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Zoning: Setback Lines: A Reappraisal

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ZONING: SETBACK LINES: A REAPPRAISAL

INTRODUCTION

The city of Roanoke, Virginia, in furtherance of its objective to establish building lines and regulate and restrict the construction and location of buildings within the city, divided the surface area of the city into "business" and "residential" districts. Another ordinance of that city created a setback line requiring all buildings subsequently erected to be located at least as far from the street as were sixty per cent of the then existing buildings fronting the street on the same block.[1] In upholding the constitutionality of the aforementioned ordinance, the Supreme Court could not find the provision "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [2]

Since 1927, when the Supreme Court handed down the above decision in *Gorieb v. Fox*,[3] the setback line has become, through continued use and judicial decision, an accepted zoning control, serving the purpose of regulating the distance which separates structures from abutting street lines. As a product of a proper exercise of a community's police powers, setback regulations may be enforced without compensation to the property owner on whose lot the restriction is imposed so long as the burden they impose does not become so great as to be confiscatory Under current zoning practice and supporting case law, however, it is difficult to determine to what extent such setback provisions curtail construction and use of the space between a structure and the abutting street line, that is, the "setback area." This vagueness in interpretation is extremely critical when viewed in the perspective of a growing scarcity of available land space and an ever-increasing population. Such an inverse ratio of decreasing land mass and increasing population has created an atmosphere conducive to utilization of what available land space there may be to the maximum possible extent. The difficult question, therefore, becomes not where and when setbacks should be imposed, but how effective the setback line can be in bringing about the desired control of a certain area.

After an examination of the purposes for which setback lines may

1. Gorieb v. Fox, 274 U.S. 603, 604 (1927).
2. *Id.* at 610, *aff'g* Euclid v. Ambler Co. 272 U.S. 365 (1926).
3. *Id.*

be created, the limitations under which they may be enforced, and the projected use which can be made of the controlled area, it will become apparent that the use of the setback as a bulk zoning control is both ineffective and self-defeating. A two-fold solution to this dilemma will be offered at the close of this discussion; first, however, it is necessary to examine the nature of the setback controls themselves.

Bulk Controls

In regulating the development of, use of, and construction upon available land space, the interests of the individual, his neighbors, and the community must be balanced to allow the free use of land to each individual within limitations necessary to promote the health, safety, and welfare of the group.[4] In zoning, this end is accomplished by means of use and bulk controls.

Simply stated, use controls limit how land may be used within a certain area. They are guidelines as to *what* can be done within an area to the same extent that bulk controls determine *where* and *to what extent* that area may be used for buildings and improvements. Bulk controls, which include setback lines,[5] govern the size, shape, and placement of buildings in relation to the property. They are designed to regulate density, provide adequate daylighting, insure privacy, and create open spaces for individual activity and relaxation.[6]

Bulk control methods are not mutually exclusive of one another. While each method may serve primarily one specific designated purpose, it is characteristic of bulk control zoning techniques that they interact with and serve other purposes besides the one specifically intended. Thus, while setbacks may be a direct means of insuring adequate daylight, they may indirectly affect density controls and the problems of over-concentrations of population.[7]

4. Note, *Zoning: Permissible Purposes*, 50 Colum. L. Rev. 202, 211 (1950):
> The reported decisions indicated that to be valid, zoning measures must have one of the following purposes (1) to protect neighbors from injuries which may result from the way in which a landowner employs his land; (2) to secure to the individual occupant of the zoned area a minimum internal standard of health, safety or comfort by regulating the way in which the land they occupy is utilized; and (3) to adjust development of a city to the capacity of municipal service facilities.

5. Toll, *Zoning for Amenities*, 20 Law & Contemp. Prob. 266 (1955).

6. Note, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Reexamined*, 60 Yale L.J. 506 (1951).

7. *Id.* at 507:
> Zoning ordinances, in general, operate in two different ways. They regulate

In light of past experience, it may be said that traditional bulk control techniques are not immune from change, and it is probable that great changes will result from expanding research and technology. Such change may stem from a search to determine human needs for light and air and a solution of how best to satisfy that need with maximum efficiency and minimum expenditure.[8]

Evolution of the Setback Line

The use of the setback line in the United States as a means of regulation under the power of eminent domain can be traced to a 1799 ordinance in Hartford, Connecticut.[9] The setback is described as

> . . . a line behind the street line beyond which on his own land the abutter must not erect buildings, the land owner retaining the right to use his land for all other purposes. The establishment of such a line is therefore the taking by the city of an easement under the right of eminent domain in the land abutting on the street in question, the city paying not the value of the land, but merely the value of the easement. This easement varies with the statute and the ordinance drawn under it by which the line is fixed. Under some ordinances nothing can be built beyond this line; under others, where perhaps lawns are deep, porches, piazzas, etc., are allowed to project for a certain distance, a subsidiary porch and piazza line being drawn.[10]

The purpose of these early "pre-zoning" setbacks was primarily to provide for future street widening.[11] Since it deprived the landowner

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the use to which land is put, and they control the bulk of buildings, i.e., the size, shape, and placement of buildings on the land. Use regulations, designed to prevent incompatible mixtures of land use, have received the lion's share of attention from courts and writers.

Similarly height controls, which, while directly aimed at limiting the problems of overconcentration, to a great degree affect the amount of daylight reaching adjoining buildings. Other means of bulk regulation (besides height, setback, and yard provisions) include the floor area ratio (FAR), minimum lot area and cubic content approaches, angle of light, daylight factor, and coverage regulations. Sometimes traditional means of bulk regulation may be utilized in direct combination as with setback and height controls which have been used in inverse proportions to one another.

8. Toll, *supra* note 5, at 269.

9. F. Williams, The Law of City Planning and Zoning 177 (1922).

10. *Id.*

11. 2 E. Yokley, Zoning Law and Practice 299 (1965). Where the purpose for establishment of setback lines is future street widening, recourse must still be had in

of reasonable use of his encumbered land, future street widening was held to be a "taking" under the government's power of eminent domain. This entitled the landowner to compensation for the taken land. When the setback became a tool of the police power in the early days of zoning, the term "setback" was unfortunately carried over from its eminent domain usage and applied to such zoning regulations. This duplicity of terms as applied to powers carrying differing responsibilities of the municipality toward the land-owner, with a decided emphasis on future street widening as the community's primary objective, resulted in judicial rejection of potentially valid zoning provisions.[12]

With the development of the comprehensive zoning ordinance in this century[13] and the courts' validation of these ordinances, setback and yard area provisions have been upheld when incorporated into such regulations.[14] Though found unconstitutional by some courts,[15] the

eminent domain as such a purpose is not encompassed within the police power of the state (zoning).

Mandelker, *Planning the Freeway Interim Controls in Highway Programs*, 1964 DUKE L.J. 439. The author, after surveying the use of the setback as it applies to future street widening, concludes at 446-447,

> . . . [S]ubstantial difficulties limit the use of the setback as a highway reservation device . . . [b]ecause the setback is most easily applied to existing streets and highways, its usefulness for new rights-of-way, is limited. Finally, a front yard which is used for highway widening will be reduced in size and will be nonconforming to the zoning ordinance. For this reason, setbacks established ostensibly for density control but actually for street widening purposes may be deeper than usual, allowing courts to detect the *ultra vires* application.

12. E. BASSETT, ZONING 61 (1940). On this confusion in terminology, the author states:

> Before the days of zoning some states empowered municipalities to establish so called set-back or building lines by eminent domain. The practice seems to have caused certain municipalities to call their frontyard requirements zoning setback lines. They ought to be called front yard requirements. That term does not confuse the courts. It shows that front yards are established for the same reason as side and rear yards—that is, because they increase light, air, and quiet. *Id.*

See also, e.g., cases cited therein.

13. *See* Toll, *supra* note 5, at 275 on the development of the landmark New York Zoning Resolution (1916).

14. 2 E. YOKLEY, *supra* note 11, at 298. Setback provisions need not be enacted pursuant to planning and zoning enabling acts. *See* Mandelker, *supra* note 11, at 441.

15. *E.g.*, *In re* Opinion of the Justices, 124 Me. 501, 128 A. 181 (1925); Franklin Realty & Mortgage Co. v. South Orange, 4 N.J. Misc. 109, 132 A. 81 (1926); Rudensey v. Senior, 4 N.J. Misc. 577, 133 A. 777 (1926); Appeal of White, 287 Pa. 259, 134 A. 409 (1926).

use of the setback as a valid means of regulation under the police power was sustained by the Supreme Court in *Gorieb*.[16]

The modern setback line as found in community zoning ordinances is thus determined by local officials acting under the appropriate enabling statute[17] in the interest of the health, safety, and welfare of the community. That such modern ordinances have the approval of the courts may be seen in such judicial opinions as that in *French v. Clintwood*:

> . . . [M]unicipal ordinances, enacted in the interest of the *health, safety, and convenience of the public*, prohibiting an owner of property bordering on a *public street* to construct buildings nearer than a specified distance from the *street line* do not unconstitutionally deprive such owner of his property without due process of law.[18]

Purposes of Setback Lines

The varying types of zoning regulations all seek similar general objectives. In *Gorieb v. Fox*[19] the Supreme Court said:

> It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. . . . All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of popula-

16. 274 U.S. 603 (1927).

17. Setback lines are often not specifically provided for but are encompassed within the broad provisions of a state enabling statute. An example is found in Va. Code Ann. § 15.1-486:

> Zoning ordinances generally; *jurisdiction of counties and municipalities respectively*. The governing body of any county or municipality may, by ordinance . . . in each district . . . regulate, restrict, permit, prohibit, and determine the following: . . . (b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures; (c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used . . . .

18. 203 Va. 562, 568, 125 S.E.2d 798, 802 (1962) (emphasis added).

19. 274 U.S. 603, 608 (1927).

> tion in urban communities and the vast changes in the extent and complexity of the problems of modern city life.

The courts have held that the regulation of light, air, and privacy are valid aspects of the police power.[20] By the adoption of setback lines, municipalities may provide a yard space[21] for lawns and trees,[22] thus keeping dwellings safe from the dust, noise, and fumes of the street and adding to the general attractiveness of the property.[23] Such a yard space creates a better home environment,[24] reduces fire hazards by providing a greater distance between homes,[25] provides for adequate light and air,[26] reduces hazards at street corners resulting from obstructions to the motorist's view,[27] relieves street congestion,[28] and by limiting the size of buildings avoids an overtaxing of sewage facilities.[29] These have all been upheld as valid ends for regulation.

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20. Thille v. Los Angeles, 82 Cal. App. 187, 255 P. 294 (1927); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Junge's Appeal (No. 2), 89 Pa. Super. 548 (1927).

21. It has been suggested that setbacks not employed for future street widening be called front yard requirements, in order to bring them into conformity with side and rear yard provisions as well as to avoid confusion between the setback of eminent domain and those established for reasons of light, air and quiet for which side and rear yards are affected through zoning. E. BASSETT, *supra* note 12, at 61. *See* cases cited therein.

As to provisions for front, side and rear yards *see, e.g.*, Toll, *supra* note 2; Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Bebb v. Jordan, 111 Wash. 73, 189 P. 553 (1920); Hayes v. Hoffman, 192 Wis. 63, 211 N.W. 271 (1926).

22. Gorieb v. Fox, 274 U.S. 603 (1927).

23. People v. Stover, 12 N.Y.2d 462, 91 N.E.2d 272 (1963); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749 (1967); *cf.* Kerr's Appeal, 294 Pa. 246, 144 A. 81 (1928).

24. Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

25. Thille v. Board of Pub. Works, 82 Cal. App. 187, 255 P. 294 (1927); Slack v. Building Inspector of Willesley, 262 Mass. 404, 160 N.E. 285 (1928); Airequipt Mfg. v. Gardner, 235 N.Y.S.2d 610 (1962); Richard v. Zoning Bd. of Appeal of Malverne, 285 App. Div. 287, 137 N.Y.S.2d 603 (1955).

26. Islip v. Summers, 257 N.Y. 167, 177 N.E. 409 (1931); *cf.* Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928).

27. *See* D. WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 291 (1958); *cf.* Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928).

28. Thille v. Board of Pub. Works, 82 Cal. App. 187, 255 P. 294 (1927); Islip v. Summers, 257 N.Y. 167, 177 N.E. 409 (1931). *Contra.* Eutair v. S. Orange, 3 N.J. Misc. 956, 130 A. 362 (Sup. Ct. 1925). *See* Clary v. Eatontown, 41 N.J. Super 47, 124 A.2d 54 (1956), on general use of setback in undeveloped residential areas as a means of regulating population density.

29. Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925). On the general purposes of setbacks *see* Note, *supra* note 4, at 202, and related reading in Gorieb v. Fox, 274 603 (1927).

Legal Limitations on the Use of Setback Lines

Once the validity of a setback restriction is established, questions emerge as to the extent to which limitations can be placed on the use of the setback area. The answers have been found in judicial construction and interpretation. Though ordinances vary considerably, an examination of certain rules of construction applied by the courts is both necessary and enlightening.

The power of the local municipality to enact comprehensive zoning ordinances is derived from the state through a proper enabling statute, exercised under the police power in the interest of the health, safety, and welfare of the community. Since zoning ordinances are enacted pursuant to the police power, their constitutionality is presumed.[30] It has been held that zoning ordinances are to receive a liberal construction in favor of the municipality.[31] Even when testimony evidences an intent among city officials to provide for proposed street widening in the adoption of an ordinance, setback limitations found within that ordinance have been upheld on grounds that the property owner was free to make use of the restricted area in any lawful purpose except the construction of buildings.[32] Authority exists which would allow the establishment of building lines separate and apart from any general zoning ordinance and limited to certain designated streets.[33]

Contrasted to the rulings favoring the zoning power are those which favor the free use of land. It is apparent that the latter rulings, in their failure to correct the deficiencies of generally defined zoning measures by not restricting coverage within the setback area, have severely limited the effectiveness of such zoning ordinances. It is of little significance, therefore, whether a "variance" is granted based on hardship, or an "exception" [34] is granted, or an "amendment" [35] is made to the

30. *See* United States v. Caroline Products Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934); Repp v. Shandi, 132 N.J.L. 24, 38 A.2d 284 (Sup. Ct. 1944).

31. Place v. Board of Adjustment of Saddle River, 42 N.J. 324, 200 A.2d 601 (1964).

32. Miami v. Romer, 58 So.2d 849 (Fla. 1952).

33. McCavic v. DeLuca, 46 N.W.2d 873 (Minn. 1951); Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954).

34. Application of Devereaux Foundation, 351 Pa. 478, 41 A.2d 744, 746 (1945):
> An "exception" in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance, as those upon which an exception may be permitted, are found to exist. But zoning ordinances usually provide . . . for another kind of dispensation, also permitted by statute, by which a "variance" from the terms of the ordinance may be authorized in cases

ordinance, because the use made of the setback area is completely outside of the ordinance. This fact makes the setback provision self-defeating.

Essentially, zoning ordinances must be formed so as to allow the owner the reasonable use of the land beyond the restrictions imposed.[36] However, it has been stated that it is uncertain whether, even absent any deprivation of reasonable use or intent to reduce land acquisition costs, a court would approve an ordinance which flatly prohibited all development.[37]

To the extent that setbacks become unreasonable and confiscatory, they will be struck down by the courts.[38] Similarly, because setback provisions must be clear in meaning and definite in their terms, where the language of the setback requirement is vague and subject to various constructions, the provision will be held invalid because of vagueness.[39] It has also been held that "zoning laws which curtail and limit uses of real property must be given a strict construction since they are in derogation of common law rights, and their provisions may not be extended by implication." [40] Thus any determination as to permitted uses within the setback area must be framed in light of these rules of construction. This is particularly critical when determining the question of maximum utilization of available land space.

Uses of the Setback Area

The court in *Union Trust Company v. Lucas*[41] dealt with a common

where the literal inforcement of its provisions would result in unnecessary hardship.

35. Prichard, *The Fundamentals of Zoning Law*, 46 Va. L. Rev. 362 (1960) (Zoning law in Virginia).

36. Arverne Bay Constr. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Frankel v. Baltimore, 223 Md. 97, 162 A.2d 447 (1960). *See* Note, *Techniques for Preserving Open Spaces*, 15 Harv. L. Rev. 1622, 1624 (1962). "Some courts, however, have looked more to the loss the landowner will sustain under a zoning regulation than to the rights he retains." *Accord*, First Nat'l Bank & Trust Co. of Evanston v. County of Cook, 15 Ill.2d 26, 153 N.E.2d 545 (1958).

37. 2 E. Yokley, *supra* note 11, at 305.

38. *Id. See* cases cited therein.

39. *Id. See* O'Connell v. Brocton Bd. of Appeals, 181 N.E.2d 800 (Mass. 1962).

40. Matter of 440 E. 102nd St. Corp. v. Murdock, 285 N.Y. 298, 34 N.E.2d 329 (1941). *See* Airequipt Mfg. v. Gardner, 235 N.Y.S.2d 610 (1962). The court in *Airequipt* also sets forth the rule that in construing legislative enactments literal meanings cannot be adhered to in defeating legislative intent, but that if the enactment is ambiguous and subject to two constructions, that one must be adopted which causes the least hardship, injustice, or absurdity.

41. 125 So.2d 582 (Fla. 1960).

restriction which demanded that "buildings" be set back certain stated distances from front and side yard lines. The property owner contested the revocation of a permit issued to him for construction of a screened enclosure to surround a proposed swimming pool within the setback area. (It may be noted that no mention was made as to the legality of the construction of the swimming pool within the setback area.) The court, in finding the provision valid, refuted the argument that the provision was unconstitutional for vagueness in that it failed to supply a sufficient standard as to what is or is not a building. Using the definition of "building" as found in a standard lexicon, the court refused to allow the construction of a screened enclosure within the setback area.[42] Other excluded uses have included billboards,[43] a fallout shelter which would give the appearance of a small quonset hut upon completion,[44] and one hundred foot radio tower with anchored guidewires,[45] a carport enclosed partly by walls and partly by a post as a support for the roof,[46] and an awning with iron pipe support.[47] Case authority may also be found holding that the word "dwelling" should be interpreted in its broad rather than narrow sense in conformity with the intent of municipal authorities.[48]

42. *Id.* at 586-87:

> . . . [F]ailure of the ordinance to define the word "building" did not invalidate the ordinance since the word has a recognized meaning in the law and is properly the subject of judicial interpretation, and that a "screened enclosure" is a building within the intentment and meaning of the zoning ordinance . . . "that which is built, a fabric framed and designed to stand more or less permanently" (Brown v. Sikes, 188 S.C. 288, 198 S.E. 854, 856) ". . . [A]n analysis of the cases . . . will reveal that the marked tendency of courts in construing the word building as used in . . . municipal ordinances . . . is to give effect to intent and purpose of the . . . ordinance . . . and in so doing to extend the meaning of the term to cover structures that ordinarily would not fall within the strict definition of the word." (Netter v. Scholtz, 282 Ky. 493, 138 S.W.2d 951, 953) . . . "[O]ne attacking the validity of an ordinance has the burden of establishing its face to have been regularly enacted. All presumptions will be indulged in favor of the validity of an ordinance when regularly enacted" (Gustafson v. Ocola, 53 So.2d 658, 661).

43. Katsoff v. Lucertini, 141 Conn. 74, 103 A.2d 812 (1954) (structure).

44. Place v. Board of Adjustment of Saddle River, 42 N.J. 324, 200 A.2d 601 (1964) (building/structure).

45. Skinner v. Zoning Board of Adjustment, Twp. Cherry Hill, 80 N.J. Super 380, 193 A.2d 861 (1963) (building).

46. Cleveland v. Young, 236 Miss. 511, 111 So.2d 29 (1959) (building/side lot line).

47. French v. Cooper, 133 N.J.L. 246, 43 A.2d 880 (1945) (not part of building in construing proper location of setback line).

48. State v. Harvey, 68 So.2d 817 (Fla. 1953).

Conversely, uses which have been permitted include a war monument,[49] and underground fallout shelter,[50] use of the surface for the temporary parking of automobiles,[51] and the construction of a sidewalk.[52] These permitted uses only serve to demonstrate the difficulties inherent in the application of setbacks to achieve the end for which they are intended. Bassett alluded to this problem when he wrote:

> Open porches are usually allowed by ordinances to extend a certain distance into the front. Where buildings have a uniform front line, the projection of an open porch that does not cut off the vision, light, and air of neighbors has been comparatively unobjectionable. But there are drawbacks. Someone will first enclose his porch with screens, and later insert removable windows in the winter. Insistence on the right to enclose such porches has given rise to litigation. Some builders have taken advantage of the porch privilege to insert permanent windows and even radiators, thus making additional rooms nearer the street than their neighbors rooms. Municipalities cannot be too careful about this matter of porches in front yards. Because unfair builders will take advantage of the slightest loophole, the ordinance should be worded so as to make sure that such porches will be as open to light, air, and visibility as possible. So long as there is a provable relation of the regulation to the access of light and air, the courts will be more inclined to uphold the constitutionality of the ordinance.[53]

To illustrate the problem involved, let us assume that a setback ordinance provides for a yard space, the latter term being defined as an "open, unoccupied space other than a court, open to the sky on the same lot with a building or other structure." [54] Under current zoning practice with its employment of the setback, this definition appears a

49. Hamilton v. McKinley Fire Co., 54 Pa. D&C. 184 (1945) (even though ordinance in question designated yard as an open, unoccupied space on the same lot with building open and unobstructed from the ground to the sky—court based its decision on its being only *ornamental* (emphasis added).

50. Handcox v. Peck, 355 S.W.2d 568 (Tex. Civ. App. 1962) (shelter not a building within terms of ordinance); *cf.* Place v. Board of Adjustment, 42 N.J. 324, 200 A.2d 601 (1964).

51. Akers v. Baltimore, 179 Md. 448, 20 A.2d 181, 191 (1941) (not violate yard provisions). (This seems to lend some doubt as to the capacity of setbacks to control the placement of other objects similar to automobiles within the setback area).

52. Miami v. Romer, 58 So.2d 849 (Fla. 1952).

53. E. BASSETT, *supra* note 12.

54. ZONING REGULATIONS OF THE DISTRICT OF COLUMBIA 6 (May, 1958).

most effective method in restricting use of the setback area. Problems of semantics require definition of *open space*, and it is here that the setback begins to lose its effectiveness. A clear and unoccupied space would presumably afford privacy, sufficient daylighting, and a reduction in the hazards of fire. However, because of the rules of construction outlined above, the interpretations of open space remain limited to the restrictions which appear on the face of the ordinance and may not, for example, include parking areas, which when filled with cars, increase the risk of fire, or ornamental structures which minimize daylighting and affect aesthetic appearance. If an interpretation was adopted defining "open space" as land in its natural state, as is proposed here, a more exact standard could be developed which would alleviate many of the uncertainties of the case-by-case approach.

The problem is thus two-fold: first, whether the setback area should be interpreted as an "open space" and second, whether the definition and construction of the term "open space," would serve to restrict the use of the setback area. By developing a definitive standard to guide zoning officials in the exercise of the power delegated to them, any questions of vagueness in interpretation which might void the provision would be eliminated. Similarly, the hazards of judicial notice, as set forth above, would be reduced to a minimum in order to effect the true purpose and intent of the setback provision.

The use of zoning to provide for open space by forbidding all development on a lot will not, it has been held, be sustained unless (1) the use as open space is clearly appropriate for the property and (2) the owner can derive some reasonable benefit from the land in its open state.[55] Both of these provisions seem less restrictive in light of a recent trend in the courts toward upholding ordinances based upon aesthetic considerations. Courts have recognized the need for useable open space[56] as related to the comfort and pleasure of the community.[57] The hold-

55. Note, *supra* note 36, at 1625. *See also* 1 E. YOKLEY, *supra* note 11, at 182. Utilizing cluster and open space provisions in zoning ordinances, requirements for lot area or size and frontage requirements are modified, particularly in situations involving new subdivisions, upon the setting aside of land by the subdivider for parks, schools, and other essential public uses.

56. *See* Toll, *supra* note 5, at 278 and cases cited therein. Those purposes include reduction of the spread of fire, assurance of access to light and air, mitigation of street dust, noise, and exhaust fumes, and aesthetics.

57. *Id.* Breet v. Building Comm'n of Brookline, 250 Mass. 73, 79, 145 N.E. 269, 271 (1924) (recreation); R.B. Const. Co. v. Jackson, 152 Md. 671, 137 A. 278 (1927) (comfort and pleasure); Pritz v. Messer, 112 Ohio St. 628, 643, 149 N.E. 30, 35 (1925)

ings of cases dealing with the open space provisions have prompted one writer to conclude:

> As thin as the material is, however, it is likely that on the square issue of validity the *usable open space* technique would be sustained, for judicial opinion on all of these controls has been most receptive to intelligent new ventures in the field.[58]

In light of such judicial attitudes, it would prove expeditious to determine definitively what is "open space" as it relates to setback regulations and the setback area, so that the purposes of such regulations could be fully carried out with a minimum of limitation on the householder and a maximum of certainty and simplicity in the application of the ordinances.

The Aesthetic Factor

Recent years have witnessed a growing interest in the area of zoning for aesthetics.[59] For many years following the adoption of the first comprehensive zoning ordinance, aesthetic factors alone were considered insufficient reason for the adoption of a zoning provision. Consequently, such ordinances based on aesthetic purposes were found unconstitutional as being without sufficient justification under the police power.[60] However, in combination with other recognized valid purposes such as reduction of fire hazards or the prevention of crime, aesthetic purposes were found to be proper reasons for the enactment of a zoning measure.[61] As noted above, the recent trend in some

(recreation); Morris v. East Cleveland, 22 Ohio N.P. (N.S.) 549, 555, 31 Ohio Dec. 197, 203 (1920) (recreation).

58. Toll, *supra* note 5, at 279 (emphasis added).

59. *E.g.* Rodda, *The Accomplishment of Aesthetic Purposes under the Police Power*, 27 S. Cal. L. Rev. 149 (1954); Note, *The Aesthetic as a Factor Considered in Zoning*, 15 Wyo. L.J. 77 (1960). *See also* Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. Fla. L. Rev. 430 (1965). "Thus far (1965), only three jurisdictions have upheld the use of the police power solely for promotion of aesthetic purposes: The District of Columbia, New York, and Oregon." *Id.* at 437.

60. Regional Survey of New York and its Environs 374 (1926): "Warnings have been issued to zoning authorities that front yards cannot be lawfully established for aesthetic reasons. They must relate to the health and safety of the community." *See also, e.g.*, Anderson v. Shackleford, 74 Fla. 36, 76 So. 343 (1917); Ware v. Wichita, 118 Kan. 265, 234 P. 978 (1925); *cf.* Berman v. Parker, 348 U.S. 26 (1954) on the use of police power for aesthetic purposes (eminent domain).

61. St. Louis Gunning Advertising v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913). *See generally* B. Pooley, Planning and Zoning in the United States, 85 (1961).

jurisdictions has been to view aesthetics as a proper zoning purpose standing alone, with the various facts and circumstances surrounding each case being determinative.[62] In the recent case of *Trustees of Sailors' Snug Harbor v. Platt*,[63] a New York court asserted categorically the right, within certain limitations, of the states to place restrictions on the use which an owner might make of his land in the interest of the cultural and aesthetic betterment of the community. The case before the court concerned the right of the Landmarks Preservation Commission of the city of New York to withhold permission from a charitable organization to reconstruct, alter, or demolish certain buildings used to provide a home for retired seafarers. The Commission based its decision on its finding that the buildings (which were one of the two best examples of Greek Revival architecture in the country) were of "a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City." The court remanded the case, however, to determine whether, as applied in the particular case, a refusal to grant permission to the organization seriously interfered with the execution of its charitable purposes in providing an adequate home for aged seamen, and was therefore such a restriction on the free use of the property as to amount to a "taking" without compensation to the owner.

Aesthetic considerations have been specifically recognized as influential in the adoption of setback restrictions. In *Gorieb v. Fox*,[64] the Court did not eliminate the possibiilty that aesthetics could be the sole factor in the establishment of setback lines. However, aesthetics were discussed and viewed in combination with other valid purposes and factors. Recently, the *Gorieb* rationale was expanded when a New York court held that aesthetics may be the sole ground for the adoption of a zoning ordinance.[65] It has also been stated that aesthetics may

62. Cromwell v. Ferrier, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967). *See* People v. Stover, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).

63. 288 N.Y.S.2d 314 (1968).

64. 274 U.S. 603 (1927).

65. Cromwell v. Ferrier, 279 N.Y.S.2d 22, 27, 28, 30, 225 N.E.2d 749, 753, 754 (1967):

> . . . [T]he question remains whether such an ordinance should still be voided because it constitutes an "unreasonable device of implementing community property. . . ." The eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern.

be an *essential* purpose to the establishment of setback lines.[66] If aesthetics may be the object of zoning, *e.g.*, setback controls, then this may prove to be a workable criteria to apply to use restrictions within the setback area.

A Suggested Approach

An attempt has been made here to direct attention to the avowed purposes of the use of setback lines and the limitations which may be imposed on attempts to restrict the use of the setback area. Unfortunately, the purposes of the restrictions have become submerged in judicial interpretation. The suggestion has been made that the setback area be denoted as providing yard space so as to bring it into conformity with side and rear yard requirements.[67] Although this would prove helpful in providing for uniformity in application among bulk zoning techniques, it does not clarify the problem which arises from an inadequate definition of terms, among which being "open space" as that term is applied to yard area provisions.

A Definition of Usable Open Space

In the face of a growing scarcity of available land space, the recommendation has been made that zoning assure the urban dweller of ". . . *usable* open space instead of mean strips of concrete of little use to anyone but alley cats." [68] Thus, in order to determine the limits of use, a definition of usability, as applied to the urban resident's needs, has been proposed: *usable open space* is only that part of the area of a

66. People v. Stover, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963) (ordinance forbidding erection of clothesline in front yard upheld). Van Voorhis, J., stated in dissent:

> No cases have been cited from this or any other jurisdiction holding that a municipal corporation or political subdivision can direct house and lot owners where they shall hang their clothes. Aesthetic considerations, in a certain sense, underlie all zoning, usually in combination with other factors with which they are enterwoven. Lot area, setback and height restrictions, for example, are based essentially on aesthetic factors. Occasionally public safety considerations are blended with aesthetics, such as the tendency of billboards to distract the attention of automobile drivers or of high hedges to block their view at street intersections. Aesthetic factors are given effect, in such cases, but have been limited to specific situations and not extended to anything which offends the taste of the neighbors or of the local legislature. *Id.* at 741, 277.

Cf. Wright v. Michaud, 200 A.2d 543 (Me. 1964).

67. *See*, E. Bassett, *supra* note 12.

68. Toll, *supra* note 5, at 278 (emphasis added).

residential lot at ground level which (1) is unoccupied by the principal, or accessory buildings; (2) provides open space unobstructed to the sky of minimum prescribed dimensions; (3) is not devoted to service dwellings, offstreet parking, or loading space; (4) is devoted to greenery, drying yards, or recreational space; and (5) is available to all occupants of the building.[69]

A Proposed Varying Aesthetics Factor

Any attempt at providing a solution to the problem of how most adequately to fulfill the intended purposes of setback lines must consider the necessity of simplicity. The application of the setback regulations must be kept simple, despite the danger that they may, by oversimplification, fail adequately to restrict utilization of the setback area. It is suggested that a suitable provision be developed to define the setback area as an open space, with that term being defined in such a way as would indicate that the property is in its natural state; that is, the property as it would stand free from the touch of man (this of course would vary according to environment). Having provided such a definition, a factor (which might be called the *varying aesthetics factor*) could be set up based upon the depth of the setback area and the permitted use of that area. While this factor would be determined according to a number of variables, an important one would be the use district in which the property to be controlled is located.

Thus, taking property in its hypothetical "natural state," and using as a *modus vivendi* a consideration of aesthetics, the distance of setback and the related use might be so determined as to provide maximum benefit to the property owner and community. This would be accomplished by weighing the influence of zoning restrictions on the economic, social, and cultural patterns of a community or district. Judicial construction has set these as the broad limitations on aesthetic zoning.[70] Therefore, while considerations of privacy, reduction of fire hazards, and daylighting might be considered, overriding weight would be given to the aesthetic factor.[71] It is proposed that by adopting this factor the goal of land use regulations may be accomplished with simplicity and uniformity in regulation.

69. *Id.* at 278. HARRISON, BALLARD AND ALLEN, PLAN FOR REZONING THE CITY OF NEW YORK 51-53 (1950).

70. Cromwell v. Ferrier, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967).

71. Toll, *supra* note 5, at 276.

Conclusion

While the effectiveness of bulk regulations is to a large part attributable to their own interaction, such regulations must withstand the test of validity not only in terms of legal sanction but practical effectiveness as well. In the transition from use under eminent domain to zoning under the police power, setback lines have ceased to respond to the demand for maximum utilization of available land space. Accompanying this problem is a definite need for a limitation on the myriad of possible constructions and activities within the setback area. Upon re-examination of the purposes of and limitations upon the utilization of setback lines, and after a determination of how best to balance the purposes and limitations, a realistic and needed solution has emerged. It is suggested here that a new factor be developed to take the place of the setback line as a zoning control. Such a factor would be based essentially on aesthetic considerations, and would involve the setback only in a composite sense along with other factors, primary among which would be those concerning land use and development. Such a change would apply only to the setback as it relates to zoning, so that the setback might retain its character as the *sine qua non* for purposes of future street widening.

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