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# The Zoning Game by Richard F. Babcock

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jurisdiction might find support in one or more of the several tests or theories of choice of law.

Mr. Speiser employs a succinct, readable style and has performed his research thoroughly. It is doubtful that his work will find its niche among oft-cited one-volume legal treatises such as *Ballantine* or *Prosser*, but it is equally doubtful that it was intended to be; it is a practice manual and as such, is full of information and practice aids for the attorney seeking a single source for the law of wrongful death actions. However, it is lamentable that having spent so long a period<sup>5</sup> in the preparation of his treatise, Mr. Speiser does not have more to contribute—in a philosophical sense—to the continuing evolution of the body of the law concerned with death actions.<sup>6</sup> He is content to expose the state of the law but is not disposed to offer direction. He has brought us to the corner but only hopes we can find our way around it.<sup>7</sup>

*Recovery for Wrongful Death* is declared to be the first treatise on death cases since the second edition of Tiffany's *Death by Wrongful Act* in 1912.<sup>8</sup> Whether Mr. Speiser's book is thus overdue is debatable in the light of the observations already made. It should, however, prove to be valuable as a convenient tool for the practicing attorney.

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**THE ZONING GAME.** By Richard F. Babcock. Madison: University of Wisconsin Press, 1966. Pp. 208. \$5.75.

Zoning is a game played furiously across the country for high stakes, but the players often have little understanding of its rules or objectives. *The Zoning Game* focuses principally on the small incorporated municipalities which surround the central city and analyzes the reasons why they play the game in such a haphazard manner. The author concludes the objectives are sound, the rules are rotten, and in a great many instances the game is being refereed by the wrong

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<sup>5</sup> In his preface, the author states that his work "was six years in the making." *Id.* at v.

<sup>6</sup> In his introductory chapter, there is reference without comment to statutory compensation provisions, §§ 1.11 *et seq.* In § 3.46 suggestion is made as to the solution of problems involved in compensation for mental anguish in death actions.

<sup>7</sup> "[T]his book comes to print at a turning point in the history of wrongful death law. It is hoped that this volume may make some useful contribution, if only to point out some of the anomalies and defects in the present law of wrongful death." SPEISER, *op. cit. supra* note 1, at v.

<sup>8</sup> *Id.* at iii.

persons using the wrong criteria. To save the game, the author urges sweeping procedural reforms and state enabling legislation to require local bodies to consider the regional and state-wide impact of their decisions.

Mr. Babcock describes the current attitude toward zoning as follows:

No one is enthusiastic about zoning except the people. The non-people—the professionals—hope it gets lost. The judges find zoning a monumental bore, most lawyers consider it a nuisance, and the planners treat it as a cretinous member of the planning family about whom the less said the better. Yet thousands of local officials regard zoning as the greatest municipal achievement since the perfection of public sanitary systems.<sup>1</sup>

The first part of the book explains this mixed reception.

Zoning is currently criticized because it was designed for an era when land use decisions were considered of local, not regional or state-wide, concern.<sup>2</sup> Consequently, the zoning power was concentrated in local lay bodies which have had little desire to systematically cope with tremendous post-war urban growth. On the contrary, "zoning has provided the device for protecting the homogeneous, single-family suburb from the city"<sup>3</sup> by its exclusion of a host of undesirable influences—low income groups, industry, and more recently, the discount house.<sup>4</sup>

The professional planner dislikes zoning boards because they tend to reject his advice. Lawyers dislike dealing with the boards for reasons graphically described by a municipal attorney:

Many planning hearings have taken on the character of an oriental bazaar where applicants wheel and deal with the commission on conditions and restrictions to be imposed on zoning. Some hearings are more like the ancient circuses in the coliseum of Rome . . . except that the Christians then got a better deal from the lions than some applicants do from the planning commission. Now instead of thumbs down or up the planning commissioner asks for a show of hands.<sup>5</sup>

The resulting stream of inconsistent decisions frustrates the developer and the lawyer who represents him. The average lawyer also dislikes zoning because he is unfamiliar with land use doctrines. Perhaps a more important source of his antipathy, however, stems from a general distrust of the administrative process which suffers by comparison to the more orderly procedures of the court room. Moreover,

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<sup>1</sup> BABCOCK, *THE ZONING GAME* 17 (1966) [Hereinafter cited as BABCOCK].

<sup>2</sup> See Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, WASH. U.L.Q. 1 (1966); Note, *Zoning: Looking Beyond Municipal Borders*, WASH. U.L.Q. 107 (1965).

<sup>3</sup> BABCOCK 3.

<sup>4</sup> BABCOCK 36.

<sup>5</sup> BABCOCK 91.

the lawyer is handicapped by judges' dislike of zoning. Appellate judges have not in general brought the same level of creative analysis to zoning as they have to other modern problems. As a result, important zoning decisions appear as routine opinions and furnish the lawyer with little insight into judicial analysis of such cases.

Mr. Babcock traces the development of zoning from a means of maximizing property values to a regulatory device for the achievement of social benefits. The earlier theory that the fundamental purpose of zoning is to protect the market value of the property has lead Professor Dunham to conclude: "The city planner may interfere with and supervise the land use decisions of a private developer only because of the interaction of one's land use with another and only where the private developer's land use adversely affects others."<sup>6</sup> This view is criticized by Babcock because it is "a firm rejection of the ideas that metropolitan or regional interests have any place in the municipal regulation or, indeed, the taking of land."<sup>7</sup> This reviewer agrees that zoning must be seen as one implementary device for regional planning, but such criticism avoids the hard question, *i.e.*, "whether this view of property as a social asset is consistent with the concept of property as an individual right."<sup>8</sup> Perhaps the answer lies in a frank recognition that the right of an urban owner to determine the uses to which his land will be put is obsolete in modern society. He should be "entitled to rents and profits from the land, but he will not be entitled to determine its use."<sup>9</sup>

*The Zoning Game* concludes by urging comprehensive procedural reforms and state control over the local decision making process. Everyone will agree the first suggestion is needed; the second is more controversial. Babcock proposes that state enabling legislation be used to delineate the areas in which municipalities must consider the impact of their decisions on state or regional planning policy. A state-wide commission would be established "to review local decision making in terms of the broad criteria set out in the statute . . . . The legislature does no more than indicate those areas where 'general welfare' is or is not coextensive with municipal boundries."<sup>10</sup> For example, decisions affecting bodies of water would have to be made with regard to their

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<sup>6</sup> BABCOCK 118.

<sup>7</sup> BABCOCK 120.

<sup>8</sup> Cribbet *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 260 (1965).

<sup>9</sup> Dukeminier, *The Coming Search For Quality*, 12 U.C.L.A. L. REV. 707, 717 (1965). See also Burroughs, *Should Urban Land Be Publically Owned?* 18 ZONING DIGEST 249 (1966).

<sup>10</sup> BABCOCK 167.

impact on state-wide water resources policy while regulation of architectural design might be designated a purely local matter.

Babcock's proposals will be met with the cry that they represent an undesirable centralization of power, sounding a death knell for local government. In fact, the opposite should occur. His proposals, although difficult to implement, can do for local legislative bodies what *Baker v. Carr*<sup>11</sup> is doing for state legislatures. Otherwise, if "the little fiefdoms of municipal powers"<sup>12</sup> continue to pursue their isolationist policies, they will eventually be circumvented altogether. Localization of the decision making process can be continued only if zoning boards become active participants in state-wide and regional planning. By asking state legislatures to expand the scope of "the general welfare," Babcock presents a way to maintain the benefits of local control over land use, while insuring that suburban municipalities will begin to cope with the dynamics of regional and state-wide urban growth.

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CENSORSHIP: THE SEARCH FOR THE OBSCENE. By Morris L. Ernst and Alan U. Schwartz. New York: Macmillan, 1964. Pp. 288. \$6.00.

*Censorship: The Search for the Obscene* does much to make the law of a complicated and controversial subject intelligible for the layman. Even though the United States Supreme Court has decided important cases since the book's publication, notably *Ginzburg v. United States*,<sup>1</sup> *Mishkin v. New York*,<sup>2</sup> and *Memoirs v. Massachusetts*,<sup>3</sup> this volume will without doubt remain for a long time as one of the basic explanatory works on the law of obscenity. While Ernst and Schwartz have written for the layman, they do not simply rehash past analyses.

The authors begin by relating sexual folkways to the surplus or deficit of women in relation to men in given societies, an argument which, while not totally persuasive, serves to emphasize the social context of "the search for the obscene." However, the authors' main focus is on the law of obscenity as developed in the courts—but not the United States Supreme Court alone. In fact, not until the last

<sup>11</sup> 369 U.S. 186 (1962).

<sup>12</sup> Cribbet, *supra* note 8, at 277.

<sup>1</sup> 383 U.S. 463 (1965).

<sup>2</sup> 383 U.S. 502 (1965).

<sup>3</sup> 383 U.S. 413 (1965).