Supra* note 34, at 615.

⁴⁸Distinguishing between the police power and the power of eminent domain is often difficult. The two have at least one common denominator — the public health, safety or general welfare. JAHN, *EMINENT DOMAIN* 5 (1953). However, eminent domain is exercised when there is a taking for a "public use" and the landowner is compensated for his loss. Police power, on the other hand, is the uncompensated injury or limitation placed upon private property by the state when public needs require it. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922).

⁴⁹*People v. Adirondack Ry.* 160 N.Y. 225, 237, 54 N.E. 689, (1899), *aff'd* 176 U.S. 335 (1899).

⁵⁰*Coff v. Bird-in-Hand Turnpike Co.*, 128 Pa. 621, 18 Atl. 431 (1889).

⁵¹*Blanton v. Fagerstrom*, 249 Ala. 485, 31 So. 2d 330 (1947).

⁵²*Georgia v. City of Chattanooga*, 264 U.S. 472 (1923).

⁵³*State ex rel. Polson Logging Co. v. Superior Court for Gray's Harbor County*, 11 Wash.2d 545, 119 P.2d 694 (1941).

⁵⁴JAHN, *op. cit. supra* note 48, at 17.

property is to be devoted to a public use. Any attempt to appropriate private property for a private use is unconstitutional even though compensation may be paid for the property.⁵⁵ However, the term "public use" is not capable of a precise definition.⁵⁶ The term is elastic and keeps pace with changing conditions.⁵⁷

Originally, public use meant a use by some governmental agency. As long as the government exercised the right directly and for the state's immediate benefit, no difficulty was experienced in determining what was a public use.⁵⁸ Procurement of property for public buildings and grounds was procurement for a public use.⁵⁹ It was also considered a public use to acquire property by eminent domain for highways, roads, railroads and parkways.⁶⁰ These acquisitions were permissible because the public at large was served.

There were a few exceptions to this early rule. These were cases in which the government was allowed to condemn land for the use of private individuals. These exceptions were based on two theories — necessity and public welfare.⁶¹ In *Head v. Amoskeag Mfg. Co.*,⁶² a state statute which authorized any person to erect and maintain upon any stream a water mill and mill dam, paying the owners of lands flooded by the dam damages assessed in a judicial proceeding, was held constitutional. It did not deprive the property owner of land without due process. The court justified this condemnation of land on the theory that the mill was a public service and the owners were public servants because they could refuse service to no one.

The same result was reached in water and electric power cases. In *Opinion of the Justices*,⁶³ the court stated that artificial light is necessary for comfortable living. It is impossible for every in-

⁵⁵ *People ex rel. Tuohy v. City of Chicago*, 394 Ill. 477, 68 N.E.2d 761 (1946).

⁵⁶ *Chicago & No. W.Ry.Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849 (1901).

⁵⁷ *Tanner v. Treasury Tunnel, Mining, & Reduction Co.*, 35 Colo. 593, 83 Pac. 464 (1906).

⁵⁸ Comment, 4 St. Louis U.L.J. 316 (1957).

⁵⁹ *Kohl v. United States*, 91 U.S. 367 (1875); *Brehfuss v. City of La Crosse*, 240 Wis. 619, 4 N.W.2d 125 (1942).

⁶⁰ *Cherokee Nation v. Kansas Ry.*, 135 U.S. 641 (1890); *In re Low*, 233 N.Y. 334, 135 N.E. 521 (1922).

⁶¹ Comment *supra* note 58.

⁶² 113 U.S. 9 (1884).

⁶³ 150 Mass. 592, 24 N.E. 1084 (1890).

dividual to manufacture electricity for himself. Therefore, it must be furnished by private companies or by government agencies. Moreover, it cannot be distributed without the exercise of eminent domain.

This early exception to the general rule of public use as being necessary for the exercise of eminent domain has seen further expansion today as the problems of a growing urban society have increased. The public evils of slum areas are matters of state concern since they vitally affect the health, safety and welfare of the public. Therefore, the courts have upheld legislation authorizing condemnation of property in furtherance of a government project for slum clearance as being for a public use.⁶⁴ When the question of slum clearance and rehabilitation of substandard areas came before the courts a novel concept of public use had to be devised by the courts. This is because the substandard property which is acquired by the municipality is often sold for development by private parties.⁶⁵

In *New York City Housing Authority v. Miller*,⁶⁶ the court discussed this novel concept of public use. It found that whenever there arises a condition which is a substantial menace to the public safety or welfare, it is the government's duty to use whatever power is necessary to correct this problem.⁶⁷ In considering the fact that property taken by eminent domain might ultimately be sold to private parties, the Supreme Court of the United States has stated:

The public end may be as well or better served through an agency of private enterprise than through a department of the government. . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment. . . .⁶⁸

The government has not stopped at condemnation for renewal projects and urban redevelopment. Beautification of land is now considered to be a public use. In *In re Kansas Court Order #39946*,⁶⁹ condemnation of offensive non-residential property along

⁶⁴ *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936).

⁶⁵ *JARR*, *op. cit. supra* note 48, at 17.

⁶⁶ 270 N.Y. 333, 1 N.E.2d 153 (1936).

⁶⁷ *Id.* at 340.

⁶⁸ *Berman v. Parker*, 348 U.S. 26, 33(1954).

⁶⁹ 298 Mo. 569, 252 S.W. 404 (1923).

a boulevard was upheld. The court found even though the parkway along the street was not traveled and was merely ornamental, it tended to enhance the attractiveness of the state. This attractiveness has an educational value and is enjoyable to people traveling throughout the state. Thus, as courts more and more realize the part that health plays in our life, they realize that aesthetic objects are worthwhile in themselves and may justify the use of eminent domain for such purposes.⁷⁰

This extension of the concept of public use and the resulting further limitation on a landowner's control of his property generally cannot be criticized. The doctrine has simply expanded to meet the challenge of an expanding world.

However, there is a conflict among state decisions concerning the aggrieved landowner's right to challenge the inclusion of his particular non-blighted property in a project. Many courts have rejected such a challenge stating that the decision of what property should be included in the plan lies exclusively within the discretion of the agency.⁷¹ The courts will not allow a complaining landowner to controvert the finding of blight with extrinsic evidence if there is substantial evidence in the planning stage records to support the agency determination.⁷²

Indicative of the attitude of many courts is *Kaskel v. Impellitteri*.⁷³ In this New York case, the taxpayer brought an action against city officials to determine if the city officials had acted improperly in acquiring realty for slum clearance. The court, in finding for the defendant, stated that the situation was one in which the legislature had authorized city officials to make a determination. The making of this decision was simply an exercise of governmental power. Because it is legislative in nature, whether wise or unwise, the court cannot reverse it.

In *Stockus v. Boston Housing Authority*,⁷⁴ the plaintiffs questioned the constitutionality of an act by which the defendants could declare their property substandard and order the property

⁷⁰ Note, 23 GEO. WASH. L. REV. 730 (1955).

⁷¹ Note, 1964 DUKE L.J. 123.

⁷² *Graham v. Houlihan*, 147 Conn. 321, 329, 160 A.2d 745, 751 (1960).

⁷³ 306 N.Y. 73, 115 N.E.2d 659 (1953).

⁷⁴ 304 Mass. 507, 24 N.E.2d 333 (1939).

vacated. After finding the law constitutional, the court considered whether or not the defendants had exceeded their authority in attempting to take the plaintiff's premises. The court found that there are instances when men trained and experienced in special subjects related to construction and sanitation might honestly differ in determining whether a certain district is a slum area. In considering the situation, the court stated that such a question is not a debatable one and the court has no right to substitute its judgment for the defendant's. The power to determine what areas within its jurisdiction constitute substandard areas was conferred upon the housing authority by the legislature.

However, a minority of courts have held an agency's determination to be judicially reviewable. In *Offen v. City of Topeka*,⁷⁵ the court held that the landowners could maintain an action for injunctive relief when a municipal board of commissioners act in an arbitrary, capricious or illegal manner in passing a resolution which leads to the taking of private property.

A landowner who cannot get a judicial review of the condemnation of his property by redevelopment agencies is being deprived of a prior existing right. It has been recommended that a statutory reformation should be made to minimize the deficiencies in the use of eminent domain in urban renewal projects.⁷⁶ The proposed legislation should give a property owner the right to appeal to a court within a reasonable time after approval of the plan. Justiciable issues would include determinations of whether the project area is blighted and/or whether there has been an abuse of discretion. Such a provision would give the landowner a fair opportunity to question this further diminution of his property rights.

In a rapidly changing world, fundamental law cannot remain static. It must be dynamic and progressive. It is therefore impossible to enumerate all the uses which may be classified as public uses in order to authorize the acquisition of private property by eminent domain. All that can be done is to predict that the concept of public use will probably be expanded in the future.⁷⁷

⁷⁵ 186 Kan. 389, 350 P.2d 33 (1960).

⁷⁶ *Supra* note 71.

⁷⁷ JAHR, *op. cit. supra* note 48, at 25.

Zoning

Zoning is a product of the twentieth century.⁷⁸ It refers to the separation of a municipality into districts. The buildings and structures in such districts are regulated according to their construction and the nature and extent of their uses. The districts themselves are dedicated to particular uses designed to serve the general welfare.⁷⁹

Before the adoption of modern zoning laws, property owners were restricted in the use of their property only by prohibitions recognized at common law or by statute because the use was detrimental to the rights of the public. As a result, haphazard conditions existed in our municipalities with respect to the location and utilization of buildings. Buildings were placed in close proximity without regard to community growth and this resulted in a menace to public safety and the general welfare. Therefore, courts were readily amenable to zoning regulations. In *State ex rel. Carter v. Harper*,⁸⁰ the court found that if zoning regulations stabilized property values and added to the happiness and comfort of the citizens then the general welfare was promoted. In *City of Aurora v. Burns*,⁸¹ the court considered the constitutionality of establishing zones to prevent congestion and to secure quiet residential districts. In its discussion the court found that although zoning is one of the most radical departures from the traditional concept of private property in our times, the need for it is so great that it has been accepted by all.

The early view of zoning recognized as its function the protection of residential areas from encroachment by industrial and commercial enterprises which reduce the fitness of the neighborhood for residential purposes.⁸² In *Euclid v. Ambler Realty Co.*,⁸³ the constitutionality of an ordinance adopted by the village of Euclid for regulating and restricting the location of trades, industries, apartment houses and various other structures was questioned. The

⁷⁸ RATHOPH, *THE LAW OF ZONING AND PLANNING* 1 (1956).

⁷⁹ *Smith v. Collison*, 119 C.A. Cal. 180, 6 P.2d 277 (1931).

⁸⁰ 186 Wis. 148, 196 N. W. 451 (1923).

⁸¹ 319 Ill. 84, 149 N.E. 784 (1925).

⁸² Note, 17 VAND. L. REV. 1469, 1472 (1965).

⁸³ 272 U.S. 365 (1926).

court in its discussion stated that the question involved was the validity of what was really the crux of zoning legislation, namely, the creation and maintenance of residential districts from which every type of trade and business is excluded. The court followed the broadening trend of cases which agree that the exclusion of such buildings from residential areas bears a rational relation to the health and safety of the community. Therefore, such a regulation is not unreasonable and arbitrary, and it was held constitutional.

However, today, rather than excluding industry from certain districts, the problem of preserving property for industrial use has been growing particularly acute in expanding suburban areas. The demand for residential property in outlying districts of large metropolitan areas is great and as a result many subdivisions are created. The community must then increase services to these areas. To afford such services, revenue is necessary, and revenue exists where there is industry. Thus there is an imperative need to attract industry.⁸⁴

As a result of this problem, zoning ordinances are being passed to protect the available industrial sites. At first, these laws were held unconstitutional.⁸⁵ However, in 1956, a California district court of appeals handed down the first United States decision clearly upholding exclusive industrial zoning.⁸⁶ The landowners in this case sought a residential building permit in an area zoned for heavy industry. The court rejected the application and upheld exclusive industrial zoning. Here the reasoning was not based on protection of industry. The residential use continued to be the solitary beneficiary of zoning protection. Three years later the Supreme Court of Illinois upheld a zoning ordinance which excluded future residences from a commercial and industrial area.⁸⁷ The court based its reasoning on the protection of industry and commercial establishments, making this a significant decision.⁸⁸

The extent to which other courts may follow this holding is yet to be determined. In *Chicago Title & Trust Co. v. City of Harvey*,⁸⁹

⁸⁴ 17 VAND. L. REV. supra note 82, at 1472.

⁸⁵ *Ibid.*

⁸⁶ *Roney v. Board of Supervisors of Contra County*, 138 Cal. App. 2d 740, 292 P.2d 529 (1956).

⁸⁷ *People ex rel. Stokie Town House Builders, Inc. v. Village of Morton Grove*, 16 Ill.2d 183, 157 N.E.2d 33 (1959).

⁸⁸ Comment, 11 W. RES. L. REV. 302 (1960).

⁸⁹ 30 Ill. 2d 237, 195 N.E.2d 727 (1964).

an action was brought to have a zoning ordinance declared void in so far as it changed the classification of the plaintiff's land from residential to industrial. The court, although finding for the plaintiff, indicated that had there been a reasonably immediate industrial use the defendant would have prevailed. What courts in the future may decide is subject to conjecture. However, in view of past deviations, an expansion of the area of zoning is foreseeable—with a further diminution of property rights resulting.

Conclusion:

Time and space here do not permit treatment of all the areas wherein property rights have been diminished. The reader is invited to consider also the areas of urban renewal, war uses, condemnation for highways and access thereto, and the current propositions with respect to civil rights. Property rights are not absolute and a limited encroachment upon them seems to be necessary in order to exist in today's world. In the words of one commentator,

As one looks back along the historic road traversed by the law of the land in England and in America, one sees that a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position, which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things.⁹⁰

Although this evolution has been slow in the past, the rapid development of the world today has brought about an increased tempo in diminishing property rights. In order to prevent unnecessary, haphazard property restrictions, the legal profession must be alert, well-informed and willing to take a role in this process.

Hazel Armenta Straub

⁹⁰ 5 POWELL, REAL PROPERTY 494 (1962).