JOSHUA GORDON

A *Euclid*-Turn: *R.B. Construction Co.* v. *Jackson* and the Zoning of Baltimore

During the first several decades of this century, zoning was a major issue in cities around the country including Baltimore.[1] But the constitutionality of comprehensive zoning laws was still in doubt. The United States Supreme Court had declared fifty-three progressive state social reforms unconstitutional between 1889 and 1918 and invalidated nearly 140 proposed reforms between 1920 and 1930.[2] Nonetheless, "by 1926 there were at least 425 zoned municipalities comprising more than half of the country's urban population," and zoning had withstood constitutional attacks in many states.[3]

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[1]G. Power, *The Advent of Zoning*, 4 Planning Perspectives 1 (1989). G. Power, *The Unwisdom of Allowing City Growth to Work Out Its Own Destiny*, 47 Md. L. Rev. 626 (1988).

[2]C. Warren, *The Supreme Court in United States History* 463-65 (1922). P. Murphy, *The Constitution in Crisis Times 1918-1969* 63 (1972).

[3]Power, supra n.. When *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, was decided in 1926, zoning had been held constitutional in California, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, New York, Ohio, Oregon, and Wisconsin, but had been held unconstitutional in Delaware, Georgia, Maryland, Missouri, and New Jersey. See *Brief amicus curiae* filed by A. Bettman, as counsel for the National Conference of City Planning, the National Housing Ass'n, and the Mass. Fed. of Town Planning Boards, in *Euclid* v. *Ambler Realty Co.*, reprinted in A. Bettman, *City and Regional Planning Papers* 157 (1946). In 1925, the status of zoning in the District of Columbia was unclear. The *Baltimore Sun* reported a case decided by the U.S. Supreme Court, sitting as "District Supreme Court," upholding zoning in that city. The *Sun*, July 1, 1925, quoted the case, written by a Judge Bailey: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety." This case, however, has not been located through independent research by the author, and no Bailey ever sat on the U.S. Supreme Court.

In 1925, Maryland's highest court declared Baltimore's zoning ordinance in violation of the state and federal constitutions, yet just two years later took the opposite position.[4] The significant intervening event was the 1926 United States Supreme Court landmark ruling on zoning, approving the comprehensive zoning law in the village of Euclid, Ohio.[5]

The switch by the Maryland Court of Appeals was a product of events far away, and it illuminates an era of Baltimore history involving a rancorous debate about the government's role in land use decisions. Baltimore's civic leaders had debated the issue for decades and, as with many great debates, it eventually was decided by the courts in Maryland in a law suit titled *R.B. Construction Company* v. *Howard W. Jackson, Mayor.*[6] In this case, a small company, which wanted to build block row homes near Arlington in Baltimore's Northwest Corridor, collided with the zoning law requiring side yards.

Early Zoning in Baltimore

The Baltimore City Council passed a number of "Zone Ordinances" throughout the last quarter of the 19th century, which by 1908 had given the Mayor the power to approve or disapprove the location of a variety of buildings: wards for the feeble-minded, sanitariums, stables, blacksmith shops, junk shops, brick factories, stoneware factories, paint factories, soap factories, candle factories, woodworking factories, lumber yards, iron mills, foundries, breweries, distilleries, packing houses, gas works, and acid works.[7] In 1910, Baltimore instituted racial zoning. While not strictly zoning in a modern sense, Baltimore's racial ghettoization law forbade blacks from moving into a block in which more than half the residents were white, and likewise forbade whites from moving into a block in which more than half of the residents were black.[8] In 1917,

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For convenience, I will hereafter refer to the *Baltimore Sun* as the *Sun*; the *Baltimore Evening Sun* as the *Evening Sun*; the *Baltimore News* as the *News*, and the *Baltimore American* as the *American*.

[4]*Goldman* v. *Crowther*, 147 Md. 282 (1925). See also, *Tighe* v. *Osborne*, 149 Md. 349 (1925); *Byrne* v. *Maryland Realty Co.*, 129 Md. 202 (1916) *R.B. Construction Co.* v. *Jackson*, 152 Md. 671 (1927).

[5]*Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

[6]152 Md. 671 (1927).

[7]Baltimore, Md. Ordinances 155 (1908). The Mayor's powers were circumscribed, however, because the courts had limited the grounds on which permits could be disapproved. While permitting generally was allowed, *Commissioner* v. *Covey*, 74 Md. 262, 22 A. 266 (1891) and could be denied to fire hazards such as tall buildings, *Cochran* v. *Preston*, 108 Md. 220, 70 A. 113 (1908) or theaters, *Brown* v. *Stubbs*, 128 Md. 129, 97 A. 227 (1916), non-conformance of a proposed building with the general character of others in the neighborhood was not an adequate grounds for denial, *Bostock* v. *Sams*, 95 Md. 400, 52 A. 665 (1902).

[8]Maryland law provides a definition: "For the purpose of promoting the health, security, general welfare, and morals of the community, the Mayor and City Council

however, the U.S. Supreme Court ruled, in a Kentucky case, that such laws were unconstitutional.[9]

Baltimore's next attempt at zoning was more localized. The community of Forest Park in the Northwest Corridor comprised mostly detached, cottage-style homes. Owners were interested in protecting their neighborhood from "cheap two-story development of congested dwellings [which] would be highly detrimental to one of the largest, most beautiful and artistically developed suburban communities" in Baltimore.[10] Thus, in 1912, the Maryland General Assembly passed a law which ordered that "no dwelling house shall be erected within [Forest Park], unless the same is constructed as a separate and unattached building ... ."[11] The Maryland Realty Co. planned to build semi-detached two story houses, but was denied a permit. The Realty sued and three years after the statute was enacted, the Maryland Court of Appeals, in a case called *Byrne* v. *Maryland Realty Co.*, held the ordinance unconstitutional because it was for "purely esthetic [sic] purposes."[12]

Baltimore Zoning Gets Under Way in the 1920s

In 1918, the City of Baltimore annexed sixty-two square miles of new land to the city, tripling its size, and bringing about a renewed effort at settling the suburbs. Shortly thereafter, as part of the City's pro-zoning propaganda, the City Council commissioned a study for the development of the new suburbs, in which various civic organizations and individuals participated.[13]

The study did not attempt to justify zoning; it assumed it was "a recognized necessity."[14] The study did not make specific zoning

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of Baltimore City are ... empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, off-street parking, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, signs, structures, and land for trade, industry, residence, or other purposes." *Md. Ann. Code of 1957* Art. 66B §2.01(a). Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913,* 42 Md. L. Rev. 289, 299 (citing *Baltimore Sun*, Dec. 20, 1910, at 7, col. 5-6).

[9] *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

[10] *Byrne* v. *Maryland Realty Co.*, 129 Md. 202, 205 (1916).

[11] 1912 Md. Laws, ch. 693 §1, cited in *Byrne*, 129 Md. at 203-04.

[12] *Byrne* v. *Maryland Realty Co.* 129 Md. 202, 209 (1916).

[13] Olson, *Baltimore: The Building of an American City* 302 (1980). *Report of the City Plan Committee of the City of Baltimore, MD on The Development of the Territory added under the Act of 1918, Together with Recommendations and Suggestions on the Railroad, Rapid Transit, and Harbor Problems of the City* (May 1, 1919) (hereinafter *City Plan Report*). Second *Annual Report of the Board of Zoning Appeals, for year ending December 1925* (1926) (hereinafter *Second Annual Report*).

[14] *City Plan Report* at 3.

recommendations, but did recommend the city pass a zoning law.[15] As a result of the study, in July 1921 Baltimore Mayor William Broening created a seven-member Zoning Commission to draw up a comprehensive zoning plan to be submitted the City Council.[16] The committee was appointed in August, and was

> direct[ed] to present a zoning ordinance divid[ing] the City into districts with reference to the height, area, and use of land and buildings in such districts, providing regulations therefore and maps which were to be a part of the ordinance and were to be the graphical representation of the zoning plan.[17]

This was a standard comprehensive zoning plan. It used maps to create overlapping sectors in which rights of real property ownership were restricted and it employed three basic terms of control: (1) use—the regulation of the purpose for which the land may be used; (2) height— the regulation of maximum heights, usually by reference to the width of nearby streets; and (3) area—the regulation of the amount of ground space a building may occupy.[18]

In the Baltimore proposal, the use districts were defined as: residential, allowing only residence, small hotels, churches and municipal or recreation use; first commercial, allowing residential use, plus retail and wholesale business, and light manufacturing; second commercial, allowing all the above plus most non-obnoxious businesses; and industrial, allowing any use. Virtually all of the 1918 annexation was deemed residential.[19] The plan proposed several height districts. Height in the industrial districts were allowed to be up to two-and-one-half times the width of the nearest road. In the residential districts buildings were allowed to be no taller than the width of the road, and in some cases to no more than forty feet tall. The proposal also provided for six area districts. Area A was the most permissive; areas E and F were the most restrictive, requiring a side yard, and limiting buildings to twenty-five percent of the lot. Most of the 1918 annexation was zoned E or F, thereby requiring the new suburbs to contain only detached homes.

The Commission worked very slowly. It had hoped to be finished by the fall of 1923, but six months into the project, only three of Baltimore's ninety square miles had been mapped.[20] The maps were not completed and made available to the public until nearly a year after the City Council

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[15]Id. at 16.

[16]Baltimore, Md., Ordinance 615 (June 1921).

[17]*Second Annual Report.*

[18]Modern zoning statutes may include more varied elements. For an overview, see R. Bernhardt, *Real Property in a Nutshell*, ch. 19 (2d ed. 1981).

[19]There was a controversy over whether gas stations should be allowed in residential districts. *American*, Dec. 8, 1921, at b21.

[20]*News*, Jan. 25, 1922; *Sun*, Jan. 25, 1922.

passed the ordinance, and a year-and-a-half behind schedule.[21] The delay was due to political tensions on the Commission—the conservatives had dug in their heels against the plan, while the progressives would not back down from a comprehensive zoning ordinance.[22]

The solution, as some had predicted, was to hire outside experts. Edward Murray Bassett, a New Yorker and counsel to the New York Zoning Commission, quickly became involved as an advisor to the Commission on a non-permanent basis and was consulted on nearly every aspect of zoning.[23] The Commission asked him to decide whether the city had legal authority to zone, whether a zoning appeals board should be established, whether there should be a separation between first- and second-residential districts, and whether the city should set aside public use districts.[24] When it appeared that the Commission had a final plan, it asked Bassett to "approve" it before submittal to the City Council.[25]

Other outside experts also gave counsel. Another New Yorker, George B. Ford, a zoning expert and member of the committee that prepared the New York zoning law, came to Baltimore as a expert surveyor. The Commission asked him to review Bassett's work, as Bassett's advice was primarily legal.[26] When the impasse remained unresolvable, the commission turned to Robert Whitten of Cleveland, who had zoned Atlanta, and was at the time working on zoning Indianapolis.[27]

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[21]*Baltimore Realtors Bulletin*, June 20, 1924.

[22]*News*, March 6, 1923. *American*, Aug. 31, 1922.

[23]Opponents of zoning, including Edward Coonan, City Surveyor and leading official voice against zoning, frequently predicted eventual reliance on outsiders. *Evening Sun*, Jan 21, 1921. *American*, Mar. 22, 1922.

[24]*Sun*, Mar. 25, 1922; *American*, Mar. 25, 1922. Mr. Bassett emphatically said it did, ("I find your laws very well adapted to zoning," *Sun*, Mar. 20, 1922), but later qualified his position, *Sun*, June 16, 1922. By 1925, after *Goldman* v. *Crowther* struck the use provisions of the plan, Bassett claimed that he had legal qualms all along, and that the *Goldman* decision was bound to happen. *Sun*, April 18, 1925. Although a lawyer, and something of an expert, [see Bassett, *Zoning: The Laws, Administration, and Court Decisions During The First Twenty Years* (1974)], Bassett was from New York and may have had little expertise in Maryland law.

Bassett's position changed on other issues as well. Initially he suggested that some areas of the city be left "undefined" with regard to use in order to allow development to come naturally and have zoning follow the trends. *Sun*, Mar. 25, 1922; *American*, Mar. 25, 1922. Later, when it was clear the progressives on the Commission wanted to zone the entire city, Bassett strongly opposed "undefined" areas. *Sun*, June 16, , April 7, Mar. 25, 1922; *American*, Mar. 25, 1922 (he was in favor). *Sun*, April 7, 1922 (he was opposed).

[25]*Sun*, June 17, 1922; *News* Aug. 29, 1922.

[26]*News* Aug. 30, 1922; *Sun*, Aug. 30, 1922.

[27]The situation became petty as well. The Commission chair refused to show up at a meeting at which his opponent was scheduled to talk. *Evening Sun*, Sept. 1, 1922. Whitten was not the first choice, as others had previously refused the job. *American*, Aug. 31, 1922.

The Zoning Commission instituted a "school of zoning" to convince the public of the merits of zoning. It aimed for support among business-people, and went to schools spreading its "educational propaganda" among children. Arlington was a target for its efforts and members of the Commission spoke at the Arlington Presbyterian Church in May 1922.[28] While both sides of the debate claimed public support, this effort by the Zoning Commission suggests that public fovor for zoning was less than support for it in newspaper editorials.[29]

In May 1923, the Baltimore City Council adopted a plan. It required the building inspector (generally called the Zoning Commissioner) to initially review building permit applications. The plan allowed appeal to an eight-member Board of Zoning Appeals, with four members each from the Republican and Democratic parties.[30] It also prescribed limited circumstances in which variances would be allowed.[31]

The system was up and running quickly. By July 1923 the building inspector had already approved some building permits, and the press reported his actions in great detail.[32] The job of the building inspector turned out to be largely ministerial; only about two percent of the applications were disapproved.[33] In the opinion of the Board of Zoning Appeals, this small number of disapprovals showed wide public acceptance of the zoning regulations.[34]

Baltimore's zoning law was challenged in the courts almost immediately in the case of *Goldman* v. *Crowther*.[35] Daniel Goldman, a tailor, had attempted to carry on his trade from his basement in an area set

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[28] *American*, Jan. 20, 1922; *Sun*, May 17, 1922.

[29] Compare *Sun*, editorial, June 28, 1920 (claimed public in favor zoning), and Henry Perring, Chairman of the Zoning Commission, cited the fact that by 1921, 30 cities had zoning ordinances, *Sun*, Nov. 21, 1921, with Op.ed, Edward Coonan, City Surveyor, *Evening Sun*, Jan 21, 1921 (claimed public opposed to zoning). Baltimore's three major papers were pro-zoning, see e.g., *Sun*, July 21, 1921; *News*, July 28, 1921; *American*, Nov. 26, 1921.

[30] Baltimore, Md., Ordinance 922 (May 1923). One candidate, E.H. Bouton, was disallowed from appointment because he had registered as a "declined voter." *Sun*, June 12, 1923.

[31] Various minor changes were continually made to the plan by amendment. *Sun*, Oct. 19, 1923.

[32] E.g., *Sun*, Aug. 1, 1923; *Sun* Aug 8, 1923; *Sun* Aug 28, 1923.

[33] The job was not non-political, however, because the powers of the office were discretionary. When action was not taken against violators, critics charged favoritism. For example, in one case a grocery store at 2546 Edmondson Avenue was permitted even though the ordinance technically prohibited it. *American*, Dec. 30, 1924.

[34] *Third Annual Report of the Board of Zoning Appeals, for year ending December 1926* (hereinafter *Third Annual Report*) 11 (1927).

[35] 147 Md. 282 (1925). The suit was tried in December 1923, just five months after the City Council passed the ordinance. On appeal, the case was argued twice, first on April 25, 1924, and then reargued on Nov. 12, 1924. *Daily Record* (Baltimore), April 25, 1924; *Sun*, Nov. 12, 1924.

aside for residential purposes only.[36] The inspector of buildings denied him a permit, and he sought satisfaction in the courts. Based on both the Maryland and Federal constitutions, the court held that the ordinance went beyond the power of the state:

> In this State the courts have uniformly held that the police power is not unlimited, but that wherever it is invoked in aid of any purpose or legislation, such purpose or legislation must bear some definite and tangible relations to the health, comfort, morals, welfare, or safety of the public.[37]

The court explicitly declined to consider countervailing policy or political reasons for zoning.[38]

The *Goldman* decision received public attention for days and was roundly criticized by the press.[39] In response to the decision, Mayor Howard W. Jackson, then en route to Florida, assembled an emergency meeting of the City Council by wire.[40] *Goldman* came down on Wednesday, February 4, 1925. By the following Monday, the City Council proposed and enacted, a new ordinance.[41] The acting Mayor (Jackson presumably being still in Florida) signed the measure on Tuesday.[42]

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[36]A history of the facts of the case are in G. Power, *Pyrrhic Victory: Daniel Goldman's Defeat of Zoning in the Maryland Court of Appeals*, 82 Maryland Historical Magazine 275 (1987).

[37]*Goldman* v. *Crowther*, 147 Md. 282, 293 (1925).

[38]Id. at 287. "This question can be approached by either of two avenues; one legal; the other political and sociological. If approached by the former the validity of the restraints and prohibitions of the ordinance must depend upon whether they violate certain definite guaranties and assurances found in the Federal and State constitutions and the law of the land. If approached by the latter, the question is to an extent freed from the embarrassment of harmonizing any apparently repugnant provisions of the act with those guaranties, since in such case the end to be accomplished and the benefit to be derived are the main factors to be considered, and the rights of mere individuals may be subordinated to the public convenience, upon the principle that such rights are always subject to the paramount authority of the State to subordinate them to what is conceived by those speaking for it to be for the benefit of the State, as representing all the citizens.

"Which one of these two methods of approach should be used ... is a question which goes to the root of our system of government ... . [W]e are not at liberty to examine the question from any other than a legal standpoint, and therefore we cannot be controlled in our consideration of the validity of this ordinance by its possible benefit to the public ... ." Id.

[39]*American*, Feb. 4, 1925; *Sun*, Feb. 5, 1925. It also received attention at the International Conference on City Planning in New York City. *Sun*, April 18, 1925; *Sun*, April 24, 1925. *Sun*, Feb. 5, 1925; *Sun*, Feb. 6, 1925; *Sun*, Feb. 7, 1925; *Baltimore Realtors Bulletin*, Feb. 13, 1925.

[40]*American*, Feb. 6, 1925.

[41]*Sun*, Feb. 7, 1925. Baltimore, Md., Ordinance 334 (1925).

[42]*Sun*, Feb. 10, 1925.

This replacement ordinance directed that all building permits be granted unless the proposed use would create hazards from fire or disease, or, mimicking the language of the *Goldman* decision, would "in any way menace the public welfare, security, health or morals."[43] Thus, the city attempted to get around *Goldman* by using the court's words.[44] But the mere passage of the emergency ordinance could not settle the situation. Although Daniel Goldman had challenged only the use portions of the law, the reasoning of *Goldman*—that government may make zoning laws for only a narrow set of reasons—applied with equal force to the area and height portions of the ordinance. Thus, it left the status of *any* zoning law very much in doubt.[45]

The uncertainty surrounding the constitutionality of the ordinances put all city functions dealing with land and land improvement in jeopardy, because there was no assurance that the decisions or actions of any city board could be enforced.[46] Developers, taking advantage of the uncertain situation, filed hundreds of zoning permit applications.[47] There were incessant complaints of loose or non-enforcement of the emergency zoning ordinance passed in the wake of *Goldman*. "From June 1 to June 14 [1925], inclusive, no less than twenty-five permits were granted for the opening of [stores, warehouses garages and other] business establishments in residen[tial] blocks."[48] The need for a new zoning ordinance was clear to city leaders. Shortly after *Goldman*, Mayor Jackson appointed a commission to draft "an ordinance that will stand the test of the courts, and one of the questions to be decided by [the] commission is whether an amendment to the Constitution of the State is necessary to enable the city to pass such an ordinance."[49]

The mayor promised that if the commission recommended a constitutional amendment, he would ask Governor Ritchie to call a special session of the Maryland legislature.[50] The zoning commission made such a recommendation several months later.[51] As if to confirm the recommendation, in December the Maryland Court of Appeals declared the emergency zoning ordinance null and void in a case called *Tighe* v.

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[43]Baltimore, Md., Ordinance 334 (1925).

[44]*Sun*, Feb. 10, 1925.

[45]*Evening Sun*, June 16, 1925; *Sun*, June 17, 1925; *Sun*, June 18, 1925.

[46]*Sun*, June 18, 1925.

[47]Over 100 applications were filed on February 11, the day after the new ordinance was signed, *Sun*, Feb. 11, 1925, and 119 were filed on February 18, a week later. *Sun*, Feb. 18. 1925. This number of daily filings was more than double the average daily rate of the previous year-and-a-half. *Second Annual Report*.

[48]*Evening Sun*, June 16, 1925. This compares to just fifty-eight business permit approvals for all of 1926. *Third Annual Report*.

[49]*Sun*, April 11, 1925.

[50]Id.

[51]*Sun*, July 15, 1925.

Osborne.[52] In the suit, Mary Tighe had proposed to build a 30-horse stable on a lot that was zoned for residential use, but her permit was denied because such a use would comport with neither the neighborhood nor the zoning district. Ms. Tighe sued, and the Court held that the delegation of power to the Zoning Commissioner and the Board of Zoning Appeals was unconstitutional because the board had too much discretion.

In a fit of *deja vu*, the City Council passed a second emergency zoning ordinance, just four days after the *Tighe* decision.[53] But because the courts had thrown doubt on the very validity of the zoning ordinances, uncertainty in public and private land planning remained.[54] Citizens called upon Mayor Jackson to persuade Governor Ritchie to convene a special session, as the Mayor had promised. The next regular session of the General Assembly was scheduled for the fall of 1926, less than a year away, but because of legislative rules, a measure could not be voted on until the fall of 1928—nearly three years after the *Tighe* decision. Nonetheless, Governor Ritchie resisted the call for a special session, and Mayor Jackson, contrary to his promises, was reluctant to press the Governor too hard because, in his view, there was not a sufficient "emergency."[55]

Although the newspapers claimed that the "public demands permanent zoning," this reluctance on the part of the leadership of both the city and the state adds credence to the speculation that zoning was perhaps not as popular as it first appeared.[56] Adding to the appearance of an absence of popular support were the activities of two of the City's strongest proponents of zoning, James Martien and Henry Perring. Martien, the first chair of the Baltimore Board of Zoning Appeals, used the Baltimore *Sun* to warn city residents to show more support for zoning or, he feared, the legislature would not pass the necessary enabling legislation.[57] Perring, the chair of the Commission which drafted the original zoning law, went on the stump to garner support for a special session of the legislature.[58]

In the spring of 1926, the Court of Appeals heard the *Tighe* case argued again.[59] Mary Tighe had been again blocked from building a horse stable, this time by the ordinance passed four days after the decision in her

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[52]149 Md. 349 (1925); *Sun*, Dec. 10, 1925.

[53]*Sun*, Dec. 15, 1925. This second emergency ordinance was upheld by a lower Maryland Court. *Sun*, Jan. 6, 1926.

[54][Z]oning in Baltimore [is] virtually a thing of the past ... but the city claims zoning is still in effect." *Sun*, Mar. 27, 1926.

[55]*American*, Mar. 15, 1926. This controversy prompted the East Arlington Improvement Association to threaten to withhold its endorsement of the Governor for re-election, *Sun*, Feb. 23, 1926. The Governor responded that he would not be swayed by such threats, *Sun*, Feb. 24, 1926. *Sun*, Mar. 30, 1926.

[56]*American*, December 16, 1925.

[57]*Evening Sun*, June 18, 1925.

[58]*Sun*, Dec. 23, 1925.

[59]*Sun*, April 8, 1926.

first case. The Court issued a second opinion and invalidated parts of the second emergency ordinance, thus creating even more doubt about the future of zoning.[60] Moreover, because so many different zoning laws had been enacted and struck down, there was uncertainty about what zoning the City Council might be allowed to enact, and there was no way of knowing what the still existing laws allowed or required.[61] The ordinance then in force, for example, did not ban billboards, as the former laws had, and it was not clear whether billboards could be regulated or not, as none of the court cases had specifically addressed the issue. The *Sun* pointed out the confusion:

> The public welfare clause was embodied in the second [first emergency] zoning ordinance, which also was invalidated by the Court of Appeals, but was left out of the third [second emergency] measure which was upheld by the higher court. This ordinance, under which the city is now operating in the interests of zoning, bases the right to deny permits only on grounds of a health, safety or morals menace.[62]

After the second *Tighe* decision, Mayor Jackson initially planned to ask the Governor to convene a special session of the Maryland General Assembly in order to write a constitutional amendment allowing zoning, but later announced he would not make the request.[63] In September, the City Council wrote a fourth zoning ordinance, which merely embodied all the various ordinances which it believed were then in effect.[64] Even though the ordinance probably had no legal basis, it passed the Council in five minutes with no debate, and on the last day of September 1926, the Mayor signed it.[65]

Euclid v. *Ambler Realty Co.* and the Constitutionality of Zoning

In 1926, the U.S. Supreme Court put an end to much of the confusion in zoning law with its decision in *Euclid* v. *Ambler Realty Co.*[66] The village of Euclid had a comprehensive zoning ordinance, including detailed use, area, and height restrictions. Ambler Realty owned a 68-acre tract in the village, a suburb of Cleveland, Ohio. Ambler's land would be worth more if zoned for industrial use but part of it had been restricted to residential use. Ambler Realty brought suit against the village and lost, but the law of zoning changed forever.

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[60]*Tighe* v. *Osborne*, 150 Md. 452 (1925).
[61]See cases collected in *Goldman* v. *Crowther*, 147 Md. 282, 297-302 (1925).
[62]*Sun*, May 26, 1926.
[63]*Sun*, April 14, 1926. *Sun*, June 10, 1926.
[64]*Sun*, Sept. 21, 1926.
[65]*Sun*, Sept. 25, 1926. *Sun*, Oct 1, 1926.
[66]272 U.S. 365 (Nov. 22, 1926).

In *Euclid*, Ambler Realty alleged a violation of the main provision in the federal constitution related to zoning—the fifth amendment "takings" or "eminent domain" clause.[67] This clause provides that "private property shall [not] be taken for public use, without just compensation."[68] There had been much debate in the late ninteenth and early twentieth centuries about what action constituted a taking.[69] It was clear that the government cannot take a person's land for a *private* purpose; and that if the government takes a person's land for a *public* purpose, it is a taking, and the person must be compensated.[70] The more difficult question is whether a government regulation, which admittedly diminishes the value of a person's property, rises to the level of a taking. The older view, which the Maryland Court used, was hard and fast: without physical appropriation, no taking had occurred, but if the government actually took property, it had to compensate the owner.[71]

By the 1920s the Supreme Court had begun to develop a more flexible rule. It viewed takings on a continuum. Allowable regulation, on one end, required no compensation, while excessive regulations,on the other, required compensation. When deciding whether the government had to pay compensation, this meant the courts had the difficult job of deciding where

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[67]Ambler Realty also attempted to use the equal protection clause of the fourteenth amendment, which provides that "[n]o State shall ... deny to any person ... the equal protection of the laws." *U.S. Const.*, amend. XIV. This clause is generally used to ensure that people are treated equally by the law, i.e., that like people are treated similarly, and dissimilar people are not treated alike. When dealing with zoning, the legal test the Supreme Court declared in *Euclid* is the same as for the takings clause; if a regulation is reasonably related to legitimate government ends, it passes equal protection muster. See e.g., *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981). Thus, the Court held that Euclid's ordinance did not violate the equal protection clause.

There were some non-constitutional legal issues involved in zoning as well. One concern was whether the Baltimore City Council and Baltimore City Courts had the power to pass and enforce zoning laws. Because municipalities are subdivisions of states, and not independent sovereignties, they have only limited power to make laws. See *Goldman* v. *Crowther*, 147 Md. 282, 310-12 (1925). For that reason, the scope of power invested in the Board of Zoning Appeals was unclear. Id. Zoning's detractors argued that zoning was an issue for the state legislature, not the City Council. *Evening Sun*, Jan 21, 1921.

[68]*U.S. Const.*, amend. V. The takings restriction on the power of government is part of what is called "substantive due process." Thus, it is accurate to refer to the fifth amendment claims by those opposed to zoning as due process claims. The takings clause was made applicable to the states via the Fourteenth Amendment, *Chicago, Burlington & Quincy Railway v. Chicago*, 166 U.S. 226 (1897).

[69]The debate continues today. See e.g. R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

[70]*Missouri Pacific Railway* v. *Nebraska*, 164 U.S. 403 (1896). *Kohl* v. *United States*, 91 U.S. 367 (1875); *Moale* v. *Baltimore*, 5 Md. 314 (1854).

[71]*Mugler* v. *Kansas*, 123 U.S. 623, 668-69 (1887).

to draw the line between permissive and excessive regulation.[72] To draw this line, the Supreme Court, unlike the Maryland Court, was willing to concede that changes in society meant changing the application of constitutional principles.[73] The Supreme Court in *Euclid* thereby framed the question around the issue of whether zoning was a valid exercise of the state's sovereign power to regulate. The court, reasoning that protection of the public welfare was a legitimate state goal, and that the Euclid zoning plan was a generally reasonable way to achieve that goal ruled that the state's action was valid.

Because the ordinance the Supreme Court approved in *Euclid* was comprehensive, the decision left few zoning issues in constitutional doubt.[74] Even though the state courts were still free to strike zoning laws based on their own constitutions, the legal tide had turned. Many had awaited the *Euclid* decision because it would give the Supreme Court an "opportunity to pass squarely on the issues involved."[75] While city leaders and supporters rejoiced, the response of the legal profession in Baltimore was varied.[76] Some held that, while federal constitutional objections to zoning had been erased, an amendment to the Maryland Constitution would still be necessary.[77] Others dissented, holding that the Maryland and Federal Constitutions were substantially the same, and, therefore, *Euclid* took care of any objections that could be raised.[78] In any event, most

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[72]*Pennsylvania Coal* v. *Mahon Co.*, 260 U.S. 393, 413 (1922) (Holmes, J.) ("when [regulation] reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain" it).

[73]See supra, n. and accompanying text. *Euclid*, 272 U.S. at 386-87 ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.").

[74]The question of whether zoning could rise to the level of a taking, thus requiring compensation, was resolved by *Nectow* v. *Cambridge*, 277 U.S. 183 (1928) (zoning ordinance, though generally constitutional, may operate unconstitutionally on a particular individual); *accord First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 US. 304 (1987) (temporary taking must be compensated).

[75]*Sun*, April. 20, 1926. *Sun*, Oct 9, 1925.

[76]*Sun*, June 8, 1925; *Sun*, July 26, 1925.

[77]*Sun*, Nov. 23, 1926. Early in 1927, the City Solicitor, Charles C. Wallace, determined that an amendment to the Maryland Constitution would still be necessary to sustain zoning. *Sun*, Jan. 6, 1927.

[78]*Goldman* v. *Crowther*, 147 Md. 282, 287 (1925). The Maryland Constitution provided that "[t]he General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation ...." *Md. Const.* art. III, §40. The Maryland Declaration of Rights provided that "no man ought to be ... disseized of his freehold liberties or privileges ... or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land." *Md. Const.* art. XXIII. *American*, Nov. 23, 1926.

agreed that prior to any passage of zoning ordinances by Maryland municipalities, the General Assembly must pass an enabling act.

R.B. Construction v. *Jackson*—The *Euclid* Turn in Maryland

The issue was settled in Maryland less than a year after *Euclid* when the Maryland Court of Appeals reversed its string of decisions striking down Baltimore's various zoning laws. In March 1927, the Maryland Court decided *R.B. Construction Company* v. *Howard W. Jackson, Mayor*, a case that challenged the area provisions of Baltimore's zoning law in the same constitutional terms as previous cases.[79] In *R.B. Construction*, however, the Maryland Court allowed zoning. The press announced this victory in a matter-of-fact fashion, indicating that after *Euclid*, zoning was coming to town regardless of the legal machinations necessary to secure it.[80]

The *R.B. Construction* case involved the northwestern Baltimore suburb of Arlington. At the turn of the century, Arlington, Maryland had been a stable unpretentious town.[81] The main road to Baltimore was unpaved, but the Western Maryland Railroad served the town making the shipment of hay, grain, coal and wood its principal business.[82] Arlington also had a bank, drug store, and several other stores.[83] Nearby was Electric Park, a summer resort and long-established race track.[84] Streetcars served the town as early as the 1890s—making it a true suburb of Baltimore—and by 1923 three different lines connected it to the city.[85]

After the first World War, there was an explosive move to the suburbs.[86] Arlington, annexed to Baltimore in 1918, had an elevation of about 400 feet, making it one of the city's highest points and a prime spot for development.[87] In 1926 when the R.B. Construction Company applied for permission to build row houses on Granada Avenue, new areas had

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[79]152 Md. 671, (1927).

[80]*Sun*, Mar. 24, 1927.

[81]*Baltimore and its Towns* 80, 82-83 (Joseph B. Legg, ed.) (probably compiled around 1925) (this portion probably published in the *Baltimore Sun*, Sunday Feb. 7, 1909 at p. 24.) Arlington was a former dairy farm.

[82]The Western Maryland went from western Maryland and the Shenandoah, to Gettysburg and Pennsylvania's Cumberland Valley. Johns Hopkins University, *Guide to the City of Baltimore* 53 (1893). *Baltimore and its Towns*, supra n. at 81.

[83]Id. at 80.

[84]Id. at 81.

[85]Farrell, *Who Made All Our Streetcars Go?: The Story of Rail Transit in Baltimore*, (1983), map on frontispiece, and passim

[86]Building was slow during the World War; only 3,747 applications for home construction were issued from 1916 to 1918. Real Estate Board of Baltimore, *A Survey of Housing Conditions* 10 (1921). But the 1920s saw rapid building growth in Baltimore; nearly 75,000 building permits were issued in Baltimore from 1923 through 1926. *Second Annual Report; Third Annual Report*.

[87]See supra, n. and accompanying text.

been a part of Baltimore City for just eight years.[88] As with other suburbs included in the 1918 annexation, Arlington had city services, but had to pay only the lower county taxes. Granada Avenue, however, did not benefit from this, because it had been located just inside the city line as drawn before the 1918 annexation.[89]

In 1926 R.B. Construction applied for a permit to build 16 block row houses on Granada Avenue, "a suburban section of the city, hitherto improved with detached frame cottages, and ... embraced in the area district 'E' provided for by [the zoning] Ordinance."[90] But because the

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[88]The R.B. Construction Company was incorporated in July 1923 by Nathan Rosenstadt, his brother Isadore, and Ethel M. Yeatman, who all lived in Baltimore's northwest corridor, and who all owned equal shares of the company's stock. Its purpose was "[t]o build, construct, and erect, stores, dwelling houses, garages, office buildings, and all kinds of structures; [t]o negotiate loans, to borrow or lend money on negotiable papers, and other approved collateral," and to generally engage in the real estate business. R.B. Construction Company, Articles of Incorporation (1923), on file at the Maryland Department of Assessments and Taxation. The company's offices were initially in downtown Baltimore, but moved around to various parts of the city between its founding and 1929, when it ceased being active. Compare Articles of Incorporation, and Polk, *Baltimore City Directory* (1923 through 1929). It was forfeited as a corporation on February 16, 1934. Charter Index Master Card, State Tax Commission of Maryland, for "The R.B. Construction Company, Incorporated," IBER 43, OLIO 194.

The Rosenstadt family is of some interest, though not prominent (*e.g.*, one of their family businesses, "New York Silk," did not have a display advertisement in the *City Directory*, while other silk stores did). The Rosenstadt family first appears in the *City Directory* in 1894. Members of the family worked as cigar-makers, tailors, dry-goods retailers, silk merchants, and even the treasurer of a bank; they lived in various parts of Baltimore, moved around often, and usually lived above their stores. In 1920, Isadore Rosenstadt went into the real estate business, and his brother Nathan joined him a year later. Ms. Yeatman, possibly a school teacher, was not active in the business. The economic depression of the 1930s, however, got the best of the family's businesses --they cease to be listed after 1929-- and most members of the family became other people's employees. Isadore died in the 1930s, and Nathan in the 1950s. See Polk, *Baltimore City Directory* (1894 through 1956). Transcript of Record, from the Baltimore City Court in the Case of R.B. Construction Company, a Body Corporate, vs. Howard W. Jackson, Mayor of Baltimore City, and Charles H. Osborne, Inspector of Buildings for Baltimore City, to the Court of Appeals of Maryland (hereinafter *Transcript*), Petition for Mandamus at 4.

[89]The alley behind the houses standing on Granada Avenue today runs roughly down the line of the 1918 annexation.

[90]In 1926, when R.B. Construction applied for a permit to build, the application procedure had from one to five steps as follows:
1.The applicant petitioned the Bureau of Buildings (Osborne, at the time, chair). If the applicant got a permit, it was free to build. 2.If disallowed, the applicant could appeal to the Board of Zoning Appeals. 3.If the Board agreed with the Bureau, the applicant could not build, and had no further administrative remedies. 4.If the Board wanted to overturn the Bureau (allow the development to go forward), it reviewed the case and made a recommendation to the City Council to pass an ordinance (a private bill) to allow the building. (The Board had no independent power after the various court cases.) 5.The Buildings and Building Regulations Committee of the City

ordinance provided that "[i]n an E Area District there shall be reserved on each lot at least one side yard not less than ten feet wide . . . ," eliminating the possibility of block rows, the permit was denied.[91]

The company appealed to the Board of Zoning Appeals and the Board in turn asked the City Council to overturn the Bureau of Buildings by passing a private ordinance allowing R.B. Construction to build the two rows of block-houses.[92] Owen W. Van Daniker managed the company's fight in the city council with the help of a group of Democratic politicians.[93] The Council had always followed the Board's recommendation, but for the first time the Council refused, signaling "the first indication of organized opposition to the [B]oard in the Council."[94] R.B. Construction's argument was that row-homes should be allowed because the land was vacant, a completely irrelevant point.

Earlier events would have signaled an experienced developer that the construction company had a weak case, which suggests that R.B. Construction was an amateur in the process and politics of land development. In 1923, three years earlier, the Board of Zoning Appeals had rejected an application to build five two-story brick block-row houses in Forest Park, a nearby neighborhood similar in style to Arlington. According to the Board, "[t]hese districts have been zoned for detached houses of the Bungalow type and there seems no good reason why other kinds of buildings should be permitted in them." The Board explicitly recognized that its ruling applied to neighborhoods outside of Forest Park.[95] Furthermore, in 1924 the Board of Zoning Appeals called its declaration to disallow rows of block-type houses in cottage communities a "major policy."[96] Also in 1924, the Board rejected a plan for row houses

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Council had jurisdiction. If the Committee, and then the Council, voted to allow the development, it could go forward. If not, the applicant had no further administrative (and most likely no legislative) remedies.

Sun, July 3, 1926. *Transcript*, supra n. at 11. A public hearing had been held in 1922 regarding how Granada Avenue was to be zoned. *American*, Jan. 20, 1922.

[91]Baltimore, Md., Ordinance 922 §17(b) (1923), as amended by Baltimore, Md., Ordinance 435 (1925). R.B. Construction initially claimed it had been granted a permit on July 24, 1926, but that it had been revoked three days later. *Transcript*, supra n. at 4. The city claimed that a permit had been issued "by mistake" but that it had been declared "null and void" the following day. *Id.* at 11. This minor dispute did not figure in the court's decision.

[92]An applicant had five days after a permit was denied by the Bureau of Buildings to file an Appeal to the Board of Zoning Appeals. R.B. Construction, at first, missed the deadline. Possibly at the urging of its attorney, William Pinkney Whyte, Jr., the company filed a second application. Probably as a courtesy, Osborne, chair of the Bureau, bent the rules to allow the second application "to enable the applicant to appeal within the time prescribed by law," *Sun*, July 8, 1926.

[93]*Sun*, July 3, 1926.

[94]*Sun*, June 15, 1926.

[95]*Sun*, Aug. 1, 1923.

[96]*Sun*, Jan. 6, 1925. *American*, Dec. 30, 1924.

just four blocks north of the site on which R.B. Construction proposed to build. In that matter, trustees of an estate endeavored to sell land for $80,000 to a realty company which intended to build block rows, but the city denied permission to build because of the side yard requirement. The estate sued the city for damages because, as a result of its denial of permission, the realty would pay no more than $50,000 to $55,000, costing the estate about $30,000.[97] While the outcome of the case is not known, it is clear that the zoning board did not approve the permit.

When the R.B. Construction proposed its Granada Avenue building plan in 1926, neighbors got involved in the process and opposed the development. They feared that their property values would depreciate because of the presence of block row houses nearby. They also argued that if Granada Avenue were exempt from the zoning ordinance, every unimproved lot in Walbrook and Forest Park would likewise be exempt.[98] The neighbors also noted that the Granada Avenue lots, which R.B. Construction intended to develop, had deed restrictions against block rows.[99] These conditions would have undoubtedly alerted an experienced developer that a permit would be difficult, if not impossible to obtain.

Having been denied a permit, R.B. Construction turned to the Court of Appeals for relief.[100] In support of zoning, the City used policy arguments, claiming the plan was designed to

> lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and safety; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.[101]

Each of these claims was supported with a short study written by a city employee.[102] R.B. Construction's arguments, on the other hand, were the same constitutional claims that had lost in *Euclid*, and were therefore likely losers in Maryland as well. [103] The company raised the familiar takings and equal protection issues, and the issue of whether the City of Baltimore had the power to enact a zoning ordinance.

The Decision in *R.B. Construction* v. *Jackson*

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[97]*American*, Jan. 15, 1924.

[98]The neighbors referred to the Granada Avenue neighborhood as "North Forest Park." This was probably for political reasons; the *Byrne* decision had concerned Forest Park, and it was known as an upscale area.

[99]*Sun*, June 15, 1926.

[100]Procedurally, the Company petitioned for a writ of mandamus.

[101]*R.B. Construction Co.* v. *Jackson*, Appellee's Brief, iii.

[102]Id. at appendix.

[103]R.B. Construction's building application was filed three months after the *Euclid* decision.

Judge Urner, who dissented in *Goldman*, wrote for the majority in *R.B. Construction*. He first described the zoning ordinance, as it applied to Granada Avenue. He then laid to rest any question of the need for the General Assembly to pass an enabling act supporting zoning in Baltimore: "In regard to any purpose within the proper scope of [state] power, the City of Baltimore has been invested with the full measure of the authority which the State itself could exert."[104] Although *R.B. Construction* did not concern use zoning *per se*, Judge Urner quoted at length from *Euclid* to the effect that it was of equal constitutional validity in Maryland as it had been in Ohio.[105]

The holding of the case rested on judicial deference to the legislature. Quoting the United States Supreme Court, Judge Urner wrote, "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control."[106] He then canvassed the various provisions of the zoning ordinance, declared them reasonable, and concluded that "the area provision affecting this case is within the scope of the . . . power which the municipal government of Baltimore is entitled to exercise.'[107]

Judge Offutt, who had written the majority opinion in *Goldman*, dissented, but in doing so, abandoned his *Goldman* rationale. In a major concession to the majority, he did not take issue with "reasonableness" as a legal test for the validity of a zoning law; he just viewed this ordinance as unreasonable.

> Such regulations have no visible relation to the public health, safety, or morals, but have a wholly different purpose, and are designed, as the ordinance itself states, to effect a scheme which will in the judgment of the Mayor and City Council promote the public comfort, convenience, prosperity, and general welfare, and conserve property values. Heretofore the only limitation upon the use of private property has been that the owner thereof should not so use it as to imperil the public safety, health, or morals.[108]

In the *Goldman* majority opinion, Judge Offutt had held that the federal and Maryland constitutions had an identity of purpose. *Goldman* cited both the federal and state constitutions without distinguishing between them, writing that the zoning ordinance at issue was in "violation of the guaranties of the State and Federal Constitutions."[109] In his dissent in *R.B. Construction*, however, Judge Offutt switched his position. He

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[104]*R.B. Construction*, 152 Md. at 674.

[105]Id. at 676.

[106]Id. at 677, quoting *Euclid*, 272 U.S. at 388 (citing *Radice* v. *New York*, 264 U.S. 292, 294, (1924).

[107]*R.B. Construction*, 152 Md. at 678.

[108]Id. at 685-86 (Offutt, J., dissenting).

[109]*Goldman*, 147 Md. at 287.

quoted Article 3, §40 of the Maryland Constitution[110] and cited, at considerable length, only Maryland cases for its explication. He then recognized *Euclid*, but only to say that it did not apply in Maryland: "That [zoning] legislation . . . invade[s] constitutional rights and guaranties which have been recognized and respected since Runymede cannot well be questioned. And indeed so much is conceded in the case of *Euclid*."[111] The dissent, however, is not the law, and R. B. Construction lost its case.

Conclusion

The Baltimore City Council persistently enacted zoning ordinances in the early years of this century. The Maryland Court of Appeals just as doggedly struck them down as unconstitutional in a series of decisions culminating with *Goldman* in 1925. The following year, however, the United States Supreme Court came down with its *Euclid* decision. It used flexible policy reasons, rather than narrow legal categorizations, and found that zoning stood up under constitutional scrutiny. Just one year later, the Maryland Court reconsidered its position, and in *R.B. Construction*, followed the Supreme Court. This policy choice by the Supreme Court, and then the *Euclid*-turn in Maryland, reveals how the courts responded to changing times.

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[110]See supra, n.

[111]*R.B. Construction*, 152 Md. at 691 (citations omitted). *R.B. Construction* decided an additional issue beyond the scope of this paper. The Company claimed that the zoning ordinance provided for " an unconstitutional delegation of unlimited discretion" to the Board of Zoning Appeals to grant variances. 152 Md. at 679. The majority disagreed saying "[i]t is a limited discretion and is plainly essential to the practical application of the [zoning] plan ...." Id.