

***Byrne v. Maryland Realty Co.* and the Elimination of  
Aesthetic Zoning in Maryland**

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## A. Introduction:

Today's familiar cry of "Not in my backyard!" is not new to property owners. In 1915 the familiar cry was raised by a number of homeowners and building associations as they fought to prevent a developer from constructing rowhomes in northwest Baltimore.

Perhaps in response to the more extensive, progressive attempts at building regulation in other cities, most notably New York, which can be categorized as city planning,<sup>1</sup> Baltimore confined its regulations to the type of housing, as well as usage, by the acts of the General Assembly in specific areas under specific statutes in order to remedy certain perceived health and welfare problems.<sup>2</sup> A number of regulations were passed and enforced in Baltimore under the aegis of the "Mayor's Ordinance."<sup>3</sup> This ordinance, passed by the City Council gave the Mayor the privilege of approving or disapproving of the location of certain types of businesses.<sup>4</sup> Furthermore, building permit restrictions had been upheld by the Court of Appeals as a way of restricting certain types of building, which were considered detrimental to the community.<sup>5</sup> Even though certain types of building restrictions were successfully passed, the city continually attempted to expand the range of its powers.

On May 12, 1915, an opportunity for building developers arose to challenge the limits of acceptable building restrictions with the filing of a permit to build in a restricted area of Baltimore.<sup>6</sup> In a time when cottage style homes were in vogue and

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<sup>1</sup> SEYMOUR I. TOLL, *ZONED AMERICAN* 140, 172-87 (1969).

<sup>2</sup> *See* *Byrne v. Maryland Realty Co.*, 129 Md. 202, 203-04 (1916) (quoting MD LAWS 1912 ch. 693 § 1).

<sup>3</sup> Garrett Power, *The Unwisdom of Allowing City Growth to Work Out Its Own Destiny*, 47 MD. L. REV. 626, 629 (1988).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The Court of Appeals upheld regulations restricting, for example, the height of buildings and the location of movie theaters. *Id.*

<sup>6</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

suburbanization was the high style,<sup>7</sup> the residents of Forest Park, Baltimore saw the filing of this permit to build a group of fourteen semi-detached homes on Garrison Avenue between Dalrymple Avenue and Bonner Road<sup>8</sup> in their neighborhood as an invasion, an eyesore, and the antithesis of everything they had striven for as a community.<sup>9</sup> For these residents, the sanctity of their quiet suburban cottage community was about to be destroyed solely to meet a growing need for housing. The residents feared the urbanization of their quiet community.

The residents of Forest Park were able to breathe a temporary sigh of relief when on May 14, 1915 Mr. Clarence Stubbs, Inspector of Buildings, rejected the application for the permit to build.<sup>10</sup> However, this was only a stay of execution for their cottage community. In less than one year, the idea that a community could shape itself through building type restrictions would disappear.

The rationale behind the disagreement between the city with the residents of Forest Park and the Maryland Realty Co. may have been simply due to an overwhelming interest in preserving the continuity of the community and retaining the suburban quality of the area. However, a discriminatory intention may have underpinned the arguments of the residents and the city in favor of preserving the ordinance barring rowhomes in Forest Park.

This paper will first outline the case, which brought the issue of aesthetic building regulation and zoning before the court in Maryland, *Byrne v. Maryland Realty Co.*

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<sup>7</sup> See generally ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987).

<sup>8</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

<sup>9</sup> See, e.g. Baltimore City Archives, Solicitor's Files, Number 19323, Transcript of Case, 80-81,85.

<sup>10</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

(*Byrne*).<sup>11</sup> This paper will then set *Byrne* within the context of the time including discussing the major characters involved in the resolution of the issue. Finally, this paper will argue that although discriminatory efforts by the city and the residents of Baltimore were rife at the time this case was decided, this case was rooted in a community's perception that society was forwarded through suburbanization which could only be achieved by prohibiting rowhomes. Furthermore, the action brought by the city was an effort to retain property values that were perceived to decline sharply when situated adjacent to higher density housing rather than an effort at discrimination.<sup>12</sup> *Byrne* was not a case about discrimination, but rather, a case of perceived societal improvement through the restriction of the use of land by aesthetics. *Byrne* was about the tension between the owner's property rights and the power of the city to control development. At its most basic, *Byrne* was a case of dollars and cents, the value of the property to the residents of the quiet suburban community weighed against that individual right of the developer to do whatever he wished with his property.

Later the trend becomes obvious as jurisdictions carved out exceptions to the general rule that an owner could do whatever he or she wanted with his or her land. Basing their decisions upon *Berman v. Parker* jurisdictions were allowed to zone purely upon aesthetics.<sup>13</sup> Finally, in the seminal case of *Penn Central Transportation Co. v. New York City* jurisdictions were given the right to preserve landmark and historic structures by prohibiting an owner from appreciably changing his property.<sup>14</sup>

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<sup>11</sup> 129 Md. 202 (1916).

<sup>12</sup> See Baltimore City Archives, Solicitor's Files, Number 19323, Transcript of Case, 154.

<sup>13</sup> *Berman v. Parker*, 348 U.S. 26 (1954) quoted in Kenneth Regan, Note, *You Can't Build that Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1014 (1990).

<sup>14</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

B. The Case and the Characters:

*1. Court of Common Pleas.*

*a. The Filing, The Parties, and the Preparations.*

On June 16, 1915 the relatively young Mr. John D. Nock and the experienced Mr. Harry Karr of Benson & Karr fired the opening salvo on behalf of Maryland Realty Company in what was to become the end of the possibility of aesthetic zoning in Maryland.<sup>15</sup> On behalf of the Maryland Realty Company, they filed a petition in the Court of Common Pleas challenging Mr. Clarence E. Stubb's, the Inspector of Buildings of Baltimore City, decision not to issue a building permit for the erection of semidetached homes to the company.<sup>16</sup> While not much can be ascertained about Mr. Nock, he appears to have been a junior associate<sup>17</sup> at the firm of Benson & Karr and in this case had the opportunity to come face to face with the solicitor of the city under the tutelage of one of the named partners, Mr. Karr.<sup>18</sup>

Unlike, Mr. Nock, Mr. Karr was an experienced attorney. Born in Baltimore County on July 31, 1876<sup>19</sup> and educated by the Baltimore public schools prior to entering Baltimore Law School where, in 1898, he earned an LL.B. and was subsequently admitted to practice by the Baltimore Bar in the same year.<sup>20</sup>

Mr. Karr was not only a native of Maryland who had a stake in the outcome but also a lawyer with a particular eye for property law. Mr. Karr was counsel for the Real

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<sup>15</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

<sup>16</sup> *Id.*

<sup>17</sup> See Baltimore City Archives, Solicitor's Files, Number 19323, Letter from Benson and Karr to R.F. Leach, Jr.

<sup>18</sup> *Id.*

<sup>19</sup> BALT. EVE. SUN, September 18, 1957 as presented in Biographical Card File in Maryland Department of the EPFL, under Karr, Harry E.

<sup>20</sup> FELIX AGNUS, ET AL. EDS., THE BOOK OF MARYLAND "MEN AND INSTITUTIONS" A WORK FOR PRESS REFERENCE 100 (1920).

Estate Board of Baltimore and worked at reducing property taxes.<sup>21</sup> Mr. Karr also served as general counsel for the Maryland League of Building Associations and “was appointed in 1938 by Governor Nice as chairman of a statewide committee to study and report to the Legislature on the possibility of State supervision of building and loan associations.”<sup>22</sup>

The petition Mr. Nock and Mr. Karr filed on behalf of Maryland Realty Co. indicated that on May 12, 1915 the Maryland Realty Company, after “securing a permit from the Appeal Tax Court,” applied for a building permit from Clarence E. Stubbs, Inspector of Buildings of Baltimore City.<sup>23</sup> Like Mr. Karr, the building inspector was a product of the Baltimore City School system.<sup>24</sup> Mr. Stubbs completed the four-year program in architectural drawing at the Maryland Institute in only three years graduating at the age of 18.<sup>25</sup> After this formal education Mr. Stubbs became a journeyman carpenter “in order to learn all classes of work”<sup>26</sup> and then served as the superintendent for the erection of a number of large factories before being appointed District Inspector in 1904.<sup>27</sup> From this position he was elevated to Assistant Building Inspector and finally Building Inspector by Mayor Preston.<sup>28</sup> In this capacity Mr. Stubbs rejected the building application on May 14, 1915.<sup>29</sup> Mr. Stubb’s decision to reject the permit was based upon

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<sup>21</sup> BALTIMORE NEWS-POST, September 4, 1957 *archived in* Biographical Card File in Maryland Department of the EPFL, under Karr, Harry E.

<sup>22</sup> *Id.*

<sup>23</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

<sup>24</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 58 (Baltimore American 1914).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

Chapter 693 an Act of the Legislature, which was approved on April 8, 1912.<sup>30</sup> The regulation said in relevant part:

That no dwelling house shall be erected within that section of Baltimore city embraced within the following lines: Beginning at the intersection of the western city boundary and Forest Park avenue, and running thence easterly along Forest Park avenue to Garrison avenue; thence southerly along Garrison avenue to Duvall avenue; thence westerly along Duvall avenue to the western city boundary, and thence northerly to the place of beginning, unless the same is constructed as a separate and unattached building; and if such dwellings are of frame construction they shall be at least twenty feet apart, and if stone or brick construction they shall be at least ten feet apart.<sup>31</sup>

The property in question, which was described within the petition as “fronting two hundred and fifty-nine feet and three inches on the west side of Garrison Avenue between Dalrymple Avenue and Bonner road, and running back an uneven depth of from one hundred feet to one hundred and sixty-seven feet and three inches to a ten foot alley” fell squarely within the boundaries of this act.<sup>32</sup> The petition requested a writ of mandamus compelling Mr. Stubbs to issue the building permit.<sup>33</sup> The arguments outlined in the petition challenged the act as unconstitutional because it prevented the construction of the “kind” of dwelling that they wish to erect even though the company had complied with all of the regulations of the city.<sup>34</sup>

Mr. Nock and Mr. Karr faced a formidable team across the aisle. Mr. Robert Fulton Leach, Jr., the Assistant City Solicitor, an up and coming protégé of Mr. Samuel Summers Field, City Solicitor, answered the petition.<sup>35</sup> Mr. Leach was also a native of

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<sup>30</sup> *Id.*

<sup>31</sup> *Byrne v. Maryland Realty Co.*, 129 Md. 202, 203-04 (1916) (quoting MD LAWS 1912 c. 693 § 1).

<sup>32</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915); *Byrne*, 129 Md. at 204.

<sup>33</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

<sup>34</sup> *Id.*

<sup>35</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Answer of Clarence E. Stubbs.

Maryland. Born in Fairmont, Somerset County, Maryland on March 3, 1873,<sup>36</sup> Mr. Leach studied at Hackettstown Collegiate Academy, New Jersey, the University of Virginia, and the University of Maryland.<sup>37</sup> After being admitted to the bar in 1900,<sup>38</sup> he began his legal career in the offices of former Mayor Thomas G. Hayes and then was a member of the law firm of Baker, Leach and Tucker.<sup>39</sup> After serving as City Solicitor, Mr. Leach served as State's Attorney for Baltimore City from 1920 to 1924.<sup>40</sup>

When Mr. Leach died at the age of 73 on August 28, 1946, his assistant while he was the State's Attorney, J. Bernard Wells, stated; "under his direction, the office reached its pinnacle of efficiency in the prosecution of crime in this city in any time."<sup>41</sup> He further stated that "[h]e set a standard which his successors have tried to emulate."<sup>42</sup> Mr. Leach was known for his skillful cross-examinations and his forceful concluding arguments.<sup>43</sup>

Also representing the City of Baltimore was Mr. Samuel Summers Field. Born in Fauquier, Virginia on December 14, 1864 to Samuel and Sarah Virginia Field, Mr. Field was educated in both private and public county schools in Virginia.<sup>44</sup> He graduated from the Bethel Military Academy in 1883 and then from the University of Virginia with an LL.B. in 1884.<sup>45</sup> Remarkably, Mr. Field completed the degree in law before the age of 19 in only one year.<sup>46</sup>

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<sup>36</sup> *Robert F. Leach Dies in Hospital*, BALT. SUN, August 29, 1946, at 28.

<sup>37</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914).

<sup>38</sup> *Robert F. Leach Dies in Hospital*, BALT. SUN, August 29, 1946, at 28.

<sup>39</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914).

<sup>40</sup> *Robert F. Leach Dies in Hospital*, BALT. SUN, August 29, 1946, at 28.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914).

<sup>45</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914).

<sup>46</sup> *S.S. Field Succumbs to Pneumonia Attack*, BALT. SUN, April 18, 1920, at 16.

After graduating from law school Mr. Field began to practice law only two years later in Baltimore, Maryland.<sup>47</sup> At first, Mr. Field practiced law alone, however, in 1907 he was invited to join the firm of Gill & Preston as a partner with the future mayor of Baltimore.<sup>48</sup> This arrangement continued until Mr. Field appointed to the office of City Solicitor in September of 1911.<sup>49</sup> Mr. Field continued in the position of City Solicitor for eight years.<sup>50</sup> When Mayor Preston left office, the two once again became law partners and formed the firm of Preston & Field.<sup>51</sup> Mr. Field “drafted, fought for and put through the annexation act, and the Greater Baltimore Non-Partisan League, which aided materially to bringing about city extension”<sup>52</sup> and therefore had a stake in the outcome of *Byrne* from the beginning.

Samuel Field, while an immensely successful city solicitor was unsuccessful as a politician.<sup>53</sup> The *American* described him as “too honest and too sincere.”<sup>54</sup> He attempted to gain a seat in Congress in 1902 and in the House of Delegates in 1917 and failed in both attempts.<sup>55</sup> Mr. Field’s interest in entering politics no doubt had an effect on how he handled *Byrne*.

Mr. Field died of heart disease and pneumonia on April 17, 1920.<sup>56</sup> Former mayor and law partner James Preston, in Mr. Field’s obituary complimented Mr. Field by stating that “[h]is loveable but strong character and his splendid ability made him not

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<sup>47</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914); *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at 16.

<sup>48</sup> *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at A14.

<sup>49</sup> DISTINGUISHED MEN OF BALTIMORE AND OF MARYLAND 114 (Baltimore American 1914); *S.S. Field Succumbs to Pneumonia Attack*, BALT. SUN, April 18, 1920, at 16.

<sup>50</sup> *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at A14.

<sup>51</sup> *S.S. Field Succumbs to Pneumonia Attack*, BALT. SUN, April 18, 1920, at 16.

<sup>52</sup> *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at A14.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *S.S. Field Succumbs to Pneumonia Attack*, BALT. SUN, April 18, 1920, at 16

only a beloved personal associate but a striking public figure.”<sup>57</sup> The *American* described Mr. Field’s briefs as “marvels of conciseness.”<sup>58</sup> Furthermore, “lawyers who opposed him admit[ted] he never left a point uncovered.”<sup>59</sup>

Mr. Leach, as lead counsel for the City at the trial level of *Maryland Realty Co. v. Stubbs*<sup>60</sup> chose to rely upon the validity of Chapter 693 in answering the complaint of Maryland Realty Co.<sup>61</sup> Rather than argue that aesthetics were a permissible basis for zoning, Mr. Leach instead demanded proof that the Maryland Realty Company complied with the regulations surrounding the obtaining of a permit to build.<sup>62</sup> Curiously, Mr. Leach appears to have considered arguing directly that aesthetics were a permissible basis for zoning in an earlier draft of the answer.<sup>63</sup> In the earlier annotated draft of the answer, Mr. Leach stated that,

the granting or refusing of said permit, as asked for, involves the question of the construction of a class of improvement which, under all circumstances, would be highly detrimental to one of the largest, most beautiful and artistically developed suburban communities, constituting the suburbs of the City of Baltimore.<sup>64</sup>

The assistant solicitor continued in the draft answer to propose to use a resolution passed by the Forest Park Improvement Association as evidence to underscore this argument that the building restriction was permissible use of the police power to conserve the aesthetics of the community.<sup>65</sup> The resolution of the Forest Park Improvement Association stated that the community’s suburban character, which underpinned its success, was rooted in the prohibition of attached housing and that the invasion of developers with attached

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<sup>57</sup> *Id.*

<sup>58</sup> *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at A14.

<sup>59</sup> *Id.*

<sup>60</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Answer of Complaint.

<sup>61</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Answer of Clarence E. Stubbs.

<sup>62</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Answer of Clarence E. Stubbs.

<sup>63</sup> See Baltimore City Archives, Solicitor’s Files, Number 19323, Draft Answer of Clarence E. Stubbs.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

housing would destroy the character of community.<sup>66</sup> However, in the filed answer, this argument was cut and Mr. Leach put Mr. Nock and Mr. Karr to the test to prove Maryland Realty Company's case challenging the act of the Maryland General Assembly.<sup>67</sup>

The rationale for eliminating this argument from the answer was perhaps due in part to reservations Mr. Leach may have had regarding the case. Years earlier and shortly after the passage of Chapter 693 in 1912, Mr. Field, the city solicitor, asked Mr. Leach to render an opinion on the matter of "the power of the City to limit the character of improvements on private property in certain localities."<sup>68</sup> Mr. Leach's opinion stated that "[t]he city, in my judgment, has no such power as the decisions now stand, if the restriction is attempted to be based upon merely aesthetic considerations."<sup>69</sup> In this opinion letter, Mr. Leach cited *Bostock v. Sams*<sup>70</sup> as evidence that an aesthetic building regulation would be struck down by the Court of Appeals.<sup>71</sup> In *Bostock*, the leaseholder of land on Mt. Royal Avenue planned to build a zoo, which was termed by the opposition as a "continuous circus" which would destroy the character of one of the "most beautiful streets in the city."<sup>72</sup> The court, in that case, ordered the issuance of the building permit stating that:

Without undertaking to quote at large this enumeration of [police] powers granted, it may be affirmed of them that those which are therein contained to authorize the regulation of building within the city look to regulations to guard against dangers to arise from an unsafe construction of buildings, or from constructing them of inflammable materials, or in such manner as might prove

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<sup>66</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Forest Park Improvement Association, June 22, 1915.

<sup>67</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Answer of Clarence E. Stubbs.

<sup>68</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Opinion Letter dated April 14, 1913.

<sup>69</sup> *Id.*

<sup>70</sup> 95 Md. 400 (1902), 52 A. 665 (Md. 1902).

<sup>71</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Opinion Letter dated April 14, 1913.

<sup>72</sup> *Bostock v. Sams*, 52 A. 665, 667 (Md. 1902).

offensive, or deleterious to health or in a way to involve danger to other property or to life or limb. . . . While thus a broad discretion is given the corporation to use the police power, the nature of the power is clearly indicated in the terms and in the connection in which it is granted, and the nature of the objects and purpose for which it is to be used is pointed out. None of these objects or purposes can be subserved by compelling the citizen to conform a building which he may desire to erect to the “general character” of the building which his neighbor may previously have erected, nor to take into consideration whether, however lawful the character of his structure, or the use for which it is intended, may be, its erection will, in the uncontrolled opinion of a designated agency of the corporation, “in any way tend” to depreciate the value of property in an undefined locality.<sup>73</sup>

Following the rationale of the court in *Bostock*, Mr. Leach had good reason to be concerned that the court would not permit the use of *anything* other than health and welfare to bar building in any part of the city.

In the opinion letter, in support of the opposite side of the argument, Mr. Leach cited *2 Dillon*<sup>74</sup> Sec. 695, *Cochran v. Preston*,<sup>75</sup> and *Garrett v. Janes*<sup>76</sup> (referring positively to an ordinance restricting ornamentation upon buildings in Mount Vernon due to its encroachment upon the public sidewalks) as indicating a growing interest in permitting aesthetic ordinances in Baltimore.<sup>77</sup> These sources, however, do not back up Mr. Leach’s argument in *Byrne* in support of aesthetic zoning. In *Cochran* the issue concerned the building of an extra story onto a seventy foot building that would be used to house servants.<sup>78</sup> The case states that “[a]mong the police powers of the state the right to regulate the height of buildings in a city is one that cannot be questioned.”<sup>79</sup> The court continued, though, to state that “purely aesthetic” restrictions upon property rights will

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<sup>73</sup> *Bostock*, 52 A. at 668-69.

<sup>74</sup> John Dillon wrote the foremost treatise on the municipal corporations entitled *Commentaries on the Law of Municipal Corporations* in 1872. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 45 (1999).

<sup>75</sup> 108 Md. 229, 70 A. 113 (Md. 1908).

<sup>76</sup> 65 Md. 260, 3 A. 597 (Md. 1886).

<sup>77</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Opinion Letter dated April 14, 1913.

<sup>78</sup> *Cochran v. Preston*, 70 A. 113, 113-14 (Md. 1908).

<sup>79</sup> *Id.* at 114.

not be tolerated.<sup>80</sup> The court in *Cochran* found that the ordinance was permissible and the builder can be denied the permit to increase the height of his building because of the added fire danger that the extra height would create avoiding basing its holding on aesthetics.<sup>81</sup> The court stated:

We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees that its purpose was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire.<sup>82</sup>

A close look at *Garrett* reveals a weakness in Mr. Leach's arguments in support of aesthetic zoning in *Bryne*. In *Garrett* the plaintiff challenged a city ordinance that proscribed the building of "any porticoes, steps, or any other ornamental structure whatever on Mount Vernon place."<sup>83</sup> While the court does explain Mr. Leach's principle that the aesthetic or harmonization of the neighborhood may be taken into account in the creation of an ordinance, this was not the grounds upon which the court rested its decision.<sup>84</sup> The court stated that:

We see no difficulty in the standing together of a special ordinance adapted to a particular locality, such as Mount Vernon place, and a general one, applicable to the streets and alleys of the city at large. The need of such discrimination is apparent. The necessities of thoroughfares, such as Baltimore or Pratt street, for instance, or of those adjacent to markets or wharves devoted to business, thronged with pedestrians, and of streets and alleys as generally used, are not similar to those of places or squares set apart for ornament and relief from the crowds and activities of commerce. As to the former, facility of passage along the sidewalks is a paramount requirement; while as to the latter it is in furtherance of the purpose to render them attractive,-- to give more freedom to the exercise of private taste for adornment in their vicinity. In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable; and we regard the ordinance allowing steps, porticoes, or any other ornamental

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 114-16.

<sup>82</sup> *Id.*

<sup>83</sup> *Garrett v. Janes*, 3 A. 597, 598 (Md. 1886).

<sup>84</sup> *Id.* at 601-02, 603.

structures to extend nine feet into Mount Vernon place a valid and reasonable exercise of statutory power . . .<sup>85</sup>

The court appeared to have based its decision upon the proposition that the rights of the property owner may not be infringed unless the infringement is based upon some commercial necessity.<sup>86</sup> Aesthetics do not appear to be a valid rationale for the reduction of property rights in this instance.

In preparing for *Byrne v. Maryland Realty Co.*, Mr. Leach, according to his notes in solicitor's file, based his research and his memoranda upon the power of the state to control the use of property for the "welfare of the community."<sup>87</sup> Mr. Leach, unable to rely upon yet to be decided case *Euclid v. Ambler Realty Co.*,<sup>88</sup> had to rely upon earlier and perhaps less direct case law to demonstrate that zoning, specifically aesthetic zoning was a legitimate police power of the state. As a result, his notes focused upon cases such as *Bacon v. Walker*,<sup>89</sup> which pronounced that "[t]he police power embraces regulations designed to promote the *public convenience or the general prosperity* as well as regulations designed to promote the public health, morals or safety."<sup>90</sup> Mr. Leach was forced into arguing the opposite proposition than that he had encouraged in his opinion letter two years earlier. However, in his memoranda regarding his preparation for *Byrne* he indicated that his arguments in court would be focused on encouraging a broad

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<sup>85</sup> *Id.* at 600.

<sup>86</sup> *Id.* at 602-03 ("The damage suffered is that incident to residing in a city where houses are necessarily close together, and the legitimate use of his property by a neighbor will unavoidably often cause discomfort, and where he, in turn, will suffer inconvenience from the same cause. It often occurs that it would be more agreeable if next door there were not a tree or an awning or a signboard to obstruct the light; but were such obstructions rightfully exist, they afford no ground for legal redress.")

<sup>87</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Memorandum in Preparation for *Byrne*.

<sup>88</sup> 272 U.S. 365 (1926) (upheld the constitutionality of zoning in general).

<sup>89</sup> 204 U.S. 311 (1907).

<sup>90</sup> *Bacon v. Walker*, 204 U.S. 311, 317 (1907), *quoted in* Baltimore City Archives, Solicitor's Files, Number 19323, Memorandum Regarding *Byrne* Preparation (emphasis added).

interpretation of the police powers.<sup>91</sup> The broader the interpretation of the police powers the more likely the protection of convenience and prosperity, not only health and welfare, that “all great needs” could be reached.<sup>92</sup>

In an attempt to bolster his arguments, Mr. Leach even goes so far as to delve into the legislation passed in other states such as Michigan, New York, Wisconsin, Minnesota, and Illinois in an attempt to gather support for aesthetic based city planning ordinances.<sup>93</sup> The legislation of these states at the time took expansive steps to restrict building in areas based not only for health and welfare but also for presumptively aesthetic reasons.<sup>94</sup>

The pressure upon the solicitor’s office throughout this case must have been intense. First, the community was very vocal regarding the perceived destruction of their suburban enclave. The community sent the solicitor’s office letters expressing its concern. Three examples come from the Women’s Civic League, the Garrison Boulevard Improvement Association, and the Forest Park Improvement Association.<sup>95</sup> The community also lobbied the Mayor’s office regarding their concerns. Notably, the Mayor’s office appears to have received inquiries from the Garrison Improvement Association.<sup>96</sup> Furthermore, to underscore their letters to the solicitor’s office, both the Garrison Boulevard Improvement Association and the Forest Park Improvement Associations passed resolutions in response to the filing of the case by the Maryland Realty Company (on June 29, 1915 and June 22, 1915, respectively) and sent copies of

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<sup>91</sup> See Baltimore City Archives, Solicitor’s Files, Number 19323, Memorandum in Preparation for *Byrne*.

<sup>92</sup> See *id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *id.*

<sup>95</sup> See Baltimore City Archives, Solicitor’s Files, Number 19323.

<sup>96</sup> See *id.*

these resolutions to the solicitor's office.<sup>97</sup> These resolutions refer to the benefits of "architectural symmetry and harmony" as well as the sanitation in separate housing.<sup>98</sup>

Second, the solicitor's office and the mayor's office had closer ties than simple business. Mr. Field and Mayor Preston were law partners.<sup>99</sup> This most likely placed more pressure upon Mr. Field to secure the results that Mayor Preston needed to please his constituents.

*b. The Trial.*

The trial of *Byrne v. Maryland Realty Co.* was conducted before Judge James Murray Ambler who, similar to Mr. Field, Judge Amber was a Virginia native.<sup>100</sup> He was first educated at William and Mary College and then for two years at University of Virginia.<sup>101</sup> After teaching for seven years he entered study of law.<sup>102</sup> Judge Ambler was admitted to the Baltimore Bar and the Richmond Bar in 1881.<sup>103</sup> He was employed first as a junior associate by the law firm of Barton & Wilmer, which later promoted him to a named partner and changed its name to Barton, Wilmer, Ambler & Stewart.<sup>104</sup>

While Judge Ambler's credentials indicate that he was a competent and well-liked attorney, he was a relatively recent addition to the bench when this case came before him

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<sup>97</sup> *See id.*

<sup>98</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Forest Park Improvement Association, June 22, 1915.

<sup>99</sup> *S.S. Field Dies Suddenly at Home*, BALT. AMERICAN, April 18, 1920, at A14; and *S.S. Field Succumbs to Pneumonia Attack*, BALT. SUN, April 18, 1920, at 16.

<sup>100</sup> MARYLAND STATE BAR ASS'N, REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29 AND 30, 1934 50 (1934).

<sup>101</sup> *Id.*

<sup>102</sup> *Former Judge J.M. Amber Dies After Weeks Illness*, BALT. SUN, April 8, 1934, at 16.

<sup>103</sup> MARYLAND STATE BAR ASS'N, REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29 AND 30, 1934 50 (1934).

<sup>104</sup> MARYLAND STATE BAR ASS'N, REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29 AND 30, 1934 50 (1934); *Former Judge J.M. Amber Dies After Weeks Illness*, BALT. SUN, April 9, 1934, at 16.

December 20, 1915.<sup>105</sup> Appointed to the Supreme Bench of Baltimore on January 3, 1912<sup>106</sup> by Governor Crothers and subsequently elected for a term of fifteen years in 1913,<sup>107</sup> Judge Ambler had not been on the bench more than two years when *Byrne v. Maryland Realty Co.* (at the time titled *Maryland Realty Co. v. Stubbs*<sup>108</sup>) which held the power to alter the course of building in Baltimore, came before him.

At trial, eighteen witnesses were called,<sup>109</sup> including the architect and builder for Maryland Realty Co., Mr. Stanislaus Russell, the Vice President of Maryland Realty Co., Mr. Harwell W. Thomas, local residents including Mrs. Charles W. Shaw, Mr. William T. Howard (a physician), and Mr. George W. Horton (retired chief of the Baltimore City Fire Department).<sup>110</sup> The strategy of Maryland Realty Co., apparent from its witness, was to argue that the city did not have the power to prevent the construction of the row homes as well as to demonstrate that they had successfully designed row homes that would not interfere with the “harmony” of the neighborhood. On the other side of the aisle, the city brought forth witnesses to demonstrate that the buildings would be an eye sore and would be a threat both to the safety of their occupant but also to the health of the community.

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<sup>105</sup> See *Former Judge J.M. Amber Dies After Weeks Illness*, BALT. SUN, April 9, 1934, at 16; and Baltimore City Archives, Solicitor’s Files, Number 19323, Transcript of Case, 1. When Judge Ambler passed on April 8, 1934 his practice was described as being “more that of a counselor than that of an advocate.” *Former Judge J.M. Amber Dies After Weeks Illness*, BALT. SUN, April 9, 1934, at 16; and MARYLAND STATE BAR ASS’N, REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29 AND 30, 1934 50 (1934). He mainly drafted documents, associated with finances and the organization of corporations, and handled estates than found himself arguing in court. REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29, 30, 1934 51 (1934).

<sup>106</sup> *Former Judge J.M. Amber Dies After Weeks Illness*, BALT. SUN, April 9, 1934, at 16.

<sup>107</sup> MARYLAND STATE BAR ASS’N, REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT HOTEL AMBASSADOR, ATLANTIC CITY, N.J. JUNE 28, 29 AND 30, 1934 50 (1934).

<sup>108</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Transcript of Case, 1-2.

<sup>109</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Transcript of Case, Index of Witnesses.

<sup>110</sup> *Id.*

The case appears to have gone according to plan for Mr. Leach as he called the residents of the area and members of the improvement associations to the stand. One statement suffices to give the tenor of all of the community member's testimony as they were trotted in front of the court one by one. Reverend George W. Haddaway, the minister of a church approximately five blocks away, stated that "[t]he entire neighborhood has grown up as a cottage neighborhood and each man tries to outdo the other with the attractive quality of the house and there are no other apartment style houses in the area." . . . "I should dislike *any man* to build a house of that character anywhere near my church property."<sup>111</sup>

On the other hand, the assistant solicitor found himself in trouble when he called the retired fire chief of the city of Baltimore to presumably to demonstrate that rowhomes were a fire hazard and perhaps avoid arguing solely on the basis of aesthetics, which Mr. Leach appeared to believe was a weak argument at best. Mr. Horton testified that brick houses were less likely to catch fire than frame houses and that fighting fires in rowhomes was no more difficult than in detached houses.<sup>112</sup> In fact, the fact finder may have been given the impression that fighting a rowhome fire was easier than fighting a separate house fire because, Mr. Horton, testified that he has fought these fires from the shelter of an adjoining building by breaking through the wall of the rowhome next door.<sup>113</sup>

To support his arguments that health and sanitation were a reason for the exclusion of rowhomes in the area of Forest Park, Mr. Leach called, as a witness, Dr.

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<sup>111</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Transcript of Case, 80-81,85 (emphasis in the original).

<sup>112</sup> *Id.* at 41-46.

<sup>113</sup> *Id.* at 46-47.

Willaim T. Howard.<sup>114</sup> This former teacher of bacteriology and hygiene at Western Reserve University in Cleveland, Ohio and specialist in sanitary and health conditions<sup>115</sup> testified that disease was easier to control in homes, which were built apart because the reduced transmission of disease.<sup>116</sup> Furthermore, he testified that closely spaced homes held higher mortality and disease rates than widely spaced homes.<sup>117</sup>

The court was not persuaded by Mr. Leach's arguments and asked "I am not bound to suppose that a suburbanite claims more rights and privileges than other people do or that he has any claim to a deeper feeling or higher sentiment than the poor unfortunate that has to live in a house in town, am I?"<sup>118</sup> In an attempt to sway the court, which appears to have failed, Mr. Leach responded by stating; "No, sir. He is not entitled to any more except when somebody comes out to bother him in his territory."<sup>119</sup>

The court ordered the issuance of a Writ of Mandamus for the Inspector of Buildings to provide Maryland Realty Company with a permit to build rowhomes on the disputed plot on December 31, 1915.<sup>120</sup>

However, on December 22, 1915, after prevailing in the Court of Common Pleas, the firm of Benson & Karr, apparently confident in their case (or interested in winning an opinion of record), offered to pay the costs of the Solicitor's Office if Mr. Leach was willing to prosecute an appeal to the Maryland Court of Appeals.<sup>121</sup> This must have been

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<sup>114</sup> See *id.* at 192.

<sup>115</sup> *Id.* at 193.

<sup>116</sup> *Id.* at 194-199.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 145-46.

<sup>119</sup> *Id.*

<sup>120</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Request for Appeal filed with Court of Common Pleas.

<sup>121</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Letter from Benson & Karr to Robert F. Leach dated December 22, 1915; Baltimore City Archives, Solicitor's Files, Number 19323, Request for Appeal filed with Court of Common Pleas.

too tempting to Mr. Leach to turn down because the City filed a request for an appeal in January of 1916.<sup>122</sup>

## 2. *Court of Appeals.*

### a. *The Briefs.*

On appeal the city raised three rationales as to why the ordinance prohibiting row homes in Forest Park was permissible. First, the city argued that it was a permissible use of the state's police power to regulate building by virtue of aesthetics.<sup>123</sup> Second, the city argued that it was a permissible use of the state's police power to protect the property values of the residents of Forest Park.<sup>124</sup> Third, the city argued that it was a permissible use of the state's police power to protect the health and welfare of the citizens of Forest Park by prohibiting row homes.<sup>125</sup>

Under the aesthetic argument, the city argues that the "high-class frame cottage suburb" should not be invaded by this variety of building.<sup>126</sup> From the outset, the solicitors, on behalf of the city, argued that the neighborhood should remain a cottage suburb and that buildings should be constructed that harmonize with the neighborhood.<sup>127</sup> The new Enoch Pratt Library branch built across the street from where these proposed rowhomes would be built was offered as an example of how buildings should be designed to harmonize with the neighborhood.<sup>128</sup>

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<sup>122</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Request for Appeal filed with Court of Common Pleas.

<sup>123</sup> See Appellant's Brief, *Byrne*.

<sup>124</sup> See Appellant's Brief, *Byrne*.

<sup>125</sup> See Appellant's Brief, *Byrne*.

<sup>126</sup> Appellant's Brief at 1-2, *Byrne*.

<sup>127</sup> *Id.* at 2.

<sup>128</sup> *Id.*

The city based its argument that the building restrictions outlined in Chapter 693 were valid on the Maryland Court of Appeals' earlier ruling in *Cochran v. Preston*.<sup>129</sup> The city pointed to this case as demonstrating a trend towards the use of aesthetics as a sole pillar upon which police power can be founded and, therefore, the appellants argued that the Maryland Realty Company should not be permitted "exploit opportunities at the expense of the whole community."<sup>130</sup> Mr. Field and Mr. Leach quoted *Cochran*:

. . . it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction under some circumstances to the exercise of this power, even for such purposes.<sup>131</sup>

Next, the city argued that depreciation of property values is a sufficient basis for the exercise of police power by the state.<sup>132</sup> Here the appellants ground their argument in the valid use of police power to improve the "common good" of the population.<sup>133</sup>

Finally, the city argued that the reduction in the risk of fire and the improvement in the health associated with the building of detached houses as opposed to rowhomes justified Chapter 693.<sup>134</sup> Citing the testimony of Dr. Howard, the appellants argued that the threat to the health of the public is sufficient to uphold the ordinance against rowhomes.<sup>135</sup>

Mr. Nock and Mr. Karr for the Maryland Realty Company responded to the arguments of the City Solicitors each in turn. First, Maryland Realty Co. responded to the aesthetic argument that the buildings would not harmonize with the locale by arguing

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<sup>129</sup> 108 Md. 220 (1908).

<sup>130</sup> Appellant's Brief at 10-11, *Byrne*.

<sup>131</sup> *Id.* at 10 (quoting *Cochran v. Preston*, 108 Md. 229, 229 (1908)).

<sup>132</sup> *Id.* at 16.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 17.

<sup>135</sup> *Id.*; *Supra* notes 110-112.

that the proposed rowhomes would not be the only brick buildings in the neighborhood.<sup>136</sup> The appellees pointed to photographs entered into evidence in the Court of Common Pleas as showing that there were already similar brick homes within fifty feet of Garrison Avenue.<sup>137</sup> Since the homes Maryland Realty Co. proposed to build were not significantly different they argued that they would not disrupt the aesthetics of or the harmony of the community.

Second, Maryland Realty Co. exposed the slant that the city placed upon *Cochran* and *Bostock*. By relying upon the same cases, Maryland Realty Co. demonstrated the weakness of the city's position.<sup>138</sup> The appellee's brief brought to the court's attention that the Court of Appeals has never permitted an act to stand when its sole ground is aesthetics and "contains no suggestion that it was intended to provide for the public safety, nor to safe-guard the health or morals of the community, nor to preserve public order, nor in any way to be promotive of any object which calls for the exercise of the police power."<sup>139</sup>

Third, Maryland Realty Co. pointed to the testimony of retired Fire Chief Horton, as evidencing that there was no increased threat of fire from the building of rowhomes soundly undermining the appellant's argument that the row homes were unsafe.<sup>140</sup>

*b. The Decision.*

Judge Burke, the author of the majority opinion, and the court did not accept the arguments of the Mr. Field and Mr. Leach. In affirming the decision of the Court of Common Pleas, Judge Burke stated that:

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<sup>136</sup> See Appellee's Brief, *Byrne v. Maryland Realty Co.*, 129 Md. 202 (1916).

<sup>137</sup> Appellee's Brief at 3, *Byrne v. Maryland Realty Co.*, 129 Md. 202 (1916).

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.* (quoting *Bostock v. Sams*, 95 Md. 400 (1902)).

<sup>140</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Transcript of Case, 41-46.

It does not follow that because a statute has been enacted for the ostensible purpose of guarding the safety, health, comfort, or promoting the general welfare, it must be accepted as a proper exercise of the police power of the state; nor can a statute which is, in fact, a proper exercise of such power be declared void merely because it results in circumscribing limits of individual conduct to narrower bounds. Necessarily there are limits beyond which legislation cannot constitutionally go in depriving individuals of their natural rights and liberties. . . . The courts of this country have, with great unanimity, held that the police power cannot interfere with private property rights for purely aesthetic purposes.<sup>141</sup>

Relying upon the weight of cases in Maryland and other jurisdictions the court determined that it is a forgone conclusion that restricting building based upon aesthetics alone is not constitutional.<sup>142</sup>

### C. This a Case of the Overreach of Aesthetics:

#### *1. Aesthetics.*

On the heels of the Victorian Era of opulence in homebuilding, the “minimal house,”<sup>143</sup> and the trend of suburbanization,<sup>144</sup> came the belief that aesthetics of the community were of greater importance. Therefore, the aesthetic argument of Maryland Realty Company became the most obvious reason for the blocking of the original building permit and consequently why Maryland Realty fought for a mandamus.

#### *a. The case materials.*

Rather than discriminatory reasons, the case materials openly point only to the aesthetics of the structures and, to a smaller extent, to the health and safety issues that surround the rowhouse when compared to freestanding structures.<sup>145</sup>

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<sup>141</sup> *Byrne v. Maryland Realty Co.*, 129 Md. 202, 210-11 (1916) (quoting *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436 (1911)).

<sup>142</sup> *Id.* at 211-14.

<sup>143</sup> GWENDOLYN WRIGHT, *MORALISM AND THE MODEL HOME: DOMESTIC ARCHITECTURE AND CULTURAL CONFLICT IN CHICAGO, 1873-1913* 231-53 (1980) (Ms. Wright describes the movement towards simplicity and efficiency in the American home during this era.).

<sup>144</sup> *See generally* ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 3-17, 116-25 (1987).

<sup>145</sup> *See* Baltimore City Archives, Solicitor’s Files, Number 19323.

*i. The Pleadings and Briefs.*

The city, through Mr. Field and Mr. Leach, focused heavily upon the aesthetics of the buildings and the lack of symmetry and harmony in neighborhood that would be produced by granting permission to build rowhomes in Forest Park.<sup>146</sup> In the original draft of the answer, Mr. Leach directly indicates that the production of rowhomes would degrade the character of the neighborhood by breaking up the view of the neighborhood especially upon the main thoroughfare of Garrison Avenue.<sup>147</sup>

By calling to the witness stand multiple photographers and architects, the solicitor and company attempted to convey that rowhomes would bring an eyesore to the neighborhood when compared with the cottage homes that made up the bulk of the housing stock.<sup>148</sup> The solicitors further attempted to support this theory by entering photographs of the neighborhood into evidence that showed not only the homes of the neighborhood but also the wide thoroughfares and open spaces in the community.<sup>149</sup>

The rigorous attempts to retain a certain look for the community even invaded the design decisions of public buildings in the area. The solicitor entered into evidence a group of photos demonstrating the cottage character of the community.<sup>150</sup> Photograph after photograph showed blocks of neat frame homes with ample space between them.<sup>151</sup>

Looking at the photographs alone, it is not difficult to realize how out of place the semi-

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<sup>146</sup> Appellant's Brief at 2, *Byrne*.

<sup>147</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Draft Answer of Clarence E. Stubbs.

<sup>148</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Transcript of Case, Index of Witnesses; Baltimore City Archives, Solicitor's Files, Number 19323, Photographs; *See also* Appellant's Brief (Included Photos), *Byrne*.

<sup>149</sup> *See* Baltimore City Archives, Solicitor's Files, Number 19323, Photographs; *See also* Appellant's Brief (Included Photos), *Byrne*.

<sup>150</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Photographs, Numbers 1-18.

<sup>151</sup> *Id.*

detached housing would be once built.<sup>152</sup> The city evidenced the attention the city paid to designing buildings that matched the community by calling attention to the new Enoch Pratt Library branch built at the cost of \$25,000.<sup>153</sup> The library was designed to mesh well with the neighborhood and was situated across the street from the proposed building site for Maryland Realty Company's new rowhomes.<sup>154</sup> The record indicates that the city was solely interested in preventing the look of the cottage suburb from being disturbed by the more urban look of rowhomes.<sup>155</sup> In order to underscore this argument the solicitor made certain to enter a photograph of the library into the record demonstrating the harmony which the design of the library kept with the remainder neighborhood.<sup>156</sup>

Considering the solicitor's preparations even further, the memoranda written by Assistant Solicitor Leach in preparation for the *Byrne* indicated that the city was increasingly interested in being able to restrict building according to aesthetics.<sup>157</sup> Even though the case law did not support the city's interest, the city still argued that aesthetics should be a permissible use of the police power of the city. The city's reliance upon *Cochran* and *Bostock* as well as other cases in order to support this argument was faulty.<sup>158</sup>

*ii. Letters and Resolutions.*

The community spoke out about the plan to build rowhomes in their neighborhood. Both the Garrison Boulevard Improvement Association and the Forest

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<sup>152</sup> *Id.*

<sup>153</sup> Appellant's Brief at 2, *Byrne*.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Envelope of Photos, Photo Number 9.

<sup>157</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Memorandum in Preparation for *Byrne*.

<sup>158</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Opinion Letter dated April 14, 1913; *See supra* text accompanying notes 68-86.

Park Improvement Association, passed resolutions during the trial, expressing their disapproval of the building of rowhomes in their neighborhood.<sup>159</sup> These resolutions indicated that the communities believed that the beauty of the neighborhood would be diminished through the building of these rowhomes.<sup>160</sup>

The Garrison Boulevard Improvement Association stated in its resolution:

[w]hereas said Act of 1912 was passed for the purpose of preserving the artistic beauty and symmetry of development of the property covered by said Act as also for the purpose of protecting the frame cottages constructed upon said territory from fire risk as much as possible; also because of the lack of sewer facilities for the purpose of handling the sewage upon the territory closely built upon and further to prevent great financial loss to the individual property owners as also loss to the City's taxable basis, which would be occasioned by the erection in this cottage neighborhood of the type of two story properties before mentioned.<sup>161</sup>

The resolution continued to note that the city had grown to a point where it valued education and fine arts and therefore should, and should be permitted to, work towards shaping its future growth in a way that supports these values.<sup>162</sup> In support of this proposition, the resolution quoted the dicta of *Cochran v. Preston* which stated that:

it may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances to the exercise of this power even for such purposes.<sup>163</sup>

In quoting *Cochran*, however, the resolution failed to acknowledge the true holding of the case by failing to relate the beginning of the court's statement and the context. The resolution conveniently left out that: "Regulations, which are designed only to enforce

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<sup>159</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Garrison Boulevard Improvement Association, June 29, 1915; Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Forrest Park Improvement Association, June 22, 1915.

<sup>160</sup> *Id.*

<sup>161</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Garrison Boulevard Improvement Association, June 29, 1915.

<sup>162</sup> *Id.*

<sup>163</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Garrison Boulevard Improvement Association, June 29, 1915; *Also* *Cochran v. Preston*, 70 A. 113, 114 (Md. 1908).

upon the people the legislative conception of artistic beauty and symmetry, will not be sustained, however much such regulations may be needed for the artistic education of the people.”<sup>164</sup> The statement continues “[s]uch is undoubtedly the weight of authority, though it may be that . . .”<sup>165</sup> Thus, while the resolution uses *Cochran* to argue that the city already has the police power to restrict building for aesthetic harmony in the furtherance of the values of the community, *Cochran* actually does not support this argument. The Forest Park Improvement Association resolution is flawed for the same reasons.<sup>166</sup>

These resolutions were sent to the solicitor’s office for Mr. Leach to review and to, no doubt, convey the views of the community to the office. Most notably their focus, as well, was only upon the aesthetics of the neighborhood and not upon any other concern that may be associated with rowhomes.

*b. The Design Element.*

Closely associated with the resolutions presented by the Garrison Boulevard Improvement Association and the Forest Park Improvement Association to the solicitor’s office is the concept that the design of the rowhomes led to the uproar over the introduction of rowhomes in Forest Park. Perhaps the community did not have a concern associated with the building of rowhomes by Maryland Realty Company but that the community took issue with the type and style of the rowhome that Maryland Realty Company planned to produce.

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<sup>164</sup> *Cochran v. Preston*, 70 A. 113, 114 (Md. 1908).

<sup>165</sup> *Id.*

<sup>166</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Resolution of the Forest Park Improvement Association, June 22, 1915.

Ms. Mary Ellen Hayward and Mr. Charles Belfoure in *The Baltimore Rowhome*, through a discussion of the evolution of the aesthetic and design of the rowhome state emphatically that come 1915 the in vogue rowhome design was the “daylight house.”<sup>167</sup> Wider than its predecessors at between 20 and 21 feet compared to 12-16 feet, the Daylight house was designed to permit homes to be two rooms wide and two rooms deep with windows in each of the rooms.<sup>168</sup> This was an extremely attractive advance from the previous rowhouses, which usually had a room in the center of each floor which remained dark.<sup>169</sup>

The community may also have approved of the development if the homes were built in the English style, another fashionable style being developed at the same time.<sup>170</sup> English style rowhomes were designed to look like attached English cottages with “Tudor half-timbering with elegant Flemish bond, herringbone, and diaper-pattern brickwork using glazed headers.”<sup>171</sup>

According to Maryland Realty Company’s petition to the Court of Common Pleas, the company proposed building “fourteen semi-detached two-story, slag roof, brick dwellings” on a parcel that would front on 259 feet of Garrison Avenue.<sup>172</sup> The homes would only have been slightly over eighteen feet wide. This description provided by the Maryland Realty Company was not consistent with description of the high style

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<sup>167</sup> MARY ELLEN HAYWARD & CHARLES BELFOURE, *THE BALTIMORE ROWHOUSE* 130, 133-35 (1999).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Baltimore City Archives, Solicitor’s Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

rowhomes of the time and, therefore, would not only frustrate the cottage community plan but also be out of style from the moment they were built.<sup>173</sup>

*c. Suburban growth.*

The suburb developed in response to the growth of automobile use and the street car lines development which permitted individuals to live miles from where they worked.<sup>174</sup> Furthermore, the compressed nature of cities encouraged the belief that cities caused disease further encouraging suburban growth.<sup>175</sup> As expressed by Robert Fishman in *Bourgeois Utopias*,<sup>176</sup> the suburb was a middle class invention, combined with the concept of the austere Victorian home expressed by Gwendolyn Wright in *Moralism and the Model Home*,<sup>177</sup> it may be argued that those that moved to Forest Park sought a utopian society which they believed only a cottage community could bring.

With the introduction of these rowhomes, the city was following the citizens out to the suburbs where they had attempted to escape city life. Therefore, it is reasonable to argue that they citizens of Forest Park were fighting against the destruction of their chosen lifestyle.

*d. Similar ordinances.*

The attempts to constrain building in Forest Park were not unique to the area. The city had successfully protected aesthetic interests by constrained building in other areas

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<sup>173</sup> MARY ELLEN HAYWARD & CHARLES BELFOURE, *THE BALTIMORE ROWHOUSE* 151 (1999); Baltimore City Archives, Solicitor's Files, Number 19323, Copy of Petition of Maryland Realty Company v. Clarence E. Stubbs (1915).

<sup>174</sup> *See generally* SHERRY H. OLSON, *BALTIMORE: THE BUILDING OF AN AMERICAN CITY* 266-73 (Expanded Bicentennial Ed. 1997); GWENDOLYN WRIGHT, *BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA* (1983); ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 4, 23 (1987); GWENDOLYN WRIGHT, *MORALISM AND THE MODERN HOME: DOMESTIC ARCHITECTURE AND CULTURAL CONFLICT IN CHICAGO 1873-1913* (1980).

<sup>175</sup> *See generally id.*

<sup>176</sup> ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 4, 134 (1987).

<sup>177</sup> *See* GWENDOLYN WRIGHT, *MORALISM AND THE MODERN HOME: DOMESTIC ARCHITECTURE AND CULTURAL CONFLICT IN CHICAGO 1873-1913* (1980).

basing its regulations upon the health and welfare of the public. The best example of a successful regulation in Baltimore was the height restriction placed upon buildings in Mount Vernon, upheld in *Cochran*, which was discussed above.<sup>178</sup> On its face, the ordinance passed by Baltimore to prevent the building of apartment homes over a certain height in Mount Vernon prompted by the threat of fire.<sup>179</sup> Nevertheless, the ordinance also allowed for the grand scale of the Washington Monument to be protected and for light to be permitted access to Mount Vernon.<sup>180</sup> As such, the ordinance protected the aesthetics of the neighborhood as well as reducing the potential for fire damage.

Similarly, in *Garrett* a city ordinance was upheld regulating how far out into the sidewalk stoops could project.<sup>181</sup> The stated purpose of the ordinance was to keep the walkways clear for pedestrians.<sup>182</sup> But, an undercurrent of protecting the style of the neighborhood may be detectable because even though the ordinance was upheld the court permitted the construction of the building that brought the case to trial stating that it fell within the ordinance's acceptable limit.<sup>183</sup>

## 2. *Discrimination.*

The spread of the immigrant population in Baltimore was perceived as a threat to the style of life and of the well-heeled founders of the suburban community of Forest Park. While the buildings proposed by the Maryland Realty Company would not have fit into the community's overall aesthetic, another reason the citizens of Forest Park may have fought the proposed buildings could have been the fear that the immigrant Jewish

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<sup>178</sup> *Cochran v. Preston*, 70 A. 113, 114-16 (Md. 1908).

<sup>179</sup> *Id.*

<sup>180</sup> Appellant's Brief at 10, *Byrne* (quoting *Cochran v. Preston*, 108 Md. 229, 229 (1908)).

<sup>181</sup> *Garrett v. Janes*, 3 A. 597, 598 (Md. 1886).

<sup>182</sup> *Id.* at 600.

<sup>183</sup> *Id.* 600-02.

population might purchase and inhabit the less expensive rowhomes that were built by the realty company.

*a. The Growing Immigrant Population in Baltimore.*

In Baltimore, the general sentiment amongst the population was that the Russian Jewish population was second class to the German Jewish population that had helped to build the city of Baltimore.<sup>184</sup> The popular view was that the German Jewish merchants had helped Baltimore become an industrial leader.<sup>185</sup> While at the same time the Russian Jewish population, which was generally less affluent and skilled, was perceived as a threat to high-class neighborhoods and as a cheap source of labor supplanting the American born laborers.<sup>186</sup>

As a result of this view, the Russian Jewish immigrant population, confined and quickly outgrowing East Baltimore, looked northwest for space to expand its community.<sup>187</sup> The Jewish population transplanted itself in waves, first by moving to the Forest Park area in 1920, directly after the favorable decision by the Court of Appeals for the Maryland Realty Company, and later further northwest to the areas of Pikesville and Randallstown as their numbers outgrew its community again.<sup>188</sup>

The Jewish population relocated to these areas for several reasons. First these areas had no “gentlemen’s agreements” or restrictive covenants excluding individuals of Jewish descent.<sup>189</sup> Second, the Jewish population wanted to escape the “crowded

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<sup>184</sup> SHERRY H. OLSON, *BALTIMORE: THE BUILDING OF AN AMERICAN CITY* 279 (Expanded Bicentennial Edition, 1997).

<sup>185</sup> *Id.* at 279-85.

<sup>186</sup> *Id.*

<sup>187</sup> *Jewish Baltimore: The Story of a People and a City*, *BALT. NEWS AMERICAN*, January 29, 1979, at 1A.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

tenements of east Baltimore.”<sup>190</sup> Lastly, by moving to an area that could accommodate the entire community in the areas of northwest Baltimore made it possible to have institutions and businesses tailored to Jewish culture.<sup>191</sup>

*b. Similar building restrictions in other communities are facially discriminatory.*

While no covenants can be located regarding Forest Park and the area in dispute in this case, other wealthy suburbs of Baltimore did possess covenants that restricted the sale and occupancy of homes to individuals who were not of Jewish descent.<sup>192</sup> The two neighborhoods of Ashburton and West Forest Park exemplified this type of exclusion.<sup>193</sup> These communities drafted their restrictive covenants against the sale to Jewish individuals as early as 1927.<sup>194</sup>

*c. Problem - Nothing in the case or the community indicated discrimination on its face.*

Discrimination was not a factor in the attempt to restrict the building of rowhomes in Forest Park because nothing in the case or the expressed views of the community indicated discrimination. Even though it was commonplace and no stigma was assigned to the writers of restrictive covenants to property at the time, no such restrictions were added in the Forest Park area.<sup>195</sup> Furthermore, no statements made in private correspondence by the concerned citizen’s organizations of Forest Park such as the

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (For example, the concentration of the Jewish population made it possible for kosher butchers to stay in business and for synagogues to be formed.)

<sup>192</sup> SHERRY H. OLSON, *BALTIMORE: THE BUILDING OF AN AMERICAN CITY* 281 (Expanded Bicentennial Edition, 1997).

<sup>193</sup> Garrett Power, *The Residential Segregation of Baltimore’s Jews: Restrictive Covenants or Gentlemen’s Agreement*, Fall 1996 *GENERATIONS* 5, 5-6 and n.18 (1996).

<sup>194</sup> *Id.*

<sup>195</sup> See *Jewish Baltimore: The Story of a People and a City*, *BALT. NEWS AMERICAN*, January 29, 1979, at 1A.

Garrison Boulevard Improvement Association,<sup>196</sup> the Women's Civic League,<sup>197</sup> or the Forest Park Improvement Association<sup>198</sup> indicate discrimination as a rationale for the prohibition of rowhomes. These sources only indicate that the community had aesthetic dislike of the buildings.

If discrimination were a significant motive behind the case, it would only be natural for someone in the community to have voiced this concern to someone especially in a personal letter to the solicitor. This a glaring omission because making such statements lacked any stigma evidenced by the openly added restrictive covenants added to deeds filed with the city.

*d. The 1930 Census.*

While it may not be identifiable within the case or within the statements of the members of the community, the 1930 United States Census provides some basis and some contrary evidence for the discrimination argument.

According to the census enumeration district map, the rowhomes in question in *Byrne* were planned for the east side of block 254, this is the west side of Garrison Boulevard between Bonner Road and Dalrymple Avenue.<sup>199</sup> This stretch of Garrison Boulevard was coded as the 3100 block.<sup>200</sup> In 1930 seven families (a total of nineteen individuals) lived in the six homes built on this block of Garrison.<sup>201</sup> The families were

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<sup>196</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution of the Garrison Boulevard Improvement Association, June 29, 1915.

<sup>197</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Letter from Ms. James to Mr. Leach.

<sup>198</sup> Baltimore City Archives, Solicitor's Files, Number 19323, Resolution Unanimously Adopted by the Forest Park Improvement Association, June 22, 1915.

<sup>199</sup> *Byrne*, 129 Md. at 204; Department of Commerce – Bureau of the Census, Fifteenth Census of the United States: 1930, Population Schedule, Enumeration District Map.

<sup>200</sup> Department of Commerce – Bureau of the Census, Fifteenth Census of the United States: 1930, Maryland, Baltimore City, Population Schedule, Enumeration District Map.

<sup>201</sup> Department of Commerce – Bureau of the Census, Fifteenth Census of the United States: 1930, Maryland, Baltimore City, Population Schedule, Enumeration District 4-609, Sheet 4a.

the Miller's, Johnson's, Roman's, Mahoney's, Honso's, Knapp's, and McComb's; and out of this group only Ms. Sarah Miller was born outside of the United States and spoke a language other than English.<sup>202</sup> Furthermore, only one individual was from Russia and a total of only three had Russian parents and one further had German parentage.<sup>203</sup> The remainder of residents on Garrison Boulevard's 3100 block was an assortment of individuals from Washington, D.C., Pennsylvania, and Maryland with parents from other areas of the United States.<sup>204</sup> This undercuts the possible argument that the citizens of Forest Park opposed the building of rowhomes on a discriminatory basis based upon ethnicity because it demonstrates that after the homes were built there was still no influx of the perceived undesirable inhabitants.

It is further possible to use home ownership as an indicator of wealth and therefore gain an idea of how the property values may have fared. Out of the six homes, four rented and two owned their property.<sup>205</sup> This lends credence to the argument that the building of rowhomes led to the reduction of property values. However, it is also possible to argue that the reason for the properties remaining rental units was due to the likely high price of the property on the main thoroughfare through Forest Park.

Finally, examining the professions of the individuals who moved onto the 3100 block of Garrison Boulevard may help to provide a window into the type of businesses that were represented in these new buildings in this affluent neighborhood. There were two secretaries, one stock boy, an electrician, a safe deposit worker, and a cafeteria

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

manager.<sup>206</sup> Furthermore, Mr. McComb lived at 3112 Garrison Boulevard and was the pastor of the Forest Park Church.<sup>207</sup> While these professions were not as affluent as other professions, the numbers indicate that the neighborhood most likely did not change entirely due to the building of these rowhomes.

However, a close look at the census data for the same block on other streets indicates some growth in the Jewish population in Forest Park by 1930. On the Bonner Road, Dalrymple Avenue, and Windfield Avenue sides of block 254, out of the thirty four homes on these three sides of the same square of the city, eight of these homes had a Yiddish speaker in them.<sup>208</sup> This represents only 23.5% of the homes.

Examining the total population of block 254 of this enumeration district, twelve individuals originally spoke Yiddish out of a total of 135 individuals.<sup>209</sup> While this indicates less than a 10.3% (14 out of a total population of 135 on the block) of the individuals who lived on this square of the city it may indicate a large shift in the population composition occurring after the initial building of the rowhomes in question.<sup>210</sup>

Both a discriminatory and nondiscriminatory undercurrent to the case of *Byrne v. Maryland Realty Co.* can be demonstrated through the use of the census data. However, with only a small percentage of the population in this square of the city affirmatively speaking Yiddish in 1930 it is difficult to conceive that the neighborhood radically changed after permission to build rowhomes was given. From this, it may be concluded

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Department of Commerce – Bureau of the Census, Fifteenth Census of the United States: 1930, Maryland, Baltimore City, Population Schedule, Enumeration District 4-609, Sheets 3a, 3b, 4a, and 20xa.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

that the access to the community was determined not by the discrimination of the residents but by the prices of the property.

#### D. Conclusion.

Over time, zoning has become an accepted part of the police power of governments. Ostensibly it remains a tool used only to protect the health and welfare of the public. However, within the recent past, zoning has been used to protect buildings of historical and aesthetic importance from being destroyed by developers in search of higher profits.<sup>211</sup> It is difficult to separate the two situations, while one is the tearing down of a historic or beautiful structure and the other is the construction of a structure that will change the character of a community, both are actions of destruction. The first is the act of elimination destroying character and the second is the destruction of character through construction.

It appears that cities have progressed to where the “development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction under some circumstances to the exercise of this power.”<sup>212</sup>

[NB - The writer has devised the citation format for citation to the Solicitor’s Files and Census Reports because the Bluebook does not indicate an appropriate citation format for these sources. All other citations adhere to the Bluebook 17<sup>th</sup> ed.]

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<sup>211</sup> See generally *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

<sup>212</sup> *Cochran v. Preston*, 108 Md. 229, 229 (1908).