Bound By Oath | Season 3, Episode 5 | The Blessings of Quiet Seclusion

Gov. Cahill: "For the past several months, I have met frequently . . . with builders and realtors, … with mayors, with labor leaders, with planning and zoning officials and many other outstanding citizens of our state to discuss the crisis in housing. … All … were in agreement that a crisis indeed existed. … Huge segments of our work force, although earning more today than ever before, are confronted with the same problem. … Most young … couples are prohibited from purchasing a home because of existing housing prices. … Tenants in many areas of our state are facing substantial increases in rent, many of whom can ill afford it, but are unable to find apartment vacancies elsewhere. … These people, the young and the aged, the teacher and the mechanic, white and black, are thrifty and respectable citizens, yet they are foreclosed from decent and adequate housing at a reasonable cost in areas of their choice. The reason is obvious."

John: That was the Governor of New Jersey giving a special address to the state legislature – in 1970. And while taking care not to point fingers at anyone and acknowledging that there were of course lots of factors at play in the economy, he said that zoning was to blame for the housing crisis. He didn't call for abolishing zoning, but he said that somewhere along the way there had been a perversion – his word – of the original concept of zoning. Instead of advancing the general welfare, zoning was being used to systematically exclude low-income residents and much of the middle class from living in large areas of the state. And he warned that if the legislature didn't do something, the state judiciary would "inevitably" step in and "mandate drastic change."

John: Hello and welcome to Bound By Oath, a podcast on constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. On this episode, we return to the

subject of zoning. We will discuss how federal courts have abandoned the field, telling property owners seeking to challenge arbitrary, irrational, or discriminatory restrictions to go to state court. Which is what we'll do. In 1975, just a few years after the governor's warning, the Supreme Court of New Jersey took a look at a local zoning code that made it illegal to build housing for low- and moderate-income people and said enough. In the case of *Southern Burlington County NAACP v. Township of Mt. Laurel*.

Carl Bisgaier: I mean, we were ecstatic. We were sitting at the Post Office reading the decision. And it was like, my God. We kept saying over and over again, we won.

John: But the decision was, as a noted scholar pointed out, merely the "beginning, not the end of the anti-exclusionary story" in the state.[1] It's a story that continues to this day.

Carl Bisgaier: People have said, "Oh, wow, it must have been so thrilling to work on this case." This was one of the most depressing, negative experiences I've ever had. Because from the very beginning, we were losing, losing and losing – and waiting, endless amounts of time to lose. I had no idea when I went out to interview Ethel Lawrence that basically I had 50 years in front of me, of tilting at windmills, with the land use decisions in the State of New Jersey.

John: Also on this episode, we will talk about some current litigation in state courts that here at the Institute for Justice we hope will open up some opportunities for people to use their property in peaceful and productive ways.

Lij Shaw: It was a complete surprise to receive a cease and desist letter from the city for having my studio here. I had been recording here for 15 years at that point with no issue from any

[1] Norman Williams and Anya Yates, The Background of *Mt Laurel I*, Vermont Law Review, 1996

neighbors. This is how I make a living.

Cindy Tucker: Requirements for square footage keeps going up and up. And the cost of building keeps going up and up. And this puts homeownership out of the reach of so many people here. We have legislated people out of homes.

Chasidy Decker: The city's zoning laws are forcing me out of my perfectly good, safe home for absolutely no reason.

John: I'm John Ross. Thanks for listening.

BBO Montage

John: Way back in the 1980s, the owner of a failing golf course in the suburbs of Chicago had an idea. They would close the club and build a new subdivision with houses on half-acre lots. But city officials opposed the idea. And when the owner filed an application for rezoning, the city gave them the runaround, raising one objection after another before eventually going incommunicado for an entire year. By which time the application had expired and needed to be refiled. But city officials said the second application wasn't quite right either and would have be reworked starting from scratch. By then, however, the property owner had gone bankrupt. Their lender foreclosed on the property. Their sole remaining asset was a lawsuit, filed in federal court, seeking money damages for the way the city strung them along until they ran out of money, violating their due process rights along the way. In 1995, the case reached the U.S. Court of Appeals for the Seventh Circuit. This is the first paragraph of the decision, quote: "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more

hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit." Brutal. After the ruling, by the way, the city did what it could have done all along and purchased the property. Today, it is still a golf course with a banquet hall run by a private company in partnership with the city.[2] Not that that was any relief to the property owner, who died a few years after the decision still mired in bankruptcy.[3]

John: Today, and in 1995, and in 1975, federal courts are not and were not boards of zoning appeals. If you ask a federal court to review the constitutionality of a local land use decision, there's a good chance you're going to get yelled at.

> **Judge Wilkinson**: Let me ask you something. Who has a better idea of traffic congestion in Chesapeake? And who has a better idea of drainage capacities? … And whether there's sufficient capacity in the schools or not?

John: That is a federal judge at an oral argument just a few months ago.

> **Judge Wilkinson**: Why should we supplant our judgment on conditions in Chesapeake, which we are at a far removed from, for the local officials of Chesapeake?
> **Lawyer**: Your honor, I'm not asking this court to supplant its–
> **Judge Wilkinson**: Yes, you are!

John: In the case, a developer had spent years jumping through various hoops necessary to build housing on a 90-acre property outside of Norfolk, Virginia – only to ultimately be denied permission for allegedly bogus reasons. The city's own expert, for instance, had said that the

[2] Chicago Tribune, March 23, 1994
[3] https://casetext.com/case/in-re-spatz

development would not cause flooding problems.

> **Judge Wilkinson**: What you want to do is you want to take this whole area, remove it from the people who were elected by the citizens of that county, and put it in unelected hands. Yes, you do. You … disagree with a legislative decision.
> **Lawyer**: Because the legislative decision was arbitrary and capricious and wasn't based on rational facts.

John: But the court was not interested in reasons, facts, or evidence.

> **Judge Wilkinson**: You keep talking to us about evidentiary decisions. You know the place for your evidence? It's before the city council.

John: In a unanimous ruling, the court held that quote: "The citizens of Chesapeake retain the right to fashion the destiny of their community subject to whatever appeals state … law provides. … The record gives us no reason to take their future from them." Again and again, judges have said that the small matter of local land use regulations are, by and large, beneath the dignity of federal courts. But as we talked about last episode, it didn't have to be that way. In its landmark decision upholding zoning in 1926, *Village of Euclid v. Ambler Realty Company*, the Supreme Court said that in some instances, the general public interest might outweigh a municipality's interest in its zoning laws. For example, if there was a shortage of housing in a region, the zoning laws of one municipality in that region might have to take a back seat. And in a subsequent decision in 1928, the Court held that zoning could be irrational and arbitrary. In that case, *Nectow v. Cambridge*, it said that zoning a parcel for residential use even though it was surrounded by heavy industry was just such an arbitrary rule. So what happened? Well, for over 40 years, nothing. The Supreme Court hardly took up any constitutional challenges to

zoning. And when the Court did begin to show a renewed interest in the 1970s, almost without exception it ruled in favor of local government. Sometimes on big constitutional questions. But other times, they disposed of cases on disappointing procedural grounds. For example, *Warth v. Seldin*, decided in 1975.

> **Emmelyn Logan-Baldwin**: The basic complaint of the petitioners is that the zoning ordinance of the Town of Penfield, New York on its face and as applied is illegal and unconstitutional being racially discriminatory.

John: That is the attorney for a group of low-income residents of Rochester, N.Y., of which the Town of Penfield is a suburb, arguing at the Supreme Court. They alleged that Penfield's zoning ordinance – by mandating large single-family homes on large lots with large setbacks – made it "practically and economically impossible" for them to live in the town. And they alleged that the town's zoning ordinance was specifically intended to exclude minorities.

> **Emmelyn Logan-Baldwin**: We're saying here that this is racially motivated, and it is the same as the town hanging a sign outside the Town of Penfield that minorities are not wanted here. It has that same effect.

John: In addition, a group of home builders intervened in the lawsuit, alleging that they had tried to build low- and moderate-income housing in Penfield and each time had their plans rejected.

> **Emmelyn Logan-Baldwin**: All of those efforts have been denied, all those applications. The Penfield Better Homes application to rezone was denied by the town on the basis that the housing was not appropriate or consistent with the use of the adjacent properties, which is single-family dwelling.

John: One developer, who had previously built single-family homes in the town, alleged that town officials had threatened to retaliate against them for being part of the lawsuit, saying that they would not be able to get approvals to build any more projects whether it complied with the zoning or not.

> **Emmelyn Logan-Baldwin**: They allege in their complaint, not only have they made these various and numerous applications for exceptions to the zoning ordinance, but that the Town of Penfield has threatened that if they pursue this lawsuit … that they will not be allowed to do business in the ordinary course with the public officials of the town.

John: But in a decision written by Justice Powell, and decided by a vote of 5-4, the Court ruled that none of the plaintiffs had adequately alleged that they were harmed by the ordinance, and thus they did not have standing to bring the lawsuit.

> **Justice Powell**: We conclude that none of none of the petitioners has alleged facts sufficient to satisfy the threshold requirement of standing to sue in the federal courts. … Accordingly, the judgment of the Court of Appeals for the Second Circuit is affirmed.

John: Regarding the low-income plaintiffs, the majority said that they hadn't adequately alleged that the zoning ordinance – rather than the general "economics of the area housing market" – had priced them out of Penfield. As for the developers, the majority said they had not been sufficiently specific about the projects they were forbidden from building. Writing for the dissenters, Justice Brennan accused the majority of forcing the plaintiffs to prove in their initial pleadings – before discovery and depositions – what ordinarily is proved at trial. Quote: "This Court has not required such unachievable specificity in standing cases in the past, and the fact that it does so now can only be explained by an indefensible determination … to close the doors

of the federal courts to claims of this kind." The result of the case was to dramatically shrink the universe of people who could bring challenges to exclusionary zoning. If you didn't already own property in town, good luck getting in the courthouse doors. If you were a developer, it had now become much harder to show that your claims were ripe for review. And, in other cases that did proceed to the merits, the Court was unwilling to say that the Constitution protects against arbitrary or discriminatory treatment. Perhaps most infamously in the case of *Belle Terre, New York v. Boraas*.

> **Chief Justice Burger**: We'll hear arguments next in Number 73-191, *Village of Belle Terre against Boraas and others*.

John: The case involved a couple who had rented their house on Long Island to six university students. But the village of Belle Terre – population just 700 – where the house was had an ordinance barring more than two nonfamily members from living together under the same roof. You could have a roommate, but you couldn't have roommates. The homeowners sued, as did the students, who said their living arrangements were the best they could afford. They didn't want to live in dormitories, and the other housing near their school was unaffordable. They claimed the village was discriminating against them on the basis of their choice of lifestyle, a violation of their right to the equal protection of the laws. In response, the village, said, oh yeah, we are totally discriminating.

> **Lawyer for Belle Terre**: 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 was the village's lawyer arguing at the Supreme Court. He said that since zoning for

single-family homes had been upheld, it was not a big leap to mandate that only single families be allowed to live in a single-family home. No one was casting any judgments on anyone else's lifestyle choices.

> **Lawyer for Belle Terre**: 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. … Now you can call that separate but equal if you will but that's what it is.

John: And he said that federal courts are not boards of zoning appeals.

> **Lawyer for Belle Terre**: Zoning has traditionally been considered a matter of local responsibility and this Court has wisely refrained from becoming a National Board of Standards and Appeals to hear applications of variances from zoning.

John: Which, as it happens, was not a successful argument at the appeals court below. In a divided opinion that cited *Nectow v. Cambridge*, the U.S. Court of Appeals for the Second Circuit, had actually struck down the ordinance. Even though the village had claimed that it was meant to prevent traffic congestion, parking problems, and noise, the appeals court said whether those problems were real or even addressed by the ordinance was just quote "rank speculation." According to the majority, what was really going on was that some people were imposing their preferences on everyone else. Quote: "Such social preferences … while permissible in a private club, have no relevance to public health, safety, or welfare." But by a vote of 7 to 2, the Supreme Court reversed. The Court did not mention *Nectow*. It did not include any caveats on the power of the government to regulate land use. Instead, in an opinion written by Justice Douglas, the Court waxed lyrical about the supposed benefits of zoning. Quote:

> **Belle Terre opinion**: A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

John: With those words, any hope that a federal court would ever find that zoning could ever be too arbitrary, too confiscatory, or too paternalistic probably died in Belle Terre, New York. As we talked about on the last episode, zoning proponents in the 1920s insisted that zoning was not mere aesthetic regulation, that they were not advocating using the law to forcefully impose one notion of what is beautiful on individual property owners. But that is exactly what the Supreme Court's decision in *Belle Terre* allows local officials to do. All that is necessary to insulate a zoning ordinance from constitutional review is for officials to claim that a law protects the blessings of quiet seclusion or neighborhood character or just about anything else that sounds nice. Absent a major reversal, property owners have little recourse in federal court. Which calls for a quick break in the story so that I can make an exciting and time-sensitive announcement. When we return, we'll return in state court.

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John: Welcome to the break. I have an exciting and time-sensitive announcement. Next month, on Friday, May 10th, we at the Institute for Justice will be hosting a conference at our office in Arlington, Virginia to commemorate, contemplate, and commiserate over the 100th anniversary of the open fields doctrine. The very same doctrine that we explored on Episode 1 of this

season.

> **Maine's lawyer**: Thank you Mr. Chief Justice and may it please the Court. Fourth Amendment protection does not apply to Mr. Thornton's woods. … The Fourth Amendment does not protect property rights.

John: The conference will feature an extraordinary array of scholars and Fourth Amendment experts, including Professor Laura Donohue, who you will remember from Episode 1. If you love freedom, property rights, and the Fourth Amendment, or if you're just open to being persuaded about any of those things, please do consider attending. For all the details, google Institute for Justice and open fields or check the show notes. You won't want to miss it.

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John: Welcome back. With the doors to federal courthouses closed, advocates turned their attention to state court and to state constitutions. And by all accounts, the leading case on that front comes from New Jersey. In 1970, the governor declared that the state was in the grip of a housing crisis caused in large measure by exclusionary zoning. And he noted that the state's supreme court was keenly aware of the problem and had unmistakably indicated that it was ready to stop deferring to local governments. And in 1975, in the case of *Southern Burlington County NAACP v. Mount Laurel Township*, that's exactly what happened. We spoke with Carl Bisgaier, who argued the case.

Carl Bisgaier: My name is Carl Bisgaier. I'm 79 years old and we're going to start talking about events that happened when I was 25.

John: Mr. Bisgaier had just graduated from law school and begun working at a nonprofit legal services program in the City of Camden, New Jersey.

Carl Bisgaier: And just at that time I got a call from a suburban minister from Haddonfield, New Jersey. And I don't expect any of you to know what Haddonfield, New Jersey means. But it is the crown jewel of South Jersey, a very old, wealthy community. It had a black community in it. They had actually two churches, local churches that dated back to the 1860s, 1870s. There was vacant land around where these churches were and a couple of rundown buildings. And this group was headed by this minister who was representing one of the white churches, very strong, prestigious church. And he was one of the big leaders of the community. They had put together a little group. They had gotten state funding and they were trying to turn this area into a low- and moderate- income neighborhood for the black community. The town didn't support it. They lost their option. They called me up. They said what can you do? And I knew nothing about land use law. I had never heard of zoning before.

John: So he went and talked with the developer who had pulled out of the project.

Carl Bisgaier: And I met with the South Jersey Builders Association. Because I was just curious what was going on. Why didn't they build low- and moderate-income housing? I mean, it was sponsored by the federal government. Guaranteed residents. Guaranteed income. It seemed like a no brainer – exactly what a builder would want – took away all the risk. They said there was no way that they would ever build if the community wasn't supportive of what they were doing. Their takeaway was we build what they want, where they want it. And we're doing really well.

John: The builders said that trying to build something that local officials did not want was

suicide. Because municipalities have a million ways to delay a project, to cost you money, to make your life miserable. And they gave a concrete example.

Carl Bisgaier: If the building inspector doesn't come out in a timely way and inspect our concrete, we can lose a lot of concrete, a lot of time. And it'll be a really a disaster. So ~~okay,~~ so I left there and ~~I~~ we had a young woman who was a planner in our program, and I asked her, I said, What's going on here? How are they able to do this? She said, Oh, it's so easy. All they have to do is zone, which is this thing that came out of the 1920s but had morphed into this incredible powerhouse for municipalities to control development. They controlled everything: the size of a lot, the number of units, single family versus multifamily. They were even controlling whether units were rental or condo or ownership. They were controlling whether families had to be biologically related. Setbacks, width of streets, four-foot sidewalks instead of three-foot sidewalks. I mean, it was like endless. So okay, I learned a lesson there. I understood what the builders were talking about. They weren't really building as independent developers. They were really the running dogs for the municipality, which they freely acknowledged.

John: The group in Haddonfield that had lost their option was not interested in suing the town. But it soon became clear that many municipalities all over the state were using their zoning codes to police who could and could not live in their towns on the basis of income.

Carl Bisgaier: So we decided to research this. I sent a memo out to the staff attorneys in these different offices that said look if you know anything about what's going on in these towns or any activity, housing activity give us a call. I immediately got a call from our Burlington office.

John: Officials in Mt. Laurel Township, in Burlington County, had recently approved the construction of massive new housing developments. Mt. Laurel had been a rural community –

with a total population of less than 3,000 residents spread over 22 square miles – as recently as 1950. But it was growing quickly and becoming a suburb of the city of Camden and also of Philadelphia, which is about 10 miles away.

Carl Bisgaier: We had never heard of Mount Laurel Township before. It had five planned unit developments. They had approved 11,000 units of housing in the town. A local group was looking to build 36 low- and moderate-income units. They had an option. The town blew them off. And they were done.

John: All of the new housing being planned was designed to be affordable only to the upper middle class. And at the same time that Mt. Laurel officials were hoping to welcome tens of thousands of relatively wealthy new residents, they were forbidding a small group of locals from building new housing.

Carl Bisgaier: They turned out to be a local African American community, which had been in Mount Laurel township since before the Civil War. These residents were politically active and very powerful in the town before the town started developing.

John: The group lived a neighborhood around their church. Many of their homes were old and dilapidated. Some had dirt floors.

Carl Bisgaier: This was literally converted chicken coops and people were living in them. It was horrific.

John: But when they tried to improve conditions on their own, they were blocked by the township. After that, they managed to secure public funding to build 36 subsidized apartments.

But the township blocked that too. Infamously, the mayor came to their church for a meeting and told the group, quote: “If you people can’t afford to live in our town, you will just have to leave.”

Carl Bisgaier: The mayor he said, Look, there's nothing we can do about this, the town is developing. And if you can't afford to live here, you just have to find someplace to go. Which is like where? There's no place to go. Okay, so he did say that. It really infuriated them. So we met with them and we said, look, the only thing we're gonna be able to do is sue these people. And by the way, the law is horrible. New Jersey is a home rule state. The Supreme Court is incredibly deferential to local decision making. All it has to do is be remotely reasonable, and have any possible justification, and it's okay with the court.

John: In the years prior, New Jersey courts had upheld minimum interior floor space requirements, minimum lot sizes requirements, bans on multifamily housing, bans on hotels in certain districts as well as bans on mobile homes in all districts. But as the governor warned the legislature in 1970, the New Jersey Supreme Court had begun to signal that it was open to a major reversal.

Carl Bisgaier: We met with Mary Robinson, who was the leader of that community. What she said went.

John: But she and some of the other residents were not initially inclined to sue the township.

Carl Bisgaier: She was opposed to it. And she said that this was her town, her family lived in this town, her friends live in this town. She wasn't going to sue her town. Well, at that point, this woman stood up and she said this is wrong. We can't let this happen. First of all, we wouldn't be suing our town. This isn't our town. This is their town, and they're hurting us. They're making us

leave. Many of our residents have left the town because they can't afford to live here anymore. She wanted to do this. And they wanted us basically to leave so that they could talk this over.

John: The next day, Mary Robinson's daughter, Ethel Lawrence, who was also a leader of the group, said she wanted to talk.

Carl Bisgaier: She said, Look, I'm willing to do this. But you guys have to commit to being in this for the long haul. I'm not going to have my family and our community sue and then find out, you know, that this was like just something you enjoy doing. So we committed. We said look, one way or another, however long this takes – now let me tell you that we had no idea it was gonna be till 1997 that low- and moderate- income housing was ever built in this town. This was still 1970. But anyway, we committed that we would do it. And she committed. She said she'll be a plaintiff. Her daughter who's living in a converted chicken coop would be a plaintiff – and her aunt.

John: The lawsuit had several different groups of plaintiffs. There were plaintiffs who lived in Mt. Laurel. There were plaintiffs who had been forced to leave because they could not find housing. There were so-called regional plaintiffs, who lived in the region but could not afford to move to Mt. Laurel. And there were community groups like the local branch of the NAACP. Most, if not all of whom, would probably not even have standing to sue in federal court.

Carl Bisgaier: New Jersey is very liberal when it comes to the law of standing with the right to participate in litigation. Anyway, so here I am this young, 25-year-old attorney. I knew nothing at all about this. You understand this was my first trial. I had a local board member who was a litigator tell me how to get a document into evidence because I didn't even know what to say.

John: As a first order of business, Carl and his colleagues asked the city for documents – all the documents.

Carl Bisgaier: All the minutes of meetings, all the applications, all the decisions by the board – everything you can ask for. I get a call shortly thereafter upon the municipal attorney who was Jack Gerry. Jack Gerry was ~~in~~ a prestigious local lawyer, who was of awesome integrity. Ultimately became a federal court judge. He recognized that we're entitled to these documents How about we give you a desk in the municipal building? Ask for and get anything you want. We will not record what you're getting. And knock yourself out. So I did. I literally had a desk in the municipal building in Mount Laurel. They were very cooperative. All the people there helped me. Anything I wanted. I went through a gazillion applications, decisions, zoning board records. It was insane what I found. Constant dialogue about property taxes, the need to have a high ratables. How do you have high ratables? You have zoning which requires upper class housing. Bring those people into the town. What do you do with the poor people? Don't do anything. Literally, this was on the record. Let their housing deteriorate, they'll move out. Then close down those residences. Knock them down.

John: The city later conceded in court that their zoning decisions were driven entirely by the impact on tax revenue.

Carl Bisgaier: I then submitted a demand for admissions, which for those of you who are not lawyers is a demand that requires your adversary to basically say yes or no – that what you're asking is true or false. And I had all this detail, every document. Jack looked at this for like a half an hour had some people research whether I was accurate or not – saw that they were all accurate. And he just basically admitted to everything. This was like, I don't know, 50 page document of admissions. I didn't even have to have a trial at that point. Okay, so we bring the

case, which actually we never expected to win. Our goal was to create a record, get up to the Supreme Court, and win there.

John: The hope was that the judge would be fair and let them get all their evidence into the record so that it could be reviewed by the state supreme court. If he did that, it didn't matter if they won or lost in the trial court. But they won – on some claims – and the judge ordered Mt Laurel to undertake new "analyses, studies, and plans" that would "enable and encourage" developments like the 36 apartments proposed by Mary Robinson and Ethel Lawrence.

Carl Bisgaier: He knew these people, and he said the town had an obligation to take care of them and to assess what their needs were and to proactively – that proactively helping 11,000 new residents, they could proactively help their own people. The case shot up to the New Jersey Supreme Court.

John: Zoning ordinances in dozens of other municipalities were being challenged at the same time, and so there was a fair bit of luck involved with the Mt Laurel case getting to the state supreme court first and getting to be the flagship case. But that's where the good luck ended.

Carl Bisgaier: The first oral argument was about as horrific an experience as I've ever had. We were unprepared. The questions were devastating. This was a very powerful court with very intelligent justices and they really came after us. After the argument, we were fairly devastated. But something surprising happened. Sometimes you get a second shot at the apple. The supreme court decided it wanted to rehear the case. They had questions. We really learned our lesson. We really prepared. We were ready, really ready for the second argument.

John: For those of you keeping track at home, this is now the third episode in a row where the

Supreme Court, or now a state supreme court, has reheard a case. But I promise, in spite of that, it really is unusual. We can't say for sure why the justices wanted this case reargued, but one of them had retired after the first argument and two more were just about to retire, so it seems like they wanted to make the big statement on zoning that they had been signaling for years before the makeup of the court changed.[4]

Carl Bisgaier: Well, the argument went incredibly well. We had answers to every thing they possibly could have asked us. And we did have the feeling that something good was going to happen here. So we waited and we waited, I think, for an entire year, before the decision came down. And we won. I mean, we were ecstatic. We were sitting at the Post Office reading the decision. And the court ruled – here was their ruling: Every developing municipality in the state of New Jersey is obligated to do their fair share of the regional need for low- and moderate-income housing and to proactively support a fair share of the development.

John: The Court cited the original caveat in the Supreme Court's decision in *Euclid v. Ambler* that a region's need for housing might outweigh any one municipality's parochial interests. And they ruled that limits on zoning were required by the state constitution.

Carl Bisgaier: Much to our benefit the power to zone in New Jersey is constitutional. It's delegated to the state legislature by the Constitution. And what the legislature then did is it delegated that power to municipalities. Each municipality had the right to do their own zoning. Well, that was a great opportunity to say, wait a second here. The state constitution delegated this power under the general welfare clause. Well, general welfare must mean that it's for the general welfare. You can't be just picking and choosing who you're going to benefit with the right to zone.

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[4] Norman Williams and Anya Yates

John: The decision produced what is called the *Mt Laurel* doctrine. Which says that certain municipalities, so-called developing municipalities like newly forming suburbs, were obligated to assess how much need there was for low- and moderate-income housing in their region and not only permit but proactively do what they could to provide their fair share of that housing.

Carl Bisgaier: That's what they said and then they provided no remedy for recalcitrant municipalities. What they said was we expect having ruled that municipalities, being public officials, will adhere to this decision and abide by it.

John: Oops.

Carl Bisgaier: We were not given a remedy by the Supreme Court in *Mount Laurel I*, and oh, surprise, surprise, you know, the municipalities did not comply.

John: The case went back to the trial court, where the plaintiffs again sought to build the 36 apartments and sought to prove that indeed Mt. Laurel was a developing municipality that had not met its fair share of the regional need.

Carl Bisgaier: You gotta parse every word of that ruling. We litigated what is the developing municipality? What is fair? What's fair share? What does it mean to be proactive? Do you actually have to support an application? What does it mean to zone proactively? Everything was litigated. And we were going nowhere.

John: To Carl's knowledge, not a single municipality in the state took the view that they were covered by the doctrine. In Mt Laurel, officials came up with a plan intended to make it look like

they were complying without actually approving any housing.

Carl Bisgaier: The town came up with the most horrific plan you could possibly imagine. I mean they had one site which literally was in an industrial park. I went and interviewed the developer, the attorney for this developer, I said, What is the deal with this? He said that's never going to be developed. The township attorney told me they were just looking for the worst site they could find. They don't care if its developed. They're not going to do put any pressure on us. So I said would you be willing to testify to that? He said, Well, subpoena me and I'll testify.

John: The township got a new legal team, and this time they were much less helpful.

Carl Bisgaier: At this point, we were not looking at really nice guys on the other side. They were really going to litigate this case, big time. They were infuriated by the fact that I had left Legal Services by then. And I was working for the state public, the Public Advocate's Office. This was the state now was funding a lawsuit against this municipality.

John: And this time the case was before a new trial judge, who refused to let the testimony from the developer that the township's plan was a sham into the record.

Carl Bisgaier: This time, we're talking about a serious case. This was like a 19- 20 day trial. We had expert witnesses all over the place. What does it mean to be proactive? What does it mean to zone for low income housing? What do you have to do to actually make it a realistic housing opportunity. What does that mean? What is a realistic housing opportunity? Okay, so we had witnesses doing all that and it took a long, long time.

John: This time, they lost. By then, eight years had passed since the initial meeting with Ethel

Lawrence, Mary Robinson, and the rest of the community. And there was no housing to show for it.

Carl Bisgaier: People have said, Oh, wow, it must have been so thrilling to work on this case. This was one of the most depressing negative experiences I've ever had. Because from the very beginning, we were losing, losing and losing – and waiting, endless amounts of time to lose. I had no idea when I went out to interview Ethel Lawrence that basically I had 50 years in front of me of tilting at windmills with the land use decisions in the State of New Jersey. Anyway, we lost it was horrible. I can't tell you what it was like to drive out to Ethel Lawrence's home with that decision and tell her what happened. And she said you can't appreciate how long we have waited to be represented to challenge this type of discrimination. And we will wait as long as it takes. I mean, you know, what are you going to do with somebody like that? We were getting supported by her.

John: All across the state, developers, property owners, aspiring homeowners, nonprofits, and even the state of New Jersey itself through the public advocate's office, were getting stuck in court fighting about the definitions of developing municipality, fair share, and all the rest. The Mt Laurel doctrine had resulted, the supreme court said later, in "paper, process, witnesses, trials, and appeals" but not much new housing.

Carl Bisgaier: The *Mount Laurel* case and the *Mount Laurel* doctrine was collapsing all over the place. We were losing everywhere. We realized that something had to happen for us to be able to convince the Supreme Court number one, this isn't going away. And number two, we need a definitive ruling. We need a remedy here.

John: A builder's remedy.

Carl Bisgaier: There's only one class of potential plaintiffs who have the knowledge, ability and willingness to sue, and that's builders, developers, landowners. But for them to do that, they need a remedy. They need to know that if they do that, they're going to get something. And that's this builders remedy. That's where the builders remedy concept came from. You didn't have that before. If a developer sued before and won on a zoning issue. They didn't get a remedy. The town was then required to rezone.

John: And when the town rezoned, there was no guarantee that the project that was the subject of the lawsuit would be approved. So the *Mt Laurel* case went back to the New Jersey Supreme Court, this time combined with five other lawsuits against other municipalities. And in 1983, 12 years after the litigation first began, the court issued its decision in what is called *Mt Laurel II*.

Carl Bisgaier: Well, it was worth waiting for. If you want to read what a court can do, if it wants to do something, to affect social discrimination and to really do something for low- and moderate- income people, if you have the time, this is not an easy read, read *Mount Laurel II*. They – number one, they went after all of these towns. .They eviscerated these towns. Then they defined everything. Forget developing municipality. Every municipality had an obligation to take care of their indigenous poor and a fair share of the regional need. Here's how you calculate fair share, this is what you do. Whatever you have to do to sponsor state and federal housing, you will do that.

John: And this time, the ruling had some teeth.

Carl Bisgaier: But this was the unbelievable thing they did. They appointed three judges in the state of New Jersey, to hear all of the Mount Laurel cases, all of them. And they were the most

prestigious trial judges in the state. So now, every case including the Mount Laurel case, was now going to a judge whose job it was implement the Chief Justice's decision. I mean what would you expect these judges were going to do? They were not exactly going to sit on their hands and be berated by the chief. within one year of this decision, I think 95 Mount Laurel lawsuits had been filed by developers from all over the country. Why? Because suddenly, the developers' rights were flipped completely. Instead of being subject to municipal discretion. Now it was the municipality had to prove that the developer's proposal was contrary to health and safety. Go do that.

John: Developers would then be required to set aside housing for the poor.

Carl Bisgaier: What the court had said was okay, here's your ticket to a builders remedy. And you have to build a percentage of low- and moderate-income housing. That's where inclusionary developments came alive. And they found 20% to be a reasonable number.

John: And developers building new subdivisions were eager to take advantage.

Carl Bisgaier: Get 100 acres of land, which is now zoned at five acre lots. And propose a multifamily development there. What do you think the flip is on that? Well, big surprise, they would do that. They had no problem doing that. I represented Toll Brothers when I left the Public Advocate's Office.

John: Toll Brothers is a private developer.

Carl Bisgaier: They had a project near the turnpike on the Amtrak line, walking distance from the station. They had proposed like 100 units and the town had rejected it. We sued. They got

1500 units on that property.

John: Which was very profitable and resulted in a lot of new housing.

Carl Bisgaier: I mean, it was incredible. And that's what happened all over the state. Developers were building these monster developments in areas of these wealthy towns, which never would have had this kind of development.

John: Within a year, the state legislature finally was moved to act, adopting a law called the Fair Housing Act which created a new agency within the executive branch to implement the Mt Laurel doctrine, taking over the role of creating fair share plans from the judiciary.

Carl Bisgaier: What happened after *Mount Laurel II* was the legislature decided to act. Because the municipalities were going crazy with these judges. And they adopted ~~a~~ legislation which created a entity which would do affordable housing reviews of municipal plans, as well as coming up with a fair share plan for all municipalities. And truthfully, it actually worked pretty well.

John: According to Mr. Bisgaier, the result was a kind of detente. There was still plenty of litigation, but if municipalities got on board and agreed to a fair share plan they regained some degree control over development within their borders.

Carl Bisgaier: And by the way, an interesting thing about that is 80% of the units were being built a lot of them multifamily units for middle and moderate income people, which again, never would have happened.

John: That lasted for about a decade. But the system depended upon the good will and the good faith of state officials, and eventually an official who was not a fan of the Mt Laurel doctrine was appointed to the head of the agency overseeing all of the administrative machinery. And things suddenly ground to a halt.

Carl Bisgaier: She hated the Mount Laurel decision and she basically gutted it. She refused to come out with a fair share plan. So you had nothing that's happening. She blamed the need for census data. It was all bull. And we ended up litigating the issue of why the government has to do something. They have to come up with a plan. They're obligated to do it under the statute.

John: That litigation eventually wound up once again before the New Jersey Supreme Court, and there has since been a *Mt Laurel III* decision and then a *Mt Laurel IV* decision. And I hope you will forgive us skipping over much of the saga. In short, since the 1980s, the degree to which the judiciary or the executive branch has been responsible for implementing the doctrine has continued to shift. And just two weeks ago, the governor signed new legislation with a new balance of responsibilities that is intended to result in a lot more affordable housing without quite so much litigation.

> **NBC News Reporter**: With the stroke of a pen, New Jersey Governor Phil Murphy today signing into law the state's new affordable housing bill aimed at getting low- and middle-income families a roof over their head.
>
> **Governor**: This is a landmark day by any measure.
>
> **Reporter**: The governor's team says the bill will establish a streamlined framework for determining how many affordable housing units each city and town will need to build under what's commonly known as the Mt Laurel doctrine.

John: In Mt Laurel Township itself, the Ethel Lawrence Homes, a project with apartments, townhomes, and single-family homes on 60 acres, opened finally in the year 2000, nearly 30 years after Ethel and the community first filed suit. She did not live to see the project's completion.

Carl Bisgaier: Here we were developing in her town, which is what she always wanted, wasn't going to happen. She wasn't gonna live to see that. Anyway, legacy, from that point of view I guess it's been a success. The energy that it's taken? I mean, if every developer in the United States of America had been building 20% of their housing for low and moderate income people, I want you to go back to Mount Laurel to 1983 and go forward 30 years, and get a sense of how much low- and moderate-income housing would have been built by private developers. We don't have a housing problem. We have the best industry in the world for building housing. If there's something that the building community the United States of America can do, it is that it can build a house. It knows how to do that.

John: In spite of the Mt Laurel decisions by all accounts there remains a drastic shortage of housing in New Jersey. So all in all its legacy is a bit of a mixed bag. Mt Laurel is the leading case when it comes to state courts going a different route on zoning issues than federal courts. But nearly 50 years later, no other state court system has tried to address exclusionary zoning as comprehensively as New Jersey has. And in New Jersey the process for a landowner who wants to build still involves a lot of process: studies, layers of review, approvals, subsidies, mandates, and the good will and good faith of local officials who often remain recalcitrant. At the Institute for Justice, we are also in the zoning reform ballgame, and we are trying a different approach. With the greatest respect to Carl and Ethel and their team, and with the recognition that our approach is one that would require a major reversal – at least in federal court – we're sticking with the basics. Not more or better planning. Instead, we're arguing in state courts

around the country that an essential component of owning property is the freedom to build and to use your property as you see fit subject only to restrictions that are reasonable. And not just when it comes to housing. In Texas, we have challenged parking minimums and some other parking requirements for our client's small business, an auto repair shop, that are physically impossible to comply with. In North Carolina, we are arguing that restrictions on an animal sanctuary, including a ban on hosting any type of event or having groups of volunteers work at the property, do not make sense. In Michigan, we're arguing that a rural town's adoption of a ban on cemeteries – right after our clients tried to a open a business providing what are called green burials – simple, natural, more affordable burials on forested land – is arbitrary. And in Tennessee, we are challenging severe restrictions on some home-based businesses.

Lij Shaw: My name is Lij Shaw. It's L-I-J. It's short for Elijah. And what I do for a living is I record and produce records for people. And I have a home studio that I like to record music out of. Recording in home studios is a Nashville tradition. It's just what everybody does in Nashville.

John: Lij lives in Nashville, where he earns a living recording local artists and more than a few nationally renowned performers in his home studio. One record mixed in his studio has even won a Grammy. And he also teaches classes there. But unbeknownst to him, while it was and is perfectly legal to have a home studio, in 2017, when we filed the lawsuit, he was not allowed to have any clients, visitors, guests, or students come to the studio.

Lij Shaw: It was a complete surprise to receive a cease and desist letter from the city for having my studio here. I had been recording here for 15 years at that point with no issue from any neighbors. This is how I make a living.

John: The law has since been revised allowing him to have up to three clients at a time, but not

more than six per day, which is still arbitrary and still threatens his livelihood. If a band has more than three musicians in it, and they all want to record together too bad. Additionally, the classes that he teaches are only affordable for students if there are more students in the room than the law allows. Also, visitors are not permitted on Sundays or any other day after 7 p.m., which is a huge problem because musicians often only have time to record on weekends and evenings. Additionally, Lij must keep a log of every client who comes to the studio and make the log available to authorities for inspection.

Lij Shaw: I have absolutely no idea who complained about me having a home studio here. The way codes enforcement works in Nashville is that somebody can anonymously go to their website and just fill in a complaint.

John: There's no legitimate reason for any of these restrictions. He's a good neighbor; the studio is totally soundproofed. He's not causing any parking issues because his guests' cars all fit in his driveway, which is surrounded by a privacy fence. There's just nothing going on that could plausibly be described as a nuisance or even a near-nuisance.

Lij Shaw: All I know is that my neighbors love me being here. They actually told me in so many words that they felt that me being here and having a home studio made the neighborhood more valuable to them and a better place to live.

John: So Lij filed suit against the City of Nashville, arguing that the Tennessee Constitution demands that cities have a good reason to stop people from using their property peacefully and productively. And notably, Nashville permits many other types of home-based business to operate without any of the restrictions I just mentioned – including those that have the potential to be more disruptive to quiet sanctity of a residential neighborhood than Lij's studio, like for

instance, short-term home rentals. In 2022, the lawsuit reached the Tennessee Supreme Court, which ruled that because of the revisions to the home-based business ordinance the case needed to go back down to the trial court to further develop the factual record. As of today, the city still has yet to point to any persuasive reasons for the restrictions on some home-based businesses but not others. Instead, their argument remains that the court should not ask for any reasons.

Lij Shaw: I think it stinks. I think it makes no sense at all. This is Music City. If you can't make music in Music City, then maybe we should stop calling it Music City.

John: We are also challenging zoning laws that make it illegal or impossible for people to build or find housing. Cindy Tucker works with a nonprofit that owns an 8-acre property in Calhoun, Georgia about an hour and half outside Atlanta.

Cindy Tucker: We live here, we work here, we love this county. We want to see it grow, and continue to be the kind of place where people want to raise their families.

John: The nonprofit wants to build a cottage community of 20 to 30 tiny homes. And the plans are ready, they have financial backing, contractors are standing by to build. And there is a healthy waiting list of potential purchasers looking for smaller starter homes or looking to downsize homes.

Cindy Tucker: The property that we have is perfect for students. It is perfect for people who are retiring, who are not ready for assisted living, but can no longer maintain the big family home. People who are just starting out on their careers. It gives them that wealth building asset but it's not taking up half to two-thirds of their income. We're looking at mortgages that are under

$100,000.

John: All that's needed is for the government to get out of the way.

Cindy Tucker: The city has turned us down every time we have gone before them. For five years, they have turned us down.

John: Housing prices in the area have exploded, but the city has mandated that developers build big houses or no houses.

Cindy Tucker: Requirements for square footage keeps going up and up. And the cost of building keeps going up and up. And this puts homeownership out of the reach of so many people here. We have legislated people out of homes.

John: There are no legitimate reasons to ban modestly-sized homes. And the Georgia Constitution requires reasons. As does the Idaho Constitution.

Chasidy Decker: The city's zoning laws are forcing me out of my perfectly good, safe home for absolutely no reason.

John: That is Chasidy Decker. She owns a 250-square-foot tiny home that's on wheels.

Chasidy Decker: It was one of the last gifts my grandfather gave me before he passed. And it's been the best thing. I've lived in it for almost four years now and I don't regret a thing. I decided to go tiny for three main reasons. Flexibility, stability and affordability. And I was really interested in the minimalistic lifestyle.

John: In 2022, Chasidy found a landlord who owned a house in Meridian, Idaho, outside of Boise that had everything she needed. A little bit of space and an RV hookup for utilities, which are extremely scarce. She spent months looking for a suitable place all over Boise.

Chasidy Decker: When I found this spot, I was so excited. Because I'm like, wow, like, I'm never gonna find another spot like this. Private property. The hookups are readily available. Exactly what I need. The homeowners are amazing. You know, it's a win-win situation for both of us.

John: The homeowner is a construction foreman, and he bought the house for his 25-year-old son to live in – because housing prices have exploded and even though his son works full time and has roommates, he can't afford housing on his own. Chasidy's rent money was going to help chip in and pay the mortgage. But the day after she moved in, a code enforcement officer told her she had to go.

Chasidy Decker: The first day that I had signed lease and got set up, spent the night, went to breakfast the next morning, and when I returned to home code enforcement was just leaving my door.

John: Her tiny home is safe, built to code, and aesthetically pleasing. But the city says it violates the zoning ordinance.

Chasidy Decker: I felt completely defeated and helpless. What did I do wrong?

John: It turns out that the city has some awfully fishy code enforcement practices. If you go to

the neighborhood where Chasidy wanted to live, you will see dozens of code violations right out in the open. Inoperable cars. A shipping container in someone's yard. And even RVs that people appear to be living in. None of which to be clear the city should crack down on. But the fact remains that Chasidy and tiny homes on wheels are being singled out for enforcement. Just this past week, the case went to trial in an Idaho trial court, where we made the argument that the government should let people find these kinds of private solutions to navigating the housing crisis.

Conclusion

John: Going back to the federal courts, one thing the Supreme Court has made some positive moves toward quite recently is protecting property rights. Could that mean that the bucolic, and nonsensical, language from Justice Douglas's *Belle Terre* opinion could be going away, and the more reasonable approach of the 1928 *Nectow* decision could return? Maybe even an overruling of *Euclid* itself? Perhaps. But in the meantime we have what Judge Jeffrey Sutton calls 51 imperfect solutions, the 50 state constitutions in addition to the federal one. That's the path Carl Bisgaier tried in New Jersey with, as he put it, some successes and some failures. And it's what we're trying at IJ under the constitutions of Tennessee, Georgia, Idaho, and other states. Property by property, use by use, we're trying to help fight the monster that zoning has become while people build homes and places to work. And it's something others across the country are doing as well. In fact, the last few years are demonstrating that Carl and his team in New Jersey were ahead of their time. More than ever before people all over the ideological spectrum are calling for zoning reform. Even legislatures have taken the hint, with meaningful reform in places as varied as Minneapolis, California, and Montana. And where legislatures haven't yet, IJ is arguing in court that by simply letting people exercise their property rights we can get more of the housing, and the freedom, that everyone recognizes is desperately needed.

John: Next time on Bound By Oath, we are going to take a break from case law and legal doctrines, and we'll dive into the origins of property and property rights. From hunting spears to condos, what makes property *property* in the first place?

Credits

Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. The theme music is by Patrick Jaicomo.