ZONING IN WASHINGTON: THE "FAIRLY DEBATABLE" RULE

In *Anderson v. Island County*,[1] the Supreme Court of Washington held as arbitrary and capricious the rezoning, from residential to commercial, of a cement-batching plant site on the grounds that the plant's adverse effects on the environment outweighed the public benefits to be provided by the plant.[2]

On March 11, 1966, Island Sand and Gravel, Inc. (I.S. & G.), began gravel operations on 17 acres in the Holmes Harbor area of Whidbey Island, Washington, a residential area. Nine months later, the Board of County Commissioners for Island County passed an interim zoning ordinance[3] which zoned the entire Holmes Harbor area as residential. At the same time I.S. & G. was beginning construction of a cement-batching plant on its Holmes Harbor land. In 1969, I.S. & G. applied for a conditional use permit[4] to operate its cement-batching plant but later withdrew its application. On September 22, I.S. & G. applied to the Island County Planning Commission (an agency subordinate to the Board of County Commissioners) to have its 17-acre tract rezoned from residential to commercial. After a public hearing, this request was denied.

On October 21, 1969, I.S. & G. appealed to the Board of County Commissioners, which overruled the Planning Commission and rezoned I.S. & G.'s land to the "commercial" category on the basis that the services of I.S. & G. were necessary for the growth and development of Island County. Plaintiffs in *Anderson,* residents of Holmes Harbor, brought a certiorari action in the state superior court to review the zoning change. The trial judge sustained the rezoning, and plaintiffs appealed to the Supreme Court of Washington.

Zoning acts and amendments to zoning ordinances which constitute rezoning are presumed to be constitutional and valid.[5] Since the

1. 81 Wash. 2d 312, 501 P.2d 594 (1972).
2. *Id.* at—, 501 P.2d at 602.
3. *See* WASH. REV. CODE ANN. § 36.70.790 (1964).
4. *Id.* § 36.70.810-.900.
5. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.10 (1968) and cases cited therein [hereinafter cited as ANDERSON]; 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.93 (3d ed. 1965).

landmark decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[6] upholding the constitutionality of comprehensive zoning ordinances, the courts have had two tasks whenever examining zoning ordinances or regulations. First, the courts must determine whether the particular zoning ordinance in question, and the regulations promulgated under it, are within the permissible scope of the municipal zoning power.[7] To determine this, the courts have developed the "general welfare" test: a zoning ordinance will be upheld only if it is reasonably related to the general welfare of the public.[8] But the evolution of zoning cases has been a continuing expansion by the courts of the "general welfare" test.[9] Because of this expansion, the test has, in most jurisdictions, ceased to be a serious bar to regulation.[10] Second, the courts must determine whether the application of an ordinance, otherwise constitutional, is "reasonable," that is, whether a valid ordinance is being applied reasonably in the context of its own fact situation.[11] A zoning ordinance will be considered to have failed the test of reasonableness if it is either arbitrary, confiscatory or discriminatory in its application.[12] The courts have used a variety of standards[13] when zoning regulations have been held unreasonable, but in general it can be said that a zoning regulation is unreasonable when there is no rational relationship between the objective of the regulation and its application to a

6. 272 U.S. 365 (1926).

7. *See* ANDERSON § 7.03.

8. *Id.*

9. *Id.* § 2.10. *See also* Note, *Protection of Environmental Quality in Non-Metropolitan Regions by Limiting Development*, 57 IA. L. REV. 126, 134 (1971).

10. Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Extractions*, 73 YALE L.J. 1119, 1123 (1964).

11. A primary consideration in ascertaining the reasonableness of a zoning classification is whether there has been a substantial changing trend in the development of the zoned area or whether it remained substantially unchanged in character. Scott v. City of Springfield, 83 Ill. App. 2d 31, 39, 226 N.E.2d 57, 61 (1967).

12. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 4, at 4-2 (1972). For an excellent discussion of whether zoning restrictions for the purpose of environmental protection are confiscatory and thus unreasonable see Note, *The Scope of State and Local Government Action in Environmental Land Use Regulation*, 13 B.C. IND. & COM. L. REV. 782 (1972).

13. *See generally* 1 A. RATHKOPF, *supra* note 12, ch. 5.

particular parcel of land.[14] The burden of proving unreasonableness is upon the party challenging the ordinance.[15]

If, however, the reasonableness of the zoning action is "fairly debatable," the courts will generally uphold the action.[16] That is, if "reasonable minds could differ" as to whether a zoning regulation is or is not arbitrary, discriminatory or confiscatory, the courts will not substitute their judgment for that of the zoning agency.[17] This "fairly debatable" rule governs the propriety of changing the status or classification of an area, and protects the judgment of zoning authorities as to whether or not there has been a change of conditions justifying rezoning.[18] But the dispute under the "fairly debatable" rule must concern not mere words or expressions of opinion but basic physical facts pertinent to issues arising under applications of zoning ordinances; a mere difference of opinion does not require a finding that the reasonableness of a regulation is debatable.[19] Though the courts give consistent verbal adherence to the rule, they have not necessarily abdicated their power to review zoning regulations.[20] Decisions which conclude that zoning ordinances are unconstitutional as applied to specific property are not uncommon, and many such decisions are reached upon a finding that the litigant attacking the zoning regulation has taken the issue beyond the reach of reasonable debate.[21] There is no shortage of cases in which courts have seen no

14. Heyman & Gilhool, *supra* note 10, at 1124. *See also* 1 A. RATHKOPF, *supra* note 12, ch. 5.

15. ANDERSON § 2.15. For a discussion of the burden of proof on applicants for exceptions to zoning laws see Comment, *Burden of Proof in Special Exception Cases*, 1972 URBAN L. ANN. 233.

16. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); Willdel Realty, Inc. v. New Castle County, 281 A.2d 612 (Del. 1971); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); Lillions v. Gibbs, 47 Wash. 2d 629, 289 P.2d 203 (1955); State *ex rel.* Morrison v. City of Seattle, 6 Wash. App. 181, 492 P.2d 1078 (1971). *See also* 8 E. MCQUILLIN, *supra* note 5, § 25.281.

17. ANDERSON § 2.16.

18. *Id.*

19. 8 E. MCQUILLIN, *supra* note 5, § 25.281. *See, e.g.*, People v. Village of Elmwood Park, 27 Ill. 2d 177, 188 N.E.2d 684 (1963) (mere fact that municipality introduced evidence in support of ordinance does not mean that reasonableness of ordinance is debatable).

20. ANDERSON § 2.16 and cases cited therein.

21. *Id.*

fairly debatable issue, although a review of the record contains facts which appear to provide ample support for a difference of opinion.[22]

In most Washington cases,[23] however, the supreme court has used the "fairly debatable" rule to justify its refusal to investigate the validity of a zoning regulation under the reasonableness test.[24] Thus, in three cases with fact patterns similar to that in *Anderson,* the court failed to question the reasonableness of a zoning regulation because there was an "honest difference of opinion." In *State ex rel. Smilanich v. McCollum,*[25] plaintiffs appealed a zoning action which granted a conditional use permit to an asphalt-batching plant in a residential area. The trial court upheld the zoning board's decision, and in affirming the judgment on appeal the Supreme Court of Washington said:

> [C]ourts will resolve every reasonable doubt in favor of the validity of the enactment . . . . That the nonconforming use of the area by the gravel processing and asphalt processing plants is detrimental to residences is unquestioned . . . . The determination as to whether the area was an "undeveloped area" . . . was a matter of discretion on the part of the commission and the board.[26]

The court thus adopted an essentially *laissez-faire* attitude toward the reasonableness test by bowing to the zoning body's "discretion."

This attitude was limited only slightly in *McNaughton v. Boeing,*[27] a suit brought by owners of a residential property located next to a 23-acre tract rezoned from residential to business for a shopping center. Again, the trial court upheld the zoning action. The Supreme

22. *See, e.g.,* Ward v. Village of Skokie, 26 Ill. 2d 415, 186 N.E.2d 529 (1962), *noted in* 1963 U. ILL. L.F. 116.

23. An exception to this practice has been the court's decisions in the "spot zoning" cases, in which the court essentially ignored the fairly debatable rule. Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832 (1969); Anderson v. City of Seattle, 64 Wash. 2d 198, 390 P.2d 994 (1964); Pierce v. King County, 62 Wash. 2d 324, 382 P.2d 628 (1963). *See also* D. MANDELKER, THE ZONING DILEMMA 115 (1971).

24. In Washington, the reasonableness test is not met only if there is a "manifest abuse of discretion." State *ex rel.* Smilanich v. McCollum, 62 Wash. 2d 602, 384 P.2d 358 (1963). Such an abuse of discretion is defined as "arbitrary and capricious conduct." Lillions v. Gibbs, 47 Wash. 2d 629, 289 P.2d 203 (1955).

25. 62 Wash. 2d 602, 384 P.2d 358 (1963).

26. *Id.* at 606, 609, 384 P.2d at 361, 363.

27. 68 Wash. 2d 659, 414 P.2d 778 (1966).

Court of Washington, in affirming the lower court, admitted that the zoning regulation could be overturned if it were arbitrary or capricious, but "under the facts in this case, there was room for two opinions. *This was shown by the testimony that there were those who favored and others who protested the adoption of the Commissions's recommendation.*"[28] Since there will undoubtedly be both proponents and opponents of any zoning action, the *Boeing* court's unusual interpretation of the fairly debatable rule left Washington zoning agencies still comparatively free of the reasonableness test.

This trend was continued in *State ex rel. Myhre v. City of Spokane*,[29] an action by residential property owners to review the validity of an amendment to a zoning ordinance which reclassified property from residential to business-commercial. This rezoning would enable a shopping center to be built on the land in question. Plantiffs contended that the rezoning action was arbitrary and capricious. The trial court gave judgment for plaintiffs, pointing out that the population of the area was growing, that there was no evidence that the shopping center was needed,[30] and that the rezoning would definitely have an adverse effect on adjacent landowners.[31] Nevertheless, the Supreme Court of Washington upheld the rezoning action, finding that it was reasonably related to the general welfare, and that "[i]t is not an abuse of discretion or arbitrary and capricious conduct for public officers to accept the conclusions of proponents of an issue which is honestly debatable."[32] The court thus continued its broad interpretation of the fairly debatable rule despite considerable evidence that reasonable men could differ on the issue of whether the rezoning was in the public interest.

The court in *McCollum, Boeing,* and *Spokane* seemed to be using a simple difference of opinion as to the value of a zoning change to justify the application of the fairly debatable rule. This is a departure from the general interpretation of the rule, which does not require a finding that the reasonableness of a regulation is debatable simply because there is a difference of opinion on the worth of the

28. *Id.* at 663, 414 P.2d at 780, *citing* Lillions v. Gibbs, 47 Wash. 2d 629, 633-34, 289 P.2d 203, 205 (1955) (emphasis added).

29. 70 Wash. 2d 207, 422 P.2d 790 (1967).

30. *Id.* at 219, 422 P.2d at 797 (dissenting opinion).

31. *Id.* at 221, 422 P.2d at 798 (dissenting opinion).

32. *Id.* at 213, 422 P.2d at 794.

zoning action. The *Anderson* court, however, approached the problem with a different attitude. First, the court decided that it could review the record de novo, because the record both at trial and at appeal consisted entirely of written and graphic material.[33] Then the court examined the findings of fact made by the Island County Board of Commissioners.[34] In contrast with the *McCollum, Boeing,* and *Spokane* cases, however, the *Anderson* court did not treat these findings of fact by the zoning agency with great deference. Instead, the court was willing to weigh the environmental aspects of rezoning against the positive benefits. Testimony of neighboring property owners at the hearing before the Board of Commissioners described the plant operation as "noisy, dirty, unattractive, . . . dust producing, screeching . . . until all hours of the night, . . . [a] dangerous nuisance."[35] The court pointed out that nothing in the record indicated that I.S. & G. soil was unique or different from the surrounding area, or that the condition of the soil was not known at the time the interim zoning ordinance was passed.[36] Furthermore, there was no validity to the finding that I.S. & G. was essential because of the growth, development, and employment opportunities it would provide the area.[37] Thus the court concluded that because of the adverse effect the batching plant would have on neighboring property owners, the rezoning did not bear a substantial relationship to the public welfare or interest. The court then dealt with the fairly debatable rule:

> Keeping in mind the rule that an honest difference of opinion upon this issue is sufficient to uphold the action of the Board of County Commissioners, we now consider the proceedings more closely to determine whether, in fact, reasonable men could differ regarding the relation of the zoning action to the public interest. This closer analysis leads us to conclude that the action of the Board of Commissioners was arbitrary and capricious.[38]

33. 81 Wash. 2d at—, 501 P.2d at 597.

34. The Board had found that I.S. & G. would provide a needed source of employment. The trial court agreed with these findings. *Id.* at —, 501 P.2d at 598.

35. *Id.* at —, 501 P.2d at 598.

36. *Id.* at —, 501 P.2d at 598.

37. Recognizing that similar operations on the island are available to provide needed products and services without creating a threat to the health and welfare of neighboring landowners, it is evident that the need to rezone the property in question to commercial in the middle of a residential zone is considerably outweighed by the detriment to the public.
Id. at —, 501 P.2d at 599.

38. *Id.* at —, 501 P.2d at 599.

Despite the fact that the members of the local zoning agency and the trial court agreed that the zoning change was in the public interest (and therefore there certainly was an "honest difference of opinion" with the viewpoint of plaintiffs) the court concluded that the issue was not "fairly debatable."

It seems apparent, then, that the fairly debatable rule no longer has the same influence on decisions of the court as it did in *McCollum, Boeing,* and *Spokane.* For in *Anderson* there was at least as much difference of opinion among reasonable men regarding the rezoning action as there existed in *McCollum, Boeing,* and *Spokane;* but contrary to those cases, the *Anderson* court did not use difference of opinion as an excuse to justify an unwillingness to weigh environmental factors.

It is obvious that there seldom will be a zoning action which does not have both proponents and opponents who are, at least ostensibly, "reasonable men." Because of this, the "fairly debatable" rule in Washington operated, in effect, to ratify the decisions of the zoning agencies. In *Anderson,* the court saw that there were clearly many reasons why the zoning action in question was unreasonable. Yet it was also clear that, by its previous standards, the dispute was "fairly debatable" and thus the zoning action would have to be upheld. The court's only alternative to sustaining an obvious injustice was to change its interpretation of the fairly debatable rule, refusing to apply it simply because there was a difference of opinion on the worth of the zoning action. This is the de facto course taken by the court. Thus, the *Anderson* court has apparently removed a major obstacle to judicial application of the reasonableness test in Washington.

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