

# The advent of zoning

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This essay looks at some of the lawyers and judges who were instrumental in the enactment and judicial approval of American zoning laws. They were members of the upper class with an interest in protecting their fine residential neighbourhoods from the location of cheap housing or business nearby. Some of them had other hopes for zoning. A reformer looked to zoning as part of a plan to increase the influence of the business/professional community over the political affairs of the city. A small town lawyer sought a national reputation. A planning advocate hoped that zoning would be a first step in the development of 'master plans' to guide the physical growth of cities. A conservative ideologue saw in zoning a scheme to classify the population and to segregate them according to their station in life. Not all these aspirations were to be fulfilled, but they help to explain the initial success of zoning in the legislatures and the courts.

## Introduction

In the 1920s well-to-do Americans wanted to be left alone to enjoy the nation's prosperity. Lawmakers were to mind their own business. *Laissez-faire* was the order of the day[1], and the United States Supreme Court mirrored the mood: it looked on reform legislation with disfavour. Between 1920 and 1930 the Court struck down as unconstitutional over one hundred state laws which dealt with social or economic matters[2].

During this same period many American cities enacted building zone laws. New York City adopted the first comprehensive zoning ordinance in the country in 1916; by 1926 there were at least 425 zoned municipalities comprising more than half of the country's urban population. New York, Chicago, Boston, Baltimore, Pittsburgh, Los Angeles, Buffalo and San Francisco headed the list of large cities which had introduced government controls into the land market[3]. Given the attitude of the leadership class, the political success of such novel and intrusive controls is confounding. In 1927 the United States Supreme Court upheld the constitutionality of zoning in the case of *Village of Euclid v. Ambler Realty Company*[4]. If the hostility of the Court to other forms of social and economic legislation is considered, the legal success is likewise a surprise.

This essay examines the leaders of the bench and bar who were the driving force behind the adoption of building zone laws. We will look at who they were, what they said and why

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they represented. Taken together their association with zoning will provide a narrative chronicle of legislative enactment and judicial approval. But there is more. If the examination is fruitful it may puzzle out the advent of zoning. Zoning's personal appeal to members of the ruling elite may explain its approval by the body politic; its professional appeal to members of the legal establishment may explain its acceptance in the courts.

### Ernst Freund

The first zoning lawyer was Ernst Freund. A German emigré, he came to America to become the leading scholar of constitutional law. In 1904 while a member of the Faculty of the University of Chicago School of Law he published *The Police Power*[5]. It became the definitive text which was time and again used to test the constitutionality of zoning.

Zoning's philosophical roots lay in Germany. There the districting idea was linked to building regulations which had been developing since the medieval period. A powerful monarch or a petty prince would prescribe in detail the style and appearance of the capital in which he resided. The results of this benevolent despotism was found in the cities of Mannheim, Potsdam, Dresden and Berlin. By the end of the 19th century these regulations had been translated into comprehensive laws which focused their attention on urban structure and aesthetics specifying the density and arrangement of commercial, industrial, and residential uses of land[6].

Ernst Freund's position as a scholar, and a German, specially qualified him to comment upon zoning. As a constitutional lawyer he resisted the popular delusion that zoning was consistent with traditional notions of the police power. By tradition, governmental controls were limited to situations involving 'health, safety and the suppression of nuisances.' Zoning was designed to promote the public good. This liberalization of the police power which permitted public interest to override private right was a departure from old principles. Furthermore according to the common law, the police power must operate irrespective of class distinction. Zoning might violate this precedent[7]. As a refugee from German authoritarianism, Freund knew that zoning had a price. It must be purchased at some cost to the 'democratic way of life' and at some sacrifice of the freedom that expresses itself in variety[8].

### Edward Murray Bassett

Edward Murray Bassett did not suffer from Freund's timidity. Bassett was a reformer. He embraced the attitude, 'if we pay too much attention to constitutional requirements as hithertofore set forth by the courts, we will never get anywhere. Let us try to frame a method that will be workable, and then make it agree so far as we can with court pronouncements'[9].

Bassett was born in Brooklyn, New York to a working-class family. His father was a farmer and a peddler. Bassett improved himself through a good education first as a

scholarship student at Hamilton and Amherst, and later at Columbia Law School from which he graduated in 1886[10].

Bassett established a law practice in New York City and served one term in the U.S. Congress (1902–1904). After returning to private practice he became a public utility lawyer. He had success in obtaining higher rates of return for his clients, the public utility monopolists[11]. However, in mid-life Bassett decided that he did not want to make his future in public utility law. He had visited Germany in 1908. Germans had built the most marvellous cities of modern times. He was convinced that in the United States, as in Germany, government must regulate the course of urban development[12]. Zoning work was to provide him with an alternative vocation.

Bassett had the opportunity when, in 1914, he was appointed chairman of New York City Commission on Building Districts and Restrictions. In the course of its fact-finding, the Commission determined that New York City's land and buildings were changing for the worse. Stores, factories and garages were invading residential areas; store keepers were subject to unhealthy competition; slums were a blight on neighbourhoods, and property values were unstable[13]. The Commission suggested a legislative fix. It rejected use of the governmental power of eminent domain which would require costly payment of compensation to private landowners. Instead it recommended that New York City use its police power. Three overlapping sets of districts would be established: use, height, and area. The 'use' districts were particularly designed to protect residential neighbourhoods from commercial or industrial encroachment. 'Height' limitations would be tied to multiples of street widths. 'Area' limitations would curtail the extent to which a structure could cover a lot. In 1916 New York City adopted an ordinance creating these districts and the first comprehensive zoning plan was created[14].

Although justified as a reform promoting the general welfare, zoning also suited some special interests. In 1913 the Fifth Avenue Merchants' Association had found itself in the midst of a territorial struggle. The Association's vision of a retail centre for the carriage trade was threatened by the fledgling garment district[15].

The Merchants' Association objected to the nearby garment industry on business grounds. Hordes of immigrant labourers violated the ambience in which luxury retailing prospered. But the Association was losing out in the real estate marketplace as garment manufacturers outbid them for Fifth Avenue parcels. Moreover, the Tammany Society, the political machine which dominated city politics, was on the side of the garment industry. The Association looked to the Commission for assistance. It convinced the Commission to recommend a 125 foot height limitation in the Fifth Avenue District thereby discouraging construction of garment lofts[16].

New York's residential suburbanities also found a special solace in zoning. The zoning plan required lower housing density in the suburbs. One family, detached-house districts possessing trees and lawns were protected from invasion by tenements and apartment houses[17]. Middle-class residents were assured a homogeneous neighbourhood.

Edward Murray Bassett spent the rest of his professional life as zoning's promotor and publicist. In his book *Zoning*[18] he explained his motivation as follows:

After a zoning plan was adopted by New York City, a citizen's committee was established... to help extend zoning throughout the country. They feared that if this rather new invocation of its police

power were employed in only one city the courts would frown on it because of its limited use. The future of zoning was at that time precarious and was considered that its extension to other cities would be an aid securing the approval of the courts.

### James F. Metzenbaum

Meanwhile the test case which Bassett feared was meandering its way to the United States Supreme Court. It came from a town in Ohio which had copied the New York Zone Plan. James F. Metzenbaum had been present at its inception. Metzenbaum was a Cleveland, Ohio lawyer who lived in the nearby Village of Euclid, a community of approximately 10,000 on the metropolitan fringe. Metzenbaum served as the village counsel[19].

When Euclid was incorporated as a village in 1903, it was dominated by Euclid Avenue, a residential street of great mansions which ran westward to Cleveland. Metzenbaum lived on the Avenue which was dubbed 'Millionaire's Row' and declared to be America's most beautiful street[20].

In 1922 Euclid had adopted a comprehensive zoning ordinance which Metzenbaum had drafted[21]. The ordinance was not based on a city plan. The Village had never taken a foresighted look at its future. Studies had not been undertaken as to the rate of population growth, nor as to the demand for parks and schools. Choices had not been made as to placement and size of new highways and sewer lines. Metzenbaum took the 'use', 'height' and 'area' districts found in the New York City Zone Plan and superimposed them on the Village of Euclid so as to reflect existing development. To fill in the blanks, vacant land adjacent to the Village's two rail lines was zoned industrial. And in a preservation effort, land fronting on Euclid Avenue was zoned residential. The Avenue had fallen on hard times; some of its grand mansions had been razed for the construction of gasoline filling stations, others were being converted to funeral parlours and apartment houses.

A decade before, the Ambler Realty Company had purchased sixty-eight acres of vacant land which lay between Euclid Avenue and the Nickel Plate Railroad. It held the land in speculation of an increase in value. The 1922 zoning ordinance divided its tract into industrial and residential districts – the Euclid Avenue frontage was zoned residential while the Nickel Plate Railroad frontage was zoned industrial[22].

In May of 1923 Ambler filed suit in the United States District Court for the Northern District of Ohio. Its complaint was simple. The zoning ordinance reduced the value of the Euclid Avenue frontage from \$150.00 to \$50.00 a front foot. There was no evidence that commercial development would injure the public's health or safety, nor was it a nuisance. The ordinance, Ambler Realty contended, was not a valid exercise of the police power, and deprived it of property without due process of law in violation of the United States Constitution[23].

Metzenbaum was unsuccessful in his defence of the Village before the Ohio Federal District Court. Judge David C. Westenhaver forcefully condemned the ordinance[24]:

The plain truth is that the true object of the ordinance in-question is to place all the property in an undeveloped area of sixteen square miles in a straight-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income

or situation in life ... [I]t may not be done without compensation under guise of exercising the police power.

Since the Ohio Federal Court has decided *Ambler Realty Co. v. Village of Euclid* on the basis of the United States Constitution, it was ripe for appeal to the U.S. Supreme Court. Metzenbaum took the appeal on the Village's behalf.

James Metzenbaum was impressed by the importance of his task. He considered Judge Westenhaver's decision a 'challenge to American citizenry'; the *Euclid* case presented the question of whether 'the constitution was meant so to hamper and restrict the American people, or was intended to protect them in their right to make their cities, large and small, liveable and tenatable for the present as well as for the coming generations'[25].

In the 142-page brief which Metzenbaum prepared in support of his argument before the Supreme Court, he argued that city planning was necessary to keep pace with the complexities of modern urban conditions. The 'philosophy of zoning' promoted the 'general welfare', he said. He reminded the Court that as of January 1, 1925, over 24,000,000 Americans through their elected representatives opted for the benefits of comprehensive zoning laws[26]. In a democracy 24 million voters cannot be wrong.

In reply, lawyers for the Ambler Realty Company debunked the notion that 'the Village of Euclid or any other village [was] able to measure, prophetically, the surging and receding tide by which business evolves and grows, to foresee and map exactly the appropriate uses to which land shall be developed and the amounts necessary for each separate use, in a complicated classification ...'[27]. They pointed out that uncontradicted evidence at the trial showed that the ordinance cost Ambler tens of thousands of dollars.

Lawyer Metzenbaum had little ground for optimism. Judge Westenhaver's criticism of zoning was powerful, and the nine-man United States Supreme Court had displayed little toleration for social and economic legislation. The Court bore the conservative stamp of William Howard Taft, the former President of the United States, who served as the Court's Chief Justice. Justices Willis VanDevanter, James McReynolds, Pierce Butler and George Sutherland were firmly in the Taft camp. Justice Edward Terry Sanford was a newcomer to the Court whose judicial philosophy remained an open question and Justice Harlan Fisk Stone, a former Dean of Columbia Law School, was a strong judge with an independent turn of mind. Only Justices Oliver Wendell Holmes and Louis Brandeis had a record of commitment to legislative reform[28]. At best, zoning seemed destined to fail its constitutional test by a vote of 5:4.

The United States Supreme Court heard oral arguments in the *Euclid* case in January 1926. As luck would have it, Justice George Sutherland was absent that day and by tradition therefore ineligible to participate in the decision. The U.S. Supreme Court failed to reach a decision. Metzenbaum was satisfied with the hung jury; the opposition had been held 'in check'. Chief Justice Taft scheduled the case to be reheard at the next term of court[29].

### Alfred Bettman

The rehearing of the *Village of Euclid v. The Ambler Realty Company* gave Alfred Bettman an opportunity to make amends. A corporate lawyer by vocation, Bettman was a city planner by avocation. As a leader of the National Conference on City Planning, he had undertaken to

prepare a brief *amicus curiae* in support of the constitutionality of zoning, but to his embarrassment had failed to file it in time. The second hearing gave Bettman another chance[30].

Alfred Bettman's career before the Bar had not been characterized by missed opportunities. He had been born in Cincinnati, Ohio, of good German-Jewish stock. He earned a B.A. degree from Harvard in 1894 and combined M.A./LL.B. degree there in 1898. Upon his return to Cincinnati to practice law, he became active in reform politics. He served as City Solicitor and became aware of issues of city planning and finance. Once out of office he continued these interests and in 1917 became a charter member of the American City Planning Institute[31].

Bettman took time off during World War I to go to Washington to prosecute violators of the Espionage Act. He had some success and gained a reputation as 'the man who put socialist Eugene Debs behind bars'[32].

When he returned to Cincinnati in 1919 he renewed his planning efforts. As President of the United City Planning Committee, he raised \$100,000 in support of the creation of the Plan of Cincinnati. All the while he remained active in the National Conference on City Planning serving on its Board of Directors. In 1924 he was appointed as the Secretary of Commerce, Herbert Hoover's advisory committee on housing and zoning, and was personally responsible for the drafting of the Standard State Zoning Enabling Act which that group published and disseminated[33].

The National Conference on City Planning had debated long and hard as to whether to join in the *Euclid* case. Some argued that the case was weak and that the Conference should not be involved. The Village had been districted before any kind of city plan had been prepared and the ordinance was a carbon copy of the New York Plan. Planners found imposition of controls, before any kind of overall plan had been prepared, deplorable[34]. However Lawyer Bettman's views prevailed. At stake was whether municipalities might use the police power to bring spatial order to American cities. Bettman argued that the Conference could not afford to remain silent[35].

Alfred Bettman was particularly well-suited to defend the constitutionality of zoning. Not only was he an expert on the subject matter, but he was also well respected by both of the Supreme Court's ideological wings. He was a conservative hero as the man who jailed socialist Debs and a personal friend of fellow Cincinnati, Chief Justice William Howard Taft. His credentials as a reformer were also good. He and co-religionist Louis Brandeis were both disciples of Rabbi Isaac Mayer Wise who had fused Reform Judaism into a gospel of urban reform[36].

For the rehearing of the *Village of Euclid v. The Ambler Realty Company* counsel Alfred Bettman submitted a 'Brief on behalf of the National Conference of City Planning, the Ohio State Conference on City Planning, the National Housing Association and the Massachusetts Federation of Town Planning Boards, *Amici Curiae*'[37]. The Bettman brief made a significant tactical departure from the Metzenbaum brief. Both recognized that the major factual weakness of the Village's case was the evidence that the Ambler Realty Company would suffer tens of thousands of dollars of loss as a result of the denial of commercial use of their Euclid Avenue frontage. But the two briefs responded to this problem in different ways.

In his original brief James Metzenbaum had argued that zoning was a form of city

planning which promoted the general welfare and was therefore a legitimate exercise of the police power. Metzenbaum rationalized away Ambler's evidence of depreciation in the value of its land by saying it 'begged the question'. 'Confiscation', he said, 'cannot refer to that effect on future or speculative or even present values, which is a necessary incident to the existence of the police power'[38].

Bettman dealt with the confiscation problem differently. Rather than broadly supporting zoning as a promotion of the general welfare, he narrowly justified it as a nuisance suppressant. 'Zoning -- ha[d] the same fundamental basis as the law against nuisances,' Bettman said, and was merely 'a new application of sanctioned traditional methods for sanctioned traditional purposes'[39].

James Metzenbaum also prepared a supplemental *Brief on Behalf of the Appellants*, for the rehearing. Therein Metzenbaum took the unusual step of explicitly disavowing Bettman's *Amicus Curiae* brief in order to avoid 'prejudice [to] any of the rights of the Village'. Metzenbaum took pains to point out that the Village had 'studiously refrained' from constitutionally justifying the zoning ordinance as a device to suppress 'nuisances' and 'semi-nuisances'[40].

Bettman's nuisance analogy contained a pitfall which Metzenbaum wanted to avoid. It seemed plausible on the facts: under its police power, government could suppress nuisances without paying compensation; nuisances were land uses which produce offensive odour and noise and excessive dangers; the use classification in the zoning ordinance foreclosed Ambler Realty Company from industrial use of its Euclid Avenue frontage; industry sometimes produced odour, noise and danger; therefore the ordinance was designed to prevent nuisance-like conditions and was within the police power.

A nuisance analysis, however, revealed zoning's class bias. In his definitive treatise, *The Police Power*, Ernst Freund stated with certainty 'that in defining nuisances no standards may be established which discriminate against the poor'[41]. When Alfred Bettman touted zoning as a means of suppressing nuisances he opened it to attack for violation of this principle.

The zoning ordinance created a cumulative hierarchy of use classes: in first class districts only single family residences could be built; in second class districts single or two family residences; in third class districts apartments, hotels, churches, hospitals and public buildings join single or two family residences as permissible uses. At the bottom of the list in sixth class territory, anything went, including industry, sewage disposal, prisons, commercial establishments, and all kinds of residences. Hence while zoning assured the upper classes light and airy neighbourhoods free from congestion, it left the under classes to compete for space with commerce and industry. Moreover, the ordinance required lots on which the fewest people lived to have the largest free areas for light and air, while those on which the most people lived had minimum requirements for light and air[42]. Zoning, when viewed as a technique for suppressing nuisances, turned utilitarianism inside out; it sought the greatest good for the fewest and richest in number.

Hence, on rehearing, the U.S. Supreme Court was presented with two briefs in defence of zoning, both of which had a weakness. Metzenbaum broadly justified zoning as a form of city planning which promoted general welfare. The flaw in this argument was that it required a conservative court to liberally expand the police power to include goals beyond health and

safety and the suppression of nuisances. Bettman narrowly justified zoning as a device for suppressing nuisances. The flaw in this argument was that it exposed zoning's socially retrograde side-effects which violated the principle that nuisance laws should operate irrespective of class distinctions.

### George Sutherland

Justice George Sutherland was present for the second hearing of the *Village of Euclid v. The Ambler Realty Company*. Chief Justice Taft assigned to him the task of writing of the opinion for the Court.

A circuitous route had brought Justice Sutherland to the United States Supreme Court. He was born of British parents in England in 1862. A year later he was brought by his father, a convert to Mormonism, to the State of Utah[43].

In his early years Sutherland lived out the Horatio Alger story. He left school when he was twelve years of age to make his way in the world as a clerk. Entirely as a result of his own industry and frugality, he was able to return to the classroom – first at Brigham Young Academy, then at the University of Michigan Law School[44].

While at Michigan, Sutherland came under the influence of Professor Thomas N. Cooley. Cooley was the author of the treatise, *Constitutional Limitations*. The book was the leading constitutional law tract of the day; its emphasis on the limits of government power fit nicely with the political and economic ideas of the 1880s[45].

Sutherland returned to Utah and eventually became a member of Salt Lake City's leading law firm. He served in Congress and the United States Senate, and after his defeat in 1916 opened a Washington law office. He served a term as President of the American Bar Association and in the 1920 presidential campaign became one of Warren Harding's closest advisors. Harding repaid him with an appointment to the Supreme Court in 1922[46].

Just one year after his appointment to the Court, Sutherland expounded his judicial philosophy. The question arose as to whether or not Congress had the authority to legislate a minimum wage for the women and children in the District of Columbia. Writing for the Court's majority in *Adkins v. Childrens Hospital*, Sutherland said[47]:

[T]here are limits to ... [governmental] power, and when these have been passed it becomes the plain duty of the Court in the proper exercise [of its authority] to so declare. To sustain individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by preservation against arbitrary restraints on the liberty of its constituent members.

Accordingly the Court struck down the law. Sutherland's biographer, J. Francis Paschal characterized *Adkins* as an 'attack on the very idea of government'[48].

Sutherland has been characterized as a man of intelligence but with an *a priori* intellect[49]. He was a logician and used the deductive method[50]. Justice Sutherland used this approach in writing the opinion for the Court in *The Village of Euclid v. The Ambler Realty Company*. He derived his major premise from Bettman's brief: zoning is simply an application of the law of nuisance to modern urban conditions. He then reasoned that

nuisance laws are a constitutionally permitted exercise of government power, even though they may incidentally result in the reduction in value of private property rights. Therefore, zoning laws were constitutional[51].

Sutherland spent his analytic energy downplaying zoning's anti-equalitarian side. He explained at length why the exclusion of apartments from single family residential neighbourhoods fit within the nuisance analogy. Apartment houses, he admitted, had not traditionally been viewed as nuisances, but he opined, '[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard'. Likewise, apartment houses degraded neighbourhoods of single family detached houses by monopolizing light and air and increasing noise and traffic. Hence from the upper class perspective apartment houses were nuisance-like 'parasites'[52].

Sutherland told part of the story to make the facts support his conclusion. True enough, the exclusion of apartments increased open space and decreased noise and congestion in first class neighbourhoods. Ignored was the fact that the law excluded apartment dwellers from suburban amenities. Also ignored was the precedent that nuisance laws might not discriminate against the poor.

The Sutherland opinion was accepted by a 6 to 3 vote of the U.S. Supreme Court justices. Sutherland was joined not only by Holmes and Brandeis who had a long record of deference to legislative reforms, but also by the strong-minded Stone and the cipher-like Sanford. By siding with the majority, Chief Justice Taft had been able to designate Sutherland as the opinion's author. In mute dissent were Justices VanDevanter, McReynolds, and Butler who rejected zoning with a knee-jerk of reaction[53].

## Reprise

Ernst Freund, a legal scholar and civil libertarian had second thoughts concerning zoning. He had reservations as to whether American cities could and should be entrusted with the power. When the final reckoning came, however, he determined not to make a 'fetish' out of opposing zoning. Freund lived near the University on the South Side of Chicago. '[T]he coming of colored people into [the] district' impressed him with the need for zoning. While under the position taken by the United States Supreme Court a 'legal color line' was impossible, zoning laws could protect against 'unfair non-conformity'[54]. The grand houses on the South Side could be placed in a single-family residential district thereby preventing their conversion into tenements. The neighbourhood would continue to be first class.

Edward Murray Bassett was an archetypal reformer of the Progressive Era. He came from a new upper-class group of businessmen, doctors, lawyers, teachers and engineers who were unhappy with the existing state of municipal government. He advocated innovations in the formal machinery of government which would centralize the process of decision-making[55]. He loudly proclaimed that a building zone system would result in a more rational and efficient municipal government thereby promoting the 'public interest'. Zoning, he said, would 'Save New York' for big businessmen and small storekeepers alike; fine residential districts would be protected from blight; and the wholesome surroundings of a zoned city would produce sound and healthy working class families of good citizens[56].

However, as historian Samuel P. Hays has pointed out, the reformers' proclamations should not be taken at face value. Hays observed that during the Progressive Era there was '[b]ehind – contemporary rhetoric concerning the nature of the reform' sometimes a 'pattern of political behaviour ... at variance with it'[57]. Certainly this is true with respect to Bassett. While he talked of bringing spatial order to American cities, he acted to enhance the political power of the professional and managerial class into which he had climbed. New York and other cities were controlled by political machines which catered to working class elements. Zoning and other municipal reforms were designed to shift control to the upper classes. Specifically he sought to protect the merchants from the ravages of 'unhealthy' competition and to assure bourgeois homeowners' neighbourhoods free from second class dwelling units. His advocacy of better living conditions for the worthy poor was all puff; absent were the economic incentives necessary to supply housing at rents low-income tenants could afford; zoning restrictions only served as an excuse for failure to provide constructive solutions such as public housing.

When his involvement with zoning began, James Metzenbaum was a small-town lawyer. As counsel for the Village of Euclid he had both a private and a professional stake in defending its zoning ordinance. Metzenbaum lived on Euclid Avenue, a grand residential boulevard which was threatened with commercialization, and he had drafted the challenged zoning ordinance which was designed to protect all of Euclid from unwelcome change.

Metzenbaum was sure to lose his personal battle. Geo-political destiny had ordained that his street would be a commercial strip. Zoning strictures were to prove no match for market forces. Several years after the Supreme Court's decision all of Ambler Realty's land was rezoned for industry. Today on Euclid Avenue, gasoline filling stations, used car lots and fast food restaurants abound[58].

On the professional level Metzenbaum was more successful. Zoning provided an opportunity to escape the provincialism of law practice and to gain a national reputation. *Euclid* was Metzenbaum's first appearance before the United States Supreme Court. He relished the job: '[T]o have become spokesman of so splendid a cause, was an exceptional privilege which well warranted a consecration to the task'[59]. Although Alfred Bettman may have upstaged him before the Court, Metzenbaum none the less created for himself a career of public service. He joined Edward Murray Bassett, Bettman, and others, in the legion of zoners across the country. He became a consultant from coast-to-coast. His book, *The Law of Zoning* became the standard legal treatise. It is now in a second edition[60].

Alfred Bettman was a lawyer by trade but a city planner at heart. He embraced the planner's credo that experts using the scientific method should order the course of the city's physical development. After choices concerning the location and size of streets, rapid transit lines, sewers, power plants, parks and public buildings had been made and expressed in the city's master plan then zoning would dictate compliance. But when called upon to defend the zoning ordinance of an unplanned village he used his lawyer's instinct. Rather than attempting a broad justification of city planning as a legitimate pursuit of the 'general welfare', he made a narrow defence on zoning as a technique for the suppression of nuisances.

When Alfred Bettman advocated zoning as a means of suppressing nuisances, he took a chance. He exposed zoning's class bias when he argued that nuisances and near nuisances

could be excluded from well-to-do residential neighbourhoods and not from others. Bettman gambled that the Supreme Court would favour its classmates over its precedents when reaching a decision. The gamble paid off. Justice George Sutherland warmed to Bettman's argument. Sutherland had a profound faith in *laissez-faire*. Zoning *qua* planning was an ideological anathema – a novel and intrusive entry by government into a private market.

On the other hand, from Sutherland's plutocratic perspective, zoning *qua* nuisance prevention had a certain appeal. It was activist government, but it protected the well-positioned. It put everything and everybody in their place. Upper class neighbourhoods were protected from perturbation, and capitalists from competition. Zoning had a feudal appeal.

Over the long term Alfred Bettman's victory before the Court failed to satisfy his client. The National Conference on City Planning had hoped that the Supreme Court would approve comprehensive planning. Bettman's apology for zoning districts as a device for suppressing nuisances fell short of legitimizing a master design for the physical development of the city. Sutherland's opinion said nothing which legitimated planning. And with controls already in hand, few cities bothered to develop comprehensive plans for transportation, education, recreation, housing and infrastructure. According to Lewis Mumford 'zoning without city planning [was] a nostrum'[61].

## Conclusion

This article has looked at some of the lawyers and judges who were instrumental in the enactment and judicial approval of American zoning laws. They were a mixed group, with mixed motives. The legal scholar shared with the others the hope that zoning would protect their well-to-do residential neighbourhoods from the ravages of change. The municipal reformer looked to zoning as part of an effort to take control of municipalities away from the machine politicians and to vest it in politicians more responsive to the business-professional community. The small town lawyer used zoning as a means for establishing a national reputation and clientele. The planning advocate hoped that zoning would be the first step in the development of master plans which would guide the growth and development of cities. The conservative ideologue saw in zoning a neo-feudal scheme which would classify the population and segregate them according to their station in life. Not all of these aspirations were to be fulfilled, but taken together they help explain the appeal of zoning to the legislatures and the Court.

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21. *Ibid.*
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24. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924).
25. J. Metzenbaum, *The Law of Zoning*, Vol. 1, Baker, Voorhis & Co., Inc., 1955, p. 57.
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27. Brief and Argument for Appellee p. 83 in *Landmark Briefs*, Vol. 24, p. 571.
28. Toll, *op. cit.*, pp. 245-248.
29. Metzenbaum, *op. cit.*, pp. 56-58; Toll, *op. cit.*, p. 239.
30. Toll, *op. cit.*, pp. 235-237.
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33. *Ibid.*
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36. Gerckens, *op. cit.*, p. 121.
37. *Landmark Briefs*, p. 763.
38. Brief on Behalf of Appellants pp. 51-53, 62, in *Landmark Briefs*, p. 411.
39. Brief on Behalf of the National Conference on City Planning ... *Amici Curiae*, pp. 23-28, 62 in *Landmark Briefs*, Vol. 24, p. 763.

40. Brief on Behalf of the Appellants (On Rehearing), pp. 42-43, *Landmark Briefs*, Vol. 24, p. 825.
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42. *Ibid.*, p. 161.
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50. Paschal, *op. cit.*, p. 15.
51. 272 U.S. 379, 387-390 (1926).
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