

RESOLUTION PASSED BY THE COUNTY COMMISSIONERS OF BALTIMORE COUNTY ON JULY 16, 1939, ESTABLISHING A "SPECIAL RESIDENTIAL AREA", etc. In re: William F. Roberts

OPINION OF THE COURT

This is an appeal by one, William F. Roberts, from the decision of the Board of County Commissioners refusing a permit under the Zoning Act of Baltimore County, Act of 1939, Chapter 715, of the General Assembly of Maryland.

William F. Roberts, on May 5, 1939, contracted to purchase one acre of land located on Lech Raven Boulevard in Baltimore County, a short distance from the line dividing the City from the County. On May 17, 1939, the General Assembly of Maryland passed an emergency act, Chapter 715, Acts of 1939, (which may be designated as a Zoning Act), for the Metropolitan District of Baltimore County. On June 20, 1939, by an advertisement in "The Jeffersonian" a weekly newspaper published in Baltimore County and in general circulation throughout the Metropolitan District of said County, notice was given to the public of a hearing to be held. In pursuance of said public notice, a hearing was held on July 16, 1939, by said County Commissioners in the Court House at Towson, Maryland, to determine whether or not the property in the instant case, along with others, should be classified as a residence area under said Act.

The area designated is within the Metropolitan District of Baltimore County, being bounded on the south by the Baltimore County Line, on the East by Hillen Road and the Lech Raven Boulevard, on the north by the southern boundary

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With the third contention, that the Board exceeded the power vested in it by the Legislature and therefore acted illegally, the Court cannot agree. It would be unreasonable to say that the Board of County Commissioners must complete a survey of the whole area authorized to be zoned by the Legislature before acting on a particular spot. It must be borne in mind that the Legislature passed this act as an emergency measure to take effect immediately. To hold that there must be lengthy proceedings, hearings and surveys before the Board could legally restrict the use of land in any particular district, would be to defeat the will of the Legislature. Nor can the Court close its eyes to what has happened elsewhere when similar legislation was pending. Frequently the authorities were deluged with applications for objectionable uses in order to "get in under the wire" before the restrictions were passed.

The fact that the applicant had contracted to purchase the land before the passage of the Act and intended to use it commercially, gives him no vested rights as against the County.

In the case of *Mapius vs Mayor and City Council*, 164 Md. 222, the applicant had been given a permit in error and contrary to the Zoning Law, and setting under the permit the applicant had expended large sums of money, and in fact had partially completed his building, but the Court held that he had no vested rights in that permit, and ordered its revocation.

Neither does intention to use affect or establish a non-conforming use, especially to vacant land.

Chagt vs Md. Zoning Appeals, Daily Record, 12-20-39.

Upon the evidence before the Court cannot rule that a

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of the property at the southeast corner of Lech Raven Boulevard and Taylor Avenue, and on the West by a line parallel to Lech Raven Boulevard and approximately 500 feet west therefrom. On June 23, 1939, Mr. Roberts acquired title to his land at the southern corner of the intersection formed by Lech Raven Boulevard and Hillen Road, which property is within the designated area.

It being the intention of Mr. Roberts to use the property for commercial purposes, to wit, dairy products, on the same day June 23, 1939, an application for a permit by Roberts to erect a building on this property for the sale of merchandise, was made. As a result of the hearing on July 16, 1939, the County Commissioners of Baltimore County designated said area to be a residential area, and the appellant was advised of the action of the Board. From this decision an appeal was taken to the Circuit Court for Baltimore County.

While admitting the constitutionality of the Act as a whole, the appellant contends:

1. That it is unconstitutional as to this particular property;
2. That the County Commissioners of Baltimore County erred in that the testimony did not justify their conclusion;
3. That the said Board exceeded the authority granted it by the Acts of 1939, Chapter 715.

At the hearing on the appeal there was no evidence presented to the Court that would bring the case within those accepted legal principles, warranting the holding of the Act unconstitutional as a whole but unconstitutional as applicable to particular cases, as was held in the *McGee* case (297 U.S. 103).

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non-conforming use exists because the property is in close proximity to similar commercial uses, or that horses from a nearby riding academy traverse the said land; they likewise traverse public highways.

To secure satisfactory zoning laws elsewhere has been a long and arduous task with many conflicting decisions in the early cases, but in this State, as stated by Chief Judge Dennis of the Supreme Bench of Baltimore City, in his careful analysis of the authorities, in the zoning case of *Lewis vs Mayor and City Council*, reported in the Daily Record of June 25, 1938: "The difficulty confronting lower courts lies not in stating the doctrine which is stable, but in applying the same to a given state of facts." This decision was affirmed in *Lewis vs Mayor and City Council of Baltimore*, 164 Md. 140.

Chapter 715 of the Acts of 1939, is not an all-embracing zoning law for the Metropolitan District of Baltimore County, in the sense that it authorizes the regulation and restriction of all land within the Metropolitan District. It merely authorizes and empowers the Board of County Commissioners to designate residence areas only, and within such areas to adopt a comprehensive plan of regulation and restrictions affecting the construction and the use of land and buildings therein. It does not authorize the County Commissioners to establish commercial or industrial areas or to regulate the construction or use of buildings or land in such areas, but only to establish residence areas from which commercial uses can be excluded. To this extent it differs from the Baltimore City Zoning Ordinance (Ordinance 1847, approved March 30, 1931), and the City of Frederick Ordinance (passed and approved August 5, 1929), and the Anne Arundel County Zoning Law

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The facts in the instant case are more nearly like those presented in the *Zahn* case (274 U.S. 325), which involved a fast growing section of Los Angeles, and in which the Court said: "The constitutional validity of the ordinance in its general scope is settled by the recent decision of this Court in *Euclid vs Ambler Co.*, 272 U.S. 365"; and further: "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question."

All laws, in a measure at least, interfere with the privileges of individuals, and a zoning restriction is no exception, but here the interest of the individual must give way to the higher rights of a community.

In substance, it has been contended that the burden of proof in each individual case is upon the County to show that the restrictions substantially affect the public health, safety, morals and general welfare. The authorities do not bear out this contention. Were this so each case would require endless evidence of matters difficult to prove, but accepted by the ordinary individual, and approved by our Court. For example, regulations concerning height of buildings, health laws, fire rules and many other laws restricting individuals and regulating use of property are based on these same principles have been approved by our Courts and that without specific and detailed proof as to how these affect the public health, safety, morals and general welfare.

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(Chapter 633, of the Acts of 1939).

The very nature of the Act contemplates that the residence areas established by the County Commissioners will be separate, distinct and isolated, and this is specifically recognized by the Act itself in its provision that the "County Commissioners of Baltimore County may designate . . . certain residence districts or divisions of such number, shape and area as may be deemed best suited to carry out the purposes of this Act and within such districts they may regulate and restrict the erection . . . and use of buildings, structures and land." The comprehensive plan of regulation and restriction referred to in the Act therefore relates to the individual areas established by the Board, and requires that within each area designated there must be uniformity of regulation and restriction applicable to the entire area. It does not mean and could not have been intended to mean that the entire Metropolitan District was to be zoned or that regulations or restrictions adopted must apply to the entire District or restrictions adopted must apply to the entire District or to all of the residence areas designated by the Board of County Commissioners.

This type or kind of zoning is not unusual. In *Ex Parte Quong Wo (Cal.)* 115 Pac 714, an ordinance of the City of Los Angeles establishing seven separate and distinct industrial districts in the City, and classifying the remainder of the City as a residence district from which were excluded industrial uses, was upheld. In *State ex rel Henry vs Miami (Fla.)* 150 So. 88, an ordinance of the city put a particular part of the city in a residence district from which hospitals were excluded, and petitioner for the writ of mandamus to compel the issuance of a permit for a hospital attacked the

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Cochran vs Preston	109 Md. 280
Brown vs Shubbs	189 Md. 159
Rich. Constr. Co. vs Shubbs	212 Md. 671
Osborne vs Oranell	136 Md. 68
Forsythe vs Standell	158 Md. 368
City of Baltimore vs Board of Public Works	182 Md. 545

And many others.

Without going into details of the testimony taken before the Board of County Commissioners, and further considering that upon appeal the hearing is de novo, the second contention that the said Board was in error in designating this area for residential purposes must be dismissed. It is well known that Lech Raven Boulevard is a dual highway extending into Baltimore County from Alameda (a residential and likewise a dual highway) in Baltimore City, and further that after much controversy the City authorities established said Lech Raven Boulevard and both sides thereof as a residential area set up to the City limits. The residence area designated by the County Commissioners of Baltimore County is nothing more than a continuation of the residence area established in Baltimore City. This is only a very short distance from the property in controversy. In view of the act of the City authorities with their many years of experience with practical zoning, can it be said that the Board of County Commissioners was acting contrary to the interest of the community, or that their act was arbitrary, unwarranted or unreasonable in designating this area for residential purposes? Even though the Court disagreed with the findings of the Board, it could not substitute its judgment for that of the Board of County Commissioners. What discretion the Board has was vested in it by the Legislature and cannot be usurped by the Court.

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validity of the ordinance on the ground that it was not a part of a comprehensive scheme to zone the entire City. The ordinance was upheld and the Court said in part:

"Undoubtedly, where an Act vesting the City with authority to zone or make regulations and restrictions which amount to zoning, clearly evidences the legislative intent that the authority and power thus vested can only be carried out by one comprehensive zoning ordinance covering the entire City, such intent must be observed, else the ordinance will fail. But, by our holding in the *Skidman* case above cited, the City of Miami was not confined to the passage of one comprehensive ordinance zoning the entire territory of the City by the statutory provision above quoted."

The Act is a grant by the State of Maryland to one of its municipal corporations, the Board of County Commissioners of Baltimore County, of a portion of its inherent sovereign power that is commonly called the "police power." It is now well recognized and settled that the regulating and restricting of the use of property for the purpose of industry, business and residences, or what is termed "zoning," is a proper application of the police power. The concentration of population, the convergence of traffic upon a commercial establishment with an increase in noise, dust, fumes, gas and refuse matter that necessarily results therefrom, the overcrowding of land with decrease in free space for light, air and easy access by fire-fighting apparatus, all affect the public health, safety and welfare and the segregation of such uses and the restrictions and regulation thereof within the areas to which such uses are confined are now well recognized objects of the police power. In *Village of Euclid vs Ambler Realty Co.*,

272 U. S. 368, the first decision of the Supreme Court upholding zoning regulations and cited followed with approval in *P.L. Construction Co. v. Jackson*, 132 Md. 671, and *Jack Lewis v. Baltimore*, 164 Md. 146, and *Lipsett v. Parr*, 164 Md. 222, it was stated:

"Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years urban life was comparatively simple, but with the great increase and concentration of population, problems have developed and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons which those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable."

The Act, therefore, is a proper exercise by the State of its police power and the grant of power to the County Commissioners is likewise proper and valid under the case of *Horton v. Covey*, 74 Md. 203; *Parr v. Plan Co.* vs. *Baltimore*, 132 Md. 671, and *Pocomoke City v. Standard Oil Co.* 142 Md. 330.

In the *Horton* case the validity of the Act of the Legislature granting to the Town Commissioners the power to prohibit the

erection of a building without a permit from the Commissioners was before the Court and the refusal of the Town Commissioners to grant a permit was upheld. In the *Baltimore* case an Act of the Legislature empowered the Town Council to pass ordinances regulating the construction of buildings and an ordinance was passed requiring the applicant to secure a permit before any construction work could be done. Citing the *Horton* case, this ordinance was upheld. In the *Pocomoke City* case, an Act of the Legislature granted to the Commissioners of Pocomoke City the power to pass ordinances for the good government of the town, and under this grant of power Ordinance No. 63, Series "C", was passed prohibiting filling stations on Market Street, in Pocomoke City. The validity of the ordinance was attacked, and in upholding the ordinance the Court said at Page 376, with reference to the police power:

"Primarily the power belongs to the State and is ordinarily exercised by its legislative department, but the right to exercise it may lawfully be delegated to such subordinate agency of the State such as a municipal corporation (*Nighe v. Osborn*, 142 Md. 339, 131 Atl. 201), and such an agency may delegate to others the purely administrative duties incident to it (idem.), or may, itself, directly exercise the entire power. Where such an agency acts directly, the only limitation upon its right to exercise the power is that it must act impartially, that any interference by it with unrestricted use of private property must be reasonably necessary to the public welfare, and consistent with the prohibitions of the Constitution. Where the power is exercised directly by the agency or delegate the validity of acts done under its authority

is determined by whether its acts in a particular case are upon the facts of such case reasonably necessary to the protection of the public welfare, but, when any part of it is further delegated by the municipality to subordinate officials, the validity of their acts under it may depend upon whether the grant or delegation to such officials rested then with a complete and uncontrolled discretion, or whether it rested then with mere ministerial and administrative functions to be exercised in obedience to and in conformity with definite rules, guides and standards."

Chapter 715 is a grant of the police power of the State to a subordinate agency, namely, the County Commissioners of Baltimore County, who are empowered to act directly and therefore the only limitation upon their exercise of the power is that they must act impartially, their action must be reasonably necessary to the public welfare and it must be consistent with the prohibitions of the Constitution. There is not here involved any question of delegation of ministerial or administrative functions by the County Commissioners to some subordinate agency or officials which would require definite rules, guides or standards by which such subordinate agency or official would be bound. The Act confers upon the identical officials, that is, the Board of County Commissioners of Baltimore County, the right to exercise the police power of the State and the power to execute such exercise, and therefore the absence of rules or guides in the Act does not affect its validity.

Chapter 715 of the Acts of 1939 being valid, the only question remaining is the validity of the action taken under the Board of County Commissioners of Baltimore County.

the district in which it is located, as to justify the denial of his right to so use it. But the State, acting through its delegates, the Mayor and City Council of Baltimore, has said otherwise, and, upon the facts, it cannot be said as a matter of law that its conclusion was either unreasonable or arbitrary."

In *Lipsett v. Parr*, 164 Md. 222, in speaking of the position of a Court in determining the validity of legislative action under the police power, the Court said at Page 230:

"In the solution of the problem of the exclusion in Baltimore City Zoning Ordinance of an ice house from a second commercial use district, it is not essential to the validity of this restriction that its necessity as a public measure shall be clearly demonstrated. Unless it can be held to have no reasonable tendency to serve any proper purpose of the police power, the restrictions may not rightfully be declared invalid."

Further at Page 232, the Court said:

"The restrictions here must be held within the scope of the power conferred by the General Assembly, unless it is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the Court in interfering and setting it aside as a plain abuse of authority."

In *Jones v. Board of Zoning Appeals*, 173 Md. 609, an application for a gasoline filling station permit was sought and denied. The Ordinance under which the Board of Zoning Appeals acted in denying the permit was attacked and at Page 676 the Court said:

"At most the appellant (petitioner for the permit) has succeeded only in showing the existence of facts tending to

In considering this question it is well to bear in mind the nature and office of the Board of County Commissioners and of any action taken by the Board. In *O'Brien v. Baltimore County Commissioners*, 61 Md. 15, it is stated at Page 23:

"They (County Commissioners) are a body clothed with a limited and special jurisdiction, deriving their authority only from statute, and charged with the execution of the powers which the statute confers upon them."

This definition was followed and applied in the cases of *McCurdy v. Jansop*, 132 Md. 318; *Lewis v. County Commissioners*, 131 Md. 303; *Howard County v. Matthews*, 146 Md. 553; and *Gordon v. Montgomery County*, 164 Md. 210.

In *Howard County* case at Page 261, the Court said:

"Baltimore City and the Counties of Maryland are public political territorial divisions of the State, established for public political purposes connected with the administration of the government, possessing the character, and endowed with the powers of corporations, according to the law, severally applicable to them. They are merely instruments of government, appointed to aid in the administration of public affairs, and are part of the State. As public corporations they are to be governed according to the laws of the State and are subject to the control of the Legislature. . . . Counties are political divisions of the State organized with a view to the general policy of the State and the functions and powers exercised by them have reference mainly to such policies, which general State policy is, when applied to a particular county, modified and adjusted so as to meet the local conditions and thus serve the needs of the people resident within its territorial boundaries. Counties, like municipal corporations, can only exer-

raise some question as to the wisdom of the enactment, but that the ordinance is valid on its face we entertain no doubt, and it is equally clear that it was enacted in pursuance of delegated authority from the Legislature. This being true, it cannot, under the facts disclosed by this record, be declared invalid or unreasonable in its application to appellant's property."

Applying this well-settled principle to the instant case, I believe the most that can be said from petitioner's point of view is that whether or not the action of the County Commissioners was wise or unwise or necessary or unnecessary is a debatable question.

The intrusion of commercial uses in the area which is now dedicated to residential uses, would undoubtedly adversely affect the public welfare and there is no more reason for holding the designation of the area as a residence area invalid than there would be for holding the residential use district immediately to the south in Baltimore City established under Ordinance No. 1247, approved March 30, 1931, likewise invalid. I do not see how the Court can say how the designation by the County Commissioners is "so clearly unreasonable, so arbitrary, oppressive or partial as to raise the presumption that the Legislature never intended to confer the power to pass it", which would be necessary in order to justify the Court in holding that such designation was invalid.

In addition to the foregoing, it is also stated in *Lipsett v. Parr*, 164 Md., at Page 230:

else such powers as are expressly granted by the State, together with such implied powers as are necessary for the execution of the powers expressly granted."

See also Annotated Code, Public General Laws, Article 29, Section 1, which provides in part:

"The County Commissioners of each County in this State are declared to be a corporation."

In view of the foregoing there can be no question that the Board of County Commissioners of Baltimore County is a municipal corporation of the State of Maryland. Being such they have power to exercise those powers expressly granted to them together with such implied powers as are necessary for the execution of the granted powers. Action taken by the County Commissioners pursuant to an expressly granted power may therefore take the form of an ordinance or a by-law or merely a rule or regulation, but it is immaterial what the action be called; its validity, force and effect are governed by the same principles of law that would govern or apply to a municipal ordinance.

The action taken by the Board of County Commissioners on July 19, 1939, designating the area involved as a residence area was taken under the authority of Chapter 715 and in accordance therewith. Notice of a hearing was duly given, the hearing held at which testimony was taken and following same the County Commissioners resolved that the area in question should be designated as a residence area from which commercial uses should be excluded. In determining whether or not the action taken by the County Commissioners was a proper and valid exercise of power under Chapter 715 it is not necessary that the

Court must be convinced that said action was of necessity required as a police measure.

In *P. B. Construction Co. v. Jackson*, 132 Md. 671, there was involved the Baltimore City Zoning Ordinance, which required side yards in a particular area district, and the question before the Board was the validity of such a restriction. On Page 674, the Court said:

"It is not essential to a decision sustaining the Ordinance, as to its area provisions, but its necessity as a public measure shall be clearly demonstrated. Unless it can properly be held to have no reasonable tendency to serve any legitimate purpose of the police power, we cannot rightfully declare it void."

Further, at Page 677, quoting from *Buel v. Ambler*, 272 U.S., 368, the Court said:

"If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

In *Jack Lewis v. Baltimore*, 164 Md. 146, there was a petition for a writ of mandamus to compel the Building Engineer to issue a permit for a funeral parlor in a residential use district under the Baltimore City Zoning Ordinance from which district funeral parlors were excluded. One of the contentions of the petitioner was that the exclusion was invalid and as to this the Court said at Page 154:

"As stated above the right of the appellee (Mayor and City Council of Baltimore) to establish residential use districts is not questioned by the appellant, but his contention is that the use of his property as an undertaking establishment is not so inconsistent with the residential character of

"So what the Legislature has distinctly declared may be done cannot be annulled by the Court because they may consider the thing, when so authoritatively done, to be unreasonable or against sound policy." * * * The rule is different if the ordinance had been passed under the incidental authority of the municipality or under a grant of power of a general nature. So, unless the ordinance is void, in whole or in part, because repugnant to a Constitutional prohibition, or the particular provision at bar is not within the grant of power conferred upon the municipality by Article 66-b of the Code, the ordinance will be sustained."

Applying this principle to instant case the Legislature has distinctly declared that the County Commissioners may designate residential areas. The reasonableness of the action of the County Commissioners cannot, therefore, be inquired into since the Legislature has distinctly declared what may be done and the County Commissioners have acted pursuant to this specific grant of power. I do not believe, however, that there is any question but that the action of the County Commissioners in this instance is reasonable, and the Court therefore is without power to strike that action down.

There are two other thoughts or arguments that I would like to suggest which while not determinative nevertheless strengthens the views above expressed.

First: Chapter 715 grants to any person, taxpayer, officer, department board or bureau of the County, aggrieved by any decision of the County Commissioners the right to appeal to

the Circuit Court of Baltimore County. The power of the Court on appeal, however, certainly is to do nothing more than determine a judicial question. In other words, where the County Commissioners exercise the power conferred upon them by Chapter 715 by designating a given area as a residence area the County Commissioners are performing a legislative function. To permit the Court to sit in review upon that legislative function and to substitute for the decision of the County Commissioners its own decision is in effect to permit the Court to legislate. Any view that construed Chapter 715 to vest such a power in the Circuit Court for Baltimore County would render the Act in part invalid as contrary to Article 8 of the Declaration of Rights to the effect that the legislative, executive and judicial powers of government ought to be separate. Robey vs. Prince George's County, 92 Md. 186; Deasley vs. Ridout, 94 Md. 689; Supervisors vs. Todd, 97 Md. 283, and Close vs. Southern Maryland Agricultural Ass'n, 134 Md. 636. Therefore, the function of the Court on this appeal is not to determine whether or not the action of the Board of County Commissioners was wise or not, or was good policy or not, but only to determine whether or not the action of the County Commissioners was within the scope of the power conferred upon them by Chapter 715 and did not transcend any of the limits of the Constitution.

Secondly: The principle that a Court cannot control the exercise of legislative discretion is too well settled to require the citation of authority. However, whether the action

of the Board of County Commissioners be considered legislative in nature cannot be immaterial since it is equally as well settled that where public officials are vested with discretion in the performance of a duty the Court will not inquire into the exercise of that discretion as to whether it was wise or unwise so long as the official does not act in fraud or bad faith. Wiley vs. Board of School Commissioners, 81 Md. 401; Madison vs. Harbor Board, 78 Md. 395; Manger vs. Board of Medical Examiners, 90 Md. 699; Puller vs. Eldarkin, 160 Md. 660; Strott vs. Broening, 160 Md. 560; Purnell vs. Ocean City, 162 Md. 169. Chapter 715 vests in the Board of County Commissioners the discretion of selecting and designating residence areas. To permit the Court to set aside a finding of the County Commissioners merely because the Court did not agree with the conclusion of the County Commissioners would be to substitute for the discretion of the County Commissioners the Court's discretion and would violate the purposes of Chapter 715.

A careful analysis of appellant's brief indicates as heretofore stated, only three contentions are made: First: That it is unconstitutional as applied to this property; Second, that the action of the Board of County Commissioners was erroneous in view of the testimony presented to them; and Thirdly: That the action of the Board of County Commissioners was beyond the power granted them by Chapter 715.

As to the first point, I think that the most that can be said is that the appellant has shown that there may be some difference of opinion as to the wisdom of

designating the area in question as a residence area, but as pointed out by the Court of Appeals in many cases, above cited this is not sufficient to justify the Court in striking down the action of the County Commissioners.

As to the appellant's second point, it seems to be that his argument is that any action taken by the County Commissioners must be exercised strictly in accordance with the power granted; that the power granted is to acts to promote the public health, safety, morals and welfare, and that the exercise of that power if unregulated may become unconstitutional. With the first two points there can be no argument, namely, that the action of the County Commissioners must be in accord with the power conferred and must be to promote the public welfare. However, the fact that the exercise of that power may become unconstitutional in a given instance is no ground for striking down the entire power, or declaring that the exercise of the power in this particular instance is invalid.

Briefly, to conclude, Chapter 715 of the Acts of 1939, is valid. (Easton vs. Covey, 74 Md. 689; Farmers and Planters Co. vs. Salisbury, 136 Md. 617; Pocomoke City vs. Standard Oil, 162 Md. 363; Sheld Village vs. Ashler, 879 U.S. 305.)

The action taken by the County Commissioners thereunder in designating the area involved as a residence area is likewise valid since it is clearly within the scope of the power conferred and cannot be said to be so clearly unreasonable, arbitrary, oppressive or partial as to justify the Court in interfering and setting it aside. (H.B. Constitution Co. vs.

Jackson, 152 Md. 671; Jack Lewis vs. Baltimore, 164 Md., 146; Lipsitz vs. Carr, 164 Md. 282; Jones vs. Ford 173 Md. 666.)

Further, the function of the Court on an appeal of this kind is not to sit in judgment on the wisdom or expediency of action taken by the County Commissioners and to substitute the Court's own discretion, but only to determine whether or not the action taken by the County Commissioners violates some Constitutional prohibition. (Robey vs. Prince George's County, 92 Md. 186; Deasley vs. Ridout, 94 Md. 689; Supervisors vs. Todd, 97 Md. 283; Close vs. Southern Maryland Agricultural Ass'n, 134 Md. 636.) Since the action of the County Commissioners in designating the residence area does not violate any of the prohibitions of the Constitution, that action must be sustained.

Therefore, finding that the Board of County Commissioners are acted within and in conformity with the powers vested in it by the State Legislature, this appeal must be dismissed, and the action of the Board of County Commissioners affirmed.

(Signed) Wm. H. Lawrence,
Judge.

Mr. Clerk:

Please issue summons duces tecum for the following witness to appear at the Circuit Court for Baltimore County, Judge Lawrence's court room, at 10 A. M., on Monday, June 17, 1940 to testify for the Appellant and bring with him the records of the office of the zoning clerk pertaining to application for permit by William F. Roberts on or about June 25, 1939 and appeal of William F. Roberts from decision of County Commissioners of Baltimore County.

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Attorney for Appellant

Revised June 15, 1940

RESOLUTION PASSED BY THE COUNTY COMMISSIONERS OF BALTIMORE COUNTY ON JULY 18, 1939 EXTENDING A CERTAIN RESIDENTIAL AREA THE RESIDENTIAL DISTRICT OF DIVISION OF BALTIMORE COUNTY (BEING SINCE THE BALTIMORE COUNTY METROPOLITAN DISTRICT, AS AUTHORIZED BY THE "CHARTER ACT OF BALTIMORE COUNTY, 1939," ACT OF 1939, CHAPTER 715 OF THE GENERAL ASSEMBLY OF MARYLAND AND EFFECTIVE FROM AND AFTER MAY 17, 1939.

ORDER OF APPEALS
IN
COUNTY COMMISSIONERS OF BALTIMORE COUNTY

STATEMENT OF FACTS

The general facts surrounding this litigation are set forth in the Appellant's brief filed herein, but attention is respectfully directed to several additional and important features that were either not mentioned or stressed lightly therein.

The property involved is located on one of the main and newest thoroughfares from Baltimore, leading to one of the most beautiful, scenic locations in Baltimore County, the Loch Haven Reservoir and Dam. Loch Haven Boulevard is now a dual highway almost to the point of the property owned in these proceedings, and the testimony of the witnesses from the zoning Commission in Baltimore City, as well as the general knowledge of facts, of which the Court can take judicial notice, indicates that this type of roadway will finally be completed to Loch Haven. Being of new and modern construction, it is the evident purpose and desire of all public officials having any interest or control in this type of development, that this highway should not be permitted at any time, and particularly in the very inception of its improvement, to become the scene of the unfortunate many of the main arteries of Maryland have been degraded into. The testimony of the zoning Department of Baltimore City is to the effect that

Loch Haven Boulevard from Thirty-third Street to the County line for a distance of some hundreds of feet on each side thereof, has been zoned as residential, and that such zoning and classification is now valid and effective within the City limits over the entire distance of this road, between the points indicated.

POINTS IN CONTROVERSY

The constitutionality of the Zoning Act of Baltimore County, being Chapter 715 of the 1939 Session of the General Assembly of Maryland, being conceded by the Appellant, the only legal question for determination in this case is the reasonableness of the Order of the County Commissioners of Baltimore County herein appealed from, in zoning the area in question as residential.

With the concession of validity of the Act itself, it is respectfully submitted that the legal question involved is thus narrowed to the single inquiry of whether or not the County Commissioners of Baltimore County, in passing the Order appealed from, exercised the discretion imposed upon them by the Act in a reasonable manner and with some relationship, however slight, to the purpose set forth in the Act. This connection it is respectfully urged that the function of the Court is not to substitute its judgment for the judgment of the administrative body charged with the operation of the Act, but merely to ascertain whether that administrative body fairly exercised the discretion entrusted to it, in which event its action should be affirmed, even though the Court itself might differ with the result reached, because to do otherwise would constitute the Court as the zoning authority, which the Act does not contemplate and which, even if it did, would not be a judicial function and would accordingly be rejected by the Court if such an effort were made.

ARGUMENT

It is conceded that this application was the first one made for a permit after the effective date of the Zoning Act, May 17th, 1939. The

Appellant's argument seems to be, that because of this fact, and actually because of this fact alone, he should be permitted to erect his commercial enterprise on the location sought, and that because of the fact that his application to do so was filed before any comprehensive zoning of the County had been accomplished, and actually before anything more than a skeleton organization to administer the act could have been set into effect, that he should be of right, permitted to proceed unregulated and unrestricted. That such a proposition will be accepted by the Court, we respectfully submit, is unthinkable. Once again in this respect, the only judicial inquiry that is involved is the reasonableness of the Commissioners' action. Manifestly, it would be and was, impossible for them or any other administrative body to have promulgated and adopted, on the very date of the effectiveness of the Zoning Act, or actually within many months of that time, any comprehensive plan for the zoning of a County as large and as varied, in interests and activity, as Baltimore County is, and yet this certainly does not mean that until it is physically possible to adopt and enforce a comprehensive plan, all types and kinds of commercial structures and enterprises should be permitted and approved, because to do so, would at once destroy the very value and purpose of the act. If this were the law every person desiring a commercial activity of any kind, could at once take advantage of this period during which the Commissioners would be held powerless, and by the time a comprehensive plan had been developed, because of these shortcomings, the value of zoning would be lost, and the plan itself would have been rendered ineffective due to the intervening interests thus acquired, and a new plan would have to be promulgated, which procedure would have to be followed over and over again for the same reason, until the situation would become ludicrous.

Manifestly, no such condition was in contemplation by the Legislature when it passed the act in question and none such should be seriously urged upon any Court. In the reasonable exercise of the serious

duties and obligations imposed upon the County Commissioners by this act, they certainly are required, and upon failure to do so, possibly would be required by a Court in appropriate proceedings, to deal with individual conditions such as presented by this appeal, in advance of their adoption of the comprehensive plan required by the act. To do otherwise would stultify both the Commissioners in their administrative capacity and the legislative intention itself.

Now how did they proceed to deal with this application and upon the basis of what facts did they act? They found first, as has been pointed out, that this location is at the intersection of Loch Raven Boulevard and Hillen Road, with Loch Raven Boulevard itself being zoned as heretofore mentioned.

They found secondly, that there is no community, development or town at this location and further that within some five or six hundred feet, two similar establishments are located, serving the general public with the same type and kind of service as the Appellant contemplates.

The Appellant's contention seems to be that wherever there is a commercial enterprise within six hundred feet of a location which it is desired to use commercially, that that fact alone requires that the new location be zoned commercially. That such is not the law, needs no citation of authority, and is in fact the real purpose of zoning by permitting the administrative body to exercise its discretion in such situations provided its discretion bears some reasonable relation to the public health, safety and welfare.

In this case it certainly cannot be said affirmatively that the location of the proposed establishment would not endanger the public safety and would not be injurious to the general welfare, and the burden is necessarily on the Appellant to prove as an affirmative fact that his proposed use would not have been so construed, and having failed to do so under the facts of this case, his appeal should be dismissed.

The test by which a determination is made of the public health, safety and welfare cannot be isolated but must be had with regard to the whole situation of which the individual project is a part. That the public welfare would be injuriously affected if this enterprise is approved, is abundantly proven by the testimony of Mr. Thomas, the Zoning Department of Baltimore City and the neighborhood residents. Not only would property values be depreciated, which is one of the tests by which the public welfare is measured, not only would the public safety be jeopardized and endangered, a fact which the location itself and the judicial knowledge reposed in the Court of the density of the traffic at that point and the involvement of traffic which this structure would entail, but from both of these considerations a liability to the public health itself follows and is inevitable.

Thus it appears, upon full consideration of all the facts that the discretion of the County Commissioners of Baltimore County was reasonably and fairly exercised with a full relationship to the purpose sought to be achieved by the Zoning Act and that their action should be affirmed.

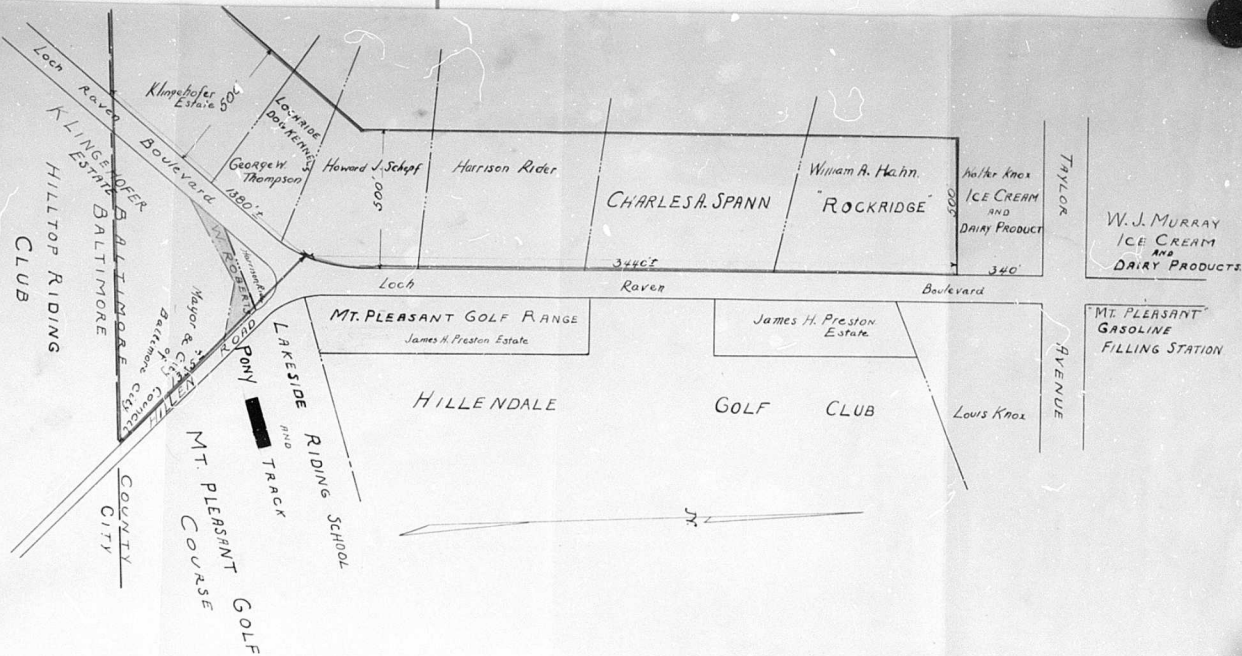
The consideration that the Appellant attempts to draw from the location of the so-called Hiding Academy adjacent to this property, the final issue upon which they attempt to hinge a reversal, falls when it is analyzed in connection with the facts. This is merely an isolated and seasonal pleasure spot of what is now a farm property, and is at best a non-conforming zoning use, which obviously does not require and could not require every other location that it touches to be commercially classified, because to do so, as has heretofore been pointed out would destroy zoning. All Zoning Acts have had to assume a starting point and when they become operative, situations were found which would not have been permitted if zoning had been effective when they were created. This has not meant, however, that zoning has had to stop or has been required to classify

everything else in the same category as these existing uses, but decision after decision has characterized them as non-conforming uses, bearing no relationship and forming no chart for zoning actions subsequent to the adoption of the acts.

For the reasons indicated, it is respectfully submitted that the appeal herein should be dismissed and the action of the County Commissioners of Baltimore County should be affirmed.

Respectfully submitted:

J. Howard Murray, Counsel to the County Commissioners of Baltimore County.



THIS PLAN NOT DRAWN
TO SCALE

J. HILTON GREEN
Surveyor & Civil Engineer
Towson, Md.