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Book Reviews: Guide to Maryland Zoning Decisions; Handling the Land Use Case

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BOOK REVIEW

GUIDE TO MARYLAND ZONING DECISIONS. Second Edition. By Stanley D. Abrams.† The Michie Company, Charlottesville, Virginia (1984). Pp. 383.

HANDLING THE LAND USE CASE. By Frank Schnidman,‡ Stanley D. Abrams,† John J. Delaney.‡† Little, Brown and Company, Boston, Massachusetts and Toronto, Canada (1984). Pp. 710.

Reviewed by Philip J. Tierney.‡†

Understanding the mysteries of zoning and land use law have confounded both lawyer and layman alike for the past sixty years. The field contains a host of exotic terms and concepts that belie ready understanding or uniform definition. For example, what is the difference between comprehensive plans and master plans, and why does it matter? What is the difference between piecemeal and comprehensive zoning? Why are piecemeal zoning decisions subject to an administrative appeal, whereas zoning actions generally are considered legislative in nature? What is a "floating" zone, and how does it differ from a "euclidean" zone? What is the "change-mistake" rule, and when does it apply? Why are conditional uses valid, but conditional zoning is not? What are the limits of proper governmental involvement in land use matters?

In 1975, Stanley D. Abrams, a Maryland attorney with an expertise in land use matters, responded to this quandary with the first edition of his *Guide to Maryland Zoning Decisions*. This one volume compendium of Maryland zoning decisions organized a confusing and unwieldy subject matter into eleven concise chapters and provided answers to many questions concerning Maryland land use law. Although it was not a complete treatise on the subject, the book filled a void that needed to be addressed at that time.

The decade since the publication of Abrams' first edition has been a dynamic period in land use law. After years of uninvolvement in land use matters, the United States Supreme Court became involved and rendered a number of land use decisions. Moreover, the Maryland appellate courts continued their close judicial oversight over land use matters. Some of the most intriguing of these land use issues can be grouped under the following categories: the growing relationship of planning to zoning; the nature of the piecemeal zoning decision—whether legislative or administrative; constitutional limits on the police power; the availability of monetary damages for government overregulation; and, the en-

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largement of governmental powers in the land use field. A brief sketch of each issue may help the reader better appreciate the two new books under review.

The relationship of planning to zoning started off on the wrong foot and has been out of synchronization ever since. A model zoning act, proposed by the federal government in 1926, was adopted by most states during the late 1920's. A provision of the act required zoning to be consistent with a comprehensive plan. The drafters' intent was to create a close link between planning and zoning or, in other words, to establish what some now call the consistency doctrine.

Unfortunately, when local zoning actions were first litigated, most localities had neglected to adopt any planning document worthy of the name. Many jurisdictions, including Maryland, addressed this shortcoming by broadly defining a comprehensive plan, originally intended to be equivalent to master plans, to include the zoning ordinance. This rationale enabled the courts to uphold the challenged zoning action as consistent with the comprehensive plan. This broad view of the comprehensive plan, however, had the effect of diminishing the role of master plans in relationship to zoning. As a result, master plans have since been treated in Maryland as mere guidelines for future development to be accorded little weight.

The consistency doctrine has been reinvigorated by both state and local legislation. Several states, most notably California and Oregon, have enacted laws requiring strict consistency between master plans and zoning. Also, several Maryland localities have developed consistency requirements between master plans and subdivision regulations.

Notwithstanding Maryland's traditional view toward master plans, consistency requirements have been upheld.¹ In *Floyd v. County Council*,² the court of special appeals implied that a statutory link between master plans and zoning is permissible. At least one local government, Montgomery County, has followed this approach and adopted a consistency requirement for several zoning classifications. Consequently, a question to be answered in future litigation will be how much support Maryland courts should eventually give to these legislative initiatives.

Comprehensive and piecemeal zoning are significantly different in character. Comprehensive zoning generally applies to wide areas, considers many land uses and other aspects of the public interest, and is initiated by the government only after extensive planning and evaluation.³ This action is clearly legislative in nature.

Piecemeal zoning, on the other hand, involves a single tract and the zoning request is typically filed by a property owner or a potential devel-

1. *Coffey v. Maryland-National Capital Park & Planning Comm'n*, 293 Md. 24, 441 A.2d 1041 (1982); *Board of County Comm'rs v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979).

2. 55 Md. App. 246, 461 A.2d 76 (1983).

3. *Mraz v. County Comm'rs*, 291 Md. 81, 433 A.2d 771 (1981).

oper. Unlike the comprehensive zoning process, many jurisdictions apply certain procedural due process rights to the piecemeal zoning process. These due process elements have been held to include adequate notice to adverse parties, cross examination of witnesses, application of consistent reasoning, and written findings of fact and conclusions of law. Also, judicial review is permitted pursuant to an administrative appeal procedure.

In *Hyson v. Montgomery County Council*,⁴ the Court of Appeals of Maryland declared that, although zoning actions are characterized as legislative in nature, certain aspects of the piecemeal zoning process involve the resolution of adjudicative facts concerning particular parties and, thus, are quasi-judicial. In effect, the piecemeal zoning process was found to involve contested cases in the administrative law context.

Maryland's establishment of a clear-cut distinction between comprehensive and piecemeal zoning actions, and its alignment with those jurisdictions that held piecemeal zoning to be quasi-judicial or administrative in nature, was short lived.⁵ In 1976, the Supreme Court in *City of Eastlake v. Forest City Enters., Inc.*⁶ affirmed an Ohio determination which considered piecemeal zoning to be legislative in nature and subject to a referendum. One year later, while explaining the differences between comprehensive and piecemeal zoning actions, the Court of Appeals of Maryland in *Montgomery County v. Woodward & Lothrop, Inc.*⁷ observed that the *Eastlake* decision may lessen the need for the application of strict due process procedures to the piecemeal zoning process.⁸ Later, the Maryland court upheld a county referendum procedure as applicable to comprehensive zoning.⁹ These decisions create uncertainty as to the continued viability of procedural due process requirements in the context of piecemeal zoning and raise questions about whether such zoning could be petitioned to referendum by unsuccessful litigants.

The court of appeals had a recent opportunity to clarify the Maryland position in *Cardon Invs. v. Town of New Market*,¹⁰ but failed to do so. In that case, the court of special appeals had earlier affirmed the trial court's reversal of the county commissioners' decision to rezone property to permit its use as a truckstop. In so affirming, the court of special appeals correctly assessed the administrative nature of the piecemeal zoning process:

4. 242 Md. 55, 217 A.2d 578 (1966).

5. See *Acierno v. Folsom*, 337 A.2d 309 (Del. 1975); *Cooper v. Board of County Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980); *Palmer v. Township of Superior*, 60 Mich. App. 664, 233 N.W.2d 14 (1975); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

6. 426 U.S. 668 (1976).

7. 280 Md. 686, 376 A.2d 483 (1977), *cert. denied*, 434 U.S. 1067 (1978).

8. *Id.* at 713-14, 376 A.2d at 498.

9. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 388 A.2d 523 (1978).

10. 302 Md. 77, 485 A.2d 678 (1984).

When a legislative body sits as a zoning board, its actions are those of an administrative agency and are judged accordingly Although the zoning hearing may be governed by laws actually passed by the same body when it sat as a legislature, it does not thereby gain any additional authority; it still acts as an administrative agency whose authority is limited by statute and case law¹¹

However, the court of appeals affirmed the court of special appeals's decision on separate grounds and the quasi-judicial aspect of piecemeal zoning was not addressed.¹² Until clarified, this ambiguity could prove mischievous and encourage unfortunate departures from strict due process standards in piecemeal zoning.

During this same period, some land use regulations were invalidated and the exercise of the police power was limited. In *Moore v. City of East Cleveland*,¹³ an Ohio zoning regulation was found to restrict unreasonably living arrangements among members of the same family in that its definition of family excluded first cousins. Later, in *Schad v. Borough of Mount Ephraim*,¹⁴ the Supreme Court invalidated, as an infringement on the right of free expression, a local zoning regulation that absolutely prohibited live performances within the borough. Likewise, the Court in *Larkin v. Grendel's Den, Inc.*¹⁵ struck down a Massachusetts regulation which vested churches and schools with veto authority over the issuance of a liquor license for a nearby business as an improper exercise of the police power and an improper fusion of governmental and religious functions. Most recently, the Court in *City of Cleburne, Texas v. Cleburne Living Center*¹⁶ rejected on equal protection grounds a local zoning regulation that imposed a special permit requirement on a group home for the mentally retarded when other congregate living arrangements were allowed as a matter of right.

Maryland also established limits on the exercise of the police power. In *Maryland-National Capital Park & Planning Comm'n v. Chadwick*,¹⁷ the court of appeals invalidated as confiscatory a regulation that prohibited the use of property placed in a three year reservation status pending a government study concerning its possible acquisition. Recently, in *Howard County v. J.J.M., Inc.*,¹⁸ the court struck down a local regulation that sought to exact land from a developer that was unrelated to the subdivision involved. These decisions will no doubt prompt further judi-

11. *Cardon Invs. v. Town of New Market*, 55 Md. App. 573, 590, 466 A.2d 504, 514 (1983), *aff'd on other grounds*, 302 Md. 77, 485 A.2d 678 (1984).

12. *Cardon Invs. v. Town of New Market*, 302 Md. 77, 485 A.2d 678 (1984).

13. 431 U.S. 494 (1977).

14. 452 U.S. 61 (1981).

15. 459 U.S. 116 (1982).

16. 105 S. Ct. 3249 (1985).

17. 286 Md. 1, 405 A.2d 241 (1979).

18. 301 Md. 256, 482 A.2d 908 (1984).

cial challenges to governmental regulations that are perceived to be improper infringements on the use of private property.

Governments' expansive exercise of the police power and judicial decisions concerning the constitutional prohibition against the taking of private property without just compensation have prompted the advancement of the compensation theory. The cause of action is based on claims of deprivation of civil rights or inverse condemnation, and represents an attempt to recover monetary damages for overly restrictive governmental regulations that are deemed to be confiscatory. Supporters of this theory received some encouragement in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*¹⁹ in which it was held that a regional land use agency is not entitled to immunity from a compensation theory claim filed in federal court under 42 U.S.C. § 1983. Compensation theory supporters received further encouragement in *San Diego Gas & Elec. Co. v. City of San Diego*²⁰ where a plurality of Justices expressed general support for the notion that monetary damages should be available in certain circumstances when governmental regulation operates, even temporarily, to deny economically viable use of private property. Furthermore, the Court has recently established procedural requisites for such a claim in *Williamson County Regional Planning Comm'n v. Hamilton Bank*²¹ even though the Court has yet to articulate standards to determine what constitutes confiscatory regulation.²² Hence, the compensation theory retains considerable vitality, even if only in the abstract, and it presents an interesting cause of action that has yet to be litigated in the appellate courts of Maryland.

An anomaly to the curtailment of certain governmental land use regulations is the general enlargement of governmental authority in land use matters. In 1978, in *Penn Central Transp. Co. v. City of New York*,²³ the Supreme Court upheld a controversial New York City landmark law that thwarted development of air rights over Grand Central Terminal, a designated historical landmark. Two years later, in *Agins v. City of Tiburon*,²⁴ the Court again supported local land use regulation when it held that preservation of low density and open space areas were legitimate objectives of governmental regulation in order to protect residents from the ill effects of urbanization.

Maryland courts likewise have supported new and innovative legislation concerning land use matters. For example, a Howard County regulation which provided for a reversion to the old zoning category if the developer did not use the new zoning within a reasonable time was held

19. 440 U.S. 391 (1979).

20. 450 U.S. 621 (1981) (dictum).

21. 105 S. Ct. 3108 (1985).

22. The Supreme Court will consider this issue again in the current term in *Mac Donald, Sommer & Frates v. County of Yolo*, Doc. No. 3 civil 22306 (Cal. Ct. App. Jan. 24) (unpublished opinion), *cert. granted*, 106 S. Ct. 244 (1985).

23. 438 U.S. 104 (1978).

24. 447 U.S. 255 (1980).

to be a reasonable exercise of police power in *Colwell v. Howard County*.²⁵ Similarly, local growth control regulations of marina development were upheld in *Mears v. Town of Oxford*²⁶ and a historic district regulation was upheld in *Faulkner v. Town of Chestertown*.²⁷ Also, state-wide regulations governing mobile homes were upheld in *Cider Barrel Mobile Home Court v. Morris L. Eader*.²⁸

In the area of eminent domain, the scope of governmental authority has been broadened even more. In *Mayor of Baltimore v. Chertkof*,²⁹ the court of appeals adopted a public purpose doctrine that permits the exercise of eminent domain powers even though the land acquired might not actually be put to a public use. Most recently, the Supreme Court in *Hawaii Hous. Auth. v. Midkiff*³⁰ extended the public purpose doctrine to include almost anything that is rationally related to a conceivable public purpose.

These developing trends and others, such as challenging exclusionary zoning practices, demanding more low and moderate income housing, and "creatively" financing the infrastructure necessary to accommodate new growth, place greater demand than ever on the practitioner to identify and understand pertinent land use issues. Fortunately, these issues have been addressed by two books which should be considered as complementary works because of their relationship to one another.

Mr. Abrams has updated his *Guide to Maryland Zoning Decisions* with a second edition that significantly expands its coverage of land use issues and provides more current material. For example, a new chapter on Supreme Court decisions has been added to provide a comprehensive review of recent Court decisions affecting land use. One of the strengths of the book includes its discrete breakdown of the subject matter into concise sections which are keyed to a helpful index and table of cases. This structure enables the reader to quickly trace key words and phrases to the explanatory text. The author also avoids tedious commentary in favor of direct references to primary sources.

However, it should be understood that the Abrams book is designed to serve only a limited purpose. It is neither a treatise nor a how-to-do-it book. It only provides a compendium of zoning decisions, nothing more. Moreover, the scope of the book is oriented almost entirely to zoning and does not give extensive coverage to other land use issues. For example, the entire field of eminent domain, although increasingly relevant to zoning because of recent trends, has been referenced only in passing.

The nature of the book, focusing as it does almost entirely on case

25. 31 Md. App. 8, 354 A.2d 210 (1976).

26. 52 Md. App. 407, 449 A.2d 1165 (1982).

27. 290 Md. 214, 428 A.2d 879 (1981).

28. 287 Md. 571, 414 A.2d 1246 (1980).

29. 293 Md. 32, 441 A.2d 1044 (1982).

30. 104 S. Ct. 2321 (1984).

law developments, will require frequent updating of the book so that the book remains reasonably current. Consequently, the form of the book would be more useful if presented in a looseleaf edition in which more frequent supplements could be inserted. The treatise, *Rathkopf, The Law of Planning and Zoning* (Clark Boardman Co., Ltd. 1985), effectively uses this form in its new fourth edition.

The second book under review, *Handling the Land Use Case*, was developed by Mr. Abrams, John J. Delaney, a Maryland colleague, and Frank Schnidman, a senior fellow at the Lincoln Institute of Land Policy in Cambridge, Massachusetts. This work provides a comprehensive review of land use matters and serves as a complement to Mr. Abrams's second edition. The book is well planned, beginning with an overview of the land use process, and then proceeding to an evaluation of the legal basis for this regulatory scheme and an extensive discussion of the processes involved. Several sections deal with the developing trends, although not in the same manner as discussed above.

The book serves several functions including a compact one volume treatise, a how-to-do-it book, and a form book. The treatise portion, which covers almost half the book, comprehensively addresses the same issues one might find in better known treatises such as those by Anderson, Rathkopf, or Williams. Of course, a single volume must necessarily deal with these issues on a summary basis, and the particulars must be obtained from other sources, some of which are referenced by the authors.

The remaining part of the book provides a detailed how-to-do-it explanation of the land use process. One of the most helpful aspects of the book is this portion's extensive discussion of administrative procedure and its step-by-step analysis of that process. Also, this portion provides a comprehensive analysis of the causes of action, remedies, and defenses relevant to land use matters. Furthermore, the practitioner is offered a discussion of the nuts and bolts of land use practice and a large selection from which to choose. Moreover, in an extensive appendix, a variety of forms are provided which will be helpful to those practitioners handling either land use matters or administrative appeals.

The authors present a balanced approach of the land use controversy, and also provide a fundamental explanation of the land use process. For Maryland attorneys, the book is of particular interest because of its focus on many of the issues involved in Maryland land use litigation, and the authors' almost exclusive reliance on Maryland sources and Professor Williams' treatise which ranks Maryland among the leading zoning jurisdictions.³¹

Like the Abrams book, *Handling the Land Use Case* is not without limitations. One is given the impression that the authors never resolved

31. N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* § 2.05 (1977 & Supp. 1983).

whether the book was to be an attorney's guide or a treatise. It is clearly more valuable as a practitioner's handbook because of the practical advice about everyday problems connected with presenting the land use case. The overemphasis of Maryland sources and the paucity of references to other sources limits the usefulness of the book as a comprehensive treatise. Notwithstanding these limitations, the book is a useful one volume review of the entire land use field and, along with the Abrams book, constitutes a valuable addition to the land use practitioner's library.