★ planning advisory service

AMERICAN SOCIETY OF PLANNING OFFICIALS

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PUBLIC PROPERTY ZONING PROBLEMS

> Municipal and state officials usually comply with zoning requirements as a matter of comity. It is often said that officials should be the first to comply with their own regulations.
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> Zoning, by Edward M. Bassett, Russell Sage Foundation, 1940.

When government officials decide to erect a public building or to acquire land for public use, they have an unusual opportunity to initiate activities that will influence the physical development of their community. It is disappointing when this opportunity for public leadership is used in a way that conflicts with zoning requirements, which represent merely minimum standards that can reasonably be applied to private property. An occasional conflict of this type, however, appears to be unavoidable, and a number of recent ones have ended in the courts. In the first six months of 1958 the highest courts of New Jersey, New York, Virginia, and Wisconsin handed down opinions in such cases. Disputes over the zoning of public property often have effects that are at least as far-reaching as those involving private property. And they raise some unusual problems to which there are no readily apparent solutions.

If a private citizen should decide that his land in a residential zone is really better suited to industrial use, his chances of actually using the land for industry are none too good. Unless he can obtain an amendment to the ordinance, his only real recourse is to the courts. His chances there are limited by the recognized view that private property is subject to regulation in the public interest. In reality, the drafters of the particular zoning ordinance may have been unwise or shortsighted. Nevertheless, except in the most extreme cases, the courts defer to the local governing body's decision that it is a reasonable regulation in the public interest.

If a public body wants to build a garage for its garbage trucks in a residential zone, the public interest may be much more difficult to determine. Though the ordinance is presumably in the public interest, so is the decision to build the garage. What, then, is the effect of the ordinance in this situation?

State zoning enabling acts typically contain a sweeping provision such as the one authorizing West Virginia municipalities to regulate the use of

property for "trade, industry, residence, or other purpose." Despite the breadth of these provisions, it is clear that the statutes were intended primarily to authorize control of private property. So were most local zoning ordinances. In the absence of specific mention of public agencies, which is found in the enabling acts of only three or four states, courts have been understandably hesitant to infer an intent that public activities should be compelled to meet the standards laid down for private ones.

Without the direction of specific legislative provisions, the courts have rendered a variety of decisions. Many of these turn on the phrasing of the local statute or ordinance. Other opinions have suggested that the grant of the power of eminent domain for a particular purpose implies an intent to exempt the land used for that purpose from zoning regulations. And a number of courts have declared that the ordinance does not apply to "governmental" functions but would apply to those in which a government acts in a "proprietary" capacity.

It should be possible to devise ordinances and statutes that would do a more nearly satisfactory job of securing the objectives of good zoning without at the same time putting unreasonable limits on the power of public agencies to carry on their activities. In order to do this, it would first be necessary to distinguish the various public agencies that may be involved. Quite different problems may be presented when:

1. A city or county wants to disregard its own ordinance.

2. A state or federal agency wants to disregard a local ordinance.

3. One local government wants to disregard the ordinance of another local government. This includes relations between cities and counties, cities and neighboring cities, and local governments and special districts such as school districts.

Though there continue to be occasional cases in the first two of these groups, it is in the third that many recent ones are concentrated. As built-up areas extend further and further out from the central city, cities are increasingly likely to consider locating public facilities in neighboring unincorporated areas that may have their own zoning ordinances. In some metropolitan areas, annexations and incorporations have so reduced the amount of unincorporated territory that cities are sometimes almost compelled to locate such facilities as municipal airports and sanitary land fills within other municipalities. And school building programs sometimes run into serious objections from one or more of the municipalities in which the school board may operate. Some method is needed to assure in these cases that each local government pays reasonable attention to the requirements of the other.

Do Public Uses Fit Zoning Classifications?

Whenever practical, the minimum standards established by the zoning ordinance should be met in the development of public property, as well as private. Zoning is supposed to guide community development in accordance with a com-

prehensive plan, or at least to guarantee certain amenities to property owners. Neither of these objectives can be attained if the development of public property is substandard. There is, nevertheless, a question whether zoning is a practical device to attain these objectives when public property is involved.

The zoning ordinance establishes and separates groups of compatible uses. The uses permitted in any one zone are ordinarily quite homogeneous. But some of the most familiar government activities (airports, for example) do not fit conveniently into any group or zone. In suburbs that are almost exclusively residential, sewage disposal plants and incinerators may also seem out of place wherever they are put. Several other governmental uses must sometimes be located in a particular area whether or not they prove compatible with neighboring uses. Thus, though a city might prefer to exclude pumping stations and sewage lift stations from its single-family residence zones, operation of these utilities sometimes requires that they be located there. Elementary schools seem to be in a class by themselves, since, despite unusual noise and pedestrian traffic, they almost always belong in residential neighborhoods.

Even if a number of governmental uses cannot in practice be restricted to particular zones, it does not follow that they should be exempt from all zoning control. Most of them can at least comply with such requirements as height, yards, ground coverage, and off-street parking. (In fact, a local council may well decide that unusually large yards should be provided for these uses.)

There may be legitimate objections from property owners even to uses that do comply with the ordinance in these ways. But many times the hue and cry of neighbors seems to be based on the assumption that every principal building in a one-family residence district must be a private house. One private utility that camouflaged a substation as a private residence later complied with neighbors' requests that lights be installed to make the house look "lived in" at night. Automatic timers cause the lights in the second story windows to go on for half an hour before bedtime. Drafters of zoning ordinances, while making every effort to limit or eliminate actual elements of incompatibility, should consider the possibility that some of the damage caused by a pumping station that complies with all bulk requirements for one-family houses is imaginary.

Special permits are often required by zoning ordinances for private uses that cannot readily be listed as permitted uses. This procedure certainly may be appropriate for public uses such as water towers, which cannot be expected to comply with height requirements, and any other use that must violate bulk regulations. Local councils might also decide that permits provide a desirable form of additional control even for uses that are required to comply with bulk regulations. Of course, standards should be established in the ordinance to govern the issuance of any special permits required.

It is not the purpose of this report to suggest the proper zoning treatment of all common uses of public property. Some indication of the variety of treatment accorded such uses by current ordinances does seem worthwhile. Many ordinances specifically exempt public structures from the ordinance.

And such exemptions have been held proper in court decisions. See, for example, City of Cincinnati v. Wegehoft, 162 N.E. 389 (Ohio 1928), and City of McAllen v. Morris, 217 S.W.2d 875, ZONING DIGEST Vol. 1, page 30 (Tex.Civ. App. 1948).

At the opposite extreme are ordinances that cover every use they legally can. Such an inclusive provision is contained in the proposed Philadelphia ordinance (1958).

> Property Owned, Leased or Operated by Public Agencies:
> Property leased or operated by the Commonwealth of Pennsylvania or the United States, and property owned, leased or operated by the City of Philadelphia, or any other public or governmental body or agency, shall be subject to the terms of this Title, as follows:
>
> (a) Where such public or governmental uses are specifically listed, they shall be governed as indicated;
>
> (b) Where such public or governmental uses are not specifically listed, they shall be permitted only in districts permitting private uses of a similar or substantially similar nature;
>
> (c) Property owned by the Commonwealth of Pennsylvania or the United States shall be exempt from the provisions of this Title only to the extent that said property may not be constitutionally regulated by this City.

Among ordinances that do explicitly or implicitly assert authority over public uses, there is no uniformity of treatment of individual uses. Some ordinances, such as that of Tiffin, Ohio (1950), authorize the board of zoning appeals to issue a permit for any municipal utility or building in any district.

Many ordinances, however, do limit certain public uses to particular zones. For example, Chicago (1957) permits municipal incinerators in the M3 manufacturing district. The Denver ordinance (amended to 1957) lists public parks and playgrounds, elementary and secondary schools, utility pumping stations, and water reservoirs among permitted uses in its most restricted residence district (R-0). In the next district (R-1), it also permits public art museums, fire and police stations, and terminals for intra-city public transit vehicles. Bismarck, North Dakota (1953) lists among permitted uses in the most restricted residence district electric transformer station (but not a steam generating plant)[1], sewage pumping stations, water pumping stations and reservoirs, community centers, municipal golf courses and museums, public parks, playgrounds, and swimming pools, as well as several kinds of schools.

Another common system of classification lists some public and utility uses as permitted by right, although others require a special permit. For example, the ordinance of Clarkstown, New York (1955) lists among the permitted

[1]These uses are, of course, also often privately owned.

uses in the RA residence agricultural district community centers, libraries, museums, public art galleries, and similar community facilities, public parks and playgrounds, schools, and fire and police stations. But special permits are required for airports, public and private hospitals, and reservoirs, among others. Darien, Connecticut (1957) lists public schools as permitted uses in the most restricted residential zone, but it requires special permits for governmental uses, including municipal buildings and water supply facilities. Chicago permits public libraries, public parks and playgrounds, and elementary and high schools in the R-1 district. Special permits are required for municipal recreation buildings and public utility and public service uses, including such uses as fire and police stations, public art galleries and museums, water filtration plants, pumping stations, and reservoirs.

Regulation of Private Uses Without Public Ones?

Before examining the desirability and effectiveness of zoning when applied to public property, it is worthwhile to consider whether a decision to exempt public uses from the zoning ordinance might weaken the control of zoning over similar private uses. If such weakening is found, there is, of course, an independent reason to regulate public uses under the ordinance.

When it is proposed that an ordinance classify public uses one way and private ones another (perhaps listing public schools as a permitted use while excluding or requiring special permits for private and parochial schools), it is necessary to ask what justification exists for the distinction. If all public activities are exempt from the ordinance, it may be because the governing body prefers to reach its decisions on the desirability of public improvements without the formalities imposed by the ordinance. Or exemptions may be based on the theory that public agencies would not be bound by the ordinance anyway. Whatever the reasons for such exemptions, cases already cited have held such a distinction to be justified.

There may also be adequate reason to permit one potentially detrimental use only when it is owned by the public. For example, in a recent Massachusetts case, the court upheld an ordinance allowing municipally owned or operated public parking lots in single-family residence districts (Pierce v. Town of Wellesley, 146 N.E.2d 666, 10 ZD 84 (1957)). The court reasoned:

> By reserving to itself the privilege of operating such lots in residence areas, the town retained complete control (through its town meeting, a public body) of a type of operation, which, if generally permitted in residence areas, might do damage to the whole zoning scheme. . . .

The court found no unreasonable discrimination in giving to the town rights that private individuals do not have. It also declared that the detriment to property adjacent to the lots does not invalidate a decision by the governing body that there are sufficient public reasons to permit the parking lots.

Much of the litigation on this problem has involved ordinances that permit

public schools in a particular district but restrict or exclude parochial or private ones. A number of courts have found such provisions invalid. For example, Roman Catholic Welfare Corp. v. Piedmont, 289 P.2d 438 (Cal. 1955). There is also contrary authority. For example, State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43 (Wis. 1955), in which the court pointed out that a private school imposes on a community the same disadvantages as a public school. The public benefit conferred by a private school, however, is not the same as that of a public school, which all children in the immediate neighborhood may attend.

Unless a state court is willing to accept this distinction as the basis for a determination of the zone in which private schools belong, it is difficult to distinguish public schools from private ones. It might nevertheless be possible to exclude from a zone all schools -- private and public -- other than those that draw students from within a specified distance of the school. The effect of such a provision might be to permit the single elementary school needed in each neighborhood but to exclude public high schools, as well as parochial and private schools, which ordinarily draw from several neighborhoods. (The reasonableness of such a provision might be affected by the adequacy of provision made for these uses in other zones.) In the absence of local legal opinion that a court might take this view, it may prove safer to attempt to regulate public schools in the same way that private ones are regulated.

Zoning of public uses may or may not have any effect on zoning of similar private uses. There is no general rule. The problem should be considered, however, in drafting any zoning ordinance in which different treatment of the two is proposed.

Effect of Ordinance on Enacting Government

Of the various governments that sometimes object to being bound by a zoning ordinance, the government that enacted the ordinance usually seems least justified in doing so. Apart from any effect of strengthening control over similar private uses, application of the zoning ordinance to the city's own property may have two advantages. First, it may aid in coordination of the activities of different departments of city government with the city's overall plan. Second, it may give owners of private property the greatest possible opportunity to know what kind of development they should expect on neighboring land.

It has sometimes been objected that this coordination of city departments with each other and with the plan is not really a valid function of the planing agency, since each department's proposals are presumably made with the public welfare in view. Unfortunately, however, the fact that an official is employed by the city does not necessarily mean that he is interested in or sympathetic with comprehensive planning. An official concerned with the location of fire houses or pumping stations should be (and usually is) aware that there are problems in locating such facilities in addition to providing efficient fire protection or water distribution. But since his primary responsibility is for the functioning of the fire or water department, he should be expected to attach greater importance to departmental efficiency

and convenience than to the detriment his plans might cause to neighboring landowners, or even to other departments.

Is the zoning ordinance the best -- or even a desirable -- tool to use in achieving this coordination? The ultimate decision to construct any public building must be made by the city's legislative body. Enforced compliance with the zoning ordinance or any alternative to such a requirement is therefore to some extent a self-imposed limitation on the way the council reaches its decision. To the extent that such a limitation is likely to lead to a more informed and intelligent decision by the council, it seems desirable. Any greater limitation, however, seems clearly unjustified unless some other objective is thereby accomplished.

Mandatory referral to the planning agency of all proposals for public projects may be the most desirable way to aid the council in reaching its decision. The comments included in the original edition of the Standard City Planning Enabling Act, issued in 1928 by the Advisory Committee on City Planning and Zoning of the United States Department of Commerce, explain the problem this way:

> Numerous matters are constantly before council for decision. Some of them may represent a departure from or violation of the city plan. Others may represent matters upon which the city plan contains no light but which involve a major planning problem. As council proceeds from week to week with its work, pressed by all sorts of pressures to pass this, that, or the other measure, there is great danger, especially in the early stages of the planning movement in any city, that the city plan may come to be ignored or given rather casual attention. . . .

The planning agency presumably is the body most aware of the details of the city's plan. It is also the body most likely to have the time and inclination to review proposals with a view to making the projects fit into the community better. About half the states include in their planning legislation a mandatory referral provision resembling the following one from the standard act:

> Whenever the commission shall have adopted the master plan of the municipality or of one or more major sections or districts thereof no street, square, park, or other public way, ground, or open space, or public building or structure or public utility, whether publicly or privately owned, shall be constructed or authorized in the municipality or in such planned section and district until the location, character, and extent thereof shall have been submitted to and approved by the commission. . . .

Requiring compliance with the zoning ordinance can be either an alternative to mandatory referral or a supplement to it. Unless the ordinance provides for a special permit to be issued for public uses by the planning agency, zoning control is not likely to be a satisfactory alternative. Relatively little control is retained over the location of uses permitted outright by the ordinance. And the usual special permit provision gives power to the board of zoning appeals instead of the planning agency, an arrangement that

seems less desirable insofar as the objective is to do any planning. If mandatory referral is not practical for any reason, zoning can have some value in coordinating public projects with the plan, but it ordinarily does not seem to be a satisfactory substitute.

Zoning may, however, provide a highly desirable supplement to mandatory referral. It can give property owners the most reliable possible idea of what development they may expect and plan for on neighboring property. Even with the best of zoning, this idea may not be as precise in the case of nearby city owned property as it is with private land. Nevertheless, an owner seems to have more assurances with zoning than he has without it.

Would a combination of planning agency referral and zoning ordinance compliance result in such an unwieldy set of requirements that the council might find itself hampered in making decisions? It certainly might slow down some decisions that might otherwise be rushed through. It should not, however, ultimately limit the council's discretion. Mandatory referral legislation contains procedures for overruling the planning agency's recommendations. The Standard City Planning Enabling Act provided for overruling the planning agency by a two-thirds vote of the council. Some state statutes require only an absolute majority of the council.

If the city council chooses to relieve itself of any self-imposed zoning requirements, it can also find a way to do so. It is true that cities have occasionally run into procedural difficulties after subjecting city property to zoning requirements. For example, in Kelly v. Philadelphia, 115 A.2d 238, 7 ZD 241 (Pa. 1955), the court found that city property was bound because of an explicit provision in the ordinance. It therefore held that failure to comply with procedural requirements for amendments prevented the city from building an incinerator on a parcel of ground that it had tried to rezone from residential to "least restricted."

Cities that subject their property to the zoning ordinance may find themselves subject not only to statutory requirements of notice and hearing on amendments but also to a requirement that only an extraordinary majority of council may amend the zoning map after a protest by more than 20 per cent of neighboring property owners. But even if such a requirement prevented a map amendment, the city might be able to enact an amendment that would permit the particular public use anywhere in the district. In City of McAllen v. Morris, 217 S.W.2d 875, 1 ZD 30 (Tex.Civ.App. 1948), the city had attempted unsuccessfully to obtain a variance for a fire station in a residence zone. The court upheld a later amendment that exempted public structures from the ordinance altogether. If the noncompliance involves only requirements controlling bulk rather than those governing location, the council might instead be able to enact special bulk requirements applicable to the public use in question. Still another possibility is suggested by the case of Sheets v. Armstrong, 161 Atl. 359 (Pa. 1932) in which a council's authorization of a particular use on a particular piece of property was held effective despite conflict with the zoning ordinance. A finding that the council has this power to override the ordinance automatically, however, seems to remove most of the advantages of zoning public land.

The point of mandatory referral and zoning of the city's property should not

be to restrict subsequent decisions of the council. It may sometimes be a justifiable legislative decision (however undesirable from the standpoint of planning and zoning) to crowd a fire station onto a small lot in a residential zone in order to save public money. Mandatory referral and zoning, however, provide procedural safeguards against the danger that such decisions may be made inadvertently or hastily. These devices draw the problem to the attention of both the planning agency and nearby property owners, who may then be able to make effective protest. Under the circumstances, this seems to be the most that can be asked.

As already mentioned, the courts have been very hesitant to hold cities bound by their own zoning ordinances in the absence of clear indication that this result was intended when the ordinance and enabling legislation were passed. This reluctance is particularly common when the city is acting in its so-called "governmental capacity." In Nehrbas v. Incorporated Village of Lloyd Harbor, 140 N.E.2d 241, 9 ZD 113 (N.Y. 1957), use of a building for meeting rooms of the governing body and for storage of a police car and garbage trucks was permitted in a residential district, since all these functions were found to be governmental in nature. And in McKinney v. City of High Point, 74 S.E.2d 440, 5 ZD 98 (1953) and 79 S.E.2d 730, 6 ZD 81 (N.C. 1954), the building of a water tower was found to be a governmental function. The court consequently determined that the city was not bound by a regulation that permitted municipal utilities in any district only with a permit from the board of zoning appeals. In Lees v. Sampson Land Co., 92 A.2d 692, 5 ZD 46 (Pa. 1952), the court held that the zoning ordinance permitted the public uses in question but stated that cities would have had the right to build them even if it did not. And in Mayor of Savannah v. Collins, 84 S.E.2d 454, 7 ZD 27 (Ga. 1954), the court allowed the city to place a fire station in a residence zone, since the city had the power of eminent domain for this purpose.

In the Kelly case already cited, a city was held to be bound because of an explicit provision to that effect in the ordinance. And in Taber v. Benton Harbor, 274 N.W. 324 (Mich. 1937), water distribution was found to be a proprietary function rather than a governmental one, so that the city was bound by the height limit in the ordinance. Erection of a water tower incident to the sale of water to a neighboring municipality was held to be proprietary in Baltis v. Village of Westchester, 121 N.E.2d 495, 6 ZD 244 (Ill. 1954). There are also some cases in which, though the ordinance was held to allow the use in question, the court seems to have treated the ordinance as binding on the city. See, for example, Thornton v. Ridgewood, 111 A.2d 899, 7 ZD 122 (N.J. 1955), and Wicker Apartments v. Richmond, 99 S.E.2d 656 (Va. 1957).

Despite this well established hesitancy to hold the city to its own requirements, it seems that the advantages of applying both zoning and mandatory referral to all the city's property outweigh any procedural inconvenience. There seems thus to be a valid basis for revising statutes and ordinances to make clear that such control is intended.

Effect of Ordinance on State and Federal Governments

As soon as a second unit of government is involved -- whether it is the state or federal government or another local government -- the problems presented by attempted zoning control become more difficult. So long as only the city's own property within its own corporate limits is involved, it is possible to rely primarily on the political process to solve conflicts over land use. Such factors as finances and convenience, as well as detriment to surrounding owners and compliance with an over-all plan, will be weighed by the same legislative body. We have seen already that in this situation required compliance with the zoning ordinance is effective primarily as a device for calling attention to zoning and the plan behind it and cannot be expected to bind the city permanently if there are strong enough demands that the ordinance or plan be circumvented. Unfortunately, no such convenient arrangement exists when one government wants to build in the jurisdiction of another. Either government may take an irresponsible position, and there is no simple method to reconcile the two views.

Since counties and municipalities are usually considered creatures of the state, local regulations have been held ineffective when applied to state departments and agencies. For example, in Davidson County v. Harmon, 292 S.W.2d 777, 8 ZD 245 (Tenn. 1956), the state was allowed to build a mental hospital 74 feet high despite a 40-foot height limit in a county ordinance. And in City of Charleston v. Southeastern Constr. Co., 64 S.E.2d 676, 3 ZD 99 (W.Va. 1951), a state office building was allowed in a residential zone.

The power of a state to disregard local ordinances seems to have no relation to the desirability of its using that power in any particular case. The nature of the state activity and the difficulty of fitting it into a usual land use pattern probably should be the determining factors. For example, if there are irreconcilable conflicts between state and local ideas on the proper location of an expressway, the state must prevail. Local zoning ordinances were found not to apply to a turnpike commission in State ex rel. Ohio Turnpike Comm'n v. Allen, 107 N.E.2d 345, 4 ZD 200 (Ohio 1952). In authorizing construction of an airport, a state might also find it necessary to override local ordinances because of the large areas of land involved and the likelihood of local objections to the disruptive effect of the airport.

On the other hand, most state buildings form an integral part of the cities in which they are located. Their land use characteristics are unaffected by the fact of state ownership. In such cases, there is ordinarily no reason for the state to disregard the plans that it has authorized its cities to make. A state office building can comply with off-street parking requirements just as well as a private building can.

In 1954, Governor Gregg of New Hampshire directed that the state observe Concord zoning regulations even though the state attorney general had ruled that it was not required to do so. An order such as this one is not so permanent that it could not be altered in a specific case if it were decided that state interests must prevail over local ones. It does call attention to local regulations, however, and it limits any tendency of state officials to make their own plans without actively considering local needs. As an alternative to such an order, a state legislature might include a provision

in authorizations for state projects that they are subject to local zoning. (Though a similar provision was held ineffective in the Charleston case already cited, other state courts might take a different view.)

The federal government is, of course, also exempt from local zoning whenever it chooses to be. Among cases often cited for this proposition is Tim v. Long Branch, 53 A.2d 164 (N.J. 1947), in which local zoning was held ineffective to prevent conversion of a house to apartment. The house was leased by the government under the terms of the federal Lanham Act. Another case is United States v. Chester, 144 F.2d 415 (3d Cir. 1944), in which municipal building and zoning regulations were held inapplicable to emergency housing for war workers. And a township was held not entitled to an injunction against the United States in Ann Arbor Township v. United States, 93 F.Supp. 341, 3 ZD 20 (E.D.Mich. 1950), even if a veterans hospital under construction should be found to violate the zoning ordinance.

The problem, as in the case of state governments, is to find a regulatory system that will encourage compliance with local regulations but will nevertheless be sufficiently flexible to permit the government to override occasional unwarranted local obstructions. Legislation involved in the Long Branch decision required consultation between federal and local officials so that construction authorized by the act might "so far as may be practicable, conform in location and design to local planning and tradition." Though such a provision is not a binding one, it seems to be all that can reasonably be included in federal legislation. A more recent example of such a provision is the one in the Defense Housing Act of 1951 (42 U.S.C. 1592d):

> Notwithstanding any provisions of this Act, housing or community facilities constructed by the United States pursuant to the authority contained herein shall conform to the requirements of State and local laws, ordinances, rules, or regulations relating to health and sanitation, and, to the maximum extent practicable . . . to the requirements of State or local laws, ordinances, rules, or regulations relating to building codes. /Editors' underlining./

It seems that this type of provision could properly be extended by explicit reference to zoning ordinances in addition to building codes.

Such requirements could perhaps also be applied to ordinary government buildings. The Post Office Department, for example, already complies with zoning regulations as far as possible. In obtaining sites for development of leased postal facilities, department officials are instructed:

> After obtaining all available assignable land options, contact the proper local officials and obtain a written statement from them that the proposed use of the sites for the purpose intended will not conflict with any local, State or Federal planned project, i.e., eminent domain proceedings, zoning restrictions, planning restrictions, etc. . . .

Effect of Ordinance on Other Local Governments

Proposals of a municipality, county, or school board to build within the zoning jurisdiction of another government seem to be causing an unusual number of disputes. It is ordinarily unrealistic to suggest that local governments should be subject to the zoning ordinances of other jurisdictions in the same way that private citizens are. We have already observed that a city may sometimes decide to disregard its own ordinance. Since an ordinance is ordinarily drafted without regard for the needs of neighboring cities (or counties or school boards), these outside bodies may be even more likely to require some way to override the ordinance. The fundamental difficulty, as with state or federal agencies, is that there is no single decision making body that can weigh the advantages to the constructer against the disadvantages to the zoning scheme. Who, in other words, is to say whether the city should be forced to build the incinerator within its own limits or whether the county is being unreasonable by zoning the needed area residential?

On some basis or other, the courts usually find zoning ordinances inapplicable to other local agencies and governments. Statutes sometimes specifically exempt school boards or housing agencies, for example, from local zoning. And even without explicit exemptions, statutes may be interpreted to free agencies from these requirements. For example, in Town of Atherton v. Superior Court, 324 P.2d 328 (Cal.App. 1958), statutory provisions for the selection of school sites were interpreted to override local zoning requirements. In Green County v. City of Monroe, 87 N.W.2d 827, 10 ZD 103 (Wis. 1958), state law required the county to build a jail at the county seat. In complying with this state requirement, the county was allowed to build despite zoning regulations of the county seat city.

In Aviation Services, Inc. v. Board of Adjustment of the Township of Hanover, 119 A.2d 761, 8 ZD 73 (N.J. 1956), a nonconforming municipal airport in a township residential zone was allowed to expand. The court did not apply any presumption of immunity from zoning, since a municipality is not superior to a township in a hierarchy of governments. The court did infer legislative intent to override the zoning ordinance, however, from the grant to the city of the power of eminent domain for this purpose. And in Incorporated Village of Lloyd Harbor v. Town of Huntington, 149 N.E.2d 851 (N.Y. 1958), a town was permitted to acquire land for public bathing beaches despite the village zoning ordinance, which the court found unreasonable.

One of the few cases going the other way is City of Richmond v. Board of Supervisors of Henrico County, 101 S.E.2d 641, 10 ZD 178 (Va. 1958). The city had authority to construct a jail outside the city limits, and the county had a zone in which jails were permitted. The court found that the statute authorizing the jail should not be interpreted to allow the city to erect it in a county agricultural zone. Thus the city was bound by the ordinance, although the function in question is clearly "governmental."

A partial solution to conflicts such as these is provided by legislation that assures that each government is aware of the desires of the other. The New Jersey planning statute, for example, provides:

> Whenever the planning board after public hearing shall have adopted any portion of the master plan, the governing body or other public agency having jurisdiction over the subject matter, before taking action necessitating the expenditure of any public funds, incidental to the location, character or extent of one or more projects thereof, shall refer action involving such specific project or projects to the planning board for review and recommendation, and shall not act thereon without such recommendation or until 45 days after such reference have elapsed without such recommendation. This requirement shall apply to action by a housing, parking, highway or other authority, redevelopment agency, school board, or other similar public agency, Federal, State, county or municipal. /Editors' underlining./

A majority vote of the appropriate body is needed to override the planning board's recommendation. A provision such as this seems likely to encourage cooperation among the affected governments. It cannot, of course, guarantee it.

In the absence of a legislative solution, the courts may be able to weigh the merits of each government's position in conflicts such as these. Such weighing sometimes goes on, one suspects, in decisions on the applicability of the zoning ordinance to a particular activity of a neighboring government. But in Washington Township v. Ridgewood, 141 A.2d 308, 10 ZD 171 (N.J. 1958), the court did this independently. In that case, the village originally proposed to build three elevated water towers. As to two sites, objections to elevated tanks led to their abandonment in favor of tanks at or below ground level. The village had partly constructed the third (elevated) tower, which was partly in a neighboring borough, when the lawsuit was begun. A majority of the court concluded that the village was not bound by the zoning ordinance of the neighboring borough, explicitly rejecting the validity in these circumstances of the distinction between proprietary and governmental functions. The court nevertheless approved granting an order to remove the partly completed tower. It stated that the village had an obligation to act reasonably, especially in light of the conflict of its interests with those of surrounding jurisdictions.

> Among the considerations which Ridgewood should have weighed but in fact ignored were the zoning schemes of the /surrounding municipalities/ and the land uses abutting and near the site.
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> . . . . . .
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> Hence Ridgewood could have placed the tank at ground level, either at the /present/ site or the alternate site. The difference is one of cost described above /at most about $66,000/. Under the circumstances, Ridgewood should have assumed that cost rather than visit the burden of an elevated structure of 160 feet upon the other municipalities. We agree with the trial court's finding that Ridgewood acted arbitrarily.

The most satisfactory solution (apart from ultimate merger of many of the

neighboring communities that get into these disputes) may be the establishment of an authority other than the interested agencies to make the final decision. The court in the Washington Township case in fact suggests the need for the legislature to provide such a solution. Perhaps the greatest advantage of having such a body would be that governments would then have real incentive to try to adapt their actions to their neighbors' zoning ordinances. Knowledge that an ordinance may prove enforceable encourages "voluntary" compliance with it.

The question remains just what kind of a board might be established to settle such disputes. In some cases, this might be a desirable function to assign to metropolitan planning agencies. As an alternative, this job might conceivably be handled by a state-wide body, though careful consideration would have to be given to the exact composition and functioning of any such proposed body.

Effect of Ordinance on Public Utilities

A privately owned public utility sometimes presents many of the same zoning problems to a community that a neighboring government does. The community must deal in each case with an outside body that may or may not be especially concerned with the community's welfare. And the utility, like the neighboring government, may be almost forced to build within a community that considers only its own interests.

The various zoning classifications discussed previously for public uses apply also to privately owned utilities. Just as a public industrial use, such as an incinerator, is not ordinarily entitled to any special zoning consideration, neither is a privately owned steam generating plant. On the other hand, electric substations and water pumping stations may require some special treatment whether they are publicly or privately owned. Ordinances may permit such uses by right, sometimes subject to special standards. For example, the Denver ordinance permits gas regulator stations in its most restricted district and exempts such stations from limitations on sound generated to the extent of 65 decibels. Electric substations are permitted in the next district subject to the same sound limits and, when transformers are exposed, only if a six-foot fence or wall obstructs view, noise, and passage of persons or materials. In some other cities, substations and similar uses are permitted only with special permits.

Statutes in some states either permit or require the exemption of public utilities from zoning. Several New England states permit the exemption of public utilities when this is in the public interest. For example, the department of public utilities in Massachusetts may exempt particular installations by public service corporations from zoning after public notice and hearing. This provision has been applied to permit a gas regulator station in a residence district, after approval of the location by the state utilities department. The court found the department's approval sufficient even without a finding that the proposed location was the best one or the only one available. (Town of Wenham v. Department of Public Utilities, 127 N.E.2d 791, 7 ZD 225 (Mass. 1955).) The state commission's certificate of public convenience in Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d 287, 6 ZD 178 (Pa. 1954).

The danger of a mandatory exemption from zoning for all public utilities is suggest by a recent decision of the court of appeals of Ohio (not yet reported) in which a truck terminal was held to be exempt from zoning.[2] Though an outright exemption of public utilities seems unjustified, any such exemption should certainly be limited to uses -- such as substations and transmission lines -- that have unusual location requirements.

Another Ohio decision, applying a different statute, seems to be at the opposite extreme. The regional planning statute provided that after a plan had been adopted no "public improvement or utility privately owned" might depart from the plan without unanimous approval of the county board. This was applied to an electricity transmission line case in State ex rel. Kearns v. Ohio Power Co., 127 N.E.2d 394, 7 ZD 232 (Ohio 1955).

Mandatory referral statutes in some states follow the Standard City Planning Enabling Act by including privately owned public utilities among the uses that must be referred to the planning agency for approval. In a few states, the agency's decision is binding unless overruled by the state agency that exercises supervisory power over the utility. This arrangement seems to have the advantage of at least requiring an explicit decision to overrule the local commission, though one may question the understanding of local zoning problems possessed by some utilities commissions. If, as suggested in the Washington Township case, an authority other than conflicting local governments were given power to resolve intergovernmental land use disputes, it might prove desirable to give the same body power to decide when utilities should be exempted from local plans. Ideally, of course, zoning ordinance should contain reasonable provisions for public utility uses, so that compliance with the ordinance may be required without any state board to overrule local authorities.

Conclusion

The application of planning controls to private property is now a fairly routine matter in most states. Despite the much smaller number of instances in which such controls are enforced on public property, the need for such control is sometimes serious. Unfortunately, we have not yet devised satisfactory methods to apply controls in these cases. We need to devise statutes and ordinances that can be relied on to assure that public property is used as intelligently as possible and with maximum fairness to neighboring owners.

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[2] Zoning ordinances are usually held binding on truck and freight terminals. See, for example, Everett v. Capitol Motor Transp. Co., 114 N.E.2d 547 (Mass. 1953).