Notre Dame Law Review

Volume 34 | Issue 4 Article 7

8-1-1959

Book Review

John M. Anderton

BOOK REVIEW

ZONING FOR MINIMUM LOT AREA. By T. Rogers, W. Rabin, D. B. Gibbons, J. Stephenson III. Philadelphia, Pennsylvania: University of Villanova Press, 1959. When Easttown Township, Pennsylvania, enacted a zoning ordinance in 1940, the township legislators could scarcely have predicted that their particular zoning ordinance would attract national interest, and would even be the subject of a book.

A "Town Hall Meeting" was held last year at Villanova University following the now famous case of *Bilbar Construction Company vs. Board of Adjustment of Easttown Township,*[1] which meeting was attended by two hundred attorneys, including counsel involved in the case. At the meeting, according to William B. Ball,[2] who conducted the meeting and later wrote the introduction for the book herein reviewed, "We did not seek to retry the case, but we think much good could be served by better informing the public of its facts and its implications." As an outgrowth of the meeting, the book was written, the authors being four of the attorneys who attended the meeting. The book is devoted exclusively to comments about the Bilbar case and its implications, legal, economic and social. It would be difficult to discuss the book unless the reader had some knowledge of the basic facts of the case, so I will set these out briefly.

The section in the zoning ordinance which was attacked in the Bilbar case was one which provided that the minimum lot area in an "A" residential district should be one acre, with a minimum frontage of 150 feet. The Bilbar Construction Company and another concern acquired some real estate subject to the "A" residential minimum lot requirements, and they made application to the township for a permit to construct a dwelling on a lot of 21,000 square feet with 100 feet frontage. When permission to build was denied, the matter was litigated and reached the Pennsylvania Supreme Court. On May 2, 1958, this court upheld the constitutionality of the ordinance. The court pointed out that, "While the promotion of the public health, safety, morals and general welfare is the test for checking subjectively whether a municipality's exertion of its general power to zone has been exceeded, courts do not apply the criteria in a vacuum." The court went on to say that although recent cases in Pennsylvania had tended to ignore "general welfare" as a consideration in determining whether the police power had been constitutionally exercised, "Its importance lies partly in the fact that it admits of aesthetic consideration when passing upon the validity of a zoning ordinance."

The book is divided into four sections, each section constituting a comment covering one particular aspect of the *Bilbar* case. The first section, entitled *The Bilbar Case and the Protection of the Municipality,* is authored by Theodore O. Rogers,[3] who is solicitor for the township which enacted the zoning ordinance in controversy. Quite naturally, Mr. Rogers approves the decision which upheld the constitutionality of the zoning ordinance of the township he represents. He points out that zoning ordinances are normally considered valid where they have a substantial relationship to health, safety, morals or the general welfare. Accordingly, he states that the court would almost necessarily have to take one of two positions: (1) That the regulation in question must be clearly to preserve health, safety, morals or the general welfare; or (2) That the regulation need only have a substantial or reasonable relation to health, safety, morals or the general welfare. If the court took position (1), he states, "Then the burden would appear to be on the municipality to justify its regulation. . . ." If the court adopted the second position, then "It would seem to follow that the burden of proving the absence of such relationship (to health, safety, morals or general welfare) should be on the one

---

1 393 Pa. 62, 141 A.2d 851 (1958).
2 Professor of Law, School of Law, Villanova University.
3 Of the Chester County, Pennsylvania Bar.

asserting its invalidity." He went on to state that in 1957 when the *Bilbar* case came before the Pennsylvania Supreme Court, that his analysis of prior decisions led him to believe that the decision would be the stricter view, as set out in proposition (1). It is quite apparent that he was overjoyed when the court faced the issue squarely and ruled in favor of the municipality. Discussing the court's ruling, he states that the court "squarely decided that the burden of proving the unconstitutionality of the ordinance rests upon the party so asserting, and that the presumption of constitutionality of an ordinance is as strong as that attending an act of legislature." He goes on to state that the "ghost" of the "clearly necessary" test has been banished from Pennsylvania.

On top of the layer of bouquets and plaudits heaped upon the Pennsylvania Supreme Court by the author of the first comment on the *Bilbar* case, the author of the second comment adds a layer of rather bitter criticism and scorn. In this respect it is noted that the fact that the authors of the first two comments made no attempt to write impartially, or indeed even objectively, makes their comments more readable and interesting. Both authors set out their comments in clear, lawyerlike fashion, with the obvious purpose of convincing the reader on the one hand that the decision was one of the most learned and logical which was ever handed down by the Pennsylvania Supreme Court, and on the other hand, that the decision was probably the Court's worst.

The author of the second comment, Walter W. Rabin,[4] who entitles his comment, *The Bilbar Case and Home Building*, states that as a result of the *Bilbar* case, ". . . the law of zoning with regard to constitutionality has been left in a state of confusion and uncertainty." He goes on to state that the court ". . . without reversing anything, has reversed everything. In just a few pages of the decision, the court without indicating that it was overruling any of its prior decisions, made certain statements which were so completely contrary to the well settled law as it had then existed, that it is impossible for them to exist side by side. And yet, in the absence of a pronouncement that any prior law has been repudiated, that is precisely the situation."

He bitterly attacks the court in its acknowledgment that aesthetic consideration can be utilized in passing upon the validity of the zoning ordinance, when he states, "And what is the boundary, if any, beyond which aesthetics may not be a determining factor? To be more specific, could a municipality lawfully ordain that in keeping with the general character and architecture of that municipality, no residence could be built which was not colonial or modern, or any other style of architecture which appealed to the aesthetic sense of the commissioners or supervisors of that municipality?" In defense of the builders, he states that "With the expanded powers granted municipalities under the Bilbar case, the builder now has little choice other than to submit to whatever regulations are imposed, no matter how unreasonable, or else abandon his building operations."

D. Barry Gibbons[5] is the author of the third comment, which is entitled *Minimum Lot Requirements—The National Picture.* The comment is a scholarly analysis of the state of the law in the United States with regard to minimum lot requirements. He states that although zoning regulations are widespread in the United States, minimum lot requirements have not become a matter of judicial concern in 9 states, namely, Montana, New Mexico, Vermont, North Carolina, Nevada, New Hampshire, Idaho and Indiana. Of the remaining 39 states, he points out that Georgia, Oklahoma, South Dakota and Wyoming[6] express an extremely conservative view with regard to land regulation and use, "generally holding such restrictive regulation to be in derogation of the common

---

4 Of the Philadelphia Bar. Co-author of *Law of Zoning in Pennsylvania.*

5 Of the Delaware County Bar.

6 Richardson v. Passmore, 207 Ga. 572, 63 S.E. 2d 392 (1951); City of Guthrie v. Pike & Long, 206 Okla. 307, 243 P. 2d 697 (1952). But see Modern Builders, Inc. v. Building Inspector of City of Tulsa, 197 Okla. 80, 168 P.2d 883 (1946), an ordinance containing minimum area requirement attacked but not on that ground. City of Sioux Falls v. Mary Cleveland, 75 S. Dak. 548, 70 N.W. 2d 62 (1955); State ex rel. George v. Hull, 65 Wyo. 251, 199 P.2d 832 (1948).

law and, as such, to be construed in favor of the property owners, and generally expressing a disfavor toward any restrictions on real property." He points out that of the 35 jurisdictions remaining, the specific problem of the constitutionality of minimum lot requirements have been presented to the courts of 12 states, and 11 out of the 12 have upheld the validity of such ordinances. It thus appears that the *Bilbar* case brings Pennsylvania into the area of the majority rule. The author then analyzes the decisions in these 12 states. The 11 states which have upheld the validity of zoning ordinances containing minimum lot requirements (in addition to Pennsylvania) are California,[7] Connecticut,[8] Florida,[9] Maryland,[10] Massachusetts,[11] Illinois,[12] Missouri,[13] Nebraska,[14] New Jersey,[15] New York[16] and Texas.[17] Alone in its holding that such zoning laws are unconstitutional is the state of Michigan, where, the author states, "Virtually all attacks on zoning regulations are sustained. . . ." He points out that Michigan has ruled that the reasonableness of the exercise of police power is always subject to judicial review.

The author of the fourth comment, John G. Stephenson III,[18] discusses the sociological effects of the *Bilbar* decision, entitling his comment *Zoning, Planning and Democratic Values.* It is quite apparent that the author disapproves of the decision of the *Bilbar* case, but unlike the author of the second comment, he does not say so in so many words. He advocates that owners of suburban property should protect themselves by private means, such as cooperative purchase of undeveloped areas, restrictive covenants, and similar devices. He seems to suggest that perhaps zoning should return to its original confines of excluding nuisances from established areas, and states, "We can allow private persons to express their desire for controlled neighborhoods through cooperative ownership, large scale developments for the purpose of lease, and restrictive covenants; but we cannot tolerate this expression through zoning."

He does not consider that it is desirable, by means of zoning ordinances, to stabilize a community and protect property values, stating, "It must be remembered that the settlement of the New World was accomplished by people who fled a society in which an overly stable property system had become the means of dividing society into rigid classes. In the interest of greater stability the laws of primogeniture and borough English denied the inheritance of land to all but the oldest and youngest sons." In expressing a fear that minimum lot zoning might stratify our society, the author apparently failed to take into consideration the fact that in the United States anyone can aspire to ownership of a 1-acre lot. In addition, he has perhaps not considered the effect of our present tax laws, state and federal, upon large estates, which tax laws tend to prevent large estates from remaining in the hands of one family for several generations; nor the effect of our laws of eminent domain which enable governmental bodies, public utilities, and others to condemn land in the public interest.

The author further states that, "It has been noted[19] that while the American people have advanced politically to the stature of a nation, that they have not advanced culturally beyond the condition of a tribal society. While we identify ourselves as American citizens, and incidentally as citizens of the state in which we reside, we identify ourselves at the same time as rich or poor, professional people or business people, ac-

---

7 Clemons v. City of Los Angeles, 216 P.2d 1 (1950).
8 De Mars v. Zoning Commission, 142 Conn. 580, 115 A.2d 653 (1955).
9 Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 642 (1941).
10 County Commissioners v. Ward, 186 Md. 330, 46 A.2d 684 (1946).
11 Simon v. Town of Needham, 311 Mass. 560, 42 N.E. 2d 516 (1942).
12 Bright v. City of Evanston, 10 Ill. 2d 178, 139 N.E. 2d 270 (1956).
13 Flora Realty & Investment Co. v. City of Ladue, 382 Mo. 1025, 246 S.W. 2d 771 (1952).
14 Dundee Realty Co. v. City of Omaha, 144 Neb. 394, 13 N.W. 2d 634 (1944).
15 Fisher v. Bedminister Township, 11 N.J. 144 (1952).
16 Wolfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).
17 Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921).
18 Professor of Law, School of Law, Villanova University.
19 The author does not state by whom it "has been noted."

cording to the national origin of our ancestors, or according to our religious affiliations or lack of them. In terms of the zoning and home building problem, we prefer to live with other people of the same economic, ethnic and cultural class."

In my opinion, the author exaggerates the danger inherent in zoning ordinances which give some consideration to aesthetic matters. Nothing in the cases discussed in this book would lead one to conclude that any court in any state would uphold zoning ordinances which presume to zone real estate in accordance with the religion, national origin, profession or occupation of the owners of such real estate. However, there undoubtedly are dangers inherent in placing too much stress upon aesthetic standards, and perhaps no better way could be found to emphasize this real danger than to exaggerate it. Furthermore, the author's suggestion that private enterprise should assume a greater share of the burden of planning subdivisions and protecting home owners has considerable merit.

Although, as the reader may discern, I disagree to some extent with the views of the author of the fourth comment, his section is extremely well written, and perhaps because it does present views with which I disagree, it is probably the most stimulating and thought provoking of the four comments.

It is impossible to engage in the general practice of law in any community in this country without encountering numerous problems involving zoning. Therefore, the book is recommended reading for lawyers who must, of necessity, become better informed about a field which enters into practically every real estate transaction today.

*John M. Anderton**

---

* LLB, University of Notre Dame, 1949; Member of Indiana Bar; Former Trial Attorney, U.S. Department of Justice, Anti-Trust Division; Former City Attorney for La Porte, Indiana; Presently practicing in La Porte, Indiana.