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

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Book Review

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

In his Foreword to this book, Dennis O'Harrow describes Richard Babcock as a "combatant" who has paused briefly in his active playing of the zoning game to stir up "at least a little storm among all of us." To be sure, this is one of the first impressions which the reader feels as he gets into the stream of the author's thought, for Babcock seizes the initiative in the very beginning, and nimbly penetrates the workings of zoning practice in modern American municipalities while most literature on land-use control merely nibbles at this massive subject's outer defenses. Nor does he ever relinquish this initiative and go over to the defensive. The end is as stimulating as the beginning, and lays down what may well become the elements of a successful plan for rescuing zoning from an undeserved fate in the next quarter century.

Relying on the shock tactic of showing how the game is actually played, instead, of how its apologists say it should be played or how the courts explain it in their decisions, the author begins by whisking the reader through a series of chapters in which he successively challenges the records and credentials of landowners and developers, the decision-makers of local zoning agencies, the planners, the lawyers, and the judges.

The result is a view of zoning in the United States as a frighteningly successful record of protecting the single-family unit pattern of suburbia (including its complementary facilities for one-stop shopping, "convenience services", private recreation and amenity) and enticing prestige industry to locate where it will help the municipal tax base, but an ominously unsuccessful record of facing up to the consequences of this result on the future growth of the communities most directly involved, and the problems of the larger surrounding region relating to transportation, public open space and recreational needs, pollution of air and water, and most other major public facilities. And over all this anarchy, caused by fragmented authority, amateurism and downright sloppy decision-making by administrative bodies, indifference on the part of courts, and uncertainty about the "general welfare" basis

of land-use control, the author paints in the deepening shadow of a growing relative shortage of land and natural resources necessary to build and rebuild the American scene.

This is a harsh judgment to lay upon a system which numerous professionals in the fields of planning, public administration, and the law have conscientiously tried to adapt to the pressures of urbanism that have characterized the years since World War II. But the judgment is plain spoken, delivered with wit, and documented by references to observable phenomena which anyone who has been in recent contact with zoning processes will immediately recognize and be able to amplify from his own experience. No one, therefore, is entitled to take offense. Nor can one claim that the author is writing solely for the satisfaction of crying havoc, for as quickly as he finishes exposing the shortcomings and frustrations of the principal players in the zoning game, he shifts his attack to the purposes, principles, and parties with which efforts to raise the quality of zoning practice must be concerned.

In this analytical inventory, Babcock finds the literature of the law and planning laden with myths which, he concludes, offer no real help in drawing new blueprints for rebuilding zoning's basic machinery, or writing a new operations manual for zoners. Commencing with the search for an underlying purpose or rationale, he discards both the "Property Value Theory" and the "Planning Theory" of zoning. The former, he feels, is too preoccupied with the effect of proposed land uses on the value of other neighborhood property. ("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.")¹ The latter, he asserts, is too dangerous since it implies an infallibility to municipal planning which it does not deserve. ("... the municipal plan serves as a useful intramural yardstick for the municipal regulations. . . . It is an error, however, to dignify the municipal plan with more authority than this limited function. But to measure the validity of zoning by the degree to which it is consistent with a municipal plan does just that.")² Thus, he concludes that the search for a single unifying purpose in zoning is futile, and only hinders one from viewing it as part of an essentially political technique through which private land use is regulated in accord with public interests.

There is, in Babcock's view, just as little benefit in trying to articulate any unique principles of zoning. What planners and others have sometimes labored to build up as doctrinal precepts are, under clearer scrutiny, really techniques of administration which have evolved and changed as planning philosophies have changed over the past forty years. The principles which actually control zoning policy and practice are, according to the author, the same rules of constitutional law which apply in other fields of governmental regulatory action—equal protection, substantive and procedural due process, the concept of general welfare—and which form the prerequisites of acceptable public administration from generation to generation.

Assignment of appropriate roles to the several "interested parties" in the zoning process is not easy. Here the author rightfully objects to the traditional approach to zoning as a competition between the interests of the landowner, his neighbors, and

1. R. BABCOCK, *THE ZONING GAME* 119 (1966).

2. *Id.* at 122-23.

the municipality, in which the municipality more regularly than not surrenders to the pressure of the neighborhood. But beyond that point the distinctions become blurred. It seems clear enough that the neighborhood is entitled to call on zoning to protect it from the things that nuisance doctrine embraced; but should it go as far as dictating architectural conformity? And what about the much larger neighborhood that comprises the metropolitan region? It has very specific interests in such matters as regional transportation, recreational facilities, and pollution problems. When and how should these considerations be introduced into the zoning process?

At this point some might be ready to break off the attack with a call for more research, or new ideas, or a rallying of all interested professions for a coordinated approach. Not Babcock. He lays the challenge squarely in the lap of his own profession, asserting that they who brought forth the zoning concept some fifty years ago are now the logical ones to lead it out of its present wilderness. And he poses three specific lines of action as the basis of needed reforms: (1) more detailed statutory prescription of the required administrative procedure at local levels; (2) statutory restatement of the major substantive criteria by which the reasonableness of local decision-making is measured; and (3) creation of a state-wide administrative agency to review the decisions of local authorities in land-use matters, with final appeal to an appellate court.

For each of these three elements in his proposed rearmament and reorganization of the machinery of zoning, the author makes a strong case. As to state statutory control over municipal zoning procedures, there is every reason to support it as a relevant, practical, and long overdue step by the states. Hopefully, the state legislatures can be persuaded to go beyond the matter of prescribing rules for local public hearings to deal with the entire sequence of steps in processing land-use control actions. In hearings which inquire into the kinds of questions which the author urges be considered, procedural fairness may not really be achieved by guaranteeing a right of cross-examination, a transcript of testimony and written statements of findings, and reasons for the decision of the zoning body. All this is of little help to a party who either lacks access to the technical information he needs to deal with these issues, or, having access to the necessary data, lacks the technical competence to marshal and present it. In this era when the gadgetry of American science and engineering technology seems to have a rising appeal for both business and government, the parties who have professional staffs or who can hire consultants to present and interpret data in administrative proceedings start out with a definite advantage over the have-not parties. Perhaps the author would agree that his specifications for upgrading procedure should include some means of reducing this particular disparity in the actual ability of the parties to utilize their chance to build better records before the zoning boards.

Perhaps he would also agree to having this new statutory framework for procedural control go into the matter of zoning agency ethics. Measures to minimize the chances for conflicts of interest and to provide remedies for cases which justify challenge on this ground would seem to necessarily be for the state legislature to provide.³

3. Babcock, in gentlemanly fashion, stops short of asserting outrightly that corruption is

As to his second proposal, calling for articulation of substantive standards to be used by local zoning agencies in evaluating the interests legitimately concerned with the land-use policy that is involved in a specific zoning request, the author suggests an extensive rewriting, or at least amplification, of existing state enabling legislation for local zoning. It is, he agrees, a job which a state administrative agency could do, but he prefers the statutory method in order to put the weight of the legislature behind this state policy. This seems wise, particularly in the light of his third suggestion for establishment of a new method of reviewing local zoning actions for adherence to these criteria.⁴

In his last proposal, the author argues for creation of a state administrative agency with authority to enforce state policy as to zoning criteria and procedure, and in some instances to grant monetary awards to landowners whose applications to develop land are denied because of a desire to sustain neighborhood preferences in land use of amenities. This suggestion has already been greeted with skepticism by some observers, and may expect to encounter more.⁵ But it is a proposal which makes more and more sense as one considers the overriding need for more careful handling of the regional issues in many modern zoning cases, and the alternatives of trying to accomplish this through judicial proceedings.

If the merits of this suggestion are clear, however, the prospects of persuading the states and their political subdivisions to try it are not so clear. As Babcock recognizes, the cry against "destruction of local power to set land use policy" will be a formidable one, against which only a hard-headed argument of time and money savings is likely to be effective. If it is not enough, possibly a mixture of state and local representation in the membership of the reviewing body would be more agreeable. In this regard, the author believes it is important that "[l]ocal decision-making is not taken away from local government. . . ."⁶ and so sets himself apart from others who would call for direct exercise of zoning powers by state regulatory agencies on the ground that "getting the job done" is more important than who does it or how it is done. It is not clear how much of his position he would be willing to concede in order to accommodate this latter view, but surely this question must have occurred to him as a result of recent attempts by state highway departments to develop better forms of land-use control in the critical areas around the interchanges of expressways.⁷

a part of the problem of assuring fairness in zoning proceedings. The reviewer, however, lives in a county which during the past year has indicted and tried nine public officials, land developers, and lawyers for bribery in zoning cases, and is downright mad about it. Others who have thought it is time to call for stronger measures to stop corruption in zoning include Dennis O'Harrow, who has suggested creating a National Zoning Crime Commission. See O'Harrow, *Planning, 1965*, in AMERICAN SOC'Y OF PLANNING OFFICIALS (Nov. 1965).

4. Others have agreed that "strategic control" over the conduct of local zoning is the best means for upgrading this activity where it is either economically unjustifiable or politically unacceptable for the state to intervene directly. See, e.g., the remarks of Mishkin, Beuscher, Dunham & O'Harrow in "A Critical Look at Zoning Law" in *Municipal Law Service Letter* (Section of Municipal Law, American Bar Association) vol. 10, No. 1, January 1960.

5. See, e.g., Professor Hagman's review in 34 U. CHI. L. REV. 469 (1967).

6. R. BABCOCK, *supra* note 1, at 173.

7. See, for example, Wisconsin Department of Resource Development, *The Protection and*

Be this as it may, one hopes that Babcock has indeed accurately gauged the temper of the times, and found a formula which will succeed in saving zoning as an area where local government can function more readily and effectively. In saying the things that he has about the municipal policies and practice of zoning, he has presented a commentary which is unique, and sure to become memorable in the literature of this field of law. More than that, this book will become a stimulus for a new generation of lawyers and judges whose lot it will be to finish the reformation of zoning law.

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