

REVIEW

American Planning Law: Land Use and the Police Power. NORMAN WILLIAMS, JR. Callaghan & Company, Chicago, 1975. Five Vol. \$225.00.

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In 1928, the United States Supreme Court made it clear in *Nectow v. City of Cambridge*¹ that the celebrated *Euclid*² decision of two years earlier did not mean that the courts had abdicated their role of arbitrating particular applications of the zoning power. Yet it was not until 1974 that the court accepted another zoning case. On April Fool's Day of that year Justice Douglas, writing for a majority of the Court in *Village of Belle Terre v. Borass*,³ held that the traditional definition of "family" in zoning ordinances, which excluded a group unrelated by blood or marriage, was not unconstitutional. During this forty-six year hiatus, as Professor Williams observes,⁴ state appellate courts disposed of more than 10,000 reported zoning disputes.

Since the *Belle Terre* decision (referred to by one commentator as "Douglas v. Douglas"), the United States Supreme Court has decided one more zoning case and has granted certiorari in three others.⁵ This is a remarkable turnabout. Students of and practition-

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¹ 277 U.S. 183 (1928).

² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³ 416 U.S. 1 (1974).

⁴ 1 N. WILLIAMS, JR., *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER*, § 3.01, at 81 (1975).

⁵ In *Warth v. Selden*, 422 U.S. 490 (1975), the Court held that nonresidents did not have standing, at least in the absence of a specific proposal for a low-cost housing development, to attack an alleged exclusionary scheme of the zoning ordinance of a suburb of Rochester, New York. In a case involving a Chicago suburb, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir.), cert. granted, 96 S. Ct. 560 (1975), the Court has agreed to review an opinion of the Seventh Circuit which held that the refusal to rezone a tract of land to a greater density to permit an interracial housing development was unconstitutional primarily because the suburb had failed to take steps to correct a notable racial imbalance in the community. In *City of Eastlake v. Forest City Enterprises*, 41 Ohio St. 2d 187, 324 N.E.2d 740, cert. granted, 96 S. Ct. 185 (1975), the Supreme Court has taken a case in which the Ohio Supreme Court held unconstitutional an amendment to the charter of a Cleveland suburb that required a referendum on any amendment to the municipality's zoning ordinance. In *Gribbs v. American Mini Theatres, Inc.*, 518 F.2d 1014 (6th Cir.), cert. granted, 96 S. Ct. 85 (1975), at stake is the constitutionality of a provision in

ers in land use law (today it is *infra dig* to call it "zoning law") are waiting for the other judicial shoe to drop. The concern is not solely with what the Court will do but also with why the Court has taken such a singular move. (Anyone may speculate: my theory is that most Supreme Court law clerks are former law review editors; law reviews these past few years have published a multitude of articles on the social implications of zoning; law clerks have some influence in selecting the few cases in which certiorari is granted.)

What the Court—so innocent in zoning—will do is the occasion for less frivolous speculation. I know what the justices should do as a predicate to a decision in *Eastlake* or *Arlington Heights*: they should read at least some chapters of Professor Williams's commanding five volume treatise on the development of American land use law. I commend, in particular, the chapters on "The Three Parties in Interest," "The Role of Judicial Attitudes in Planning Law" and "The Four Periods of American Land Use Controls." No one before Williams has done so masterful a job in identifying the diverse and conflicting interests out of which this system of law is being constructed.

Most works on zoning are dull (a difficult feat in so lively a field); many simply regurgitate the cliches that infest most judicial opinions in zoning cases; none has been willing to undertake the kind of empirical investigation and pragmatic analysis that Williams employs and which is essential to an understanding of this emotion-charged field of law.

That this is a useable as well as a readable work is due in large part, I surmise, to the happy circumstances that Professor Williams has been in the marketplace as a consultant and planner/lawyer for urban and suburban municipalities and, as a scholar, has had a chance to reflect—a luxury too many of us practitioners shrug off as we struggle with the immediate task of persuading a trial judge that the zoning restrictions on our client's acreage are reprehensible.

Reference to the market place and scholarship suggests two divergent standards by which a treatise such as *American Planning Law* may be judged. Is it useful to the practitioner? Does it persuade the student? By both tests Williams's effort is, on balance, a success.

the Detroit zoning ordinance which requires 1,000 feet between adult book stores, adult movie houses and topless bars. (Boston has followed a different technique in its zoning ordinance: it has created an Adult Entertainment Zone, more commonly referred to as the "Combat Zone.") The Sixth Circuit concluded that the Detroit restriction was invalid under the equal protection clause of the fourteenth amendment.

The practitioner expects an analysis that is insightful and a compilation that is thorough. In many ways Williams serves both needs. The basic premise of these five volumes—that one must learn to think of zoning decisions in terms of whether they are “developer”-initiated or “neighbor”-initiated—is correct and not always appreciated. Williams suggests that there is often a third interest at stake in zoning cases which he calls, with some license, “third-party nonbeneficiaries.” These are the nonresidents who may be affected by municipal zoning policies. Certainly some nonresidents, particularly if their incomes are low or moderate, are affected by zoning policies of some suburbs. Whether these interests will be generally recognized to have standing beyond Professor Williams’s home state of New Jersey, and possibly New York and Pennsylvania, remains a matter of speculation. Perhaps Williams’s work will persuade. It should.

Williams also has performed a neglected service in describing the historical periods in the development of zoning law; and, to the best of my recollection, no one has so effectively catalogued the judicial attitudes in the principal “zoning” states. His analysis of the ambiguous relationship between the slippery statutory phrase “in accordance with a comprehensive plan” and the implementing zoning ordinance is worth the price of the five volumes. No zoning practitioner should try a case where “the plan” is at issue without first reviewing Williams’s description of this nether region.

There are, of course, some irritations for the practitioner. Somewhat surprising is Williams’s use of the term “downzoning” to mean an increase in permitted density. The customary use of that phrase among trial lawyers and most courts is to describe the action of a municipality when it lowers the density, as in “Boca Raton had to downzone extensive areas of multiple-family districts in order to bring its zoning in line with the population cap amendment to its charter.” More importantly, Williams, understandably concerned with housing, tends to be about as conventional as other zoning texts when it comes to commercial uses. For example, he is short on a consideration of the use of zoning to protect commercial uses from competition. He does not cite (at least they are not in the index) *Pearce v. City of Edina*⁶ and *Forte v. Borough of Tenafly*,⁷ two remarkable cases dealing with the use of zoning to protect existing commercial development. And Williams, in his proper assault

⁶ 118 N.W.2d 659 (Minn. 1962).

⁷ 106 N.J. Super. 346, 255 A.2d 804 (1969).

on the popularity and faddism of Planned United Development and his critique of "contract" zoning might have assisted some practitioners by noting that the courts in some jurisdictions uphold PUDs and anomalously strike down contract zoning, thereby proving that a rose is not a rose by any other name.

I found the index better than adequate and, of all things, interesting. Who could fail to be titillated by an index caption, "Traveling Front Yards," or one labeled "Peace and Quiet"? Yet this should not be surprising in a compendium where the footnotes, without sacrificing thoroughness, are also often delectable in their candid bias.⁸ Some will be annoyed by, but I found refreshing, footnotes that seemed more appropriate to a guidebook on Manhattan restaurants, such as: "The recent publication by the National Science Foundation, (McAllister Ed.) *Environment, a New Focus for Land Use Planning* (1973), seemed disappointing." Almost as though "the Beaujolais was insipid; the coq au vin uninspired."

When I step out of my role of practitioner and try to play the part of student of the zoning process I must give Professor Williams a mixed review. But that is fair game because my reservations go to his biases rather than to his scholarship.

His treatment of the abuse of the variance process by zoning boards is definitive, but that is well-trod ground.⁹ Unfortunately, Williams does not treat the variance problem as part of a larger procedural due process crisis in zoning. More positively, Williams's post mortems on the impact that land use classics such as *Euclid*, *Rockhill v. Chesterfield Township*¹⁰ and *Gage v. Los Angeles*¹¹ have had on the actual development of the respective subject properties represent the kind of study not found in more pedestrian works that rely principally on library research. His extensive attack upon the use of zoning to exclude racial minorities and the economically disadvantaged should be—and is—as definitive as anything can be in a turbulent area of the law. Williams played a key role in the attack upon the practice that resulted in the seminal opinion of the New

⁸ "In this impressive body of Massachusetts land use law, no one judge stands out from the rest, with the possible exception of Chief Justice Rugg. . . . Almost all the judges writing such opinions have done well, although one (Cutter) is noticeably weaker than the rest." Or: "the reasoning and attitude is characteristic of many 4th Dept. (N.Y.) opinions." *Id.* at § 149.05, n.9.

⁹ Worse luck that Williams's account probably will not be read by the countless laymen who play higgledy-piggledy with elementary fairness in that administrative arena.

¹⁰ 23 N.J. 117, 128 A.2d 473 (1957).

¹¹ 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954).

Jersey Supreme Court in the *Mount Laurel* case.¹² On that sensitive issue Williams was a prophetic voice two decades ago when few of us understood that municipal land use policy had serious social implications.

I am troubled by Williams's discussion of the growing popularity of flexibility in zoning. I say this not because he is wrong about the dangers of increased discretion in the zoning process—that should be a concern for those interested in fair play in an administrative system employed in thousands of municipalities. My reservations about Williams's protest center more on his apparent endorsement of the merits of the old system of reliance on advance designation of zoning districts on the grounds that at least it provided (1) greater certainty and predictability and (2) less risk of developer-controlled policy. Professor Williams has a different recollection of the old system than this student.¹³ The name of the zoning game has been change, even before the coming of PUDs, contract zoning, and floating zones. Certainty and rigidity were definitely not hallmarks of Euclidean zoning. From the very beginning in the 1920s what mattered was not what the zoning map said today; the important issue was how the decision makers would respond to a request for a rezoning tomorrow. "Flexibility" by way of amendment or variance has been a central feature of zoning since its inception. One may argue that the current interest in flexible techniques at least has the advantage of candor; no one today would be fooled by the pretense that the zoning map is immutable.

I also take exception to Professor Williams's apparent faith in the capacity of the urban and regional planner to bring coherence and continuity to substantive policy on growth. My bias pushes me to put in first priority a reform in the process by which decisions are made.

Williams's major omission on growth policy is his almost complete failure to deal with the inexcusable condition of the zoning process as a whole (which is something more than just variances) and his seeming insensitivity to the efforts of the state courts to put a brake on the ad hocery that passes for administrative law in zoning. I find, for example, no mention of the use of zoning examin-

¹² South Burl. Cty. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 96 S. Ct. 18 (1975).

¹³ Williams and I also have a different view of professional planners. In *The Zoning Game* I suggested planners, unlike lawyers, engineers or doctors, are frustrated by the knowledge that their clients often do not follow their advice. Williams in a footnote says he has never met such types. So much for a professional life spent mostly in Princeton, New Jersey!

ers to bring some professionalism to the hearing process. For a commentator who obviously understands what is going on, it is astounding to read this observation by Williams on the signal decision in *Fasano v. Commissioners of Washington County*:¹⁴

[T]he opinion adopted the odd theory that, while the passage of an original zoning ordinance was a legislative act, adoption of a piecemeal amendment was a judicial act by the county commissioners.¹⁵

“Odd”? The distinction between adoption of a comprehensive zoning ordinance and a proposal for a particularized change is not odd in New York, Colorado, and Washington, to name a few additional states. It is odd, however, that a student as sensitive as Williams to the “neighbor-developer” reality of zoning disputes could not recognize that any proposal for a particular zoning change is not more than an adjudication between competing private interests, whatever it is labeled and whether it is decided by a board or commission, or by a local legislature.

Williams also ignores the efforts of the drafters of the American Law Institute’s Model Land Development Code to bring some coherence to and ensure greater fairness in the local planning process. But then Williams all but ignores the Model Code. This omission is particularly startling in chapter 160 where he discusses state and regional land use controls and details various new state laws but does not even cite article 7 of the Model Code to which many of the new state laws owe a great deal.

But all this is no more than a reasonable difference over emphasis and bias. This is the first definitive work on what is happening in this field of law; because of its evident scholarship and empirical research, it may be the last that can get away with such opinionioning.

Williams states early in his treatise:

An important Y-fork lies in the road not far ahead, and it is not now clear which direction will be followed. The Y-fork is a broad one, and the roads lead in very different directions. Specifically, now that the third period of municipal near-autonomy is drawing to a close, to what extent will the courts move to strengthen the position of the third-party nonbeneficiaries? Or, alternatively, will the shift be primarily to strengthen the position of developers?—*i.e.*, will this be

¹⁴ 264 Ore. 574, 507 P.2d 23 (1973).

¹⁵ 1 N. WILLIAMS, JR., *supra* note 4, § 26.12, at 524.

essentially a reversion to stage two, perhaps in a somewhat more sophisticated form? The principal question facing American land use controls today is as simple as that; and there is reason to expect that it will be settled in the next two or three years—specifically, by the choice of the rationale made in the antiexclusionary zoning cases.¹⁶

No one, not such encyclopedists as Anderson and Rathkof, nor such advocates as Hagman, Costonis, Bosselman, Mandelker and Babcock, has combined a detailed account of what has actually been happening in this field with such a superb analysis. This is why Williams's work will survive much of the detritus that is scattered over this field of law.

¹⁶ *Id.* § 5.06, at 111.