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THE EFFECT OF LAND USE LEGISLATION ON THE COMMON LAW OF NUISANCE IN URBAN AREAS

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The common law governing the non-trespassory invasion of the peaceful and exclusive use and enjoyment of one's land has its roots deep in legal history. Most of the legislative land-use regulations in the form of zoning ordinances, building codes, housing codes, and related enactments, developed after 1898 when the pioneer architect, Daniel Burnham, discovered how to build skyscrapers.[1] Obviously, these statutes, codes, and ordinances apply to the same subject matter as the common law of nuisance, but in many instances they do not concur with the common law. This note analyzes the effect in law and equity of these statutory enactments on the common law of nuisance.

INTRODUCTION

"Nuisance" is a general term, rather than a term referring to a specific tort.[2] As pointed out by the Colorado Supreme Court, the failure to observe this fact has led to confusion in the law.[3] Certain terms of classification are used with precise meaning, however, and these are defined below in the manner in which they are used here.[4]

With reference to the effect of the act, nuisances may be public or private. A public nuisance is one which affects similarly (but not necessarily in the same degree) all persons coming within the

1 This history has been reviewed many times by the courts when evaluating the general legality of zoning ordinances, e.g., the leading case of Village of Euclid v. Ambler Realty Co., 282 U.S. 365, 386 (1926).

2 Prosser, Torts § 70, comment (2d ed. 1955).

3 Robinson Brick Co. v. Luthi, 115 Colo. 106, 110, 169 P.2d 171, 173 (1946).

4 Derived from King v. Columbia Carbon Co., 152 F.2d 636 (5th Cir. 1945); Black, Law Dictionary 1215 (4th ed. 1951); 3 Bouvier, Law Dictionary 2379-84 (Rawle's 3d Rev. 1914); Joyce, Nuisances chs. 1-2 (1906); Prosser, op. cit. supra note 2, at 389-90; Webster, New Twentieth Century Unabridged Dictionary 1146 (1954); 28A Words and Phrases 647-56 (Perm. ed., 1955) (nuisance); 35 Id. 172-74 (public nuisance); 33 Id. 693-97 (private nuisance); and 27 Id. 406-07 (mixed nuisance).

extent of the range of operation of the act. A private nuisance is one which causes pecuniary loss in the property interest of an individual or a few persons, or one which causes danger or substantial discomfort to the person or persons having an interest in the use and enjoyment of the property affected. Mixed nuisances are both public and private.

Nuisances classified by the character of the act itself include nuisances per se (nuisance at law), statutory nuisances, and nuisances *per accidens* (nuisance in fact). A nuisance per se is a nuisance at all times and under all circumstances, regardless of location or surroundings. A statutory nuisance is an act which has been declared to be a nuisance by legislative enactment, and frequently is defined by the statute as a misdemeanor. A nuisance *per accidens* is a lawful act which may become a nuisance by reason of the circumstance or of the location and surroundings. This last test of nuisance is sometimes called the "pig in the parlor" test, as given in the dictum by Mr. Justice Sutherland in *Village of Euclid v. Ambler Realty Co.*[5]

The normal rules of equity jurisdiction apply fully in the nuisance field: notably, the refusal of the equity court to enjoin the possible commission of a criminal act, the refusal of equity to act when there is an adequate remedy at law, and the refusal of equity to act when the balancing of the equities of the case does not show a remedy which will result in substantial justice.

Public nuisances are offenses against the state, and hence only the state may act to abate the nuisance or to punish the offender. In contrast, a private nuisance inflicts special damage on specific property owners, and the property owners so adversely affected may bring civil suit for injunction or for recovery of damages. Equity will not enjoin a criminal nuisance, with the possible exception of a purpresture.[6] However, private nuisances may be enjoined, and under some circumstances, a public nuisance may also be enjoined if the hazard is great enough. A public nuisance may also be a private nuisance if it results in special damage to particular property owners, and provided that the special damage is different in character from the element causing the public nuisance. In such an event, both sets of rules *i.e.*, rules governing both public and private nuisances apply to the act.

If the nuisance is of the type which is subject to equity jurisdiction, the court will enjoin a nuisance per se before it has been commenced. It may also enjoin a nuisance *per accidens* before the act has commenced if the evidence is undisputed that the act in that location would be a nuisance, no matter how carefully conducted.

Clearly, then, no zoning ordinance is necessary to support a suit for an injunction against a potential nuisance *per accidens*, prior to the commencement of the use.[7] However, in the absence of a zoning ordinance or restrictive covenant, courts are reluctant to grant

5 282 U.S. 365, 388 (1926).
6 An obstruction to a public way.
7 Mutual Service Funeral Homes v. Fehler, 257 Ala. 354, 58 So. 2d 770, 774 (1952).

such injunctions against any lawful use.[8] A recent Pennsylvania decision has gone even further by stating unequivocally: "When owners of real estate in a residential area desire to preserve their neighborhood in an unchanged condition, they must secure appropriate zoning ordinances or be protected by building restrictions."[9]

One of the strongest cases in this group is *Dill v. Excel Packing Co.*,[10] decided late in 1958 by the Kansas Supreme Court. In this case, a suburban subdivision was opened some six miles from Wichita in an agricultural area. The County Commissioners had zoned to a depth of three miles from the city limits, but the developers located this subdivision beyond that zoning control. In a strongly-worded opinion, the court observed that if one wants to enjoy the advantages of country life and to escape the limitations and costs of city living, he must also accept the disadvantages of a rural environment, including the absence of legislative or equity protection against the operation across the road of a feed-lot for 3,000 head of cattle.

Government, particularly on the municipal level, commonly regulates the use of land as a means of accomplishing affirmative public ends. This is an exercise of the police power, and involves no compensation to the owners as distinguished from eminent domain proceedings. The effects on adjacent land owners are merely incidental, and are not relevant to the issues either of the legitimacy of the ends or of appropriateness of the means. It is the effect of this group of enactments, as contrasted to statutory nuisances, which is examined in this note.

The exercise of the police power may take several forms. In the first form, the government may establish a land use incidentally to a direct exercise of its police powers. For instance, a city might develop and operate a park or an airport.

The second form of exercise of the police power consists of the order to, or authorization of, a specific private party to devote spe-

8 Roberts v. Rich, 200 Ga. 322, 37 S.E.2d 401 (1946); Moss v. Burke & Trotti, 198 La. 76, 3 So. 2d 281 (1941); Garrett v. Borough of Beaver, 367 Pa. 626, 81 A.2d 900 (1951); Menger v. Pass, 367 Pa. 432, 80 A.2d 702 (1951). *But see* Yaffe v. City of Fort Smith, 178 Ark. 406, 10 S.W.2d 886 (1928); Densmore v. Evergreen Camp W. of W., 61 Wash. 230, 112 Pac. 255 (1910).

9 Menger v. Pass, 367 Pa. 432, 80 A.2d 702, 703 (1951).

10 183 Kan. 513, 311 P.2d 539 (1958). Compare People *ex rel.* Gershberg v. Arkow, 204 Misc. 635, 124 N.Y.S.2d 704 (New York City Magis. Ct. 1953) (converse proposition: if people want city conveniences, they must also tolerate city inconveniences).

cific land to a specific use. Most commonly, this takes the form of a franchise either to a public utility for the installation of power lines or service mains, or to a railroad or transit company for the construction of tracks and related structures. Occasionally, the specific use is not clearly "vested with the public interest" as the examples cited.

The third form of exercising the police power is a general limitation on the private development of land for the promotion of the public health, safety, welfare, or morals. This has been a long and increasingly complex development of the law, paralleling the growth of urban communities and the increasing mechanization of all aspects of modern life.[11]

Four of the five most common land use regulations have only one or two clearly defined public purposes. Probably the earliest of the four was fire districting, in which certain areas of the city were designated, and within those areas, no construction materials below a certain level of fire resistance could be used. Obviously, these regulations were enacted as a reaction to the great conflagrations which swept most modern cities at some time during their early years, such as the Denver fire of 1863 and the famous Chicago fire. A decision upholding such regulations was rendered as early as 1838 in New York.[12] These regulations have remained essentially without change in form or purpose to the present day.[13]

Until 1898, the construction methods of the times limited the height of buildings without any need for legislation. However, the technology of skyscraper construction was discovered in that year, and almost at once, a problem arose from the fact that the buildings were being built higher than water could be raised in fire hoses. Again as an obvious fire protection measure, major cities began to limit the height of buildings.[14] These regulations soon merged into zoning ordinances. With modern construction practices of using standpipes, sprinkler systems, automatic fire alarm systems, and highly fire-resistive materials, absolute height limit requirements are either being retained for other purposes or gradually are disappearing altogether.[15]

The modern building code is a somewhat more complex regulation, covering both fire-resistive qualities and the strength of materials. Some reasons for the regulation are: (1) fire protection, and (2) need for strength to support both natural loads such as the weight of snow and the pressure of winds, and artificial loads such as machinery.[16]

Housing codes came into being about 1900, with the New York City Tenement House Act, regulating "railroad flats." Since then,

11 See the review of the development of this body of law in the leading case of Gorieb v. Fox, 274 U.S. 603, 608 (1927).

12 Hudson v. Thorne, 7 Paige 261 (New York Ch. 1838).

13 E.g., Denver, Colo., Building Code §§ 601-05 (1949, as amended), which is the most recent version of a fire districting system started by Denver, Colo., Ordinance 92, Series of 1873. (The Denver Building Code is not part of the Denver Rev. Municipal Code, and is published separately.)

14 See Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907); Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908).

15 E.g., compare height limits in Denver, Colo. Rev. Municipal Code, § 610 prior to 1955 ("1925 zoning ordinance") with the present provisions in that section relating to bulk planes.

16 E.g., Denver, Colo., Building Code, Ordinance 140, (1949, as amended).

the codes have become more comprehensive and increasingly strict in the definitions of housing fit for human occupancy. Characteristically, these codes contain minimum standards of space per person, amount of light and air required within the structure, and water and sanitation installations. The purpose is preservation of the public health, primarily through control of contagious diseases. Most major American cities now have such regulations.[17]

The fifth type of land-use regulation is zoning. It differs in character from the preceding four types of regulation primarily because of its complexity of purpose and because of its regulation of the geographic location of land use as well as the manner of land use. Legally, zoning and nuisance are not the same,[18] but the two elements of difference between zoning and the other regulations have led zoning to be widely mistaken for some sort of codified nuisance legislation. This error may not be explicit, but it is back of every application for an amendment, a variance, an exception, or legal relief from allegedly unreasonable regulations, when those requests are based on the plea that the neighbors do not object, or that the proposed exemption would not hurt the other property owners in the area. In law, the zoning ordinance is a vehicle for achieving a number of public ends simultaneously. The standard statement of zoning purpose is:

> Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land. . . .[19]

Almost every zoning enabling act in the country contains this exact language.[20]

Different problems are presented by (1) complying with the permissive aspects of these ordinances, and (2) violating the prohibitive aspects of these ordinances.

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17 *E.g.*, Denver, Colo., Rev. Municipal Code § 630 (1950, as amended).

18 Village of Euclid v. Ambler Realty Co., 282 U.S. 365, 387 (1926) (in considering zoning, one reasons by analogy from the field of nuisance); Beverly Oil Co. v. Los Angeles, 40 Cal. 2d 552, 254 P.2d 865, 869 (1953) (nuisance is not the basis of zoning); Robinson Brick Co. v. Luthi, 115 Colo. 106, 111, 169 P.2d 171, 173 (1946) (zoning preempts the field of public nuisance); Webb v. Alexander, 202 Ga. 436, 43 S.E.2d 668, 672 (1947) (violation of a zoning ordinance is not a public nuisance). *Contra*, a series of Louisiana cases, of which New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798, 799 (1924) is the leading case, holding that a violation of a zoning ordinance is a nuisance per se. See also the text accompanying notes 50-61 *infra* regarding the effect of compliance with a regulatory ordinance on the issue of private nuisance, and text accompanying notes 62-74 *infra* regarding equity jurisdiction over violation of a regulatory ordinance.

19 U.S. Department of Commerce, A Standard State Zoning Enabling Act § 3 (1924), in G. B. Smith, Law and Pratice of Zoning 429 (1937).

20 In Colorado, see Colo. Rev. Stat. § 139-60-3 (1953), and Denver City Charter, § 219A-C (1953 compilation).

For the purpose of this discussion, governments must be divided into two classes: the state and its political subdivisions, and the governmental corporations vested with general or limited municipal powers. The first class consists of the state itself, counties and school districts. Counties and school districts, as agencies of the state, exercise the delegated sovereign power of the state. The second group is comprised of cities and towns,[21] and a wide variety of special districts organized to carry out limited functions such as fire protection, sewage removal, and provision of water.[22]

The first group of governments presumably exercise only the sovereign power of the state.[23] Historically, the exercise of this sovereign power was immune both from suit and from liability, under the common law maxim: "The King can do no wrong." In this analysis, it is presumed that immunity from suit has been waived.[24]

The common law immunity from liability is carried over most strongly in the equity court, where no injunction would be granted against the operation of a structure maintained as an incident to the exercise of the police power, such as a courthouse.[25]

However, at law damages were allowed for personal injuries resulting from the maintainance of a nuisance incidental to an exercise of the police power;[26] and, under certain circumstances, so were damages for injury to property interests. Two different theories were used to grant this latter relief. In some states, the tort liability theory was ignored, and recovery was allowed under the eminent domain theory that property could not be damaged for a public purpose without the payment of just compensation.[27] In other states, recovery for property damage resulting from maintenance of a public facility may be recovered under a nuisance liability theory.[28]

The second class of governmental units, existing in corporate form with limited or general municipal powers, is considered in most instances to exist for "the improvement of their own territory and the property of their citizens."[29] These municipal powers are frequently termed "proprietary powers," and include businesses run by the city such as utility systems[30] and transportation

21 Colo. Const., amend. XX; Colo. Rev. Stat. ch. 139 (1953).
22 Colo. Rev. Stat. ch. 88 (1953).
23 However, the once-clear character of counties has gradually become blurred as they assume municipal powers to govern unincorporated urban areas. See Farnik v. County Comm'rs, 341 P.2d 467 (Colo. 1959).
24 See Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957).
25 Liebman v. Richmond, 103 Cal. App. 354, 284 Pac. 731 (1930).
26 *Id.* (dictum); cases cited in Annot., 75 A.L.R. 1196 (1931).
27 Dayton v. Ashville, 185 N.C. 12, 115 S.E. 827 (1923); see Colo. Const., art. II, § 15.
28 District of Columbia v. Totten, 5 F.2d 374 (D.C. Cir.), *cert. denied*, 269 U.S. 562 (1925), and numerous cases cited therein; State *ex rel.* Helsel v. Board of County Comm'rs, 79 N.E.2d 698 (Ohio C.P. 1947).
29 Portsmouth v. Mitchell Mfg. Co., 113 Ohio St. 250, 148 N.E. 846, 847 (1925).
30 Harms v. City of Beatrice, 142 Neb. 219, 5 N.W.2d 287 (1942) (water); Portsmouth v. Mitchell Mfg. Co., *supra* note 29, (sewers); cases cited in Annot., 43 A.L.R. 961 (1925) (sewers).

systems,[31] and governmental activities having no state counterpart.[32]

A land use operated under a proprietary power is subject to the same liability as though that land were operated by private interests. Normally, the uses can not be enjoined in advance, since it is presumed that (1) the activity is not a nuisance per se; and (2) that the activity will not be so conducted as to become a nuisance *per accidens*.[33] Since municipalities derive their authority from the state, the law for exercise of that authority is pursuant to statutory or constitutional authorization. Hence, it cannot be a public nuisance.[34] In evaluating a private nuisance *per accidens*, the court weighs the equities in determining what, if any, abatement should be ordered.[35] When such a nuisance is conducted by a municipality, the public necessity aspect of the activities weighs heavily against any total abatement, and most partial abatements.[36] In general, this same strong public utility aspect does not apply when damages are the issue. Damages usually are awarded unless the nuisance is the very thing authorized by the state.[37]

LEGISLATIVE AUTHORIZATION OF USES VESTED WITH PUBLIC INTEREST

Whenever an owner devotes his land to public use, or to a use for the benefit of the public, his activity becomes vested with the public interest, and subject to a greater degree of governmental regulation than ordinary private enterprise.[38] The most common examples of these enterprises vested with the public interest are privately-owned public utilities (water, sewage removal, electricity, gas); common carriers, and communication transmission enterprises (telephone, telegraph, television, radio). Within any geographic region, other particular uses, such as grain elevators,[39] irrigation ditch companies,[40] and coal mines[41] may also become vested with the public interest.

The degree of public importance varies, both between different kinds of enterprise and within any given enterprise. Some uses are granted the power of eminent domain,[42] and others are merely regulated.[43] For the purposes of developing the statement of law on the former type of enterprise, railroading is used as the

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31 David v. New Orleans Public Belt R.R., 155 La. 504, 99 So. 419 (1923); cases cited in Annot., 31 A.L.R. 1306 (1924).

32 Denver v. Porter, 126 Fed. 288 (8th Cir. 1903) (dumps are municipal, not sovereign); Williams v. Longmont, 109 Colo. 567, 129 P.2d 110 (1942) (parks are proprietary). For development of the general disagreement regarding the legal nature of waste and garbage collection and disposal, see cases cited in Annot., 63 A.L.R. 334 (1929); Annot., 156 A.L.R. 718 (1945); and Annot., 52 A.L.R.2d 1135 (1957).

33 City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926).

34 State *ex rel.* Helsel v. Board of County Comm'rs, 79 N.E.2d 698, 707 (Ohio C.P. 1947).

35 City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926); cases cited in Annot., 52 A.L.R.2d 1135 (1957), and Annot., 40 A.L.R.2d 1178 (1955).

36 State *ex rel.* Helsel v. Board of County Comm'rs, 79 N.E.2d 698 (Ohio C.P. 1947).

37 Cases cited in Annot., 40 A.L.R.2d 1178 (1955) and Annot., 156 A.L.R. 718 (1945).

38 Munn v. Illinois, 94 U.S. 113, 126 (1876).

39 Munn v. Illinois, 94 U.S. 113 (1876).

40 Colo. Rev. Stat., § 50-2-1 (1953).

41 Colo. Rev. Stat., § 92-12-1 (1953).

42 Colo. Rev. Stat., § 50-2-1 (1953). See also comments in Beseman v. Pennsylvania R.R., 50 N.J.L. 235, 13 Atl. 164 (Sup. Ct. 1888) (significance of eminent domain in determining degree of public interest).

43 H. H. Howard v. Etchieson, 310 S.W.2d 473, 474 (Ark. 1958); State v. WOR-TV Tower, 39 N.J. Super. 583, 121 A.2d 764, 767 (Ch. 1956).

example.[44] The same general principles apply to other privately-owned enterprises having the power of eminent domain.[45]

The very purpose for which a railroad is created is the carrying of persons and freight on trains moving on tracks. Hence, the railroad is not liable for incidental nuisance which might result from the proper carrying out of the function of running trains on tracks.[46] However, in Colorado, the power of eminent domain granted to the railroads requires the payment for damage to private property adversely affected by the operation, irrespective of the law of nuisance.[47]

The problem of terminals, roundhouses, switching yards, and other accessory structures and uses is treated somewhat differently among the various states. A majority of states hold that these are essential activities to railroading, and, if properly operated, they enjoy the same legislative immunity from nuisance liability as the running of the train on the tracks. A minority, hold that the location of these facilities is optional with the railroad, and hence is essentially private in character. In these minority states, there is no absolute immunity from nuisance liability, but a strong public interest enters into the weighing of the equities in injunction actions.[48]

Regardless of whether the state in question follows the majority or the minority view on the issue of whether a properly operated facility constitutes a nuisance, there is unanimity in the view that if the nuisance results from the improper operation of any facility, the actor is liable. The legislative authorization was only for the properly operated function, and not for the nuisance.[49]

When the use affected with the public interest is merely regulated, it has full liability for private nuisance, but no liability for public nuisance.

COMPLIANCE WITH GENERAL PERMISSION LEGISLATION

Many municipal regulations permit or authorize various classes of land uses provided that such uses are conducted in accordance with the provisions of the ordinance. The effect of such ordinances on the law of nuisance has been the subject of considerable confusion, largely due to the use of overly-inclusive terminology. Within the last decade and a half, the courts have been engaged in clarifying the effects of these regulatory ordinances on various types of nuisance.

The Colorado Supreme Court holds that a zoning ordinance pre-empts the field of public nuisance.[50] Several older cases added the proposition that a use permitted by a zoning ordinance, and

44 This discussion is based on cases cited in Annots. at 69 A.L.R. 1188 (1930), 6 A.L.R. 723 (1920), and 6 A.L.R. 713 (1920), supplemented by specific later cases as indicated.
45 Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W.2d 517 (1956).
46 Beseman v. Pennsylvania R.R., 50 N.J.L. 235, 13 Atl. 164 (Sup. Ct. 1888).
47 Colo. Rev. Stat., § 50-1-1 (1953).
48 Van Cortlandt v. New York Cent. R.R., 139 Misc. 892, 250 N.Y.S. 298, 314 (Sup. Ct. Westchester County 1931), *rev'd*, 238 App. Div. 132, 263 N.Y.S. 842 (1933), *rev'd*, 265 N.Y. 249, 192 N.E. 401 (1934).
49 Cf. Westville v. Whitney Home Builders, 32 N.J. Super. 538, 108 A.2d 660 (Ch. 1954).
50 Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946).

operated in a careful and efficient manner, cannot be enjoined as a nuisance per se.[51]

In the field of private nuisance, the majority rule appears to be that the zoning ordinance is not a bar to the institution of an action against a nuisance *per accidens*. The equity courts are divided on whether injunctive relief may be granted against such activities as are permitted by the zoning ordinance, and operated in a careful and efficient manner. Precedent is not strong in the equity court, and hence the courts do not feel bound by the earlier decisions in terms of the nature of relief granted in any specific case. Within this limitation, there is some indication that Colorado,[52] New York,[53] Oklahoma,[54] and Pennsylvania[55] would tend to refuse injunctive relief against an activity which is permitted by a zoning ordinance, and which is carefully and efficiently conducted. The states of

51 Kirk v. Mabis, 215 Iowa 769, 246 N.W. 759 (1933); Salvation Army v. Frankenstein, 22 Ohio App. 159, 153 N.E. 277, 278 (1926); Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 Pac. 976, 978 (1922). See also Robinson Brick Co. v. Luthi, *supra* note 50; Glenmore Distilleries Co. v. Fiorella, 273 Ky. 549, 117 S.W.2d 173, 177 (1938) (conformity with fire prevention code).

52 Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946).

53 Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y.S. 229 (1932); Key v. Pearliris Realty Corp., 106 N.Y.S.2d 443 (Sup. Ct. 1951). *Contra*, Sweet v. Campbell, 282 N.Y. 146, 25 N.E.2d 963 (1940); Moore v. United States Crematorium Co., 158 Misc. 621, 286 N.Y.S. 639 (Sup. Ct. Nassau County), rev'd, 247 App. Div. 637, 291 N.Y.S.289 (1936), rev'd, 275 N.Y. 105, 9 N.E.2d 795, (1937).

54 Weaver v. Bishop, 174 Okla. 492, 52 P.2d 853 (1935) (contains a good analysis of the legal development of this point up to that date).

55 Walker v. Delaware County Trust Co., 314 Pa. 257, 171 Atl. 458 (1934). *But see* Appeal of Perrin, 305 Pa. 42, 156 Atl. 305 (1931).

Alabama, Iowa, Massachusetts, Michigan, New Jersey, and Texas appear to hold the view that the provisions of a proper zoning ordinance are persuasive but not controlling on the issue of whether injunctive relief should be granted under these conditions.[56] Spot zoning[57] is not persuasive or controlling.[58]

Prior to 1935, California also held that a use could be enjoined as a nuisance, even when permitted by the zoning ordinance and operated in a careful and efficient manner.[59]

In 1935, section 731a of the California Code of Civil Procedure was adopted, reading in part:

> "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunction process from the necessary operation in any such commercial or industrial zone of any use expressly permitted therein; nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation."

A series of subsequent cases indicates that the effect of this legislation is to put California among the states holding that injunctive relief will not be granted against uses conducted in accord with zoning ordinances, if such uses are conducted carefully and efficiently.[60]

If the permitted use results in a nuisance *per accidens*, law courts will award damages.[61]

VIOLATION OF REGULATORY ORDINANCES

Violation of regulatory ordinances has, by definition, the legal remedy of fine or imprisonment or both. Relief may also be had through injunction or abatement proceedings in some circumstances.

Early cases held that violation of a regulatory ordinance would not confer jurisdiction on an equity court for granting an injunction. If the "merely" illegal act was also a common law nuisance, it could be enjoined, but the issue of illegality was irrelevant to

56 Shell Oil Co. v. Edwards, 236 Ala. 4, 81 So. 2d 535, *cert. denied*, 350 U.S. 885 (1955); Dawson v. Laufersweiler, 241 Iowa 850, 43 N.W.2d 726 (1950); Weltshe v. Graf, 323 Mass. 498, 82 N.E.2d 795 (1948); Rockenbach v. Apostle, 330 Mich. 338, 47 N.W.2d 636 (1951); Kosich v. Poultrymen's Service Corp., 136 N.J. Eq. 571, 43 A.2d 15 (Ch. 1945); Stahf v. Passaic Piece Dye Works, 108 N.J. Eq. 46, 153 Atl. 707, (Ch. 1931); Dunaway v. Austin, 290 S.W.2d 703 (Tex. Civ. App. 1956).

57 Spot zoning is the establishment of a different zone on a land area than that zone applied to the surrounding area, when the difference is for the peculiar benefit of the owner of the land rather than for the public interest; a type of unconstitutional private legislation.

58 Harris v. Skirving, 41 Wash. 2d 200, 248 P.2d 407 (1952); Shell Oil Co. v. Edwards, 236 Ala. 4, 81 So. 2d 535 (1955) (dictum).

59 Fendley v. City of Anaheim, 110 Cal. App. 731, 294 Pac. 769 (Dist. Ct. App. 1930); Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 Pac. 484 (Dist. Ct. App. 1926).

60 Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948); Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 P.2d 37 (Dist. Ct. App. 1949); North Side Property Owners Ass'n v. Hillside Memorial Park, 70 Cal. App. 2d 609, 161 P.2d 618 (Dist. Ct. App. 1945); McNeill v. Redington, 67 Cal. App. 2d 315, 154 P.2d 428 (Dist. Ct. App. 1944).

61 Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955); Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946); Fairfax Oil Co. v. Bolinger, 186 Okla. 20, 97 P.2d 574 (1939) (contains a review of the law to that date).

the proceedings.[62] However, when it was questionable whether the act was a common law nuisance, an ordinance declaring the act to be a nuisance coupled with a showing of special damages was adequate to sustain an action for injunction.[63]

A few states define the violation of a zoning ordinance to be a public nuisance, and judically authorize injunctive proceedings.[64] More commonly, however, legislative authorization is employed to aid in enforcement of the zoning regulations.[65]

The courts of the various states are in conflict in their attitude toward parties in injunctive proceedings. Some hold that a private citizen is not entitled to an injunction against a violation of the zoning ordinance, since this is a public nuisance.[66] Others hold that if the zoning violation is also a nuisance *per accidens*, it may be enjoined by citizen action.[67] Still others have held that a zoning violation is a nuisance per se, and hence enjoinable by citizen action at any time.[68] In Colorado, as in many other states, this last right is established by statute.[69]

A nonconforming use under a zoning ordinance is a special problem. It is a use which was lawful when the zoning ordinance was adopted (or amended), but which does not comply with the zoning ordinance at the time in question. Technically, its status is that of a use which is tolerated but not encouraged. In general, legislatively-imposed limitations on its continuance have been upheld;[70] but in the absence of such limitations, the courts tend to treat

62 Philbrick v. Miami, 147 Fla. 538, 3 So. 2d 144 (1941) (zoning); Jacobsen v. Padgett, 108 So. 2d 303 (Fla. App. 1958) (zoning); First National Bank v. Sarlls, 129 Ind. 201, 28 N.E. 434 (1891) (fire zones); Houlton v. Titcomb, 102 Me. 272, 66 Atl. 733 (1906) (fire zones); Village of Port Austin v. Parsons, 349 Mich. 629, 85 N.W.2d 120 (1957) (setback ordinances); Village of St. Johns v. McFarlan, 33 Mich. 72 (1875) (fire zones); Warren v. Cavanaugh, 33 Mo. App. 102 (1888) (location of stone quarries); Hudson v. Thorne, 7 Paige 261 (N.Y. Ch. 1838) (size and location of pressed hay factory in fire zone); Wampum v. Moore, 34 Wis. 450 (1874) (fire zones).

63 Levine v. Board of Adjustment, 125 Conn. 478, 7 A.2d 222 (1939); Town of Grundy Center v. Marion, 231 Iowa 425, 1 N.W.2d 677 (1942); General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936); Eskridge v. Sandusky, 136 N.E.2d 465 (Ohio C.P. 1955); Magnolia Petroleum Co. v. Wright, 124 Okla. 55, 254 Pac. 41 (1927); Shields v. Spokane School Dist., 31 Wash. 2d 247, 196 P.2d 352 (1948).

64 New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924); New Orleans v. Lafon, 61 So. 2d 270 (La. App. 1952); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (App. Div. 1952) (slightly modified); Riccardi v. Board of Adjustment, 394 Pa. 624, 149 A.2d 50 (1959); Molnar v. George B. Henne & Co., 377 Pa. 571, 105 A.2d 325 (1954).

65 Colo. Rev. Stat., § 139-60-8 (1953); Denver City Charter, § 219A-H (1953 compilation); Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946); Portage Township v. Full Salvation Union, 318 Mich. 693, 29 N.W.2d 297 (1947); Young v. Scheu, 56 Hun 307, 9 N.Y.S. 349 (Sup. Ct. 1890). *Cf.* Webb v. Alexander, 202 Ga. 436, 43 S.E.2d 668 (1947), which holds that a zoning violation may be enjoined under an enabling statute relative t, public nuisance if the violation is proved to be a public nuisance.

66 City and County of San Francisco v. Safeway Stores, 150 Cal. App. 2d 327, 310 P.2d 68 (Dist. Ct. App. 1957); O'Brien v. Turner, 255 Mass. 84, 150 N.E. 886 (1926).

67 Hopkins v. MacCullock, 35 Cal. App. 2d 442, 95 P.2d 950 (Dist. Ct. App. 1939); Biber v. O'Brien, 138 Cal. App. 353, 32 P.2d 425 (Dist. Ct. App. 1934); Smith v. Collison, 119 Cal. App. 180, 6 P.2d 277 (Dist. Ct. App. 1931); Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (App. Div. 1952); Scott v. Champion Bldg. Co., 28 S.W.2d 178 (Tex. Civ. App. 1930).

68 McCartney v. Schuette, 243 Iowa 358, 54 N.W.2d 462 (1952); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929); State v. Lew, 25 Wash. 2d 854, 172 P.2d 289 (1946).

69 *E.g.*, Colo. Rev. Stat., § 139-60-7 (1953); Denver City Charter, § 219A-G (1953 compilation). These means are indirect, involving proceedings before the Board of Adjustment by "persons aggrieved," alleging error by the administrator in deciding not to enforce; reviewable by the courts on writ of certiorari. This approach does not appear to have been used.

70 City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954); Beszedes v. Board of Comm'rs of Arapahoe County, 116 Colo. 123, 178 P.2d 950 (1947); Mercer Lumber Companies v. Village of Glencoe, 390 Ill. 138, 60 N.E.2d 913 (1945); Dorman v. Baltimore, 187 Md. 678, 51 A.2d 658 (1947); Borough of Rockleigh v. Astral Industries, 23 N.J. Super. 255, 92 A.2d 851 (Ch. 1952); D' Agnostino v. Jaguar Realty Co., 22 N.J. Super. 74, 91 A.2d 500 (Ch. 1952).

such uses as if they were conforming uses, authorized by the zoning ordinance.[71] Of course, an illegally issued permit does not change the status of a zoning violation.[72]

Abatement is the power to force the cessation of uses which are clearly detrimental to the public health or safety or morals. It frequently accompanies the grant of power to regulate land uses, and sometimes serves as a substitute for the injunction.[73] However, in Colorado a public official abates a use at his peril.[74]

SUMMARY

Regulatory land use statutes under the police power are not legislative statements of the law of nuisance. However, when such statutes deal with the same subject matter as common law public nuisances, the statutes pre-empt the field.

In the field of private nuisance, a specific legislative authorization bars injunctive relief against the "very" use authorized, provided that the use is conducted in a careful and efficient manner. An improperly conducted use is not an authorized use. As the permission shifts from mandatory to permissive, and as the degree of public interest in the use decreases, the effect of the legislative provisions shifts from being an absolute bar to injunctive relief to being persuasive evidence. The legal remedy of damages remains unaffected if the state is one requiring compensation for damages to land incidental to eminent domain.

In general, violations of land use regulations were not within the jurisdiction of equity, but this common law rule has generally been superseded legislatively. However, a violation did not bar a private nuisance action under the common law.

71 Firth v. Scherzberg, 366 Pa. 443, 77 A.2d 44 (1951); Benjamin v. Lietz, 116 Utah 476, 211 P.2d 449 (1949).

72 McCartney v. Schuette, 243 Iowa 358, 54 N.W.2d 462 (1952); Hyams v. Amchir, 57 N.Y.S. 2d 77 (Sup. Ct. 1945).

73 Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933); Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (Dist. Ct. App. 1957); First National Bank v. Sarlls, 129 Ind. 201, 28 N.E. 434 (1891); Burley v. City of Annapolis, 182 Md. 307, 34 A.2d 603 (1943); People v. Kelly, 295 Mich. 632, 295 N.W. 341 (1940).

74 McMahon v. City of Telluride, 79 Colo. 281, 244 Pac. 1017 (1926).