CHAPTER IV

FLOOD PLAIN ZONING : CONSTITUTIONAL VALIDITY

Of the methods aimed at reducing or redistributing flood losses, the zoning of flood plain of a river is an important one. The concept of zoning has become very familiar in the task of town and country planning in which the area of a township is divided into residential, industrial and commercial sectors with specification as to height, size, space, *etc.* But the notion of zoning of a flood plain is comparatively a newer one than the traditional types of zoning. Each river has a floodway of flood plain which is an area that will be flooded by the "greatest flood which can reasonably be expected for that region."[1] It is the flood plain of a river that will enable it to discharge the waters of very high floods. Therefore, it is very essential that the flood plain should be kept free from encroachment by people in order to minimise the flood losses. The flood plain zoning is to be contrasted with other types of flood protection measures such as dams, levees, detention reservoirs, channel enlargement, *etc.* Compared to the latter methods of flood control, flood plain zoning is less expensive and is suited to the flood problems of certain regions.

In essence, flood plain zoning involves regulation of land use so as to restrict human activity on the flood plain. The entire flood plain may have to be divided into different zones depending on the hazards involved in the use of flood plain as well as the frequency of floods. In a zone susceptible to frequent flooding, say once in five or ten years, only agricultural uses may be permitted. No kind of building construction may be allowed. On the other hand in a zone which will rarely be flooded, structures may be permitted with strict building specifications, and public and social institutions such as schools, hospitals, orphanages, jails *etc.* may have to be completely prohibited. In other words, in a flood plain no valuable asset must be allowed to be created.

As flood plain zoning involves regulation of land use, the government would require legislation to that effect. In other words, there must exist a law which provides for zoning of flood plains and the law must be constitutional. That is, the law must meet the test of constitutionality on grounds of equality before the law under article 14 and the Indian citizens' fundamental right to acquire, hold and dispose of property under article 19(1)(f) of the Constitution.

1. Beuchert, "Zoning on The Flood Plain," 49 *A.B.A.J.* 258 (1963).

(*i*) Equality before the law or equal protection of the laws

The flood plain zoning legislation has to meet the challenge of article 14 of the Constitution guaranteeing equality before the law and equal protection of the laws. Equality clause does not mean equality for all alike as it is impossible to achieve that in this world. What it does mean is that laws should operate alike on all persons under similar circumstances. Those similarly situated must be similarly treated. So what article 14 prohibits is discrimination both substantive and procedural. It forbids class legislation but does not forbid classification. However, in order that the classification may be considered as permissible two conditions must be satisfied :

(*a*) it must be based on intelligible differentia which distinguishes persons or things that are grouped together from others not included in the group, and

(*b*) the differentia must have a rational relation to the object sought to be achieved by the statute in question *i.e.*, there should be nexus between the object of the statute and the basis of classification attempted by the statute.[2]

The classification may be made by the statute itself, or the statute may empower the government or public officials directly to select or classify persons or things for applying the provisions of the statute. In the latter case the courts have insisted that the statute should contain principles or policies for guiding the exercise of discretion by the government or the public officials.[3] Further, the courts have held that the conferment of discretionary powers on the state government or high ranking public authorities is considered as a guarantee against abuse and unfair exercise of

2. The cases involving the interpretation of article 14 are legion. Significant among the cases decided by the Supreme Court are the following : *Charanjit Lal* v. *Union of India*, A.I.R. 1951 S.C 41; *State of Bombay* v. *F.N. Balsara*, A.I.R. 1951 S.C. 318; *State of West Bengal* v. *Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75; *Kathi Raning* v. *State of Saurashtra*, A.I.R. 1952 S.C. 123; *Budhan Chowdhry* v. *State of Bihar*, A.I.R. 1955 S.C. 191. These cases were referred to and summarised by Das C.J. in *Ram Krishna Dalmia* v. *Justice Tendolkar*, A.I.R. 1958 S.C. 538.

3. *Ram Krishna Dalmia's* case *ibid* citing *Anwar Ali Sarkar's* case *ibid* (discretion conferred on the state government to classify offences or cases at its pleasure) and *Messrs Dwarka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 224 (discretion conferred not on the state government but on the coal controller who could delegate that power to any person whatsoever). In the *Anwar Ali Sarkar's* case the West Bengal Act of 1950 was declared void as it did not disclose any policy to guide the discretion of the government in classifying cases or offences. Similarly in the *Dwarka Prasad* case, the Coal Control Order was struck down as there was no policy underlying the order. *Jyoti Pershad* v. *Union Territory of Delhi*, A.I.R. 1961 S.C. 1602; *Raghubar Dayal* v. *Union of India*, A.I.R. 1962 S.C. 263. Indian Law Institute, *Cases And Materials on Administrative Law In India*, 610-615 (1966). M.P. Jain, "Administrative Discretion and Fundamental Rights," *1 J.I.L.I.* 249 (1958-59).

power.[4] Therefore, it may be reasonably inferred that vesting of wide discretionary powers on subordinate officials might be held by the courts to be unreasonable.

The courts have generally upheld classification based on territorial and geographical considerations under various statutes.[5] Especially under municipal statutes the courts have upheld classification of various localities within a municipal area for payment of water charges by measurement as opposed to payment of water tax[6]. Similarly, the bye-laws of a municipality classifying buildings into residential, non-residential and industrial undertakings for supply of water and levy of water rates has withstood the challenge of discrimination under article 14.[7] Therefore, in general, one may state that a statute on flood plain zoning may survive the attack under article 14. However, the draftsman must keep in mind certain essential points in drafting the legislation.

The flood plain zoning legislation, instead of making the classification of the territory into flood-prone areas and other areas itself, may have to empower the executive to do so. However, the statute must incorporate necessary guidelines for canalising the executive's discretion.

The persons who would be affected by flood plain zoning legislation may contend that their subjection to the zoning scheme is an illegal classification. If the state can prove that the basis of classification is reasonably related to the objects of the statute, it will stand the test of constitutionality on the ground of equal protection of the laws. Where the object of the statute is to prevent channel encroachment, a landowner whose freedom to use his land as he pleases has been curbed by the flood plain zoning legislation, may contend that others similarly placed are not covered by it.

4. See for instance *Gurbachan Singh* v. *State of Bombay*, A.I R. 1952 S.C. 221 (The Supreme Court justified the power of externment conferred on the Commissioner of Police *inter alia* on the basis that "... The power to initiate proceedings under the Act has been vested in a very high and responsible officer and he is expected to act with caution and impartiality while discharging his duties under the Act.") at 224; *Pannalal Binjraj* v. *Union of India*, 1957 S.C.R. 233 (The Supreme Court upheld the power vested in the Income-tax Commissioner and the Central Board of Revenue under the Income-tax Act to transfer certain cases. Bhagwati J. stated :

> "... This power is vested not in minor officials, but in top-ranking authorities like the Commissioner of Income-tax and the Central Board of Revenue, who act on the information supplied to them by the Income-tax Officers concerned," at 257.) *F.N. Roy* v. *Collector of Customs*, A.I.R. 1967 S.C. 648.

5. Classification based on territory into dangerously disturbed areas and other areas for purposes of speedy trial of specified offences was held valid by the Supreme Court in *Gopi Chand v. The Delhi Administration*, (1959) Supp. 2 S.C.R. 87. The several instances where different laws applied in the same state due to the merger of former native states and linguistic reorganization of states point out that classification based on geographical considerations based on historical reasons were upheld. For full particulars see Seervai, *Constitutional Law of India*, 206 (1967).
6. *Hirabhai Ashabhai* v. *State of Bombay*, A.I.R. 1955 Bom. 185.
7. *Sethumadhavan* v. *Vishakapatnam Municipality*, A.I.R. 1964 A.P. 280.

For instance, the law may prohibit construction of structures in the flood channel by all persons except public agencies. Ordinarily such regulatory legislation may classify persons or things on degrees of harm, or on the basis that the few regulated people must bear the cost because of benefit to the public. But here the exemption of public agencies from the prohibition of construction does not seem to be based on permissible classification. The difference between structures is merely based on the persons of the builder.

Possibly it is on the basis of degrees of harm that flood plain zoning legislation may permit different types of land uses in the different zones of a flood plain. For example, only agricultural or recreational uses may be permitted by all people in an area subject to frequently recurring floods.

Let us consider that the object of the statute is to protect health and property in the flood prone area. Here again certain kinds of land uses may be permitted and certain others prohibited. By way of illustration, agriculture and recreational uses do not require that degree of protection as needed by residential or commercial or industrial uses of flood plain; hence the former land use may be permitted and the latter uses not permitted. However, in the same flood plain area, there cannot be valid classification of residences or industrial or commercial houses based on the area they occupy. In other words, the criterion that residences or industrial houses only on parcels of more than one acre may be permitted to be built on the flood plain cannot stand the scrutiny of article 14 as one cannot reasonably say that one acre plots need more protection than smaller plots or that it is more desirable to protect the health and property of the former than the latter.

(*ii*) Reasonableness under article 19

As flood plain zoning legislation regulates land use in areas susceptible to flooding, it must meet another test of constitutionality under article 19(1)(f) and (5) of the Constitution of India. Under article 19(1)(f) a citizen of India enjoys the fundamental right to acquire, hold and dispose of property. Clause 5 of article 19 enables the state to impose reasonable restrictions on the right in the interests of the general public or the interests of any Scheduled Tribe. Hence the right is not absolute, it is subject to reasonable restrictions. The overall scheme of the guarantee of property right under article 19 reflects the reconciliation of the claims of the individual and those of the society at large. It represents the pattern of social control of property right.

What is the test for determining the reasonableness of restriction? The generally accepted one is that laid down by Chief Justice Patanjali Sastri in *State of Madras* v. *V.G. Row*[8] with reference to the right to form associations or unions:

8. A.I.R. 1952 S. C. 196.

> ...[T]he test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and emergency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict ....[9]

Further, the reasonableness of the restriction has to be judged with reference to the fundamental right which is restricted. Therefore:

> "...a decision dealing with the validity of restrictions imposed on one of the rights conferred by Art. 19(1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely, reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case."[10]

In addition, the courts have laid down certain criteria in articulating the tests of reasonableness. One is whether the law is intended to be a temporary or permanent measure. What may be considered as a reasonable restriction under a temporary statute will not necessarily be considered reasonable under a permanent statute or one of indefinite duration. Similarly, where a statute provides for emergent circumstances of apprehended danger to life and property, restrictions may be considered reasonable which may not be so under ordinary circumstances.[11]

The courts will examine the substantive and procedural provisions of a statute to adjudge the reasonableness of restrictions. With regard to the former the question may be whether the statute confers unlimited discretion on the executive to implement the statute or incorporate policies for the guidance of the executive. With regard to the latter the question may be whether the statute provides reasonable safeguards, such as right of hearing, right of appeal or judicial review.[12] A law may be declared uncon-

9. *Ibid* at 200.
10. *Ibid* at 201.
11. *Ibid* at 200.
12. *Nabin Chandra* v. *State of Orissa*, A.I.R. 1957 Orissa 56 (The High Court examined the substantive and procedural provisions of the Orissa Tenant Relief Act, 1935, and the rules made thereunder for adjudging the reasonableness of restrictions imposed on the landlord's right to property under article 19(1)(f). The court found the restrictions reasonable; *Satish Chander* v. *Delhi Improvement Trust*, A.I.R. 1958 Punjab 1); *Mahendralal* v. *Union Territory of Tripura*, A.I.R. 1959 Trip. 21 (In these cases certain provisions of the Government Premises Eviction Act, 1950, were held void on the basis of unreasonableness because the powers of the competent authority under the Act were wide and liable to be abused and further the procedural safeguards provided by the Act to the occupant were wholly inadequate. The provision for appeal against the order was to the central government which in effect meant an officer appointed by the central government,

stitutional under article 19 if it confers unguided or absolute discretion on the executive without providing procedural safeguards to the individual.

Under article 19(1)(f) and (5) the restrictions on use of property *inter alia* have to be in the interests of the general public. The standard of the general public's interests is wide enough to introduce flood-plain zoning measures aimed at protecting the health, safety and property of individuals, whose occupation of the flood plain zone, if permitted, would hurt themselves or their property. The significant difference between the permitted and prohibited activity in the flood plain seems to be the degree of probable damage. It is under this rationale that flood plain zoning measures provide for allowing agricultural uses and recreational and entertainment facilities in flood prone area; whereas residential or commercial or industrial uses are either wholly prohibited or regulated in terms of their location, height, and other building specifications.

A flood-plain zoning legislation like any other zoning measures will have to be a permanent measure. Its application has of necessity to be limited to those areas of the river susceptible to frequent flooding with resultant damage. Therefore, the statute has to delegate powers on the executive to select areas for applying the zoning legislation. However, the statute must contain provisions for canalising the executive discretion both substantively and procedurally.[13] Substantively, the statute in conferring

The aggrieved person had no right of hearing before the appellate authority. No provision existed for giving a show cause notice to the person affected and the jurisdiction of the court had been expressly barred.) *State of M.P.* v. *Champalal*, A.I.R. 1965 S.C. 124, 129. In this case the owners of the lands were not given an opportunity to prove that their land was free from Kans infestment and so the restriction for tractorising their land for Kans was held as unreasonable. Indian Law Institute, *Cases and Materials on Administrative Law in India*, 606-10 (1966). See Seervai, *Constitutional Law of India*, 353-397 (1967).

13. In *Sashibhusan* v. *Bihar State*, A.I.R. 1956 Patna 493, the High Court upheld the validity of Bihar Public Irrigation and Drainage Works Act, 1947, which empowers the state government to initiate schemes for executing public works, *inter alia*, for flood control. The court examined the substantive and procedural provisions of the statute to adjudge the reasonableness of the restrictions imposed on the right to property under article 19(1)(f). The constitutional validity of the zoning law for town planning was contested in *Maneklal Chhotalal* v. *M.G. Makwana* (A.I.R. 1967 S.C. 1373) on the grounds, *inter alia*, that the Bombay Town Planning Act, 1954, as originally enacted and also after its amendment, by the Bombay Town Planning (Gujarat Amendment and Validating Provisions) Act, 1963, was invalid in view of article 19(1)(f). In this case the petitioners' land within the limits of Ahmedabad Municipal Corporation was taken under the Town Planning Act and they were given reconstituted plots. The area of the reconstituted plots was less than the area of the land taken from the petitioners. The petitioners were also required to pay fifty per cent of the development charges. This was challenged as unreasonable restriction. The court examined the substantive and procedural provisions of the statute and found the restrictions reasonable under article 19(5). In *D. Balakrishnamurthy* v. *Municipal Commissioner*, A.I.R. 1961 A.P. 489, 491 restriction on the construction of buildings within the municipal area was held reasonable.

the power on the executive to select areas for zoning ought to specify the purposes for or consideration on, which the power is to be exercised. As already examined, the objective of protection of health, safety and property of occupants of the flood plain may be considered to give sufficient policy guidance to the executive in the exercise of its powers. The statute in order to meet the test of constitutionality may also have to contain certain procedural safeguards to persons aggrieved by the application of zoning laws. The flood plain zoning measures may have to be incorporated in a scheme to be prepared by the government. There should be provisions for publication of the scheme together with adequate notice to the persons whose interests are likely to be affected to make objections to the proposed scheme. Further, the Act should provide for hearing of objections by a hearing officer. The hearing officer's report has to be merely recommendatory only. The ultimate power of approval of the scheme should lie with the government. Here again the objectors may have to be given an opportunity to file written objections to the recommendations of the hearing officer.

Another safeguard which has to be provided is the provision for payment of compensation for any damage or loss caused to the owners or occupiers of land by the investigatory work for the scheme and also by implementing the scheme. In other words, the law should provide compensation for tortious acts on the part of the executive agencies.