Bound By Oath | Season 3, Episode 4 | A Pig in the Parlor

Dept. of Commerce Zoning Primer, 1922: "Suppose you have just bought some land in a neighborhood of homes and built a cozy little house. There are two vacant lots south of you. If your town is zoned, no one can put up a large apartment house on those lots, overshadowing your home, stealing your sunshine and spoiling the investment of 20 years' saving. Nor is anyone at liberty to erect a noisy, malodorous public garage to keep you awake nights or to drive you to sell out for half of what you put into your home. If a town is zoned, property values become more stable, mortgage companies are more ready to lend money, and more houses can be built. … If zoning can reduce the cost of living, why not have it?"

John: Hello and welcome back to Bound By Oath. I'm John Ross from the Institute for Justice's Center for Judicial Engagement. And what I just read comes from the federal government's incredibly successful pitch in 1922 for state governments to enable and local governments to adopt zoning – and thus to dictate to an unprecedented degree what property owners could and could not do with their land. Soon after, zoning arrived at the Supreme Court. And the question was: Is it a proper exercise of government power to ban duplexes, or townhomes, or apartments, or stores, or home-based businesses from certain neighborhoods? Or instead might preventing people from putting their own property to peaceful and productive use be an arbitrary restriction on private property and individual rights? In 1926, in the landmark case of *Village of Euclid, Ohio v. Ambler Realty Company*, the Court ruled that indeed zoning is constitutional.

> **Lawyer at SCOTUS**: In it's sweeping decision in *Euclid v. Ambler*
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> **Lawyer at SCOTUS**: laid down in *Euclid v. Ambler*
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> **Lawyer at SCOTUS**: *Euclid vs. Ambler*, which was quite explicit on the point

John: This episode will be all about *Euclid*.

Michael Wolf: The zoning ordinance in Euclid ~~is~~ was typical of its time, and it's typical of our time today.

John: According to one eminent land-use scholar, the Supreme Court's reasoning in *Euclid* was quote "the most important redefinition of the nature of private property ever made in United States courts."[1]

> **Lawyer at SCOTUS**: This concept that has been so vital to the development of land-use law, of a rational planning system … this is the essence of *Euclid*.
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> **Lawyer at SCOTUS**: This Court has established a long history, commencing with Village of Euclid versus Ambler Realty.

John: On this episode, we'll talk about just what the Court did in *Euclid* that was so radical.

Michael Wolf: What is the real problem about having a duplex next to a single family dwelling? About having a row of townhouses across the street from a single family detached dwelling? It's hard to make that justification.

John: And we'll talk about some of the arguments that proponents of zoning made both before the *Euclid* decision and in the decade or so after it – in particular how they justified the most restrictive category of zoning: single-family districts.

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[1] Richard Haar, Reflections on *Euclid* in Zoning and the American Dream: Promises Still to Keep

John Infranca: In that period of the kind of mid 20s, to the early 1930s, we see a shift, particularly among some of the more prominent players in this field, who were zoning advocates but had their own hesitations about single-family districts. And they responded to concerns that this new type of use districting departed too much from health and safety rationales.

John: On our next episode, we'll have a lot to say about what has happened in the nearly 100 years since *Euclid*. For instance, here is a lawyer in 1974 urging the Supreme Court to uphold a local zoning rule.

> **Lawyer at SCOTUS**: The plaintiffs use the epithet separate but equal. Well, that epithet has an odium connected with it because of its legal history. But logically the concept separate but equal, I must admit, is the concept of zoning.

John: That gentleman won his case.

> **Lawyer at SCOTUS**: If you have a zone for one-family residential community, that does not express a judgment that people living in two-family houses are undesirables. It's a rather fine-tuned judgment that certain uses are more appropriately put off into one zone.

John: That's coming up next time. For now, we'll head to the suburbs of Cleveland, Ohio, where it all kicked off.

BBO Montage - Justices saying the oath

John: Starting in 1916 in New York City, cities and towns across the United States began passing zoning ordinances, limiting to a much larger extent than ever before how property

owners could use and develop their properties. Naturally, those ordinances were challenged in court, and one of the arguments that got some traction was that local governments did not have the power to enact zoning codes unless and until their state's legislature gave them that power. In 1922, the federal government convened committees and produced, among other things, a model law, a so-called zoning enabling act, that state legislatures could and did pass to enable zoning at the local level.

Michael Wolf: Some of the leading zoning and planning experts, some of them lawyers, were on these bodies that were convened by the Department of Commerce.

John: That's Michael Allan Wolf, who is a law professor at the University of Florida.

Michael Wolf: And they develop this model state zoning ordinance that caught on like wildfire. And the motivation of the federal government – because these are two very pro-business administrations, the Harding administration, the Coolidge administration – but the motivation is we need more housing built. It's good for the economy to build housing. It's good for people to have housing.

John: In addition to planners and lawyers, the people on the committee included real estate developers, engineers, men of business. And they wanted to be able to tell their customers that if they bought a nice, new house in a quiet, residential neighborhood, it would stay a quiet, residential neighborhood.

Michael Wolf: And then the developers were also concerned because they wanted to make sure that if they have identified up a nice parcel for residential subdivision, that a slaughterhouse wouldn't be located next door, and that would be the end of that investment.

That's the major advantage of, I think, of the zoning ordinance that there is relative certainty so that you know that you can make this investment with pretty good assurance that the conditions on the ground are not going to change. It doesn't hurt by the way, from a partisan perspective, it doesn't hurt that those experts were convened by a Republican administration. So this wasn't some wacky, ultra liberal planning scheme that we're talking about. It was something that was done at the behest of developers to protect real estate investments.

John: If you've listened to our previous episode on residential segregation, you won't be surprised to learn that many zoning advocates had other motivations as well. And that's a part of the story of zoning that we'll come back to. But first, we'll head to the Village of Euclid, Ohio, which borders Cleveland. In 1922, Euclid was mostly farmland. But Cleveland and its industry was spreading outwards, and village officials passed a zoning ordinance that looked a lot like the federal government's model legislation.

Michael Wolf: The zoning ordinance in Euclid is was typical of its time, and it's typical of our time today.

John: Today's regulatory landscape is vastly more complicated than the zoning ordinance in Euclid. For instance, according to city planner and scholar M. Nolan Gray, zoning codes are hyper specific and hyper local. Even if you are an expert on what you can and can't build in one city, you pretty much have to hire a planner or a lawyer to tell you what is legal in another city. But even so, at root, modern zoning shares the defining characteristics of Euclid's zoning code.

Michael Wolf: There were three characteristics of every parcel of land in the village of Euclid. The landowner was told what uses were permitted, and what uses were not permitted. The landowner was told how tall a structure could be built on the premises. And the landowner was

told the area, the percentage of the parcel that could be occupied by a building. And that was usually a backyard requirement, a side yard requirement and a requirement of how close you could build to the street. Those three aspects – height, area, use – are the essence of zoning today. In fact, that's what I would call Euclidean zoning.

John: In the most restrictive land-use category, only single family homes would be allowed. In the next category, single-family homes and two-family homes. After that, single-family homes, two-family homes, and also apartments, churches, hotels. After that, all of the above plus retail stores. And after that, light and then heavy industry. And if a property owner felt aggrieved by the restrictions, they could ask for a variance.

Michael Allan Wolf: You would go to a board – not the not the local elected body but a board of appointed officials – and you'd be able to plead your case to them, show that you had a special hardship special circumstances of undue hardship.

John: And if that didn't work, you could ask the city to change the zoning.

Michael Allan Wolf: If you did not comply with the zoning ordinance, then it could be enforced the same way that anybody else whose violating any other local ordinance. And so that typically meant that you could be fined.

John: In Euclid, you could be fined up to $500 per day. Adjusting for inflation, today that's just under $9,000. One property owner in Euclid whose vision for his property was now illegal was William Ambler, a former state senator from Michigan who had relocated to Cleveland and become a developer. Ambler Realty owned a 68-acre parcel that Euclid's ordinance divided in three: one section that could be industrial and that had access to a railroad; another where there

could be apartments and hotels; and a then third section that faced Euclid Avenue, the main thoroughfare connecting the village to Cleveland. That section could only be single-family and two-family homes. According to Ambler, the restrictions decimated the value of his property, which he thought would instead be most productive as a purely industrial property.

Michael Wolf: He claimed that it resulted in a 75 percent reduction in value of the property.

John: Euclid officials meanwhile said that the value of the property would instead go up and that everyone in the village would benefit from sound planning and the fine-tuned, expert judgments of the zoning board. In any case, to challenge the restrictions, Ambler hired a big gun. Newton Baker.

Michael Wolf: There are so many fascinating characters in this case. We start with Newton Baker, whose most recent job is Secretary of War during World War I. He was a pacifist who was Secretary of War – go figure that. Very well respected. After the war, he establishes a law firm, which is still known as Baker Hostetler.

John: Baker was a committed progressive.

Michael Wolf: A progressive with a capital P. This is during the Progressive Era. It meant that you believed very much that government can solve people's problems. And that government should rely on experts to solve people's problems.

John: Prior to serving as Secretary of War, Newton Baker had served two terms as the mayor of Cleveland, where he had championed progressive causes, notably the public ownership of utility companies, like electricity. He argued that the private monopolists he wanted to replace were

quote: “the greatest contributing cause of the corruption of the American city.” So why would William Ambler hire a committed progressive like Newton to attack the progressive project of zoning?

Michael Wolf: One could make the argument that Baker was just being a zealous advocate. But letters reveal that Baker was really concerned about the nature of zoning. That he really did consider some aspects of zoning to be socialistic. Why shouldn't the Cleveland metropolitan area continue to grow naturally and organically?

John: In both personal letters and in legal briefs, Newton Baker made the case that development should happen naturally – that individual property owners were in a better position than so-called experts to determine how their own property should be put to use. And he was keenly aware that zoning could be put to use to discriminate. Indeed, Ambler Realty was not the only property owner that Newton Baker represented in a zoning case. In another suburb of Cleveland, a proposal to build a Jewish orphanage was rejected because, according to a letter that Baker wrote to a colleague, local officials quote “did not think it would be good for the village to have a large number of Jewish children in it.” End quote. Defending the law, meanwhile, was the village attorney, James Metzenbaum, who also sat on Euclid’s planning commission.

Michael Wolf: James Metzenbaum was a young, progressive lawyer himself. He worshiped Newton Baker. but James Metzenbaum had a personal connection to Euclid, Ohio. Because he and his newlywed wife, Bessie, had lived in Euclid, Ohio when they got married. Unfortunately, Bessie died very young. And so one can't help but think that he took this case on as part of a personal mission to make sure that the bad parts of Cleveland did not make their way down Euclid Avenue, and envelop the cemetery where her mausoleum was, and eventually that sweet little village where he had lived with his newlywed wife.

John: Newton Baker and James Metzenbaum had some acquaintance. While he was still mayor, Baker had recommended Metzenbaum to lead Cleveland's Young Democrats. And speaking of recommendations, after he joined the Wilson Administration, Newton Baker had given a much more important recommendation:

Michael Wolf: It does appear that the reason why Westenhaver became a federal judge ~~is~~ was at the behest or the lobbying of Secretary of War Newton Baker.

John: David Westenhaver was a former law partner of Newton Baker's, and in 1916 Baker successfully lobbied President Wilson to have Westenhaver appointed as a federal judge. Several years later, Ambler Realty's challenge to Euclid's zoning ordinance landed in Judge Westenhaver's court.

Michael Wolf: Should he have recused himself? Well, the rules then were faster and looser than they are today. I've never seen anything that indicates that what Westenhaver did was egregious. It was curious. It was interesting. I don't know that it was egregious. And I'm not convinced that another judge would have come to a different conclusion. So you have that interesting relationship, and Westenhaver had other very interesting cases during his career.

John: Such as the trial of Eugene Debs, the socialist presidential candidate and opponent of the United States' participation in World War I. Debs had given a speech that prosecutors said illegally interfered with the draft.

> **Eugene Debs**: [T]he working class who fight all the battles, … the working class who freely shed their blood and furnish the corpses, have never yet had a voice in either

declaring war or making peace.

John: After Debs' conviction, Judge Westenhaver sentenced him to 10 years in prison. And as it happens, one of the top federal prosecutors who worked to uphold that conviction at the Supreme Court would also go on to play a starring role in the *Euclid* case. Alfred Bettman.

Michael Wolf: Now, to planners the great hero of the story is Alfred Bettman. He is the patron saint of planning lawyers.

John: Before going to Washington to put people in prison, Bettman was a charter member of the American City Planning Institute, now known as the American Planning Association. After the war, he returned to city planning and, among other accomplishments, he supervised the drafting of the federal government's model state zoning enabling law.

Michael Wolf: In fact, every year the American Planning Association has a special lecture at their annual meeting. I was honored to give that lecture about my Euclid book, and it's named after Alfred Bettman. And according to the planners, he saved the day, his amicus brief, and they say that's the reason why the Supreme Court majority decided that zoning was not unconstitutional.

John: But back to the trial court, where in 1923, Judge Westenhaver ruled in favor of his former law partner, Newton Baker, and struck down the ordinance. Quote:

> **Westenhaver opinion**: The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket.

John: He wrote that the village's arguments about about health, safety, and public welfare were a quote "false pretense." Quote:

> **Westenhaver opinion**: The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit [the village]. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.

John: And he cited a then-recent Supreme Court decision for the idea that courts should be on the lookout for situations where officials claimed to be advancing public health and safety but really had other aims. That case was *Pennsylvania Coal v. Mahon*, which we discussed on Episode 2. Judge Westenhaver also cited a case we talked about last episode, *Buchanan v. Warley*, in which the Supreme Court struck down residential segregation and in which it said that the right to property included the right to freely use and enjoy one's property without interference unless the government has a really good reason for interfering. Further, Judge Westenhaver ruled that the ordinance violated Ohio's state constitution, which declares that there is an inalienable right to acquire, possess, and protect property.

Michael Wolf: So Westenhaver not only made a decision based on the deprivation of property rights, but Westenhaver pointed out the socioeconomic impact of zoning. And he pointed out that the reason why people live in certain neighborhoods is economics. And that, when you close off certain neighborhoods, and only allowed a certain kind of residential development, one effect is going to be excluding people. One of the reasons for excluding people was the fear that landowners had, that if certain people lived near them, that it would reduce the value of their property. And we know who he's talking about. He's talking about African Americans, and he's talking about Southern and Eastern European immigrants. And he's talking about the people

who live in the tenements in Cleveland and other major American cities.

John: Indeed, there are many examples of city officials using zoning as pretext to harass and discriminate. For instance, according to Professor Paige Glotzer, after the Supreme Court struck down residential segregation, officials in Baltimore, Maryland, pivoted and used a zoning ordinance to designate huge chunks of the city that were mostly home to African Americans and recent immigrants for industrial use. And when industry moved into those neighborhoods, home values dropped, which in turn made it harder for those residents to buy homes elsewhere. Westenhaver thought that the Supreme Court had ruled definitively that these sorts of schemes were unconstitutional.

Michael Wolf: He also talked about the – we could call it the anti-competitive aspect of zoning. Because what is government doing when it creates a zoning map? It is changing the real estate market. It's telling potential developers if you want to build a factory, you can only do it in this limited area. Well, that drives up the value of the limited amount of acreage is available for industrial use. So, as I tell my students, Judge Westenhaver's opinion highlights some of the major objections we have even today to zoning.

John: After Judge Westenhaver struck the ordinance down, very important people in the planning community urged the Village of Euclid not to appeal.

Michael Wolf: When Euclid lost the case, state planning officials, they did not want Metzenbaum to appeal the case to the Supreme Court because they were afraid that the Supreme Court will come up with a negative ruling.

John: Leading proponents of zoning, including Alfred Bettman, were not keen on the case being

appealed to the Supreme Court. In a private letter, Bettman said Euclid officials had failed to make a quote “scientific survey” to comprehensively analyze and plan for future growth. Rather, Bettman felt that they were imposing their own parochial vision, which was that the village should be set aside almost entirely for residential use. According to Bettman, that made the ordinance quote, “a piece of arbitrary zoning and on the facts not justifiable.”

Michael Wolf: But because Metzenbaum the village attorney was such a zealous advocate, he did not listen to their advice. And he went ahead, and he brought the case to the Supreme Court.

John: Under jurisdictional rules that have long since changed, the case then went directly to the Supreme Court. Where James Metzenbaum was anxious to do everything just right.

Michael Wolf: And you can look at the records in the Supreme Court, and he was close to harassing the Supreme Court employees. He was so concerned that he was doing the right thing and making the right arguments and the file was complete and everything. He wanted to make sure that all the justices got copies of all his appendices and everything.

> **James Metzenbaum letter to clerk**: Frankly, I have begun to worry lest I may not have this Brief in on time and so I am taking the liberty of once more troubling you to ask in reference to this phase of the subject. … I will not procrastinate or delay even though I know that I will have time until the latter part of the month, but, on the contrary, if I do have that knowledge, then it will relieve me of the mental fear of having this cause stricken from the files and records because the Brief has not been submitted in time. At the present moment I fear I am working against time….

John: Somewhat unusually, the Court heard arguments twice.

Michael Wolf: So the case was argued twice before the Supreme Court. Justice Sutherland was not present at the first oral argument. He was ill he was in South Carolina. He was recovering from an illness. The Court was apparently badly divided. And so they asked for a second argument.

John: There's no transcript, but Professor Wolf did correspond with someone who attended the argument in person.

Michael Wolf: A very prominent antitrust attorney and law professor, who had been a clerk at the time for one of the Supreme Court justices. And he ran into James Metzenbaum, and he said that James Metzenbaum was a nervous wreck. And he tells a story about how there was an attorney from Texas, who had appeared in a case that Metzenbaum was observing. And the attorney was not wearing a vest. And the Supreme Court rule said that attorneys had to wear a vest. And he was called on it. And Metzenbaum panicked. And he said, I don't have a vest, should I go back to Cleveland and get one? And this young attorney just said: Just button your overcoat and the justices will not know that you're not wearing a vest. He was basically panic stricken about this oral argument.

John: And that argument did not go well for Metzenbaum.

Michael Wolf: This attorney said that Metzenbaum was not a very good advocate. It was a very nervous presentation. He said he attacked Judge Westenhaver, which was inappropriate. It just wasn't a very competent oral argument. And he said that Baker was masterful, that he had a very commanding presence.

John: As I said, there's no transcript, but in the files of Baker Hostetler, the law firm that Baker founded and that still exists today, is the notecard that Baker used at oral argument. And on that card there were two cases.

Michael Wolf: The *Pennsylvania Coal* decision of the Supreme Court in 1922 and *Buchanan v. Warley*. The argument he made was that zoning on its face is unconstitutional. That the whole idea was antithetical to the police power. That it was not being done for the protection of public health, safety, morals and general welfare. That it was aesthetic based and that it was haphazard and totally subjective.

John: In his brief to the Supreme Court, Baker wrote that if you looked past zoning proponents' arguments, at bottom zoning was quote "merely a desire of some people to tell other people how to use their property." And, quoting some more:

> **Baker brief**: Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land.

Michael Wolf: And by the way, there is an historical basis for this notion. Because we can trace the American planning movement back to what was called the City Beautiful movement.

John: Neoclassical architecture, marble, columns. And Beaux Art, like Grand Central Terminal in New York City. These are examples of the fruits of the City Beautiful movement. Of course, planning advocates were keen to argue that they weren't trying to forcibly beautify other

people's property. In the briefs, James Metzenbaum, the village attorney, and Alfred Bettman, the planning lawyer, argued that zoning was merely the next logical step in a long line of land-use regulations going back to the colonial era.

Michael Wolf: We we had rudimentary land-use controls, but incrementally – and this is the argument – incrementally, the Court had accepted different kinds and more intensive forms of land use regulation.

John: Before zoning, courts had long upheld regulations and prohibitions on noxious industries, for instance. Land-use regulations intended to protect from fire and disease had been upheld. As we talked about last episode, the Supreme Court had upheld a ban on brickmaking in Los Angeles, even though the brickmaker in question had been there before any homes had been built in the neighborhood. Similarly, the Supreme Court had upheld height restrictions in Boston that allowed commercial buildings to be taller than residential buildings.

Michael Wolf: And by the way, there was a good reason to accept height regulations, because the ladders that the firefighters had could not reach the top floors of really high buildings.

John: Boston argued, among other things, that a fire in a residential building could quickly turn into a calamity if people were asleep, whereas in the commercial district the buildings were much closer to water and in any case people were less likely to be sleeping in them. The Supreme Court ruled that quote: "This Court is not familiar with the actual facts," end quote, but the city's reasons seemed reasonable enough. In *Euclid*, James Metzenbaum asked for the Court to defer to the village's reasons.

Michael Wolf: Metzenbaum's argument is that this is common sense. And the courts generally

defer to local and state governments when they exercise their police power. It's not aesthetic regulation, doesn't take away in anybody's property. That Ambler still can make ample use of that parcel, as can other landowners.

John: Metzenbaum also pointed out that zoning was really popular. By the time the Supreme Court considered the case, 366 municipalities had adopted zoning, including 44 of the biggest 68 cities in the country.

Michael Wolf: So all the building blocks were in place for zoning. It's not a radical departure. That's the idea behind Metzenbaum brief. That is the idea behind Bettman's brief as well. The piece that Bettman emphasizes is the nuisance aspect. And he talks about the fact that this is just one step away from private nuisance.

John: Before zoning, if your neighbor interfered with your use and enjoyment of your property, the common law had a few tools, most notably the nuisance action. Some scholars, like Professor Wolf, say that zoning is an improvement over nuisance law and related common law tools.

Michael Wolf: There were several tools that had been in existence in many cases for centuries to regulate land use, but none of them was efficient. And none of them was sufficient.

John: And indeed, there are many old cases where some neighbors had to put up with a lot.

Michael Wolf: There's a farmer whose livestock is dying. And there's an energy company next door that has an open pit in which they're storing oil. And the livestock are dying because the well is poisoned. And the justices on the Supreme Court of Rhode Island say, Well, you know, in

modern Rhode Island, industry is more important than agriculture. It's our job to determine whether this is an unreasonable interference. We judge that it isn't. And it also could work the other way as well. You could have a judge that is very anti-business, and says any time any landowner could show any negative environmental externality by a business next door, that that judge would just want to shut down that business next door. So there's very little predictability with private nuisance law. So, in certain cases it works. But it's not a good comprehensive system for reconciling discordant land uses.

John: Other scholars have a more positive view of nuisance law, and argue that if zoning disappeared tomorrow, we could actually do a pretty good job with regulating traditional nuisances without going so far as to make it illegal to have a coffee shop, a home-based business, or an apartment building in a residential neighborhood.

Michael Wolf: But what Bettman argued, and also Metzenbaum argued, was that the goal of zoning is very similar to the goal of preventing public and private nuisances. And that's the argument that seems to have won the day with Justice Sutherland.

John: In an opinion written by Justice Sutherland, the Court upheld zoning by a vote of 6 to 3. The ruling virtually ignored all of Judge Westenhaver's concerns. It does not mention *Buchanan v. Warley*. It does not mention *Pennsylvania Coal*. And it says that even if, assuming without deciding, William Ambler's property had lost 75 percent of its value, zoning would still be constitutional.

Michael Wolf: A lot of people, particularly planners, point to Bettman's brief and say this was the key brief. And the key argument was that zoning is not that far removed from nuisance law. And he talked about what a nuisance is. He said a nuisance is the right thing in the wrong place.

And he basically said that a furnace belongs in the cellar and not in the parlor.

John: Bettman used a colorful metaphor to describe the type of near-nuisance that zoning would avoid. The right thing in the wrong place. Like a furnace in the parlor instead of the cellar.

Michael Wolf: Interestingly enough, that argument does make its way into Sutherland's opinion.

John: In Justice Sutherland's opinion, he used a slightly different metaphor: a "pig in the parlor instead of the barnyard." And while the case ostensibly was about limiting industrial uses, the Court upheld zoning broadly, meaning it upheld restrictions on apartments and rules about backyards, front yards, and all the rest.

Michael Wolf: What is the real problem about having a duplex next to a single family dwelling? About having a row of townhouses across the street from a single family detached dwelling? It's hard to make that justification. But Sutherland made the justification based on public health and safety. He said that apartments can monopolize the rays of the sun. And that they lead to increased traffic. So that the children living in those single family residences are at risk.

John: Sutherland wrote that various experts and commissions had painstakingly considered zoning and unanimously come to the conclusion that quote:

> **Euclid decision**: The segregation of residential, business, and industrial buildings … will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children.

John: The most famous or infamous, part of the opinion concerns apartment buildings. Citing the expert consensus, Justice Sutherland wrote that apartments – when they were built in neighborhoods of single-family homes – were quote:

> **Euclid decision**: a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. … Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

John: It is open to interpretation whether he was referring to the apartment buildings or whether he might have meant the residents of those apartment buildings themselves could be parasitical. In any event, perhaps the biggest legacy of the opinion is that the Court was willing to defer: zoning proponents said they had good reasons and whether or not that was true, the Court was willing to give them the benefit of the doubt. Quote:

> **Euclid decision**: If these reasons, thus summarized, do not demonstrate the wisdom or sound policy … of those restrictions … at least, [they] are sufficiently cogent to preclude us from saying … that such provisions are clearly arbitrary and unreasonable.

Michael Wolf: This opinion is extremely deferential. And in a sense, that's what makes *Euclid* monumental. It is very difficult to think of another important decision of the United States Supreme Court rendered in the 1920s that is still adhered to so consistently by state and federal courts.

John: There are very few precedents from that era that are still good law. But one of them is that federal courts are not going to look too closely at a local government's reasons for imposing land-use regulations. If today, you could should show, with real-world evidence, that zoning had not in fact helped traffic congestion or street accidents or noise pollution or any of the other justifications cited by Justice Sutherland, none of that would actually matter. Because the legacy of *Euclid* is that the federal courts do not get involved. But it didn't have to be that way. In the *Euclid* decision itself, there were some indications that courts should not always defer.

Michael Wolf: Now, is there a limit to that deference? Yes, the Court says there may be circumstances in which we will not allow one municipality to stand in the way of progress for the entire metropolitan area. But that caveat is rarely cited by the courts.

John: Also, the Court left the door open to finding that while zoning is constitutional as a general matter, in certain specific cases it might be arbitrary and unreasonable. In 1927, for instance, a federal appeals court ruled in favor of Newton Baker in his other zoning challenge; prohibiting the Cleveland Jewish Orphan's Home from opening in a residential neighborhood was unreasonable. And then in 1928, in the case of *Nectow v. Cambridge*, the Supreme Court took up a challenge to a particular zoning designation for a particular property.

Michael Wolf: In the *Nectow* case, the City of Cambridge enacted a zoning ordinance that affected a relatively large parcel of land that had been sort of unzoned or unregulated and then was put in a residential zone. But the parcel, particularly a specific part of the parcel, what the Court called the locus, part of the parcel was bordered by industrial uses. In fact, the owner of the property tried to sell that locus, that part of the parcel, to somebody else, and the purchaser backed out of the deal because of the existence of the zoning ordinance.

John: The property was located next to an automobile factory and near a soap manufacturer and a railroad. And the buyer had agreed to purchase it for about a million dollars in today's money.

Michael Wolf: So here is a landowner who can actually show: I lost a land sale because of zoning. This is a challenge that's brought after *Euclid*. The state high court, the Supreme Judicial Court of Massachusetts, gets the case. The court appoints a special master. The state court wants to make sure that they get all the facts straight. The special master demonstrates to the satisfaction of the court that this is a confiscatory regulation. That this has cost this landowner a lot of money, and it makes no sense. No one will be able to develop the locus as residential use. The court takes those findings, but based on *Euclid* comes to the conclusion that doesn't violate the Constitution. So with those factual findings, the case goes to the Supreme Court. And the Supreme Court reverses. And they basically say: No, this is a case – and they cite *Euclid* – this is arbitrary, capricious, unreasonable. There's no substantial relation to the protection of public health, safety, morals and general welfare. And the Supreme Court issued a warning shot. That's what *Nectow* was: local governments, be careful, don't use this zoning power for confiscatory purposes. But you know what? That's the last time the Supreme Court ever found zoning as applied to be unconstitutional. Nowadays, we make these arguments under regulatory takings arguments and physical occupation takings arguments. It's not even worth it to try to make a due process/equal protection claim anymore in the Supreme Court when it comes to a typical zoning case.

John: For nearly a century, when a property owner has gone to federal court and said that zoning or a particular aspect of a zoning code is unreasonable, arbitrary, or a false pretense, the Supreme Court has said too bad, there is no remedy in federal court. And that is a story we're going to pick up on the next episode. But first, before we close this episode, we're going to take

another look at the arguments that zoning proponents made in the 1920s and 1930s to justify zoning under the police power – in particular how they justified the most restrictive category of zoning: single-family districts.

John Infranca: The standard State Zoning Enabling Act which informs the drafting of most zoning ordinances, references the possibility of having single family only districts only in a footnote.

John: That is Professor John Infranca of the Suffolk University Law School.

John Infranca: And so we see hesitation there as to whether or not single family districts are going to be justifiable and whether or not courts are going to uphold them.

John: Today, zoning is practically synonymous with single-family districts, where nothing other than single-family detached housing is allowed. It is not just a suburban phenomenon; huge swathes of urban areas around the country are often set aside exclusively for single-family homes. Which is something that early zoning advocates did not necessarily intend.

John Infranca: Early zoning advocates, to the extent that they embrace single-family zoning, it was not the large enclaves of single-family zoning that we see today in many urban areas or in many suburban areas. Instead, they envisioned single-family zoning in close proximity to businesses, to apartment areas, to transit. They definitely embrace smaller lots, something akin to what we see discussed now in the planning literature as what's called gentle density. And so they didn't embrace the vision of low density zoning on two-, three-, four-acre minimum lot sizes.

John: Even so, what they did embrace got plenty of pushback from critics at the time.

John Infranca: The primary obstacle was people arguing, well listen, if the police power is about health, safety, the public welfare, how is it that keeping a duplex out of a single family neighborhood is really addressing that? Is it really gonna cause an injury to health and safety if we put a two-family home next to a single-family home? There was an interesting discussion in Seattle where a lot of people were arguing that two family homes were safer, particularly for the quote unquote, traveling man – someone who traveled a lot for work and would feel more secure if their family was home with another family living in the same structure. There was also a lot of appeals, in numerous press reports, to President Calvin Coolidge, who apparently raised his own family in a two family house. And so the argument was that if it was good enough for the Coolidge family, it should be good enough for society at large.

John: And, zoning proponents were deeply concerned that courts would not uphold single-family zoning.

John Infranca: In the early 20th century, land use regulations were much more grounded in health and safety. So we saw setback requirements, open space requirements, maximum lot coverage requirements, regulations of building height, regulations of building materials. All of these were focused on the spread of fire, which was a significant and legitimate concern as well as the spread of disease.

John: But a duplex or a triplex could meet lot coverage and setback requirements.

John Infranca: And so it was this shift from regulation of space and how much land can be occupied, which zoning proponents saw had a clear link to health and safety, to a focus on use. And so early zoning proponents had to address this. If you accepted the police power

justification to segregate single family uses, the question then became, well, why allow any non single family uses? If there was something unhealthy or unsafe about not living in a single family district then why allow any multifamily use? Why allow any greater density in other parts of the city?

John: When it was pointed out that single-family zoning would segregate people by class, proponents argued, au contraire, zoning does indeed offer significant benefits to the poor.

John Infranca: Zoning's benefits accrue not just to the well off, but they in fact provide particular benefits for less well-off households. And so the argument here was that it's going to be too costly for a developer to place a private deed restriction in the deeds of lower-cost properties that they're selling off but that city governments could step in and could use the police power, as it was said by one advocate, in favor of the poor man, to give him the same kind of protected home districts that the rich man has. And so you see a lot in the popular press – particularly on the West Coast and some of the West Coast cities – this argument that zoning benefits, the quote unquote, poor man. That it provides security in their home that the rich man can buy, either through private restrictions, or just by buying enough land to keep their neighbors far enough away.

John: Another argument zoning proponents made was that zoning was really just reinforcing existing patterns of development that were already arising naturally, and in the process make it easier to build and fund infrastructure around that development.

John Infranca: There's an efficiency argument in terms of the provision of city services, if we zone in a way that reinforces existing natural patterns of development. So the argument here was to say, Listen, some parts of urban areas or already primarily single family, we're going to,

in a sense, freeze them in place because that's going to allow for the development of an infrastructure that kind of meets the needs of those single family areas, and allow for a concentration of denser development, more commercial development in the urban areas where we can then provide the needed infrastructure in terms of roads that would meet that particular need. And so there's an efficiency argument in terms of the provision of city services, that justified distinguishing between some districts, allowing them to only be single family, but not imposing that restriction on all districts.

John: Another argument was that zoning was meant to be comprehensive.

John Infranca: But really, for the police power purposes, the argument that I think was most significant was an appeal to comprehensiveness. So an argument that new zoning ordinances were comprehensive in nature. And this was, of course, relying part in a perception of expertise among planners and lawyers at the time. That they were thinking broadly about the development needs within a jurisdiction.

John: What was promised was that experts would be thinking systematically and comprehensively about the diverse needs of the community.

John Infranca: And the argument here became that if we take it as given that zoning itself – full stop, dividing cities into different districts in a comprehensive manner – is a valid exercise of the police power – that it serves health, safety and welfare – then courts should not question individual components of that zoning in isolation. They shouldn't focus in on single family zoning and say, well, this does not seem justified under the police power. They should instead view it as a component have a larger whole. So it was almost as if to say that you can't isolate a given component of zoning and strike it down. The only option is either strike down all of zoning

uphold it all.

John: James Metzenbaum and Alfred Bettman had told the Court in *Euclid* that upholding zoning would make for just a small change in the law – a natural next step from land-use regulations that had come before. But after *Euclid*, planning advocates began to say that actually, the change had been very radical indeed.

John Infranca: Edward Landels who was coauthor of The California Planning Act,1929, he wrote in the American Bar Journal, in 1931, that courts were basically he said, indulging in something close to fiction.

John: Quote: “We seem, however, to find the courts indulging in something close to fiction, in recognizing extensions of the states’ power to regulate the use of private property. In recent years the constitutionality of stringent zoning ordinances has been sustained repeatedly on grounds that bear but little genuine relation to, or are but incidental to, the real purpose of such ordinances. Zoning ordinances have been paraded under the guise of measures designed to effect purposes usually unthought of by the city councils enacting them. In this way, what is really a very radical though necessary extension of the states’ police power has become established.”

John Infranca: So what he's saying here is essentially, why were these embraced? Well, they were embraced, perhaps because of concerns expressed by citizens of not wanting denser development in their neighborhood, perhaps by some concerns about efficient provision of city services, perhaps by some concerns about property values But when they get into court, we make this argument that it's related to the police power. In some ways, I think there's a sleight of hand going on here.

John: Professor Infranca argues that if we were to take early zoning proponents' commitment to comprehensiveness seriously today that would mean dramatically relaxing land-use regulation.

John Infranca: If you're going to restrict zoning to single-family only in certain parts of the city, you need to be thinking about whether or not the rest of the city or the region provides for adequate supply of housing. And that would severely constrain the ability of a municipality to impose single-family districting. And if we're going to allow it, we should be requiring municipalities to more explicitly make the case for why traditional police power concerns of health safety and welfare justify it. And the level of deference we now afford is problematic because it doesn't ask for those justifications.

John: Hear, hear. On the next episode, we're going to cover some big developments in zoning law after *Euclid*. And we're going to talk about some exciting current litigation to push back on 100 years of deference. But before we go, you may interested to learn what happened to William Ambler's property in Euclid. After the Supreme Court released its opinion in 1926, the land remained vacant until World War II.

Michael Wolf: That parcel was basically unoccupied. And it was – part of it was still zoned for residential use, that is the part on a new facing on Euclid Avenue. Because of wartime needs, the property was rezoned for industrial use, and airplane parts were manufactured in that building. It then became a General Motors Fisher body plant. Then General Motors pulled out and the parcel is now a 1 million square foot parcel that has a lot of commercial uses. There's a company there. I think they rent and sell heavy industrial equipment. So it is a massive building on Euclid Avenue, and across the street is still that beautiful little cemetery and residential neighborhood.

John: Bordering the property on two sides are homes.

Michael Wolf: And on either side, you can see through the chain link fences this big industrial development. So that's how the property is being used right now.

John: I'm John Ross, thanks for listening.

Credits

Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali, Joe Powers, and Charles Lipper at Volubility Podcasting. We relied mightily on the scholarship of Michael Allan Wolf, John Infranca, Paige Glotzer, and M. Nolan Gray. With voice work by Sam Gedge and Robert McNamara. The theme music is by Patrick Jaicomo.