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LAW AS HIDDEN ARCHITECTURE: LAW, POLITICS, AND IMPLEMENTATION OF THE BURNHAM *PLAN OF CHICAGO* SINCE 1909

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I. THE BURNHAM *PLAN* AND THE PROGRESSIVE ERA: HAMILTONIAN DEMOCRATIC IDEALS IN 1909 CHICAGO

Every one knows that the civic conditions which prevailed fifty years ago would not now be tolerated anywhere; and every one believes that conditions of to-day will not be tolerated by the men who shall follow us. This must be so, unless progress has ceased. The education of a community inevitably brings about a higher appreciation of the value of systematic improvement, and results in a strong desire on the part of the people to be surrounded by conditions in harmony with the growth of good taste . . .¹

In the summer of 1906, Daniel Burnham and Joseph Medill McCormick, publisher of the *CHICAGO TRIBUNE*, found themselves on the same transcontinental train headed from San Francisco back home to Chicago.² Burnham had been in San Francisco trying, although unsuccessfully, to convince its civic leaders to forge ahead with implementation of his plan for San Francisco that had been set for public presentation on the precise day in April when the great San Francisco earthquake of 1906 and

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1. DANIEL H. BURNHAM & EDWARD H. BENNETT, *PLAN OF CHICAGO* 121 (Charles Moore ed., Princeton Architectural Press 1993) (1908) [hereinafter *PLAN OF CHICAGO*].

2. CARL SMITH, *THE PLAN OF CHICAGO: DANIEL BURNHAM AND THE REMAKING OF THE AMERICAN CITY* 68 (The University of Chicago Press 2006).

resulting fire destroyed much of that city. Burnham was in a dour mood on that train ride since San Francisco's political leaders, much like those of New Orleans in the wake of Hurricane Katrina, had made it quite clear to Burnham that quick reconstruction of the city to its previous pattern rather than redevelopment according to a new vision and plan was the politically expedient course.

Burnham and McCormick had known each other for years. They had plenty of time for discourse during that long transcontinental trip. McCormick urged Burnham to forget his disappointment about the failure of San Francisco's civic leaders to adopt Burnham's vision. "Turn your attention back home," McCormick must have told Burnham. "Create a great civic plan for Chicago instead."³ Burnham was skeptical. He saw even greater obstacles in Chicago than he had encountered in San Francisco. He now knew from his planning work there, as well as in Cleveland and Washington, D.C., that the backing of the business and political leaders was indispensable to successful consensus about and implementation of a comprehensive plan.

But for McCormick and the *TRIBUNE*, there was an urgent new motivation. The reputation of Chicago had been badly tarnished by Upton Sinclair's *THE JUNGLE*, a nationwide best seller, and by Lincoln Steffens' *THE SHAME OF THE CITIES*. Both books exposed in graphic terms the social costs of Chicago's lightning quick growth into America's second largest city. The nation was beginning to focus more on the squalor in so many Chicago neighborhoods and its rampant political corruption rather than its remarkable ascendance into the ranks of world class cities.

They were on a street which seemed to run on forever, mile after mile—thirty-four of them, if they had known it—and each side of it one uninterrupted row of wretched little two-storey frame buildings. Down every side street they could see it was the same—never a hill and never a hollow, but always the same endless vista of ugly and dirty little wooden buildings. Here and there would be a bridge crossing a filthy creek, with hard-baked mud shores and dingy sheds and docks along it; here and there would be a railroad crossing, with a tangle of switches, and locomotives puffing, and rattling freight cars filing by; here and there would be a great factory, a dingy building with innumerable windows in it, and immense volumes of

3. *Id.* This was not the first time this idea had been broached to Burnham. In fact, Burnham himself for many years had been proposing some of the elements that would later become parts of the Plan. In February of 1897, just after the end of the World's Columbian Exposition, Burnham had made a presentation to the Merchants Club, an entity that later merged with the Commercial Club, on "The Needs of a Great City." *Id.* at 67. Around the same time, he had also addressed the Commercial Club itself on the topic of "What Can Be Done to Make Chicago More Attractive?" *Id.*

smoke pouring from the chimneys, darkening the air above and making filthy the earth beneath. But after each of these interruptions, the desolate procession would begin again—the procession of dreary little buildings.⁴

These muckrakers were also, in the eyes of Chicago's business elite, poisoning the public's mind with a description of Chicago's business leaders as capitalists run amok with no ethics or social consciousness.

McCormick and the other Chicago business leaders were indignant at the charges hurled at them by the muckrakers such as Steffens and Hamland Garland during this middle decade of the thirty year Progressive Era that lasted from 1890 to 1920. After all, they, like their President, Theodore Roosevelt, were Republicans⁵ and "Progressives" with a capital "P". The Republican Party had become the party of the Progressives, and Roosevelt was its leader. They believed the success of Chicago was intimately connected to their personal success as leaders of business and industry. And they knew that the Commercial Club of Chicago, the organizational entity behind the 1909 *Plan of Chicago*, had been founded in 1877 by thirty-nine leading businessmen for the express purpose of "advancing by social intercourse and by a friendly interchange of views the prosperity and growth of the city of Chicago."⁶ After all, one could not achieve membership in the Commercial Club unless one had demonstrated an "interest in the general welfare" as demonstrated "by a record of things actually done and of liberality, as well as by willingness to do more" and "a broad and comprehending sympathy with important affairs of city and state, and a generous subordinating of self in the interests of the community."⁷

The Commercial Club and its related entity, the Merchants Club, had even hosted presentations by prominent reformers Jacob Riis and Jane Adams on the playground movement and discussions on such other topics as municipal finances, public fraud, "Our City Streets," "pollution, unemployment [and] labor violence."⁸

But locally, Chicago was not then—and is not now—a Republican town. Its democratic aldermen, especially those that controlled the downtown precincts, were notoriously corrupt. The council's Gray Wolves, "a group of ethically challenged and

4. UPTON SINCLAIR, *The Jungle* 26 (Penguin Books 2006) (1906).

5. SMITH, *supra* note 2, at 66. A promotional document published by the Commercial Club just before release of the final plan of 1909 listed thirty-two of its members as involved in the project and "virtually all were Protestant and Republican." *Id.*

6. *Id.* at 64.

7. *Id.* at 65.

8. *Id.*

politically powerful" city council members⁹ that included "Bathhouse" John Coughlin and Mike "Hinky Dink" Kenna were still powerful despite repeated attempts by progressive reformers, led by the Civic Federation and the Municipal Voters League, to defeat them and limit their power in the council through procedural steps. In the April 1909 aldermanic elections, Coughlin, Kenna, and the other Gray Wolves faced only token opposition and were re-elected handily despite pronouncements by both the Civic Federation and the Municipal Voters League that all of them were "totally unfit" for office.¹⁰

The local democratic councilmen were secure in their political base. They provided jobs and support for the immigrants and working class families in exchange for political support at election time, a Democratic Party practice that had become a part of the accepted way of life in Chicago.

And the working class backgrounds of the political leaders could not have been more in contrast with the Ivy League backgrounds of the core group¹¹ that signed on to develop and promote the Burnham *Plan*.

As a result, McCormick, Burnham and the other business and civic leaders did not have much faith in the support they might receive from the local, small "d" democratic process. In a speech to the Commercial Club in 1904, Burnham had urged action outside the political process using the resources of the business community in order to assure that Chicago's growth and development would continue apace. He expressed little hope in getting the public sector to join in the process—but he knew that somehow the eventual support of the public sector would be essential to realizing his vision of the future of Chicago. Burnham put it bluntly: "The public authorities do not do their duty and they must be made to." But how that public sector support was to be garnered was far from clear. Any planning effort to improve the image and character of the city and the lot of its citizens would have to be led—and paid for—by its business leaders.

No doubt these business leaders were genuinely motivated to improve the lot of all Chicagoans including the lower class European immigrants who poured its steel and butchered its hogs, and the rural farm girls who sold its drygoods and toiled in its factories. But they also wanted to restore the reputation of Chicago and demonstrate to the world that the civic spirit that had

9. *Id.* at 49.

10. *Id.* at 51. Progressives had made some political progress by getting the reformer Carter Harrison II elected Mayor for two terms, once from 1897-1905 and again from 1911-1915. *Id.* at 49.

11. Ten of the thirty-two members of the Commercial Club listed in a promotional document as contributing significantly to development of the Plan had attended Harvard, Yale or Princeton. *Id.* at 66.

created the inspirational Great White City of the World's Columbian Exposition could indeed make the city a better place to live for all of its citizens.¹² Those that had been in Chicago since the 1880s, like Burnham, were fearful that the endless opportunities for Chicago's expansion and growth that had seemed so boundless in 1889 had somehow become constricted. Theodore Dreiser could describe 1889 Chicago in *SISTER CARRIE* as follows:

In 1889 Chicago had the peculiar qualifications of growth . . . Its many and growing commercial opportunities gave it widespread fame, which made of it a giant magnet, drawing to itself, from all quarters, the hopeful and the hopeless—those who had their fortune yet to make and those whose fortunes and affairs had reached a disastrous climax elsewhere. It was a city of over 500,000, with the ambition, the daring, the activity of a metropolis of a million. Its streets and houses were already scattered over an area of seventy-five square miles. Its population was not so much thriving upon established commerce as upon the industries which prepared for the arrival of others. The sound of the hammer engaged upon the erection of new structures was everywhere heard. Great industries were moving in. The huge railroad corporations which had long before recognized the prospects of the place had seized upon vast tracts of land for transfer and shipping purposes. Street-car lines had been extended far out into the open country in anticipation of rapid growth. The city had laid miles and miles of streets and sewers through regions where, perhaps, one solitary house stood out alone—a pioneer of the populous ways to be. There were regions open to the sweeping winds and rain, which were yet lighted throughout the night with long, blinking lines of gas-lamps, fluttering in the wind. Narrow board walks extended out, passing here a house, and there a store, at far intervals, eventually ending on the open prairie.¹³

By 1906, however, as Burnham and McCormick travelled back to Chicago from San Francisco, the city had quickly developed a different reputation for environmental degradation and public squalor.

Upton Sinclair in *THE JUNGLE* described the palpable change in the environment as you approached the city by train in 1905 as follows:

A full hour before the party reached the city they had begun to note the perplexing changes in the atmosphere. It grew darker all the time, and upon the earth the grass seemed to grow less green.

12. There has always been an unresolved back story to the Plan involving Burnham's handwritten first drafts of significant sections devoted to solving such social ills which were not included in the final version of the Plan as published. See *id.* at 106 (discussing Burnham's ideas for improving life for Chicagoans).

13. THEODORE DREISER, *SISTER CARRIE* 31-33 (University of Pennsylvania Press 1991).

Every minute, as the train sped on, the colors of things became dingier; the fields were grown parched and yellow, the landscape hideous and bare. And along with thickening smoke they began to notice another circumstance, a strange pungent odour.¹⁴

Burnham and McCormick were well aware of this change in the city. As the 1909 *Plan of Chicago* put it, “Conditions in Chicago are such as to repel outsiders and drive away those who are free to go.”¹⁵ Changing these conditions and restoring the reputation of the city was one of the central goals of the 1909 planning effort.

Burnham and these public-spirited civic leaders of Chicago “believed in the ethos of the City Beautiful movement”¹⁶ that cities—and their inhabitants—could be transformed and uplifted by concerted public actions led by enlightened civic leaders and designers as exemplified by the 1893 World’s Fair. These problems changing the city for the worse could be met head on and eliminated.

What was needed was a top-down transformation, one based on Hamiltonian democratic principles. In the Hamiltonian vision of America, men of wealth occupying positions of civic leadership had responsibilities as citizens of the republic—“the statesman’s responsibilities to the public good and for the powers granted to him.”¹⁷ “In Hamilton’s theory of republicanism, ambitious men could be trusted with quantities of power extraordinary for republics because their historical reputations would so clearly depend on truly serving the public good.”¹⁸

In 1909, Hamilton, and Chicago’s civic—as opposed to political—leaders distrusted the same common people for whom they were planning the City Beautiful. The Haymarket Riot and Pullman Strike of the 1890s had created a fundamental rift between workers and management. The civic and business leadership also distrusted Chicago’s notoriously corrupt politicians, especially those who controlled the downtown First Ward where so many of Chicago’s civic leaders had their offices. These politicians were the antithesis of the leadership of the Commercial Club.

So that was the business, social, and political setting as Chicago’s civic leaders embarked on the effort to craft a plan for

14. SINCLAIR, *supra* note 4, at 26.

15. PLAN OF CHICAGO, *supra* note 1, at 124.

16. SMITH, *supra* note 2, at 14.

17. Robert W.T. Martin, “Reforming Republicanism: Alexander Hamilton’s Theory of Republican Citizenship and Press Liberty” in THE MANY FACES OF ALEXANDER HAMILTON: THE LIFE AND LEGACY OF AMERICA’S MOST ELUSIVE FOUNDING FATHER X, 110 (Douglas Ambrose & Robert W.T. Martin eds., 2006).

18. *Id.* at 110.

the city with Daniel Burnham as the master craftsman. There were at least four competing interest groups involved in the interplay that would define the future of Chicago and the success or failure of efforts to implement Burnham's vision: the Republican educated business and civic leaders, the Progressive reformers, the entrenched local ward-based political establishment, and the inhabitants of Chicago's various neighborhoods, who at the time, were primarily working class first generation immigrants with close ties to their extended families and places of worship and their precinct captains.

Implementation of the plan would need the support of significant components of all four of these groups. And the interplay and political maneuverings between those same four groups so palpable in 1909 has continued for one hundred years to define the way in which planning—and later, zoning—in the wake of the 1909 *Plan* has and has not been implemented in the city and its region.

It has been a continuing story of strong political and civic leaders emerging from the fray to implement pieces of the Burnham *Plan* in accordance with his vision. The progress has been in fits and starts, but it has always been forward.

And behind it all, quietly at work, are the practical political and legal limitations imposed on Chicago's ability to get things done.

The untold story of the implementation of the Burnham *Plan* of 1909 is the story of how our Illinois laws, our Illinois judicial decisions, and our Chicago and Illinois judges have shaped the legacy of that plan, sometimes in a manner promoting Burnham's vision and at other times thwarting it. Truly, the law has been the hidden architecture—and judges the hidden architects—of what we have accomplished in Chicago in pursuing Burnham's vision as of the 2009 centennial of the 1909 *Plan*.

II. THE HIDDEN LEGAL ARCHITECTURE BEHIND THE BURNHAM *PLAN*

The Hamiltonian underpinnings of the City Beautiful Movement and the 1909 *Plan of Chicago* becomes immediately apparent in some of its opening lines such as the following: "Great success cannot be attained unless the special work in hand shall be entrusted to those best fitted to undertake it." Or consider the *Plan's* statement, in referring to the World's Columbian Exposition of 1893 as its inspiration, that "[i]t had become the habit of our [Chicago] business men to select some one to take the responsibility in every important enterprise; and to give to that person earnest, loyal, and steadfast support."¹⁹ The *Plan*

19. PLAN OF CHICAGO, *supra* note 1, at 4.

attributes the success of the World's Fair to, first, "loyalty to the city and to its undertakings" and, second, "to the habit of entrusting great works to men trained in the practice of such undertakings."²⁰ The *Plan* was the embodiment of a political philosophy grounded in fundamental skepticism about enlightened "reason" prevailing in a mass democracy.

For most Chicagoans over the years, when the 1909 Burnham *Plan of Chicago* is mentioned, two images come to mind. The first image is of a few pithy maxims attributed to Burnham but not actually in the *Plan* document itself. The most famous is the following:

Make no little plans; they have no magic to stir men's blood
 Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency.²¹

The second image that comes to mind involves the wonderful Jules Guerin drawings included in the *Plan*, particularly the drawings involving concepts for the lakefront.

But as a result of the Burnham *Plan* centennial celebration it is important to revisit the actual document itself, open it up again, perhaps for the first time in many years, and review it in detail. The 1909 *Plan of Chicago* is organized into eight chapters, each ranging from eight to twenty-two pages, titled as follows:

- Chapter I. Origin of the Plan of Chicago
- Chapter II. City Planning in Ancient and Modern Times
- Chapter III. Chicago, The Metropolis of the Middle West
- Chapter IV. The Chicago Park System
- Chapter V. Transportation
- Chapter VI. Streets Within the City
- Chapter VII. The Heart of Chicago
- Chapter VIII. Plan of Chicago

Hidden away at the very back of the volume is an Appendix. At thirty pages, it is the longest component of the text. The title of the Appendix is *Legal Aspects of the Plan of Chicago*.

The legal Appendix was written by Walter L. Fisher, as counsel for the Plan Committee of the Commercial Club of Chicago. Fisher was a Commercial Club member and former President of the Chicago Municipal Voters League.²² The frontispiece to the Appendix lists twelve legal reviewers "all of

20. *Id.* at 6.

21. Urban Development and Design Theory, <http://www.arch.umd.edu/ARCH654/index.html> (last visited Apr. 6, 2010).

22. *Reading the Plan*, The Encyclopedia of Chicago, <http://www.encyclopedia.chicagohistory.org/pages/300006.html> (last visited Mar. 21, 2010). Fisher would later go on to be Secretary of the Interior under President Taft. *Id.*

whom concur in the conclusions and recommendations stated.”²³ The fact that there were twelve legal reviewers including the Corporation Counsel for the City of Chicago, the Cook County Attorney, and various past and present attorneys for the West Chicago, Lincoln Park, and South Park Commissions, provides a clear insight into the legal basis of “planning” in the early years of the twentieth century. There must have been considerable disagreement in the legal community about the appropriateness of alternative methods for accomplishing the goals and vision of the *Plan*. The Commercial Club needed somehow to demonstrate to the political machine—and perhaps the courts—that there was a consensus among the portions of the legal community that would be charged with implementing the *Plan*.

Chapter VIII of the *Plan* of 1909, titled “The Plan of Chicago,” made the importance of a legal agenda very clear: “It is quite possible that some revision of existing laws may be necessary in order to enable the people to carry out this project; but this is clearly within the power of the people themselves.”²⁴

The primary legal tool to implement the plan was not land use regulation but rather acquisition of land through the power of eminent domain combined with publicly financed infrastructure improvements. That emphasizes a very important point about the 1909 *Plan of Chicago*—it was not a modern twenty-first century comprehensive land use plan. There is only limited discussion of enacting *land use* regulations to accomplish the *Plan*’s objectives. Instead, the *Plan* proposes a massive program of public investment to build and relocate major thoroughfares, widen streets, relocate train stations and tracks, construct a new civic center, and create public parks in city neighborhoods, along the lakefront, and in the outlying suburbs.²⁵

23. PLAN OF CHICAGO, *supra* note 1, at 126. The twelve reviewers listed are Edward J. Brundage, Corporation Counsel for the City of Chicago; Harry A. Lewis, County Attorney of Cook County; Benjamin F. Richolson, Attorney for the West Chicago Park Commissioners; Charles A. Churan, Attorney for the Commissioners of Lincoln Park; Robert Redfield, Attorney for the South Park Commissioners; Edgar B. Tolman, Frank L. Shepard, Harry S. Mecartney, Frank Hamlin, and R. P. Hollett, all listed as counsel to the three park commissions previously identified; Milton J. Foreman, Member of the City Council; and George A. Mason, Special Assessment Attorney for the City of Chicago. In addition, William W. Case is identified as having “assisted in the preparation of the opinion.” *Id.*

24. *Id.* at 119.

25. Specifically, the Plan promotes the acquisition, maintenance, and control of parks, boulevards and arteries of communication throughout the metropolitan territory tributary to Chicago; the establishment and control of similar parks, circuits and avenues within the city itself, and incidentally the reclamation of slums and congested areas; the embellishment of the shore of Lake Michigan; the consolidation and rearrangement of freight and passenger

For example, construction of new boulevards was one component of the *Plan*:

The street plan as laid out involves a very considerable amount of money; but it will be found that in Chicago as in other cities, the opening of new thoroughfares, although involving large initial expense, creates an increase in values

The cost will amount to many millions of dollars, but the result will be continuous prosperity for all who dwell here; and such prosperity the city cannot have unless it becomes a convenient and pleasant place in which to live.²⁶

As a result, most of the legal discussion in the Appendix deals with the statutory authority of various types of special local government units in the Chicago metropolitan area to exercise the power of eminent domain. A considerable amount of text is dedicated to the creation of park districts and to the need for inter-municipal cooperation in creating multi-jurisdictional parks and boulevard systems.²⁷

The legal addendum is not a soaring and confident expression of a vision about using the law to implement the *Plan*. Instead, it is an almost pessimistic statement of the limits of American land use and planning law contrasted sharply with an envious look at the lack of such limits in European law of the same era.

This constrained focus on eminent domain and public investment was a direct result of the Illinois legal situation that faced Daniel Burnham and the civic leaders backing the *Plan*.²⁸ The legal Appendix laments the "rigid constitutional constraints"²⁹ on Chicago's authority to implement the 1909 *Plan*. The most significant constraint, in the eyes of the lawyers who reviewed and

terminals; and the creation of a Civic Center connected with other parts of the city by convenient avenues, and in or about which shall be grouped important public buildings which may hereafter be erected.

Id. at 129-30.

26. *Id.* at 123-24.

27. *See id.* at 130-38 (dedicating eight pages to discussing outer parks, city parks, squares, and the lake shore development).

28. The perception was not necessarily in accord with historic reality. *See generally*, FRED BOSSELMAN, DAVID CALLIES, AND JOHN BANTA, Council on Env'tl. Quality, *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS*, (1973) (examining the taking clause in the Constitution and land use regulations).

29. The authors of the Appendix reason that

[t]he purpose of an inquiry into the legal aspects of the Plan of Chicago is to ascertain to what extent and in what manner the Plan can be carried out under the existing laws, to suggest such additional legislation as may be necessary or desirable, and to consider how far such legislations is controlled or prevented by existing constitutional provisions.

PLAN OF CHICAGO, *supra* note 1, at 127.

approved the legal appendix in the 1909 *Plan*, was the Fifth Amendment prohibition on “the taking of private property for public use” and its accompanying guarantee that “no person shall be deprived of property without due process of law.”³⁰

The principal focus of the discussion in the 1909 *Plan of Chicago* regarding “the police power”—even in 1909 the authority of government to provide for the health, safety and general welfare was commonly called “the police power”—is on lands adjacent to public parks. The goal of regulating lands adjacent to public parks is to “prevent offensive advertising, restrict the kinds of businesses, if any, to be conducted thereon, and make appropriate regulation of the height, manner of construction, and location of the surrounding buildings.”³¹ After reciting those goals, Walter Fisher, writing for the legal review team, quickly concluded that the police power “is quite inadequate to the solution of this special problem” and cited a Harvard Law Review article for support that on both “theoretical and practical grounds” the police power cannot be exercised to accomplish “public aesthetic ends.”³²

The legal appendix contrasts the constitutionally constrained American-style city planning with the “sweeping undertakings and arbitrary though effective methods of European city planning”³³ possible in the absence of constitutional protections for private property owners embodied in the takings and due process clauses of the Fifth Amendment. The *Plan* laments that such “wide-reaching reforms” could only be implemented in Chicago “with important modifications.”³⁴ Among the innovative “reforms” listed are prohibiting advertising that “might ‘disfigure the landscape,’” maintaining “the suburban character of certain localities,” and imposing building setback lines for public streets.³⁵ The problem, according to the legal Appendix, is that in the United States “compensation is allowed to any owner of property who can show himself to be injured by such restrictions upon the use of his land”³⁶ while the European legal system imposed no such requirement of compensation.³⁷ The property owner in America could also challenge the basic constitutionality of such regulations as a taking of his property for a “public use” and in Illinois could even demand a jury trial to fix the just compensation—even for a

30. *Id.*

31. *Id.* at 139-40.

32. *Id.* at 140, (citing Wilbur Lardemore, *Public Aesthetics*, 20 HARV. L. REV. 35, 43 (1906-07).

33. PLAN OF CHICAGO, *supra* note 1, at 127.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* Sec. 182 (Univ. of Chi. Press. 1904)) (noting the comparison of American and European land use law).

building setback regulation!³⁸

The solution to this legal problem was to establish a whole new way of thinking about the definition of what was, and was not, a public use: “[t]he conception of a public use must alter and expand with the development of civilization, and especially with the growth of cities.”³⁹

III. BREAKING THE POLICE POWER IMPASSE: NEW YORK STYLE ZONING “DISTRICTING” COMES TO CHICAGO

The history of zoning in Chicago is a . . . story of bold visions trimmed by political reality, residents battling developers, and occasional misfires stirring up great controversy.⁴⁰

Today, the central element of virtually every comprehensive city plan is a set of recommendations for changes to the local zoning and development code. But when Burnham and the Commercial Club published the *Plan of Chicago* in 1909, the concept of zoning—“districting” as it was commonly called then—was in its infancy.

Only a few of the components of a modern zoning ordinance, such as building height limits, to be discussed later, were in place in 1909 when the *Plan of Chicago* was published. The legal appendix to the 1909 *Plan of Chicago* discusses *Welch v. Swasey*,⁴¹ the 1906 Massachusetts Supreme Court case that first upheld “the right of the legislature to delegate to a city the power to regulate the height of buildings, to prescribe different regulations for different districts, and to invest a commission with the right to determine the boundaries between such districts,” in other words, the right to zone.⁴²

In other parts of the country, *Welch* was seen as a radical departure from established precedent. Walter Fischer, after summarizing the significance of the *Welch* decision, laments that given Illinois judicial attitudes, “[i]t is doubtful whether local distinctions of this character would be sustained in Chicago under existing legislation, except in so far as might be justified by the power to establish fire limits.”⁴³ Fischer and his legal committee believed judicial attitudes in Illinois related to nuisance law, prohibited Boston-style use districting in Chicago:

38. PLAN OF CHICAGO, *supra* note 1, at 127-28 (describing the recourse for a citizen of the United States and Illinois should his property be converted for public use).

39. *Id.* at 142.

40. JOSEPH P. SCHWIETERMAN & DANA M. CASPALL, THE POLITICS OF PLACE: A HISTORY OF ZONING IN CHICAGO, 1 (Jane Heron ed., Lake Claremont Press 2006).

41. 79 N.E. 745 (Mass. 1906).

42. *Id.*

43. PLAN OF CHICAGO, *supra* note 1, at 141.

A business which is an actual nuisance may be prohibited altogether; and the legal machinery exists for excluding saloons and some other kinds of business from limited areas. Such exercise of the police power must, however, bear some reasonable relation to the public health, safety, or morals, and could not, under existing constitutional restraints, be extended to business in general.⁴⁴

It would take fifteen more years of legal slogging in the Illinois legislature and the courts before Chicago actually enacted its first comprehensive zoning code. It was not a walk in the park.

Chicago had been using so-called "frontage consent laws" for twenty years as an indirect method for regulating some types of "nuisance" uses. A use could be prohibited on a particular block front if a stipulated percentage of property owners on the street voted to prohibit it. Such "frontage consent" laws had become a routine part of pre-zoning neighborhood planning in Chicago and other cities since at least the 1880s. Frontage consent restrictions on livery stables were adopted by Chicago in 1887 and eventually upheld by the Illinois Supreme Court in *City of Chicago v. Stratton*⁴⁵ in 1896. Soon frontage consent laws had been enacted by Chicago to control many other uses deemed "nuisances" by the City Council. "[B]y 1905 the City was using a common system of frontage consents to regulate construction not only of stables but billboards, hospitals, gas reservoirs, blacksmiths, foundries, packing houses, rendering plants, tanneries, breweries, distilleries, junkshops, laundries, grain elevators and soap making plants."⁴⁶

In 1913, the Illinois Supreme Court, in *People ex rel. Friend v. City of Chicago*,⁴⁷ invalidated a City of Chicago frontage consent ordinance that prohibited retail stores on a residential block in the absence of approval by other property owners on the street front.⁴⁸ Other courts around the country had recently also invalidated frontage consent requirements. The year before the Illinois decision in the *Friend* case, the United States Supreme Court had invalidated a Richmond, Virginia frontage consent law in *Eubank v. City of Richmond*.⁴⁹ The legal ground used by the Illinois

44. *Id.* Interestingly, Fischer cites only two cases to support this pessimistic view of Illinois courts, and one of them, *City of St. Louis v. Hill*, 22 S.W. 861 (Mo. 1893), is a Missouri rather than Illinois case. PLAN OF CHICAGO, *supra* note 1, at 141.

45. 44 N.E. 853 (Ill. 1896).

46. Fred P. Bosselman, "The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards," 12 N. ILL. U. L. REV. 527, 571 (1991-1992) (internal quotations omitted). This system was subject to open and notorious political abuse. Proponents and opponents of various uses engaged in extensive vote buying campaigns.

47. 103 N.E. 609 (Ill. 1913).

48. *Id.* at 612.

49. *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

Supreme Court in *Friend* to invalidate frontage consents was both equal protection—the statute only regulated groceries and meat markets and not all retail stores—and invalidity of any law based solely on aesthetic considerations. The case went further and said the city council did not have the power to “deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare.”⁵⁰

With frontage consent laws legally dead, the implementers of the Burnham *Plan* had lost their only established land use legal tool for regulating uses. So they then turned for inspiration to the innovative, but as yet not widely adopted, concept of zoning as it was developing in Boston and most notably for Chicago, in New York City. The need for zoning regulation of uses was generally supported by the Chicago business and real estate community—if not by the courts—during the decade following the publication of the Burnham *Plan*. The Chicago Real Estate Board had been a strong promoter of the use of frontage consent laws to assure uniformity of use in particular neighborhoods. The real estate community favored such uniformity because “a relatively uniform pattern of uses within the neighborhood . . . would maximize the aggregate value of property by avoiding the value reductions that were assumed to be the result of ‘incompatible’ neighboring uses.”⁵¹

In 1914, Alderman Charles Merriam took up the torch for a zoning code as a substitute for the legally repudiated frontage consent concept. Merriam had attended the University of Chicago during the years of the World’s Fair construction and was now a political science professor there.⁵² In 1911, he unsuccessfully ran for mayor on a reformer’s platform. He now made it his mission to do two things: first, get the Illinois legislature to adopt enabling legislation authorizing cities and villages to adopt comprehensive zoning laws; second, shepherd a zoning code through the Chicago City Council.

Among Merriam and other reformers in Chicago, “[z]oning was not only a tool to reduce land-use conflicts, it was seen as an integral part of the effort to rid Chicago of its image as a crowded, dirty, and corrupt city.”⁵³

In 1914, Merriam authored a technical report describing the social and economic basis for using zoning to protect residential

50. *Friend*, 103 N.E. at 611.

51. Bosselman, *supra* note 46, at 568-69.

52. Charles E. Merriam, University of Chicago Centennial Catalogues, http://www.lib.uchicago.edu/e/spcl/centcat/fac/facch15_01.html (last visited Apr. 6, 2010).

53. SCHWIETERMAN & CASPALL, *supra* note 40, at 24.

neighborhoods from an inevitable transformation into industrial areas.⁵⁴ Zoning would help stabilize these residential neighborhoods and slow what was seen as an inevitable pattern of change in big city neighborhoods. Merriam's report was adopted by the Chicago City Council in 1917.⁵⁵ With the report in hand, Merriam then drafted enabling legislation granting authority to cities and villages "to establish residential, business, and industrial districts."⁵⁶ The legislation was introduced into the Illinois General Assembly in 1917.

State Senator Edward Glackin, who feared giving municipalities absolute power to adopt city wide zoning codes, proposed amendments to the Merriam legislation that applied frontage consent principles to create neighborhood by neighborhood zoning by referendum. Under the Glackin additions, a municipality would propose a district plan for approval by property owners in a particular neighborhood. If sixty percent of the property owners approved of the plan, then the city council could prepare a zoning ordinance appropriate for that particular neighborhood.⁵⁷ The so-called Glackin Law rather than Merriam's legislation was enacted by the General Assembly in 1919. In an editorial, the CHICAGO TRIBUNE urged the city to enact a zoning code now because the state had created at least a piece of the legal machinery to do so.⁵⁸

As enacted in 1919, the Illinois Zoning Enabling Act would not allow the New York style city-wide zoning that many in Chicago, including Edward Bennett, the co-author of the 1909 *Plan*, saw as absolutely necessary. Bennett had come to realize that city wide zoning was essential to the implementation of the 1909 *Plan of Chicago*, and now, together with Merriam and others, began to lead the technical efforts to prepare a zoning code for Chicago.

The New York influence on Burnham as an architect is well known. The New York influence on Bennett as a zoning advocate is not so widely known. Well before his association with New York architects such as Richard Hunt and Charles McKim in designing the 1893, World's Columbian Expositions, Daniel Burnham had become well acquainted with New York society and New York society with him. In March of 1893 before the opening of the

54. Bosselman, *supra* note 46, at 573-74.

55. Chicago City Council, *Building Districts & Restrictions* (Cornell Univ. Library 2001) (1917).

56. SCHWIETERMAN & CASPALL, *supra* note 40, at 17.

57. *Id.* at 18.

58. Specifically, the CHICAGO TRIBUNE argued that "Chicago is a big place. There is room for everybody. There ought to be residence districts reserved for homes, and factory districts reserved for manufacturing." CHI. TRIB., June 20, 1919.

World's Fair, Burnham was feted at Madison Square Garden in New York by his fellow east coast architects involved in the design of the soon-to-open Chicago exposition.⁵⁹ In 1900 he had opened a small affiliated office in New York to supervise his New York and east coast commissions.⁶⁰ Over the years, Burnham and Root and Daniel H. Burnham & Co. had designed a number of buildings in New York City including the iconic Flatiron Building.⁶¹

Edward M. Bassett, a New York attorney, former one-term U.S. Congressman and the father of the American zoning movement, was well known to both Burnham and Bennett. There was extensive correspondence between Bassett and both Burnham and Bennett over many years.⁶² In 1911, Burnham and Bennett met with him in New York City. In October of 1916, a group of Chicago civic leaders interested in the zoning debate went to New York City to meet with Bassett who had led New York's effort to adopt a zoning code and had recently been named chairman of New York's Citizen's Zoning Committee.⁶³

Although Bassett had been to Chicago on many occasions, including a visit in 1893 to the World's Fair, he now began to make regular trips to Chicago. Bassett saw serious legal problems in the Glackin Law adopted by the Illinois legislature in 1919. The "wide disparities in land-use regulations between neighborhoods"⁶⁴ possible under the Glackin "zoning by referendum" approach created a high likelihood that courts would use the due process and equal protection clauses to invalidate any Chicago zoning laws based on the Glackin approach.

In December of 1919, shortly after the Glackin Law was passed in Springfield, the Chicago Real Estate Board convened a two-day conference of leading zoning advocates and attorneys from around the country. One of the principal topics was the relative merits of Glackin-based neighborhood referendum zoning and other piecemeal zoning methods compared to city-wide zoning.⁶⁵ Bassett was one of the principal speakers.⁶⁶ He urged comprehensive, city-wide zoning as the only constitutionally defensible approach to controlling land uses. More than 400 persons attended the banquet for the event at the Morrison

59. THOMAS S. HINES, *BURNHAM OF CHICAGO: ARCHITECT AND PLANNER*, 113 (Univ. Chi. Press, 2d ed., 2009).

60. *Id.* at 269.

61. See *The Flatiron Building*, <http://www.nyc-architecture.com/GRP/GRP024.htm> (last visited Apr. 6, 2010) (listing Daniel H. Burnham & Co. as the architect).

62. SCHWIETERMAN & CASPALL, *supra* note 40, at 144.

63. *Id.*

64. *Id.*

65. *Id.* at 19.

66. *Id.*

Hotel.⁶⁷ “Few events in Chicago history were as significant to the evolution of the city’s land-use policies”⁶⁸

The Morrison Hotel conference accelerated the push for zoning in Chicago. Two months later in February 1920, the city created a Chicago Zoning Commission to draft a city-wide zoning code in the expectation that the state legislation would be amended to allow such laws.⁶⁹ The Chicago Real Estate Board created a new zoning committee and retained New York’s Edward Bassett as its legal counsel to draft the Chicago ordinance.⁷⁰

The 1919 meeting, and Bassett’s inspiring leadership, even convinced Senator Glackin that his 1919 State Zoning Enabling Act needed amendments.⁷¹ In June of 1921, the state legislature repealed the Glackin Law and replaced it with a Zoning Enabling Act drafted by the Chicago Real Estate Board special committee under the guidance of Edward Bassett.⁷²

Meanwhile, the Chicago Zoning Commission had also been pressing on with its work. In April of 1922, it widely distributed *Zoning Chicago*, its booklet summarizing the purposes of a zoning code and its legal basis. Both Edward M. Bassett and Burnham’s 1909 *Plan* co-author Edward M. Bennett were consultants to the Commission. In April of 1923, the City Council adopted Chicago’s comprehensive zoning ordinance. It was immediately hailed by one Chicago alderman as “[t]he greatest thing in the way of progress which Chicago has done in fifty years.”⁷³

It still remained to be seen if the Illinois courts would uphold the constitutionality of the new Chicago zoning ordinance. Challenges to the Evanston and Aurora zoning codes, adopted in 1921 and May, 1923 (respectively),’ worked their way up to the Illinois Supreme Court before Chicago’s zoning code. In February of 1925, the court issued a draft opinion in the Aurora challenge case “saying that a law that prohibited new uses in an area where similar existing uses were allowed to remain violated the state constitution’s prohibition against special legislation. Only if an ordinance limited each district to a specific use or uses could it be upheld.”⁷⁴ The court feared that already established but now nonconforming uses were being granted a monopoly privilege by operation of law.

67. *Id.*

68. *Id.* at 18.

69. *Id.* at 19.

70. *Id.* at 19, 144.

71. *Id.* at 20.

72. *Id.*

73. *Council Votes Zoning Law at Final Session*, CHI. TRIB., Apr. 6, 1923, at A1.

74. Bosselman, *supra* note 46, at 577. According to Professor Bosselman, the original draft opinion can only be found now at 57 Chi. Legal News, Feb. 26, 1925.

It looked like the Illinois courts were about to overturn all of the work done since 1913 to gain public and property owner support to replace frontage laws with a zoning code. After a rehearing was granted to Aurora, however, on December 16, 1925, the Court issued its official final decision in *City of Aurora v. Burns*.⁷⁵ The Illinois Supreme Court had changed its mind. Zoning was legally sound: "Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs."⁷⁶

The court said that no monopoly was created because other districts in the zoning code of Aurora allowed for the operation of the uses prohibited and made nonconforming in some districts. The court put some limits on the zoning authority, however. Communities must take care in mapping districts: "[a]n arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable."⁷⁷

The court also found a sound policy basis for the limitations that zoning imposed on private property: "the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly."⁷⁸

On the same day, the Illinois Supreme Court also upheld the Evanston zoning code in *Deynzer v. City of Evanston*.⁷⁹ After a sixteen year battle, the judicial limitations on local government exercise of the police power that had caused Walter Fisher to doubt that Illinois courts would ever uphold "districting" had been removed. Despite his pessimism, a concerted effort by the legal community in tandem with the real estate community had won the day. And after the decision of the United States Supreme Court upholding the constitutionality of comprehensive zoning in *Village of Euclid v. Ambler Realty*⁸⁰ less than a year later, frontal attacks on the general constitutional validity of zoning in Illinois were no longer possible. Implementation of the Burnham *Plan* vision of regulating uses for the benefit of Chicago's citizens was now clearly legally possible.⁸¹

75. *City of Aurora v. Burns*, 149 N.E. 784, 790 (Ill. 1925).

76. *Id.* at 788.

77. *Id.*

78. *Id.*

79. *Deynzer v. City of Evanston*, 149 N.E. 790, 793 (Ill. 1925).

80. 272 U.S. 365, 397 (1926).

81. Bassett moved on to work on zoning codes in other cities after 1923. Edward Bennett continued to stay involved in implementation of the zoning code and indirectly the 1909 Plan through his continuing role as consulting architect to the Chicago Plan Commission. SCHWIETERMAN & CASPALL, *supra* note 40, at 19. The Plan Commission had been created in the wake of the 1909 Plan of Chicago to generate the public support for the public funding

IV. BUILDING HEIGHT LIMITS AND DOWNTOWN CHICAGO'S ARCHITECTURAL CHARACTER

Chicago's skyline is a testament to the famed architects . . . Yet the city's silhouette is also the product of many years of regulation governing the location, height, and contours of its buildings.⁸²

The most visible way in which law has served as a hidden architecture in the development of Chicago since 1909 is in the manner in which the city has dealt with building height. The soaring height of downtown Chicago buildings was a controversial civic issue in 1909 and in the decades immediately preceding and after the adoption of the *Plan of Chicago*.

For example, in 1893, Chicago had imposed a height limit of 130 feet on downtown buildings.⁸³ This was couched primarily as a safety regulation to "protect the public from the risk of fire and falling debris"⁸⁴ as well as to preserve light and air to streets clogged with horse drawn vehicles and the resulting manure. Buildings taller than ten stories, it was believed, would block sunlight, trap odors and keep winds from clearing the air. "Some streets seemed destined to become dark and dangerous 'skyscraper canyons' that were incubators for germs."⁸⁵

This 130-foot height limit was vigorously opposed by the real estate development community.⁸⁶ The ten-story limit was actually lower than the height of some recently built skyscrapers such as Burnham's Monadnock Building and Jenney's Manhattan Building (both sixteen stories in height) and Sullivan and Adler's Auditorium Theater, at seventeen stories, the world's tallest building when it was completed in 1890. These buildings were substantially taller than the typical five to seven-story buildings constructed in the wake of the Chicago Fire. Ever taller buildings had been made technologically possible and economically feasible by the perfection of the light-weight steel frame skeleton used by William LeBaron Jenney and others in the late 1880s combined with the invention of the electric elevator by Samuel Otis.

necessary to build the infrastructure components of the Burnham plan. *Id.* at 11.

82. *Id.* at 79.

83. ROBERT M. FOGELSON, *DOWNTOWN: ITS RISE AND FALL, 1880-1950* 143 (Yale Univ. Press, 1st ed., 2001). Such building heights, however, were applied uniformly across the city. The framers of the legal Appendix to the 1909 Plan of Chicago questioned the legality of establishing differing height limits in differing parts of the city. It was not until the Illinois Supreme Court upheld the constitutionality of zoning in 1925 that a clear basis for differing building heights in various parts of the city obtained a firm legal grounding. *See generally Burns*, 149 N.E. 784 (upholding a zoning ordinance for the city of Aurora).

84. SCHWIETERMAN & CASPAL, *supra* note 40, at 9.

85. *Id.* at 80.

86. *Id.* at 9.

Chicago's height limit of 1893 was "the first of its kind in the United States"⁸⁷ This was a significant expansion of the nuisance laws.⁸⁸ But the new ordinance exempted from its coverage several buildings that already had received their permits including Burnham's Reliance Building and Masonic Temple building at State and Randolph, which, when completed in 1894, was the tallest building in the world at 302 feet and 20 stories.⁸⁹

By the time the *Plan of Chicago* was published in 1909, the real estate community had successfully doubled the height limit to 260 feet.⁹⁰ They argued successfully that such advances as the electric street car and growing number of automobiles reduced the number of horses and reduced the odor and air problem that accompanied horsedrawn public conveyances. Therefore, taller buildings should be allowed.

The Burnham *Plan* of 1909 was based on an aesthetic that subjugated building height to a uniform, European style cornice height. The Jules Guerin drawings show mile after mile of Parisian style classical buildings of a symmetrical height. The Burnham *Plan* proposed a maximum height limitation across the entire City of Chicago of 240 feet—about fourteen stories.⁹¹

In the middle of the decade of the 1910s, following the publication of the *Plan of Chicago*, however, the maximum height limit was reduced back to 200 feet.⁹² These height limits based on public nuisance theories had a fundamental impact on the appearance of downtown Chicago. Limitations on height combined with a shortage of office space pushed developers to acquire large quarter block sites, build to the maximum height allowed, and add interior light wells to get around the problem created by constructing buildings on such large sites.⁹³ Burnham's Railway Exchange (Santa Fe) Building and Peoples Gas Building on Michigan Avenue, as well the Federal Reserve Bank of Chicago on LaSalle are examples of these massive buildings with internal light wells.⁹⁴

The reduction to 200 feet was short-lived. In 1920, the height limit was again increased to 260 feet but ornamental towers—as

87. *Id.* at 80.

88. Municipal officials used the concept of nuisance laws to limit the activity of builders. *Id.* at 9. The 1893 height limit on downtown buildings was to protect the public from the risk of fire or falling debris. *Id.*

89. Others also grandfathered in included the Fisher Building, Old Colony Building and Marquette Building still standing on Dearborn Street, and each at least seventeen stories tall. *Id.* at 81.

90. *Id.*

91. KENNETH HALPERN, DOWNTOWN USA: URBAN DESIGN IN NINE AMERICAN CITIES 79 (Whitney Library of Design, 1978).

92. SCHWIETERMAN & CASPAL, *supra* note 40, at 81.

93. *Id.*

94. *Id.*

long as they were not occupied—could rise to 400 feet.⁹⁵ This restriction was short-lived also. The first Chicago zoning ordinance adopted in 1923 (to be discussed later) increased the height limit from 260 to 264 feet but allowed useable towers without any limitation on height to be added.⁹⁶ However, there was a practical limit on the height of these towers imposed by other provisions in the zoning code—the footprint of such towers could be no more than one-fourth of the footprint of the building and could not contain more than one-sixth of the volume of the non-tower portions of the building.⁹⁷

The 1920 and 1923 “tower provisions” are responsible for the design appearance of some of Chicago’s most iconic landmarks including the Wrigley Building, built in two sections (and connected by a sky bridge) in 1921 and 1924, and the Tribune Tower, built from 1923-25.⁹⁸ On larger sites, some of these so-called “zoning-law towers” built in the 1920s, such as the forty-five-story 1929 Civic Opera House, could soar to over 550 feet and a few even rose to over 600 feet, such as the Board of Trade Building built in 1930.⁹⁹ The Great Depression of the 1930s effectively put an end to the era of the “Twenties Towers” but not before nearly two dozen of such tall buildings had been constructed downtown.¹⁰⁰ For the next almost twenty-five years, the Board of Trade would reign as Chicago’s tallest building as the Depression and World War II put an end to downtown commercial development following the completion of the 535-foot Field Building (also known as LaSalle National Bank) in 1935.¹⁰¹

Chicago’s downtown streetscape changed little between the mid-years of the Great Depression and the mid-1950s.

It was not until 1952 that construction began on another Chicago downtown skyscraper, the forty-four-story Prudential Building. In the interim, Chicago had made a change to the downtown height restrictions—a 1942 revision to the basic 1923 zoning code added a “bulk limit” on buildings. The limit effectively restricted the useable floor area of a building to about twelve times the lot area. But there was no restriction on height. A twenty-four-story building could be built if only half the site was used and a forty-eight-story building constructed on a quarter of the site.¹⁰²

95. *Id.* at 83.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 84.

100. *Id.*

101. *Id.*

102. A block building covering the entire site could only rise twelve stories, but a block building covering half the site could rise about twenty-four stories. *Id.* at 85. The zoning code bulk limitation was lot area multiplied by 144. *Id.* These concepts, taken in consideration with contemporary construction trends,

The developers of the Prudential Building were able to build to its height by acquiring a substantially larger site and then leaving much of it undeveloped. Only a few other buildings in downtown Chicago, including the Continental Insurance Building on Wacker Drive and the Inland Steel Building at the corner of Monroe and Dearborn, were built under this volume control system that was replaced by a new set of height regulations in the comprehensive 1957 Chicago Zoning Ordinance.¹⁰³

In 1957, volume limits were replaced by a system specifying a floor area ratio, commonly called FAR, for various zoning districts. In the 1950s, the effective 12.0 FAR in the 1942 zoning code was perceived to be too restrictive. Post-war America was booming, and the demand for downtown office space in Chicago was soaring. In 1957, the prior volume limit of 144 times lot area was replaced by a specific FAR limitation. In downtown Chicago, the specified FAR was 16.0, but developers could provide “amenities” and in exchange could receive floor area bonuses, a technique that was routinely used over the next twenty-five years in downtown Chicago resulting in a significant change in the character and appearance of downtown Chicago and its streetscape.

This new law reflected the input from Chicago architects who believed that street level sunlight gained from upper floor setbacks “was more theoretical than real”¹⁰⁴ It also reflected the influence of Mies van der Rohe then directing the architecture program at IIT. Upper floor setbacks were anathema to the ascetic of his sleek modernist boxes such as the Seagram Building then under construction in New York or the Inland Steel Building in Chicago. The influence of Miesian theory on Chicago School architects in the 1950s was such that bonuses for upper floor setbacks were supplemented by other types of bonuses in a deliberate rejection of New York’s continuing adherence to the earlier 1920s wedding cake approach to providing “breathing room” at street level.

The bonus system provided additional floor area for so-called “amenities” such as sidewalk arcades (effectively recessed first floors under overhanging upper floors), public plazas (such as the one in front of the Daley Center), and ground level setbacks. These were in addition to the more traditional amenities of upper story setbacks that had been in play in Chicago since the 1920s and proximity to public open spaces such as the Chicago River.

Architects began to design Miesian modernist structures such as The John Hancock Building, the First National Bank Building, the Standard Oil Building (now Aon Building) and the Equitable

resulted in “the equivalent of a FAR of about 12.” *Id.*

103. *Id.*

104. HALPERN, *supra* note 91, at 79.

Building adjacent to the Tribune Tower on Michigan Avenue which were, in effect, pieces of sculpture set back from the street on one or more sides where large open plazas not only created height and floor area bonuses, but allowed the architect's work to be viewed clearly. The result was another stunning architectural flowering in downtown Chicago. Architects in the 1960s and 1970s at Skidmore Owings & Merrill, C. S. Murphy (later Murphy/Jahn), Perkins & Will, and other Chicago design shops once again put Chicago at the center of the world of architecture, at least in the design of tall, downtown buildings.

By the early 1970s, however, critics were charging that Chicago's comparatively high base FAR of 16.0¹⁰⁵ and plaza/setback bonus system were turning Chicago into a series of full-block megaliths that threatened to "completely destroy what remains of the humane scale of the street."¹⁰⁶ If a site was large enough—such as in the case of Sears (now Willis) Tower that occupied a whole city block¹⁰⁷—and the developer compiled enough amenity bonuses, the only restriction on the height of a building was the landing pattern at O'Hare Airport!¹⁰⁸ Prominent architect Jack Hartray, Jr. summed up Chicago's downtown zoning as "boomtown zoning that lets you build a Sears Tower on every block."¹⁰⁹ Mary Decker, Executive Director of the Metropolitan Planning Council, described the situation as follows: "We have the most permissive zoning ordinance in America All developers have to do is include a plaza here, a setback there, and they can build to the angels."¹¹⁰

According to Paul Gapp, Architecture Critic for the CHICAGO TRIBUNE, the root of the problem was in Chicago politics. "As long as Chicago's real estate developers enjoy the most lucrative zoning

105. Boston, Los Angeles, Philadelphia, Washington D.C. and New York had FAR limits ranging from 10-15, and Atlanta and San Francisco had even higher FAR limits. SCHWIETERMAN & CASPALL, *supra* note 40, at 90. Eventually, though, each of these cities lowered their FAR limits to levels lower than Chicago's. *Id.*

106. HALPERN, *supra* note 91, at 81.

107. The use of full city-block sites, a common practice in the 1960s, was unexpected and unanticipated. *Id.* at 79. Halpern explains that [o]n a full block site, by setting the building back on *all* four sides, by providing a continuous arcade at the base of the building, and by also providing building setbacks, the building could reach an FAR of at least 40, which would allow a structurally sound 140-story building containing about 6,000,000 square feet (550,000 square meters) on each block in the central area.

Id. at 79.

108. *Id.* at 81. This was not foreseen at the time the 1957 zoning ordinance was enacted. *Id.* at 79.

109. John McCarron, *Chicago Needs Zoning Reform to Help its New Growth Complement the Old*, CHI. TRIB., Dec. 20, 1987, at 1.

110. *Id.*

ordinance in the country, thanks to politicians without conscience or vision, this city will continue to produce new warts and blemishes to mar the effect of its architectural achievements.”¹¹¹ The Chicago architectural community had lost its Hamiltonian democratic ideals that had inspired it to prevail against the pedestrian aesthetic of the political establishment.

The public plazas surrounding many of these 1970s vintage architectural sculptures came to embody the problems with Chicago zoning and the loss of the Burnham vision. Many of these plazas were windswept little used waste lands. The small public plaza on the Chicago River at the base of Mies Van der Rohe’s iconic IBM Building at 405 N. Wabash was—and is still—so windy that on blustery days, building management puts out a series of ropes anchored to stanchions. Tenants approaching the building must haul themselves hand-over-hand into the building like mountain climbers ascending the last 200 meters of Mount Everest!

Studies in New York in the 1970s by William H. Whyte¹¹² of how public plazas work—and how they do not work—in attracting people and pedestrian activities exposed the fallacy that an open area around the base of a building, by itself, can be an important public improvement. Through time lapse photography and by simply watching people and how they use public parks and plazas, Whyte began to understand good design principles for public spaces.¹¹³ The plaza surrounding the Sears Tower came in for particularly harsh criticism in Chicago. Whyte summed up the relationship between zoning and these dead city center spaces as follows:

[Z]oning is certainly not the ideal way to achieve the better design of spaces. It ought to be done for its own sake. For economics alone, it makes sense. An enormous expenditure of design expertise, and of travertine and steel, went into the creation of the many really bum office-building plazas around the country. To what end?¹¹⁴

What was happening to the streetscape of downtown Chicago began to be noticed all around the world and “Chicago style” development began to be used in a denigrating fashion in Europe.¹¹⁵

111. Paul Gapp, *An Architect’s View: What’s Good and Bad Downtown*, CHI. TRIB., Dec. 27, 1978, at A4.

112. See generally WILLIAM H. WHYTE, *THE SOCIAL LIFE OF SMALL URBAN SPACES*, (Project for Public Spaces 1980) (recapping Whyte’s study of New York plazas and how they fit into urban planning and design).

113. *Id.* at 16.

114. *Id.* at 15.

115. For example, Charles Prince of Wales, in one of his campaigns against constructing new modernist buildings in the heart of London, reportedly said that “[i]t would be a tragedy if the character and skyline of our capital city

Various efforts to change the rules related to building height and bulk in downtown Chicago and along the lakefront failed during the last few years of Mayor Richard J. Daley's term in office and during the terms of Mayor Bilandic and Mayor Jane Byrne. With the election of Mayor Harold Washington in 1983, the Planning Department led by Planning Commissioner Elizabeth Hollander began to consider a comprehensive rewrite of the zoning code including its height and bonus system. She and her Planning Department staff, including former American Planning Association staff member David Mosen, understood the important insight first enunciated in Chicago in the Burnham and Bennett plan of 1909 that: "the quality of our built environment depends as much on such inherently dull things as FARs as it does on the dramatic conceptualizations of architects."¹¹⁶

However, the political divide between Mayor Washington and the City Council made systematic reform of the zoning code politically impossible.¹¹⁷ Instead, Commissioner Hollander expanded the authority of the Planning Department by an administrative directive that scrapped the existing height and bonus system in downtown Chicago. She substituted an informal and somewhat ad hoc "negotiated" bonus system based on the planned development provisions in the 1957 Chicago Zoning Ordinance. Developers were "encouraged" to present their projects to the city as planned developments, also call PDs or PUDs.¹¹⁸ This allowed the Planning Department to trade floor area bonuses for such additional public amenities as "interior cultural space, rooftop gardens, and 'winter gardens'" or for actual contributions of funds for neighborhood improvements.¹¹⁹

With the election of Mayor Richard M. Daley in 1989 the years of fractious "council wars" came to an end.¹²⁰ Unlike his

were to be further ruined and St. Paul's dwarfed by yet another giant glass stump, better suited to downtown Chicago than the City of London." JOHN RATCLIFFE ET AL., *URBAN PLANNING AND REAL ESTATE DEVELOPMENT* 213 (UCL Press 2009) (1996).

116. Gapp, *supra* note 111.

117. Chicago during that period was sometimes described as "Beirut by the lake" in tribute to the internecine "council wars" between Mayor Washington's supporters and opponents in the Chicago City Council. See Larry Green, *Chicago Mayor Wins Backing to Defeat Machine*, L.A. TIMES, May 10, 1986, at 3 (discussing how the Wall Street Journal dubbed Chicago "Beirut by the Lake" in connection to the "council wars").

118. The planned unit development (PUD) provision of the Chicago Zoning Code was added in the early 1960s to accommodate Marina City, a mixed use project built in 1964 that did not conform to the provisions of the 1957 code.

119. SCHWIETERMAN & CASPALL, *supra* note 40, at 90.

120. See *Council Wars*, Encyclopedia of Chicago, <http://encyclopedia.chicagohistory.org/pages/342.html> (last visited Apr. 6, 2010) (describing the council wars as Mayor Harold Washington battling to assert his power against the city council's majority block).

father, who was intently focused on large scale physical planning and major public works projects¹²¹—macro-planning—the second Mayor Daley also understood the aesthetics and nuances of what makes a street, a neighborhood and a city “work”—micro-planning. Planning commissioners David Mosen and Valerie Jarrett under the second Mayor Daley continued the work of their predecessor Elizabeth Hollander.

Although the time was now right for a new set of bonus and height regulations, it took until 1998 for the city to devise a new bonus system and until October of 2001 for the City Council to add it as an amendment to the 1957 zoning code. Many of the amenities routinely traded for density in the ad hoc planned development bargaining of the 1980s and 1990s now officially became part of the bonus system. Other codified bonuses now included riverwalks, public art, adopt-a-landmark, and through-block connections. “For PDs, the bonus system was now akin to a restaurant menu, allowing developers to choose from a broad list of amenities subject to planning department approval.”¹²²

The coming of the Great Recession in 2008 meant many proposed downtown Chicago development projects were cancelled or put on hold.¹²³ The last building completed during the Great Depression was the Field Building on LaSalle Street in 1935. The last building completed during the Great Recession was the Trump International Hotel and Tower on the north side of the Chicago River at Wabash in 2009.

The Field Building is one of the finest expressions of art deco design as allowed by the 1923 zoning code with its height limits. The Trump Tower is a great but not perfect expression of how the new bonus for amenity exchange system embodied in the 2004 Chicago Zoning Code can result in a design that incorporates the best of the Burnham vision for the relationship between architecture and the public. The Trump Tower’s well designed riverfront park and upper level setbacks respectful of neighboring buildings results in a quality piece of urban design. It embodies how zoning and planning law since the Burnham *Plan* of 1909 has evolved to assure that Chicago’s architecture relates to its setting and its people even when expressed in one of the tallest buildings in the city.

The Great Recession, like the Great Depression, will result in

121. See *Daley’s Chicago*, Encyclopedia of Chicago, <http://www.encyclopedia.chicagohistory.org/pages/1722.html> (last visited Apr. 6, 2010) (explaining how Richard J. Daley oversaw many building projects that included creating the Chicago skyline, completing the expressways, expanding O’Hare International Airport, and constructing University of Illinois at Chicago – Chicago Circle).

122. SCHWIETERMAN & CASPALL, *supra* note 40, at 90.

123. One project, the Mandarin Oriental hotel/condo project on Wacker Drive, was stopped in mid-construction.

another long pause in downtown Chicago development. This time the pause will likely be shorter than the twenty year gap between completion of the Field Building in 1935 and the start of construction on the Prudential Building. But, the pause gives Chicago another chance to reassess its recent development history and measure its success against more than economics. It allows Chicago to again take stock of the Burnham ideal for how buildings should relate to the street and the city to which they belong. The importance of this periodic reassessment may have been put best by Blair Kamin, current Architecture Critic for the CHICAGO TRIBUNE: "For it is only by analyzing what we have built today that we can better grasp what to design tomorrow."¹²⁴

V. THE BURNHAM *PLAN* AND GRANT PARK—BURNHAM'S VISION LOST . . . AND FOUND AGAIN

The most common misconception about the Burnham/Bennett 1909 *Plan of Chicago* is that it contains Burnham's famous statement about "making no little plans."¹²⁵ But those words are not in the *Plan* but rather from a Burnham speech given on another occasion.¹²⁶

The second biggest misconception about the 1909 *Plan* is that it prohibited any construction in Grant Park or along Chicago's lakefront. That also is not true. Burnham actually wanted buildings in Grant Park, although buildings in a park-like setting.¹²⁷ The *Plan* envisioned the Field Museum of Natural History where Buckingham Fountain is today.¹²⁸ It also envisioned two other major structures, one to the north, as well as one to the south, and some smaller structures at the southwest corner of Grant Park.

As shown in the illustrations in the 1909 *Plan of Chicago*, these Grant Park structures were to be designed in the Beaux Arts style. As in so many other ways, Burnham and Bennett's inspiration for these classically inspired buildings in a park setting was most likely Paris.

Grant Park was to be the "intellectual center of Chicago."¹²⁹ The Field Museum was to be built here as would a major library.¹³⁰ The Art Institute, already in place on the Michigan

124. BLAIR KAMIN, *WHY ARCHITECTURE MATTERS: LESSONS FROM CHICAGO* xvi (Univ. of Chi. Press 2001).

125. See *supra*, note 21 and accompanying text (giving the "make no little plans" quotation and citation).

126. There is considerable disagreement as to the origin of the quote.

127. See *PLAN OF CHICAGO*, *supra* note 1, at 115 (proposing to keep building related to the arts grouped together).

128. *Id.* at 114.

129. *Id.* at 112.

130. The Crerar Library, originally to be in Grant Park, was eventually later

Avenue edge of the park, would be relocated further east and expanded significantly.¹³¹

Grant Park was also to be a great gathering place for public recreation and festivals:

as Michigan Avenue is widened and extended, the great traffic which this thoroughfare is sure to bear will come to require large open spaces for gatherings of people to witness parades and pageants . . . and at gala times, when the harbor is illuminated, the terraces of Grant Park will afford unsurpassed views of the spectacle. Such pleasures make a universal appeal, and give charm and brightness to the life of people who must of necessity pass long summers in the city.¹³²

But there were three obstacles to accomplishing Burnham's Grant Park vision. One was physical. One was political. The third was legal.

The physical problem was that Grant Park existed in name only in 1909. Before 1901, the area immediately east of Michigan Avenue was called Lake Park. Until the Chicago Fire of 1871, Lake Michigan lapped right up to the edge of Michigan Avenue. After the fire, much of the rubble from the ruined city was dumped into the shallows of the lake in what is now Streeterville and Grant Park. By 1882, the area between Michigan Avenue and the Illinois Central Railroad trestle had been essentially filled. Between 1897 and 1907, additional work was undertaken to fill in another area east of the railroad trestle. The name of the park was changed from Lake Park to Grant Park in 1901. For years, the lakefront immediately east of Michigan Avenue and south of the Chicago River was "an unsightly mess . . . littered with stables, squatters' shacks, a firehouse, garbage, and debris."¹³³ There were broken wagons, remnants of a traveling circus and "the ruins of a monstrous old exhibition hall."¹³⁴

The political problem was that the City of Chicago and its ward politicians not only had their eyes on Lake Park/Grant Park but treated it as their personal turf for political rallies . . . and more notorious events. "Hinky Dink" Kenna threw regular political bashes on the rubble strewn area east of Michigan Avenue. This was not a gathering like the one that celebrated the election of Barack Obama in Grant Park in November of 2008.

built at the northwest corner of Michigan and Randolph across the street from the Chicago Public Library. It now sits in Hyde Park. *Crerar Library, John*, Encyclopedia of Chicago, <http://www.encyclopedia.chicagohistory.org/pages/348.html> (last visited Apr. 6, 2010).

131. PLAN OF CHICAGO, *supra* note 1, at 110.

132. *Id.* at 111.

133. SMITH, *supra* note 2, at 24.

134. LOIS WILLE, *FOREVER OPEN, CLEAR, AND FREE: THE STRUGGLE FOR CHICAGO'S LAKEFRONT* 73 (Univ. of Chi. Press, 2d ed., 1991).

Instead, Kenna's parties in the park were an early twentieth century Chicago cross between Mardi Gras, the Roman Colosseum, and Wrestlemania featuring beer tents, a masquerade ball, wrestling and boxing matches, dog fights, circuses, and other assorted entertainments including appearances by Chicago's most notorious madams from the infamous Levee district accompanied by official police department escort.¹³⁵ When church and civic leaders complained about Kenna's lakefront parties, he simply responded "Chicago ain't no sissy town."¹³⁶ He was absolutely right.

The other part of the political problem was that the City of Chicago had plans to build public buildings on the lands east of Michigan Avenue. As of 1897, the city already had a firehouse, a post office and an armory located east of Michigan Avenue, and it wanted to build a new city hall there.¹³⁷ In addition, the city saw that land as an economic gold mine—fill it in, level it, and sell it off. A downtown lake front is "no place for a park," said Alderman William Ballard. "It should be used to bring revenue to the city."¹³⁸ It would be politically difficult to keep the city from selling additional new land created on fill east of Michigan Avenue.

The legal problems were the most complicated. In 1852, the city had given the Illinois Central Railroad the legal right to extend its tracks north of 22nd Street on a 300 foot wide right of way in the shallows of Lake Michigan. The railroad would build a trestle above the shallow water.¹³⁹ The trestle was required to be 400 feet east of the west line of Michigan Avenue, putting it a few hundred yards off-shore.¹⁴⁰ It was that land between the trestle and Michigan Avenue that was filled in with rubble from the Chicago Fire. By 1890, additional fill had been added at various places along the Chicago shoreline both north and south of the Chicago River. The Illinois Central had also purchased a significant tract of land along the south bank of the Chicago River east of Michigan Avenue and developed a series of freight yards, grain elevators, and locomotive shops.

135. *Id.* at 74.

136. *Id.*

137. SMITH, *supra* note 2, at 25.

138. WILLE, *supra* note 134, at 75.

139. This right had been granted to the Illinois Central Railroad in exchange for their promise to make the trestle a breakwater as well. *Id.* at 26. The construction of a pier at the mouth of the Chicago River a few blocks further north had changed the pattern of sand distribution south of the river. *Id.* Lake Michigan storms were eating away at the shoreline along South Michigan Avenue, threatening to destroy the mansions that had been built on the Lake Michigan beach. *Id.*

140. *Id.* at 28. However, the shoreline was constantly shifting, creating some interesting legal problems at the core of the first of the later lawsuits filed by Montgomery Ward. *Id.* at 74-76.

The railroad deal and the trestle and breakwater had been built despite two important inscriptions that had been noted on official subdivision maps for land along the lakefront between Roosevelt on the south and Randolph on the north.¹⁴¹ The first was the notation “[p]ublic ground . . . [f]orever to remain vacant of buildings” on the 1839 subdivision maps of the marshy land east of Michigan Avenue between Madison Street and Randolph.¹⁴² The second was the inscription “Open ground . . . [n]o building” on the lakeside edge of subdivision maps of the land south of Madison Street to Roosevelt.¹⁴³ According to the Illinois Supreme Court, this inscription was put on the subdivision map “as an inducement” and assurance to purchasers of lakefront land that “there would be no buildings to obstruct the view of the lake.”¹⁴⁴

In 1890, however, the dry goods baron Montgomery Ward decided he had to do something about Lake Park. He had just built his new office headquarters at the northwest corner of Madison and Michigan. His office looked out over the mess that was Lake Park. He did not like what he saw. He was as disturbed as much or more by the political rabble as the physical rubble in the park. Shortly after moving in, he reportedly turned to his legal counsel George P. Merrick and said “Merrick, this is a damned shame! Go and do something about it.”¹⁴⁵ It took twenty years, but George Merrick eventually did do something about it.

The first thing Merrick did was file a lawsuit to “clear the lakefront . . . of unsightly wooden shanties, structures, garbage, paving blocks and other refuse piled thereon.”¹⁴⁶ He also sought an injunction to stop the city from building any more public buildings east of Michigan Avenue. The city corporation counsel replied to

141. As interpreted by the Illinois Supreme Court, the city and the Illinois Central had agreed that the Lake Park open ground restrictions did not extend that far out into lake where the trestle was to be built. The agreement also placed other restrictions on the Illinois Central: it was prohibited from erecting any

buildings between the north line of Randolph street and the south line of Lake Park, nor place upon any part of their works between these points any obstructions to the view of the lake from the shore, and that it should make and keep open through its works such culverts or ways as would afford room for the uninterrupted flow of water from the open lake to the space inside of the inner or west line of the railroad right-of-way.

City of Chicago v. Ward et. al., 48 N.E. 927, 931 (Ill. 1897).

142. *Ward*, 48 N.E. at 930. Lois Wille, in her book, states that this inscription simply said “public ground.” WILLE, *supra* note 134, at 22.

143. *Ward*, 48 N.E. at 930. According to Lois Wille, the inscription read “Public Ground – A Common to Remain Forever Open, Clear and Free of any Buildings or other Obstruction Whatever.” WILLE, *supra* note 134, at 23.

144. *Ward*, 48 N.E. at 930.

145. WILLE, *supra* note 134, at 71.

146. *Id.* at 74.

the count in the suit related to public buildings with two legal arguments. First, the notations on the 1830s plat maps clearly allowed public uses east of Michigan Avenue and such buildings as a civic center were a public use. Second, the areas on the maps that were underwater in the 1830s but had now been filled in by the City of Chicago out to the Illinois Central trestle, were exempt from the restrictions related to “public grounds” being forever open, clear and free.¹⁴⁷ The corporation counsel also argued that after the inscriptions were made, the shoreline had changed due to continuing erosion of the lakefront, and the lands that had been subsequently submerged were also exempt from the restriction.¹⁴⁸

Ward won and the city lost in the trial court. Merrick got a permanent injunction prohibiting anyone, including the city, from building on the land east of Michigan Avenue¹⁴⁹ “or using it for anything but a public park.”¹⁵⁰

The city appealed, and the case slowly worked its way up to the Illinois Supreme Court. Ward offered to pay for the construction of the park if the city would drop its appeal. The city refused. In 1897, in *City of Chicago v. A. Montgomery Ward*,¹⁵¹ the Illinois Supreme Court ruled in favor of Montgomery Ward.

A few years later, George Merrick, again on behalf of Montgomery Ward, filed another lawsuit, this time to stop the City of Chicago from building an armory in Lake Park/Grant Park. The proposed armory was to be east of the Illinois Central tracks in an area where the city had been filling the lake. Ward prevailed in the trial court and obtained an injunction stopping construction. The city appealed, and the Illinois Supreme Court in 1902 in *Bliss v. A. Montgomery Ward*¹⁵² upheld the trial court decision. While the Illinois Supreme Court recognized that the city had obtained

147. *Id.* (emphasis added). The argument appears to be that since the areas that had been filled were submerged in the 1830s, they were not “grounds” when the inscription was written on the maps.

148. *Ward*, 48 N.E. at 932.

149. The Illinois Supreme Court also emphasized the significance of two pieces of state legislation passed in the 1860s to prohibit the City of Chicago from granting other railroads the right to build trestles across the ponds between the Illinois Central trestle and Michigan Avenue. One of the laws specifically stated that

the state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the person owning lots or land on said street or avenue.

Id.

150. WILLE, *supra* note 134, at 74. This is not quite accurate as later cases would specifically state that public “use” did not imply a public “park.”

151. *Ward*, 48 N.E. at 937.

152. 64 N.E. 705, 709 (Ill. 1902).

the legal right from the state to fill in land east of the Illinois Central tracks, it upheld the trial court prohibition of construction of any "building or structure" based upon the public trust created by the same survey map notations¹⁵³ that formed the basis for the first Ward decision.¹⁵⁴

In 1903, the state legislature passed legislation authorizing park districts to construct and maintain museums in their parks. A few weeks later, the City of Chicago enacted an ordinance giving the South Park Commission complete jurisdiction over Grant Park.¹⁵⁵ In 1906, Marshall Field died and in his will left \$8 million for construction of a museum of natural history. Shortly thereafter, the South Park Commissioners reached agreement with the administrators of the Field estate to construct the museum in Grant Park, on the approximate location where Buckingham Fountain is located today.¹⁵⁶ George Merrick, on behalf of Montgomery Ward, filed suit once again. And once again the case went all the way to the Illinois Supreme Court, which, for the third time, ruled in favor of Montgomery Ward in *A. Montgomery Ward v. Field Museum of Natural History*.¹⁵⁷

The decision in *Field Museum* was issued on October 26, 1909, less than four months after publication of Burnham's *Plan of Chicago*. The *Plan* clearly showed the Field Museum in the center of Grant Park. Burnham and the Commercial Club were of course well aware of Ward's litigation as it progressed through the courts.¹⁵⁸ They went forward with the Grant Park plan anyway

153. The underlying rationale was that deliberate filling by the city should be treated the same as natural accretions. *A. Montgomery Ward v. Field Museum*, 89 N.E. 731, 734 (Ill. 1909).

154. *Bliss*, 64 N.E. at 709. This lawsuit by Montgomery Ward infuriated many of the civic and business leaders of Chicago. Construction of an armory was vitally important to them given the riots and labor violence in Chicago during the 1890s.

155. *Field Museum*, 89 N.E. at 735. An earlier city ordinance in July of 1896 gave the South Park Commission jurisdiction over portions of the park north of Jackson Street between Michigan Avenue and the railroad right-of-way as well as portions east of the railroad north of Monroe Street and extending east to the outer sea wall. The 1896 ordinance also reserved to the city, however, land for the proposed Field Columbian Museum and for an Illinois National Guard armory. *Id.* at 734. This new ordinance also removed the site of the Art Institute, the Crerar Library, and a monument to Dr. Samuel Guthrie, inventor of chloroform, from the jurisdiction of the South Park Commission. *Id.* at 735.

156. The specific location of the Field Columbian Museum in Grant Park had been specifically set aside in the ordinance of 1896 granting jurisdiction of part of the park to the South Park Commission. *Id.* at 735.

157. *Id.* at 737.

158. The city had also launched a suit of its own to stop Ward by "condemning away" the easement held by Ward and other Michigan Avenue property owners. See *South Park Commissioners v. Montgomery Ward and Company*, 93 N.E. 910 (Ill. 1910) (ruling that the type of easement created by

convinced that Ward would not stand in the way of Marshall Field's \$8 million bequest for a museum. Marshall Field's will had stipulated that the bequest was contingent upon the city furnishing a site, free of charge, for the museum.

The public outcry against Montgomery Ward was vociferous. The CHICAGO TRIBUNE called him a "human icicle."¹⁵⁹ Others comments were less metaphorical and more scatological. Partly in response to his public critics during the Chicago debate leading up to the *Field Museum* decision, Ward offered to contribute funds to buy land elsewhere for the museum. The Field Estate refused.¹⁶⁰

The battle that Montgomery Ward won had been a contest between two contrasting visions for Chicago's lakefront park. As Blair Kamin of the CHICAGO TRIBUNE and many before him have commented, "[o]ur front yard, the lakeshore is the face Chicago presents to the world."¹⁶¹ Montgomery Ward, after his final victory in the *Field Museum* case gave his only public interview related to litigation to keep Grant Park open.¹⁶² He said "I fought for the poor people of Chicago, not the millionaires."¹⁶³ He envisioned Grant Park as open space for the 250,000 people, mostly poor, who lived between 22nd Street on the south and Chicago Avenue on the north and Halsted on the west. He contrasted his vision of a forever open, clear and free Grant Park with Burnham's vision of the Park which Ward saw as nothing more than a park in "which city officials would crowd with buildings, transforming the breathing spot for the poor into a showground of the educated rich. I do not think it is right."¹⁶⁴

The cost to Ward, however, was social disgrace and an estimated \$200,000 in today's dollars in legal fees.¹⁶⁵ Ward believed his efforts to preserve Grant Park would never be appreciated.¹⁶⁶ Today at 11th Street in Grant Park, on the east side of the pedestrian bridge that crosses the Metra tracks to the Museum Campus where the Field Museum was eventually built, there is a small bust of Montgomery Ward with an inscription

the plat map inscriptions could not be condemned away). But, Ward won again. *Id.* at 915.

159. WILLE, *supra* note 134, at 78.

160. *Id.*

161. KAMIN, *supra* note 124, at 298.

162. At the last minute before the Field bequest was set to expire, the South Park Commission and the Illinois Central Railroad reached agreement for the museum to be built just outside the southern boundary of Grant Park on land that was exempt from the prescriptive easement related to open space created by the 1830s plat maps. WILLE, *supra* note 134, at 80.

163. *Id.*

164. *Id.*

165. *Id.* at 71.

166. In one of only a few of his public comments on the litigation, he was reported to have said: "Perhaps I may yet see the public appreciate my efforts. But I doubt it." *Id.* at 80.

commemorating his battle to preserve Grant Park.

But Ward's battle to stop the Field Museum would not be the last legal battle over Grant Park. The legal tangles over the meaning of the inscriptions on the subdivision plats of the 1830s have gone on to this day. The Art Institute had originally been allowed to build in Grant Park because it had obtained the consent of all adjacent property owners.¹⁶⁷ The 1897 *City of Chicago v. Ward*¹⁶⁸ decision recognized this method—in effect, a reincarnation of the old frontage consent laws—as one of the legal ways of voiding the open space restrictions on the old plat maps.

The third of the Ward cases, the 1909 *Field Museum* case held that the plat map inscriptions prohibited “buildings” but not other “structures . . . absolutely necessary for the comfort of the public and the proper use of the park.”¹⁶⁹ The Illinois Supreme Court mentions storm shelters, “band stands, lavatories, toilets, and the like” as “absolutely necessary” structures in a public park and also differentiated between construction above and below the surface of the ground.¹⁷⁰

In 1952, the Illinois Supreme Court again heard a case involving Grant Park. The Chicago Park District proposed constructing the Grant Park underground parking garage. A Michigan Avenue building owner relying in part on the three Montgomery Ward cases filed suit to stop the construction. The Illinois Supreme Court in *Mich. Boulevard Bldg. Co. v. Chi. Park Dist.*¹⁷¹ allowed the construction of the underground garage to proceed. As support, it cited the distinctions between above ground and underground construction and between buildings and structures referenced in the *Field Museum* case.¹⁷² While it labeled the underground garage itself as a “building,” the vents and air intakes that would be above ground were “structures” that would be landscaped in such a way as not to block the views across Grant Park.¹⁷³ The garage and its above ground “structures” were therefore allowed under the distinctions made in the previous Ward decisions.¹⁷⁴

167. Montgomery Ward later said he “regretted not fighting the Art Institute construction.” *Id.* at 75. Later the Art Institute successfully argued that its expansions to the east into Grant Park were also covered by the original vote since the additions were to the east and did not extend the 400 foot Michigan Avenue frontage as originally approved. *Id.* at 75.

168. 48 N.E. 927 (Ill. 1897).

169. *Field Museum*, 89 N.E. at 736.

170. *Id.*

171. 106 N.E. 2d 359 (Ill. 1952).

172. *Id.* at 361.

173. *Id.* at 362.

174. *Id.* The Court would not go so far, however, as to rule that any type of “structure” was automatically allowed in Grant Park: “it is drawing too fine a line of distinction to say that the erection of structures generally would not be

The plaintiffs in the *Mich. Boulevard* case also wanted the Illinois Supreme Court to declare that the inscriptions on the 1830s maps restricted Grant Park to “park uses” only. The Illinois Supreme Court rejected that argument. Nothing in the original map inscriptions described the lands as restricted to “park” use¹⁷⁵ and this distinguished the Grant Park situation from the facts in a number of other cases in which the Illinois courts had ruled that dedications for park purposes imposed a more severe set of restrictions on use.¹⁷⁶

Montgomery Ward would have been clearly upset by the ruling in the *Mich. Boulevard* case that the dedication on the plat maps did not restrict the land in front of Michigan Avenue to park use. In his interview with the CHICAGO TRIBUNE in the wake of the Field Museum case, he called the land east of Michigan Avenue “park frontage on the lake.”¹⁷⁷ He would also have likely been dismayed by the *Mich. Boulevard* case distinction between “structures” (allowed subject to judicial review) and “buildings.” In another lawsuit, he had unsuccessfully attempted to enforce the view restriction by enjoining the installation of overhead electric trolley car lines on Michigan Avenue.¹⁷⁸

The *Mich. Boulevard* decision cleared the way for Grant Park and Millennium Park as we know them today. Improvements are carefully constructed to be structures (including music pavilions) rather than buildings and much of the infrastructure is located below ground.

Burnham continues to receive virtually all of the accolades for the preservation of Chicago’s lakefront. As Blair Kamin of the CHICAGO TRIBUNE has put it, “[t]he lakefront and its parks represent a legacy of incalculable value, a testament to visionaries such as Daniel Burnham, who . . . recognized that public spaces made better democracies, better citizens, and better lives.”¹⁷⁹ In the case of Grant Park, at least, more acclaim should be given to Montgomery Ward than to Daniel Burnham.

in violation of the spirit of the restrictions in the original dedications.” *Id.* at 362.

175. *Id.* at 360.

176. See e.g., *Village of Riverside v. MacLain*, 71 N.E. 408 (Ill. 1904) (enjoining property owners from constructing a road through a park that was dedicated for public use); *Village of Princeville v. Auten*, 77 Ill. 325 (Ill. 1875) (affirming the trial court’s decision to prevent the village from building its town hall on a space that had been dedicated as a “public square”).

177. WILLE, *supra* note 134, at 80.

178. *Chicago City Railway Co. v. Montgomery Ward & Co.*, 76 Ill. App. 536 (1898).

179. KAMIN, *supra* note 124, at 298.

POSTSCRIPT: REINVENTING THE BURNHAM VISION TODAY

And so, Grant Park today reflects a combination of two visions, the Burnham vision of a cultural center and the Ward vision of an open space preserved for the people of Chicago. It is that perfect tension between the Hamiltonian democratic (Republican) vision of Burnham as evidenced in the leadership of the Chicago business and civic community in assuring the funding for such cultural facilities as the Art Pritzker Pavilion and the Ward vision of a democratic park for the every day working people and families of his era in a crowded congested city.

The final Chapter of the *Plan* laid out very clearly the central question that faced us as citizens and lawyers in 1909 and still face us today when it comes to new plans for Chicago. "And what hope is there that the people will desire to make Chicago an ideal city?"¹⁸⁰ An important part of the impetus for the 2010 celebration of the centennial of the 1909 *Plan of Chicago* is to allow us to pause and ask, "What will be our new vision for Chicago?"

Law students, lawyers and judges, like architects and political and business leaders, during this celebration of the Burnham/Bennett plan centennial need to find inspiration and a renewed commitment to the spirit of the 1909 *Plan of Chicago*. They need to understand and respect the importance of land use law and development regulation to our quality of life. In a time of budget constraints at every level of government, lawyers need to continue to recognize that we must continue to commit our public fiscal resources to accomplish great projects and to form public private partnerships such as was done in the effort to create Millennium Park and the attempt to bring the Olympics to Chicago.

And so over the past year, the City of Chicago has been celebrating the centennial of Daniel Burnham's visionary plan for Chicago. The centennial celebration did not involve major new public works projects to, for example, complete the lagoon and island system envisioned along Chicago's lakefront. Nor did it involve the construction of any major monuments to Burnham—although one is proposed for the front lawn of the Field Museum. Instead, it has been about finding new inspiration for planning Chicago.

180. PLAN OF CHICAGO, *supra* note 1, at 119.

The inspiration for law students and young lawyers in particular can be found in the following words from the legal appendix to the 1909 *Plan*:

The purpose of an inquiry into the legal aspects of the *Plan of Chicago* is to ascertain to what extent and in what manner the *Plan* can be carried out under the existing laws, to suggest such additional legislation as may be necessary or desirable, and to consider how far such legislation is controlled or prevented by existing constitutional provisions.¹⁸¹

As Daniel Burnham also put it so well, “Let your watchword be order, and your beacon beauty.”¹⁸²

181. *Id.* at 127.

182. Attributed to Daniel Burnham.

