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The Zoning Game: Municipal Practices and Policies, by Richard F. Babcock (1966)

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BOOKS

BOOKS REVIEWED

THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES. By Richard F. Babcock. Madison: The University of Wisconsin Press, 1966. Pp. xvi, 202. $5.75.

Through the musty corridors stacked with appellate reports and multi-volumed tomes on zoning law comes now a breath of fresh air. At long last someone has described the facts of life in the world of zoning. For this we can thank, in addition to Mr. Babcock, the University of Wisconsin Law School for sponsoring the lectures that were this book's genesis.

Anyone who has worked in zoning and planning knows of Richard Babcock and his undoubted expertise. He has written extensively for the law reviews[1] and he has appeared with frequency on the planner's chautauqua circuit. If you had to name one practicing lawyer—as distinct from city attorney, governmental official, or academic—more widely known than any other in the field of zoning, certainly, it would be Richard Babcock. His competence may well be another success story attributable to the American law reviews. While an editor of the *University of Chicago Law Review,* Babcock wrote an exhaustive comment on the amortization of nonconforming uses[2]—there has been little written in twenty-five years that is any better—and thereupon began his distinguished career in the zoning game.

This is a small book—there are only 185 pages of text—but, like the counting-house of Barabas, it contains infinite riches in a little room. There is good work on all aspects of zoning buried in the law reviews, but none of it, as Dr. Johnson said, is in a "bound book." The standard texts are of "the type tonsorial or agglutinative, so called from the shears and pastepot which are its implements and emblem."[3] Furthermore, what is written in those books often bears little relation-

[1] *E.g., The Illinois Supreme Court on Zoning,* 15 U. CHI. L. REV. 87 (1947); *Classification and Segregation Among Zoning Districts,* 1954 U. ILL. L.F. 186; *The New Chicago Zoning Ordinance,* 52 NW. U.L. REV. 174 (1957); *The Unhappy State of Zoning Administration in Illinois,* 26 U. CHI. L. REV. 509 (1959); (with F. P. Bosselman), *Suburban Zoning and the Apartment Boom,* 111 U. PA. L. REV. 1040 (1963); *An Introduction to the Model Enabling Act for Planned Residential Development,* 114 U. PA. L. REV. 136 (1965).

[2] Comment, *Amortization of Property Uses Not Conforming to Zoning Regulations,* 9 U. CHI. L. REV. 477 (1942).

[3] Cardozo, *Law and Literature,* 48 YALE L.J. 371, 493 (1939).

ship to the realities of zoning. There are few areas of the law where the gap between theory and practice is so wide, where the difference between what the courts say and what actually goes on is so marked, as in the field of zoning. Happily we now have a book that points this out: Babcock speaks not only from a sound theoretical base, but also from extensive experience in the practice.

This may be an irreverent book but it is not a flippant one: the title and major subtitles convey an erroneous impression. Perhaps rather than irreverent, it is a book of abounding candor. Indeed, because of his candor Babcock does not divulge many of his sources.[4] Had he named names, the poor fellows might have been shot at sunrise.

Babcock's frankness is most pronounced when he tells about the way zoning is really used in the suburbs: as a protective device for exclusionary purposes. "The resident of suburbia is concerned not with *what* but with *whom*."[5] These are "the whispered reasons" Babcock wrote about in another connection.[6] He is not exaggerating, I suggest. My own experience has been that protestors against multiple family dwellings in suburban areas will do everything but come right out and say that "nice" people simply don't live in apartments. Most of the time the arguments are phrased in terms of increased costs of urban services and impact on the schools. But Babcock points out that at bottom it is a social judgment and not fear of overcrowding the schools that motivates the hostile housewife and her commuting husband at the zoning hearing.[7]

In the same vein, Babcock tells about his client's application for a discount house in suburbia.[8] So long as the people thought the proposal was for a Jewel Tea Store there seemed to be no opposition. But when it became known that there might be a discount house (even though erected and managed by Jewel Tea, and even though its impact on the neighborhood would be the same), the application was doomed. Because, of course, the lower prices might attract "undesirable" shoppers from outside the neighborhood.

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[4] See, *e.g.*, pp. 75, 90, 97, 122.

[5] P. 31.

[6] Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1068-71 (1965).

[7] P. 31. One real estate developer of reputation and responsibility once said that he would gladly agree, if he thought it would mollify the opposition, to pass out contraceptives to all applicants for housing and require an affidavit of sterility as a closing document.

[8] Pp. 36-37.

Babcock points out how phony is much of the talk about open space. Open space for whom? is the way he phrases it.[9] As an example he tells about the furor caused among the neighbors when the Cook County Forest Preserve wanted to acquire an additional 1000 acres near Barrington, Illinois. The Forest Preserves, which ring the city of Chicago with green belts, are public areas, and who knows what kind of people might come to picnic in the park near bucolic Barrington?

Zoning, like all law, is administered by men. You can't talk about the institution without talking about the men who run it. Babcock takes up seriatim the roles of the players in the zoning game: the layman as public decision maker (herein of plan commissions); the layman as private decision maker (herein of developers); the planner; the lawyer; and the judge. He does not devote a chapter to the legislator but words of wisdom for legislating men can be found in the last half of the book.

Judges, Babcock points out, have been acting like super zoning boards for years; only recently have they begun to liberate themselves. In 1964 the Illinois Supreme Court announced that, except when novel issues were involved, it would hear no more zoning appeals.[10] But that one case of novelty, Babcock says, *must* be decided by the state's highest court, and one out of two hundred, perhaps, should be decided by the United States Supreme Court—it has not heard a zoning case since 1928—to obviate divergent rules that will be intolerable in an urban society.[11] Finally, Babcock is doubtful whether, until the courts define the general welfare in a broader way than they have, the legislature will act at all.[12]

From now on, I cannot conceive of an urban planner worth his salt who is unfamiliar with the chapter on the Planner in this book. Babcock is somewhat acerbic about the planners' theology, but no more so than he is about the lawyers' apathy. He has great sympathy for the ambiguous role the planner has to play: planners do not like zoning, but they have to work with it all the time.[13] Finally, Babcock puts the comprehensive plan in proper perspective: it is no more or no less valid than a zoning ordinance if its scope is limited and its function circumscribed.[14]

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[9] P. 32.
[10] P. 110.
[11] *Ibid.*
[12] P. 180.
[13] Pp. 62-64.
[14] Pp. 122-23.

Similarly, I cannot conceive of a lawyer pretending even to token familiarity with zoning who should not read this entire book. After all, lawyers dreamed up the zoning technique; it is their responsibility to bring it in line with current events. For, as Babcock says, whatever role the planners may play—and it is an important one—and whatever legacy the planners have bequeathed us—and it is a munificent one—the ultimate solution will have to be legal. It is the lawyers' job to find it. Up to now both lawyers and law schools have been seriously in default.

Two chapters in the book describe the role of the layman in the zoning process. This is fitting and proper. It is through essentially lay bodies—plan commissions, boards of adjustment, city councils—that zoning decisions are made. It is by laymen, sometimes merely the developer's "own sweet will,"[15] that subdivisions get established. In discussing the narrow objectives that dominate the average suburban zoning structure, Babcock has penned words that should be cast in bronze and placed in the meeting rooms of every planning commission, zoning board, and city council in the country: "To use zoning as a tool solely for protecting the values of neighboring property is an extreme form of parochialism our society cannot afford in the twentieth century."[16]

The plan commission, Babcock says, is a dodo.[17] I gather he would also say it is a dud. It arrogates to itself expertise about, and exercises power over, matters it knows not of. It should be, I take it, abolished. Yet there must be some body (whether you call it plan commission, zoning commission, zoning committee, board of adjustment, board of appeals, or what not) to hold a hearing, assemble a record, and make an informed recommendation. I do not understand Babcock to advocate that all hearings be held before the quasi-legislative body itself (i.e., city council or county board). Until we have something better, and Babcock's state review board does not seem to have a nisi prius function, the plan commission had best be with us.

Babcock treats real estate developers not altogether unsympathetically. He is kinder to them, I suspect, than most of us would be. He points out how they have been blackmailed by zoning authorities over the years and how they have been frustrated time and time again by delay and duplication in the zoning process. But he accords

[15] HAAR, LAND USE PLANNING 349 (1956).
[16] P. 119.
[17] P. 40.

them little sympathy in their current complaint about local prejudice keeping them from introducing suburbia to multiple-family dwellings—even of the cluster type that will in fact create more open space than an equivalent number of single family homes. It was the developer in search of a buck who foisted a generation of cracker box houses upon us; the local resident who bought the developer's tract house now sits on the plan commission and is not about to admit he was taken in.[18]

Babcock's assessment of zoning, like zoning itself, is ambivalent. Nobody is for it, he says, except the people, and by these he means the people of suburbia where it has its greatest success fulfilling its protective role. To take an inventory of zoning as the last third of the 20th century begins, one must cast at least a furtive glance at its history. Babcock gives us a brief review from the 1916 New York City ordinance through the Commerce Department standard act in the twenties right up to the search for flexibility in modern zoning ordinances by way of planned developments, floating zones, special uses, etc. The purposes have changed over the years but the procedures and principles have not adapted themselves commensurately. And a good deal of zoning theology, which we solemnly regard as immutable principles, he says consists of nothing more than techniques and procedures, which must be modified to meet new circumstances.[19]

Zoning is the most universal legal tool we have to control use of land, and what bothers Babcock is that its misuse can have greater adverse impact on the community than the misuse of many other legal and administrative techniques. "Dollar venality in the execution of one urban redevelopment project" he says, "will receive strident and outraged attention from the metropolitan press, while daily evidence of intellectual dishonesty and moral corruption in the application of zoning in our suburban areas is accepted as a civic norm."[20]

Babcock does more than strike a balance sheet on zoning. In his last two chapters he makes affirmative proposals that will rock a boat or two. His basic point is, of course, that if we expect zoning to do a viable job in the urban society of our times we can no longer equate the general welfare with purely parochial interests. Essential components of the general welfare, which present-day zoning hardly recognizes,

[18] Pp. 50-52.
[19] P. 126.
[20] P. 124.

are the interests and values of the people and institutions in the metropolis surrounding the local area.

I suspect there will not be serious quarrel with his procedural proposals. He would place in the enabling act certain basic concepts of fair play and due process required of all local zoning authorities. Moreover, he would make them applicable to quasi-legislative bodies such as city councils and county boards. This may upset purists but it squares with the facts of life. When a city council acts on a recommendation of a planning commission it is, I submit, performing an administrative and not a legislative task. Any review in the courts should be on the record and not by way of a trial de novo.[21]

His substantive proposals will evoke more controversy. He would place in the enabling act certain standards and principles concerning, in the main, the necessity of relating local zoning decisions to the metropolitan region. At the outset one might say, as was said about the Taft-Hartley Act, that here indeed is a lawyer's G.I. bill of rights! Yet if we are to rid zoning of its extreme localism something like this must be done.

Babcock's final proposal—creation of a state-wide agency to hear all zoning appeals—might raise the blood pressure of home-rule enthusiasts, but it strikes me as eminently reasonable. A body of consistent standards could eventually be developed and the review of zoning decisions would be conducted by a non-parochial board away from the hog-calling atmosphere of most zoning hearings.

One thing Babcock is sure of. It is the job of the Bar to undertake zoning reform, and the time is now. What we have to do is obvious enough; we need no more data from the planners. Babcock tells of Holmes's cry of anguish when he received another box of books on economics from Brandeis.[22] I trust we lawyers have done better than Holmes, though. According to legend, the books came back from the Cape just as Brandeis had packed them; Holmes hadn't even opened the crate.

At the very most I can disagree with Babcock only in emphasis. I

[21] An attempt was made in 1959 to amend the Illinois Zoning Enabling Act so as to characterize all zoning map amendments (which must be enacted by the local legislative body) as "administrative decisions" and thus reviewable exclusively under the Administrative Review Act. The attempt foundered in the real property committee of the Illinois Bar Association, because local zoning administration in Illinois was so primitive, so the committee felt, that any record coming before a judge for review would be meaningless.

[22] P. xiii.

should not be inclined to excoriate "contract zoning" as he does.[23] It seems to me a perfectly straightforward way to achieve flexibility—as much so as the special use, planned development, or floating zone—given existing kinds of zoning ordinances, but then we have argued about this before.[24] I also am loathe to believe that before the legislators will act at all the courts must intervene to redefine the general welfare. I certainly think the courts should intervene, but I have some hopes—perhaps naive ones—that at least some legislatures will be enlightened enough to refashion zoning and planning laws to fit the needs of an urban society.

I also detected a note of pessimism—muted to be sure—that I am not sure I share. I have great faith that lawyers will rise to their appointed task. After all, a profession that developed an effective scheme for regulating the issuance and distribution of corporate securities, or created workable methods to resolve labor disputes, or, indeed, designed the federal system itself, is, I submit, capable of devising a way to regulate use of land in the public interest without abrogating completely all individual rights. If this smacks too much of Pollyanna, perhaps it is because I know there are lawyers around like Dick Babcock who will show us what to do.

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[23] Pp. 9-10.

[24] *Compare* Dallstream & Hunt, *Variations, Exceptions, and Special Uses*, 1954 U. ILL. L.F. 213, 236-38 *with* Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 526 (1959), *and* Hunt, Book Review, 32 U. CHI. L. REV. 208, 211-12 (1964).

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