

1949

Phi Kappa Iota Fraternity and Dr. Floyd F. Hatch v.
Salt Lake City, Earl J. Glade, Fred Tedesco, John B.
Matheson, L. C. Romney, Cleve Wooley and W. Y.
Tipton : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

PHI KAPPA IOTA FRATERNITY,
a non-profit corporation, and DR.
FLOYD F. HATCH,

Plaintiffs and Appellants,

vs.

SALT LAKE CITY, a municipal corporation, EARL J. GLADE, FRED TEDESCO, City Commissioners; CLEVE WOOLLEY and W. Y. TIPPON,

Defendants and Respondents.

RESPONDENTS' BRIEF

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FILED

SEP 24 1949

CLERK, SUPREME COURT, UTAH

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vs.

SALT LAKE CITY, a municipal corporation, EARL J. GLADE, FRED TEDESCO, City Commissioners; CLEVE WOOLLEY and W. Y. TIPPON,

Defendants and Respondents.

Case No.
7357

RESPONDENTS' BRIEF

STATEMENT OF FACTS

In 1927 Salt Lake City adopted a comprehensive zoning ordinance after holding public hearings (T. page 84). As originally enacted the zoning ordinance divided the City into the following use districts: Residential "A," Residential "A-2," Residential "B" and

“B-2,” Residential “C,” Commercial, Industrial, Industrial “B” and Unrestricted. The uses permitted in Residential “A” District remained in all respects the same to the present time, except for the amendment complained of by plaintiffs. On page 8 of plaintiff’s brief, the pertinent parts of the present ordinance, as amended in January 1939, relating to Residential “A” District, are quoted. The amendment involved only sub-paragraph 6 of paragraph (b), sub-paragraph (b) containing 7 sub-paragraphs each enumerating an exception to the restrictions imposed in paragraph (a). Prior to the amendment this sub-paragraph read: “6. Dormitories, fraternity or sorority houses or boarding houses occupied only by the faculty or students of a public educational institution and supervised by the authorities thereof.”

The 1939 amendment retained the above language and simply added thereto the following: “subject, however, to the express condition that such dormitories or fraternity or sorority houses shall not be located or established more than 600 feet distant from the land and premises occupied by the institution to which they are incident.”

As so amended this ordinance has stood unchallenged and unchanged since its adoption in January 1939 until this present action was commenced by plaintiffs in November 1948, nearly 10 years later.

It will be noticed that the ordinance before amended referred only to public educational institutions, and did

not permit fraternities in Residential "A" District where the educational institution was private or one not a public institution. The amendment did not change that aspect, it simply continued it. The amendment, therefore, is no more directed toward the University of Utah than was the original ordinance, nor is it any more discriminatory against private schools or schools not falling within the characterization of a public educational institution than was the original ordinance. All that was accomplished by the amendment was to restrict the area in Residential "A" zone where fraternities or sororities could be maintained.

Before the amendment was enacted by the City Commission the proposed change was referred to the Planning and Zoning Commission, consisting of representative citizens of Salt Lake City, a commission created under the provisions of the statutes authorizing zoning. This Commission duly considered the advisability of the amendment by investigating on the ground and considering the matter in one of its meetings. The merits of the amendment were considered and its adoption recommended by the Planning and Zoning Commission. The City Commission then advertised a public hearing on the matter. At the hearing a great number of people were present and there expressed their views, some in favor and some against the amendment. After the hearing the City Commission passed the amendment (T. page 85-87).

Exhibit "C" is a copy of the minutes of the meeting of the Planning and Zoning Commission at which the

proposed amendment was considered. Exhibit "A" is a copy of the petition addressed to the City Commission by 26 residents living in the vicinity of the University of Utah requesting the amendment here involved. It also contains a copy of the recommendation of the Planning and Zoning Commission and the order of the City Commission directing the advertising of notice of the hearing to be held on the proposed amendment. Exhibit "B" is a copy of the minutes of the meeting of the City Commission at which the hearing on the proposed amendment was held. The minutes of the Planning and Zoning Commission, Exhibit "C," states that the Commission considered the matter of "amending said ordinance so as to exclude such establishments (fraternities and sororities) from that territory outside a 1/8 mile radius from the lands and premises occupied by the institution to which they are incident, meaning in this case the University of Utah." From this statement in the minutes of the Planning and Zoning Commission plaintiffs conclude that the amending ordinance, as later passed, was directed solely toward and applied only to the University of Utah. The fact is that the University of Utah was, and still is, the only public educational institution in Salt Lake City which permits fraternities and sororities to be organized among its students. It is also true that the advocates of the passage of the ordinance were residents in the neighborhood of the University of Utah, but the language of the amendment as passed and adopted by the City Commission is in no way limited

to the University of Utah but is applicable to any public educational institution anywhere in the City whenever such institution is created.

The foregoing shows that the amended ordinance complained of was given thorough and careful consideration by both the Planning and Zoning Commission and by the City Commission and by the public before it was adopted. There was a difference of opinion among the persons expressing their views at the public hearing held to consider the matter. The amended ordinance received the unanimous approval of both Commissions. It stood unquestioned and unassailed for nearly 10 years, until plaintiffs brought this action claiming it created unlawful discrimination and was unreasonable, arbitrary and capricious. It is very important, therefore, that the particular position and status of each of the plaintiffs now attacking the amended ordinance be reviewed in the light of the record.

As to plaintiff Hatch the record shows that he acquired his home at 1363 Butler Avenue about 1932, (T. page 43) while the original ordinance was in effect permitting fraternities and sororities to locate in his neighborhood. At that time there were already several fraternities and sororities so located. At the time the amendment was adopted there had already located within the 600 foot area from the lands of the University 12 fraternities and sororities and 2 were located beyond the 600 foot area. Exhibit "D" shows these fraternities and sororities existing at the time the amended ordi-

nance was adopted, such houses being colored yellow. Since 1939 only 2 sororities and 1 fraternity have located within the 600 foot area, one of which is on Butler Street, being number 1386, the other being on Federal Way and 1st South respectively, a considerable distance from Hatch's residence at 1363 Butler Avenue (T. page 69-70). These 3 houses are shaded brown on Exhibit "D." No objection was made by Hatch, or anyone else, so far as the record shows to the location of these two sororities and one fraternity. The record is also silent as to the likelihood as to any additional fraternities or sororities locating in the foreseeable future within this 600 foot area. On the contrary, the evidence is that the plaintiff fraternity failed after 1 year of thorough search by a special committee appointed for that purpose to find a suitable house for sale within that area, and it was for that reason that it purchased the home at 1175 Second Avenue in defiance of the prohibition of the amended ordinance (T. page 71-72). So far as Hatch is concerned, therefore, there is no evidence whatever that any additional fraternities or sororities are likely to locate in the 600 foot area or that conditions within this area appear likely to be changed to his detriment in any manner whatsoever by reason of the imminency or possibility of additional fraternities and sororities locating therein. Twelve of the 15 fraternities and sororities located within this area were so located before the amended ordinance was adopted and without being compelled so to do.

Hatch's objection to the amended ordinance is that should additional fraternities or sororities locate within the 600 foot area there will be additional traffic congestion (T. page 44) and this will provide additional arguments for establishing full year schools in Cedar City and Carbon County, whereas, the University alumnae wish to keep "a concentrated large school here." As before stated, there is not the slightest evidence in the record that any additional fraternities or sororities contemplate locating in this 600 foot area or that there are any houses or vacant lots available to them for such purpose. In harmony with the foregoing, the trial court found, "There is no evidence that any fraternity or sorority intends to or will or can now or at any time in the future acquire premises within the area comprising the 600 foot limitation in said ordinance for use as a fraternity or sorority house or that any further congestion or crowding of fraternity houses within said area is imminent or threatened or is likely. That neither the enforcement of the zoning ordinance against the plaintiff fraternity's use of the property at 1175 Second Avenue as a fraternity house, nor the use of said property as fraternity house will in anywise increase or diminish or otherwise affect the congestion, noise or inconvenience or overcrowded condition already or otherwise present in the neighborhood of plaintiff Hatch's residence, and the enforcement of said ordinance will not be prejudicial to or discriminatory against plaintiff Hatch or other property owners in Residential "A"

District who own property within 600 feet of the lands and premises occupied by the University of Utah.”

What are the facts as to the plaintiff fraternity that give it standing in court to attack the amended ordinance? This plaintiff had full knowledge of the fact that under the ordinance a fraternity was not permitted in a Residential “A” District except within the 600 foot area. Notwithstanding such knowledge on August 27, 1948, it entered into a contract to purchase the house at 1175 Second Avenue, the purchase price being \$35,000.00 (T. page 77), and thereupon occupied and still continues to occupy said premises as a fraternity house bringing this action after it was threatened with prosecution for violating the ordinance. The evidence further shows that the fraternity could not find a house within the 600 foot area suitable for its purposes and within the reach of its financial resources although a house could have been obtained for the sum of \$40,000.00 cash. Plaintiff fraternity had no property rights prior to the purchase of the house on Second Avenue and it acquired that property knowing that its contemplated use thereof would be in violation of the ordinance.

Exhibit “1” is a part of the use district map covering Salt Lake City under the zoning ordinance. The red shaded area, with the exception of the rectangular area immediately north of the University of Utah, shaded green, and having pencil lines running diagonally across the same (being the 600 foot area of Residential “A” District here involved) is a portion of the Residen-

tial "B" District. This red shaded area extends from Second East Street east to the University grounds, extending generally between 4th Avenue and 9th South Street under the zoning ordinance. Fraternities and sororities are permitted within Residential "B" District. It thus appears that an extensive area of the City has been left open for the location therein of fraternities and sororities.

ARGUMENT

POINT I

THE PLAINTIFFS CAN ONLY RELY UPON THOSE FEATURES OF THE ORDINANCE WHICH AFFECT THEM IN THEIR PROPERTY RIGHTS AND ONLY TO THE EXTENT THAT SUCH RIGHTS ARE AFFECTED.

We wish to refer the court first to a universal principle of constitutional law that will in itself dispose of all claims of unconstitutional discriminations made by the plaintiffs. It should be remembered, in this connection, that plaintiff fraternity acquired what interest it has in the real property here involved with full knowledge of the existence of the City ordinance and that it prohibited the use of said property for a fraternity house. As to it there can be no discrimination. It owned no property when the ordinance was passed. It chose to defy the ordinance and to put itself in the position where it now claims it is discriminated against. The ordinance was passed 10 years ago. Can it now be said that

a person who elects to disregard it 10, 15, or 50 years after its passage has any standing in court to say that it discriminates against him?

The principle of constitutional law to which we refer is stated in 16 C.J.S., page 179, Section 88, as follows:

“The unconstitutionality of a statute on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons generally may not be raised by one not belonging to the class allegedly discriminated against.”

The same rule is stated in 11 Am Jur. Page 752, Section 111, as follows:

“Even though a person may come within the main purpose of a statute, he has no standing to raise constitutional questions which do not directly affect him, for unless a party can show that he himself has been wrongfully included in the terms of a law, he can have no just ground of complaint. Hence, a litigant can be heard to question the validity of a statute only when, and in so far as, it is applied to his disadvantage.”

In *Cronin v. Adams*, 192 U.S. 108, 28 L. Ed. 365, the court held that a saloon keeper cannot challenge the constitutionality of an ordinance excluding females from saloons, saying:

“What cause of action, then has plaintiff in error? He is not a female, nor delegated to cham-

pion any grievances females may have under the ordinance if they have any.”

Retz v. Leghston, 10 Cal. App. 685, 103 P. 363. In this case it was held that there where an ordinance forbidding saloons except in certain defined limits of the city, contained a proviso that existing hotels outside such limits might conduct bars, one living outside such limits, who had no hotel erected either before or after the passage of the ordinance, could not object that the ordinance was void because it unreasonably discriminated between existing hotels and those thereafter built.

In *Joseph Schlitz Brewing Co. v. City of Milwaukee*, 286 N. W. 602, the statute imposed an occupational tax on operators of grain elevators and warehouses and exempted them from municipal or state taxation. It did not impose the tax on owners of grain which is not stored in warehouses or elevators. The City of Milwaukee attacked the statute claiming it unconstitutional “because personal property owned by one taxpayer and in elevators or warehouses would be taxed thereunder while the same kind of personal property owned by another but not in warehouses or elevators would be subject to personal property tax.” The court says:

“If there were discriminations, as contended by the city, the city is not affected by the discrimination and has no standing to raise the constitutional point. This has been so frequently held that it needs no further exposition here.”

In *Platt v. Philbrick*, 47 P. 2d 302, the statute permitted the lawful occupant of privately owned lands to take, hunt, or kill on such lands predatory or destructive birds or mammals and to possess and carry firearms within the boundaries of the game refuge. No one else could kill such birds or animals or have or carry firearms within the refuge. Plaintiff contended that the protection to wild game afforded by the statute would result in such an increase thereof that her garden might be injured by the invasion of predatory birds and wild life and that the statute was discriminatory between occupants against nonoccupants. The court held plaintiff could not urge this objection quoting from another decision as follows:

“ ‘It is well established that a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against. *Estabrook Co. v. Inc. Acc. Com.*, 177 Cal. 767, 177 P. 848; 5 Cal. Jur. 622, Sections 52, 53; 6 R. C. L. 89, Sections 87, 88, 89; 12 C. J. 768, Section 189.’ ”

Ex Parte Irish, 121 Kan. 72, 250 P. 1056, 61 A. L. R. 332. Here Irish was convicted of violating a city ordinance of Holton, which provided for payment of a license fee of \$150 per year by any nonresident who sells bread or bakery products in the city. Irish brought a writ of habeas corpus but did not allege he was a nonresident. The court held that he could not rely on the

discrimination between residents and nonresidents saying:

“In 12 C. J. 760, the rule is declared to be that ‘it is a firmly established principle of law that the constitutionality of a statute may not be attached by one whose rights are not affected by the operation of the statute.’

“A large list of cases is there cited to support the statement quoted. 12 C. J. 768, says: ‘The unconstitutionality of a statute, on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons, may not be raised by one not belonging to the class alleged to be discriminated against.’ ”

In *Heald v. District of Columbia*, 66 L. Ed. 853, 259 U.S. 114, the District of Columbia levied a tax of a certain per cent of the value of intangible property of persons resident or engaged in business within the District. The executors of Peters’ estate paid the tax under protest and brought suit to recover it back, claiming the act void because it required every nonresident who engages in business in the District to pay the tax on all property wheresoever situated. The Supreme Court held this objection was of no avail to the executors since all property of the estate was located in the District and the owners are residents within the District, saying:

“It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom

the act is unconstitutional, and that the alleged unconstitutional feature injures him.”

This same rule is stated by Judge Brandeis in *Premier-Pabst Sales Co. v. Grosscup*, 80 L. Ed. 1155, 298 U. S. 226, as follows:

“We have no occasion to consider the constitutional question, because it appears that plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution, must show that the alleged unconstitutional feature injures him.”

Our Supreme Court in *Utah Mfrs. Assn. v. Stewart*, 82 Utah 198, 23 P. 2d 231, recognized this rule. There plaintiff, who was not engaged in selling alcohol but would only be a purchaser, contended the statute creating the state alcohol warehouse and giving the warehouse manufacturer a monopoly on the sale of alcohol was invalid. The court says:

“Plaintiff contends the law is unreasonable and discriminatory. If this were true, we do not see how plaintiff can lawfully complain, since there is no discrimination against it or other manufacturers who use alcohol, since all are subject to the same regulations. Plaintiff is not one who seeks to sell in competition with the manager, but a user who is afforded an opportunity to purchase through or from the warehouse manager. The only manner in which plaintiff and others similarly situated claim to be injured is that they are required to pay a higher price for alcohol because of the charges authorized by statute to be

collected by the manager, and the fees imposed by rules and regulations of the Attorney General and the Governor. In no other way does plaintiff allege it is injured in its property or rights.”

The case of *Wulfshon v. Bruden*, 241 N.Y. 288, 150 N.E. 120, 43 A. L. R. 651, involved a zoning ordinance. The plaintiff sought to erect an apartment house and attacked the ordinance requiring a certain setback from the street and a certain backyard. The court says:

“Appellant complains that the regulations for setbacks are unreasonable because they do not graduate such setbacks to the size of the building but require the same area for a small as for a large building. Such an argument is not available to him. The only question which he is entitled to argue is that these setbacks are unreasonable in the case of a building four and five stories high and designed to accommodate nearly 600 people. It will be time enough to consider whether they should not be reduced in the case of a smaller building when somebody desiring to erect such smaller building complains of them as unreasonable.”

The case of *Heimerle v. Village of Bronxville*, 5 N.Y. S. 2d 1002, involved a zoning ordinance and will be quoted from extensively later in this brief as, in our opinion, it disposes of plaintiffs’ case as a whole. On the question now being discussed the court says:

“The fact that other property within the 200 foot distance in other locations may be unreasonably affected, if such fact exists, does not aid

the plaintiffs. The only question which the plaintiffs are entitled to argue is that the restriction is unreasonable as applied to this property. The burden of proof on that subject has not been sustained by the plaintiffs.”

While we think the rules of law enunciated by the foregoing authorities dispose of plaintiffs’ case we shall proceed to answer their arguments as made under subdivisions A, B, C, D, E and F of their brief. We shall consider each of these subdivisions under Point II.

POINT II

PLAINTIFFS HAVE GIVEN THE ORDINANCE AN ERRONEOUS CONSTRUCTION UNDER SUBDIVISIONS A, B, C, D, E AND F OF THEIR BRIEF, AND IN ADDITION ARE NOT ENTITLED TO URGE THE ALLEGED DISCRIMINATORY FEATURES THEREIN ASSERTED.

A

The ordinance, subsection (a) prohibits all uses except those specified therein, for it says that in “Residential “A” District no building or premises shall be used or maintained, etc., for other than one of the following uses,” naming them specifically. This all inclusive prohibition is then modified in subsection (b) so as to permit uses which are ordinarily appurtenant to the uses specified in subsection (a) such as are specifically mentioned in the succeeding subdivisions numbered 1 to 7, inclusive. When subdivision 6 refers to dormitories, fraternity or sorority houses occupied *only* by the faculty

of students of *public educational institutions*, that opens the prohibition in subsection (a) only to the extent expressed, namely, these houses must be occupied *only* by faculty or students of *public educational institutions*. This clearly does not permit fraternities in Residential "A" District incident to private schools. Plaintiffs not only concede, but argue that the word "schools," a permitted use under subsection (a), include both private and public schools. When the incidental use permitted under subdivision 6 by its language only refers to public educational institutions it is perfectly clear that the City authorities were permitting fraternities in a Residential "A" District only when incident to a public school. If subsection (a) already permitted fraternities in Residential "A" District as a part of a "school" there would be no need at all of subsection (b,6) to grant the right. We admit there is a distinction made in the ordinance between fraternity houses incident to public schools and those incident to private schools, the former being permitted and the latter prohibited. If it be claimed that this distinction involves an unconstitutional discrimination, neither of the plaintiffs is in a position to urge it, under the law cited above, as neither is a private school, nor is either a fraternity seeking to come into Residential "A" District as an incident to a private school. Furthermore, there is no showing that the distinction is an unreasonable one, the burden of proof being upon the plaintiff to make such showing.

B

Under subdivision B of their brief plaintiffs likewise misconstrue the ordinance and they say that the ordinance permits without limitation the number of boarders or lodgers who may live in a two-family dwelling. In Section (a) every use is prohibited other than one-family dwellings, two-family dwellings, etc. Neither the words "one-family dwelling" nor the words "two-family dwelling" contemplates a use of a dwelling to house boarders or lodgers. Without subdivision 5 of subsection (b) the use of any dwelling for boarders or lodgers would be absolutely forbidden in Residential "A" District. Subdivision 5 so far removes this ban as to permit 6 boarders or lodgers in a one-family dwelling, but expressly says that such provision does not apply to a two-family dwelling, and hence no boarders or lodgers are permitted in a two-family residence in Residential "A" District. That the foregoing is the proper construction of subsection (a) is shown by the fact that under Section 6717 (a-2) of the 1944 Revised Ordinances, boarding or lodging houses for the first time are made permissible in Residential "B" and "B-2" Districts. There is, therefore, no discrimination between two-family dwellings and fraternity houses, assuming that a fraternity house is an equivalent of a boarding or lodging house, as no boarders or lodgers are permissible in a two-family dwelling in Residential "A" District.

C, D, E AND F

With respect to subdivisions C, D, E, and F of plaintiffs' brief, we submit the authorities hereinafter appearing. We desire to add here the following:

As to subdivision "C," plaintiff Hatch is not any more discriminated against than any other person who finds himself in a particular zone where other uses than one-family or two-family uses are permitted. If there are residences in a commercial zone, there is the natural subjection to new and additional commercial enterprises coming into the area to the detriment of the residential feature. Yet commercial zones are selected and confined in many instances to small areas as was the case in *Marshall v. Salt Lake City*, hereinafter cited and quoted. The ordinance attached does not confine fraternities to a 600 foot area. Fraternities are permissible in Residential "B" area to the west, northwest, and southwest of the University. The City is under no obligation to so establish fraternity zones as will provide already built houses suitable for fraternities. As a matter of fact the evidence discloses there are no more houses available within the 600 foot area and that the plaintiff fraternity for that reason went outside that area. All other fraternities were established without any action being taken by plaintiff Hatch. To strike the ordinance down in this case will not in any wise relieve Hatch. All the fraternities and sororities that could locate within the 600 foot area have already done so and all but two did so while the entire area of Residential "A"

was open and available to them. To reopen Residential "A" to fraternities and sororities will not prevent new ones from locating within the 600 foot area if a suitable house can there be obtained. The ordinance fixing the 600 foot limitation was passed in January, 1939. No action was taken by Hatch during the ten year interval against this ordinance. Neither the complaint nor the evidence shows any necessity now for his taking the present action for the evidence shows that the plaintiff fraternity could not and did not acquire a house within the 600 foot limitation. Consequently there is no threat now of any additional burden upon Hatch. So whether the fraternity should be permitted to use the house on Second Avenue for a chapter is of no concern to Hatch. Striking down the ordinance will not cause any of the fraternities already located to move. There will be just as much traffic congestion and other disturbances incident to fraternities and sororities in Hatch's neighborhood regardless of whether the plaintiff fraternity is or is not permitted in the Second Avenue house. There is no evidence that any other fraternity is threatening to invade this 600 foot area while the evidence is to the effect that there is no house now available within that area for a fraternity. The evidence further discloses that there are numerous houses in close proximity to the University in Residential "B" which are of such a character as to be suitable for fraternities and sororities. There is absolutely no showing, therefore, why the extraordinary remedy of injunction should be invoked in this case in

behalf of plaintiff Hatch or why the ordinance should be declared invalid as to him.

As to subdivision D of plaintiffs' brief, all we need to say is that the ordinance was passed by the City Commission and what was intended must be drawn from the language of the ordinance itself. No mention is made therein of the University of Utah. The language is general and would apply to any public educational institution, now or hereafter established, in a Residential "A" District. The fact that for the time being the University is the only such institution where fraternities and sororities are organized and have chapter houses cannot be taken as evidence that the ordinance was directed toward the University and applicable only to fraternities and sororities of that institution. Salt Lake City is the only first class city in the State of Utah. Is it to be contended that all legislation concerning first class cities is for that reason directed to Salt Lake City alone and is, therefore, class legislation and so void?

As to subdivision E and F of plaintiffs' brief we feel that the authorities hereinafter referred to amply answer the contentions made by counsel.

It is apparent that the two plaintiffs in this case occupy conflicting positions. The fraternity asserts that there is no such distinction in law or fact between houses occupied by fraternities and houses occupied by one or two families as would form a reasonable basis for separate treatment of fraternities by the ordinance. Hatch, on the other hand, claims fraternities are a de-

triment to a strictly residential district and create conditions which should not be permitted to exist in such district. He claims the location of fraternities in his neighborhood has materially reduced the value of his property and the future location of fraternities will destroy the value thereof. This clearly shows that there is a reasonable basis for treating fraternities as a class in fixing proper zoning restrictions. The same considerations are present as regards fraternities in a strictly residential area as are present in lodging or boarding houses in such an area.

POINT III

GREEK LETTER FRATERNITY MAY BE EXCLUDED FROM RESIDENTIAL DISTRICT UNDER ZONING LAW.

Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835. The fraternity entered into an agreement to purchase a large residence property for the sum of \$25,000 paying \$6000 down and giving a mortgage for the balance. The property was located in residential A district which permitted only one and two family dwellings, churches, schools, libraries, parks, playgrounds, farming and truck gardens, hospitals or institutions of an educational philanthropic eleemosynary nature, and accessory buildings. The fraternity argued that the owner had a right to sell the property to the fraternity for the exclusive residential use as a family within the meaning of the city ordinance.

“The ordinance, however, does not appear to uphold counsel’s construction of the word

'family' as used in the above cited "A" residence district section. Has it come to pass that a company of approximately 20 or 30 unrelated young fraternity men can properly come within the generally accepted meaning of the social unit which is designated as a family? We do not think so. And counsel's contention in respect of the family-rights feature of the defendant fraternity is plainly negatived by the express provision that 'fraternities', and other designated occupants as well, may be installed under the 'B' section of the ordinance. Clearly the fraternity is confined to the 'B' section.

"Plaintiffs point out that, if the judgment of the trial court is sustained, the students will lodge in the Allison house and be served with two meals each day. And, of course, from time to time, more room will be added to accommodate the future influx of students in attendance at a large, influential and rapidly growing university. Plaintiffs also contend that such use of the house 'will cause confusion on account of the numbers living in said house; will depreciate the value of the plaintiffs' property, and other property in the neighborhood; will cause confusion because of the prescence of automobiles owned by members of said fraternity, and because of the proximity of the plaintiffs, the first named plaintiff being within 20 feet of said house and the others being immediately across the street therefrom plaintiffs will be specially damaged,' by reason of its proximity. It is shown that 'these three homes are all of the value of over \$50,000 each, and are typical of the district,' and that many like residences will be greatly depreciated in value in the event that the defendants prevail in this suit.

“Plaintiffs gladly concede in the brief that the proposed young men occupants of the defendant fraternity house are high-class and well-behaved in their demeanor. But it will be presumed that they are not different from any equal number of young men students in somewhat similar situations at the other seats of learnings. *Hannan v. Harper*, 189 Wis. 588, 208 N. W. 255, 45 A. L. R. 1119, is a case arising in Milwaukee wherein the court made this observation:

“ ‘The occupancy of the upper flat of the dwelling house as headquarters and clubrooms of a college fraternity amounts to a constructive eviction of the tenant of the lower flat and a breach of an implied covenant for quiet enjoyment, entitling the tenant to an injunction to restrain such breach.’

“And in the statement of facts, at page 256 (189 Wis. 589), speaking of college students generally, the court observed that it is a matter of common knowledge and well established that groups of students are for the most part exuberant, boisterous, and hilarious, and that they do not ordinarily keep regular hours and are addicted to the use and abuse of vibrant and sonorous musical instruments.

“In a zoning case decided in 1925, the question of the police power as relating thereto is discussed at length, and the court, in an unusually instructive opinion, say:

“ ‘The police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general wel-

fare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, with-in reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. * * * In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare, was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed, so has the definition of 'public welfare,' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479."

The court reversed judgment for the fraternity enjoining the City from enforcing the ordinance.

The above case was followed in the case of *City of Lincoln v. Logan—Jones*, 120 Neb. 827, 235 N.W. 583, where it was held that a Greek letter fraternity violates the zoning ordinances of a city when it occupies and uses in an exclusive residential district a residence as a chapter house.

POINT IV

THE WISDOM AND NECESSITY FOR THE ZONING, THE NUMBER AND NATURE OF THE DISTRICTS CREATED, AND THE BOUNDARIES THEREOF AND THE USES PERMITTED THEREIN ARE MATTERS WHICH LIE WITHIN THE DISCRETION OF THE GOVERNING BODY OF THE CITY.

Under Section 15-8-90 U.C.A. 1943 the legislature has vested broad power and discretion in the governing body of the city in establishing zoning regulations and use districts. We quote:

“15-8-90. Districts.

“For any or all of said purposes the legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings or structures, or the use of land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.”

Marshall v. Salt Lake City, 141 P. 2d 704. This case lays down the point above stated and states that:

“Unless the action of such body is arbitrary, discriminatory, or unreasonable or clearly offends some provision of the constitution or statute, the court must uphold it if within the grant of power to the municipality. It is primarily

the duty of the city to make the classifications if a classification is reasonably doubtful. The judgment of the court will not be substituted for the judgment of the city. *The requirement that zoning be by districts does not require that districts be confined and rigidly limited to one particular type of use.*"

On the question of what is a reasonable exercise of the police power, the court says:

"The preservation of the public health, morals, safety and welfare are not to be determined or gauged in dollars and cents alone, nor in protection from contagious diseases or moral charlatans. The public health involves the preservation of the mental, moral, and civic health of the inhabitants as well as physical health. A citizenry mentally alert and alive to the interests of the city and its inhabitants, filled with pride and confidence in the community and nation, awake to its weaknesses, needs and possibilities, is as much a matter of public concern and effort, as is the prevention of epidemics. Again, a mentally healthy and alert citizenship is one of the most effective ways of preserving the physical health. So, too, the moral health of the people is a matter of grave public concern. The higher the sense of public responsibility, of private citizens and public officers alike, the greater the assurance of safety in person, liberty, and property. The higher the moral tone, the morale of the people, the cleaner will be the city, the more beautiful the homes and parks; the more peace and quiet that abounds, the greater the joy and life and living in the community. The public health, safety, morals, and welfare, as those terms are

used with reference to government and its exercise of police power are inseparably linked to, and founded upon, the peace of mind, happiness and contentment of its citizens. A government such as ours is merely a form for cooperative action, set up by free men, to enable them to live and operate as a unit, insuring the preservation to each of life, liberty and the pursuit of happiness, and imposing only such restrictions upon the individual as shall be necessary to preserve and protect the welfare of society as a whole. A chain is no stronger than its weakest link, so society is no better or stronger than the units of, and upon, which it is builded. The unit upon, and out of which our present society is built is the family and the home. A basic and very important element in determining public welfare, especially as applied to regulations and restrictions governing residences and residential property, is its need or effect upon the homes and home life of the people. It is certainly the prerogative, and probably the duty of organized society, to take those measures and do those things which tend to preserve in their beauty, integrity and social force, the homes and homelife of its citizens. Those things, therefore, which contribute or reasonably may contribute to the convenience and enjoyment of the family home, and the homelife of the people generally, in such a way as may affect their health, safety, morals and general welfare are within the scope of the police power, and may properly form the basis for action by the city in zoning.

“As to what restrictions and limitations should be imposed upon property, and what uses thereof should be permitted, has been by the legislature, committed to the judgment and dis-

cretion of the governing body of the city. As long as that body stays within the grant, and purposes fixed by the legislature, the courts will not gainsay (its) judgment. In *Walton v. Tracy Loan & Trust Co.*, 97 Utah 249, 92 P. 2d 724, 726, we said: 'No one would doubt that the exercise of the zoning power is definitely a legislative function and activity.'

"The court, in *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388, at page 395, says: 'It must be conceded that, where a given situation admittedly presents a proper field for the exercise of the police power, the extent of the invocation and application is a matter which lies very largely in legislative discretion (*State ex rel.*) (*Carter v. Harper*, 182 Wis. 149, 196 N.W. 451) (33 A.L.R. 269), and we are well satisfied that the weight of authority dealing with the subject of zoning may now be regarded as establishing that 'every intendment is to be made in favor of zoning ordinances, and courts will not, except in clear cases, interfere with exercise of power thus manifested.'

"And in *Euclid, Ohio, v. Ambler Realty*, supra, we read: 'If the validity of the legislative classification * * * be fairly debatable, the legislative judgment must be allowed to control.' "

Wilkins v. City of San Bernardino, 175 P. 2d 542.

"Plaintiff sought declaratory relief, claiming that the zoning ordinance of the city of San Bernardino was unreasonable and invalid as applied to the west 112 feet of his property because that portion was placed in a single family dwelling zone. The remainder of this property is lo-

cated in a small or 'spot' business zone which is in the center of a large residential district, zoned for single family dwellings. Plaintiff, in substance, is attempting to obtain an extension of one arm of this small business zone by judicial decree, contrary to the legislative determination by which the boundaries of the zone were established."

Plaintiff had erected multiple dwellings and garages on the middle portion of the lots east of the disputed westerly 112 feet. He applied twice for re-zoning which was denied and then obtained a permit to erect single family two-story dwellings and garages on the west 112 feet of these lots. Instead of erecting single family dwellings, however, he erected two multiple family units in violation of the zoning ordinance.

"In the present case, there is no contention that the zoning ordinance as a whole is invalid, but only that its application to part of plaintiff's property is unreasonable and hence we must assume, in accordance with the rule that every intendment is in favor of the validity of such ordinances, that the enactment as a whole is a proper exercise of the police power and adapted to promote the public health, safety, morals and general welfare. This being so, the sole question is whether the application of the ordinance to plaintiff's property is so oppressive and unreasonable as to justify the granting of relief, or whether there was any reasonable justification for the legislation as applied to plaintiff's property so as to make the action of the city in denying plaintiff's applications for re-zoning, a legitimate exercise of the police power. A city

cannot unfairly discriminate against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance. *Reynolds v. Barrett*, 12 Cal. 2d 244, 251, 83 P. 2d 29. But the mere fact that some hardship is experienced is not material, since 'Every exercise of the police power is apt to affect adversely the property interest of somebody.' *Zahn v. Board of Public Works*, 195 Cal. 497, 512, 234 P. 388, 394. It is implicit in the theory of police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals and general welfare, and if there is no arbitrary and unreasonable application in the particular case.

"Where it is claimed that the ordinance is unreasonable as applied to plaintiff's property, or that a change in conditions has rendered application of the ordinance unreasonable, it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, as a matter of law, that the ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power. See *Rehfeld v. City, etc. of San Francisco*, 218 Cal. 83, 85, 21 P. 2d 419. Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determin-

ation of the legislative body, if there is a reasonable basis for the belief that the establishment of the strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. *Acker v. Baldwin*, 18 Cal. 2d 341, 344, 115 P. 2d 455; *Miller v. Board of Public Works*, 195 Cal. 477, 490, 234 P. 381, 38 A. L. R. 1479; *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388; see *Otis v. City of Los Angeles*, 52 Cal. App. 2d 605, 614, 126 P. 2d 954.

“The courts cannot write the zoning laws and cannot say that the legislative body has erred in drawing the lines of the districts, or in restricting the territory devoted to business or to multiple dwellings, unless there is a clear showing of abuse of legislative discretion, i.e., that the restrictions are unreasonable: As stated in *Miller v. Board of Public Works*, 195 Cal. 477, 493, 495, 234 P. 381, 387, 38 A. L. R. 1479, ‘The man who is seeking to establish a permanent home would not deliberately choose to build next to an apartment house, and it is common experience that the man who has already built is dissatisfied with his home location and desires a change. * * * Somewhere the line of demarcation must be drawn, and it is primarily the province of the municipal body to which the zoning function is committed to draw that line of demarcation, and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested in the absence of a clear showing of an abuse of that discretion. In short, as previously indicated, we are not permitted to substitute our judgment for the legislative judgment.’

“So-called ‘spot’ zoning results in the creation of two types of ‘islands.’ As pointed out above, the objectionable type arises when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of ‘island’ results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more ‘spots’ in the district. It is the second type of ‘island’ that is presented in this case and if there is any discrimination, it is in favor of the ‘island’ since it may be devoted to a greater number of uses than the surrounding territory. It is clearly within the discretion of the legislative body of the city to determine whether such an ‘island’ should be enlarged or not, and the mere fact that the owner may enjoy greater benefits, or that his property will be enhanced in value, if the size of the island is increased, cannot entitle him to compel the allowance of such increase in size. *Herfeld v. City, etc., of San Francisco*, 218 Cal. 83, 21 P. 2d 419; See *Otis v. City of Los Angeles*, 52 Cal. App. 2d 605, 126 P. 2d 954; *Kort v. City of Los Angeles*, 52 Cal. App. 2d 804, 127 P. 2d 66; *Rubin v. Board of Directors*, 16 Cal. 2d 119, 104 P. 2d 1041. Zoning necessarily involves boundary problems and, when ‘spots’ zoning is permitted in a residential district, the legislative body must determine where the boundary is to be placed, attempting, as far as possible, to minimize the resulting inconvenience. This is essentially a legislative problem, and the determination may be attacked only if there is no reasonable basis therefor. Often there may be little difference in the character of the property on either side of the line, but such showing will not justify a judicial alteration or extension of the boundaries.

If an owner could compel the extension of the boundaries of the 'island,' by any such showing, then the next adjoining owner in turn could likewise make the same kind of a showing and obtain another extension of the 'island' to his property, and in a short time there would be an end to the effectiveness of all zoning legislation."

Taintor v. Hattemer, 72 N. Y. S. 2d 537. Plaintiff brought an action under the Declaratory Judgments Acts to have a zoning ordinance declared invalid. The plaintiffs further complain that the zoning change made by the Town Board wherein the land herein referred to, including the portion of the 'roadway,' was changed from a residential zone to an industrial zone, was done arbitrarily and unreasonably and constitutes an unreasonable, illegal, confiscatory exercise of zoning power and that the change of zone deprives the plaintiffs of their property without due process of law and denies plaintiffs the equal protection of the laws.

"With respect to the change of zone, it must be remembered that the action of the Town Board complained of constituted a legislative act. No machinery for the review of the action of the Town Board in making change in the zoning ordinance is provided in the Town Law, the reason therefor being that within constitutional limits the Town Board is the sole judge as to what law should be enacted for the protection and welfare of the people and as to when the police power which it possesses is to be exercised. It is true that an exercise of the police power will be scrutinized by the courts to determine whether or not it is unconstitutional in that it unreasonably and ar-

bitrarily deprives a person of the use of his property. So long as the action of the Town Board does not infringe upon the inherent rights of life and liberty and the enjoyment of property, either directly or through some limitation thereon, a determination as to the necessity for the exercise of the police power is conclusive upon the court. The discretion of the legislative body is very broad and becomes the subject of supervision by the court only when it becomes necessary to determine whether or not it has been exercised within proper limitations. *Green Point Savings Bank v. Board of Zoning Appeals of Town of Hempstead*, 281 N.Y. 534, at pages 539, 540, 24 N.E. 2d 319, at pages 321, 322. No facts are alleged in the complaint showing that the Town Board exercised its powers beyond the proper limitations or that its action was unreasonable and arbitrary. The plaintiffs by this form of relief seek to obtain in this action the determination that the zoning change was made illegally. There is no claim that the procedure adopted in making the change was improper. The plaintiffs merely claim that the result of the change was not in the best interests of the plaintiffs and others similarly situated.

“No reported case in this State has been drawn to the attention of the court wherein any court has reviewed by declaratory judgment such a determination as was made by the Town Board in this case. True, in *Matter of Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642, the court permitted a taxpayer to attack a zoning ordinance by way of a declaratory judgment. But as to that case the Court of Appeals in *Arverne Bay Construction Company v. Thatcher*, 278 N.Y. 222, at page 226, 15 N.E.

2d 587, at page 589, 117 A.L.R. 1110, narrowed its construction as follows:

“ ‘The rule established by that case is this: To sustain an attack upon the validity of the ordinance an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted.’

“There are no allegations whatsoever in the complaint herein to indicate that the plaintiffs are unable to use their property for any purpose to which it is reasonably adapted.

“In the exercise of sound discretion, the court deems the various issues here involved not to be subject of a declaratory judgment. The discretionary power of the court in an action for a declaratory judgment should be invoked only where a resort to ordinary actions or proceedings would not afford adequate relief. *Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 43 N.E. 2d 803.”

POINT V

THE PRESUMPTION IS THAT THE ZONING ORDINANCE IS VALID AND THE BURDEN IS ON THE ONE CHALLENGING THE ORDINANCE TO PROVE ITS INVALIDITY.

Repp. v. Shahadi, 132 N. J. L. 24, 38 A. 2d 284.

“It is now well established that where a zoning ordinance is a reasonable exercise of the powers granted by the zoning statute, within the purview of the zoning amendment to the consti-

tution, the municipal enactment will be sustained. The presumption is that the regulations are reasonable unless the contrary is shown.”

Pass v. Town of Bloomfield, 49 A. 2d 476.

The defendant town amended its zoning ordinance to create a new zone classified as a garden type apartment residential zone. The property affected comprised 21 acres, being a part of Lot 1, Block 970, and used as a small public golf course. It was bounded on the north by farm land, on the south by Glen Ridge Golf Course, on the east by Third River and on the west by Glen Ridge Golf Course. The property was zoned for 1 family dwellings. The court says “we find no evidence to overcome the presumption of validity.”

Zadworny v. City of Chicago, 380 Ill. 470, 44 N.E. 2d 426.

“An ordinance enacted in the exercise of power conferred upon a municipality enjoys a presumption in favor of its validity, and it is incumbent upon one attacking it as unreasonable and oppressive to show affirmatively and clearly that such charge is true.”

De Bartolo v. Village of Oak Park, 396 Ill. 404, 71 N.E. 2d 693.

Plaintiff sought to convert her single family residence into a 2 family residence. Her property was within 50 feet of property zoned as commercial. There were 2 other houses in the same block used for 2 family resi-

dences, but these were constructed and so used before passage of the zoning ordinance. The commercial zone was separated from the 1 family residence area by a 16 foot area. Plaintiff contends that since there were already some 2 family residences in the same block as her property and that a portion of the block south of the alley was zoned for commercial use renders the ordinance invalid as to her property. The court says:

“A zoning ordinance is presumed to be valid. The burden is upon the one assailing such an ordinance to overcome this assumption . . . It is axiomatic that zoning must begin somewhere and end somewhere. Some property in a commercial zone must be near, or even adjoin property in a residential zone. The very nature of a zoning ordinance requires that certain desirable neighborhoods adjoin others which are less desirable. There is no evidence in the record touching the question of any diminution in the value of plaintiff’s property because it is zoned for single family residence purposes.”

Dupage County v. Henderson, 83 N.E. 2d 720.

“The ordinance is presumed to be valid, and the burden of showing it unreasonable and oppressive, as applied to appellants, rested upon them. Their showing had to be clear and conclusive. All that they have shown is that they purchased the property knowing it was subject to the zoning ordinance restriction against carrying on a manufacturing business thereon. The violation of the ordinance is admitted. They have not shown that the particular restriction, as ap-

plied to them, is not a proper exercise of the police power in that it does not have a substantial relation to the general welfare of the people about them.

“The fact the ordinance permitted a large number of uses within the district, which the appellants deemed more detrimental to the people and their property, can neither diminish nor enlarge their defense, for those other uses are not theirs. The fact that nonpermissive uses are carried on by others contrary to the ordinance neither fortifies nor weakens the case of appellants, but each alleged violation of the ordinance is a complete case within itself and must stand or fall upon the facts and circumstances of that case alone. The appellants charge in this court that the classification of their property as non-industrial in the ordinance amounts to a capricious invasion and an unreasonable invasion of their property rights. *The presumption of the validity of that classification must be overcome by proof made by defendants which is clear and convincing.* City of Springfield v. Vancil, 398 Ill. 575, 76 N.E. 2d 471. The defendants have not supplied the proof required. The uses permitted and forbidden in the “F” district were the result of the considered judgment of the zoning commission and the board of supervisors, all based upon a survey and analysis of the area involved by competent persons. The fact such judgment may lead to an honest difference of opinion, which leaves the subject open for debate, does not warrant this court intruding in the role of a zoning commission. All questions concerning the wisdom or desirability of particular restrictions in a zoning ordinance must be addressed to the legislative body specifically charged with determ-

ining them. *Evanston Best & Co. v. Goodman*, 369 Ill. 207, 16 N.E. 2d 131.”

Yoemans v. Hillsborough, tp. 135 N.J.L. 599, 54 A. 2d 202.

“One attacking a zoning ordinance as unreasonable is met by the presumption that the ordinance is reasonable and must bear the burden of establishing the contrary.”

Dundee Realty Co. v. City of Omaha, 13 N.W. 2d 634. In this case experts testified that the natural development of the area required that plaintiff's tract be made commercial instead of “AA” Residential District since it fronted upon a through highway whereon 9660 vehicles passed daily, creating a lot of noise and damage; that it was unsuited for residential purposes; that a shopping center would be a convenience as the nearest is 3000 feet distant; that the plaintiff's property would be cheapened by erection of one family residences; that its value for commercial uses would be from \$50,000 to \$91,800 while without plaintiff's proposed development it would only be from \$1500 to \$13,000 . . . The defendants showed the surrounding property was built up by fine homes; that these properties would be greatly depreciated in value if the area was commercial; that there was already more than sufficient commercial area for the city; that nearby was a Catholic Church, a public park, the University of Omaha, a coeducational school. The court concluded the zoning of plaintiff's property

as Residential "AA" was not arbitrary or unreasonable saying:

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"That the zoning ordinance, otherwise valid, limits use and depreciates value of property, is no reason for holding void ordinance passed in the interest of public welfare. Effective zoning necessarily comprehends prohibitions against certain uses in named districts and restriction as to area of lots to be built upon."

Burkholder v. City of Sterling, 381 Ill. 564, 46 N.E. 2d 45. Here plaintiff sought to enjoin enforcement of an ordinance amending a zoning ordinance to classify as Commercial an area theretofore classified as Residential. A hearing was had before the amendment was adopted at which property owners appeared both for and against the amendment. The court says:

"It has been repeatedly stated by this court that it will not constitute itself a zoning commission and that all questions relative to the wisdom or desirability of particular restrictions in a zoning ordinance rest with the legislative bodies creating them and that a finding will not be disturbed where there is ground for a legitimate difference of opinion concerning the reasonableness of a particular ordinance. It is not the province of the courts to interfere with the dis-

cretion of the legislative body in the absence of a clear showing of an abuse of a discretion vested in them. Where the advisability of restricting a particular area for a particular use is debatable, this court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

“From a review of the facts it is obvious that the advisability of adopting ordinance No. 752 (the amendment) was debatable. The property owners who were directly concerned in the matter were about evenly divided. The committee that conducted the first hearing, and the city council approved the re-zoning ordinance and the chancellor confirmed their action. Under such circumstances this court cannot do otherwise than affirm the decree.”

The court dismissed the complaint for want of equity.

City of Tuscon v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923. Before any ordinance was passed restricting the place where mortuaries could be located, the Arizona Mortuary purchased a tract in a residential area, obtained a permit authorizing construction thereon of a mortuary, let a contract and commenced work. When the people in the vicinity became aware of what was intended they protested to the city council. An investigation was made and an ordinance was passed prohibiting mortuaries except in the business district, where all other mortuaries were already located. The Mortuary claimed the ordinance was invalid. The lower court held

this residential district already had some business establishments and was rapidly giving way to business, and was very suitable to mortuary business and enjoined enforcement of the ordinance. The supreme court reversed the decision saying:

“As we have seen by the foregoing quotations from the Euclid Case (*Euclid v. Ambler Realty Co.* 272 U.S. 365, 71 L. Ed. 303, 54 A.L.R. 1016), neither the mere fact that the natural development of a district was toward industrial enterprise and that the normal and reasonably to be expected future use of certain property was for industry and trade purposes, nor the fact that property, if used for business purposes, would be of more value than if used for residential, will justify the court in finding unconstitutional an ordinance which checks or defeats such development or diverts it to another district.

“It is the rule in all cases involving the validity of the exercise of the police power that courts will interfere with the action of the legislative authority only when it is plain and palpable that the ordinance has no real or substantial relation to the general welfare and that it is unreasonable, arbitrary, and discriminatory.”

Cassel Realty Company v. City of Omaha, 14 N.W. 2d 600.

“In an action in court to enjoin the enforcement of a zoning ordinance on the ground that it is unreasonable, arbitrary and confiscatory it is necessary to indulge the presumption that the City Commission in the enactment was in pos-

session of the fact relating to the necessity for the zoning restriction and that its legislation related and responded to such necessitous condition.”

Miller v. Board of Public Works, Cal. 234 P. 381,
38 A. L. R. 1479.

“Whenever the recognized purposes for which the police power may be called in to play or subserved either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals, and general welfare. It will thus be seen that the police power, as evidenced in zoning ordinances, has a much wider scope than the mere suppression of the offensive uses of property, and that it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare.

“As our civic life has developed so has the definition of ‘public welfare,’ until it has been held to embrace regulations ‘to promote the economic welfare, public convenience, and general prosperity of the community.’

“Courts are loath to substitute their judgment as to the necessity for a particular enactment, for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. Every intendment is to be indulged in by the courts in favor of the validity of its exercise

and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare, that it will be nullified by the courts. The courts may differ with the legislature as to the wisdom or propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals or general welfare which the legislative body could have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind, and that those considerations did justify the regulations. When the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity or such enactment was a matter of legislative determination.

“We think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home.”

Caires v. Building Commissioner of Hingham, 83 N.E. 2d 550.

“The planning board reported that there was no real demand for the amendment and that the matter could rest until a present need for it should appear, and further suggested that no zoning change be made until after the Common-

wealth decided whether Route 128 was to be re-located in the vicinity of the locus. The reason for the decision of the board evidence the care and consideration that were given to it; but while a report ought to be filed before action at the meeting, G. L. (Ter. Ed.) c. 40, Section 27, as appearing in St. 1941, c. 320, so that the voters may learn of its recommendations, the report was only of an advisory nature and was not binding upon the voters. See *Duffey v. School Committee of Hopkinton*, 236 Mass. 5, 127 N.E. 540; *Sheldon v. School Committee of Hopedale*, 276 Mass. 230, 235, 177 N.E. 94. The board and voters might well differ as to whether the time had arrived for a change in the zoning by-law. Indeed, it has been said that the necessity for legislation, like questions of expediencey and the wisdom of an enactment, lie outside the judicial realm. *Nebbia v. New York*, 291 U.S. 502, 537, 538, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469; *United States v. Darby*, 312 U.S. 100, 115, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430; *Olsen v. Nebraska*, 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A.L.A. 1500; *Queenside Hills Realty Co., Inc., v. Saxl*, 328 U.S. 80, 82, 66 S. Ct. 850, 90 L. Ed. 1096. If it be thought that the necessity for an amendment should appear in order to justify the special purposes for which an amendment may be had to a zoning by-law, it is enough to point out that a belief on the part of the voters, that additional use of the railroad premises would furnish better and cheaper transportation facilities for business firms that might locate there, even if some location other than the locus might possibly have been found, and that the location of a hay and grain business and a lumber yard outside the center of the town would reduce the danger from

fire, could not be pronounced unreasonable or unwarranted.

“The activity of Robinson in getting the amendment before the annual meeting, in advocating its passage by newspaper advertisements and pamphlets, and in addressing the meeting, and somewhat less activity by McNulty, would not taint an enactment which was otherwise valid. It is common knowledge that nowhere is there a freer expression of individual views than at a town meeting on matters in which the town has an interest. Much may be said that may not be germane to the question before the meeting, but experience has taught that the good judgment and common sense of the voters can be safely relied upon to reach a correct decision. Publication of their opinions and debates by those holding various views only serve to assure such a decision. There is nothing here to indicate that the majority of the voters were acting solely in behalf of Robinson and McNulty rather in the best interests of the town as they thought, and there is nothing in the slightest degree that affects the integrity of their vote.

“In any event, a classification as the means for attaining a permissible end is not to be declared invalid “if any state of facts reasonably can be conceived that would sustain it.” *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 36 S. Ct. 370, 374, 60 L. Ed. 679, L.R.A. 1917 A. 421, Ann. Cas. 1917B, 455; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327; *New York Rapid Transit Corp v. New York*, 303 U.S. 573, 578, 58 S. Ct. 721, 82 L. Ed. 1024.”

“It cannot be said that the judgment of those having an intimate knowledge of all the essential

factors involved, that the amendment was in the public interest, is entirely lacking in any rational basis. Due regard must be accorded to the collective judgment of those familiar with the locality and the circumstances prevailing in the town. See *Welch v. Swasey*, 214 U.S. 91, 105, 29 S. Ct. 567, 53 L. Ed. 923.

“The vote of the town meeting referring to “the whole or any part of” the locus, which was immediately followed by a definite and specific description by metes and bounds of the entire area, “so that thereafter said area shall be used for business district uses as in said zoning law provided,” must be reasonably construed, not “with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in the forms of law; and every reasonable presumption is to be made in its favor.” *Taunton v. Taylor*, 116 Mass. 254, 261. The only area mentioned in the vote is the entire area, and the purport and effect of the vote, as expressly stated upon its face, were to change the by-law “so that thereafter said area” should be put in a business zone. A vote in favor of the amendment was a vote in favor of placing the entire area in a business district and cannot be properly construed as any thing else.”

Corporation of Presiding Bishop v. City of Porterville, 203 P. 2d 823.

“The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. *Wilkins v.*

City of San Bernardino, *supra*, 29 Cal. 2d 332, at page 338, 175 P. 2d 542.

“In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. *Jardine v. City of Pasadena*, 199 Cal. 64, 72-73, 248 P. 225, 48 A.L.R. 509. It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. *Lockare v. City of Los Angeles*, 33 Cal. 2d ..., 202 P. 2d 38.

“There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. *Lockhard v. City of Los Angeles*, *supra*, 33 Cal. 2d ..., 202 P. 2d 38.”

Lockhard v. City of Los Angeles, 202 P. 2d 38.

“The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power. See *Wilkins v. City of San Bernardino*, 29 Cal. 2d 332, 338, 175 P. 2d 542, *Acker v. Baldwin*, 18 Cal. 2d 341, 344, 115 P. 2d 455; *Reynolds v. Barrett*,

12 Cal. 2d 244, 251, 83 P. 2d 29; *Jardine v. City of Pasadena*, 199 Cal. 64, 72-76, 248 P. 225, 48 A.L.R. 509; *Zahn v. Board of Public Works*, 195 Cal. 497, 514, 234 P. 388. The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action. *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal. 2d 87, 93, 94, 33 P. 2d 672; *Wilkins v. City of San Bernardino*, 29 Cal. 2d 332, 338, 339, 175 P. 2d 542, see *Reynolds v. Barrett*, 12 Cal. 2d 244, 83 P. 2d 29; *Acker v. Baldwin*, 18 Cal. 2d 341, 344, 115 P. 2d 455. In passing upon the validity of legislation it has been said that "the rule is well settled that the legislative determination that the facts exist which make the law necessary must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice." *In re Miller*, 162 Cal. 687, 696, 124 P. 427, 429; see also, *Jardine v. City of Pasadena*, 199 Cal. 64, 72, 248 P. 225, 48 A.L.R. 509.

"In considering the scope or nature of appellate review in a case of this type we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government—the legislative—in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or a fact-finding body. Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitu-

tional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations.

"For the same reason the finding of the trial court that the area on Jefferson zoned M-1 is similar and identical to the area zoned C-2 is not controlling on the issue of the reasonableness of enacting the ordinance. It is well-established that similar characteristics in adjacent and surrounding areas do not necessarily preclude the zoning authorities from placing adjoining territories in different zones or justify a court in substituting its judgment for the legislative decision.

"Moreover, it appears that the majority of the M-1 uses were carried on by plaintiffs in defiance of the zoning regulations, and they cannot take advantage of their own violations of the law."

POINT VI

FIXING A BOUNDARY FOR A USE DISTRICT AT A CERTAIN NUMBER OF FEET FROM A GIVEN POINT DOES NOT MAKE THE ORDINANCE INVALID.

Langella v. City of Bayonne, 46 A. 2d 789. (N. J.) Plaintiff operated a live poultry business at 116 West 21st Street. He decided to move to 67 W. 21st Street and applied to the city for a transfer of his business.

He complied with the changes prescribed by the city health authorities. About this time the city adopted a zoning ordinance placing 67 West 21st Street in a district where live poultry business was prohibited. He applied to the city council to transfer his license and permission to operate at this address. At that time no zoning board of adjustment had been appointed. The city council granted his request over protest of residents. After the board of adjustment was appointed he applied to it for a variance which was approved. The city ordinance provided that such business could not be conducted where a church, school, library, hospital, sanatorium, or other public institution is located within 200 feet of the boundary line of the proposed site. There was a synagogue within 200 feet in a straight line. The court held:

“We think the normal and ordinary meaning of the words used in this ordinance, that the business is prohibited where a church is located within 200 feet of the boundary line of the proposed site, is that the prohibited area measured 200 feet from such boundary line that is nearest to the church in a straight line regardless of the course followed, rather than in some other manner, such as by the usually traveled route or the street lines.”

Vine v. Board of Adjustment Village of Ridgewood, 56 A. 2d 122. Plaintiff sought review of action of the Board of Adjustment in denying her leave to construct a gasoline filling station on her property. The original

zoning ordinance placed this property in a business zone. In 1938 an amendment placed it in a "double dwelling" zone. In a previous action the court found that the property was not marketable for either single or two family dwellings nor for business establishments and held the amendment an arbitrary interference. The city argues that placing the property in a district zoned against gasoline stations is reasonable, and that to grant the permit would run counter to an ordinance which provided that "no part of any filling station shall be within 300 feet of any lot line of any plot on which is located any building used as a church, etc." The proposed structure would be 300 feet from the nearest part of the edifice of the First Church of Christ Scientist, but substantially less than that distance from the closest boundary line of the Church Curtilage, measured in a direct line. Plaintiff claims that measurement from the line of the Curtilage renders the provision arbitrary and unreasonable and therefore void, for if a given church structure covers but one end of a large plot, the restricted area would be much greater on the one side than on the other, and so the regulation would not apply to all properties uniformly and equally. The court says:

"It is not arbitrary or unreasonable to provide for the measurement of the prescribed distance from the Curtilage rather than from the church edifice; and the church structure covers the greater part of the tract.

"In the absence of a clear expression contra, the restricted area is measurable by a straight line from one point to another."

Heimerle v. Village of Bronxville, 5 N. Y. S. 2d 1002. On February 1, 1937, the plaintiffs Benedicts leased a three story house with an option to buy, which house was located in Business "A" District. The south line of the lot was the north line of Residential "D" District. The north line of "D" District across the street was further north, about half the width of the lot in question. An apartment house of forty-one apartments was located adjoining the boundary line on the side of the street opposite the lot in question. The house was used as a one-family residence from prior to 1901 to 1916, when it was changed to a three-family residence. Later the bottom floor was used by a veterinary as an office and residence. When Benedicts became interested in the premises they indicated to the superintendent of building their desire to use the first floor for a funeral home. They were informed that the building code did not permit conversion of the building from residence to business as it was of frame construction and did not conform to the requirements of the code for buildings used for business. Notwithstanding this definite warning of a possible violation of the building code, the Benedicts went ahead and leased the building and commenced to use the first floor for a funeral home, in the meantime filing these actions to restrain interference with such action by the defendants. For this change of use from residential purposes to the funeral home no certificate of occupancy was ever obtained or even applied for by Benedicts, although the code required such certificate.

In 1922 defendant village adopted a zoning ordinance, substituting a new ordinance therefor in 1927. The property in question was always in business "A" district.

"Prior to 1931 this particular business district extended further to the south on both sides of the street. In 1931 the ordinance was amended to make the division line between the two districts where it now is, part of the business district being thereby transferred to the residence district. On December 7th, 1926, the Village also adopted a Building Code. This Code has never been amended since its adoption. The Zoning Ordinance, so far as it relates to the premises in question, has never been amended except that on March 8th, 1937, the amendment was adopted which now provides: 'No building or premises shall be used, and no building shall be erected or altered which is arranged, intended or designed to be used as a mortuary, undertaking or embalming parlor, funeral chapel or similar plant or establishment within two hundred (200) feet of any residence zone.' "

The court then holds that the use of the house as a funeral home prior to the passage of the amendment of the zoning ordinance on March 8, 1937, was in violation of the Building Code and so did not establish a lawful use prior to the passage of the zoning amendment. The court then says:

"From the foregoing it is obvious that the amendment of March 8th, 1937, applies in its terms to this particular property. This brings

us to the next question. The plaintiffs claim that such amendment is unreasonable and void for two reasons: First, because such amendment, upon its face, is so arbitrary and unreasonable, and lacks such relation to public welfare, etc., that it is void as a matter of law. Second, if the amendment be held to be valid upon its face and within the authority of the municipality to adopt, then it is unreasonable and void as applied to the premises of the plaintiffs. These questions will be considered in the order indicated."

The court then discusses the authorities on the question of the right to limit undertaking establishments in a zoning ordinance and concludes that the right exists. The court then says:

"The determination of the first objection made to this amendment by the plaintiffs must be made upon the ordinance itself. *Town of Islip v. F. E. Summers Coal & Lumber Co.*, 257 N. Y. 167, 177 N. E. 409. The test is, can it be said that the ordinance in this respect on its face passes the bounds of reason and assumes the character of a merely arbitrary fiat? *Village of Euclid, Ohio, v. Ambler Realty Co.*, 272 U. S. 365, at page 389, 47 S. Ct. 114, 118, 71 L. Ed. 303, 54 A.L.R. 1016; *Town of Islip v. F. E. Summers Coal & Lumber Co.*, *supra*. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Village of Euclid, Ohio v. Ambler Realty Co.*, *supra*, page 388, 47 S. Ct. page 118; *Wulfsohn v. Burden*, 241 N. Y. 288, at page 296, 150 N. E. 120, 43 A.L.R. 651; *Town of Islip v. F. E. Summers Coal & Lumber Co.*, *supra*, at page 169, 177 N. E. 409. So considered, the court

has reached the conclusion that it cannot be said upon mere inspection of the Zoning Ordinance that the end in view is not reasonably pursued by its adoption in order to promote the general welfare under the police power. *Town of Islip v. F. E. Summers Coal & Lumber Co.*, supra. In effect, the village has defined a residence district for the exclusion therefrom of general business and then provided for its extension for an additional 200 feet with respect to the particular business of undertaking establishments. This is not a violation of the provisions of section 176 of the Village Law that all such regulations shall be uniform for each class or kind of buildings throughout each district. By that section the regulations in one district may differ from those in another district. The regulations are uniform with respect to undertaking establishments throughout the district thus extended. Such an ordinance, as indicated by the authorities cited, may be sustained under the general welfare power, without particular regard to zoning ordinances, where the residential area is definitely defined and the limitation reasonable. It cannot be said here that 200 feet is unreasonable as a matter of law so as to invalidate the entire amendment.

“Upon the second contention that the ordinance is in fact unreasonable and void as applied to this particular property, the plaintiffs have the burden of proof. The evidence shows that the property immediately adjoins a residence district. The building is within a few feet of another building used for residence purposes. Many other residences exist within the neighborhood on both sides of the street in the residence district. Opposite is an apartment house with forty-

one families. The owners may be able to derive more money on a sale for this particular business purpose than for some other purpose, but the property is still available for use as a residence and the pecuniary reason alone is not sufficient to invalidate the ordinance. The fact is that if it is properly converted in accordance with the Building Code, the building may be used for many kinds of business with equal facility. The fact that other property within the 200 foot distance in other locations may be unreasonably affected, if such fact exists, does not aid the plaintiffs. *Brown v. City of Los Angeles*, supra. The only question which the plaintiffs are entitled to argue is that the restriction is unreasonable as applied to this property. *Wulfsohn v. Burden*, supra. The burden of proof on that subject has not been sustained by the plaintiffs. The undisputed facts definitely show the contrary.”

We wish to here point out that Section 176 of the Village Law referred to in the foregoing case is identical to Section 15-8-90, heretofore quoted under Point IV.

White v. Luquire Funeral Home, 221 Ala. 440, 129 So. 84. Plaintiffs sought to enjoin the defendant from erecting and operating a funeral home in the plaintiffs’ immediate neighborhood. The site of the funeral home was in a commercial zone. The zoning ordinance permitted erection and use of buildings in commercial zone for any purpose except specified uses, specifying that “undertaking, embalming, or cremating parlor if so located that any part is within 300 feet of any lot which is a residence district and which abuts

upon any part of any street which adjoins the lot upon which such structure is situated." Defendant's parlor was permitted under this ordinance. The court says:

"We cannot say that the zoning of the site of this funeral home within a commercial district, with authority to conduct such business at points within such district, was arbitrary or unreasonable upon consideration of all the factors of the problem. Indeed, we cannot say we know all the considerations that may have properly influenced the zoning of this property.

"We are not unmindful that the same discomfort comes to residents thus brought into near contact with a funeral home as if no zoning ordinance existed. Complainants are entitled to the protection accorded to all others in the enjoyment of the family residence under like conditions. What we do hold is that all of us must bear such discomforts as come from changing conditions of city life, among them the lawful zoning of our properties with a view to the general welfare."

The case of *In Re Jennings' Estate*, 198 A. 621. The trustees of the estate of Jennings, deceased, applied to the Board of Adjustment for leave to permit occupancy of a certain 2½ story residence, containing nineteen rooms and four baths, as a fraternity house. The property had been vacant since 1921 and they were unable either to sell it or rent it for one-family occupancy or for any purpose not prohibited by Section 9-A of the zoning ordinance. During its vacancy large sums of money had been spent on its upkeep. The application was made in 1937 and was denied by the Board after

a hearing. The Board decided it could not grant the application as it would involve amending the ordinance and this was solely within the jurisdiction of the City Council. The property was changed in 1926 from B Residence to C Residence. In the latter district only one-family dwellings were permitted. Section 3 of the ordinance defines multiple dwellings as one "designed for or occupied otherwise than as a one-family dwelling, two-family dwelling, or double house" and includes fraternity houses in the multiple dwelling class. The result of the denial of the application amounted to virtual confiscation under the restricted uses of the zoning ordinance. The court says:

"As it appeared that the proposed use was a multiple dwelling within the definition of the ordinance, and that it was a use prohibited by Sec. 9-A, the action of the board was strictly in accord with the ordinance.

"Appellants, while apparently not denying that their proposed use is prohibited, contend that strict enforcement will result in unconstitutional deprivation of the use of their property for the reasons quoted above (could not be sold or rented for any purpose, amounting to confiscation); that the decision appealed from is 'a manifest and flagrant abuse of discretion,' and that this court should now so declare.

"The court is not empowered to say that the general welfare of the other property owners whose use is limited to one-family residences is secured and the spirit of this ordinance is observed and substantial justice done by excepting from the operation of the ordinance the particular

dwelling owned by the appellants. Flats or small apartment houses may be entirely excluded from residential districts.”

CONCLUSION

We respectfully submit that the plaintiffs did not have such an interest as entitles them, or either of them, to attack the ordinance in question upon the grounds asserted in this cause. We further submit that there is no evidence in the record to overcome the presumption that the ordinance is valid. The plaintiffs must rely solely upon a mere inspection of the ordinance as the basis of asserting it is invalid as there is no evidence to assist them. Under such conditions the court could not say as a matter of law that the ordinance is invalid. It is not the province of the courts to invade the broad discretionary powers vested in the City Commission to determine its legislative policy in zoning the City.

We respectfully submit that the judgment of the trial court should be sustained.

Respectfully submitted,

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