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Paul T. Mann

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NOTES

Appeal of Girsh: A Judicial Requirement for Apartment Zoning

Joseph Girsh purchased seventeen and one-half acres of land in a district zoned solely for single-family residences in the Township of Nether Providence, Pennsylvania. He requested the Township Board of Commissioners to change the zoning classification to permit the building of high-rise apartment houses, which were to contain 560 units in two nine-story structures. The township was approximately seventy-five per cent residential with the remainder composed of commercial and industrial districts, and two areas where apartments had been constructed after variances¹ had been secured. The zoning scheme included no provisions for apartment uses, and the Board of Commissioners refused Girsh a building permit. In lieu of seeking a variance, Girsh sought to have the zoning ordinance declared unconstitutional. The Zoning Board of Adjustment sustained the ordinance, and the trial court upheld this ruling. *Held, reversed*: The failure of the township to provide for apartments in its zoning scheme makes the ordinance unconstitutional on its face.² *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

I. ZONING: A RELATIVELY NEW DEVELOPMENT OF THE LAW

Historical and Legal Development of Zoning. Prior to the industrial revolution there existed very little need for zoning, and it was not until society became more urbanized and the concept of private property began to evolve along lines of social utility that zoning became an important issue.³ As applied in this urbanized society, zoning was used to segregate commercial and industrial uses from residential ones. It developed as an almost exclusively local affair as local zoning regulations were the result of conflict and compromise among local citizens.⁴

Attempts were made prior to 1926 to secure a definitive statement regarding the constitutionality of zoning.⁵ However, it was not until that year that the United States Supreme Court authoritatively reached the issue.⁶ This delay stemmed from the early development of a judicial "hands

¹ A variance may be obtained to utilize a tract of land contrary to the existing zoning regulation. The land must be subject to some hardship peculiar to itself because of the restriction. *See, e.g., Mitchell v. Grewal*, 338 Mich. 81, 61 N.W.2d 3, 7 (1953).

² Apparently the constitutional basis of the decision is that the ordinance violates the due process clause of the fourteenth amendment to the U.S. Constitution. However, this is unclear. *See* text accompanying note 44 *infra*.

³ Symposium, *Zoning—A Comprehensive Study of Problems and Solutions*, 14 N.Y.L.F. 79-80 (1968).

⁴ Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1061 (1963).

⁵ *See, e.g., Wolfson v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925).

⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

off" policy.⁷ Generally, courts did not involve themselves in zoning matters unless a substantial constitutional issue was involved. Since zoning ordinances are the product of local planning, courts were loath to become "super zoning boards."⁸

In *Village of Euclid v. Ambler Realty Co.*,⁹ and in subsequent state and federal decisions on the issue,¹⁰ zoning was found to be justified under the police power of the states.¹¹ However, only specific facts and circumstances could indicate when the exercise of that power became illegitimate.¹² After *Euclid*, an ordinance came to court clothed with every presumption of validity,¹³ and if there was a "fairly debatable" issue of reasonability-of use-classification, the courts refused to disturb the ordinance.¹⁴

Zoning Used To Regulate Residences. The most controversial use of zoning is the management of population density, through which apartments are directly or indirectly prohibited. The potential for zoning problems in connection with apartments came about when the first tenement houses, built exclusively for multiple occupancies, appeared around 1850.¹⁵ The first comprehensive zoning scheme in the United States was enacted in 1916 in New York City.¹⁶ At about the same time, single-family restrictions also began to appear.¹⁷ The first important decision involving such a restriction came in 1925 in California. *Miller v. Board of Public Works*,¹⁸ and other cases,¹⁹ reflected the apartment house image presented to, and accepted by, the courts. Apartments were described as having deleterious effects on a community,²⁰ and apartment dwellers were depicted as little better than bums and drifters.²¹ In many recent court decisions, that image persists.²²

⁷ Statements to this effect are found in *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927).

⁸ *Robinson v. City of Bloomfield Hills*, 350 Mich. 425, 86 N.W.2d 166 (1957).

⁹ 272 U.S. 365 (1926).

¹⁰ See, e.g., *McMahon v. City of Dubuque*, 255 F.2d 154 (8th Cir.), cert. denied, 358 U.S. 833 (1958); *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Steiner, Inc. v. Town Plan & Zoning Comm'n*, 149 Conn. 74, 175 A.2d 559 (1961); *Brett v. Bldg. Comm'r*, 250 Mass. 73, 145 N.E. 269 (1924).

¹¹ The police power is among those rights reserved to the states by the U.S. CONST. amend. X. It has been defined as: "[T]hat inherent and plenary power in state over persons and property . . . which enables the people to prohibit all things inimical to comfort, safety, health, and welfare of society." *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530, 536 (1928).

¹² 272 U.S. at 387-88.

¹³ See *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955).

¹⁴ *Central Bank & Trust Co. v. City of Miami Beach*, 392 F.2d 549 (5th Cir. 1968); *Robertson v. City of Salem*, 191 F. Supp. 604 (D. Ore. 1961). Further specific powers of a particular zoning authority can be found in the various enabling acts of the states. See, e.g., PA. STAT. ANN. tit. 16, §§ 2020-39 (1956).

¹⁵ C. TUNNARD & H. REED, AMERICAN SKYLINE 98-100 (1956).

¹⁶ *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381, 383 (1925).

¹⁷ *Id.*

¹⁸ 195 Cal. 477, 234 P. 381 (1925).

¹⁹ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

²⁰ Among others, they clash with a residential neighborhood, they become run down quickly, and they destroy property values. For good examples of the subjective attitude of the courts at the time, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925).

²¹ The most common word used to describe apartment dwellers was "transients." Actually, that was kind in relation to most of the criticism. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

²² See, e.g., *Trendell v. County of Cook*, 27 Ill. 2d 155, 188 N.E.2d 668 (1963); *Fanale v.*

One of the first issues raised in connection with such cases was whether apartments could be segregated to certain areas,²³ ordinarily the more undesirable sections of a town.²⁴ However, the more pronounced regulatory device involves the explicit prohibition of certain land uses in a district or an entire town. The courts have split on whether this prohibition is permissible.²⁵ In the absence of any other redeeming quality, the availability of variances,²⁶ the existence of nonconforming uses²⁷ or exceptions,²⁸ or perhaps a regional influence²⁹ has saved the ordinance. Single-use districts are generally validated³⁰ when challenged, if they meet the constitutional standards.³¹

II. APPEAL OF GIRSH

Appeal of Girsh breaks new ground in holding that a zoning authority must constitutionally provide for apartment uses somewhere in a community. The court based its decision on cases involving explicit prohibitions of land uses³² and on public policy. Rather than restrict its decision to the land in question, the court chose to invalidate the entire ordinance.

In order to apply the case authority involving unreasonable explicit prohibitions, the court equated an omission of a use from the list of permissible uses with an express prohibition. The argument is that since the effect is the same, the treatment should be the same. Logically, at least, this view is sound, but there is one factor which tends to negate it. Variances are available as a matter of law, subject to approval by a zoning board. The

Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958). *Contra*, *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951).

²³ *June v. City of Lincoln Park*, 361 Mich. 95, 104 N.W.2d 792 (1960); *Fox Meadow Estates v. Cully*, 233 App. Div. 250, 252 N.Y.S. 178 (1931), *aff'd per curiam*, 261 N.Y. 506, 185 N.E. 714 (1933). At least one case, however, has held such a segregation invalid. *Altschuler v. Scott*, 5 N.J. Misc. 697, 137 A. 883 (Sup. Ct. 1927). In general, segregation has become so common as to be taken for granted. See *Babcock & Bosselman*, note 4 *supra*, at 1061-62, and authorities cited therein.

²⁴ *Speroni v. Board of Appeals*, 368 Ill. 568, 15 N.E.2d 302 (1938).

²⁵ For those decisions allowing it, see *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Connor v. Town of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957). *Contra*, *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944); *Hobard v. Collier*, 3 Wis. 2d 182, 87 N.W.2d 868 (1958).

²⁶ *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). For definition of a variance, see note 1 *supra*.

²⁷ *Id.* A nonconforming use is one which, though prohibited by the ordinance, existed before the ordinance was enacted and was allowed to remain.

²⁸ *Id.* Most ordinances contain a list of exceptions to their requirements. Churches and schools, for example, are usually excepted from zoning requirements. See *NETHER PROVIDENCE, PA., ZONING ORDINANCES* art. III, § 3.

²⁹ See *Haar, Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1054 (1953).

³⁰ The following cases involving single use districts are exemplary in finding a valid exercise of the police power: *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925); *City & County of San Francisco v. Burton*, 201 Cal. App. 2d 749, 20 Cal. Rptr. 378 (1962); *Anderson v. Cook County*, 9 Ill. 2d 568, 138 N.E.2d 485 (1956); *City of Des Moines v. Manhattan Oil Co.*, 183 Iowa 1096, 184 N.W. 823 (1921); *Brett v. Building Comm'r*, 250 Mass. 73, 145 N.E. 269 (1924).

³¹ See notes 13-14 *supra*, and accompanying text.

³² *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967) (prohibiting quarrying); *Norate Corp. v. Zoning Bd. of Adjustment*, 417 Pa. 397, 207 A.2d 890 (1965) (prohibiting off-site advertising signs); *Eller v. Board of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964) (prohibiting mushroom houses).

criteria on which a variance may be granted are admittedly strict; the reasons should be "substantial, serious, and compelling," with some hardship peculiar to the land in question by reason of the existing classification.³³ However, these criteria do not require an "economic disaster," as the court stated. In fact, variances had been obtained in two areas of Nether Providence where apartments had been built. While it is true that the number of these apartments was small,³⁴ at the very least their presence created a situation in which the constitutional issue was "fairly debatable." Furthermore, the availability of variances had been used as a constitutional safety-valve in prior cases.³⁵

The majority rejected the variance argument so as not to encourage "spot-zoning" in the township. However, a minimum amount of "spot-zoning" would seem to be inevitable, unless there were complete planning information available to insure that the area covered by the zoning ordinance could serve no other conceivably useful and acceptable purpose. In *Girsch* the ordinance involved had been followed in ninety per cent of the area it covered. The land remaining being limited, the possibilities of applications for variances were necessarily limited.

The court quoted with approval from a recent decision of its own: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."³⁶ This statement implies that the zoning commission originally decided to keep the township population at a certain level, and adopted its plan to implement this policy. But rather than start with this presumption, it would seem that, given a diligent and fair zoning commission, the plan was formulated by approaching it from a direction opposite from that which the court assumed. Zoning commissions first look at the type of land with which they are working, the available and potential resources, and the zoning plans of neighboring communities. They then formulate the plan which most nearly satisfies both the interests of the citizens and the reasonable uses to which the land may be put. In reasoning as it did, the court seemed to dismiss the basis of many zoning plans. The stated purpose of zoning in many cases is to insure that available and projected public services and facilities remain sufficient to meet the demand.³⁷ Water and power resources are good examples. Especially around large metropolitan areas (Philadelphia in this case), the danger is very real that the demand will

³³ *Poster Advertising, Inc. v. Zoning Bd. of Adjustment*, 408 Pa. 248, 182 A.2d 521, 523 (1962).

³⁴ The total number of units is fifty-four. The project, as originally planned would increase the population of the township by 13%.

³⁵ *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). The subject is also mentioned favorably in *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

³⁶ 263 A.2d at 397, citing *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

³⁷ See *City of Ann Arbor v. Northwest Park Constr. Corp.*, 280 F.2d 212, 221 (6th Cir. 1960): "[T]here is evidence that it could have a severe impact upon the neighboring residential community with respect to traffic, congestion, and danger to young children."

overreach the supply, and zoning is one constitutionally approved method of controlling the demand on these limited resources.³⁸

The majority further stated that protecting the aesthetic nature of the area is not sufficient justification for an exclusionary zoning plan. Aesthetic zoning has been a source of controversy among the courts. It has been resolved to the point where most courts consider it as a factor,³⁹ while a few consider it sufficient justification in and of itself.⁴⁰ The court in *Girsh* is in the majority in conceding it to be a factor, as it has been in other Pennsylvania decisions.⁴¹ However, in the present context, since the twin towers would obviously be incompatible with the surrounding neighborhood, the aesthetic aspect would seem to be another factor tipping the scale in favor of a "fairly debatable" issue of reasonability-of-use restriction.

In its decision the court seems to have been influenced heavily by public policy. It stated that the township was "trying to 'stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live.'" ⁴² However, the township is ninety per cent developed and lies on the outskirts of one of the nation's most populous cities. It is not "hitherto undeveloped." The court's admonition in this instance would seem to be more properly directed to preventing the extension of population into formerly rural areas.⁴³ This particular township has not been standing in the way of progress. Rather, it has developed in much the same manner as the many small suburbs adjacent to large cities all over the country.

The majority in *Girsh* seems to be making an emotional argument based on the right of people to live where and how they choose. Certainly this right is basic to life in a free society. But limitations must be imposed for the safety and welfare of the community as a whole, as this court ac-

³⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In *Girsh* the project as originally planned involved putting 32 families per acre on the land. Such a load would put a considerable strain on public services, schools, and facilities, with attendant increased traffic congestion and thus increased danger of injury. Although there was conflicting evidence as to the possible extent of such problems, there was ample evidence on which a "fairly debatable" issue could be found. See 263 A.2d at 402-03.

³⁹ *Hitchman v. Oakland Township*, 329 Mich. 331, 45 N.W.2d 306 (1951); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).

⁴⁰ *State v. Diamond Motors, Inc.*, 429 P.2d 825 (Hawaii 1967); *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 140 N.Y.S.2d 734, appeal dismissed, sub nom. *Stover v. New York*, 375 U.S. 42 (1963); *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965).

⁴¹ See, e.g., *Billbar Constr. Co. v. Easttown Township Bd. of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958).

⁴² 263 A.2d at 398:

This case presents a situation where, no less than in *National Land*, the Township is trying to 'stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live.' Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find a 'comfortable place to live' are for someone else to worry about. That decision is unacceptable.

The court goes on to justify its decision by describing the large-scale move to the suburbs, citing statistics from the *New York Times*.

⁴³ This was more clearly the situation in *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

knowledges. Its conclusion here is that the restriction in question is not necessarily related to the general welfare. The constitutional basis for this decision is not clearly explained. The court merely stated: "We must start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. Amends. V., XIV."⁴⁴

The dissent reiterated the standards of the *Euclid* case and those Pennsylvania cases echoing these standards.⁴⁵ It did not equate an omission with an express, total prohibition, and favored accepting variance availability as a constitutional safety-valve. The dissent argued that the court placed itself in the position of a "super zoning board," and that as a result of this decision, zoning commissions in the future will feel compelled to plan for every conceivable land use within a community.

III. CONCLUSION

The typical zoning plan which is based on the single-family restriction makes no provision for apartments. This arrangement has been repeatedly sanctioned by the courts.⁴⁶ The ordinance under attack in *Girsh* does not create one single-use district, for commercial and industrial districts are provided. However, the seventy-five per cent which is not so classified is restricted to single-family usage. Essentially, then, the ordinance as to this seventy-five per cent creates a single-family "district" which happens to be almost an entire municipality. It is not unreasonable to say that since the decision was reached with the help of cases dealing with commercial and industrial uses, *Girsh* is but an extension of these holdings. Consequently, it can be argued that a zoning entity must provide for all uses which it feels are even remotely reasonable, with the knowledge that if it does not foresee a possibility, the courts will void the ordinance.⁴⁷

The weight of authority is against the result reached in *Girsh*. The guiding principles are relatively simple, having changed little from their formulation in the *Euclid* case. But difficulty has come in applying them in specific fact situations. It would seem not to be clearly unreasonable or arbitrary that a suburban community have only one-fourth of its area set aside for other than single-family residences. In situations replete with conflicting evidence, courts have traditionally accepted the presumption of validity attending legislative enactments, and whenever they have found a "fairly debatable" issue, have refused to disturb the ordinance. There are not one, but several, issues which are debatable in *Girsh*.

⁴⁴ 263 A.2d at 397 n.3.

⁴⁵ See, e.g., *Glorioso Appeal*, 413 Pa. 194, 196 A.2d 668 (1964).

⁴⁶ See cases cited in note 30 *supra*.

⁴⁷ It should be noted that the majority states explicitly that this is not the result it intends. 263 A.2d at 399. But it can be rationally argued that this will in fact be the result, notwithstanding the disclaimer. The majority restricts its holding to residence-related land uses. However, of the case authority on which the majority principally relies, only one deals with such uses [*National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965)]. The majority distinguished its own authority: "Here we are faced with a similar case, but its implications are even more critical, for we are here dealing with the crucial problem of population, not with billboards or quarries." 263 A.2d at 398. Conceivably, this decision could put an intolerable strain on local zoning budgets and expertise.