ZONING LEGISLATION

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"Zoning" is the name given to regulation of building development and uses of property by division into districts having uniform height, use, or bulk requirements.[1] Initiated and developed in the United States of America as an exclusive technique of controlling the use of land, it has recently been introduced in India as a corollary to the campaign for planned development of urban areas. Its purpose is to check heterogeneous uses of land so as to ensure better and decent standards of civic life to the citizenry. So recent is the concept in this country that we have not yet been able to develop any definite and precise aspects of the law of zoning. Whatever development has taken place has been merely an off-shoot of town planning laws.

A brief survey of the development of the concept of "Zoning" in U.S.A. may help a better appraisal of the technique in our own country.

I

Zoning was introduced in U.S.A. with the attempts of the New York City Council to eliminate incompatible land uses from the famous Fifth Avenue.[2] Later, the pattern became popular and enabling legislation authorising local authorities to make ordinances for zoning the towns was adopted by all the States. In this context, considerable variation in the contents of such ordinances is natural ; nevertheless, certain uniformities are discernible. The basic unit of such control has usually been the small plot of land that is designed to be developed by a single owner or builder. Building activity on such plots is so regulated as to preserve better and healthy standards of civic life in the locality concerned. This technique of control through single plots of land is called "single-lot zoning."[3]

Three distinct varieties of this technique have been developed : (*i*) Height Zoning, (*ii*) Use Zoning, and (*iii*) Bulk Zoning. Height Zoning Ordinances divide the town in areas having uniform height requirements for buidings in such areas. Use Zoning ordinances segregate residential, commercial and industrial uses in a town by assigning different areas for such uses and also provide for eradication of existing incompatible uses. Usually the residential areas are further divided into single-family, two family and

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1. Bettman, "Constitutionality of Zoning", 37 H.L.R. 834.
2. *Id.*, at 834.
3. Goldston and Scheuer, "Zoning of Plannned Residential Development," 73 H.L.R. 211 at pp. 242-44.

multiple-family blocks. Bulk Zoning ordinances regulate the size of buidings in order to control the density of population in the town or any part thereof. These techniques may either be used singly or may be combined together, in which case the ordinance is called a 'comprehensive' zoning ordinance.

Zoning ordinances are made in exercise of police power of the State and as they affect the freedom of the owner to deal with his property, they must fulfil the requirements of the 'Due Process of Law.' The earlier promulgation of zoning restrictions was motivated by a desire to curb the nuisance potential of industrial and commercial development, which was later sustituted by a concern for the health and general welfare of the people. As a related concept, it was also held that zoning enhanced the value of the property by obviating nuisances. This limited justification of zoning has lost its value in the face of modern developments engulfing zoning in the wider problem of housing the homeless. The large increase in urban population after the second world war has shifted the stress from mere eradication of nuisances and preservation of health to 'town planning' for better living,[4] and zoning has increasingly been used to subserve such planned development.

This shift has also been reflected in the attitude of the Supreme Court of the United States of America towards the constitutionality of zoning ordinances. Three phases are discernible. The first covers the period from the first decade of this century till the end of the first world war. In this period, the Court justified the exercise of such powers primarily on the basis of an analogy drawn from the common law rule for abatement of nuisances.[5] Towards the end of this period there was an extension of this attitude to activities which were not *per se* nuisance, and yet by reason of

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4. This shift has been brought about by the following factors: (*i*) incompatibility of single lot zoning with large-scale housing development, (*ii*) technological and architectural developments necessitating more freedom in planning urban development, (*iii*) growing awareness of the impact of building design on human personality, (*iv*) growing awareness of economic segregation that results from bulk zoning, (*v*) realisation of the necessity of permitting some commercial uses in a residential area to provide for necessities and reduce monotony of exclusive residential districts, (*vi*) substitution of private agencies for public authorities that enjoyed immunity for zoning requirements, to bring about urban redevelopment, (*vii*) pattern of financing urban redevelopment that requires compliance with zoning requirements and hence effectively restrains imaginative handling, and (*viii*) the need for flexibility and adaptability that planned development for future involves.

   See: Vladeck, "Large-Scale Developments and One House Zoning Controls", 20 *Law and Contemporary* Problems, 264.

   Williams, "Planning Law and Democratic Living", *Id.* at 317.

   Toll, Zoning for Amenities, *ibid.* p. 365.

5. *Welch* v. *Swasay*, (1909) 214 U. S. 91. *Pierce Oil Corp.* v. *Hope*, (1919) 248 U. S. 498.

their situation or a change in circumstances had the potential to harm the health of the residents.[6]

The next phase began after the first world war when the problem of finding accommmodation for the growing urban population assumed a pointed acuteness. Justice Sutherland became the principal architect of judicial opinion in this field. In a series of cases beginning with the Euclid case[7], the Court upheld the excercise of comprehensive zoning ordinances because of their relation to general welfare of the community. It was no longer necessary that the prohibited use had a nuisance potential. Zoning was given a positive content, and whenever its exercise was conducive to the general welfare of the community it was valid. It was held that even in cases where the relation of impugned ordinance to public welfare was not clearly established but was also not clearly negatived the court would not interfere.

The third phase is marked by the development in the concept of overall town planning which found expression in the opinion of Justice Douglas in *Berman* v. *Parker*[8] :

> The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[9]

And, for that purpose, the learned Judge held that if the opinion of the experts constituting a Planning Commission was that the whole area be redesigned so as to eliminate the causes of blight, it was not for the Court to adjudge each particular instance of the exercise of power.

It may be added that the impugned legislation in the instant case (District of Columbia Redevelopment Act, 1945) provided for the creation of a Planning Commission to prepare and implement a comprehensive plan for land use in that district. The respondents had successfully assailed its validity in the lower court on the ground that their property was not a danger to public health and hence not amendable to the exercise of police power. The denial of the Court to look into the validity of actions taken in individual cases under an integrated plan without referring to the whole plan vindicated the propriety of the planning approach to zoning problems.

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6. *Hadacheck* v. *Sebastian*, (1915) 239 U.S. 394.
7. *Euclid* v. *Amber Realty Co.*, (1926) 272 U. S. 365 ; *Garib* v. *Fox*, (1927) 274 U. S. 603 ; *Zahn* v. *Board of Public Works*, (1927) 274 U. S. 325 ; *Netow* v. *Cambridge*, (1927) 274 U.S. 183.
8. (1954) 384 U.S. 26.
9. *Id.* at 32.

II

Prior to the adoption of the Constitution of India, regulation of land use in urban areas by zoning techniques was almost non-existent in this country. Control of building operations was left in the hands of local authorities for the purpose of ensuring sanitary conditions of life. In exercise of these powers they might prescribe conditions relating to the size of front, side and back yards, percentage of covered area, height of the proposed building and the material to be used for construction. The control was exercisable only in respect of future building operations and that too in respect of individual buildings. No general control of land use was envisaged or expected.[10]

The growth of urban population after the first World War together with rapid industrialisation created new problems. Legislative enactments like the U.P. Town Improvement Act, 1919, were aimed at providing for improvement of the town by eradication of habitation unfit for human dwellings. But as yet nothing in the line of zoning techniques was consciously resorted to. This happened only after the advent of the Constitution. The first comprehensive statement of the objectives in that respect was made in the Second Five-Year Plan to the following effect :

> If planned urban development is to be undertaken and the lines along which various urban or potentially urban centres are to develop over the course of the next ten or fifteen years, there is need for a clear conception of the pattern of economic development and especially of industrialization which is to be followed in determining the distribution, location and size of various industrial and other undertakings . . . The aim must ultimately be to evolve balanced urban-rural regions which would provide stable and diverse employment and through the provision of the necessary economic and social over heads, achieve development at reasonable social and economic costs . . . To achieve this objective, action has to be taken in each State along five principle directions ; 1. Each State should have a phased programme for the survey and preparation of master plans for all important towns. These should provide *for integration of land use and zoning principles in each town or area* with a view to obtaining the maximum amount of efficiency and economy in working and living conditions . . . . . It is recommended that town and country planning legislation should be enacted in all States and the necessary machinery for its implementation should be set up.[11]

It must be noted that the foregoing statement mentions zoning only as a subsidiary of town planning for the purpose of segregating incompatible land use. Even as such the task was left to the States which enjoy the power to legislate in respect of land, local authorities and social and economic planning. In this context we may briefly analyze the legislation

10. See Secs. 178-186 of the U.P. Municipalities Act, 1916.

11. Second Five-Year Plan, p. 569 (Publication Division, Government of India, 1956).

in respect of planned urban development of the State of Uttar Pradesh as a prototype of such state legislations with a view to delineate the zoning concepts found therein.

In 1958, the State of Uttar Pradesh put on its statute book a skeleton legislation "The U.P. (Regulation of Buildings Operations) Act." It is a small enactment of 19 sections creating the barest framework for planned town development. The Act deals both with construction of buildings on individual plots as well as with relaying of any area as a site for a colony or township, and its development by individuals or groups. Some regulations and directions have also been made by the State Government in exercise of the powers conferred upon it by the Act.

Whenever the State Government is of opinion that 'a particular area requires to be regulated under the Act with a view to the prevention of bad laying out of land, haphazard erection of buildings or growth of sub-standard colonies or with a view to the development and expansion of that area according to proper planning ; it may declare such area to be a regulated area by a notification published in the Official Gazette in accordance with the terms of Sec. 3 of the Act. Consequent upon such notification the State Government is to create a controlling authority consisting of a Chairman who should be a civil servant not below the rank of a Sub-Divisional Magistrate and other nominated members not exceeding nine including the heads of the local authorities where such area is situated.

The Controlling Authority and the State Government have been empowered to issue general directions by notification in the Official Gazette in respect of a large number of matters including development of a site into a township or, colony, division of a site into plots, erection of buildings, on such plots, use, design and number of such buildings, the amenities to be provided in such buildings, and use of land for purposes other than the erection of buildings. Any development in the regulated area, which expression also covers building operations, can only be made with the permission of the prescribed authority created for this purpose. In granting such permission the prescribed authority must be satisfied that the proposed development and use of the land is in accordance with the standards laid down in the directions, and the proposals and standards of the Master Plan of the regulated area, approved by the Controlling Authority. Any construction made with such permission or in contravention of any conditions attached thereto may be demolished and the developer shall be liable to pay a fine which may extend to ten thousand rupees.

In exercise of its powers to give general directions, the State Government issued some direction pertaining to Zoning in 1960. These directions prescribe that at least 10% of the total area of land covered by a layout

plan must be left as open spaces on which no constructions shall take place. Every plot for residential use must be at least 1800 sq. ft. in area and a plot for industrial use at least 6000 sq. ft. in area. Not more than one building can be constructed on one plot. Front, side and back yard requirements are prescribed in proportion to the size of the plot and according to the use—residential, commercial or industrial—to which the plot may be put. In case of continuous houses the side yard requirements are only applicable to corner plots but it is provided that a block may not be more than 600 yards in length. A percentage fixed in proportion to the size of the plot and varying with the use (residential, commercial, or industrial) is fixed beyond which the site may not be covered by a building. A general height restriction is provided by the rule that such building shall not exceed in height then the plane drawn at an angle of 45 from the opposite side of the road on which the building is situated. Further architectural control is envisaged to ensure aesthetic uniformity in appearance.

A perusal of these directions reveals only a nebulous notion of zoning. The directions to contemplate segregation of buildings with reference to their use for residential, commercial or industrial purpose, but no particular pattern of distribution is envisaged. It does not require exclusive classification of building areas with reference to use. Again, the basic unit of zoning is constituted by single plots of land that would be developed by different developers, though there are a few indications of large-scale housing in the provisions regarding side-yards.

These directions do appear to make a distinction between the small, medium and large plots but no indication is given of its relation with family size criterion. No zoning with respect to height criterion is at all envisaged. On the contrary, a single rule regulating height of buildings is made. In fact, all details of zoning are left to the Controlling Authority and are expected to be provided by it with reference to a Master Plan of the development of the regulated area. But at the same time the enactment suffers from a serious deficiency in this respect, as it prescribes nothing about the procedure of the formulation of a Master Plan and does not even conceive of such a plan as a necessity. It is only in the directions given by the State Government that the prescribed authority is required to see that the proposed development is in accordance with the proposals of the Master Plan which is defined by Cl.(1) (*f*) of Direction No. 1 as a "plan of the regulated area—duly approved as such by Controlling Authority with the prior sanction of the State Government defining the boundaries, character of land-use, zoning, states of development, main existing and proposed communication lines and major open spaces . . . " As we have seen in case of United States of America, zoning according to a Master Plan has distinct advantages on classical zoning techniques in providing an integrated picture of future development of the city and

having the requisite flexibility and adaptability for that purpose that the classical techniques lack. But for that purpose it is essential that planning should be made a pre-condition of intensive building development, and it must be further ensured that the plan is made after honest and intensive collection of statistical data on the basis of predictions reasonably related to the data so collected, and should not be drawn from doctrainaire principles or slogans.

Besides this, it is necessary to create an identity of purpose between the affected interests and the proposals of the Master Plan to ensure smooth running of the development in accordance with the plan. This requires participation of such interests in the creation of a plan. But this aspect has been thoroughly neglected by the said legislation. In the absence of such a provision it is even doubtful whether the legislation could survive an attack on its validity on grounds of infringment of Article 19(1) (*f*) of the Constitution. There is no participation at all, no opportunities for representation are provided to the affected interest. Perhaps, the basic reason for this is that development is conceived to be confined to areas where land has already been acquired by the State, but this restriction severely debilitates the legislation. So confined, it would fail to serve the purpose of planned urban development except in the comparatively small number of areas where the State owns all the land, and in respect of which it would seem unnecessary since the State in its capacity as the owner may well have achieved the same results by contractual means. The legislation was obviously necessary to arm it with such powers to control building development of areas of which it has no proprietory right, but in respect of which it is doubtful whether the legislation would be constitutionally valid in the light of the observations of the Supreme Court in *Maneklal Chhotalal* v. *Makwana*.[12] There, a unanimous Court speaking through Justice Vaidalingam had upheld the validity of Town Planning law of the State of Bombay. His Lordship observed :

> At every stage, from the beginning to the end the Act and the Rules, make very elaborate provisions regarding the formalities to be gone through, by the local authority, by the State Government and by other authorities concerned, in the matter of preparing and finalising a Town Planning Scheme. At all stages, a very wide publicity is given by the authorities concerned, in the matter of making known its proposals to the public and to the owners of land, who are sought to be affected by the Scheme. Provisions have been made for filling of objections and suggestions and the authorities being bound to take into consideration those objections and suggestions . . . Therefore, having due regard to the substantive and procedural aspects, we are satisfied that the Act imposes only reasonable restrictions.

In the light of these pronouncements of the highest court of the land it is obvious that the legislation which imposes restrictions on user of

12. A.I.R. 1967 S.C. 1373.

property with reference to a Master Plan in the preparation of which no participation is afforded to affected interests can hardly be sustained. The framers of the enactment appears to have not been sure of their commitment to development by planning, and rightly so because planning is a costly exercise that need only be undertaken in case where it is necessary. It is not every development that requires planning. It is only where intensive development is expected in future, like new or existing industrial towns, state capitals and the like, that proper planning is required to accommodate present changes to possible future trends. Moreover, state resources in our country are limited so that it is not possible to take up planned development throughout the country in the s me breath. A phased approach is dictated by circumstances that cannot be altered overnight, so that planned development is only possible where it is absolutely essential.

III

In the light of the foregoing the following suggestions are formulated in respect of legislations which may be undertaken in regard to Zoning :

(*i*) A distinction may be made between areas that need planned development and areas that only require a regulation of development to ensure sanitary conditions of existence. For this purpose a distinction can be easily made on the basis of population. Towns with a population of more than one lakh may be picked up for planned development. New township should be based on planned development.

(*ii*) Zoning in areas taken up for planned development may be made a part of such development, and the techniques adopted may be such as to subserve the planned development of the area.

(*iii*) Where planned development is required, provision may be made for providing opportunities to affected interests in the area sought to be planned to participate in the formulation of the plan ; and for this purpose the planning authorities be required to give wide publicity to the plan proposals and to consider the representations made in this behalf. Reasons be given in respect of decisions reached.

(*iv*) The planning authorities may be expert bodies rather than executive officers of the Government.

(*v*) Provision may be made for a periodic revision of such plans to ensure their conformity with changing situations as well as technological advancements.