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Zoning Morality--An Abuse of the Legislative Grant

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ZONING MORALITY— An Abuse of the Legislative Grant?

> Talk about morality, but be vague! Whisper if possible . . . If you bring in childrens' morality, so much the better. It doesn't matter that everyone knows you are speaking nonsense. An official won't want to take the chance, however slight, that people will think he advocates immorality.[1]

This history of zoning in the United States is "old hat." The theory developed as the country grew and its cities sprawled; it became apparent that much harm was being done the cities by their failure to have "a *raison d'etre*" to coordinate their rapid development. Our largest city, New York, led the way with it's comprehensive zoning regulation of 1916.[2]

Just ten years after the New York City plan was established, the United States Supreme Court gave its approval to the concept of zoning as we know it today in *Village of Euclid v. Amber Realty Co.*[3] That case ushered in the Standard Zoning Enabling Act to meet the urgent demand of cities for municipal zoning legislation, and that act with revisions, now forms the basis of zoning statutes in most states.[4]

A workable definition of what zoning is hoped to be today can perhaps best be had from those who must deal with it in any large city, the city or municipal body-politic. Accordingly, zoning has been defined by those charged with the responsibility of developing and administering planning

[1] This is typical tongue-in-cheek advice from an "expert" to a newly arrived suburbanite on how to get along with various boards. Finston, *So You Want To Win a Variance and Influence Your Township Board,* 15 Zoning Digest 345, 346 (1963).

[2] Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). (regulation held to be valid exercise of police power).

[3] 272 U.S. 365 (1926).

[4] *Eg.* OKLA. STAT. tit. 11 §§ 401-10 (1961).

and zoning programs as "the division of a community into districts for the purpose of regulating the use of lands, the height or bulk of buildings, the proportion of lot that may be covered by them, and the density of population."[5]

The purpose of zoning seems simple enough. One authority on the subject believes it has a two-fold purpose:

> one, to preserve the true character of a neighborhood by excluding new uses and structures predjudicial to the restricted purposes of the area, and gradual elimination of such existing structures and uses; and, second, to protect an owner's property or existing residence, business or industry from impairment which would result from enforced accommodation to new restrictions.[6]

All of this is, of course, wonderful; a well developed assault on a problem of our burgeoning country, a powerful tool for a mammoth task, which if utilized correctly will yield the desired—nay necessary—solutions of our complex country's land-use problems.

Now enter the villain: the overloaded, overworked zoning ordinance occasionally misused, often times abused; the zoning ordinance that ". . . reaches too far out, extends too far along, or goes too far into."[7]

This comment is submitted to illustrate that the advice to the newly arrived suburbanite is not so much "tongue-in-cheek," but rather serious case-proven advice on how to keep out, or get out, what is wanted out, for any number of reasons other than morality.

But let the reader decide for himself whether the following cases represent a victory for sound, rational, honest efforts to further the legitimate goals of planning and zoning or are examples of ". . . the use of the zoning ordinance to reinforce local social biases, which, were they not cloaked

[5] The International City Managers Association, *Local Planning Administration* 218 (1948).
[6] 1 Yokely, *Zoning Law and Practice* § 11 (2d ed. 1920).
[7] Craig, *Zoning is Not a Cure-All: Overworked Zoning and a Remedy* 6 Institute On Planning and Zoning 163, 165 (1965).

in police power, would be condemned out of hand by the courts . . .,"[8] and reluctant adjudication of ". . . very speculative and improbable future neighborhood squabbles . . ."[9] about which the courts know or care very little.

Morality and Billboards

After the turn of the century, Americans witnessed a mushrooming of billboards and advertising posters on almost every vacant lot and corner. Public reaction brought about ordinances and statutes regulating, and in some instances, entirely prohibiting billboards. However, most of those ordinances were short lived upon reaching the courts.[10] Yet, in spite of this, popular reaction grew stronger with greater defacing of the countryside; it was inevitable that the courts would be unable to restrain the much-pressured public officials any longer.

The court in an early Missouri case[11] found a convenient way out of this dilemma. The doctrine prevailing at the time—that the police power could not be used for purely aesthetic purposes—was reiterated. However, regulations based on aesthetics plus consideration of the public health, safety, and morals could be sustained as a proper exercise of the police power.

The court relied heavily on considerations of morality in reaching their decision. Billboards, the court said, "endanger the public health [and] promote immorality.... [T]he evidence also shows that behind these obstructions the

[8] Babcock, *Mr. Commissioner, Are You Prepared For Cross Examination?* 3 Institute on Planning and Zoning 155, 163-164 (1962).

[9] Clemons v. City of Los Angeles 3 Cal.2d 95, 222 P.2d 439, 448 (1950) (*Dissenting Opinion*).

[10] Varney & Green v. Williams 155 Cal. 318, 100 Pac. 867 (1909); Crawford v. City of Topeka, 51 Kan. 756, 33 Pac. 476 (1893); Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 Atl. 342 (1904).

[11] St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed* 231 U.S. 761 (1913).

lowest form of prostitution and other acts of immorality are frequently carried on, almost under the public gaze. . . ."[12]

A few years later, in an Illinois case,[13] the same spectre of the "nasty" billboard arose in the guise of evidence submitted to show ". . . that dissolute and immoral practices were carried on under the cover and shield furnished by these billboards."[14]

Recently, this same case was cited to show that ". . . [I]t has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards . . . [j]ustify the separate classification of such structures for the purpose of governmental regulation and restriction".[15]

Morality and Motels

In a sprightly article,[16] Richard F. Babcock, a practicing attorney, relates an anecdote about one of his friends who was representing a plaintiff who had been refused a permit for a motel in a district where hotels were permitted. The motel, if built, was to be near a high school. Of course, the municipality called the president of the school board to testify in its behalf. His testimony was that it would be unwise to permit motels close to schools because motels were frequently conducive to immoral practices. Mr. Babcock relates: "My friends' cross-examination was brief. In essence he asked the witness if he had any children? He did. Did he take them on vacations with him and his wife? He did. Did he travel by car? He did. Where did he lodge himself, his wife and children? In motels of course."[17]

If billboards are nasty, motels are downright filthy. They have come in for an inordinate amount of name calling

[12] *Id.* at ———, 137 S.W. at 942.
[13] Thomas Cusack Co. v. Chicago, 267 Ill. 344, 108 N.E. 340 (1915), *affirmed* 242 U.S. 526 (1917).
[14] *Id.* at ———, 108 N.E. at 343.
[15] United Advertising Co. v. Borough of Raritan, 11 N.J. 144, ———; 93 A.2d 362, 365 (1952).
[16] Babcock, *op. cit. supra* note 8.
[17] *Id.* at 167.

and black listing by protestants and accordingly, local zoning boards. The objections to the introduction of motels into a more or less compatible use district, are suspiciously familiar to the advice of the suburbanite. "For example, lets say some one wants to build a motel and you want to oppose it. Speak quietly and earnestly: 'Motels tend to lessen morality in a community.' "[18]

There are few direct references to immoral motels as such, perhaps because this issue is raised much more frequently at the public hearing stage and left out of the reported cases.[19]

One such reference appears however in the dissenting opinion of a New Jersey case[20] which by a four to three decision kept a motel out of a district allowing rooming houses. The judge focused on the remarks made in an argument by the mayor and town council to the effect that it was their ". . . expressed conviction . . . [t]hat such structures offer great temptation to the conduct of immoral actions . . ."[21]

There are some cases at the appellate level that do overrule the pious prattle mouthed at the public hearing and upheld at the trial court level, but these are few, perhaps due in some degree to the expense of the litigation involved. In one such case, decided in Illinois[22] the court saw through the allegations of immorality to reach its decision that an amendment to an ordinance excluding motels was unreasonable and arbitrary. This enlightened court in its unanimous opinion recited that, "it is apparent that the enactment of this ordinance was more emotional than necessary. The evi-

[18] Finston, *op. cit. supra* note 1, at 346.
[19] In a letter to the author from the American Society of Planning Officials prior to the writing of this comment, this very thing was indicated as very often being the case. It was indicated that the morality issue was very often raised at the public hearing stage but by the time it got to court, a "less arbitrary rationale" was usually adduced.
[20] Pierro v. Baxendale, 20 N. J. 17, 118 A.2d 401 (1955).
[21] *Id.* at ———, 118 A.2d at 409.
[22] Nott v. Wolff, 18 Ill.2d 362, 163 N.E.2d 809 (1960).

dence fails to show any adverse effect on the public health, morals, safety or welfare by the erection of the proposed motel . . . ."[23]

A later case in Rhode Island[24] overruled the lower court, which had held that a motel in close proximity to a race track would not bring about a due observance of public health, safety and morals. The court says of this: ". . . other than the fact that the race track is near, there is no evidence upon which this reason could be based."[25] The court adverted to an earlier case[26] in its decision and reiterated its holding that Boards of Review may view the locality and exercise its discretion in matters known to its members, but admonished however, that the board is bound in so doing to act without prejudice.[27]

A later case from Pennsylvania[28] involved land owned by the Urban Redevelopment Authority of Pittsburg which was up for sale for $196,000.00. The plaintiff offered $200,000.00 for the land, proposing to use it as a site for a drive in hotel or motel, which was qualified as a proper use for the district. The Authority rejected the bid by letter, stating in essence that though the proposed use was technically in line with the plan for the district "it would not be ideally compatible" with either the other existing commercial uses or with residential development. After the rejection of the plaintiff's offer, the Authority entertained a proposal from the Bell Telephone Co. at $196,000.00 for the land, to house an electronic computer to prepare bills for Bell's customers. On review, the Authority's decision was reversed as being arbitrary and capricious.[29] One dissenting

[23] *Id.* at ———, 163 N.E.2d at 813.
[24] D' Amico v. Bd. of Appeals of City of Pawtucket, 170 A.2d 287 (R.I. 1961).
[25] *Id.* at ———, 170 A.2d at 288.
[26] Hefferman v. Zoning Bd. of Review of City of Cranston, 51 R.I. 26, 144 Atl. 674 (1929).
[27] *Id.* at———, 144 Atl.2d at 676.
[28] Schwartz v. Urban Redevelopment Authority of Pittsburg, 411 Pa. 530, 192 A.2d 371 (1963).
[29] *Id.* at ————, 142 A.2d at 375.

judge however, thought that the first reason adduced by the Authority, that ". . . [t]he proposed use would attract transients into the area, a situation which was thought to be undesirable . . ." was part of its ". . . carefully deliberated decison based on the reasoned opinion of experts."[30]

Mobile Homes — Trailers

Trailers and trailer camps have been under public indictment for a long time.[31] No one will admit the hostility openly, but the cases dealing with the subject give an insight into a general community dislike for dwellers in mobile homes as they are known today.

An early Michigan case[32] was very explicit in stating that trailer living caused immorality among trailer children. The court recites the claims of the protestants that these children

> acquire a precocious knowledge of sex matters which should normally come to them later and more naturally . . . . [T] he common use of toilets and bathing facilities by members of the same sex of different ages create undesirable situations with potential danger to the morals of the young. . . .[33]

In holding against trailers the court candidly states: "ordinances having for their purpose . . . the attraction of a desirable citizenship are within the proper ambit of the police power."[34]

In a later Michigan case, *Gust v. Tp. of Canton,* the township clerk testified that the local townspeople had pressured him to eliminate the trailers within the community.[35] Such pressure by local groups who believed that trailer parks

[30] Schwartz v. Urban Redevelopment Authority of Pittsburgh, *supra* note 28, at ———, 192 A.2d at 376.
[31] Comment, *Regulation and Taxation of House Trailers,* 22 U. Chi. L. Rev. 738 (1955).
[32] Cady v. City of Detroit, 289 Mich. 419, 286 N.W. 805 (1939).
[33] *Id.* at———, 286 N.W. at 807.
[34] Cady v. City of Detroit, *supra* note 32, at ———, 286 N.W. at 810.
[35] 337 Mich. 137, 59 N.W.2d 122 (1953).

". . . frequently attract a nomadic promiscuous and careless population"[36] was understandable.

Much the same argument was made in a recent New Jersey case[37] which upheld the complete exclusion of trailers from an entire township. Oral arguments in the early stages of this case revealed that the local reasons for the restrictive action was based on the idea that ". . . people who lived in trailers were a shifting population without roots and did not make good citizens. . . ."[38]

Liquor and Morality

Zoning restrictions and regulations on the liquor business follow the same pattern as the uses already discussed at this juncture. Perhaps due to the "Carrie Nation-like" influences of some groups, (W.C.T.U. and certain religious denominations) liquor just doesn't stand a chance if one or more such group is against it. This causes a general reliance on these well established biases and prejudices on the part of Boards and protestants to the Boards that is largely responsible for decisions against liquor, as also is of course, the protection of children's morality.[39]

A few sample cases illustrate the "down with liquor" reasoning some courts have used. The case of *Saladino v. City of South Beloit*[40] upheld a zoning ordinance permitting seventy-five other sales and service uses but prohibiting the operation of a tavern in the district stating:

> . . . many reasons related to the public welfare, safety and morals may be suggested which cause it to be both desirable and reasonable that shopping and service areas

[36] Crawford v. Wesleyville, 68 Pa. D. & C. 215, 218 (1949).
[37] Vickers v. Tp. Comm. of Glouchester Tp. 37 N.J. 232, 181 A.2d 129 (1962).
[38] *Id.* at ———, 181 A.2d at 148 n. 4.
[39] "Talk about children, how they are apt to stroll into liquor stores in shopping centers and be corrupted, how they are apt to see their Daddies staggering out of the liquor store while they are shopping with their Mommies in other portions of the center." Finston, *op. cit .supra* note 1, at 346.
[40] 9 Ill.2d 320, 137 N.E.2d 364 (1956).

> of a city's business districts, to which its citizens are drawn to fulfill their daily needs, be kept from the influences attendant to tavern operations . . . . [T]he differences between a tippling house and other business permitted . . . as well as the relative evils they present to the public need not to be elaborated on.[41]

A later case from Pennsylvania[42] decided that a taproom to purchase and remodel be rezoned and closed. The court found that the record was replete with testimony not only about the conduct of patrons of the taproom "shocking and repugnant to the sensibilities of decent persons"[43] but that this conduct took place ". . . at times in the presence of children who passed the restaurant en route to and from . . . school. . . ."[44]

Beer and liquor were kept out of a bowling alley in an exclusive class A residential district in *Plaza Recreational Center v. Sioux City*.[45] The Iowa Supreme Court overruled the trial court in this case for basically the same reasons given by the courts in the preceding cases.[46]

In a 1961 case,[47] the Mississippi Supreme Court upheld the zoning out of the sale of beer and wine in a strip of land bordering two adjoining counties. The Board of Supervisors had originally acted on petitions signed by numerous citizens asking protection from indiscriminate sale of beer and wine which they thought was corrupting community morals and making for difficult law enforcement. The plantiffs in the case had been tavern owners for some time in the area and made several objections among which were that

[41] *Id.* at ———, 137 N.E.2d at 367.
[42] Reid v. Brodsky, 397 Pa. 463, 156 A.2d 334 (1959).
[43] *Id.* at ———, 156 A.2d at 338.
[44] *Ibid.*
[45] 111 N.W.2d 758 (Iowa 1961).
[46] ". . . the consumption of beer in public establishments in that area such as bowling alleys, . . . would affront the residents for whom the area was developed. . ." *Id.* at 763.
[47] Herbert v. Bd. of Supervisors, 130 So.2d 250 (Miss. 1961).

the order adopted was unreasonable, arbitrary and capricious; that it violated their constitutional rights inasmuch as their good locations for the sale of beer in the area prohibited could not readily be disposed of, and that as a result, the Board's order would result in deprivation of property without due process of law. The court rejected this reasoning and concluded:

> It is obvious from the findings of the Board of Supervisors in this case, that the sale of beer and light wine along the county line adjoining counties in which such sale is prohibited constitutes a difficult law enforcement problem, and under the conditions disclosed by the record, we think it can not be said that the order complained of is unreasonable, arbitrary or capricious, or beyond the power of the Board to make. . . .[48]

Zoning Redefined

Zoning is based on the police power which is to protect the general welfare or the public health, morals, safety and welfare. But what is morality or morals? No one really knows,[49] but all admit that it is there and should be protected. However, what has been persistently though barely audibly criticized, is abusing the police power to zone, overloading the ordinance to do things never really intended to be sanctioned by legislative grant; ". . . the many practices being employed in the field of . . . zoning which unquestionably evidence an abolishment of the basic principle of government by law and substitute different degrees of government by men."[50]

Billboards Revisited

Billboards as we have seen were first considered to be downright immoral and this contention won out many times. As a matter of fact were they really so? One Massachusetts

[48] *Id.* at 253.

[49] *Webster* gives six definitions of morality; *Words and Phrases* lists 15 pages of case note definitions. Vol. 32A 430-445.

[50] Whitnall, *Moral and Legal Pitfalls Along the Paths of Planning Commissions*, 4 Institute on Planning and Zoning 1, 5 (1963).

court[51] decided to find out and appointed a special master to investigate. After 114 days of evidence he reported that though there were a few instances of billboards hiding immoral or criminal activity, by and large they were not all that bad.[52] However, such evidence as this was for the most part ignored and "nasty" billboards continued to be restricted and prohibited by use of the police power.

On this doubtful premise, another element entered the picture—aesthetics. Zoning for aesthetic purposes alone had not yet been judicially countenanced, but why not tie aesthetics to public health, safety and morals and get rid of those unsightly if not so nasty billboards—shift the emphasis a little! This was done but did not escape judicial criticism. Several courts clearly saw through this subterfuge of doing indirectly what was illegal directly.[53] Rathkopf, no small authority on zoning, had similar criticism for the holding of the court that originated this idea;

[51] General Outdoor Advtng. Co. v. Dept. of Public Wks., 289 Mass. 120, 193 N.E. 799 (1935), *appeal dismissed* 297 U.S. 725 (1936).

[52] "In some isolated cases, certain signs and billboards had been used as screens to commit nuisances, hide law breakers and facilitate immoral practices . . . . These instances were all so rare compared with the total number of signs and billboards in existence that I am unable to find upon the evidence, that signs and billboards in general as erected and maintained . . . have screened nuisances or created a danger to public health or morals or facilitated immoral practices". *Id.* at ———, 193 N.E. at 809.

[53] Murphy v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944), Record, Vol. A-201, p. 11. "Adverse public opinion against unsightly signs along highways probably had much to do in the rapid change of legal thought. This public opinion was not concerned with thoughts of safety, morals or welfare. It was occasioned by the disfigurement of the landscape and by the marring of the beauty of nature. Yet the courts, somewhat sophistically it seems to me, with many protestations against unsightly signs along highways probably had much to fantastic reasoning, that what had previously no relationship to public safety and morals had now developed into a public nuisance." United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447, 450 (1964) dissenting opinion; "Many police

> What evidence there was before the Missouri court to sustain these facts[54] is difficult to ascertain. The so called facts which related to the police power and the proper exercise of the police power were probably mere rationalizations, the primary purpose of the legislation being relief against the unsightliness of billboards. Public opinion demanded this holding.[55]

MOTELS REVISITED

It is not too difficult to see what is really behind the accusation that a motel is immoral, some public officials come right out and admit that they are really not so bad, "but not in our town." They contend that for such valid and legitimate purposes as motels serve the traveling public, ". . . accommodations may be had in the neighboring municipalities . . . "[56] This was too much for one dissenting judge who exclaimed: "this community-wide interdiction evinces, I would suggest, a basic misconception of the philosophy of zoning and the constitutional and statutory

power regulations are upheld where the true but unexpressed basis is that the activity or condition is considered by practically everyone to be an eyesore or offensive to some other taste." Dukeminier, *Zoning for Aesthetic Objectives; A Reappraisal* 20 LAW & CONTEMP. PROB. 218, 220 (1955).

[54] St. Louis Gunning Advertising Co. v. City of St. Louis *supra* note 11.

[55] 1 Rathkopf, *Zoning and Planning* § 11-11 (1965), Rathkopf is pointing out an interesting phenomenon of the reasoning process of today's appellate court, adverted to in depth by a Yale Law Professor, Quinton Johnstone: "Courts sometimes are loathe to consider questions that require access to factual data that they feel ill equipped to obtain or evaluate . . . . To determine the rightness of legal doctrine may require knowledge as to how it will affect innumerable persons and institutions not before the court and the court under such circumstances ordinarily has no way of ascertaining this data . . . . Most legal doctrine is part of a self contained system of principles having no necessary relation to observable facts." Johnstone, *Judicial Consideration of Moral Doctrine in Government Land Use Control Litigation,* 8 KAN. L. REV. 1 (1959).

[56] Pierro v. Baxendale, *supra* note 20, at ————, 118 A.2d at 409, *dissenting opinion.*

zoning process."[57] Such practices are pointed out as being the antithesis of zoning.[58]

Trailer—Mobile Home Revisited

The history of the old trailer court litigation shows that rather than assimilate and regulate trailer homes by enforcing strict health measures, the hostility of the neighborhood generally sought to either completely exclude them, or impose inequitable restrictions on them such as restricting the length of their stay, or allowing officials discretionary powers to put trailers in certain zones.[59] Protest against this subversion of zoning has been continuous and apparently well justified.[60]

The current prejudice against mobile home dwellers may be unreasonable, but it is as much present today as it ever was. As late as 1962, mobile homes were completely kept out of a New Jersey Township and sanctioned by the state's highest court.[61] This decision produced one of the bitterest dissents ever reported, an eleven page out-pouring of welled up disgust for the accumulation of this particular abuse of the zoning grant; an ominous warning to municipalities and courts that they "can no longer refuse to recognize its [trailer living] proper and significant place in todays

[57] *Ibid.*

[58] The International City Managers Association. *op. cit. supra* note 5, at 220. "Zoning is not nuisance legislation which may be used to exclude undesirable uses from a community. Zoning should not be used by a community to dump on its neighbors, its own essential community services even though the services be disagreeable."

[59] *op. cit. supra* note 31, at 744.

[60] Am. Soc'y. of Planning Officials, Planning Advisory Service, *Information Report* 84, 12, 22 (1956).
"Because people who live in conventional dwellings have tended to display prejudiced or uninformed attitudes about trailer life, there is real need for unbiased inventories . . . . [Whether] the once existing prejudice against trailers was ever justified is questionable; certainly today such prejudice is unreasonable."

[61] Vickers v. Tp. Comm. of Gloucester Tp. *supra* note 37.

society and should stop acting on the basis of old wives tales."[62]

TAVERNS OR TEETOTALING

In no area of zoning law does simple "community disapproval" wield such influence as with taverns and liquor stores. Judicial bias sometimes shows through, as indicated

[62] *Id.* at ———, 181 A.2d at 148 *dissenting opinion.* Justice Hall apparently knew what he was talking about, in 1965, there were mobile home sales in excess of $1.2 billion, which accounted for 76% of the under $12,500 new home starts, *Business Week,* Sept. 3, p. 148. Other data about the mobile home dweller is very revealing. Mobile Homes Manufactures Association, *Flash Facts about Mobile Homes and Recreational Vehicles,* May 1966.

MOBILE HOME DWELLERS

More than 4 million people live in mobile homes. The average mobile home family size is 2.7 persons.

Age Groups	Total U.S. Mobile Home Household Heads*	All U.S. Household Heads*
34 and Under	43%	24%
35 to 44	17	22
45 to 54	15	20
55 and over	25	34
Income		
$ 4,999 and under	52%	47%
$ 5,000 to $6,999	23	21
$ 7,000 to $9,999	14	17
$10,000 and over	11	15
Occupations		
Professional, technical	5.1%	8.6%
Managers, proprietors	5.1	8.8
Sales workers	2.8	5.1
Clerical	3.9	6.7
Craftsmen (skilled)	21.4	15.2
Operatives (semi-skilled)	18.8	15.3
Service	4.4	5.2
Laborers	6.8	5.7
Household workers	.5	.9
Farmers	1.1	4.2
Military	7.8	1.5
Other (retired, semi-retired, no occupation)	22.3	22.8

*Based on 1960 U.S. Census covering 800,000 households.

Since World War II, there have been 2,006,560 mobile homes produced; 70% of these are currently in use as primary year-round dwelling units.

by the remarks of an Illinois Judge calling a tavern a "tippling house."[63]

We have seen that the difficulty of policing untoward motel practices has been relied on a basis for their exclusion, with morality thrown in for good measure.[64] The same devious reasoning takes place when outlawing liquor. In *Hebert v. Bd. of Supervisors,* already adverted to,[65] the reasons for drying up a section of land bordering two counties included the fact that law enforcement officers had been having a hard time enforcing the law; even the sheriff had been obstructed by physical violence from doing his sworn duty. To clinch the argument however, it was of course alleged that the morals of the community were being corrupted.[66]

What more can be said of this practice than what Justice McBride said dissenting in *Reid v. Brodsky*:[67] "To visit upon this lawful business the penalty of extinction because of community disapproval seems to me to flout the mandate of the legislature . . . ."[68]

Summary

We have attempted to portray in the cases mentioned, examples of a suspect and questionable exercise of the police power, examples of a variety of pressures causing a pharisaical retreat by Commission Boards and Judges to the sanctuary of the protection of morals doctrine when what is called for is the courage to openly label and condemn this "discrimination by subterfuge."[69] The effects of this neglect of duty are vividly present. What is not so apparent, however, is how this all came about, what intangible ingredients have been thrown together by local custom and the courts

[63] Saladino v. City of South Beloit, *supra* note 40, at ———, 137 N.E.2d at 367.
[64] *E.g.,* Pierro v. Baxendale, *supra* note 20.
[65] *Supra* note 47.
[66] *Id.* at 251.
[67] *Supra* note 42.
[68] *Id.* at ———, 156 A.2d at 343.

to account for this abuse of the legislative grant. The following are submitted as being at least, partial causes.

A. Pressure Tactics

There are first of all the pressure tactics often used by protestants. These take the form of back handed whispers, replete with innuendo and insinuations that whatever it is, "it is immoral." Also present in some council halls and courtrooms is ballyhoo by the busload wherein it is impossible to effect sound planning, zoning or adjudication within even fair-play limitations, let alone within the ambit of the legislative grant.[70]

B. General Apathy

Also present is a wide spread general apathy or ignorance of what is taking place, especially by the professionals in both the planning and zoning as well as the legal fields. Norman Williams, Jr., attorney and Director of the Department of City Planning of New York City brought this problem into sharp focus a few years back.[71] Mr. Williams expresses alarm at the many examples of the abdication of responsibility in zoning matters.

> What is particularly serious is that in this area, the machinery of democratic government is itself often used successfully for anti-democratic ends, and that courts, constitutional lawyers and the leaders of democratic thought and action remain unconcerned . . . . [They] are all too often so confused with abstractions (health, safety morals and welfare, character of the neighborhood), and are full of respect for local autonomy and so fearful

[69] Johnson, *Constiutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 200 (1955).

[70] American University v. Prentiss, 113 F. Supp. 389, 392 (1953) *affirmed* 214 F.2d 282 (1954). "The atmosphere of the proceeding was not conducive to calm deliberation; organized bus loads of angry property owners filled the hearing room and frequently interrupted witnesses and counsel by booing and hissing or applauding."

[71] Williams, *Planning Law and Democratic Living*, 20 LAW &

> of judicial review generally as to be unable to understand the implications of what is going on.[72]

Just a few years ago, another attorney and planner, Gordon Whitnall, reemphasized the caveat of Mr. Williams in foreboding terms.[73]

Many causes have been pointed out for this apathy, one of which is the fear by attorneys of repraisals by boards for too vigorous pleading, or for appealing,[74] another being that "zoning cases are usually handled by small time lawyers for a small time fee and therefore are done in a hurry."[75]

C. Insufficient Record — Insufficient Review

The most blatant defect in a proper procedure for review of board actions is that there is nothing to review! These agencies seldom explain in writing why they reached their

CONTEMP. PROB. 317 (1955).

[72] *Id.* at 349-350.

[73] Whitnall, *op. cit. supra* note 50. In the introductory paragraphs of this article Mr. Whitnall suggests alternate titles for the article, *"Are Trends in the Fields of Community Planning Jeopardizing Our Form of Government,"* or, *"Is Planning — Especially Zoning—Classifiable as Subversive Movement."* He continues and speaks of ". . . types of practices performed in the field of planning which gradually and regretably are developing a new and dangerous footpath across the meadow of time and which in another form is developing habits in the body politic that can lead ultimately only to the adoption and practice of the philosophy of Hitlers' and Mussolinis' in place of Washington and Lincoln . . . . We teach young people in school and as adults, we have come to believe that ours is a governmen by law and not a government by men . . . . Do we practice what we preach and teach? Or are we chipping at the keystone that holds the arch of our society?"

[74] Babcock, *Mr. Commissioner, Are You Ready for Cross Examination, op. cit. supra* note 8, at 156, n. 4.

[75] Williams, *op. cit. supra* note 71, at 318, n. 3. "Many opinions read as if (as was probably the case) the lawyers considered their job done when they had found the leading zoning cases in their own jurisdiction and then copied out long passages of vague language about property rights, due process, the police power and public health, safety and general welfare, which then end up as the first few pages of the courts opinion."

decisions, perhaps they don't dare; that way no one can very successfully challenge the exercise of their discretion. As one author puts it, "Never explain; otherwise you are lost" is a tested doctrine profitably employed by most successful sovereigns, and it continues to be the motto of many boards, in spite of judicial admonitions that it is not sufficient."[76]

However, even with a record of sorts the "twin shibboleths of presumption of validity of municipal action and restraint on judicial review if proofs do not overcome it beyond debate"[77] quite effectively frustrate a successful attack by a petitioner. This rule that in discretionary matters and findings of fact, the board's decision shall be final, has been trenchantly attacked: "Thus by mumbling an incantation, the bureaucrat forecloses effective Judicial review . . . . [There] are many things that this is . . . but one thing it is not: due process.[78]

Conclusion

Zoning is necessary today more than ever. But it is a power able to be easily abused as the cases indicate. Perhaps it should be candidly conceded that the standards need revision. Perhaps we should ask ourselves; is the public interest really public?

It is not contended that zoning should be abolished or that billboards, motels, mobile homes and taverns should be allowed to be located indiscriminately; what is suggested though it is that today due to the dangerously powerful legislative grant of zoning authority to cities it is too easy to abuse. It is submitted that very often today a use that has been considered a potential nuisance is zoned out without giving the good faith honest petitioner a chance. With the

[76] Babcock *op. cit. supra* note 8, at 159-160.

[77] Vickers v. Tp. Comm. of Gloucester Tp., *supra* note 37, at——, 181 A.2d. 143.

[78] Tireman-Jou-Chicago Improvement Assn. v. Chernick, 361 Mich. 211, 214, 106 N.W.2d 57, 58-59 (1960).

zoning power it is far easier to prohibit entirely than take the trouble to regulate.

Another relevant question could be asked; How does the economics of the municipal tax structure affect the decisions of Boards? A building to house electronic computers would certainly pay more taxes than a motel!

There are these and several more questions that require urgent attention; several more examples of board and commission evidencing a definite abuse of the legislative grant.

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