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Erratum
Page 308, footnote 2, line 6. For "proglem" read "problem."

safety, and a later inspection, the purpose of which is to disclose evidence necessary to a criminal conviction.[12]

The decision of the Ohio Supreme Court in *State v. Price* is sound, not only legally, but also practically. Legally, it is supported by a leading United States Supreme Court case[13] which holds that the constitutional prohibition against unreasonable searches and seizures does not bar reasonable searches, and that there is no fixed test for determining the reasonableness of searches, but rather, that the reasonableness or unreasonableness of a search depends in each instance upon the facts of the particular case. The support of the decisions in the *Richards* case, the *Givner* case and the dissent in the *Little* case, in addition to the opinions of many text writers,[14] add weight to the court's opinion. Practically, the court's decision is a commendable interpretation of public policy. There can be no regulation by ordinance of the health and safety of a community without an effective system of inspection.[15] A decision contrary to that reached by the Ohio Supreme Court might well have led to the harassment of inspectors, thereby making ineffective a vital agency of the public health and safety.

SHELDON I. BERNS

ZONING — EXTENSION OF USE DISTRICT WHERE A SINGLE PARCEL IS WITHIN TWO USE DISTRICTS

A mandamus action[1] was brought to direct the issuance of a permit to construct a building for retail use on land which, though under one ownership, was divided into two use districts. If the permit were issued, it would be necessary to extend the retail use.

The parcel fronts on Euclid Avenue, a main traffic artery in Cleveland, Ohio, and has a frontage of 281′ and a depth of 673′. The Euclid frontage was zoned for retail use to a depth of 140′. The rear was zoned

12. Under State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936), evidence of guilt obtained through such an inspection would be admissable in Ohio, not respecting the fact that such an inspection might be a violation of the occupant's constitutional right to freedom from unreasonable searches and seizures. The occupant's only right seems to be in treaspass against the inspector.

13. United States v. Rabinowitz, 339 U.S. 56 (1950).

14. "The constitutional provision in question, while primarily designed to protect the individual in the sanctity of his home and in the privacy of his books, papers and property, does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare." CORNELIUS, SEARCHES & SEIZURES § 35 (2d ed. 1930). See 47 AM. JUR. *Searches & Seizures* § 13 (1943); 79 C.J.S. *Searches & Seizures* § 6 (1952).

15. See Guandolo, *Housing Codes In Urban Renewal*, 25 GEO. WASH. L. REV. 1 (1956).

for apartment house use. The rear line adjoins a railroad right-of-way. The land on one side is zoned for apartment house use and is completely built-up with apartment houses the ages of which are 25 to 35 years. The land on the other side of the subject property is zoned for commercial and light industrial use.

Three major issues are involved: *one,* is the request a proper subject for a variance or does it necessitate an amendment to the zoning ordinance? *two,* did the Board of Appeals abuse its discretion in either refusing to grant relief to the relators or in refusing to recommend an amendment to the ordinance? *three,* is the existing zoning a restriction which is unreasonable and confiscatory and which thus constitutes a taking of relators property without due process of law?

Taking these issues in order, the court held that, since the hardship that has been created relates primarily to this particular piece of property, an extension of the use district within this parcel is a proper subject for a variance and did not necessitate an amendment to the zoning ordinance.

Secondly, the court held that the Board of Appeals did abuse its discretion; this abuse resulted from the Board's refusal to grant relief in the face of the ordinance having become obsolete with the passage of time and in the face of the enactment of additional zoning restrictions such as off-street parking, loading docks, set-backs and rear yards having seriously depleted the usable area of the retail frontage, and because no clear cut policy for dealing with the extension of retail zone depths was shown.

Thirdly, the court held that the physical and economic conditions indicate that the rear portion of the parcel is not reasonably available for apartment house use and the restriction is thus unreasonable and confiscatory and is a taking of property without due process of law.[2]

While the constitutional validity of zoning laws as an exercise of the police power has long been established,[3] there are several limitations beyond which these regulations may not extend. These limitations include the necessity for the zoning plan to be comprehensive[4] and to bear a sub-

1. State *ex rel.* Killeen Realty Co. v. City of East Cleveland, No. 24549, Ct. App., Cuyahoga County, Ohio, Oct. 8, 1958.

2. A minor issue arose concerning whether or not zoning ordinances can be used to regulate or reduce traffic congestion. The court held that while zoning ordinances are a proper means of alleviating parking problems by requiring off-street parking facilities, it is unrealistic to prevent operation of a lawful business by restrictions in a zoning ordinance simply because customers tend to generate traffic congestion by arriving in autos. This is a police problem not a zoning proglem.

3. City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

4. City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842

stantial relation to the public health, safety, morals or general welfare.[5] Legislatures may not under the guise of the police power impose any unreasonable restrictions upon the use of private property. This does not mean that some impairment of the full use of the property may not be tolerated where that impairment is reasonably necessary for the preservation of public health and morals.[6] A further limitation is that attempt to control the use of property by city ordinances cannot cause such pecuniary loss as will deprive owners of all the benefits of their property.[7] This deprivation need not occur when the zoning law is initially created but may arise after a period of time when population shifts, neighborhood changes, community growth and so on, have altered the situation so that by the passing of time the restriction has become totally destructive of the owners' rights in the property.[8]

Zoning is a legislative function. The legislative judgment must be allowed to control if the legislative classification for zoning purposes is only fairly debatable.[9] It has been held that courts will not interfere with the sound discretion of those upon whom rests the responsibility of fixing the boundaries of zones unless the exercise of this function indicates a wholly arbitrary and unreasonable action entirely foreign to any consideration involving the health, safety, morals or welfare of the public.[10]

Most zoning ordinances provide for the creation of a Zoning Board of Appeals. The power of this board to grant variances from zoning restrictions is of a discretionary nature and hence courts are properly asked to take jurisdiction when a zoning board has abused its discretion

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842 (1925); Westlake v. Elrick, 52 Ohio L. Abs. 538 (Ct. App. 1948); East Fairfield Coal Co. v. Miller, 71 Ohio L. Abs. 490 (C.P. 1955).

5. Smith v. Juillerate, 161 Ohio St. 424, 119 N.E.2d 611 (1954); State *ex rel.* Weber v. Vajner, 92 Ohio App. 233, 108 N.E.2d 569 (1952); Ottawa Hills Co. v. Ottawa Hills, 41 Ohio App. 276, 180 N.E. 903 (1931); State *ex rel.* Clifton-Highland Co. v. City of Lakewood, 41 Ohio App. 9, 179 N.E. 198 (1931); State *ex rel.* Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1930); Cincinnati v. Struble, 30 Ohio N.P.(n.s.) 380 (C.P. 1933).

6. OHIO CONST. art. XVIII, § 3; Smith v. City of Troy, 18 Ohio L. Abs. 476 (Ct. App. 1934).

7. Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich. 404, 34 N.W.2d 11 (1948); State *ex rel.* Rosenthal v. City of Bedford, 134 N.E.2d 727 (Ct. App. 1956); Murdock v. City of Norwood, 3 Ohio Supp. (N.E. Reporter) 278 (C.P. 1937).

8. Henle v. City of Euclid, 97 Ohio App. 258, 125 N.E.2d 355 (1954); Cleveland Trust Co. v. City of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952).

9. Cleveland Trust Co. v. City of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952).

10. State *ex rel.* Rosenthal v. City of Bedford, 134 N.E.2d 727 (Ct. App. 1956); Central Trust Co. v. Cincinnati, 62 Ohio App. 139, 23 N.E.2d 450 (1939); Hardy v. Horst, 101 N.E.2d 398 (C.P. 1951).

by acting in an arbitrary, unreasonable or unjustifiable manner.[11] While the court in this case held that the extension of the use district on this parcel was a proper subject for variance, it has been held that to extend a use district is not a proper subject for a variance but rather necessitates an amendment to the zoning ordinance by the legislature.[12] By holding that the extension of the use district was a proper subject for a variance, the court could then judge the discretion of the Board of Appeals in refusing to grant the extension. If it is not a proper subject for a variance, it would seem that the court has usurped the legislative prerogative; the court decided also, however, that the passing of time had so altered the physical conditions of these premises and their surroundings that the zoning restrictions had become unreasonable and confiscatory.[13] This constitutes a taking of property without due process, and the relator should be granted the permit whether the request is a proper subject for a variance or not and whether the Board of Appeals abused its discretion or not. The decision indicates that while the ordinance may not have been arbitrary when the legislation was originally passed, a substantial change in the physical surroundings of a particular piece of property may well cause the legislative action to grow into the category of being arbitrary. The 36 years since the passing of the original ordinance could indeed have caused these circumstances to obtain.

Other decisions concerning parcels of land that lie within two zone use districts indicate that while of necessity each case must be decided on its own peculiar set of facts, the tendency seems to be to grant both the legislatures and the boards of appeals broad powers with respect to the restrictions that they may place and permit to remain on private real property.[14]

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11. 42 OHIO JUR., *Zoning and Zoning Laws* § 14, at 813 n.7 (1936).

12. Kindergan v. Borough of River Edge, 137 N.J.L. 296, 59 A.2d 857 (1948); Bd. of Adjustment v. Stovall, 218 S.W.2d 286 (Tex. Civ. App. 1949).

13. Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich. 404, 34 N.W.2d 11 (1948).

14. It was held in Kindergan v. Borough of River Edge, 137 N.J.L. 296, 59 A.2d 857 (1948) that because land lies partly in a zone in which buildings may be erected and partly in a contiguous zone in which such buildings are prohibited, is not a sufficient reason for a variance to be granted. The decision in Visco v. City of Plainfield, 136 N.J.L. 659, 57 A.2d 490 (1948) declared that there is no obligation upon the local legislative body to zone for business all of the land of the individual owner, regardless of its depth; also, the delineation of such use districts by the local legislative tribunal involved the exercise of a reasonable discretion controlled by the statutory considerations and that there is no ground for judical interference unless there has been arbitrary action. For a case similar to the subject case, see Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich. 404, 34 N.W.2d 11 (1948), wherein the land was next to property zoned for commercial use on one side while the property on the other side was zoned for residential use; the zone boundary ignored property lines and was irregular; it was held that the ordinance which so pro-

Some zoning regulations include stipulations expressly intended to assist in overcoming the difficulties arising from the division of lots by a zone boundary line or from overlapping zones.[15] It would seem that wise legislation should include such stipulations in order that litigation such as arose in this case might be minimized. This phase of zoning seems to be somewhat of a stepchild in the house of professional planners and zoners whose advice is sometimes too carefully heeded by most legislatures. The East Cleveland Zoning Ordinance contains no provisions in this regard.

The decision in this case seems to call at least a partial halt to the endless march of the forces of the state against the sometime rights of private real property owners. While lip service is often paid to the necessity for reasonable ordinances and reasonable uses of discretion on the part of boards of appeals, the difficulties of changing the location of zone use boundaries, once fixed, and the attendant costs of litigation tend to enable municipalities to enforce provisions of zoning ordinances that are not always as reasonable as the professional zoners and land planners advise.

The increased reaction against private property owners that began in the early 1930's has tended to create an atmosphere in which more and more restrictions against real property are enacted, and fewer and fewer real property rights are protected. Under the guise of general welfare, many highly restrictive zoning ordinances have been enacted. Zoning boards of appeals, hesitant to abuse their discretion, have granted relatively few variances from these restrictions, especially in situations in which political expediency has entered the scene. The decision of the court in this case would seem to indicate at least a partial change in the atmosphere. In the rush for public ownership of the moon, it is well that private property ownership, one of our most cherished rights, has not been forgotten by all of the courts.

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vided was unreasonable and confiscatory and illegal as applied to such property. For several cases where the decisions of zoning boards of appeals were held *not* to be an abuse of discretion where property owners were refused variances which requested extension of a use district to the rear of a parcel that had been divided by a zone boundary line, see Visco v. City of Plainfield, 136 N.J.L. 659, 57 A.2d 490 (1949); Application of Wender, 89 N.Y.S.2d 41 (Sup. Ct. 1949). *But see* Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809 (Sup. Ct. 1946).

15. Annot., 159 A.L.R. 854 (1945).