

EXCLUSIONARY ZONING FROM A REGIONAL PERSPECTIVE

Nether Providence, Pennsylvania, is a first-class township in the greater Philadelphia area; it has an area of 4.64 square miles and a population of approximately 13,000 people. The township is residential in character and consists largely of single-family homes. Although there are provisions for apartments in several of the surrounding communities, the zoning ordinance in Nether Providence, which contains residential, commercial, and industrial zones, fails to provide for apartments anywhere in the township. In *Appeal of Girsh*,¹ the Pennsylvania Supreme Court declared this total exclusion² of apartments unconstitutional.

In 1964 Girsh contracted to purchase a 17½ acre tract of land in Nether Providence, known as the Duer Tract. The land is located next to a commuter line of the Penn Central Railroad and within six-tenths of a mile of two of the township's main roads. The land is well wooded, is crossed by two streams, contains a swampy area, several large outcroppings of rock, and rapid changes in land elevation.³ Several past planning studies had recommended to the township that it include apartments in its zoning plan and, because of its location and topography, that the Duer Tract be included in these districts. The township refused.⁴

Girsh, however, wanted to build two high-rise, luxury apartments on the land and requested that the board rezone the land. When it

1. 437 Pa. 237, 263 A.2d 395 (1970).

2. Although there were already apartments in two locations in the township, and apartments could be built after a variance was secured, the court says that the difficulty in proving the degree of hardship necessary to sustain an application for a variance makes this ordinance "the legal equivalent of an explicit total prohibition of apartment houses . . ." *Id.* at 241, 263 A.2d at 397. Since the court treats this ordinance as a prohibition of apartments, I shall do the same. There are courts, however, which would not equate an ordinance which makes no provision for a land use, but allows the use by means of variance, with a total prohibition of the use. *See, e.g.,* High Meadows Park, Inc., v. City of Aurora, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969); *Duffcon Concrete Products v. Borough of Cresskill*, 1 N.J. 509, 515, 64 A.2d 347, 351 (1949).

3. Brief for Appellant at 4, *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

4. *Id.* at 6.

refused, Girsh went to court to have the ordinance declared unconstitutional. The trial court upheld the ordinance, but the Pennsylvania Supreme Court reversed, holding that Nether Providence "cannot have a zoning scheme that makes no reasonable provision for apartment uses."⁵

Looking at the history of zoning cases, it can be seen that prior to 1949, courts decided zoning cases as if a municipality were a self-contained, isolated unit. "Traditional concepts of zoning," said Judge Stewart in *Valley View Village, Inc., v. Proffett*,⁶ "envision a municipality as a self-contained community with its own residential, business and industrial areas."⁷ Courts looked at the land use in question only as it was appropriate to that particular municipality without regard to whether that location was appropriate in view of the way the region was developing.

*Village of Euclid v. Ambler Realty Co.*⁸ foreshadowed a more regional aspect for viewing zoning cases when the court noted "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."⁹ But it was not until *Duffcon Concrete Products v. Borough of Cresskill*¹⁰ that a court changed its approach to zoning cases and looked beyond the municipality's borders to the entire region in deciding if the defendant municipality was acting reasonably in excluding a particular land use from its boundaries.

Duffcon involved a municipality of a residential character which had made no provision for heavy industry in its zoning plan. The plaintiff wanted to use his land for production of concrete blocks and challenged the validity of the ordinance. In deciding that the exclusion of heavy industry from the municipality was valid, the court took note of the fact that the borough was residential in nature and that there was extensive bottom land in the region available for industry. In striking language the court in *Duffcon* set a precedent for approaching zoning cases on a regional basis:

5. 437 Pa. at 243, 263 A.2d at 398.

6. 221 F.2d 412 (6th Cir. 1955).

7. *Id.* at 418.

8. 272 U.S. 365 (1926).

9. *Id.* at 390.

10. 1 N.J. 509, 64 A.2d 347 (1949).

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What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, *but also on the nature of the entire region* in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago. . . . The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines.¹¹ (Emphasis added)

At first those interested in land use planning considered the *Duffcon* view a boon to regional planning, and many courts followed the *Duffcon* reasoning when considering the validity of total exclusions of a land use from a municipality.¹² But, upon reflection, many writers began to see problems with this method of resolving exclusion cases.

In his book, *The Zoning Game*, Babcock says that cases like *Duffcon* and *Valley View*, "where the words of the opinion suggest a repudiation of the equation of general welfare with the municipality [result], ironically, in just the reverse."¹³ In other words, the very cases which seem to aid regional planning actually retard it and reinforce the traditional view of looking only to the municipality to determine the suitability of a particular land use. What Babcock means may become more clear when some of the problems with this regional approach are examined.

One of these problems lies in the *ad hoc* nature of judicial review. When the court reviews a municipal zoning ordinance to determine the validity of a land use exclusion, it has before it only the evidence provided by the parties in that particular case, and it is quite conceivable that "a court might be led [to hold the exclusion valid] by convincing evidence that land for these uses is provided in an adjacent municipality, even though that municipality's allocation may be sufficient to satisfy only its own needs."¹⁴ This problem can be

11. *Id.* at 513, 64 A.2d at 349-50.

12. *See, e.g.*, *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962); *Fanale v. Borough of Hasbrough Heights*, 26 N.J. 320, 139 A.2d 749 (1958); *Guaclides v. Borough of Englewood Cliffs*, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951); *Struyk v. Samuel Braen's Sons*, 17 N.J. Super. 1, 85 A.2d 279 (App. Div. 1951); *Appeal of Mutual Supply Co.*, 366 Pa. 424, 77 A.2d 612 (1951).

13. R. BABCOCK, *THE ZONING GAME* 178 (1966) [hereinafter cited as *BABCOCK*].

14. Note, *Zoning: Looking Beyond Municipal Borders*, 1965 *WASH. U.L.Q.* 107, 117.

come even more complex when several small suburban communities in an area totally exclude apartments from their boundaries; and then, when each community is brought to court to test the validity of its ordinance, the community points to the central city and argues that since apartments are allowed and provided for in the core city, it need not provide for them in its zoning scheme.¹⁵ If the courts are convinced by this argument, and several suburbs are successful in defending their exclusions, apartment dwellers will be forced to remain in the crowded central city or congregate in the few municipalities which do allow apartments within their boundaries, and, thereby, cause an overburdening of the service facilities of those municipalities.

A related problem can arise in developing areas where each new community passes zoning ordinances which exclude certain "undesirable" land uses such as apartments, mobile homes, or heavy industry with the excuse that such land uses are permitted in the surrounding unincorporated and un-zoned areas. This can result in a "contest between municipalities to see who could avoid being the last to exclude and hence the most vulnerable to attack."¹⁶

In *Girsh* the court seems to have been aware of these problems, for it notes that:

Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city.¹⁷

From this language it appears that the Pennsylvania Supreme Court has completely closed the door to regional zoning at the judicial level. That is, it has precluded any attempt to look beyond municipal boundaries to see if a particular land use is appropriate for the municipality (as the New Jersey court did in *Duffcon*).¹⁸ At the same

15. *Id.* at 117-18 n.33.

16. *ВАНСОСК* at 182.

17. 437 Pa. at 245 n.4, 263 A.2d at 399 n.4.

18. It is possible, even probable, that the court will limit this view to situations where there are *total* exclusions of certain land uses, and, maybe, to situations where the exclusions are of certain *residential* land uses. This is evidenced by the court's opinion which declares that

[I]t is not true that the logical result of our holding today is that a municipality must provide for all types of land use. This case deals with the right of

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time, the court seems to be advocating regional planning at the legislative level to prevent a race between the municipalities of an area to keep from "being the last to exclude."

Had the decision in *Girsh* been framed in a manner that would cause the townships of the area to fear losing effective local land use control, negotiations might have followed which would have led to a legislative decision on a regional policy for the location of apartments in the area.¹⁹ As Babcock said, "[T]he court [which] could not plan for the region . . . could compel regional criteria as the only alternative to total loss of control over the particular development."²⁰

One approach that would give the townships of the area reason to fear losing control of local land use decisions would be to uphold the ordinance as a whole, but to declare it invalid as applied to the plaintiff's land and allow the plaintiff to proceed with his proposed development.²¹ This would put the townships on notice that if they did not

people to *live on land*, a very different problem than whether . . . [a municipality] must allow certain industrial uses within its borders. *Id.* at 245-46, 263 A.2d at 399.

19. Babcock at 182-83.

20. *Id.* at 183.

21. Courts in Illinois have used this approach in recent decisions, but have not been as restrictive in their use of regional criteria for determining the validity of the ordinance as applied to the plaintiff's land as is advocated in this paper. *See, e.g.,* Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); High Meadows Park, Inc., v. City of Aurora, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969); Mangel & Co. v. Village of Wilmette, 115 Ill. App. 2d 383, 253 N.E.2d 9 (1969). Most courts are reluctant to look to see if a zoning ordinance has been properly applied as to a specific plaintiff's land. They feel that this is a legislative function and, in lieu of flagrant and arbitrary use of discretion, will not review or overturn a zoning board's decision and institute a new zoning classification for fear of being a "super-zoner." *See, e.g.,* Robinson v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957). But when there is a municipality-wide exclusion of a particular land use, it does not seem to be an usurpation of the legislative function to do as the Illinois courts have done and look to see if the land use proposed by the plaintiff (the one excluded by the municipality) is the most appropriate and, in some cases, the only feasible land use for that particular property.

The argument against the court's being a "super-zoner" is based on the premise that it has insufficient fact gathering capabilities. This is not true when the court is considering only one land site, one land use, and has all the facts concerning that site and proposed use before it. It is a no more difficult question to decide than any other question the court, as the final arbiter, must decide. When the court applied this approach in *Mangel*, it noted that "[t]he trial court is not to perform as a zoning board, but may, at most, allow a specific use upon which a petitioner is relying [and should cast its decision] 'in terms of the reasonableness of excluding that specific use.'" 115 Ill. App. 2d at 395, 253 N.E.2d at 15.

Recent Michigan cases have taken a similar approach to the problem—they have

plan for apartment uses, they would be leaving their ordinances open to review by the court without regard to regional development.

Instead, the court in *Girsh* merely declared the ordinance as a whole invalid.²² Nether Providence has subsequently circumvented the impact of the decision by zoning a quarry for apartment use.²³ Any hope the court might have toward forcing regional planning at the legislative level was, thereby, thwarted. The approach the court used will also cost *Girsh* and plaintiffs like him the time and expense of relitigation to determine the validity of the ordinance as it applies to his land.

Babcock says that the power to force municipalities to zone on a regional basis at the legislative level lies in the courts;²⁴ if this is true, it appears that the Pennsylvania Supreme Court missed a good opportunity to apply that force in *Appeal of Girsh*.

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enjoined the municipality from interfering with the plaintiff's proposed use of the land. *See, e.g.*, *Daraban v. Township of Redford*, 383 Mich. 497, 176 N.W.2d 598 (1970); *Lacy v. City of Warren*, 7 Mich. App. 105, 151 N.W.2d 245 (1967). In *Daraban* the court declared a single-family residential classification invalid as applied to the plaintiff's lots, and, in the absence of any request by the municipality for time to rezone, enjoined the municipality from preventing the plaintiff's erection of apartments on his property in accordance with the specific proposal presented to the court by the plaintiff. 383 Mich. at 500, 176 N.W.2d at 599.

22. Recent Pennsylvania decisions have shown a preference for determining the constitutionality of the ordinance as a whole before looking at it as it applies to the plaintiff's land. *See, e.g.*, *Exton Quarries, Inc., v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967); *Ammon R. Smith Auto Co. Appeal*, 423 Pa. 493, 223 A.2d 683 (1966).

23. Strong, *Girsh and Kit-Mar: An Unlikely Route to Equal Opportunity in Housing*, 22 ZONING DIGEST 100a (1970). Other townships in the area have also noted the weakness in the *Girsh* decision and "are looking for small, equally unsuitable locations [for apartments]." *Id.*

24. BABCOCK at 176.