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John M. Hyson

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A GENERAL OVERVIEW OF THE CONFLICTING
INTERESTS INVOLVED IN LAND DEVELOP-
MENT AND ENVIRONMENTAL CONTROL

JOHN M. HYSON†

WHEN IT WAS PROPOSED that I serve as "commentator" for today's symposium, I inquired — quite naturally, I thought — as to what the role of the commentator would be. In response to my inquiry, it was suggested that I should provide an "academic overview," drawing together the loose ends left by the preceding speakers. I am afraid that, given the present state of the law with respect to land use and environmental controls, there are too many loose ends for one person to pull together. I shall attempt, however, to put some of the issues mentioned in the preceding discussions in a general analytical context.

All of the speakers, in one way or another, have addressed the conflict in social values which must be confronted in discussing the topic of this symposium. Whenever there is a proposal made for residential development in a relatively undeveloped community, there is a conflict between the two social values of providing an adequate amount of housing and maintaining the existing environment. More specifically, a proposal for high-density residential development will often reveal the existence of three competing interests: First, there is the interest of the developer who, though he may claim to be primarily motivated by the selfless goal of providing homes for the homeless,¹ is at least equally concerned with the manner in which land use and environmental controls affect the right of "private property" which he defines as the right to use one's property in the most profitable fashion. Second, there is the interest of those outside the community wherein development is sought — Mr. Bowser's "Underclass" — who wish to reach the promised land of the split-level and the backyard barbecue but whose hopes are stymied by the high cost of suburban housing, a cost which reflects, at least in part, the expense to the developer of meeting environmental standards. Finally, there is the interest of the community wherein the development is proposed — an interest in preventing the kind of development which will threaten the "environment." As far as the citizens of the community are con-

† Associate Professor of Law, Villanova University; B.A., Boston College, 1963; M.A., University of North Carolina, 1964; LL.B., Harvard University, 1967.

1. The battle against exclusionary suburban zoning has produced its own strange bedfellows — the real estate developer and the liberal champion of the lower class. Each favors the minimization of land use and environmental restrictions upon the provision of suburban housing, but for entirely different reasons.

cerned, any development which changes the existing character of the community constitutes a threat to the environment.

These three conflicting interests are not reconciled under the law. Indeed, the conflict is created and maintained by the United States Constitution. On the one hand, the interests of landowners are buttressed by the taking clause of the fifth amendment, prohibiting the taking of private property for public use without just compensation.² Over fifty years ago, Supreme Court Justice Oliver Wendell Holmes, Jr., stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³ As one might imagine, there have been literally thousands of cases in which courts have had to consider how far was "too far."⁴ A developer or landowner may reasonably argue that an environmental control which severely limits the use of his land amounts to a taking for public use without just compensation. However, it has long been recognized that the oft-stated right of a private property owner to use his land as he sees fit is a myth. First, the law of nuisance prohibits a landowner from using his land in such a way as to cause injury to the land of another. Moreover, the states have an inherent power — the police power — to enact laws for the public health, safety and welfare. Just as the law of nuisance prohibits a property owner from using his land to the detriment of another's land, so a state can, through the exercise of its police power, prohibit a property owner from using his land in such a way as to injure the public. Thus, the taking clause and the state's inherent police power provide the constitutional foundation for the conflict between the individual developer's interest and the interest of the community wherein development is proposed.

The second conflict is the conflict between the interests of residents of the municipality in which the development is sought and the interests of non-residents who wish to become residents of the community. As I have already mentioned, it is the state's inherent police power which provides the authority to regulate the use of land in order to prevent injury to the public health, safety, or welfare. The states have partially delegated this power by enacting legislation conferring upon the municipalities the power to control the use of land through

2. U.S. CONST. amend. V. Although the Supreme Court originally held, in *Withers v. Buckley*, 61 U.S. 84 (1857), that the taking clause was applicable only to the federal government and not the states, the Court later held that the taking clause was incorporated into the due process clause of the fourteenth amendment and was thus binding upon the states. See *Chicago, B.&Q. Ry. v. Chicago*, 166 U.S. 226 (1897).

3. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

4. The most prominent of these cases are collected and analyzed in F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* 139-235 (1973).

zoning, sub-division ordinances, and other land use controls.⁵ State laws conferring such powers upon municipalities inevitably provide that the delegated powers are to be exercised for the purpose of promoting the health, safety, morals, or general welfare of the community.⁶

It was once generally assumed that a municipality's land use controls were valid if they promoted the health, safety, morals or welfare of the *enacting municipality*. In other words, "general welfare of the community" meant the welfare of the municipality exercising control over land use. However, within the past fifteen to twenty years, some courts, most notably the Pennsylvania Supreme Court,⁷ have ruled that a municipality may validly enact and enforce land use controls only if such controls promote the general welfare of the *regional community*.⁸ Specifically, a suburban municipality may not control the use of land and promote its own welfare while ignoring the welfare of the region. Thus, for example, 4-acre⁹ and 2-acre¹⁰ minimum lot size requirements have been struck down because, though they arguably may have promoted the welfare of the respective municipalities by maintaining an open environment, they were detrimental to the regional welfare because they restricted high-density, low-cost housing development.

I wish to discuss briefly, within the legal framework I have developed, an issue that has been discussed by other speakers — the problem of sewer bans or moratoria. This issue is particularly appropriate for discussion at this symposium because sewer moratoria not only have a significant effect upon land use decisions, but also are justified on environmental grounds. The importance of sewerage and sewage treatment facilities in land use decisions can scarcely be exaggerated. The absence of such facilities will effectively preclude high-density development; their installation or expansion will attract high-density development. But sewage treatment facilities have a finite capacity and allowing that capacity to be exceeded leads to degradation of the environment.

5. See, e.g., Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, §§ 10101-11202 (Supp. 1974).

6. See, e.g., *id.* § 10105.

7. See Concord Township Appeal [better known as Appeal of Kit-Mar Builders, Inc.], 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

8. This requirement is outlined most succinctly in National Land & Inv. Co., 419 Pa. 504, 215 A.2d 597 (1965), where the court stated: "the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary." *Id.* at 533, 215 A.2d at 612.

9. National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

10. Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970).

The relationship of sewage treatment facilities to land use and the environment has led many communities to impose sewer moratoria in order to prevent existing treatment systems from becoming overloaded. They accept, with no apparent remorse, the fact that these moratoria effectively stifle further development. Since there have been relatively few court decisions,¹¹ the legality of these moratoria is quite uncertain.¹²

Let us begin by examining the effect of a moratorium on the property owner. The moratorium prevents the owner's use of existing sewage treatment facilities. There may also be a local ordinance which prohibits the use of on-site septic systems or, perhaps more likely, permits the use of such systems only upon lots of a specified (and economically unfeasible) minimum acreage. The combination of these restrictions precludes any kind of residential development. Moreover, even though the restrictions may prevent the profitable use of the land, the owner may still be burdened with substantial taxes and mortgage payments. Under these circumstances, it is hardly specious for the owner to contend that the sewer moratorium is a regulation which has, in the words of Justice Holmes,¹³ gone "too far" and thus constitutes a taking.

On the other hand, the municipality imposing the sewer moratorium may quite reasonably contend that the moratorium is a valid exercise of its police power because to allow the overloading of the existing sewerage and sewage treatment facilities would be harmful to the public welfare. The public harm in such a situation is obvious, but what if a municipality, after recognizing that its existing sewerage and sewage treatment facilities were being used to capacity, were to take no action to increase the capacity? After all, as far as the municipality is concerned, maintaining the status quo with a freeze upon any further development may be quite acceptable. Such a situation, however, is totally unacceptable to those who are seeking to become residents of the municipality. What can be done with such a municipality, which, by refusing to expand its sewerage and sewage treatment facilities, fails to take into account the housing needs of non-residents?

11. The few relevant cases are discussed in Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974).

12. In the Pennsylvania exclusionary zoning decisions, *supra* note 7, the municipalities contended that the zoning was justified because of the expense involved in providing public facilities and services for a rapidly expanding population. The Pennsylvania Supreme Court, however, has consistently rejected this argument. In *Girsh Appeal*, 437 Pa. 466, 268 A.2d 395 (1970), the court stated: "Municipal services must be provided *somewhere*, and if Nether Providence [the municipality] is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden." 437 Pa. at 244-45, 263 A.2d at 398-99 (emphasis in original, footnote omitted).

13. See note 3 and accompanying text *supra*.

Is the community under any legal obligation to provide such facilities in order to accommodate continued growth? After all, this situation is different from that in which a municipality has used its zoning power to restrict development. In the latter situation, a municipality has taken an affirmative step to prevent development. However, where a municipality fails to expand existing sewage treatment facilities, it is simply declining to take an affirmative step — the expenditure of public funds — to accommodate development. Even if a municipality does expand its existing sewage treatment facilities to accommodate development, questions remain about whether it can impose the cost of that expansion upon the new developers (and thus, indirectly, upon the new residents), or whether the cost of the expansion must be borne by both the existing and new residents of the municipality. These are difficult questions to which the courts have given few answers.¹⁴

Equally difficult legal questions arise when a community has sewerage and sewage treatment facilities with capacities in excess of the community's present needs. For purposes of illustration, permit me to make reference to a controversy that exists in this immediate area. It revolves around the construction of a new sewage treatment facility, the Valley Forge Area Wastewater Treatment Facility, designed to serve the communities in Chester County. The Environmental Protection Agency, acting through Dan Snyder, the Regional Administrator, has approved federal funding for the facility but, before releasing federal funds, has quite reasonably required that the facility be designed to meet not only the present requirements of Chester County, but its future needs as well. It has been estimated (and the estimates vary depending upon who is doing the estimating) that the proposed facility would have the capacity to service up to six times the present population of Chester County. If the proposed facility is constructed, it seems reasonable to assume that the municipalities in Chester County will be subjected to enormous developmental pressures. The issue, then, is whether they must succumb to these pressures and have the rural countryside transformed almost overnight into another heavily populated suburban county. Those who suggest that the Chester County communities can use zoning to hold back such development may be underestimating the limitations put upon that power by the Pennsylvania Supreme Court's *National Land*, *Kit-Mar*, and *Girsh* decisions.¹⁵

Perhaps the answer in Chester County is sophisticated, good faith, comprehensive planning. By this I mean planning that is not

14. For a general treatment of these difficult problems, see Note, *supra* note 11. See also *Deerfield Estates, Inc. v. East Brunswick*, 60 N.J. 115, 286 A.2d 498 (1972).

15. See note 7 *supra*.

only designed to accommodate the legitimate conservation desires of Chester County's present inhabitants, but also attempts to help resolve the pressing housing needs of the Philadelphia regional population.¹⁶ This type of planning appears to have been the basis for the decision of the New York Court of Appeals in *Golden v. Planning Board of Town of Ramapo*.¹⁷ Ramapo is a suburban New York City community which had undergone extremely rapid growth. This growth had imposed a heavy financial burden upon the town because of the cost of providing the public facilities (sewerage, schools, etc.) necessary to service the expanding population. In addition, the growth was taking place in a rather haphazard fashion, and the town was forced to provide facilities at times and in places inconsistent with a logical growth scheme. The town reacted by undertaking an extensive four-volume study of the community. This study provided the basis for a master plan, a comprehensive zoning ordinance, and a capital improvements program. All of these documents were designed to ensure that future development would take place in a phased, orderly manner. The key to the zoning ordinance was a provision requiring the issuance of a permit as a condition precedent to residential development. Permits would issue only if the land proposed for development were situated in close proximity to existing public facilities.¹⁸ The ordinance's permit provision was complemented by a capital improvement program committing the town to providing adequate public facilities for the entire community over the course of an 18-year period.

A developer, who had been denied a permit, challenged the validity of the ordinance. Among other things, the developer contended that the ordinance was designed as an exclusionary device and was an invalid exercise of the police power. The court expressed its general agreement with the landmark decisions of the Pennsylvania Supreme Court,¹⁹ stating that it would not countenance "community efforts at immunization or exclusion."²⁰ Nevertheless, the court upheld the Ramapo ordinance upon the following rationale:

[F]ar from being exclusionary, the present amendments merely seek by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to

16. These needs are documented in the *Regional Housing Allocation Plan* (1973) prepared by the Delaware Valley Regional Planning Commission (copy on file at the *Villanova Law Review*).

17. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

18. If a developer did not wish to wait for the community to provide the necessary public facilities, he could provide them himself and thereby become entitled to a development permit. *Id.* at 368-69, 285 N.E.2d at 296.

19. See note 7 *supra*.

20. 30 N.Y.2d at 378, 285 N.E.2d at 302.

the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.²¹

The key to the *Ramapo* decision was the court's finding that Ramapo's sequential development and timed growth scheme constituted a bona fide attempt to accommodate population growth. Communities attempting to make use of a Ramapo-type program should not lose sight of the factors which allowed the court to find that the Town of Ramapo was acting in good faith. An essential part of the Ramapo scheme was a credible commitment to a capital improvement program which, when completed, would accommodate development throughout the community. Perhaps the most convincing indication of the town's good faith was its "provisions for low and moderate income housing on a large scale."²²

The lesson of *Ramapo* seems to be that a community may validly protect its "environment" through a timed-growth program. The price for a valid program to protect the environment is the accommodation of the competing social interest in providing adequate housing. Ramapo met this obligation with its long-range commitment to provide public facilities and its ample provision for low and moderate income housing. It remains to be seen how many other suburban communities are willing to pay this price.

21. *Id.*

22. *Id.* at 380, 285 N.E.2d at 303.